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THE ACCOUNTABILITY OF MULTINATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS:

A comparative analysis of legal redress under the US Alien Tort
Claims Act

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ABSTRACT

The US Alien Tort Claims Act renders vindication to foreign claimants of gross human rights violations committed by multinational corporations. The Act was first employed on State defendants yet US courts now permit claims against private corporations. This development has brought serious allegations against several of the world's largest corporations. Some of the allegations concern severe infringements of human rights such as mass murder, rape and genocide, while other cases address freedom of speech and expression. The Act provides civil remedies and distinguishes from legislation in other parts of the world. There are important procedural hurdles to impose litigation, nonetheless the Act has instigated a debate on the risks involved with transnational corporate activities. While several cases have been dismissed and other settled, corporate aiding and abetting is the most prosecuted field of the litigation under the Act.

The US Alien Tort Claims Act derives its support from international law and thus both domestic as well as international law is imperative for its interpretation. The implication of initiatives from the United Nations, the Organization for Economic Co-operation and Development as well as the European Union are discussed in a comparative manner. Several mechanisms have been proposed to attain greater corporate accountability, ranging from voluntary codes of conduct to binding international instruments. As corporations have become powerful global actors, the importance of foreign investments has developed into a discussion on the impact of multinational corporations in the global market and especially the implication of human rights. This thesis will discuss the current developments of accountability of multinational corporations with the starting point in the US Alien Tort Claims Act, a revision of the case law, and the importance of international and regional instruments especially in the European Union as well as United Nations and OECD.

LIST OF ABBREVIATIONS

| | |
|------------|--|
| ATCA | Alien Tort Claims Act, also commonly referred to as Alien Tort Statute |
| CSR | Corporate Social Responsibility |
| DEA | Drug Enforcement Administration |
| ECHR | European Convention on Human Rights |
| EU | European Union |
| GATT | General Agreement on Tariffs and Trade |
| ICJ | International Court of Justice |
| ICTR | International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 |
| ICTY | International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 |
| ILC | International Law Commission |
| IMF | International Monetary Fund |
| MNC | Multinational Corporation |
| MNE | Multinational Enterprise |
| NGO | Non-Governmental Organization |
| Nuremberg | The International Military Tribunal at Nuremberg created by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis |
| OECD | Organization for Economic Co-operation and Development |
| TNC | Transnational Corporation |
| TVPA | Torture Victim Protection Act |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UN Charter | Charter of the United Nations |
| UNTS | United Nations Treaty Series |
| US | United States of America |
| USC | United States Code |
| USSC | United States Supreme Court |
| WTO | World Trade Organization |

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1. INTRODUCTION

The United States *Alien Tort Claims Act* (ATCA) has had a significant impact on the discussion on business conduct in developing countries. The Act is a two-hundred-year-old statute that has been employed for the past two decades to bring multinational corporations to court for human rights violations.¹ The series of litigation was initiated in the 1980s with the Second Circuit case of *Filartiga v. Irala-Pena*.² The case granted federal courts jurisdiction to hear violations of the law of nations. Since the decision, numerous cases have been heard pertaining to violations of international law. The ATCA has been employed to hold multiple actors responsible for violations of international law, such as State actors, private actors and corporations in their involvement of atrocities regarding human rights. This thesis will explicitly address the development of corporate accountability for human rights in the US. It is important to note that the ATCA does not cover all human rights abuses, but only those that violate the law of nations or a treaty of the United States of America (US).

The US is the prime actor involving human rights litigation and multinational corporations. The success of the ATCA depends on a set of factors, such as jurisdiction, legal culture and rules of litigation. The US provides tools that are uncommon abroad and the nature of litigation differs as opposed to customs in Europe. International law will be examined, as well as voluntary approaches from the United Nations (UN) and the Organization for Economic Co-operation and Development (OECD), which still provides the most widely employed non-binding guidelines.

Transnational litigation covers a broad range of procedures. Both international and domestic forums provide vindication for victims. Yet in cases where a domestic forum addresses transnational law with abuses arising from conduct abroad and defendants with no citizenship or residency in the forum State, the litigation requires an extraterritorial application to assert authority. International law recognizes universal jurisdiction, but covers only a small range of offenses. Criminal trials were an important part of the vindication of the Second World War yet few similar prosecutions followed. It was not until the 1990s when the UN Security Council established international criminal tribunals that several countries around the world began to ascertain universal jurisdiction. Universal jurisdiction permits domestic legal systems to assert jurisdiction over human rights abuses committed abroad. The doctrine is commonly referred to authorize criminal prosecutions.³ Current international law does not impose civil responsibility on corporations meaning that corporations cannot be prosecuted

¹ The Alien Tort Claims Act is also commonly referred to as the Alien Tort Statute, or ATS, 28 USC §1350. The term “Act” refers to the ATCA.

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

³ For the ATCA, reference to the violations in former Yugoslavia and Rwanda has played a crucial role. Stephens, B., *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 *Yale J. Intl L.* 1, at 37, 2002.

before international criminal courts.⁴ The *Alien Tort Claims Act* renders civil litigation for victims from foreign jurisdictions and does not include criminal sanctions. The litigation of ATCA has both particular features to the US, as well as on the international scene.

1.1 Purpose – Framing the issue:

The impact of multinational corporations in global markets

The thesis examines the prospects of attaining corporate accountability for conduct in foreign jurisdictions. Violations of international human rights law by multinational corporations remain by and large unpunished. This can be explained by a number of factors that will be considered in the thesis. International law is primarily addressed to States, however it has experienced a shift to hold private actors on the international scene accountable for human rights violations. In the limited cases where individuals can be imposed direct obligations by international law, the legal responsibility will depend on the available procedures of States. The absence of satisfactory institutional mechanisms in the international legal order allows for limited prospects to hold global corporations accountable. States are obliged to respect internationally protected human rights, either as Contracting States to international instruments or based on norms of *jus cogens* character. States must ensure the protection of human rights, including perpetration from private persons, but only to the extent the State can control such actions. In practice several nations are unwilling or unable to protect human rights norms.

There are a multitude of factors which add to the current debates concerning the legitimacy of the ATCA and other similar legislative acts. The reluctance from States to regulate corporate conduct is vital and imposes hurdles to combat the resulting impunity of multinational corporations. The threat and fear of corporate movements from one jurisdiction to another, poses as an obstacle to regulation as MNCs can move investments to more beneficial jurisdictions. The available mechanisms to battle the impunity of multinational corporations are at this stage inadequate. This thesis intends to clarify the available mechanisms and how they can be employed in the legal setting. To facilitate a discussion on the future development of corporate conduct, historical aspects as well as non-binding norms will be mentioned.

The intention of this thesis is to determine the contemporary developments in the legal setting and the forthcoming directions for the future. The thesis will discuss the potential courses of legal accountability. The problems faced in the US and more particularly the ATCA, are not specific to that legal State. Since the case law draws upon international law and practice it also reflects current and possible hurdles to other legal structures. The EU and specific nations may have comparable obstacles if similar legislation will be enacted. In the context of this thesis, the task is to examine from a legal standpoint the extent to which States can legitimately pursue human rights objectives on multinational corporations.

⁴ Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 *Nw. Univ. J. Int'l Hum. Rts.* 2, at 315 (2008).

1.2 Method and materials

The primary actor in the area of corporate accountability and human rights is the US and American case law is the primary source in this thesis, reference is given to international law as well as different regulations to provide a comparative perspective. Since US common law is distinctive to the civil law system, the approach of this thesis will adapt to the legal practice in the US. In order to understand the structure of the thesis a brief explanation of the US legal system is provided and where possible a traditional legal dogmatic approach applied. Main sources are legal text, official international documents, international and American case law and legal doctrines. Other sources are voluntary instruments and regulations. The European Union and Swedish legislation will be considered however disregarding a more specific approach to Swedish legislation since domestic laws do not cover this aspect directly.

Corporate accountability on the international level constitutes to a large extent of soft-law, and the topic tends to be examined with a theoretical and analytical approach in literature and doctrine. It is hard to obtain a strict legal perspective to such frameworks, nevertheless the intention of the thesis is to establish legal aspects where possible. The nature of the thesis is interdisciplinary, combining corporate law and human rights norms, and thus provides a combination of international law and domestic legal sources, as well as non-binding documents and other regional instruments. While there are several legislations and regulations relevant in the field of human rights only a few will be examined due to the scope of the thesis, limited to regulations that deal with the two disciplines specifically as well as cover the most influential tools. Since violation of international law is not a secluded event, the interplay with other fields and links to corporate initiatives will be addressed and compared to a legislative aspect. Thus links to Corporate Social Responsibility, codes of conduct and corporate governance are further important tools to understand the scope and limit of the ATCA.

1.3 Definition

1.3.1 The business structure of multinational corporations

The terms multinational and transnational corporations (MNCs, TNCs) as well as multinational enterprises (MNEs) have been used interchangeably in different international instruments and scholarly works.⁵ The terms are employed in a variety of contexts and there is no general consensus how to utilize and define such corporations. No matter how TNCs,

⁵ Generally the term TNC and MNC refers to a corporation with affiliated business operations in more than one country. MNE in turn is defined as companies or other entities established in more than one country yet linked in various ways to co-ordinate the operations, the ownership may be private, State or mixed, see part I, § 3 of the OECD Guidelines for Multinational Enterprises, entered in to force 15 February 1999. The Draft UN Code of Conduct on Transnational Corporations defines TNC as enterprises that operate in two or more countries, regardless of legal form and fields of activity. It also employs a common strategy that links the entites, see Draft UN Code § 1 (a); UN Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, adopted on 13 August 2003, UN Doc., E/CN.4/Sub.2/2003/12/Rev.2.

MNCs and MNEs are defined, the corporations tend in general to be large, politically influential and autonomous entities that can move operations from separate countries.⁶ MNCs within the international system are economically influential and larger than some national economies. MNCs can exert influence that approaches the level of States or even surpassing it.⁷ In this thesis the terminology covers all different definitions employed in the international level. There is no intention to limit the coverage but rather to include a broad scope. Not only multinational enterprises but also other smaller corporations engage in activities that relate to international commerce, import and exports, without direct dealing with foreign subsidiaries. Businesses which can operate locally but be linked to international commerce and corporations through supply chains despite being principally active in a local or national market, can still have a significant impact on human rights.⁸ The importance of the promotion of human rights should not be limited by strict definitions of corporate entities since all businesses are competing in a global market and rather as the thesis shows, concepts of accountability cover a wide range of corporate conduct. It can also be difficult to distinguish the status of corporations, the control structures and forms of ownership which can be non-transparent. There are various forms of business structures, such as joint ventures, suppliers, partnerships, limited liability partnerships or limited liability companies, unincorporated associations and other contractual relationships are just a few examples.⁹

Globalization and outsourcing has for the past two decades resulted in the development of complex supply networks. These are often led by multinational Western companies. These developments have inflicted less legal obligations on parent companies and instead turned to suppliers that often have weak or weakly enforced regulation. This has in turn moved focus to other initiatives, such as the voluntary corporate codes of conduct. Implementing and monitoring of these codes of conduct has proved difficult.¹⁰

1.4 Disposition

The structure of the thesis is adapted to the structure of common law as well as international law. Common law derives its foundation and principles from case law and the approach of the thesis will be based from an interpretation of case law such as the scholarly debate is set in the US. The cases address alleged violations of human rights occurring in developing countries or places governed by oppressive regimes. The plaintiffs have in all cases relied on the *Alien*

⁶ A vital factor to the definition is the exercise of control, as opposed to a financial stake in a foreign venture. The level of control enables co-ordination among the business structure, instead of being composed of a network of independent entities. Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 *Berkeley J. Int'l L.* 45, at 47-48 (2002).

⁷ John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General of the United Nations, at 3 (2008).

⁸ David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 97 *Am. J. Int'l L.* 901, at 909 (2003).

⁹ Weissbrodt & Kruger, *supra* note 8, at 909-910.

¹⁰ Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon, & Donald S. Siegel, *The Oxford Handbook of Corporate Social Responsibility*, Oxford University Press, New York, at 377 (2008).

Tort Claims Act as a legal basis for claims. The cases concern abuses that have occurred in conjunction with the operations of multinational corporations or have an impact on the development of corporate accountability. The recent development in the US has opened up a debate concerning global corporate liability. This debate relates to greater concern with international relations, State sovereignty and extraterritorial jurisdiction. The purpose of the general background is to introduce the nature of the accusations and some key legal issues brought before the courts. The following chapter provides for a regulatory approach mainly focusing on non-binding and voluntary measures, as opposed to the subsequent chapters that deal with legal matters. This thesis will mainly deal with home State responsibility, since the role of host States and imposing regulation on behalf of developing countries is often not feasible.

The thesis explains how the ATCA is justified to hold MNCs accountable to enforce international human rights norms. The history behind the ATCA and how it was prior employed, followed by matters considering multinational operations, will be examined. Important cases highlight the limits and potential remedies of the Act. The effects on corporate accountability will be concluded to present the extent of MNC responsibility followed by a discussion on legal issues.

1.6 Delimitations

Several international instruments aspire to promote the respect of human rights by multinational corporations. These instruments denounce egregious violations of human rights, highlight environmental concerns as part of promotion as well as support labor organizations engaging employment and working standards.¹¹ This thesis will look to human rights of the most serious violations of international human rights law. The subject of this thesis involves numerous areas of international law, not only corporate statutes and human rights norms, but also issues on the limits of jurisdiction and State conduct on foreign soil as well as immunity of State officials. Politics and the powers of government inevitably has important functions, codes of conduct incline the role of non-binding norms, and the conflict between international and domestic law all raise important issues and hurdles to address corporate liability. Furthermore State responsibility and the distinction between criminal and civil liability are other important matters. The influence of norms and other market participants are important in order to recognize the direction the accountability movement has taken and further the prospect of greater liability. These topics will briefly be discussed, however only to a limited extent. Multinational accountability also interplays with other concepts of international law, and has the character of a comparative analysis, as well as an interdisciplinary aspect.

