

# **Taming the Untamable? Transnational Corporations in United Nations Law and Practice**

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## I. Introduction

Globalization is a challenge for the traditional legal system which is based upon a strong sovereign domestic legal system and a certain control of nation states by international law.<sup>1</sup> Typically, the activities of transnational corporations (TNC) as main actors of globalization point to the difficulty of holding them liable for the infringement of human rights under this traditional understanding of international law.<sup>2</sup> In some respects, TNCs are as mighty as nation states;<sup>3</sup> however, international law focuses on nation states as primary subjects of international law. Against this background, this article highlights a critical dilemma with far-reaching implications: on the one hand, in order to establish an effective control over TNCs on the level of international law, nation states would have to give up crucial parts of their sovereignty to an international body, which has not been done so far. On the other hand, if a nation state exercises on its own total control also over the TNCs' subsidiaries located in other territories and even over foreign entities, the international law principle of sovereign equality<sup>4</sup> is in danger. Firstly, there needs to be a reasonable link for a state to exercise sovereign power in extraterritorial affairs; secondly, the liability of companies touches the economic power of a state – especially if it is a developing country.

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<sup>1</sup> The discussion of globalization is comprehensive and interdisciplinary. Compare A. von Bogdandy, "Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme", *ZaöRV* 63 (2003), 853 et seq.; D.J. Bederman, *Globalization and International Law*, 2008; P.S. Berman (ed.), *The Globalization of International Law*, 2005.

<sup>2</sup> For the early forms of TNCs compare St. Kirchner, "The Subjects of Public International Law in a Globalized World", *Baltic Journal of Law & Politics* 2 (2009), 83 et seq. (92).

<sup>3</sup> A comparative ranking of the gross domestic product of states (GDP) and the revenue of TNCs shows that there are about 50 per cent corporations in the first 100 places. For the year 2006, there were 45 TNCs within the first 100 places, above all Wal Mart, ExxonMobil and Royal Dutch Shell. These enterprises have a higher revenue than the GDP of (for instance) Greece and Denmark; for the year 2007 see UNCTAD, *World Investment Report 2009*, Annex A, 225 et seq. (ranking of TNCs by foreign assets).

<sup>4</sup> Article 2 para. 1 of the Charter of the United Nations reads: "The Organization is based on the principle of the sovereign equality of all its Members."

In light of this dilemma, this article provides an overview of diverse, both traditional and new international mechanisms to ensure TNCs' adherence to human rights standards and environmental norms, identifying both the potential and the deficits of each approach. The article argues that the United Nations, as the political and legal forum of nations, has to play its part in controlling TNCs, yet its power cannot be comprehensive, but has to be complementary to nation states' activities. The article only focuses on UN-related initiatives and does not consider others, such as the Guidelines for Multinational Enterprises issued by the Organisation for Economic Cooperation and Development (OECD).

## II. Defining the Problem of Human Rights and Business

### 1. Implications of TNCs on Human Rights and International Environmental Standards

Before light is shed on the negligence of human rights (including labor standards) and the environmental standards by some TNCs, the positive impact that these mighty entities can have should be mentioned. It is because they have the power to bring about prosperity, progress and in general a higher standard of living, that TNCs are highly welcome in every country. In the idea of most economic systems, private entities are indispensable for the availability of daily goods and services.<sup>5</sup> They serve as employers of many people, they engage in all kinds of research (not least the development of medicine), or help to insure people against different financial risks.

The World Investment Report of 2008<sup>6</sup> describes TNCs as one (important) way to fund the necessary infrastructure in low-income-countries. The report mentions especially transport, electricity, telecommunications, and water. Companies are also a vehicle that transfers

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<sup>5</sup> S. Joseph, "Liability of Multinational Corporations", in: M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law*, 2008, 613 et seq.

<sup>6</sup> The World Investment Report has been published annually by the UNCTAD since 1991. It analyzes foreign direct investments and has a different special focus each year <<http://www.unctad.org/Templates/Page.asp?intItemID=1485&lang=1>>. In the World Investment Report from 2008 the special focus lies on the "infrastructure challenge".

new technologies and know-how. For all these reasons, states are competing with one another to offer the most attractive conditions for subsidiaries to settle in.<sup>7</sup> Generally speaking, developing countries are not interested in expelling them by establishing high environmental and human rights standards. Even if developing countries have profound environmental laws, they often do not enforce them properly.<sup>8</sup>

Industrialized countries are not as dependent upon the settlement of subsidiaries of TNCs as poorer countries are, so they can afford to establish a higher protection of human rights and the environment and they have the means to enforce them.<sup>9</sup> But when it comes to the shortcomings of the foreign subsidiaries of the parent company, the industrialized countries show little concern. Many legal systems have no or few rules that are specialized to deal with transnational cases brought before their courts.<sup>10</sup>

The most famous exemption from that is the American *Alien Tort Claims Act* (ATCA).<sup>11</sup> § 1350 (Alien's action for tort) reads as follows,

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<sup>7</sup> Developing countries did not always appreciate TNCs, and there were times when they were concerned over their influence, compare K.P. Sauvant/ V. Aranda, "The International Legal Framework for Transnational Corporations", in: J.H. Dunning (ed.), *United Nations Library on Transnational Corporations: The International Legal Framework*, Vol. 20, 1994, 83 et seq. (97).

<sup>8</sup> T.M. Schmidt, "Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' 'Norms' Provide the required Means?", *Cal. W. Int'l L. J.* 36 (2005), 217 et seq. (220 et seq.).

<sup>9</sup> For a quite drastic view on the relation of governments and business, see A.K.M. Masudul Haque, "Human Rights and Multinational Corporations: An Appraisal", in: M. Rahman (ed.), *Human Rights and Non-State Actors*, 2005, 25 et seq. (28): "In fact, government is now as much a creation of business as the other way around."

<sup>10</sup> M. Saage-Maaß, "Menschenrechte und transnationale Unternehmen – werden die bestehende Menschenrechtskonzeption und Rechtsmittel den Realitäten gerecht?", in: H.J. Sandkühler (ed.), *Menschenrechte in die Zukunft denken*, 2009, 159 et seq. (171). Report of the International Commission of Jurists, *Corporate Complicity & Legal Accountability*, Vol. 2 Criminal Law and International Crimes; Vol. 3 Civil Remedies.

<sup>11</sup> For a discussion of cases brought under the ATCA, see: A. Feldberg, *Der Alien Tort Claims Act*, 2008; M. Koebele, *Corporate Responsibility under the Alien Tort Statute*, 2009; S. Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights", *NILR* 46 (1999), 171 et seq. (179 et seq.); A. Seibert-Fohr/ R. Wolfrum, "Die einzelstaatliche Durchsetzung

“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.”<sup>12</sup>

United States courts are not unanimous as to whether this law only establishes the courts’ jurisdiction or whether it even provides an individual cause of action. However, in its decision *Sosa v. Alvarez-Machain*,<sup>13</sup> the Supreme Court made clear that there needs to be an additional cause of action in common law. Yet the court admitted that common law also comprises some norms of customary international law<sup>14</sup> and treaty law if this is self executing.<sup>15</sup> With this, U.S. courts are in fact enforcing norms of international law. This, on the one hand, helps to strengthen international law, but, on the other hand, it might clash with the doctrine of non-intervention.<sup>16</sup> This is all the more true, if one takes into account that neither the claimant nor the defendant need to be American and that the “link” to the U.S. can be marginal.<sup>17</sup>

How then did TNCs in the past violate international standards? The cases can be roughly put into three categories with flexible borders. Most grievously, TNCs have been part of international crimes such as

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völkerrechtlicher Mindeststandards gegenüber transnationalen Unternehmen”, *AVR* 43 (2005), 153 et seq. (153 et seq.); M. Weschka, “Human Rights and Multinational Enterprises”, *ZaöRV* 66 (2006), 625 et seq. (634 et seq.).

<sup>12</sup> Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350.

<sup>13</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 et seq. (2004).

<sup>14</sup> Seibert-Fohr/ Wolfrum, see note 11, 157 et seq. A critical view on the position that customary international law has the rank of federal common law is given by C.A. Bradley/ J.L. Goldsmith, “Customary International Law as Federal Common Law: A Critique of the Modern Position”, *Harv. L. Rev.* 110 (1997), 815 et seq.

<sup>15</sup> Feldberg, see note 11, 124 et seq.

<sup>16</sup> Compare the Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, Doc. A/HRC/8/5 of 7 April 2008, para. 19: “Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test, *which includes non-intervention in the internal affairs of other States.*” (emphasis added); see also Doc. A/HRC/11/13 of 22 April 2009, para. 15 and Doc. A/HRC/11/13/Add. 1 of 15 May 2009, summary, 3.