The discussion on jurisdiction over gross human rights violations is limited to cover the vital aspects. Separate Member States of the European Union have acclaimed universal jurisdiction

¹¹ See the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy regulates conditions in developing nations. Environmental torts are not considered to fall within the law of nations by the courts at this stage, see *Ajuindo v. Texaco*, 303 F.3d 470, 476 (2nd Cir. 2002). See also *Jota v. Texaco*, 157 F3d 153, 155-56 (2nd Cir. 1998).

but this thesis only governs a general approach of the region as such except for one paragraph on Sweden. The EU has not developed legal corporate accountability within the union as a whole, yet does address jurisdictional issues specifically. The Organization of Security and Co-operation in Europe and Council of Europe are important intergovernmental structures that work with human rights.¹² This will not be addressed to any greater extent.

The concept Corporate Social Responsibility (CSR) is also rather important to note however this approach is voluntary in essence. This thesis focuses instead on legal mechanisms but will briefly mention the concept of CSR and its implication on MNCs. While important guidelines from the OECD, UN and EU will be addressed, several other aspects converging with human rights concerns cannot be addressed in this thesis due to the scope of the subject. Specific instruments address, among other subjects, labor and environmental concerns, all of which can be linked with distinct human rights, but require a separate analysis. Several developments are taking place in the field of corporate reporting dealing with standards of accounting as well as information, yearly and quarterly financial reports, which have a bearing on CSR. However these changes and their analysis will not be included.¹³

There are several organizations within the UN dealing mainly with the human rights regime.¹⁴ This thesis will only address the instruments dealing specifically with human rights and multinational corporations. The impact of NGOs is also vital, but will not be addressed in this thesis. The US *Torture Victim Protection Act* also provides for jurisdiction on torture and extra-judicial killings committed abroad but will not be covered.

The aim of this thesis is not to provide a full and exhaustive list of tools or mechanisms dealing with MNCs and their negative impact on human rights. Rather the thesis looks to focus on the ATCA legislation as it has been at the forefront of this aspect. The development among nations and regions of the world, as well as international, regional and national programs do not have the same bearing or impact as the ATCA, but will be addressed for reasons of comparability.

¹² The Council of Europe is today an international organization that promotes standards, provides charters and Conventions to improve cooperation.

¹³ The Global Reporting Initiative (GRI) was established by the Coalition for Environmentally Responsible Economies (CERES) that today constitutes of several international groups, such as NGOs, corporations and accounting firms. It co-operates with the UN Environment Programme and UN Global Compact. The aim is to promote guidelines to reports of CSR. More on this topic, see <http://www.globalreporting.org/Home> [last visited on 13.11.09].

¹⁴ Another possible approach is to link nations with trade arrangements to meet the commitments to human rights. Under the United Nations framework, trade sanctions are one of the mechanisms available to enforce international law. MNCs are the beneficiaries of trade arrangements and a matter of interest is whether trade arrangements can be used to further human rights in third countries. The World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT) can be possible routes to such an arrangement but will not be discussed in this thesis. A further approach can be that the European Community advances and promotes human rights by trade arrangement on the level of the EU as a unit, rather than individual Member States pursuing their own agenda. More on this, see Olufemi Amao, *Trade Sanctions, Human Rights and Multinational Corporations: The EU-ACP Context*, 32 *Hastings Int'l & Comp. L. Rev.* 379, at 393 (2009).

2 BACKGROUND

2.1 An introduction to the United States legal system

The United States of America (US) is governed by a three-tiered system consisting of the judiciary, legislative and executive branches.¹⁵ There are various types of courts within the US judiciary. Of these the three main types are: the US District Courts which are general trial based courts, the US Court of Appeals, that are geographically numbered which has appellate jurisdiction and the court of last resort, the Supreme Court of the United States. Besides these there are also courts with jurisdiction over specific subject matters. A higher court decision gains more influence and lower courts follow precedents.¹⁶ Reference to US case law often stresses the level of the court and it is also important to view later court decisions in order to gain an understanding of current common law and the interpretation of international law.¹⁷

Certain procedural rules are particular to the US legal system and will thus be briefly explained in this context. US courts apply local procedural rules to all action, irrespective of the law governing the substantive claim. Favorable rules of civil procedure render the US legal system rather affirmative for vindication of international human rights violations. Factors of significance are the practice of contingency fees and the possibility to obtain considerable punitive damages.¹⁸ Costs and fees, class action suits, as well as rules of public litigation enable the probability of successful proceedings.¹⁹ Discovery rules, such as the hearing of complaints and the allowance of evidence obtained from defendants, are factors that give the US the ability to claim such broad remedies to human rights abuses.²⁰ This is partly the explanation why civil redress of international human rights has developed in the US and not in other parts of the world.

The US has certain unique features to its legal system. These include but are not limited to, aspects of legal culture and jurisdictional concerns. The *Alien Tort Claims Act* is an old statute that only for the past two decades has gathered consideration and gained influence. The ATCA only prescribes civil redress by torts as opposed to criminal proceedings. Civil litigation in the US is commonly employed as means to promote social reform and is an important part of the legal culture. The reform of public interest and public policy is intended

¹⁵ The separation of powers divides governmental authority with checks and balances of each branch and the separation is strictly maintained. The ATCA inflicts a debate on the political powers of the US government since corporate decisions on human rights impinges on the legislative branch.

¹⁶ US courts do not derive from prior decisions of the Supreme Court, nor alter earlier decisions from the same court level (*stare decisis*), as opposed to civil law where the same court level may be derived from.

¹⁷ Stephens, *supra* note 3, at 13-17.

¹⁸ Cedric Ryngaert, *Universal Tort Jurisdiction Over Gross Human Rights Violations*, Netherlands Yearbook of International Law, Cambridge University Press, Cambridge, at 3-4 and 33 (2007). Contingency fees provides that the services of a lawyer are only charged if the lawsuit is successful or favorably settled outside the court, see Black's Law Dictionary.

¹⁹ Class action are lawsuits representing a larger group of people, there are specific requirements for maintaining class action, see Black's Law Dictionary.

²⁰ Stephens, *supra* note 3, at 13-14.

to develop through civil cases on human rights. This in turn has enabled the growth of non-profit litigation offices and pro bono assistance from private firms. Public interest litigation may not always ensure enforceable judgments in favor of the victims, but corresponds to policy goals of the US and despite the lack of criminal sanctions, the public aspect of the Act serves as compensation for victims in terms of punitive damages as well as public exposure.²¹

Particular legal matters to the US also include jurisdictional concerns. Personal jurisdiction is the power of the court to bring a person under its jurisdiction. Subject-matter jurisdiction depends on the nature of the case and the claims for relief.²² With the enactment of the ATCA, US Congress authorized US federal courts jurisdiction over international human rights abuses. The Congress can assert subject matter jurisdiction by enacting legislation as long as it meets the requirements of the US Constitution (USC). Legal issues are then decided by the law indicated from Congress, in this case the ATCA is governed by international law and other statutes under US law. In order for US courts to hear claims on MNCs, it is required that the court has personal jurisdiction as well as subject-matter jurisdiction.²³ Some of the reasons acclaiming the US as the main actor of the vindication of human rights abuses by MNCs are the liberal requirements for personal jurisdiction in the US. For acts committed abroad, transitory presence is considered sufficient for jurisdiction.²⁴ Solely minimum contacts with the jurisdiction are required for the corporation to be asserted jurisdiction in the US. Temporary presence in the US provides jurisdiction and is only common in the Anglo-American legal tradition.²⁵ The rule applies equally to domestic and foreign defendants and provides for greater jurisdiction than other countries. Individuals, even corporate executives, and corporations, doing business within the country can be considered under US jurisdiction.²⁶

There are further cultural and regional aspects explaining the position of the US legal system. It is possible to claim that the US legal system encourages litigation, as well as that the society is exceedingly litigious compared to other nations of the world. For example, the Member States of the EU do not have a similar legal culture. There are contrasts between the US and the EU, as well as among Member States of the EU and states within the US that explain their respective differing positions concerning MNCs.²⁷ Despite the favorable legal culture it is important to note that there have only been a small number of proceedings under

²¹ Stephens, *supra* note 3, at 13-14.

²² Black's Law Dictionary.

²³ Stephens, *supra* note 3, at 11-12.

²⁴ Transitory jurisdiction is based on temporary presence of a defendant in the territory of the forum State.

²⁵ Stephens, *supra* note 3, at 22.

²⁶ Stephens, *supra* note 3, at 11-12.

²⁷ The corporate climate in the US provides for a great assortment of business structures and no state corporate statutes are identical yet several statutes are based on model acts providing uniformity. The Model Business Corporation Act has been enacted with revisions by the majority of states. Note however that the most prominent corporate law states Delaware, New York and California all have their own statutes. See Alan R. Palmiter, *Corporations Examples & Explanations*, Aspen Publishers, New York, at 8-9 (2006).

the ATCA meaning that several procedural obstacles remain for successful litigation against corporations.²⁸

2.2 Civil accountability

In the international legal system the first distinction among nations that is drawn is between civil and common law countries. Within each of these, there is a further distinction of law into civil and criminal law, the definitions and aspects of which, also vary from country to country.²⁹ At the national level the accountability under civil and criminal law varies and is dependent upon the legal structure.³⁰ The varieties of civil and criminal claims in domestic legal systems constitute of categories that depend on legal definitions, thus a comparative approach on the divide between civil and criminal law, from international to domestic claims, as well as establishing jurisdiction is rather difficult. A distinction between civil and criminal liability is however of necessity in this thesis. Whilst civil accountability will offer compensation and thus monetary remedy for victims of human rights violations, criminal liability can provide for other punitive tools. International law commonly provides for norms under criminal law, and as such the ATCA's norms have also been derived from international criminal law despite the fact that ATCA only provides for civil remedy. This imposes hurdles of its application and scholars do not agree whether such principles and case law indicating customary international law is applicable to corporate conduct and tort cases.

The US is the only country where civil litigation against corporations has emerged, and it appears likely that this development will persist. The *Alien Tort Claims Act* refers to international law, while other States, although applying criminal jurisdiction, also employ domestic principles. This interrelation between civil and criminal law, and principles derived from international as well as domestic law, has important consequences to the approach of corporate accountability. Besides the means of redress, where tort compensation and criminal proceedings vary greatly, it also provides for various possible outcomes. These possible legal remedies also grant varied legal systems the alternative to adapt legal accountability in each nation and region in support and protection of human rights.³¹

2.3 The attribution of corporate accountability

Crimes committed by multinational corporations in practice involve relations with several actors. It includes the MNC itself which could consist of several entities around the world, the plaintiffs, often victims of egregious human rights violations, the host State, where the events

²⁸ Stephens, *supra* note 3, at 16.

²⁹ Stephens, *supra* note 6, at 43-45.

³⁰ While the distinction between civil and criminal accountability is important, it is in practice often blurred. Criminal proceedings also allow for victim reparation, and tort judgments allow for punishment and moral condemnation by the high damages and holding the actors responsible. See Ryngaert, *supra* note 18, at 3-4.

³¹ Stephens, *supra* note 3, at 2-3.

occurred and furthermore the home States of the multinational corporations. Thus jurisdictional concerns arise when the MNC commits violations in a host State. To deal with such implications and corporate accountability, international law as well as domestic law provides for remedies. Supplementary to these are regional bodies and instruments that offer voluntary policies and mechanisms. State responsibility can be placed in the domicile of the MNC or the host State, the feasibility of such an inclination will be discussed. It is possible that the future could produce an option whereby corporate liability could be asserted directly under international law, however at present such an option does not exist. Voluntary instruments are also important means to promote human rights since corporations can adapt the norms to their individual corporate structure.³²

Corporations can directly violate human rights abroad or indirectly participate by investing in countries that directly violate the rights. Part of the legal difficulties is that military regimes may commit the atrocities without the direct involvement from the companies. While direct involvement can be the direct perpetration of the acts or ordering atrocities, indirect participation can be the employment of other actors. Oftentimes corporations do not commit the actual act, but rather allow violations to occur by adhering to detrimental governmental policies, failing to prevent abuses or passively condone the actions by remaining silent.³³ Corporate entities can also assist governmental bodies in the violations.³⁴ The corporation can perform State-like undertakings, by delegation or governmental functions.³⁵ These corporations and their representatives acting as pseudo governmental agencies can be afforded State immunity, thereby shielding them from prosecution.³⁶

2.3.1 Home and host State responsibility

Multinational corporations possess great economic power due to their size and wealth. The corporations can, and oftentimes will, exert control over recipient investment countries, also labeled host States. This renders corporations the position to ensure adherence to human rights norms. What is commonly referred to as the home State of global corporations can be derived from the location of the headquarters, parent company or some other establishment that has residency in the host nation. The increased number of transactions between host States and non-state actors, such as MNCs, has been enabled by globalization which has

³² A further tool is to create incentives for responsible conduct. It is possible for large organizations, such as the WTO, to create incentives through the banking and lending sector, such as the World Bank Group. This tool will not be discussed any further. See Olivier De Schutter, *Transnational Corporations and Human Rights: An Introduction*, *Global Law Working Paper* 01/05, at 13 (2005). Available at http://www.law.nyu.edu/global/workingpapers/2005/ECM_DLX_015787.

³³ Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 *Connecticut Journal of International Law* 51, 4 (2003).

³⁴ Andrew J Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act*, in Olivier De Schutter (ed), *Transnational Corporations and Human Rights*, Oxford, Oxford Hart Publishing, 55 (2006).

³⁵ Wilson *supra* note 34, at 59.

³⁶ States can in such cases be under US jurisdiction indirectly by prosecution of a governmental agency. This may serve against the sovereignty and equality of states, see Wilson, *supra* note 34, at 50-51.

created bonds between the developing countries and the developed countries.³⁷ The creation of influential global organizations such as the World Trade Organization (WTO), World Bank and International Monetary Fund (IMF), has enlarged the transactions taking place around the world. The liberalization of trade has enabled companies to utilize resources and cheap labor in developing countries. These factors have enabled substantial profits and growth both for the MNC and the host State and as a result of this interdependence enabled the MNC to gain immense influence in the host State.³⁸

The conduct abroad of MNCs is at present not governed by any international body. There are several guidelines and recommendations, all in essence voluntary or non-binding legal instruments.³⁹ Corporations have brought several benefits to impoverished countries, such as closing the knowledge gap, allowing for the transfer of technology, providing training of human resources and opening access to international markets.⁴⁰ Developing countries can benefit from economic relations through investment where the infrastructure and other social indicators are enhanced, as well as providing revenue for governments and creating jobs. The host government wants to attract foreign direct investment, often by offering cheap labor and natural resources to MNCs. The incentive of MNC investment is the hope of gaining wealth in developing countries. Factors that attract large corporations are resources, raw material, land, cheap labor and military protection from the government.⁴¹ Unfortunately the latter also includes regimes that disregard human rights.