<sup>17</sup> Compare Feldberg, see note 11, 217.

killing and torture. Often they were supporting corrupt regimes financially in order to enhance advantages for their business. The lawsuits against Shell,<sup>18</sup> which were settled in 2009, alleged that Shell was guilty of complicity in serious human rights violations against the Ogoni people in Nigeria. The reproaches were addressing “summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress.”<sup>19</sup> Shell was accused of having cooperated with the Nigerian military regime. As Shell agreed to pay 15.5 million US\$, it is very likely that the cases were at least in the main points well-founded.

Shell is not a solitary case, but stands for a group of cases where, for the sake of profit, companies are abetting regimes in order to achieve their economic aims even at the risk of committing international crimes.<sup>20</sup> There is another case, *Presbyterian Church of Sudan et al v. Talisman Energy, Inc.*, which deals with similar allegations.<sup>21</sup> The plaintiffs brought a suit in the US Federal Court, yet the court dismissed the lawsuit in September 2006. On 2 October 2009 the Second Circuit Court of Appeals affirmed the dismissal. In April 2010 the plaintiffs went to the Supreme Court and they currently hope that the court will overturn the dismissal of the case. The oil company Talisman Energy is being accused of “complicity in the Government of Sudan’s ... campaign of war crimes, crimes against humanity, and genocide.”<sup>22</sup> Talisman, acting through its agents, is maintained to have funded the military actions and given prolonged logistical support. The army has been pursuing a strategy of ethnic cleansing with the aim of banishing the non-Muslims from the oil concession area in Southern Sudan. In this territory, a “paper subsidiary” of Talisman Energy<sup>23</sup> is involved in drill-

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<sup>18</sup> Altogether three different lawsuits were filed: *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company*. The history of the cases is presented by the Center for Constitutional Rights, <<http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>>.

<sup>19</sup> Center for Constitutional Rights, see note 18.

<sup>20</sup> Compare also Saage-Maaß, see note 10, 167.

<sup>21</sup> Evangelischer Entwicklungsdienst (ed.), *Konflikte und Friedensarbeit*, infoletter April 2002, No. 19, 5 et seq.

<sup>22</sup> Opening Brief for Plaintiffs-Appellants in the United States Court of Appeals for the Second Circuit, 26 February 2007, 1.

<sup>23</sup> The subsidiary (Talisman (Greater Nile) B.V.) is completely dominated by Talisman Energy (Opening Brief, see note 22, 16 et seq.)

ing for oil. Thus the depopulation helped Talisman Energy to boost its profits.<sup>24</sup>

A second category of cases can be defined as the negligence of standards of international environmental law. The Shell-Case serves also as example for this dimension of wrongdoing by destroying the Ogoni ecosystem: Shell was accused of having contaminated the local water supply, the agricultural land and of having polluted the air by gas flaring.<sup>25</sup> Another notorious case is the devastating accident in a chemical plant of *Union Carbide India Limited (UCIL)* in Bhopal. The gas tragedy took place in December 1984, killing thousands of people and injuring thousands more.<sup>26</sup> There have been different litigations before U.S. courts and Indian courts. The most current judgment has been pronounced by an Indian court in June 2010, convicting seven former senior employees of Union Carbide's Indian Subsidiary of "death by negligence". Also the transnational corporation *Monsanto* has been accused of severe environmental devastation, beginning with the herbicide "Agent Orange" in the Vietnam war. Health problems, that are likely to be caused by the scattered dioxin, continue to the present day, ranging from cancer to deformations of newborns, even in the third generation. In another case, settled 2003, concerning polychlorinated biphenyls (PCB) contamination in Anniston (Alabama, United States), Monsanto agreed to a payment of about 700 million US\$. Today, Monsanto is criticized above all because of its production of genetically modified seeds, blamed for continuously developing its dominant market position, misusing its patent law to the detriment of the local farmers and for alleged influence of political decisions. Another multinational company, *Trafigura*, together with a local dumping company, Tommy, was responsible for dumping waste in Abidjan (Côte d' Ivoire) in August 2006. As a consequence, at least 16 people were killed and thousands poisoned.

A third category concerns the rights of employees. The decision for the location of a subsidiary company is often primarily influenced by a

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<sup>24</sup> For reasons of clarity and comprehensibility, the facts of this case and Talisman Energy's chain of subsidiary corporations, are considerably shortened in this paper. Due to the "corporate veil", the district court did not assume a legal responsibility of Talisman Energy.

<sup>25</sup> Center for Constitutional rights, Shell's environmental devastation in Nigeria, <<http://ccrjustice.org/files/4.6.09%20Environment%20Devastation%20Factsheet.pdf>>.

<sup>26</sup> Compare for the proceedings Feldberg, see note 11, 82 et seq.



simple calculation of costs.<sup>27</sup> Today, the costs for loans vary so much from industrialized to developing countries, that it pays for an enterprise to shift its production overseas. A current example in Germany was the closing of the Nokia subsidiary in Bochum in June 2008. The production was transferred to Romania. The company justified its decision with the comparably high level of loans and other costs in Germany. In terms of profit and in light of the world-wide competition, these decisions are reasonable. But as to the fact that Nokia could achieve a high profit of 7.2 billion Euro in 2007,<sup>28</sup> it shows that the sole profit-orientation of companies clashes with the social reality that they provoke. Even if the competition “forces” TNCs to produce abroad, they are not forced to deny basic labor rights in order to maximize their own profit.

Thus Oxfam International accuses TNCs in the fruit-picking-sector in Chile of exploiting its workers, mainly female employees.<sup>29</sup> Besides the problems of wage dumping, there are cases where the safety at work was substandard. One of these was the *Thor Chemicals Holdings Ltd.*, a United Kingdom based company, which used to produce mercury-based chemicals in England.<sup>30</sup> When it was revealed that the employees had elevated mercury levels in their blood and urine, the production was transferred to South Africa (in about 1986). *Thor Chemicals* did not establish any safety arrangements in the new plant, but rather re-

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<sup>27</sup> A. Smith (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations*, edited by Todd, Glasgow Edition Vol. 2, 1976; D. Ricardo (1817), *On the Principles of Political Economy and Taxation*, edited 1821, 3; E. Sohmen, *Allokationstheorie und Wirtschaftspolitik*, 1976; Masudul Haque, see note 9, 27.

<sup>28</sup> <[http://www.welt.de/wirtschaft/article1589775/Nokia\\_feiert\\_Traumgewinn\\_von\\_7\\_2\\_Milliarden\\_Euro.html](http://www.welt.de/wirtschaft/article1589775/Nokia_feiert_Traumgewinn_von_7_2_Milliarden_Euro.html)>.

<sup>29</sup> “In the fruit-picking sector, 75% of women work more than 60 hours a week in season, on temporary contracts, and a third of them do not earn even the minimum wage. Half these women have no contract, and therefore there is no welfare system to support them if they fall sick.” <[http://www.oxfam.org/en/campaigns/trade/real\\_lives/chile](http://www.oxfam.org/en/campaigns/trade/real_lives/chile)>.

<sup>30</sup> For a discussion of this case see Weschka, see note 11, 631 et seq., with further references; R. Meeran, “The Unveiling of Transnational Corporations: A Direct Approach”, in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, 161 (164 et seq.); R. Meeran, *Liability of Multinational Corporations: A Critical Stage*, 1999; R. Meeran, *The Thor Case*, 2003, <<http://www.minesandcommunities.org/article.php?a=741>>.

placed the workers when it became obvious that mercury had accumulated in their bodies. Three workers died, not to speak of those who were poisoned to varying degrees. A suit for compensation was filed against the parent company and its Chairman in the English High Court on behalf of 20 employees. It was reasoned that Thor Chemicals had been negligent and had not done what was necessary to protect the employees in South Africa. In 1997, Thor Chemicals agreed to a settlement of 1.3 million £. Further claims followed.

## 2. TNCs and their Role in International Law

The examples above show that TNCs have great social and political impact and are responsible for our environment in a special way.<sup>31</sup> Globalization has increased the influence and power of TNCs and has raised questions of their legal status at the international level, as TNCs can, to a certain degree, “choose” between different national laws when they decide for the settlement of a new subsidiary.<sup>32</sup> As a result of globalization, some TNCs appear as mighty global players that can be on par with nation states or might even outplay them. Despite that, international law is still focused on the entity of nation states as the main players.<sup>33</sup> Of course, states are not the only subjects of international law. But even the UN, as the most important international organization and subject of international law, is based on the power of states and the principle of their sovereignty. Thus the UN can hardly make any binding decisions.<sup>34</sup> TNCs, on the contrary, do not need any such transfer of power by the states, but they draw their actual dominance from the economy. By means of globalization they became quite independent of their nation states. This power has provoked the assumption that TNCs

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<sup>31</sup> As to the discussion of responsibilities of corporations, compare L.C. Backer, “Multinational Corporations, Transnational Law: The United Nations’ Norms on the responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law”, *Colum. Hum. Rts L. Rev.* 36 (2005), 101 et seq. (108 et seq.).

<sup>32</sup> Compare Backer, see note 31, 120 et seq.