By taking advantage of local legal systems that are not or ill adapted to efficient corporate regulation, enterprises can move to production sites and steer investment to locations where the national and regional laws are more hospitable. The relations of power between the MNC and the developing country may grant the corporation significant impact on human rights law. MNCs can influence the contracting parties of the country to abide and respect international law with the power of deciding the recipient country of investment. MNCs may also choose to opt out of countries that commit human rights violations. The economic power wielded by the

³⁷ Claudia T. Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States For International Human Rights Violations Under the Alien Tort Claims Act*, 19 *St. John's J. Legal Comment.* 111, 113 (2004-2005).

³⁸ An estimated figure of 37 000 multinational corporations with 170 000 foreign affiliates was published in 1993 by the UN Transnational Corporations and Management Division. The largest corporations had assets around 3 trillion USD, and among the 50 largest MNCs in assets, 13 were US corporations, 7 French, 6 Japanese, 5 German. See http://www.unctad.org/en/docs/wir1993overview_en.pdf [last visited on 08.12.09 17:19]. A more recent figure presents that multinational corporations has grown to over 63, 000 that constitute of 821, 000 subsidiaries all over the world. These corporations directly employ 90 million people, including around 20 million in developing countries, and produce 20 % of the world's gross product. See: Medard Gabel, Medard & Henry Bruner, *Globalinc. An Atlas of The Multinational Corporations*, New York, USA, The New Press, at 7 (2003). The numbers indicate that MNCs are part of the international structure and with this economic power also a dominant actor. See Salazar, *supra* note 37, at 124-126.

³⁹ Salazar, *supra* note 37, at 145-146.

⁴⁰ Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights With Responsibilities*, 23 *Am. U. Int'l L. Rev.* 451, 453 (2007-2008).

⁴¹ Salazar, *supra* note 37, at 114.

MNCs allow for control over development policy which has not always proved beneficial from the social standpoint of the host State.

2.3.2 The developing role of home States and government power

The home State can also prove to be a pivotal player in the MNC's decision to invest in a particular host State. The governments of the home States in effect engage themselves in brokering favorable terms for the MNC's perspective investment while also furthering their own political agenda. Particular MNCs co-operate with their own government to ensure better terms with a developing country. Aid-dependent countries are in a weak position to negotiate due to their need for monetary assistance. Developing nations with their smaller economies are also in an unfavorable position against home States with significantly larger resources. These factors lead to inequitable conditions as small host States in practice have no negotiating power. The agreements between the two nations are often imbalanced where no lobbyist or legal counsel can represent the interests of the host State.⁴² The core issue is that impoverished nations are not given the flexibility to negotiate the terms of investment. In particular US corporations are significantly supported by the strong US government.⁴³ MNCs can gain special tax or regulatory treatment, while the host States' officials are more susceptible to corruption due to low salaries and poor governmental funding.⁴⁴ The joint power of the home State and the MNC, results in the enterprise ultimately dictating the terms under which it is willing to invest.

From a legal standpoint, underdeveloped countries face difficulties in regulating the conduct of MNCs. Fear of losing investment can result in the acquittal of violators, as well as allowing and maintaining lenient laws and standards of production and working conditions. It also appears unlikely for host States to become involved in litigation that is costly and will deter future investment.⁴⁵ On one hand, host States are not willing to regulate the activities of MNCs as it is undesirable, and on the other hand it can be impossible due to legal obstacles and lack of enforcement. Impoverished nations often need the foreign investment and do not want to induce corporations to relocate to other, more hospitable countries.

⁴² Stiglitz, *supra* note 40, at 479.

⁴³ *Ibid*, 479-480.

⁴⁴ *Ibid*, 476-477.

⁴⁵ Salazar, *supra* note 37, at 148.

2 REGULATION OF CORPORATE ACTIVITIES

3.1 Self-regulation of multinational corporations

During the 20th century global firms altered both the extent and the nature of the corporate structure. Firms consistently seek to reduce costs and increase strategic flexibility by outsourcing activities that do not belong to the core of its business. The alteration of business networks affects the supply chain. Companies maintain economic control over the supply chains, yet outsourcing also concedes legal obligations for economical, social and environmental impacts to move from the company to suppliers.⁴⁶ These developments raise issues about the boundaries of Corporate Social Responsibility (CSR) and thus the extent to which the companies can be responsible for the activities of suppliers. Customer firms are responsible for purchased products or services, however not legally responsible for the activities of the suppliers. The supplier is subject to local laws. MNCs employing this structure often depend on their brand name for sales, thus poor social performance in the supply chain may damage the reputation of the company.⁴⁷ These circumstances encourage MNCs to contract with suppliers that respect and abide to human rights norms.⁴⁸

Self-regulation is a useful and flexible tool that allows standards to be coupled with each corporation. MNCs tend to prefer such an approach as it can benefit the corporate structure and promote marketing efforts as well as the utilization of codes of conduct. Multinational corporations may have intricate corporate structures where one single approach may not be feasible. Therefore the levels to which self regulation is implemented can be adaptable to each industry sector and area of business and provide an internal alternative to legally binding instruments. However consideration must be given to whether self-regulation is an efficient tool as corporate codes often have no monitoring or enforcement mechanism.

3.2 Corporate codes of conduct

By the 1970s corporate codes of conduct passed by international organizations became rather common with the attempts of complying with international law norms. Several instruments have been initiated, such as the UN Code of Conduct for Transnational Corporations in the

⁴⁶ Crane et al, *supra* note 10, at 363.

⁴⁷ Ibid, 364.

⁴⁸ There are reasons to believe that the most serious impact on management decision is the external pressure from stakeholders. Stakeholders can be any group or individual affected by the objectives of the corporation. For ethical and social performance, the most influential stakeholders are perhaps the legislative and political stakeholders, consumers and financial stakeholders. Social performance is predominantly a concern of stakeholders from the regions of Western Europe and North America. Governmental action has been encouraging companies to act socially responsible, both in the US as well in the EU. Yet most of the pressure is voluntary or applied indirectly through pressure from consumers. Crane et al, *supra* note 10, at 366-370.

1980s, yet were not adopted due to enforceability and monitoring difficulties. To this date no legally binding international code applying directly to MNCs has proved sustainable. The impediment of signing a treaty with binding norms rests with the lack of consensus to norms that the majority is willing to abide to. Corporate codes of conduct prevailed from the response to criticism from the general public, media and non-governmental organizations (NGOs). In spite of several attempts, the establishment of codes has not fully been realized. Numerous corporate codes do not bear the threat of sanctions nor are they enforced frequently. The codes seldom require an independent monitoring body to ensure compliance.⁴⁹ The incentive for MNCs to implement such codes is not particularly persuasive. Corporations can fear a disadvantage if other MNCs do not sign comparable codes. The loss of profit may result from the loss of contracts with developing countries. Since a principal objective of the corporation is shareholder profits, a decision to implement a code of conduct may not be prioritized.⁵⁰

3.3 Corporate Social Responsibility

Globalization has had dramatic effects on developing countries. Prospective investment and economic growth will continue to have social and environmental impacts. Corporate Social Responsibility is a term applied to describe the role of business in developing countries and can be viewed together with terms such as business ethics, corporate citizenship, corporate sustainability or stakeholder management.⁵¹ No general standard description of the concept is employed. Only recently have corporations initiated rather noteworthy evidence of CSR in the strategic management and stakeholder social reporting.⁵² The responsibility is often communicated towards employees and stakeholders affected by the decisions of the company.⁵³

The inherent problematic aspect of codes of conduct in the area of CSR is that there is a broad diversity in the codes. Different standards and verification mechanisms make it hard to compare corporations, or even appreciate the achievements of the specific code. It also makes it difficult to interpret whether a code is credible or not, especially for consumers.⁵⁴ While CSR and other voluntary initiatives by MNCs can affect human rights norms, it has proved that voluntary instruments do not currently benefit the victims of gross violations.

⁴⁹ Salazar, *supra* note 37, at 149-150.

⁵⁰ *Ibid*, 150-151.

⁵¹ Crane et al, *supra* note 10, at 473.

⁵² *Ibid*, 452-453.

⁵³ On the definition see § 8 of the Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM (2001)366 – C5-0161/2002 – 2002/2069 (COS)).

⁵⁴ Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in Paul Alston (ed), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, at 292 (2005).

4 MULTINATIONAL CORPORATIONS IN INTERNATIONAL LAW

International law is limited in its powers to enforce punitive actions when confronted with corporate actors evading responsibility and legal accountability. This is because it does not directly address MNCs, nor can hold individual nations responsible for MNCs' conduct abroad. States are under the obligation to respect human rights, either as contracting parties to a treaty, customary international law or norms of peremptory character (*erga omnes*). States are parties to Conventions and other instruments on the international scene, and are ultimately accountable for compliance to norms. All members of society, i.e. individuals as well as the private business sector, have responsibilities and must abide to the regulations that are indirectly imposed on them through the acts of the Contracting Parties. States are required to implement human rights obligations to the domestic level by the imposition of duties and responsibility to all actors within their jurisdiction.⁵⁵ Treaties can specifically require States to adopt measures that will prohibit organizations or corporate entities to commit violations. Thus any improper conduct by an MNC that results in abuses is considered a violation by the State of its international obligations.⁵⁶ Various Conventions apply to human rights norms. These apply to the States which are party to the specific agreement, but can be also be considered valid claims as evidence of customary international law that applies regardless of being party to the Convention. Treaties that have not entered in to force or have no enforcement capacity for the reason that no consensus can be achieved, can still be evidence of *opinio juris* or State practice. In general, States cannot be held responsible for the acts of private parties' conduct abroad. Similarly individuals not acting under the instructions or under the direction or control of the State cannot have their actions attributed to the State.⁵⁷

In the legal setting efforts to restrain and control corporate power operate on two levels. The first level attempts to regulate MNCs through universal standards. These efforts endeavor to apply above and beyond local regulations. The attempts at this level include efforts in global and regional bodies, such as the United Nations, OECD and European Union. The efforts consist of standards of operations and can include monitoring, assessment and necessary enforcement. The first level also includes activists, such as non-governmental organizations (NGOs) that engage and mobilize developed legal systems to battle corrupt corporate practice.

⁵⁵ Analía Marsella Sende, The Responsibilities of States for Actions of Transnational Corporations Affecting Social and Economic Rights: A Comparative Analysis of the Duty to Protect, 15 *Colum. J. Eur. L. Online* 33, 33-34 (2009).

⁵⁶ States can be directly responsible under certain Conventions, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child that all contain provisions obliging the States parties to take measures against private parties.

⁵⁷ Sende, *supra* note 55, at 33-34.

The second level of legal setting is the direct involvement of State regulation, such as the ATCA.

Important actors on the international level include the United Nations and the OECD. There have been several international initiatives to create an instrument that imposes direct obligations on corporations, such as the Draft set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises. Yet due to lack of consensus among nations, there is currently no binding instrument.⁵⁸

4.1 The United Nations human rights norms for businesses

By the 1940s and 1950s the structure of international law was changing due to the experiences of the Second World War. Among the initial undertakings was the establishment of the United Nations with the goal of ensuring respect of human rights. The 1948 Universal Declaration of Human Rights (UDHR) was declared to apply on States, individuals and all organs of society.⁵⁹ The accountability has developed from States to include individuals and also non-state actors. The Declaration provides universal rights to be adhered to and respected by the participating States, NGOs and corporations. However, corporate accountability under international law is highly uncertain and widely debated upon. In 1974 the UN Commission of Transnational Corporations was established, with the task of drafting a general code of conduct whose main focus was issues of international trade. The work was however ended by 1992 and the Draft Code was not adopted because of disagreements between the countries.⁶⁰

Voluntary codes have been the preferred choice for corporations and countries since the 1970s. The idea to invoke legal international responsibilities did not emerge until the 1990s. The UN set out in 1997 to create a draft on corporate liability which was completed in 2004. The document, the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights⁶¹, was however not adopted.⁶² The draft's task was to recognize the effects of TNCs on human rights and to make recommendations.⁶³ The articles consisted of human rights standards in areas on humanitarian law, civil, political, economic, social and cultural rights, as well as consumer protection and environmental practices. Part of the controversy was the non-voluntary character of the norms which differed from previous voluntary efforts. It included mechanisms of reporting, monitoring and verification. An approval from the UN bodies would have inclined the instrument to have a legal standing, even if considered soft law it could be interpreted as

⁵⁸ Another potential function is to extend the International Criminal Court to assert jurisdiction on corporate actors, but this will not be addressed in this paper.

⁵⁹ Universal Declaration of Human Rights, GA Res. 217 (A III), UN GAOR, 3rd Sess., pt. 1, at 71, UN Doc A/810 (1948).

⁶⁰ De Schutter, *supra* note 32, at 2.

⁶¹ See Draft UN Code, *supra* note 5.

⁶² Weissbrodt & Kruger, *supra* note 8, at 901.

⁶³ The UN Sub-commission on the Promotion and Protection of Human Rights created the Working Group on the Working Methods and Activities of Transnational Corporations.

current international customs. Nevertheless, the UN Commission on Human Rights declared in 2004 that although it is an important instrument, the norms have no legal standing.⁶⁴

Kofi Annan, UN Secretary-General at the time, initiated the Global Compact to regulate conduct between the United Nations and the private sector. The Global Compact was launched on July 26, 2000 as a voluntary instrument to co-operate with corporations and civil society. The instrument contains ten principles that derive from the UDHR, the Declaration of the International Labor Organization on Fundamental Principles on Rights at Work, the Rio Declaration of the 1992 UN Conference on Environment and Development (Earth Summit) and UN Convention Against Corruption.⁶⁵ The principles contain instructions to promote human rights, improve labor conditions, protection of the environment and transparency.⁶⁶ In 2004 anti-corruption values were added. The principles regarding human rights are:

- Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence;⁶⁷ and,
- Make sure they are not complicit in human rights abuses.⁶⁸

The Global Compact is based on voluntary efforts and annual reports on initiatives taken to adhere to the ten principles. The instruments, some voluntary and others not in force, indicate that there have been efforts to gather an international endorsement to corporate responsibility. The lack of a successful or binding legal mechanism is rather palpable at this stage since no legal consensus has been achieved from the 1970s. While the drafts and instruments can provide for evidence of State practice, their significance and influence are debated to this date.