<sup>33</sup> Kirchner, see note 2, 89, but see also his “communication-approach” (below note 37).

<sup>34</sup> On this topic M. Herdegen, *Völkerrecht*, 6th edition, 2007, § 40 para. 14; Security Council Resolutions made under Chapter VII of the UN Charter are legally binding; additionally, it is disputed whether also Resolutions under Chapter VI are legally binding.

are also subjects of international law. The question of who is a subject of international law has to be redefined, according to a group of academic writers. *Karsten Nowrot* states that the aim of international law in light of the new realities calls for a (at least partially) new dogmatic way of the concept of subjects of international law.<sup>35</sup> The mighty position in the international arena implies the – rebuttable – presumption that these entities are subjects of international law. Accordingly, they are bound by international law with respect to the realization of global welfare.<sup>36</sup> Other writers go even one step beyond this assumption. They leave the whole concept of “subjects of international law” aside.<sup>37</sup> This discussion reflects how deeply TNCs have changed the political power structure. The modification or even the abandonment of the category of “subjects of international law” would have far-reaching impact on the international law theory and presumably also on the structure and position of the UN.

If one sticks to the well-established structures of international law, how can TNCs be held accountable? The first option, one could see already from the given cases. The “states” can control TNCs by their laws and courts. But this mechanism regularly does not function very well. Host-states, where the subsidiary is established, are normally less developed countries that urgently need a flowering economy to handle their numerous problems. They are not interested in discouraging TNCs to locate a new subsidiary in their country. Rather they make concessions to them in order to prevent them from settling in another country. Additionally, host-states often suffer from corrupt structures

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<sup>35</sup> K. Nowrot, *Normative Ordnungsstruktur und private Wirkungsmacht*, 2006, 695, para. 28.

<sup>36</sup> Nowrot, see note 35, 696, para. 29. See also D. Kinley/ R. Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law”, *Human Rights Law Review* 6 (2006), 447 et seq. (479 et seq.), speaking of different types of personality (480).

<sup>37</sup> A short overview of this argument is given by Saage-Maaß, see note 10, 166. Compare also Kirchner, see note 2, 83 et seq., who puts forward his thesis according to which “all actors gain their power from the ability to communicate” (94), yet he does not seem to completely abandon the concept of being a subject of international law, but only shows that this traditional concept is not as decisive any more in a world which offers modern ways of communication: “In a world which is driven by communication, it is up to all actors to safeguard this elementary prerequisite of the new PIL [Public International Law]” (94).

and deficiencies in their administrative infrastructure.<sup>38</sup> On the contrary, home-states, which usually are industrialized countries, often have reasonable laws and infrastructure to protect the citizens on their territory from abuse. But their legal system is frequently not ready to deal with transnational cases. Even if it provides a legal remedy for the wrong conduct of the subsidiary, the referral to the doctrine of *forum non conveniens* might hinder an action against the subsidiary in the home-country of the parent company if the court is of the opinion that the more appropriate forum would be a court in the host-state.

If the subsidiary has taken a foreign nationality,<sup>39</sup> questions arise as to the admissibility under international law of bringing an action against it before the courts of the home-states (extraterritorial jurisdiction).<sup>40</sup> Even if an action against the subsidiary is admissible, this might not be fully satisfactory as an action against the subsidiary might not be as successful as suing the parent company, if the latter has less limited liability and is respectively financially stronger. Therefore, in many cases the claimants are bringing the parent company to trial if possible (as for instance, under the ATCA). But the parent company is regularly only liable for its own default. This means that no liability of the subsidiary automatically provokes a legal responsibility of the parent company. The default of the parent company can either consist in an “action” or in an “omission” (if there was a duty to act).<sup>41</sup> Whether the parent company can be held responsible is often the point of contention. For example, in the above mentioned case *Presbyterian Church of Sudan et al v. Talisman Energy, Inc.* the plaintiffs lodged an appeal because the district court did not see the legal responsibility of the parent company Talisman Energy.

Besides these “national” (and not comprehensive) legal actions, there is no court on an “international” level to hold TNCs directly ac-

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<sup>38</sup> Weschka, see note 11, 629; for the international environmental law, see U. Beyerlin/ T. Marauhn, *Rechtsetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992*, Forschungsbericht im Auftrag des Umweltbundesamtes, 1997, 86.

<sup>39</sup> For questions of nationality of corporations compare: American Law Institute, “Transnational Corporations and National Law”, in: Dunning, see note 7, Vol. 19 (1994), 63. First printed in: Restatement of the Law: The Foreign Relations Law of the United States, 1 (1986), 124-132.

<sup>40</sup> For more details, see K. Weilert, “Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards”, *ZaöRV* 69 (2009), 883 et seq. (891 et seq.).

<sup>41</sup> Weilert, see note 40, 895.

countable. Under the ICJ statute neither states nor other entities have the power to bring an action against TNCs. Only the International Criminal Court (ICC) has some – very limited – jurisdiction. But even here TNCs cannot be sued directly.<sup>42</sup> Only the manager of the company can be taken to the ICC. According to article 5 of the Rome Statute the ICC has jurisdiction over the following crimes only: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. This leads to the question what role the UN plays and could prospectively play in implementing human rights standards *vis-à-vis* TNCs.

The UN is predestined for this problem in a twofold way: firstly, the protection of human rights is closely connected to the UN.<sup>43</sup> The Universal Declaration of Human Rights as proclaimed in 1948 embraced, even at that early stage, social human rights (arts 22 et seq.). Secondly, the United Nations is “the” forum for problems that cannot be solved by the states on their own, but only together, as the UN embraces virtually all states. Having said that the UN is not a supranational body, and as the intentions of the states differ on the matter of TNCs, the UN is limited in its options. In order to analyze the impact of the UN, a chronological overview of its attempts and initiatives to handle TNCs will be given.

### III. Binding UN Law Towards Taming TNCs

#### 1. An Overview of Binding Conventions

First, one has to look at the prominent and legally binding UN Conventions on Human Rights: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICCPR covers the basic rights such as the right to life (article 6) and protection against torture and inhuman treatment (article 7). Also included are the right to form and join trade unions (article 22), and the prohibition of discrimination (article 26). Beyond that,<sup>44</sup> the ICESCR

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<sup>42</sup> Article 25 para. 1 Rome Statute.

<sup>43</sup> Compare Arts 1 para. 3; 13 lit. b; 55 lit. c; 62 para. 2; 68 Charter of the United Nations.

<sup>44</sup> The ICESCR guarantees also the right of non-discrimination (article 3) and the right to form and join trade unions (article 8).

provides the right of everyone to the enjoyment of just and favorable working conditions, which includes, *inter alia*, fair wages, safe and healthy working conditions, and reasonable limitation of working hours (article 7), social security (article 9), maternity protection and the protection of children (article 10), as well as the improvement of all aspects of environmental and industrial hygiene (article 12 lit. b). Besides these Covenants of 1966, there are other multilateral UN treaties which address special problems such as discrimination against women<sup>45</sup> and the protection of children.<sup>46</sup> Furthermore, there is also the UN Convention against Corruption (2003) with its article 12 regarding the prevention of corruption in the private sector. In the field of international environmental law, the most important conventions are the UN Convention on Biological Diversity of 1992, and the UN Framework Convention on Climate Change of the same year.

Besides that, there are several ILO-conventions. Its conventions are legally binding for those states that have ratified them. They specifically cover the fields of the four core fundamental labor standards: namely, the freedom of association and collective bargaining, abolishing of forced labor as well as child labor, and the prohibition of discrimination in respect of employment and occupation.

## 2. Problems in Giving Effect to International Conventions

On the one hand, there are provisions that address the said problems. On the other hand, all these norms of international law are not, in the first place, composed to solve the problems caused by TNCs. They only deal with them peripherally. But, much more importantly, these norms address in the first instance only the states as parties to the conventions. The states committed themselves towards the other contracting states by the obligations laid down. Thus the provisions of the con-

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<sup>45</sup> Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, entry into force 3 September 1981, UNTS Vol. 1249 No. 20378.

<sup>46</sup> Convention on the Rights of the Child of 20 November 1989, entry into force 2 September 1990, UNTS Vol. 1577 No. 27531.

vention are binding on the contracting states and the states have to give effect to these rules within their national legal order.<sup>47</sup>

The means by which treaty law forms part of national law differs among the legal traditions. In Germany, treaty law is transformed into national law by an act called “Zustimmungsgesetz” pursuant to article 59 para. 2 German Basic Law (Grundgesetz). But this transformation is not enough in itself to oblige companies to the single provisions of the covenants. Moreover, the provision must be “self-executing and horizontally applicable”. A norm is self-executing (directly applicable) if it is clear enough and does not depend on further action.<sup>48</sup> Some of the mentioned provisions are quite clear, e.g. article 6 ICCPR, “Every human being has the inherent right to life.” Others need clarification e.g. article 7 ICESCR, the rights of fair wages, safe and healthy working conditions and reasonable limitation of working hours. It has been even debated whether any right of the ICESCR is self-executing due to article 2 para. 1 ICESCR.<sup>49</sup> In the end, it falls within the jurisdiction of the states to decide whether a provision is self-executing.<sup>50</sup> But even if the treaty-norm is self-executing, the addressees of the treaties are, in the first place, states, and, generally treaties are not horizontally applicable. The ICESCR nearly always explicitly speaks of the “the States Parties to the present Covenant” which have to recognize the given rights. The Committee on Economic, Social and Cultural Rights has emphasized that multinational private enterprises are not bound by the Covenant,

<sup>47</sup> For the relationship of international law and municipal law compare I. Brownlie, *Principles of Public International Law*, 7th edition 2008, 31 et seq.