4.2 The OECD Guidelines for Multinational Enterprises

During the 1970s and 1980s other voluntary codes were promoted by regional governmental organizations. These were often industry-specific codes or focusing on specific issues.⁶⁹ The

⁶⁴ The UN Commission on Human Rights did not officially vote on the matter, but the norms were put aside. See Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 *Global Governance* 279, at 285-287 (2009).

⁶⁵ See the ILO Declaration on Fundamental Principles and Rights at Work, adopted at the 86th session of the International Labour Conference, Geneva, 18 June 1998; Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vols. I-III; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

De Schutter, *supra* note 32, at 7-8. See also

<http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index.html> [Last visited on 12.12.2009 12:56].

⁶⁶ Prakash S. Sethi, *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations*, John Wiley & Sons, Inc., New Jersey, at 110-112 (2003).

⁶⁷ Principle 1 of the UN Global Compact, see

<http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/index.html> [Last visited on 06.12.2009 11:56].

⁶⁸ Principle 2 of the UN Global Compact.

⁶⁹ Other examples of initiatives and codes are: The Voluntary Principles on Security and Human Rights (signed in 2000 by the US and UK governments, NGOs and several MNCs), Kimberley Process Diamond Certification

Organization for Economic Co-operation and Development (OECD), one of the main influencing organizations, issued in 1976 the Guidelines for Multinational Enterprises. The OECD guideline was adopted in 1976 by the Member States.⁷⁰ The guidelines are recommendations partly overlapping with the UN Global Compact, but also include aspects of information, consumer interest, science, technology, anti-trust and taxation. The Guidelines were revised in 2000 and constitute propositions aimed at enterprises of the Member States. They contain the policy that enterprises should respect human rights of those affected by the corporation's activities and should be consistent with the host government's international obligations and commitments.⁷¹ This implies that not only local regulations of the host State should be considered, but also international obligations, especially if these norms declare more expansive responsibility.⁷²

The revision in 2000 also expanded the focus on the National Contact Points (NPC) that promote the guidelines, handle enquiries and assist in its implementation when problems emerge.⁷³ If violations occur, either in a third State or in the territory of the Member State, the NPC may receive complaints.⁷⁴ When no agreement is reached on the national level, the NPC must after the revision issue a statement that identifies the violating corporation unless considerations of the interests of the implementation of the Guidelines require other measures.⁷⁵ Although this complaints mechanism can deter corporate conduct that violates human rights by acclaiming public interest, the compliance with the guidelines is voluntary and there is no enforcement procedure provided. The Guidelines still constitute the most widely used instrument on the international level.⁷⁶ The European Commission has further stated that the OECD Guidelines for Multinational Enterprises are setting universally applicable standards for MNEs from industrialized countries and should also apply above any code from the EU.⁷⁷ This is in line with other statements from the EU related to corporate responsibility.⁷⁸ By promoting the OECD Guidelines, the consistency of the norms will further promote corporate uniformity in the global setting.

Scheme from 2002 between governments, NGOs and MNCs), the Extractive Industries Transparency Initiative (from 2002, also signed among civil society groups, investors and IGOs), for more on this see Mantilla, *supra* note 64, at 283-285.

⁷⁰ It was adopted with the support of all the Member States, with the exception of Turkey.

⁷¹ See II (2) of the OECD Guidelines for Multinational Enterprises, entered in to force 15 February 1999.

⁷² De Schutter, *supra* note 54, at 293.

⁷³ See the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises, Part I, and Procedural Guidance, Part I.

⁷⁴ The establishment of the National Contact Points assist the implementation of the Guidelines, yet there is no dispute resolution available and it can only issue recommendations. There are currently thirty member countries of the OECD. See: http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html [Last visited on 14.10.2009 13:11].

⁷⁵ *Ibid*, Procedural Guidance, C 4 (b).

⁷⁶ De Schutter, *supra* note 32, at 2.

⁷⁷ See Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development, Brussels 2 July 2002, COM (2002) 347 final § 3. De Schutter, *supra* note 54, at 294.

⁷⁸ See the Preamble of the Green Paper, *supra* note 53. De Schutter, *supra* note 54, at 292.

5 MULTINATIONAL CORPORATIONS IN THE EUROPEAN UNION

The Member States of the European Union appoint common laws and regulations that apply to all the Members, yet not all areas are covered by the EU. Certain aspects are still independently governed by the Member State alone, some are voluntary and other implemented in separate manners and differing from nation to nation. To this date individual Member States regulate the conduct of corporations registered in a specific nation. Within the European Union (EU) several mechanisms have been initiated to expand the responsibility of enterprises. The mechanisms mainly evolve around voluntary corporate codes, often developed by international organizations or by the enterprise independently.⁷⁹ The European Parliament intends to promote voluntary initiatives by MNCs and encourage the existing international instruments from the OECD and UN.⁸⁰ The European countries implement international legal obligations in different manners, some countries apply both criminal and civil law and other countries refer directly to international law provisions in the domestic legislation.⁸¹ The free movement of capital and investments in the EU denotes that Member States experience increased competition on the regulation of corporate conduct and States seek to attract investment from other Member States.⁸² Corporations can move from one jurisdiction to another with more favourable regulations. This increased competition may have generated reluctance from the governments of Member States to impose strict requirements on MNCs. This may also be the reason why voluntary instruments have been promoted by the EU.

Apart from these voluntary instruments and corporate codes, the EU has also regulated how claims of human rights abuses by EU corporations will be heard. In Regulation No 44/2001 the EU recognizes the jurisdiction of Member States to hear tort claims resulting from MNC conduct abroad.⁸³ Member States can hear human rights claims suffered by victims, irrespective of nationality, when damage is caused by the activities of a MNC or any of its branches domiciled in a Member State. The residence of a corporation decides where

⁷⁹ In practice several corporations have chosen to incorporate in the United Kingdom due to the beneficial fiscal and corporate system. It can thus be rather important to note the procedures recognized in the UK as it in practice will be of importance to MNCs.

⁸⁰ De Schutter, *supra* note 54, at 228-229.

⁸¹ Wolfgang Kaleck, From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008, 30 *Mich. J. Int'l L.* 927, at 958-960 (2009).

⁸² De Schutter, *supra* note 54, at 228-229.

⁸³ This is regulated in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, that was consolidated to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1-23, see § 68 in the Regulation. The Regulation entered in to force on March 1, 2002, and applies to all EU Member States. The Lugano Convention was also consolidated to Regulation 44/2001, and the different instruments apply depending on the defendant's domicile; Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters.

litigation takes place and the regulations it needs to abide to.⁸⁴ The possibilities to hold an MNC domiciled in a Member State of the EU will depend on the nature of the links between the conduct and the corporation, whether it is a branch, agency, subsidiary or an autonomous entity that has a certain degree of independence and control.⁸⁵ The recognition of these links will affect whether the MNC can be held accountable for human rights violations committed abroad.⁸⁶

5.1 Human rights norms in the European Union

The implication of EU regulations is important since Member States have several parent companies with corporate links abroad and are second to the US in number.⁸⁷ The European Court of Human Rights enforces the European Convention on Human Rights (ECHR) but does not extend its jurisdiction to MNCs.⁸⁸ The Convention was adopted by the Council of Europe and signed by all EU Member States since all are members of the Council.⁸⁹ The Court bears jurisdiction to hear allegations of violations of the Convention. The Court can only hear claims by victims of human rights abuses and cases can only be brought against States.⁹⁰ The ECHR distinguishes from public international law by imposing on the Contracting States the obligation to prevent infringements committed by private parties.⁹¹ Despite this the State Parties of the Convention do not have an obligation to protect the fundamental rights of individuals affected by human rights violations but living outside the jurisdiction of the court.⁹² Even if the Convention is far-reaching compared to other regional or international instruments, it still does not impose obligations on enterprises operating on a transnational scene.⁹³ The State Parties to the Convention are required to control private individuals and their conduct under their jurisdiction, but it is limited to that jurisdiction. Foreign claimants cannot thus impose MNC accountability through the European Court of Human Rights.

⁸⁴ The control exercised by an MNC can be attributable to a defendant corporation if it can be argued that the decision which led to the violations had a close link. Another viable option is that two separate corporations operated jointly and it can thus be acclaimed joint liability. Art 2 of the Regulation, *supra* note 83.

⁸⁵ The location of the headquarter or registration are important factors to consider. See chapter 6.

⁸⁶ De Schutter, *supra* note 54, at 269.

⁸⁷ Amai, *supra* note 14, at 381.

⁸⁸ European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, ETS, No. 5.

⁸⁹ Kevin Boyle, The European Experience: The European Convention on Human Rights, *Victoria University of Wellington Law Review*, 2009, at 165-168.

⁹⁰ Art. 34 of the European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, ETS, No. 5 (ECHR).

⁹¹ *Ibid.* see art. 1 of the ECHR.

⁹² De Schutter, *supra* note 54, at 229.

⁹³ The instrument and Contracting States can be found at:

<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/> [Last visited on 03.10.2009 10:11].

5.2 Corporations in Sweden

The government of Sweden has chosen to promote good corporate conduct through self-regulation and more importantly by the adherence to international regulations by the OECD and UN. This will accordingly promote the international competitiveness of Swedish enterprises. The Ministry for Foreign Affairs in Sweden is responsible for the Swedish Partnership for Global Responsibility. Corporations can voluntarily join the Partnership and through the network gain an understanding of the international norms and how they can be implemented on a practical level. The Partnership was initiated by the Swedish government in March 2002 to promote human rights, basic employment standards, better environmental standards and anti-corruption measures by Swedish corporations. The Partnership provides a forum that promotes social responsibility between corporate actors, the government and other organs of society. The aim of the Partnership is to increase the competitiveness of Swedish enterprises, to commit to human rights and sustainable development as well as expanding the knowledge of international regulations.⁹⁴ The foundation of the Partnership is the OECD Guidelines as well as the UN Global Compact. Swedish enterprises are encouraged to promote CSR by adhering to the policies of the UN Global Compact.⁹⁵ The Swedish government also participates by promoting the OECD Guidelines through the National Contact Points of the OECD.⁹⁶ The NPC in Sweden are composed of representatives from several departments of the Government Offices of Sweden as well as representatives from trade and labor unions, industry and trade sector.⁹⁷

The Swedish Corporate Governance Board promotes good corporate governance by self-regulation directed in the *Swedish Code of Corporate Governance*.⁹⁸ The main principle of “comply or explain” promotes socially responsible behavior. In the annual corporate governance report companies are obliged to exhibit their compliance with the Code or if a rule is inappropriate in a particular circumstance, the corporation may choose to explain its position and reasons for applying other solutions. Companies obliged to follow the Code are private companies listed on the Swedish securities market.⁹⁹ The task of the Board of Directors includes having the company comply with laws and regulations relevant to the operation, as well as define guidelines to govern the company’s ethical conduct.¹⁰⁰ The Swedish government has declared its intention to abide to norms of the OECD and UN, thus listed corporations on the Swedish securities market are obliged to follow the international norms.

⁹⁴ For more about the Swedish Partnership for Global Responsibility see: <http://www.regeringen.se/sb/d/2657/a/14557> [Last visited on 18.01.10].

⁹⁵ For a list of enterprises that have joined the Partnership see: <http://www.regeringen.se/sb/d/2657/a/14557> [Last visited on 18.01.10].

⁹⁶ See http://www.manskligarattigheter.gov.se/extra/pod/?module_instance=10&action=pod_show&id=18 [Last visited on 18.01.10].

⁹⁷ Among the representatives are LO, TCO, IF Metall, Sif as well as Svensk Handel and Svenskt Näringsliv.

⁹⁸ Swedish Code of Corporate Governance, entered in to force 1 July 2008. The Revised Code is applicable from February 1st, 2010. See <http://www.corporategovernanceboard.se/> [Last visited on 18.01.10].

⁹⁹ For the annual report, see § 10.1 of the Revised Code 2010.

¹⁰⁰ See § 3.1 of the Revised Code 2010.

6 UNIVERSAL JURISDICTION

6.1 The divide between criminal and civil jurisdiction

Countries need to respect and abstain from interference in the internal affairs of other countries as States are considered equal and sovereign.¹⁰¹ Matters that fall within the scope of the internal affairs are decided by State practice and the development of international relations. The universality principle states that regardless of where an action takes place certain crimes are of international interest and affect all nations worldwide. *Jus cogens* crimes can be considered to be of an *erga omnes* obligation. Crimes of universal character can be prosecuted by the international community, diverse international courts and tribunals or by a foreign State. However it does impose jurisdictional concerns.¹⁰² The concept of jurisdiction is essential in the discussion of human rights remedies. Since no explicit prohibition has been maintained, universal jurisdiction has been considered permitted under international law.¹⁰³ While international law mainly focuses on criminal law, this argument has been widely used by scholars to argue for and against universal jurisdiction both in criminal and civil matters. There is no international consensus at this stage.¹⁰⁴ International law authorizes criminal jurisdiction in a number of Conventions, yet there is no instrument granting civil jurisdiction.¹⁰⁵ Both customary international law and treaties provide universal jurisdiction on certain acts.

The most common source of jurisdiction is territorial and accordingly the State has the right to deal with implications within its borders.¹⁰⁶ A further common source is the active personality principle where nationals' actions committed abroad can be valid claims for a State to assert

¹⁰¹ See Charter of the United Nations art. 2 § 7.

¹⁰² State immunity is also an important concern but will not be further discussed. Gillian D. Triggs, *International Law: Contemporary Principles and Practices*, LexisNexis Butterworths, Australia, 348-349, at 361-363, 2006.

¹⁰³ The *Lotus* case provides that States can claim jurisdiction unless explicitly prohibited by international law; *SS Lotus (France v Turkey)* [1927] PCIJ (Series A) No 10.