<sup>48</sup> CESCR, Doc. E/C.12/1998/24 of 3 December 1998, General Comment No. 9, The domestic application of the Covenant, para. 10 (“norms which are self-executing (capable of being applied by courts without further elaboration)).”

<sup>49</sup> Article 2 para. 1 ICESCR: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

<sup>50</sup> CESCR, Doc. E/C.12/1998/24, see note 48, para. 11; M.C.R. Craven, “The Domestic Application of the International Covenant on Economic, Social and Cultural Rights”, *NILR* 40 (1993), 367 et seq. (383). Compare also the US Senate’s ratification of the ICCPR which incorporated the declaration that: “the provisions of Article 1 through 27 of the Covenant are not self-executing”, 138 Cong. Rec. S4781-84 (1992).

but nevertheless have responsibilities with regard to the right to work.<sup>51</sup> With respect to the ICCPR, the Human Rights Committee has dismissed any direct horizontal effect,

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law.”<sup>52</sup>

But at the same time, the Committee has emphasized “... the positive obligations on States Parties to ensure Covenant rights” “will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”<sup>53</sup>

This *duty to protect and fulfill* is well known in international human rights law.<sup>54</sup> Terminology differs at this point. A good explanation of

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<sup>51</sup> CESCR, Doc. E/C.12/GC/18 of 6 February 2006, The Right to Work, General Comment No. 18, adopted on 24 November 2005, para. 52: “While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, local communities, trade unions, civil society and private sector organizations – have responsibilities regarding the realization of the right to work. States parties should provide an environment facilitating the discharge of these obligations. Private enterprises – national and multinational – while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society.”

<sup>52</sup> Human Rights Committee, Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004, para. 8.

<sup>53</sup> See note 52.

<sup>54</sup> Joseph, see note 11, 175 et seq., speaking of “horizontal” application of international human rights, but meaning the duty to protect (“the duty of states to give effect to human rights between private parties”) with further references; J. von Bernstorff, *Die völkerrechtliche Verantwortung für menschenrechtswidriges Handeln transnationaler Unternehmen*, INEF Forschungsreihe Menschenrechte, Unternehmensverantwortung und Nachhaltige Entwicklung (05/2010), 8 et seq.



the essence of this duty is given by the Maastricht Guidelines, a document put forward by independent experts of human rights,

“The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.”<sup>55</sup>

If the states do not adhere to their commitments, there are treaty-based mechanisms such as the examination of the inter-state communications according to article 41 ICCPR or the examination of individual communications according to the first optional protocol to the ICCPR as well as the newly established and (not yet entered into force) complaint and inquiry mechanism in accordance with the optional protocol of the ICESCR. Neither of these treaty based mechanisms, nor a procedure before the ICJ includes a way of taking an action against a company itself. It is only the states parties that can be blamed for their failure to respect, protect or fulfill their duties under the conventions.<sup>56</sup>

To sum up, the UN “hard laws”, i.e., the UN binding conventions, are not sufficient to tame TNCs. In the first place, their provisions are not designed for the special problems of TNCs; the social rights are often ambiguous, and the environmental provisions are not ample enough. Furthermore, only states and not TNCs can be held accountable directly. This leads to the question whether the UN has resolved the special questions related to TNCs, and to what extent.

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<sup>55</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997, *HRQ* 20 (1998), 691 et seq., para. 6.

<sup>56</sup> Before the ICJ, there is the additional problem that in cases of infringements of human rights in the host-state regarding the host-states' nationals, no other state is injured. Only in cases of infringements of obligations *erga omnes* other states are “injured”. Compare also article 54 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its 53rd Sess., GAOR 56th Sess., Suppl. No. 10, 43, Doc. A/56/10 (2001).

## IV. Non-Binding Approaches at UN-Level Towards Taming TNCs

### 1. From UNCTAD to UNCTC and Vice Versa

When UNCTAD was founded in 1964, the problems of TNCs were not on its agenda. Today, the authority of UNCTAD is underlined by the fact that 193 countries are members of it. The idea of its foundation was to improve trade and development worldwide, and to put a special focus on the developing countries. These economically weaker countries should be helped in their integration into the community of developed countries. Although this aim is not specific for TNCs, the reduction of an economic decline would abolish the root of some of the problems.

Initially, the focus of Member States was upon the benefits that Foreign Direct Investments (FDI) are able to bring about. In light of this, their emphasis was on the abolition of obstacles that were hindering industrialized countries from investing in developing countries.<sup>57</sup> It did not take a decade to change this view considerably. By the early 1970s, TNCs were observed as economically very powerful entities responsible for a number of evils.<sup>58</sup> The developing countries feared losing part of their sovereignty and suffering damage to their economy, including social and environmental aspects.<sup>59</sup>

In November 1972 the Chilean President *Allende* gave a speech at the UN General Assembly. He maintained that International Telephone and Telegraph had intervened in Chile's domestic affairs.<sup>60</sup> After that, the UN initiated a study on Multinational Corporations in World Development.<sup>61</sup> In 1973 ECOSOC appointed a "Group of Eminent Persons" with the mandate to advise on the activities and the nature of TNCs as well as their influence on development. As a consequence of that, the UN Commission on Transnational Corporations (UNCTC)

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<sup>57</sup> T. Fredriksson, "Forty years of UNCTAD research on FDI, Transnational Corporations", *Transnational Corporations* 12 (2003), 1 et seq. (2 et seq.).

<sup>58</sup> *Id.*, 4.

<sup>59</sup> *Id.*, 4.

<sup>60</sup> *Id.*, 5.

<sup>61</sup> United Nations, Department of Economic and Social Affairs, ST/ECA/190 of 1973.

was founded as a permanent intergovernmental forum.<sup>62</sup> UNCTC commenced its work in 1974 and existed for 17 years. Its main focus was to phrase international arrangements concerning TNCs, for instance a Code of Conduct on Transnational Corporations.<sup>63</sup> Furthermore, UNCTC provided data on TNCs and FDI as well as legal rules (national and international) concerning both. With its publications it made these data transparent.<sup>64</sup> In addition to that, it analyzed how TNCs affected the economy and social life, especially in developing countries. Finally, UNCTC offered the developing countries advice on their negotiations with TNCs.<sup>65</sup>

The work of UNCTC was embedded in the whole political setting which was influenced by the cold-war-climate. Thus, in the 1970s the concern was to control TNCs as the developing countries feared their sovereignty to be at stake.<sup>66</sup> In the 1980s the prospects and positive influence of TNCs were increasingly apparent. The developing countries did not fear FDIs anymore, but wanted to profit from them.<sup>67</sup> In 1992 UNCTC was closed down due to an organizational reform of the economic sector of the UN. Its important work was taken over by UNCTAD. It would be wrong to assume that UNCTAD had been silent on

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<sup>62</sup> The information on UNCTC is based on Fredriksson, see note 57, and the information provided by UNCTAD <<http://unctc.unctad.org/asp/index.aspx>>. Compare also P.T. Muchlinski, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD", in: M.T. Kamminga/ S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, 97 et seq.

<sup>63</sup> This Code of Conduct was not finished and was given up after 1992 when the work of the UNCTC was shifted to UNCTAD. The states, having different viewpoints, were then no longer interested in finalizing these rules.

<sup>64</sup> Important publications are: *Multinational Corporations in World Development* (survey given every five years) and superseded by the *World Investment Reports* since 1991; *The CTC Reporter* (published twice per year) and substituted since 1992 by the journal *Transnational Corporations* (annually).

<sup>65</sup> Fredriksson, see note 57, 5; <[http://unctc.unctad.org/asp/UNCTCO\\_rigins.aspx](http://unctc.unctad.org/asp/UNCTCO_rigins.aspx)>.

<sup>66</sup> See for further reading of the UN and TNCs, S. Tesner, *The United Nations and Business*, 2000, 16 et seq.

<sup>67</sup> Kinley/ Chambers, see note 36, 455-456: "... with the end of the Cold War and the growth of the free trade and investment movement, the emphasis began to shift away from the demands of host countries to their need to attract foreign companies and thus to deregulation."

the issue of TNCs during UNCTC's existence,<sup>68</sup> but it did not hold an expert role comparable to that of UNCTC between 1974 and 1992.