¹⁰⁴ The more recent *Arrest Warrant* case provides that there is no international prohibition to enact domestic legislation addressing universal jurisdiction, yet the case did not explicitly assert how to claim jurisdiction and the court disagreed on several points on the lawfulness; *Arrest Warrant of 11 April (Democratic Republic of Congo v Belgium)*, ICJ Reports 2002, p 3. Furthermore, the number of crimes that attract universal jurisdiction are also greatly debated upon. Universal jurisdiction has been asserted in crimes against humanity, genocide, piracy, war crimes and slave trading, see the Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered in to force 1 July 2002). See Triggs, *supra* note 101, at 358-359.

¹⁰⁵ See for instance art. 5 § 2 of the UN Torture Convention and art. 49-50, 129 and 146 of the 1949 Geneva Conventions. More on this topic, see Ryngaert, *supra* note 18, at 18. In 2001 a framework was proposed under the Hague Conference on Private International Law to draft a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The draft was the first to address universal tort jurisdiction, yet consensus could not be reached on a number of provisions and stalled negotiations. This portrays the growing development in the field of human rights, both that jurisdictional matters can be extensive for the purpose of ensuring human rights, but also that it is difficult to obtain consensus on an international level, Ryngaert, *supra* note 18, at 21-23.

¹⁰⁶ States cannot exercise jurisdiction over another State's territory unless international rules provide for an exception (State sovereignty). Jurisdiction can be claimed on the basis of nationality and territory as well as sufficient links to either of these underpinnings. See: Triggs, *supra* note 101, at 356-357.

jurisdiction. International law also grants States passive personality jurisdiction where crimes are committed against its nationals abroad.¹⁰⁷ The principle of universality provides jurisdiction on the nature of the offence or violation, the idea that certain crimes are egregious in nature and it provides States the right to deal with such infringements. The principle is often invoked under criminal law. Universal jurisdiction allows courts to hear serious infringements of international law, usually gross human rights violations irrespective of where the events occurred. This category of jurisdiction does not require any territorial or personal nexus to the forum State, but rather the nature of a particular violation determines its universality. In practice the universality principle under tort cases will ordinarily establish certain minimal territorial links to the forum. This does not require the defendants to reside in or be a national of the forum State, transient presence can suffice depending on the particular circumstances of the case.¹⁰⁸

Several domestic legislations have asserted universal jurisdiction for criminal prosecutions on human rights violations.¹⁰⁹ Most jurisdictions have in such cases referred to the Geneva Conventions or Convention Against Torture.¹¹⁰ It appears that the federal courts of the US and the universal tort jurisdiction are distinct from other countries of the world.¹¹¹ State practice outside the US remains scarce and currently there is no European jurisdiction similar to the ATCA, that offers civil remedy with the objective to provide compensation to victims of human rights violations abroad. European civil law does not codify universal tort jurisdiction and at present the US is the only country in the world to do so.¹¹²

There are also at present no binding customs or law, nor any effective remedy available to deal with the implication of MNCs on the international arena. Only a few countries have enacted legislation to deal with this problem and only an assortment based on the theory of universal jurisdiction. Under the universality principle, and thus only covering gross violations of human rights, the US federal courts can deal with tort litigation on actions committed abroad. There is no international consensus on whether international law requires

¹⁰⁷ Kaleck, *supra* note 81, at 964-965.

¹⁰⁸ Ryngaert, *supra* note 18, at 3.

¹⁰⁹ Among the more noted are the Belgian courts that have charged crimes against humanity based on customary international law. The case against Pinochet is perhaps the most noted case in Europe, *R v Bow Street Stipendiary Magistrate; Ex Parte Pinochet Ugarte (No 3)* [2000] 1 AC 147; 119 ILR 135, 200. See Stephens, *supra* note, 6, at 43.

¹¹⁰ The Geneva Conventions apply to non-international armed conflicts, the ICTY has interpreted it as permitting universal jurisdiction in serious breaches of human rights. The common art. 3 of all the Conventions prohibits certain acts that take place at any time and any place, it applies to all State parties regardless of their nationality. See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹¹¹ Under US regulations, this approach, stating international law, can be found under the Restatement (Third) of Foreign Relations Law of the United States (1987). Under § 404 it states that universal jurisdiction is recognized by the international community for certain offences of universal concern. The commentary additionally states that international law does not preclude the use of the jurisdiction outside criminal law.

¹¹² Kaleck, *supra* note 81, at 971 and Ryngaert, *supra* note 18, at 38.

home States of MNCs to prevent abuses of human rights committed outside the jurisdiction of the US.¹¹³

6.2 Jurisdiction in the United States

In the United States two statutes provide federal courts the jurisdiction to hear claims for violations of international law.¹¹⁴ The *Alien Tort Claims Act* from 1789 as well as the *Torture Victim Protection Act* (TVPA) of 1991 provide a cause of action.¹¹⁵ The TVPA was more recently enacted to codify some of the case law as a response to the ATCA. The Act brought some clarification to the ATCA on the cause of action for torture and extrajudicial killing committed by a government official.¹¹⁶ It grants both aliens as well as US citizens the right to prosecute. The most successful and extensive legislature is the ATCA, however it is not formally based on the principle of universal jurisdiction.¹¹⁷ The ATCA asserts federal jurisdiction on international law and treaties. Traditionally, international law violations required the involvement of State action. However, recent developments have changed this. Federal courts of the US hear atrocities committed on foreign soil by private actors. The American legal system can in this perspective be seen as groundbreaking by introducing such legal remedies.

US courts that hear claims filed by a foreign plaintiff against a foreign defendant that relate to torts committed abroad, can in effect be considered based on universal jurisdiction.¹¹⁸ The US federal courts in general do not confer to the ATCA as an act that grants universal jurisdiction. On the other hand the link to the US arises from corporate conduct, in practice often responsibility of the parent company. The US Supreme Court argues in their sole decision concerning the ATCA under *Sosa*, which does not discuss it in terms of universal tort jurisdiction that the ATCA provides for jurisdiction on norms comparable to the paradigms of 1789. Universal jurisdiction under customary international law authorizes the ability to take action under *jus cogens* norms. The US Supreme Court has not asserted the substantive norms actionable under the Act. Only gross violations of human rights are actions that appear to be *jus cogens* norms. Customary international law provides that all States may exercise universal jurisdiction over genocide, crimes against humanity, war crimes and torture.¹¹⁹

¹¹³ Sende, *supra* note 55, at 38.

¹¹⁴ Civil suits for victims of international terrorism is another act that can be of interest, The Anti-Terrorism Act under 18 USC § 2333 (1990). See Stephens, *supra* note 3, at 8-9.

¹¹⁵ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2009). The Act provides for aliens as well as US citizens an opportunity to bring claims of torture or extra-judicial killings under the apparent authority of foreign government committed against individuals to court. Furthermore the statute Racketeer Influenced and Corrupt Organisations, 18 USC §§ 1961-1968, can also be used to induce liability on human rights abuses by corporations. See Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, at 18 (2004).

¹¹⁶ Black, *supra* note 104, at 282.

¹¹⁷ Joseph, *supra* note 114, at 9-11.

¹¹⁸ Ryngaert, *supra* note 18, at 31-32.

¹¹⁹ Can be found in the Rome Statute of the International Criminal Court. See Triggs, *supra* note 101, at 364-365.

6.2.1 US jurisdiction over multinational corporations

For the ATCA to be applicable, personal jurisdiction over the defendant corporation is required.¹²⁰ The federal courts of the US interpret the Act as providing jurisdiction over enterprises either incorporated in the US or having a continuous business relationship with the US. The US courts cannot obtain jurisdiction over an individual or corporation that is not within the borders of the US and do not have sufficient links to the country. Victims and foreigners can seek damages to violations of international law, either by those who have committed the violations or are complicit in such actions. For a parent company to be held liable it is required that they are either a direct participant in the violations or subject to vicarious liability.¹²¹

6.3 Universal jurisdiction in the European Union

Jurisdiction in the EU is explicitly governed in Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹²² The provisions assert jurisdiction of the Member States to hear tort claims, irrespective of the nationality of the victim, based on the domicile of the company or any of its branches. The Regulation provides that the general principle of jurisdiction in the EU is exercised by the Member State of the defendant's domicile. A tort claim can be heard under two grounds of jurisdiction, in courts where the event occurred or may occur, as well as on disputes arising out of the operations of the company and thus the place where the injury resulted.¹²³ The Regulation has been interpreted as covering both the damage where the event took place, as well as the place giving rise to the event.¹²⁴ From this, it follows that the place where the decision is adopted or taken by the board of directors, can be in a Member State other than where the company is domiciled. The action can be lodged in the State where the parent company is domiciled or where a branch, an agency or other establishment of the company has been the source of damage. Therefore, if harm results from the operations of a branch, the parent company can be sued in the State where the branch is located.¹²⁵ The domicile is determined in accordance with the domestic law of the Member State where the

¹²⁰ Stephens, *supra* note 3, at 8.

¹²¹ The terms vicarious liability, corporate complicity and the doctrine of aiding and abetting refers to the facilitation of a crime or to promote its accomplishment, see Black's Law Dictionary.

¹²² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, entered in to force 1 March 2002. It replaces the Brussels Convention; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, adopted on 27 September 1968. In certain matters the Lugano Convention still applies, Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, entered in to force 1 January 1992.

¹²³ Art 5 (3) and (5) of the Regulation, *ibid*.

¹²⁴ De Schutter, *supra* note 54, at 259-260.

¹²⁵ Art. 5 (5) of the Regulation, *ibid*.

action is brought.¹²⁶ For legal persons and firms the domicile is determined by the country where the statutory seat, central administration or principal place of business is located.¹²⁷

In May 2002, the European Parliament called on the European Commission to create a study of the application in court, of the extraterritoriality principle provided in Regulation 44/2001 and encouraged the incorporation of the principle in domestic legislation.¹²⁸ Whether this will develop in the Member States remains to be seen. The ATCA and the potential use of the Regulation, differ in certain aspects. While the ATCA references to violations of the law of nations and thus universal norms of international law, the EU would employ *lex loci delicti*, i.e. the law of the jurisdiction where the event took place. The applicable law will thus depend on the liability claim. In practice most cases will render national laws that in turn identifies with international human rights law, yet the reference to *lex loci delicti* may cause difficulties if the law provides insufficient protection of the victims.¹²⁹ On the other hand, it is possible that the principle provides that the forum State law will be employed considering cases where the parent company has exercised insufficient control over a subsidiary operating abroad. In such a case, even if the damages resulted abroad, the duty of the parent company provides that the forum State, i.e. where the company is domiciled, will provide for the applicable law.¹³⁰

6.3.1 EU jurisdiction over multinational corporations

Member States of the EU can hear tort claims on damage suffered by victims, regardless of their nationality. Claims can be brought to the domicile of the corporation or the State where any branch is located and has sufficient links to the act causing the damage.¹³¹ If there is a territorial nexus to a European State, it is possible to file for a suit in the nation where the corporation is registered. However, without a territorial or personal nexus to the forum State, jurisdiction similar to universal tort jurisdiction, is not applicable.¹³² In general tort claims will be considered on the basis of the law of the jurisdiction where the event took place, *lex loci delicti*. From this it follows that the possibilities to hear claims of international law, both customary law and other norms, is limited.

The Regulation has not been widely employed in the EU and the principle providing for such jurisdiction has not been incorporated to any greater extent by the Member States.¹³³ Even when it is possible to assert jurisdiction for lawsuits in the EU, procedural rules and cultural attitudes in some legal systems towards civil litigation may render it difficult to assert claims.

¹²⁶ Art 59 (1) of the Regulation, *ibid*.

¹²⁷ Art. 2 and 60 (1) of the Regulation, *ibid*.

¹²⁸ See § 50 of the Green Paper, *supra* note 53.

¹²⁹ It has also been argued that the application of foreign law in European Courts, entailing violations of human rights, would also constitute a violation of the ECHR itself. More on this topic, see De Schutter, *supra* note 54, at 268.

¹³⁰ De Schutter, *supra* note 54, at 269.

¹³¹ De Schutter, *supra* note 54, at 258-260.

¹³² Ryngaert, *supra* note 18, at 41-43.

¹³³ See § 50 of the Green Paper, *supra* note 53.

Even the English legal system that is comparable to the US system, is renowned for denouncing universal tort jurisdiction under international law.¹³⁴ There is however a potential field of future litigation. The European States provide for criminal redress to a greater extent than the US, which can explain why civil redress is a limited option in the EU.¹³⁵ This can be considered to be the alternative to civil redress similar to the ATCA. The US may focus on civil redress, while the EU has universal criminal jurisdiction.¹³⁶

¹³⁴ An option could be to combine criminal proceeding with civil action in the EU Member States, but in such a case *locus delicti* may still apply. The doctrine of *forum non conveniens* has been argued to limit the number of heard cases, and has been a topic under English courts. The importance of UK case law should be stressed considering the large number of MNCs incorporated in the UK especially for fiscal reasons. For more on this topic, see De Schutter, *supra* note 54, at 261-266.

¹³⁵ Criminal justice is under the third pillar and belongs to the home affairs of each EU Member State, where each State decides on the domestic criminal legislation.

¹³⁶ Ryngaert, *supra* note 18, at 53.

7 CORPORATE ACCOUNTABILITY UNDER THE ALIEN TORT CLAIMS ACT

The development of cases leading up to the establishment of corporate accountability has been rapid, however human rights litigation in the US has experienced shifts and turns. The *Alien Tort Claims Act* derives from the *Judiciary Act* of 1789. The first landmark case where the ATCA was applied was the 1980 case of *Filartaga v. Peña-Irala*, prior to which the use of ATCA was uncommon in human rights lawsuits.¹³⁷ During the 1980s most of the suits concerned foreign nationals suing their own government thus entailing State action. By the 1990s the litigation expanded to private actors to include suits against MNCs alleged of aiding and abetting in human rights violations by foreign States. In subsequent years federal courts have been occupied with deciding the norms considered to be a breach of the law of nations and thus also part of federal common law. It was not until the *Kadic v. Karadzic* case that courts found private actors liable for human rights violations.¹³⁸ After this decision corporate cases began to emerge.¹³⁹ *Doe v. Unocal Corp.* was the first lawsuit concerning a private corporation.¹⁴⁰ Only on one occasion has the US Supreme Court addressed the ATCA which was not until the *Sosa v. Alvarez-Machain* decision in 2004.¹⁴¹ However that case also left several key issues unresolved. As a result *Sosa v. Alvarez-Machain* has been noted both for its use as a reference and guide, as well as a lack thereof.