Today the focus of UNCTAD is still not to hinder FDI and TNCs, but to make them profitable and helpful for all countries involved, as the states generally appraise both as beneficial; yet to date, there still remain differences between developing countries and industrialized countries.<sup>69</sup> Thus the intentions of states in respect of international regulations of corporations have diverged up to now.<sup>70</sup> TNCs have become even more widespread today, and with their enormous revenue, they are economically comparable to states. The most prominent publications of UNCTAD are the annual World Investment Reports that always draw attention to a special issue analyzing FDI with respect to the development implications, at the same time providing a political and economical analysis and statistical data.

## 2. Tripartite Declaration (1977/2000/2006)

The ILO, as specialized agency of the UN, works in many fields that are relevant for the problems around TNCs. For example, the ILO combats child labor, strives for safe working conditions, campaigns to ensure the freedom of association and the right to collective bargaining, and encourages social security. Besides these activities, already in 1977 the ILO addressed the issue of TNCs in a special way by adopting the "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy". The phrasing of this Declaration came at a time where TNCs were, above all, seen as a threat to developing countries. The Declaration was later amended in 2000<sup>71</sup> and in 2006.<sup>72</sup> It is to be understood as a set of "guidelines to MNEs, governments, and employers' and workers' organizations in such areas as employment, train-

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<sup>68</sup> For more details, see Fredriksson, see note 57, 6.

<sup>69</sup> Kirchner, see note 2, 91.

<sup>70</sup> Backer, see note 31, 123 et seq.

<sup>71</sup> International Labour Office, Official Bulletin, Vol. LXXXIII, 2000, Series A, No. 3.

<sup>72</sup> International Labour Office, Geneva 2006, <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_094386.pdf)>.

ing, conditions of work and life, and industrial relations.”<sup>73</sup> The provisions are called explicitly “voluntary” and they are not legally binding. Thus they form part of international soft law.

The Governing Body of the International Labour Office, which adopted the Tripartite Declaration, is composed of 28 government members, 14 employer members and 14 worker members. This reflects the structure of the ILO as a “tripartite organization” and this composition is unique on the international level. Thus it is not only the traditional subjects of international law that come together in a round table discussion, but also the employers who are close to the interests of TNCs, and the workers who are in a more dependant role and have only limited influence in daily operations. The fact that the Tripartite Declaration is not legally binding is a “minus” compared to the binding ILO-conventions, but at the same time it was, in a way, the precondition that the three groups could agree on these “rules” at all.<sup>74</sup> The Tripartite Declaration sees the positive potential of TNCs and aims to foster them while minimizing the arising problems.

Under the first topic (“General Policies”), the Tripartite Declaration emphasizes the “sovereign rights of States.” In the Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration, it is stated that the Procedure “cannot be invoked in respect of national law and practice” which means that “questions regarding national law and practice should be considered through appropriate national machinery.” This reflects that half of the members of the tripartite governing body of the ILO are still the governments.

The second issue of the Tripartite Declaration is the topic of “employment.” In light of the high unemployment (especially in developing countries), multinational enterprises are prompted to provide new jobs. They shall act “in harmony with national social development policies” (para. 17). But there is the problem that exactly those rules on social security (for example unemployment insurance) are missing in many developing countries. The companies are requested to employ nationals of the host-state (para. 18) and they shall employ sub-contractors of the host-state “for the manufacture of parts and equipment” to increase jobs in developing countries (para. 20). The problem of unemployment was pressing in the 1970s, as well as, today although some economic

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<sup>73</sup> International Labour Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 2006 – introduction.

<sup>74</sup> C.F. Hillemanns, *Transnationale Unternehmen und Menschenrechte*, 2004, 72.

factors have changed considerably. Due to the outsourcing of production, the problem of unemployment (especially among people with fewer qualifications), becomes a bigger problem in industrialized countries as well. Currently, the financial crisis has provoked an even greater risk of unemployment all over the world, but with dramatic impact in developing countries where social security is lacking. In addition to that, the Tripartite Declaration aims at employment opportunities without discrimination of people regardless of their race, color, sex, religion, political opinion, national extraction or social origin (para. 21 et seq.).

As a third topic, vocational training is stipulated to enhance the skills and career opportunities of the employees. Fourthly, the Tripartite Declaration also addresses “conditions of work and life.” TNCs shall offer wages, benefits and conditions at work comparable to the local standards, and, if these do not exist, they “should provide the best possible wages, benefits and conditions to work, within the framework of government policies” (para. 34). The problem with those commitments is their considerably vague nature. Also one of the big ILO issues, the abolition of child labor, is addressed (para. 36). Moreover, “adequate safety and health standards” shall be observed (para. 37). Fifthly and lastly, standards of industrial relations are addressed, embracing the freedom of association and collective bargaining. These rights shall not be diminished by any special offers that developing countries make to TNCs in order to attract them for their location (para. 46).

How efficient has the Tripartite Declaration been? Any assessment is difficult because one does not know how things would have developed without this Declaration. As the provisions of the Declaration cannot be enforced by any lawsuit, there is no hard evidence of its impact. However, the rules are seen as important, in that they address significant problems and name difficulties.<sup>75</sup> They increase the sensibility for the needs of employees and their situation, especially in developing countries, and in this manner promote other legal mechanisms. In order to foster and review the adherence to the Tripartite Declaration, the

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<sup>75</sup> Compare also A. Clapham, *Human Rights Obligations of Non-State Actors*, 2006, 215, going even one step further when maintaining “I could offer the interim conclusion here that, despite the fact that the Tripartite Declaration contains only recommendations, the Declaration provides material evidence that the international labour law regime has come to include human rights obligations for national and multinational enterprises.”

ILO has set up a follow-up program (Multinational Enterprises Programme).<sup>76</sup> The program, *inter alia*,<sup>77</sup> includes periodic surveys which monitor how the principles of the Declaration are observed. In order to analyze this, a questionnaire is sent to the Member States, national employers' and workers' organizations in order to collect information on the implementation. The Sub-Committee (to the Committee on Legal Issues and International Labor Standards) evaluates the data, and afterwards the Governing Body will adopt decisions in which it gives recommendations for future actions. However, the reports would have a greater impact if they named the TNCs with regard to their misconduct.<sup>78</sup> Since 2008, a Helpdesk has been set up where managers and workers can obtain guidance on questions regarding the Tripartite Declaration.<sup>79</sup> Those questions might be (for example) about the rights of workers in the supply chain or how one can foster the improvement of labor standards of a subcontractor.

In the end, the ILO, as specialized agency of the UN, has set up "rules" which, albeit not legally binding, help to define standards. As they address not only states, but also TNCs, they help to create a consciousness of responsibility within the companies. But without the follow-up program and the further pushing of the ILO, those principles would remain ineffective. But in view of the accompanying efforts, their acceptance comes closer to other binding conventions which also often face serious shortcomings as to their actual observance.

### 3. The Global Compact (2000)<sup>80</sup>

#### a. The Global Compact's Concept and Distinctiveness

The Global Compact is a new approach to handle the challenges of globalization. But experts disagree in their assessments of the value and

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<sup>76</sup> <[http://www.ilo.org/empent/WorkingUnits/lang--en/WCMS\\_DOC\\_ENT\\_DPT\\_MLT\\_EN](http://www.ilo.org/empent/WorkingUnits/lang--en/WCMS_DOC_ENT_DPT_MLT_EN)>.

<sup>77</sup> For the other aspects of the follow-up-program compare Clapham, see note 75, 216 et seq.

<sup>78</sup> See also Hillemanns, see note 74, 74; Clapham, see note 75, 216.

<sup>79</sup> <[http://www.ilo.org/global/Themes/Decentwork/lang--en/WCMS\\_120642/index.htm](http://www.ilo.org/global/Themes/Decentwork/lang--en/WCMS_120642/index.htm)>.

<sup>80</sup> The information given in this section relies to a large extent on the Global Compact Website.

the effects of the Global Compact. Some even fear that TNCs are not tamed by it, but instead become “partners of the UN” with even more influence in the political sphere.

The Global Compact was initiated by the former Secretary-General of the UN Kofi Annan. In January 1999, he presented his idea about this initiative at the World Economic Forum in Davos (Switzerland) at the annual meeting. The official start took place in July 2000 at the Global Compact Meeting in New York. With the support of the International Chamber of Commerce (ICC), about 50 enterprises showed their interest at this early stage. In 2010, over 7700 corporate participants and stakeholders have committed themselves to the Global Compact. There is no direct mandate in the UN Charter to establish the Global Compact; nevertheless, the Compact is clearly supported by several Resolutions of the UN General Assembly.<sup>81</sup> It has been also recognized by the G8 at several meetings, including recently in L’Aquila in July 2009.

The Global Compact is no international treaty, but a network-based initiative and platform which brings together companies, NGOs and the UN with its different agencies. Thus the Compact connects states, businesses and NGOs as three very different players on the global stage. *Sabine von Schorlemer* identifies three levels of this network.<sup>82</sup> On the first level, there is the UN (as a network with its UN agencies), and especially the Global Compact Office of the Secretary-General. The Global Compact Office is “formally entrusted with the support and overall management of the Global Compact initiative.”<sup>83</sup> The General Assembly has encouraged it *inter alia* “to promote the sharing of best practices.”<sup>84</sup> On a second level, the network embraces the UN and further core participants (such as companies and, for example, the ICC, and academic participants as well as NGOs). On a third level, there are

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<sup>81</sup> UN General Assembly resolutions recognizing the Global Compact: A/RES/55/215 of 21 December 2000; A/RES/56/76 of 11 December 2001; A/RES/58/129 of 19 December 2003; A/RES/59/288 of 13 April 2005, A/RES/60/1 of 16 September 2005; A/RES/60/207 of 22 December 2005; A/RES/60/215 of 22 December 2005; A/RES/62/211 of 19 December 2007; A/RES/64/223 of 21 December 2009.

<sup>82</sup> S. von Schorlemer, “Der ‘Global Compact’ der Vereinten Nationen – ein Faust’scher Pakt mit der Wirtschaftswelt?”, in: S. von Schorlemer (ed.), *Praxisbandbuch UNO*, 2003, 507 et seq. (530 -531).

<sup>83</sup> <[http://www.unglobalcompact.org/AboutTheGC/stages\\_of\\_development.html](http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html)>.

<sup>84</sup> A/RES/60/215 of 22 December 2005, para. 9.



other initiatives, which originally pursued another purpose than creating global rules, but now form part of the Global Compact.

The core of the Global Compact are ten principles. They cover some basic human rights, labor and environmental standards and a commitment against corruption. The principles are taken from other human rights agreements, namely the Universal Declaration of Human Rights, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and finally the United Nations Convention Against Corruption. Thus the content of the principles is not new and does not go beyond the already existing international documents.

In relation to human rights they are quite unspecific and read as follows: Principle 1: businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: they should make sure that they are not complicit in human rights abuses. Principle 3 to 6 concern labor standards. Principle 3: businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labor; Principle 5: the effective abolition of child labor, and Principle 6: the elimination of discrimination in regard to employment and occupations. The following four principles deal with environmental standards, and provide in Principle 7: businesses should support a precautionary approach to environmental challenges; Principle 8: they should undertake initiatives to promote greater environmental responsibility, and Principle 9: encourage the development and diffusion of environmentally friendly technologies. And lastly, Principle 10 sets forth: businesses should work against corruption in all its forms, including extortion and bribery.

While states are parties of ILO-conventions and other multilateral treaties, the Global Compact has *inter alia* TNCs as its parties which commit themselves directly to the principles. Thus the companies are not "bound" via their nation state, but they themselves make the decision whether to join the Compact and its principles or not. The procedure for participation is quite easy. Besides the filling in of a registration form, the company only has to send a letter ("letter of commitment") signed by its chief executive to the Secretary-General of the UN in which it expresses its support for the ten principles. It further commits itself "to making the Global Compact and its principles part of the strategy, culture and day to day operations" of the company and "to engaging in collaborative projects which advance the broader development goals of the United Nations, particularly the Millennium Devel-

opment Goals.” Also the letter includes the intention to an annually report about the “company’s efforts to implement the ten principles.” Thus there is neither a signature under any “Global Compact Treaty” nor any officially conferred membership.<sup>85</sup> In addition to that, a (relatively small) financial contribution is asked for,<sup>86</sup> which nonetheless all combined will amount to a considerable sum.

As the Global Compact is not a specialized agency of the UN, it is not funded by the UN. The funding of the core business is donated by the public sector. Additionally, there exists a Foundation for the Global Compact,<sup>87</sup> which is authorized to fundraise on behalf of the UN Global Compact Office for activities which are going beyond this core business.<sup>88</sup> The Foundation for the Global Compact also accepts donations from corporations “provided that acceptance of the donation would not threaten the integrity of the Foundation, the UN Global Compact Office or the initiative as a whole.”<sup>89</sup>

As the Global Compact is a non-binding treaty and has no means of enforcing its principles, the heart of this initiative is the “communication on progress” (COP) to which the companies oblige themselves. If a company fails to give any COP, this shortcoming will be displayed on the website of the Global Compact initiative as “non-communicating participants.”<sup>90</sup> As to the high number of documents listed on this page (to date, more than 1200), the failure to communicate seems not to be an insignificant problem. On the other hand, there are the “notable communications on progress.”<sup>91</sup> The notification of these outstanding COPs was introduced in 2004 in order to display model communica-

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<sup>85</sup> von Schorlemer, see note 82, 527.

<sup>86</sup> <[http://www.unglobalcompact.org/HowToParticipate/Business\\_Participation/index.html](http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html)>, “For companies with annual sales/revenues of USD 1 billion or more, the suggested annual contribution is USD 10,000; For companies with annual sales/revenues between USD 250 million and USD 1 billion, the suggested annual contribution is USD 5000; For companies with annual sales/revenues of less than USD 250 million, the suggested annual contribution is USD 500”.

<sup>87</sup> Foundation for the Global Compact, <<http://globalcompactfoundation.org/faq.php>>.

<sup>88</sup> Global Compact Netzwerk Österreich, FAQ <<http://abcsd.at/content/ungc/site/de/unglobalcompact/faq/index.html#frage9>>.

<sup>89</sup> Foundation for the Global Compact, <<http://globalcompactfoundation.org/faq.php>>.

<sup>90</sup> <[http://www.unglobalcompact.org/COP/non\\_communicating.html](http://www.unglobalcompact.org/COP/non_communicating.html)>.

<sup>91</sup> <[http://www.unglobalcompact.org/COP/notable\\_cops.html](http://www.unglobalcompact.org/COP/notable_cops.html)>.

tions which might inspire other companies and thus help to implement the aims of the Global Compact.

A COP is considered “notable” if all requirements set forth in the COP policy are met and if, additionally, the report shows two of the following features, i.e. either a “strong statement of continued support” or a good “description of practical actions taken” to implement the ten principles or a “measurement of outcomes that allows for checking progress” or a “Reporting process [that] ensures reliability, clarity and timeliness of information and includes stakeholder dialogue.” As with all reports, the Global Compact Office does not control whether these communications are accurate. Therefore, the communication progress remains a tool which companies can misuse. However, stakeholders and the public will assess the reports so that, in a way, a review does take place.

It becomes clear that all the mechanisms of the Global Compact are “soft” and there are no real sanctions, but only the loss of image by being perceived as “non-communicating” or even taken off the webpage if listed longer than one year as “not communicating”. If a company wishes to join the Global Compact again, it must once more apply as a participant and give a correct and actual COP. The incentive for being part of the Global Compact is the hope of the companies that it will pay in the long run if they enjoy a good reputation.<sup>92</sup> They anticipate that the adherence to ethical norms will be rewarded by profit.<sup>93</sup> To give an example: work accidents “cost” four per cent of the global gross domestic product.<sup>94</sup> If the working conditions are elevated, companies directly profit from this advancement.

The Global Compact is only one (non legally binding) initiative to ease the waves of globalization. But it is distinct in that it was initiated by the former Secretary-General of the UN. However, the Compact is often not even counted in the category of “soft law”,<sup>95</sup> as it is not a declaration, recommendation or resolution of an international organization or a state conference. Therefore, it is also distinct from the ILO Tripar-

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<sup>92</sup> Compare “ethical consumerism”.

<sup>93</sup> J. Wagner, “Institutionen jenseits des Nationalstaats – Das Beispiel des UN Global Compact”, in: R. Ohr (ed.), *Globalisierung – Herausforderungen an die Wirtschaftspolitik*, 2004, 217 et seq. (229).

<sup>94</sup> <<http://www.unglobalcompact.de/index.php?id=195&L=0>>.

<sup>95</sup> Von Schorlemer, see note 82, 428; A. Emmerich-Fritsche, “Zur Verbindlichkeit der Menschenrechte für transnationale Unternehmen”, *AVR* 45 (2007), 541 et seq. (551).

tite Declaration, which forms part of soft law. The Global Compact could be described more accurately as supporting existing international standards by a direct communication with TNCs. The distinctiveness does not lie in any new standards, but in the approach to address TNCs not only via the nation states but via different stakeholders.

The network that is created between the UN agencies, companies, business-associations, labor organizations, NGOs, the academic sector and public sector organizations and even cities, is unique in that it is very broad and enjoys the authority of the UN. Furthermore, it brings together opposing “partners”; as one has to keep in mind that some NGOs are founded to “control” TNCs and to point out their shortcomings. Embedding both in one network affords the opportunity that the communication between NGOs and TNCs is improved and that the “concept of the enemy” is thwarted. But it might also seem as if NGOs and TNCs now, above all, have a friendly relationship and for that reason some NGOs fear losing their influence.