The number of court cases heard is a small fraction when compared to the number of lawsuits filed. This is due to the difficulty in assigning responsibility to corporations when they rarely commit direct acts of human rights abuse. As a result the most important question that has developed under the ATCA is whether corporations can be held accountable for aiding and abetting (complicity) in human rights abuses. It has proved difficult to gain personal jurisdiction over individual human rights violators yet legal action on corporations based in the US has resulted in more successful outcomes than in other countries.¹⁴² The cases leading to the establishment of corporate responsibility have developed from the acts of States, individual accountability and international criminal norms as the following cases will portray. However as the litigation of court cases indicate, several obstacles remain when attributing corporate accountability to global firms. These obstacles involve various parties including the political branch, NGOs and other actors.

¹³⁷ *Filartaga v Peña-Irala*, 630 F 2d 876 (2d Cir 1980). Christiana Ochoa, Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act, 12 *Indiana Journal of Global Legal Studies* 631, 634. (2005).

¹³⁸ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995).

¹³⁹ Judith Chomsky, Jennifer Green, Paul Hoffman, Michael Ratner, and Beth Stephens, *International Human Rights Litigation in U.S. Courts*, 14-15 (2008).

¹⁴⁰ *Doe v Unocal Corp.*, 110 F Supp. 2d 1294 (C.D. Cal. 2000).

¹⁴¹ *Sosa v Alvarez-Machain*, 542 US 692, 699 (2004). Cassel, *supra* note 4, at 316.

¹⁴² Martha Lovejoy, From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth Century Paradigm of the Law of Nations for the Alien Tort Statute, 12 *Yale Hum. Rts. & Dev. L.J.* 241, 246 (2009).

7.1 The Alien Tort Claims Act

The *Judiciary Act* was one of the first laws in the US.¹⁴³ It was enacted in 1789 and is now codified in 28 USC § 1350.¹⁴⁴

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The Statute provides for civil redress to victims of human rights abuses and jurisdiction under international law.¹⁴⁵ Since no significant sources are available to interpret the legislative intent of the First Congress, the original meaning of the Statute is debated upon.¹⁴⁶ There are several theories on the primary intent from the drafters, but under the generally accepted history of the ATCA there are three principal offenses under the law of nations. The US can claim national interest in the following three offenses; violations of safe conduct, infringements of the rights of ambassadors and piracy on the high seas.¹⁴⁷ After its enactment the Statute was rarely invoked for nearly 200 years.¹⁴⁸ The federal courts have struggled with the application of the ATCA because of its ambiguous nature. The Statute does not grant a cause of action to aggrieved individuals, instead it grants jurisdiction over torts committed in violation of the law of nations. The 1789 case *Bolchos v. Darrell* considered disputes of seized ships, property rights and slaves that were seized as prizes in times of war.¹⁴⁹ Since the *Filartiga v. Peña-Irala* decision in 1980 the ATCA has commonly served as a human rights statute granting subject matter jurisdiction to federal courts.¹⁵⁰ The Statute has commonly been employed by human rights advocates to bring violators from foreign countries to justice. The plaintiff must find a cause of action in customary international law, yet in practice these same international laws are often controversial and ambiguous.¹⁵¹

¹⁴³ The act was passed after an attack on a French diplomat and the US had no sufficient legal remedies available. Lovejoy, *supra* note 142, at 244.

¹⁴⁴ The Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73, 77. The current version, with minor changes, is codified in 28 USC § 1350 (2009).

¹⁴⁵ Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1879; a Badge of Honor, 83 *AJIL* 461, 461 (1989). Tort refers to civil liability as opposed to criminal.

¹⁴⁶ The drafters did not leave a definition of the law of nations. Keith A. Petty, Who Watches the Watchmen? 'Vigilant Doorkeeping,' the Alien Tort Statute, & Possible Reform, 31 *Loy. L.A. Int'l & Comp. L. Rev.*, 7-8 (2009).

¹⁴⁷ Lovejoy, *supra* note 142, at 244. See also Salazar, *supra* note 37, at 119, Petty, *supra* note 146, at 7.

¹⁴⁸ In the case from 1961 *Adra v. Clift*, the former wife of the plaintiff tried to conceal the name and identity of their daughter on an Iraqi passport; *Adra v. Clift*, 195 F. Supp. 857 (U.S.D.M. 1961).

¹⁴⁹ *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795). Lovejoy, *supra* note 142, at 245.

¹⁵⁰ *Filartiga v Peña-Irala*, 630 F 2d 876 (2d Cir 1980). Lovejoy, *supra* note 142, at 245-246.

¹⁵¹ Peter Schuyler Black, *Kadic v. Karadzic: Misinterpreting the Alien Tort Claims Act*, 31 *Ga. L. Rev.* 28, 281-282 (1996-1997).

7.2 The requirement of State action under *Filartiga*

In 1976 in Asuncion, Paraguay, 17-year old Joelito Filartiga was kidnapped and tortured to death by Americo Norberto Pena-Irala. At the time, Pena-Irala was Inspector General of Police and it was believed that the torture took place as revenge due to the political beliefs of Filartiga's father. The family of Filartiga tried to bring the case to court in Paraguay but was unsuccessful. Later in 1978 as the family moved to New York, USA, they filed a suit in the Eastern District of New York as Pena-Irala arrived in the US. *Filartiga v. Pena-Irala* was first dismissed on lack of jurisdiction.¹⁵² The first court found that a law governing the treatment of citizens by a sovereign State was not a violation of the law of nations. Yet the appeal in the Second Circuit resulted in a granting of federal jurisdiction and cause of action and thus reversing the dismissal. The Filartiga family was entitled compensation and punitive damages as the court declared that international law prohibits official torture.¹⁵³

The landmark case of *Filartiga* opened up litigation for breaches of customary international law made by State officers.¹⁵⁴ In the case, the court relied on a wide range of sources on the evidence of torture. The violation of the law of nations and torture was found in the UN Charter, UDHR, State pronouncements, foreign constitutions and other treaties not yet ratified by the US. Later cases have relied to a lesser extent on State pronouncements and instead turned to actual State practice.¹⁵⁵ One definition states that customary international law results from a general and consistent practice of States following them from a sense of legal obligation.¹⁵⁶ In customary international law the norms are principally only applicable where governmental action is involved.¹⁵⁷ In order for the ATCA to be applicable on private actors based on norms that require State action, some joint responsibility or sufficient connection is needed for the State and private actor. The federal courts of the US have used different tests to determine the requirement of State action.¹⁵⁸

The tests include traditional State functions and participation in partnerships. It can be single events or longer relationships and indirect liability.¹⁵⁹ The nexus test (1) demands a close affiliation between the State and the alleged conduct. The public function test (2) is applicable to an entity that performs a function that traditionally belongs to the sphere of the State. The symbiotic relationship test (3) may be utilized where the State has insinuated itself to a position of interdependence with a private actor so that it can be recognized as a close

¹⁵² *Filartiga v. Pena-Irala*, 630 F.2d 880 (2d Cir.1980).

¹⁵³ Salazar, *supra* note 37, at 128-129

¹⁵⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980).

¹⁵⁵ Petty, *supra* note 146, at 11-12.

¹⁵⁶ Restatement (Third) Foreign Relations Law §102 (2). See also Statute of the International Court of Justice art. 38 (1) (b), annexed to the United Nations Charter, adopted on 26 June 1945. Article 38(1) (c) of the ICJ Statute recognizes that the general principles of law recognized by civilized nations as a source of law.

¹⁵⁷ The State action requirement can be interpreted by the federal courts by looking to the jurisprudence of the color of law. This can occur when an individual acts together with State officials or with significant State aid, see *Kadic v. Karadzic*, 70 F.3d 245 (2d Cir.1995).

¹⁵⁸ Salazar, *supra* note 37, at 33. Compare this to similar tests that can be found under 42 USC § 1983, the tests include the following; public function, State compulsion, nexus, joint action and proximate cause.

¹⁵⁹ Joseph, *supra* note 114, at 33-34.

relationship.¹⁶⁰ An individual that willfully participates in joint action with the State or its agents can meet the joint action test (4). Corporations that perform no State-like function or present no connection with a government are not within the range of norms of this character. It is thus vital to assert the specific requirements to the applicable norms.

7.3 Kadic v Karadzic and private actors

The court in *Kadic v. Karadzic* found that individuals acting in their private capacity can be responsible under the law of nations, as long as the conduct occurs under the authority of the color of state or violates a norm of international law that recognizes private parties as an actor under that norm.¹⁶¹ In the case of *Kadic* the leader of Srpska Republic, self-proclaimed and located within Bosnia-Herzegovina, was alleged of torture, rape and murder for a campaign on genocide performed by the Serbian military on the order of Karadzic. The case was dismissed by the Southern District of New York by finding that private actors cannot violate the law of nations. Yet on appeal the Second Circuit reversed the decision as individuals can be liable for certain violations of international law. The Court concluded that *jus cogens* norms cannot be disregarded by States or private individuals. However, as stated in the *Filartiga* case, torture can only be violated by State officers or actions under the color of law as found under customary international law.¹⁶² The Court thus found that Karadzic was liable even if he was not a State officer.¹⁶³

7.3.1 Non-state actors and the violation of jus cogens norms

Present treaties and Conventions acknowledge that individuals may be held accountable to violations of *jus cogens* norms. *Jus cogens* norms are defined as norms that are absolute and allow no deviation.¹⁶⁴ Among the recognized *jus cogens* norms by federal courts are prohibitions of acts against piracy, war crimes, genocide, crimes against humanity and

¹⁶⁰ See *Johnson v. Rodrigues*, 293 F.3d 1196, 1202 (10th Cir. 2002), discussing four tests used to determine whether private parties should be deemed State actors, see Salazar, *supra* note 37, at 132.

¹⁶¹ *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir.1995). Erin Stapp, Third-Party Liability for Violations of the Law of Nations: Apply International Law, the Law of the Situs, or Domestic Standards?, 49 *Santa Clara L. Rev.* 495, 501 (2009). See also: Salazar, *supra* note 37, at 132-133.

¹⁶² The *Filartiga* decision relies on the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on December 9, 1975 (Res. 3452(XXX)), that was later adopted to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The enactment of the TVPA later confirmed that torture can only be committed with links to official acts, committed either by agents of the State, or private persons closely connected to the State or acting under its instructions or effective control.

¹⁶³ Salazar, *supra* note 37, at 133-134.

¹⁶⁴ According to the international definition *jus cogens* is a norm accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law with the same character. See art. 53 of the Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS, at 331. See Salazar, *supra* note 37, at 134-135.

slavery.¹⁶⁵ The *Unocal* case also added forced labor as a modern equivalent of slavery.¹⁶⁶ MNCs may also be liable for violations of customary international law in furtherance of any *jus cogens* norm.

7.3.2 Obligations under international criminal law - the Nuremberg trials

To establish accountability the federal courts of the US require authorization from international law. The Nuremberg criminal tribunals held non-state actors accountable to violations of international human rights. The prosecutions were some of the early cases addressing individual responsibility under international law since preceding cases considered States the main actors under international law.¹⁶⁷ Corporations and corporate executives that contributed to the war efforts and profited from the Nazi regime were prosecuted for crimes against humanity and war crimes.

There are a limited number of crimes under international law that can be committed by individuals and thus held directly liable under international law. Currently these are genocide, crimes against humanity and war crimes.¹⁶⁸ Yet, even if responsibility extends to non-state actors directly under international law, it nevertheless only applies to a limited number of crimes. The Nuremberg Charter imposes individual responsibility on accomplices.¹⁶⁹ Corporate executives are subject to international law similar to other individuals.¹⁷⁰ Corporate complicity, including aiding and abetting, was at this time also established as officials were indicted and convicted.¹⁷¹ Additionally, while the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were formed, the UN Security Council codified provisions of customary international law. Both the statutes of the ICTY as well as ICTR impose individual criminal responsibility on private individuals that aid and abet in the planning, preparation or execution on acts of genocide, war crimes or crimes against humanity.¹⁷² The International Law Commission (ILC) also imposed accomplice liability in the ILC Draft Code which is considered authoritative as an

¹⁶⁵ See Restatement (Third) of Foreign Relations Law, § 404, listing *jus cogens* norms under universal jurisdiction.

¹⁶⁶ See Chapter 8.3.

¹⁶⁷ Stapp, *supra* note 161, at 500.

¹⁶⁸ For a detailed definition of the crimes see art 6-8 of the Rome Statute of the International Criminal Court.

¹⁶⁹ In 1950 the UN confirmed the Nuremberg Principle VII by finding that complicity is considered a crime in war crimes, crimes against humanity and crimes against peace. See Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, 2 Y.B. Int'l L. Comm'n, 377, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950).

¹⁷⁰ The top Nazi government, party and military leaders were indicted for several war crimes, see The Nurnberg Trial, 6 F.R.D. 69, 76 (1946). Cassel, *supra* note 4, at 306.

¹⁷¹ Cassel, *supra* note 4, at 304, 325.

¹⁷² See art. 7 (1) of the ICTY Statute; Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), as adopted by UN Security Council Res. 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (1993), as well as art. 6 (1) of the ICTR Statute; Statute of the International Criminal Tribunal for Rwanda, as adopted by U.N. Security Council Res. 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994).

international instrument by the ICTY.¹⁷³ Further the Rome Statute for the International Criminal Court also imposes similar responsibility.¹⁷⁴

7.4 Corporate accountability under Unocal

It was not until the decision of *Doe v. Unocal* that MNCs were successfully held responsible under the ATCA.¹⁷⁵ The American company Unocal had a project in Myanmar where the company jointly with a subsidiary from Myanmar was setting up a pipeline for natural gas extraction. The project was not welcomed by the local population near the area, hence required security measures. Unocal allowed the Myanmar military to be hired for security purposes over the project, even though they had knowledge of prior forced labor practices by the military. The military of Myanmar helped the project by clearing and building roads along the proposed route of the pipeline. Evidence presented before the court included that the company was notified of the atrocities committed by the military, yet continued to accept work on the project. In 1996 the plaintiffs filed suit in the District Court of California, yet the court dismissed the claims against the Myanmar military and the Myanmar owned company that Unocal was co-operating with since they are protected under the *Foreign Sovereign Immunities Act*.¹⁷⁶ Unocal on the other hand could be sued as an American-based company.¹⁷⁷ The case was remanded by the Ninth Circuit and complicity was used as the approach to indict Unocal for human rights violations.

The plaintiffs of the case were villagers from the neighboring area of the project. The Myanmar military allegedly committed rape, murder, torture, forced displacement and forced labor. The Ninth Circuit found that forced labor can be a violation of international law, also citing the *Kadic* case that private actors can be liable without the requirement of State action under the ATCA for violations of *jus cogens* norms. The Ninth Circuit Court also determined that forced labor is the modern equivalent of slavery thus making it a violation of a *jus cogens* norm. Unocal was further tried for aiding and abetting in the actions of the Myanmar military. The international law definition of aiding and abetting consists of knowledge, practical assistance, or encouragement that has a substantial effect on the perpetration of the crime.¹⁷⁸ With this standard the pipeline project could be considered forced labor. The Court found that State action was not required in proving the acts of murder and rape, since these acts were

¹⁷³ Cassel, *supra* note 4, at 307. The 1996 ILC Draft Code defines accomplice as an individual who knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission, see art. 2 (3) (d), 17, 18, 20; ILC Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (1996).

¹⁷⁴ Rome Statute of the International Criminal Court, art. 25.3 (c).

¹⁷⁵ *Doe v Unocal Corp.*, 110 F Supp. 2d 1294 (C.D. Cal. 2000).

¹⁷⁶ The Act governs claims of immunity to bring a lawsuit in the US against a foreign sovereign nation, codified at 28 USC Title 28, §§ 1330, 1332, 1391, 1601-1611.

¹⁷⁷ *Doe I v. Unocal Corp.*, 395 F.3d 932, 942-444 (9th Cir. 2002).

¹⁷⁸ The court referenced to international criminal law for the definition, See *Unocal*, 2002 US App. LEXIS 19263, at 35-36. More on this topic see Salazar, *supra* note 37, at 137-138.

committed in furtherance of forced labor which is a *jus cogens* norm. After the case of *Sosa* was decided, Unocal decided to settle with the plaintiffs.¹⁷⁹

The *Unocal* court looked to the ICTY case *Prosecutor v. Furundzija* where the concept of aiding and abetting in international criminal law consists of *actus reus*, consisting of practical assistance, encouragement or moral support that has a substantial effect on the crime and its perpetration.¹⁸⁰ *Mens rea* is the knowledge of the assistance that the acts are committed as part of an offence. An element of the court's conclusion was drawn from the Rome Statute of the ICC and ICTY. US courts have found that this standard reflects international law.¹⁸¹ The *Doe v. Unocal* case thus held that an international norm on individual responsibility can extend to MNCs. It is also believed that the case was groundbreaking for human rights activism and corporate accountability. In the *Unocal* case the universal crimes were found to be slave trading, genocide or war crimes along with other crimes committed in furtherance of crimes that are under that category.¹⁸² Since this decision, several other corporations have been found accountable under the ATCA. Corporations committing human rights violations in conjunction with foreign corporate entities can be scrutinized under the ATCA and international law. The landmark decisions of *Unocal* and *Kadic* have thus allowed the ATCA to hold MNCs liable for violations of international law under two standards, *jus cogens* norms and State action.

7.5 The US Supreme Court decision *Sosa*

The importance of the *Sosa v. Alvarez-Machain* case is the reference of applicable norms under the ATCA.¹⁸³ It is the only US Supreme Court (USSC) decision to this date. The case was decided in favor of the defendant, but the *Sosa* case has been cited by both sides to support the actionable claims for violations of the law of nations.¹⁸⁴ It holds that private parties, such as corporations, can be liable under the ATCA. Dr Humberto Alvarez-Machain, a medical doctor in Mexico, was kidnapped from his office in Guadalajara and held captive in a motel to be transported to Texas, US. In Texas he was arrested by federal officers.¹⁸⁵ The US Drug Enforcement Administration (DEA) had previously attempted to transfer Alvarez to the US for his alleged participation in the torture and murder of a DEA agent. The Mexican government refused to extradite Alvarez and the DEA decided to act without the support of the government. The trial resulted in a judgment of acquittal. Upon Alvarez's return to Mexico he sued among others Jose Francisco Sosa for the participation of his abduction and

¹⁷⁹ Salazar, *supra* note 37, at 137-138. *Doe v Unocal Corp.*, 110 F Supp. 2d 1294 (C.D. Cal. 2000). Rehearing in part, 395 F.3d 932 (9th Cir. 2002), *en banc* granted, 395 F.3d 978 (9th Cir. 2003), then settled in December 2004 before rehearing *en banc*.

¹⁸⁰ *Prosecutor v. Furundzija*, Case No. IT-95-17/1 T (Trial Chamber, Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999).

¹⁸¹ *Doe I v. Unocal*, 395 F.3d 932, 950-51 (9th Cir. 2002).

¹⁸² *Doe I v. Unocal*, 395 F 3d 932, 945-946 (9th Cir. 2002).

¹⁸³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

¹⁸⁴ Wilson, *supra* note 34, at 6.

¹⁸⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

arbitrary arrest from Mexico to the US. *Sosa* argued that the ATCA did not provide for a cause of action and that further congressional action was required before the claims could be heard. Alvarez in turn contended that the law of nations granted a cause of action.¹⁸⁶ The US Supreme Court concluded that the First Congress at the enactment of the ATCA intended the federal courts to provide for a common law cause of action, albeit for a modest set of violations under the law of nations. The Act provides for a jurisdictional grant, however common law provides for a cause of action.¹⁸⁷ The US Supreme Court justified the position by stating that Congress had not objected or asserted any limitation of the prior holdings, rather it supplemented the ATCA with the enactment of the *Torture Victim Protection Act*.¹⁸⁸ In conclusion the Court rejected Alvarez's claims of arbitrary detention as the claim was considered within jurisdiction but didn't fulfill the requirements of violating international law.

In the decision the Supreme Court stated that actionable violations are required to be definable or specific, universal and obligatory.¹⁸⁹ The USSC also concluded that the federal courts should consider foreign policy and the practical implications of the decisions. The USSC asserted that claims resting on the law of nations are to rest on current norms of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms. The definition is thus dependent on the actions that fall within customary international law and the norms that are comparable with specificity to how safe conducts, the rights of ambassadors and piracy were in 1789.¹⁹⁰ However, the debate among scholars on the legitimate way of defining and interpreting current customary international law is divided. The *Sosa* decision clearly states that the courts have no congressional mandate to define new and debatable violations of the law of nations.¹⁹¹ The court also recognized that only a narrow class of international norms provide for such a cause of action.¹⁹²

The *Sosa* case stresses certain important factors to bear in mind when applying the Act. The litigation of the ATCA should be restrained to apply under clear norms, thus limiting the scope of the Act. The list of crimes that attract universal jurisdiction under customary international law is indeed in practice very short and most likely does not extend beyond crimes against peace, crimes against humanity and war crimes, as the *Sosa* case states. Valid sources of support of international law have been discussed by the court in *Sosa*. Treaties, legislative acts or judicial decisions are important sources, yet absent such support, the

¹⁸⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-713 (2004).

¹⁸⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

¹⁸⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

¹⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (1984).

¹⁹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124, 695, 725 (2004). See also *In re South African Apartheid Litigation*, 346 F Supp 2d 538, 547 (SDNY 2004).

¹⁹¹ Petty, *supra* note 146, at 9.

¹⁹² Stapp, *supra* note 161, at 505.

practice of civilized nations is appropriate. The work of jurists and commentators are also legitimate sources.¹⁹³

7.6 Corporate complicity

The attribution of corporate complicity is a rather complex task. MNCs acting as accomplices to violations committed by a host State can be responsible to abuses under international law. Three categories have been identified by legal commentators: direct complicity, indirect complicity and mere presence in the country coupled with complicity through silence or inaction.¹⁹⁴ Corporations can be responsible for the committed abuses by facilitation or directly participate in the abuses in conjunction with government agents. Furthermore, even if the corporation is not involved in the violations, it can benefit from the failure of governmental protection of human rights.¹⁹⁵ International case law has relied on disparate doctrines and follows different precedents.¹⁹⁶ The vocabulary employed is also rather inconsistent.¹⁹⁷ To establish whether a corporation has acted in complicity, a few factors need to be considered. The corporation must have acted with intent and/or knowledge or recklessness, and the corporation must have contributed in a direct and material way to the crime.¹⁹⁸ This allows parent corporations to be held responsible in the most egregious circumstances. This doctrine however, is not applied in all nations worldwide nor is it applied in a consistent manner.¹⁹⁹ There are a variety of strategies that corporations can employ in order to escape responsibility for actions committed on foreign soil. The governments of developing countries either have no interest to protect locals or are unable to ensure effective protection. MNC can also create subsidiaries with a distinct personality and claim impunity.²⁰⁰ The problem arises when there is no central control, when the different entities are bound by independent or exclusive contractual relationships. Rather than directly conducting the violations, complicity argues that corporate entities are responsible for their

¹⁹³ Stapp, *supra* note 161, at 506-507.

¹⁹⁴ Salazar, *supra* note 37, at 139.

¹⁹⁵ Ann Marie McLoughlin, International Trend of Multinational Corporate Accountability for Human Rights Abuses and the Role of the United States, 33 *Ohio N.U. L. Rev.* 153, at 158-161 (2007).

¹⁹⁶ It was unsure in the cases following *Sosa* whether corporate aiding and abetting was allowed under international law. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F Supp 2d 289 (SDNY 2003), the court stated that private actors can be held responsible under international law for violations of *jus cogens* norms, conspiracy as well as under the doctrine of aiding and abetting. In *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 S.D.N.Y. 2006) it was further established that aiding and abetting liability is approachable under the ATCA. Plaintiffs from Nigeria claimed that various oil companies carried out extrajudicial killings, arbitrary detention, torture and crimes against humanity. *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) is a further example of this where Arab Bank participated in a joint venture to commit genocide collectively with practical assistance, moral support and encouragement.

¹⁹⁷ The term corporate complicity and the doctrine of aiding and abetting refers to the facilitation of a crime or to promote its accomplishment, see Black's Law Dictionary.

¹⁹⁸ McLoughlin, *supra* note 195, at 158 -161.

¹⁹⁹ International criminal liability for aiding and abetting has been established, although scholars are not unanimous on this issue. The question remains whether international law requires knowledge of the crime or intention is necessary for liability. See Cassel, *supra* note 4, at 306.

²⁰⁰ De Schutter, *supra* note 54, at 227-229.

actions with employees, private security firms, government agents, including police and military, as well as nongovernmental groups such as rebel groups and paramilitary organizations.

Aiding and abetting is actionable under the well-established US common law of torts. To this point there has been limited analysis on the history of aiding and abetting for violating the law of nations, both in case law as well as scholarship. It has been argued, that during the time of the Founders when piracy was rampant, aiding and abetting piracy was recognized.²⁰¹ In *Sosa* the court measured Alvarez-Machain's detention against the history of the violations of the law of nations. By referencing the categories of aiding and abetting to the law of nations as it was in the time when the Act was endorsed, the present US courts were able to maintain jurisdiction.²⁰² The courts of both *Sosa* and *Filartiga* judged the cases against the benchmark of piracy.

The doctrine is also universally recognized under customary international law and has been sustained since the Nuremberg trials. The Supreme Court did not explicitly consider aiding and abetting under *Sosa*, however courts have to a great degree reasoned and debated on the doctrine. Several courts have held that aiding and abetting is appropriate under the ATCA, yet the question still remains whether international law or federal common law provides for the appropriate standard.²⁰³ There is, at this present time, no consensus on this issue.

7.7 Khulumani and the reference to criminal law

Recently there have been several consolidated actions to redress human rights violations committed in South Africa under the apartheid regime.²⁰⁴ Plaintiffs include residents that were injured from the year 1948-1994 alleging violations by MNCs that conducted business in the region.²⁰⁵ The district court made an important reference that warrants some clarification. The court declared that the holdings of the Nuremberg tribunals or International Criminal Tribunals for the former Yugoslavia and Rwanda establishes criminal rather than civil standards and are thus not applicable.²⁰⁶ The district court also declined to apply the Convention on apartheid since the US had not ratified it at the time and other Conventions

²⁰¹ Lovejoy, *supra* note 142, at 248-250.

²⁰² Lovejoy, *supra* note 142, at 273-274.

²⁰³ Nilay Vora, Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability, 50 *Harv. Int'l L.J.* 195, at 195-196 (2009).

²⁰⁴ The definition of apartheid can be found in art 2 (a-f) in the International Convention on the Suppression and Punishment of Apartheid, adopted 30 November 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

²⁰⁵ The litigation arose from ten separate actions filed in several federal courts on behalf of three separate groups of plaintiffs that were asserting claims against numerous MNCs, more specific 23 domestic and foreign corporations, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004). One of the groups was an NGO consisting of 32,700 members that were victims of apartheid, including 91 individual plaintiffs.

²⁰⁶ *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 550, citing *Sosa v. Alvarez-Machain*, 542 U.S., 725, 728 (2004).

concerning criminal liability were found not applicable to civil remedies.²⁰⁷ These are important concerns that justices still strongly disagree on.²⁰⁸

The plaintiffs appealed and in 2007 the Second Circuit in the opinion *Khulumani v. Barclay Nat'l Bank, Ltd.* remanded the case.²⁰⁹ The Second Circuit agreed that aiding and abetting violations can be under the jurisdiction, yet had a split vote on whether customary international law or federal common law determines the scope of the doctrine.²¹⁰ A *writ of certiorari* was filed to the Supreme Court in January 2008 by the defendants. Among the questions of interest was whether litigation should be dismissed on the grounds of deference to the political branches and political question, as well as whether aiding and abetting by a private defendant is a violation of international law when committed by a foreign government. These issues were brought forward indicating important questions that need to be resolved now and for the future. The petition inclined broad interest and several trade organizations filed *amicus briefs*. The Solicitor General filed an *amicus curiae* requesting the USSC to resolve the issue on aiding and abetting liability on behalf of the defendants.²¹¹ The USSC upheld the Second Circuit's decision to allow litigation in the opinion *American Isuzu Motors, Inc. v. Ntsebeza*.²¹² Note however that this decision was not based on the merits but for a lack of quorum and the Court could thus not grant *certiorari*.²¹³ The justices had to recuse, though no reasons were given for the decision.²¹⁴ The holding in *Khulumani* is thus still accurate as the Second Circuit abides by it.²¹⁵ It is still important to note that there is no US Supreme Court decision to confirm the doctrine of aiding and abetting apart from the recused case.²¹⁶

²⁰⁷ See the International Convention on the Suppression and Punishment of Apartheid, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, at 552 (S.D.N.Y. 2004).