The Global Compact is not a “code of conduct” instructed from the UN to the TNCs and thus is distinct from the “Draft United Nations Code of Conduct on Transnational Corporations”<sup>96</sup> and the UNCTAD code “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.”<sup>97</sup> Instead, it was initiated as a platform for dialogue. How the Global Compact will develop in the future is not foreseeable at the moment. Its open and imprecise beginning was part of the concept to develop a new setting which, not least, will be shaped by its participants.

The innovative idea is that the Global Compact believes in self-regulation and that companies will not refuse to take on their responsibilities in order to realize the ten principles.<sup>98</sup> This hope is not necessarily born due to the accomplishments of TNCs in the fields of human rights and sustainable development, but it is primarily part of the con-

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<sup>96</sup> Doc. E/1983/17/Rev. 1, Annex II, 12-27, *ILM* 23 (1984), 626 et seq.

<sup>97</sup> Doc. TD/RBP/CONF/10 of 2 May 1980, adopted by A/RES/35/63 of 5 December 1980, *ILM* 19 (1980), 813 et seq.; von Schorlemer, see note 82, 520 et seq.

<sup>98</sup> Speech of K. Schwab, *World Economic Forum in Davos, Siemens Corporate Citizenship event*, manuscript 2001, cited by von Schorlemer, see note 82, 527.

viction that the problems of the globalized economy cannot be solved against the will of the main players in the economy.<sup>99</sup>

Last but not least, the Global Compact uses the internet not only for information about itself, but also as medium to display non-communicating participants, and to give information about the whole process. This transparency is indispensable for the success of the concept of the Compact. As there is no means of enforcing the ten principles, the companies shall be motivated by being able to present themselves as cherishing their commitments to the principles of the Global Compact. The idea of this third option between “official enforcement” and mere letter of intent is unique for the Global Compact.

#### **b. Strengthening the Reliability of the Global Compact**

As a reaction to criticism regarding the lack of accountability for the behavior of the participating companies, the Global Compact Advisory Council was founded in 2002. It is the first UN advisory body incorporating eminent persons of both the public and the private sector. These 17 persons, business leaders, labor leaders and leaders of civil society organizations were to support the Secretary-General to solve the problems of globalization in a cooperative manner.<sup>100</sup> The Advisory Council, meeting twice a year, had been criticized right from the beginning as to the dominance of its participating business managers.<sup>101</sup> The Council was entrusted with the improvement of the quality and actual impact of companies participating in the Global Compact. Furthermore, it was to attract new participants to the Global Compact and to help to uphold its integrity.<sup>102</sup> The Council was active until 2004, when it was dissolved by the UN Secretary-General. After a broad review, a new governance framework was established. Part of this new framework is the Global Compact Board which the UN Secretary-General appointed for the first time in April 2006. This new advisory body has its meetings annually. It shall help to develop the Compact with its policy and strategic

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<sup>99</sup> J. Wieland, in: Auswärtiges Amt (ed.), “*Viertes Forum Globale Fragen, Die UNO stärken – neue Impulse nach dem Millenniums-Gipfel*”, 2000, 39.

<sup>100</sup> <[http://www.unglobalcompact.org/newsandevents/speeches\\_and\\_statements/hc\\_for\\_school\\_of\\_business\\_dublin.html](http://www.unglobalcompact.org/newsandevents/speeches_and_statements/hc_for_school_of_business_dublin.html)>.

<sup>101</sup> A. Zumach, “Der “strategische Handel” des Generalsekretärs. Ernüchternde Erfahrungen mit dem Globalen Pakt von Davos”, *Vereinte Nationen* 4 (2002), 1 et seq. (5).

<sup>102</sup> Von Schorlemer, see note 82, 529.

advice. Thus it gives recommendations directed to the Global Compact Office, participants and other stakeholders. It should also advance the integrity of the Compact. Furthermore, the Global Compact Board has the mission to better connect the global and the local levels of the Compact. More than 70 local networks are an important addition to the Global Compact. They aim for the Compact's principles, but are self-governing. They are connected mainly by annual meetings ("Local Networks Forum").

In July 2007 the "Geneva Declaration on Responsible Business Practices" was adopted by the participants of the Global Compact Leaders Summit. At the Leaders Summit, which takes place once every three years, the leading participants of the Global Compact and other stakeholders come together for discussion and to give recommendations and action imperatives to shape the Global Compact. The Geneva Declaration clarifies that globalization and especially TNCs are not labeled as a "threat" in the Compact, but above all seen as positive,

"Business, as a key agent of globalization, can be an enormous force for good. Through a commitment to corporate citizenship and the principles of the UN Global Compact, companies can continue to create and deliver value in the widest possible terms. In this way, globalization can act as an accelerator for the diffusion of universal principles, creating a values-oriented competition for a 'race to the top'."<sup>103</sup>

Besides this accentuation of the positive impact of TNCs, the problems are also addressed. So globalization is described as creating "an ever widening range of environmental, social and governance issues" (para. 1). Companies are not "blamed" for their wrongdoing, but the declaration (in line with the concept of the Global Compact) focuses more on an incentive for companies to strive for the implementation and adherence to the ten principles, "Companies that proactively adopt and implement corporate citizenship practices – through the UN Global Compact principles or other similar corporate responsibility initiatives – are better positioned to ensure the sustainability of their operations and the markets and communities in which they do business and depend on." (para. 2)

Furthermore, the importance of the COP is highlighted because the value of the Global Compact is firmly connected *inter alia* with the potential of stakeholders to assess the progress of TNCs (compare para.

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<sup>103</sup> United Nations Global Compact Leaders Summit, 5-6 July 2007, Geneva, Geneva Declaration, Preamble.

4). After clarifying “the role of business in society” (paras 1-9), “actions for UN Global Compact Participants” are identified (paras 10-16). The actions put forward are quite unspecific and only cover general commitments. So, *inter alia*, the participants of the Global Compact confirm their commitment to the ten principles and also show their willingness to encourage supply chains and to commit to them. Finally, the Geneva Declaration lays down postulations on governments (“actions for Governments”, paras 17-21). Here, governments are urged “to ratify and effectively implement relevant conventions and declarations, including the ILO core labour standards and the United Nations Convention against Corruption.” (para. 18)

This again shows that the Global Compact does not go beyond the already existing international law, but goes in another direction to give life to these rules. It also reminds us that in international law the indicator of whether a rule is effective or not, is not necessarily its binding or non-binding character. There are many binding treaties which are not observed by the parties and we have in international law only a few examples of effective law enforcement on the international level (as for example the European Convention on Human Rights with its European Court of Human Rights).

The Global Compact utilizes “integrity measures” in order to guarantee its quality and to ensure that it can serve its aims. As these measures are neither a monitoring mechanism nor an assessment of the actions of TNCs, they only cover the prevention of misuse of the Global Compact and do not guarantee that TNCs will stick to their commitments. Rather, the integrity measures above all serve to protect the reputation of the Global Compact and thus help to bring about good efforts.

At first, there is a superficial check mainly whether the company applying to join the Global Compact is involved in the production or selling of antipersonnel landmines or cluster bombs, or whether any sanctions are being imposed against it by any international institution. In addition to that there is a formal procedure before the Global Compact Office concerning the “systematic or egregious abuses” of the principles of the Global Compact. The Global Compact website itself provides examples of infringements which are considered serious,<sup>104</sup>

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<sup>104</sup> <[http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/Integrity\\_Measures\\_FAQs.html](http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/Integrity_Measures_FAQs.html)>.

1. murder, torture, deprivation of liberty, forced labor, the worst forms of child labor and other child exploitation
2. serious violations of individuals' rights in situations of war or conflict
3. severe environmental damage
4. gross corruption
5. other particularly serious violations of fundamental ethical norms.

If such an issue is submitted in writing to the Global Compact Office, the Office will, if it holds the accusations to be reliable, contact the company and request written comments on the matter.<sup>105</sup> After that, the Global Compact Office has discretion to choose between several possible ways that could help to solve the problem.<sup>106</sup> In the end, the company might be listed as “non-communicating” or even be removed from the Global Compact website.<sup>107</sup>

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<sup>105</sup> “If an allegation of systematic or egregious abuse is found not to be prima facie frivolous, the Global Compact Office will forward the matter to the participating company concerned, requesting i. written comments, which should be submitted directly to the party raising the matter, with a copy to the Global Compact Office, and ii. that the Global Compact Office be kept informed of any actions taken by the participating company to address the situation which is the subject matter of the allegation. The Global Compact Office will inform the party raising the matter of the above-described actions taken by the Global Compact Office.”