²⁰⁸ Lucien J. Dhooge, Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank, 18 *Transnat'l L. & Contemp. Probs.* 247, at 255-260 (2009).

²⁰⁹ *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

²¹⁰ *Id.* at 260.

²¹¹ The Solicitor General is the law officer in the US Department of Justice and represents the US in cases before the US Supreme Court, see Black's Law Dictionary.

²¹² *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

²¹³ If a majority of the justices cannot be heard and determined at the next term of the Court, the judgment from the case that was brought for review will be affirmed, see 28 USC § 1, and 28 USC § 2109.

²¹⁴ Reports from financial disclosures indicate that some of the justices owned stock in several of the defendant corporations and one had a son employed in one of the corporations, see Michael A. Levine, Chapter 7: Corporate Social Responsibility, Standards and Monitoring Programs, in Carole Basri (ed), *International Corporate Practice - A Practitioner's Guide to Global Success*, New York, Practising Law Institute, at 843-846 (2009).

²¹⁵ The holdings in *Khulmani* were confirmed in the opinion of *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008).

²¹⁶ *Doe v. Exxon Mobil Corp*, 393 F. Supp. 2d 20, 21 (D.D.C. 2005) filed a petition for a *writ of certiorari* to the US Supreme Court in 2007 to resolve whether a lawsuit that may have significant impact on foreign policy interests of the US under the doctrine of political question can be a valid claim against the recognition of aiding and abetting, but the petition was rejected. The Bush Administration claimed that the recognition of aiding and abetting should be precluded in all ATCA cases, arguing that it will deter investment in countries where human rights are not prioritized. Despite objections from the Administration, the Supreme Court asserted the use of the Statute in human rights cases. The Bush Administration was under the US President George W. Bush, in office 2001-2009. See *Sosa v. Alvarez-Machain*, 542 U.S. 712 (2004). See Richard L. Herz, *The Liberalizing Effects of*

The result in *Khulumani* case left several litigation matters unanswered, indicating that the questions raised were extremely delicate and raise political proclamations as well as the concerns from NGOs.

7.8 Future claims that can affect multinational corporations

There are various standards under international law that US domestic courts may apply in order to determine accomplice liability under the ATCA. Some of these have not been tried to this point, yet may in the future be employed depending on the development of litigation under the ATCA. International law has five different theories of third party liability that are clearly defined and universally accepted. These can all potentially be employed in federal courts and MNCs should follow their development. The theories include, aiding and abetting, joint criminal enterprise, conspiracy, procurement and instigation.²¹⁷ Other common law torts that can be available include joint venture, agency and recklessness.²¹⁸

Human rights litigation in the US may also contain issues not only of international character and from federal law, but also state law. There are considerable barriers to achieve jurisdiction over foreign subsidiaries making it easier to prosecute a parent company based in the home State instead. Under US domestic law the doctrine of piercing the corporate veil is broadly employed to impose liability on subsidiaries or parent companies. It provides an opportunity to look past the formal label of co-operation and instead see to the level of exercised control. In domestic law, these subsidiaries can be considered distinct legal persons and entities separate from the parent company, yet in human rights cases it can facilitate accountability if given consideration.²¹⁹ It is an unresolved matter whether this doctrine can apply to international human rights breaches and thus which actors can potentially be held liable.²²⁰

Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement, 21 *Harv. Hum. Rts. J.* 2, at 218 (2008).

²¹⁷ Criminal joint enterprise was employed in an ICTY case, see Stapp, *supra* note 161, at 520. The standard of conspiracy is well recognized both in US as well as international law, thus is a potential ground of liability, see *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶ 249 (Dec. 10, 1998) and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320–324 (SDNY 2003). Corporations providing a government with equipment, facilities or funding to secure operations in violations of human rights can be held responsible for procurement, as found in the *Unocal* and *Talisman* cases, see *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), and *Presbyterian Church of Sudan v. Talisman Energy*, 244 F Supp 2d 289 (SDNY 2003). The international standard of instigation has considerably been employed by the ICTR with the incitement to genocide and other violence, yet is also recognized in US tort law. See Stapp, *supra* note 161, at 520-521.

²¹⁸ Herz, *supra* note 216, at 216-217. See *Sarei v. Rio Tinto*, PLC 499 F.3d 923 (9th Cir. 2007) and *Doe I v. Unocal*, 395 F 3d 932, 970 (9th Cir. 2002), *Doe v. Unocal*, 963 F Supp 880, 896 (CD Cal 1997).

²¹⁹ The doctrine is however only employed when certain requirements are met, yet the conditions vary in each state. Merely ownership of stocks is insufficient. Wilson, *supra* note 34, at 63.

²²⁰ *Ibid*, 63-66. Joint venture and other agency relationship can impose limited liability to the owners of a business. Individuals responsible for the violations and its decision-making, such as the CEO (Chief Executive

8 FUTURE IMPLICATIONS AND PROBLEMS RAISED IN THE EU AND US COURTS

The continuing expansion of trade across borders has implications to corporate conduct and human rights. In light of this expansion it has become necessary for multinational corporations to consider the development of international law and the impact that current and future changes have on the European practice and the *Alien Tort Claims Act*. MNCs have to consider several regulations and laws, ranging from voluntary instruments on corporate conduct, international human rights law, local regulations and laws of the host State and those of the home State. The range of regulations and laws do not confer to a clear structure on responsibility. The important factor for corporations to bear in mind is that the scope of universal jurisdiction is expanding and more and more countries are beginning to adopt regulations addressing MNCs, and their conduct both in the home State and abroad. The European Union confers jurisdiction on corporations in the home State, however the application is limited. The ATCA on the other hand yields broad remedies to human rights atrocities. Civil remedies similar to the ATCA are at present not available in the EU. International norms provided by the UN and OECD account for a wide number of influential instruments, however these are non-binding in nature. Some States have chosen to implement such regulations to the domestic sphere, for instance, the Swedish government has chosen to abide to the norms set by the OECD and UN through self-regulation. Swedish corporations need to follow the guidelines and regulations, but have some flexibility. The demands of the global market and the international economy mean that self-regulation is a necessary attribute for MNCs. While the corporate structure of MNCs can benefit from the flexibility of self-regulation, the issue of human rights violations still persist. The difficulties of obtaining a legally binding instrument on the international level are quite clear, however there is a possibility of obtaining a remedy based on future developments of customary international law.

8.1 Summary: Corporate accountability under the Alien Tort Claims Act

The persistence of considerable uncertainty in US courts as to the legitimacy of the *Alien Tort Claims Act* is a great obstacle to successful litigation. Despite the US Supreme Court limiting the application of the ATCA and international law only covering a limited number of offences, the Act remains an important legal tool to vindicate the victims of human rights violations. Multinational corporations have become a target of the Act and foremost under the doctrine of aiding and abetting. To claim liability of a corporation under the Act certain requirements must be met. Once a claim has been brought by a plaintiff, the court establishes whether a corporation or a private individual can be subject to the applicable norms. The court

Officer), CFO (Chief Financial Officer) or owners can be held accountable, yet in the US institutional investors merely own shares as a financial instrument and do not merit any conduct over the business as such.

has to decide the applicable standard, commonly third party liability, and the offence must be universally condemned and well defined. The specific norm must either establish that no State action is required but that a private party may be held responsible, or, if State action is required, there needs to be sufficient links with State action. As of today only four violations of the law of nations have been granted as actionable without the requirement of State action under the ATCA. To this point genocide, war crimes, forced labor or slavery as well as crimes against humanity have been under litigation. US proceedings have proved that trial courts and appellate courts do not concur on the issues, and several cases indicate that the litigation is uncertain since a federal court may decide that customary international law applies in a certain manner. The ATCA itself contains several ambiguous features and this inconsistency is portrayed by the lack of a controlling precedent. The significance of the ATCA derives from the interrelation with common law and international law. Customary international law is constantly evolving and this subjects the ATCA to constant modification and debate. Among the difficulties of following customary international law is that scholars do not agree on the matters at hand and international consensus is hard to obtain. The present debate mainly revolves around the actionable torts under the ATCA and sources of law that apply. Case law provides that corporations are not only not allowed to directly violate the norms, but are not allowed to be complicit in the violations committed abroad in the countries they invest in or private parties with whom they interact. Both prospective claimants and defendants however call for clarification and limitation of the persistent ambiguity. Claimants want to discern the cause of action while defendants want to be able to revise corporate behavior and avoid claims under the ATCA. While the Act can serve as a deterrent function to corporate misconduct, it would be of great benefit to all actors to improve the structure and standing of corporate accountability with regards to human rights.

8.1.1 Can the EU achieve accountability similar to the Alien Tort Claims Act?

The laws of EU Member States may provide a cause of action to hear tort claims under the universality principle, yet the absence of universal tort jurisdiction in European practice is vital to the fact that MNCs most likely will not be subject to similar litigation as corporations in the US. As an alternative, criminal jurisdiction is employed by some European States and victims of human rights can claim criminal remedies. The development in Europe will instead depend on the acts of governments and the European Union, as well as how international law and self-regulation will proceed. If Regulation No 44/2001 will be employed in the future, non-European victims of human rights may find the jurisdiction more hospitable with greater possibilities to hold European corporations accountable. However the principle of *lex loci delicti* limits the possibilities to hear claims in the EU since it determines both jurisdiction and the applicable law. Furthermore the EU intends to promote the OECD Guidelines as well as the regulations of the UN thus providing that international norms are being adhered to as well as promoting international competitiveness of European enterprises. This is precisely what the

Swedish government has chosen to do, and Swedish companies listed on the securities market need to take in to account the development of international law. Thus corporations in both the US and Europe are subject to changes in international law and must do their utmost to embrace voluntary instruments.

8.2 Future and current legal status of multinational corporations and human rights

Multinational corporations are governed under several regimes and the stages of development vary from State to State. The means to promote human rights by multinational corporations is mainly focused in the international setting or by regulations from the home State of the MNC. Assigning the responsibility of monitoring the protection of human rights to host States is sometimes impractical due to the host States themselves being involved in the abuse of human rights. The competitiveness of products and services from developing nations derives from low costs coupled with lenient regulations and standards. In order to impose efficient regulations on MNCs an international mandate may prove successful. In particular developing nations will not fear a disadvantage by imposing regulations, if the requirements are set by the international community or the home State. The available means for home States to regulate the activities of MNCs is however rather limited. Multinational corporations can move capital between different jurisdictions and create flexible corporate structures to create subsidiaries that are independent from their parent company. To battle such implications it appears that a twofold approach of both international and domestic measures supplementing one another is required.

Accountability of multinational corporations can largely take two directions. The international community can rely on countries to regulate the conduct of MNCs on State level, or international law can directly impose liability on the corporations. Both levels can promote voluntary approaches and corporate self-regulation or provide a binding legal framework. Consensus on the international level is nevertheless hard to obtain. Some international measures have failed or fallen short due to lack of consensus while self-regulation has prevailed. The first international level currently does not codify any consistent legal pattern, it merely promotes principled corporate conduct by flexible standards.

If the second State level is chosen to permit domestic law and regulations to govern and control the implication of multinational enterprises, it is highly likely that there will be less conformity between States, and MNCs will struggle to recognize the scope of responsibility. The State level is perhaps the prevailing level as of now, which, despite the international instruments, has in practice resulted in scarce protection of human rights. The strikingly high number of applications for summons under the ATCA, although most of them dismissed, contends the need for greater transparency of corporate responsibility.

The discussion of accountability mainly revolves around the extent of corporate liability, how responsibility can and should be encouraged. A question of interest is the preference of how to confront corporate misconduct, whether a legal and hence binding resolution is favorable,

or rather self-regulation and voluntary measures are beneficial to the corporate structure as well as the promotion of human rights. From a corporate perspective self-regulation is beneficial, yet from a human rights perspective a legal resolution is preferred to protect victims. However since corporate structures may vary to such a great extent, self-regulation is essential. The emerging corporate structures, with outsourcing and the utilization of sub-contractors and supply chains, has also altered the approach of corporate accountability. It is also reasonable to conclude that guidelines and recommendations concerning multinational conduct will become binding and standardized in corporate practice. Codes of conduct and CSR may have a vital impact and be of legal importance if given consideration by implementation in contracts or in marketing efforts by companies. To facilitate the recognition of corporate efforts as well as monitoring the adherence of the norms it is crucial that the norms are uniform for consumers and other actors of society to evaluate corporate measures. If the codes are short of an independent and public monitoring mechanism, the concrete benefit is undermined reducing the code to an exercise in public relations. The voluntary initiatives may become far more binding than originally intended due to competition in the global market and thus become a necessary element in the formation of business contracts.

Corporate accountability is very much at a formative stage of development. The prospects of promoting good corporate conduct are subject to how States choose to govern corporate responsibility and corporations choose to apply self-regulation. The international level can promote uniform corporate standards, which is essential to assert good corporate conduct. Thus both an approach on the international level as well as through the act of States is required in order to battle the impunity of MNCs. Both levels have positive and negative aspects. The distinction between legally binding and voluntary measures should not be strictly drawn since self-regulation and codes of conduct are essential to promote good corporate governance and particularly in the long term legal remedies may be invoked from these same codes and practices.

8.3 Concluding remarks

This thesis has discussed corporate accountability and the available means for plaintiffs to find a forum for remedy. While plaintiffs may have an available forum to voice their concerns and file claims, as foreign nationals there are several obstacles in the claims actually being heard. Foreign nationals often find courts abroad inhospitable and a court process is time consuming and far more burdensome placed in a foreign court system. Both multinational corporations as well as victims of human rights have no certain knowledge whether they can be prosecuted or can prosecute. This debate creates legal uncertainty. There is a great call for clarification of the elements that constitute accountability. Swift measures to improve the accountability of corporate actors must be taken to prevent future abuses of human rights, and if enacted, will benefit both claimants and plaintiffs.

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