<sup>106</sup> “i. Use its own good offices to encourage resolution of the matter; ii. Ask the relevant country/regional Global Compact network, or other Global Compact participant organisation, to assist with the resolution of the matter; iii. Refer the matter to one or more of the UN entities that are the guardians of the Global Compact principles for advice, assistance or action; iv. Share with the parties information about the specific instance procedures of the OECD Guidelines for Multinational Enterprises and, in the case of matters relating to the labour principles, the interpretation procedure under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. v. Refer the matter to the Global Compact Board, drawing in particular on the expertise and recommendations of its business members.”

<sup>107</sup> <<http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html>>, “If the participating company concerned refuses to engage in dialogue on the matter within two months of first being contacted by the Global Compact Office under sub-paragraph (b) above, it may be regarded as “non-communicating”, and would be identified as such on the Global



The last integrity measure concerns the misuse of the logo of the UN or the Global Compact's name and logo. Participants may, under certain conditions, use the UN emblem if they have received prior written authorization. The display of the UN logo by a company can evoke wrong assumptions. The keyword often used here is the "bluewashing" of a company. Therefore, there are several possible sanctions that can be imposed in such cases of misuse.

Furthermore, an important feature to uphold the reliability of the Compact, is the duty to give a COP, which is not to be confused with the Global reporting initiative. Both international corporate citizenship initiatives developed independently from one another. Nevertheless they have some features in common as they are both operating on a voluntary basis and provide, via the reports, information on the impact of corporations which are offered to the public. The Global reporting initiative was initiated by the Coalition of Environmentally Responsible Economies (CERES) and UNEP. The Global reporting initiative focuses on sustainability reports. This value reporting shall give public insight into an entity's economic, social, and environmental performance. Thus the Global reporting initiative aims at transparency and for this reason developed standards to make sustainability reports comparable. These guidelines which have been developed through a multi-stakeholder approach, are consistently reviewed and refined. Recently "third generation" (G3) Sustainability Reporting Guidelines were accepted at an international conference which took place in 2006. The Global reporting initiative is not restricted to TNCs, but also applies to smaller corporations, governments and NGOs.

Due to the high standards and broad acceptance of the G3 Sustainability Reporting Guidelines, they can be used as a model to issue an outstanding COP.<sup>108</sup> The Global reporting initiative and the Global

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Compact website until such time as a dialogue commences. If, as a result of the process outlined above and based on the review of the nature of the matter submitted and the responses by the participating company, the continued listing of the participating company on the Global Compact website is considered to be detrimental to the reputation and integrity of the Global Compact, the Global Compact Office reserves the right to remove that company from the list of participants and to so indicate on the Global Compact website."

<sup>108</sup> UN Global Compact Principles and Corresponding GRI G3 Performance Indicators, <[http://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/UNGC\\_PRINCIPLES\\_AND\\_the\\_GRI\\_](http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/UNGC_PRINCIPLES_AND_the_GRI_)

Compact complement each other in that the Compact focuses on giving effect to its ten principles while the Global reporting initiative aims mainly at transparency and thus making reports comparable. In 2006, both initiatives (Global reporting initiative and Global Compact) “have united in a strategic alliance”<sup>109</sup> at a global conference.

### c. Criticism of the Global Compact

There are many skeptical voices raised against the Global Compact. First of all, there is the fear that TNCs will profit more from the Global Compact than it demands of them. In a way, with the Compact, corporations have been upgraded to be “partners” of the UN without paying the price to be legally bound and to fear any sanctions. The concern that corporations gain even more power by negotiating with the UN at eye level is not to be dismissed, but in fact, TNCs are already making treaties with states and are often quite strong negotiating partners.<sup>110</sup> Thus the Global Compact matches their actual position as global players. As long as the Compact remains a non-binding network, corporations are also not being “upgraded” to subjects of international law. The fear of a privatization of international governance<sup>111</sup> as well as the concern that the UN will become a forum where private entities have a say must nevertheless be present in order to watch carefully the further development of the Global Compact and other such initiatives. It is a balancing act, on the one hand, to recognize that TNCs as mighty global players cannot be solely bound by traditional state doctrines of law and force, and on the other hand, not to come to a point where TNCs can freely negotiate about the law that they are bound by. If it became true that TNCs would substantially help to finance the Global Compact, this would clearly undermine the independence of the Compact.<sup>112</sup>

The argument that the Global Compact creates the impression that the UN and TNCs have the same interests in common<sup>113</sup> does not seem

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G3.pdf>. On this website the Global Compact informs how GRI Guidelines can be of use for the COP.

<sup>109</sup> <[www.globalreporting.org/newseventspress/latestpressreleases/2006/pressreleaseungc-gri.htm](http://www.globalreporting.org/newseventspress/latestpressreleases/2006/pressreleaseungc-gri.htm)>, UN Global Compact and Global Reporting Initiative form Strategic Alliance Move to Further Advance Responsible Corporate Citizenship.

<sup>110</sup> Nowrot, see note 35, 358 et seq., 366 et seq.

<sup>111</sup> Von Schorlemer, see note 82, 532.

<sup>112</sup> *Id.*, see note 82, 538.

<sup>113</sup> *Id.*, see note 82, 535.

to be compelling. It is apparent that the United Nations as a political entity has different interests than economic global players. Managers of corporations primarily seek to maximize their own profit and are acting on behalf of a minority. Thus private entities might be expected to act in accordance with human rights, labor and environmental standards, but they cannot be deemed to be responsible for the welfare of a majority. Their main interests are private and not public. States as a union of all citizens, on the contrary, have to serve many different interests. Dependent on the form of government, their administration can usually not survive if they fail to meet the basic needs of the vast majority. In a democracy, this becomes very evident. To sum up, the “natural” interests of corporations are limited to economic questions while states have to bear in mind a whole bunch of policies.

One of the most frequent arguments against the Global Compact concerns the mere voluntary character. Only binding regulations endorsed with sanctions are alleged to be effective. It is beyond question that rules which are contrary to the “natural” or “selfish” interests of corporations have a greater chance to be observed if there are judicial-like means to give effect to them. But the UN has not been given any authority by the states to enact any binding rules on TNCs, or to impose sanctions. In addition to that it was largely due to the non-binding character and the lack of controls that TNCs committed themselves to the Compact. Furthermore, it raises many questions whether any binding alternative to the Global Compact would be legally possible or politically desirable. Any binding treaty to which TNCs could become a party (as they are now “participants” of the Global Compact) would finally award corporations the status of being subjects of international law. It furthermore then seems that states in a way could decide on their own to which degree they want to be bound by human rights. Any other alternative, for example a new multilateral treaty between states establishing an international court with the competence to impose sanctions in cases of violated human or environmental rights, would have nothing in common with the Global Compact, and thus would not just be the “binding alternative” to it. Therefore, the criticism as to the non-binding character of the Global Compact means to completely forget about this idea and not just to enhance the Compact by making it binding.

Besides that, it is argued that there should be at least a control over the accuracy of the COP. On a voluntary basis this control is, in a way, being brought about by the encouragement to produce the COP after the pattern of the G3 Sustainability Reporting Guidelines.

Finally, the fear that the Global Compact empowers TNCs at the cost of NGOs has some substance to it. Being united in one network, NGOs might seem to work together with the corporations rather than controlling them.<sup>114</sup> Then again, NGOs receive more information about the corporations' performance via the Compact and the opportunities for constructive dialogues are improved.

#### d. Assessment of the Global Compact

With the Global Compact, the UN decided to follow new paths to solve the problems of globalization and the shortcomings of TNCs in the four areas covered by the ten principles. Considering that the UN is made up of states, it is remarkable that it provided this platform for non-state-actors. Doing this the UN considered the reality that these players are very influential today. Solutions cannot be found without giving a hearing to TNCs. While NGOs already cooperated with the UN in different ways, reaching from the accreditation for a UN conference up to a consultative status with the ECOSOC, the inclusion of TNCs is a new dimension. However, the critics have to be taken seriously, especially in view of the further development of the Compact. To put it simply: a monster of globalization should not be tamed in a way that strengthens it rather than tames it. But so far, especially due to its non-binding nature, the UN has found a notable way to try to overcome the initial insufficiency of states to master the problem, without touching the sovereignty of states in this area. The striking feature of the Compact lies in its avoidance of the categories of "law" and "law enforcement", because it rather focuses on how corporations can take advantage of allegiance to the principles. This, at the same time, leads to a rising sense of responsibility, and, via the reports, to an ever better supervision by other non-state actors.

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<sup>114</sup> There used to be "The Alliance for a Corporate-Free UN" as a counter-movement to the Global Compact. It was made up of different NGOs, but does not exist anymore. Compare for more details on this Alliance von Schorlemer, see note 82, 544 et seq.

#### 4. The UN-Norms on the Responsibilities of TNCs and other Business Enterprises (2003)

Also on the level of the UN, but in its legal nature and focus very different from the Global Compact, was the attempt to establish UN-Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights (in the following: UN-Norms).<sup>115</sup> Advocates of the Global Compact even saw these Norms as being in competition with the volunteer-based platform and network-oriented Global Compact.<sup>116</sup> Right after the adoption of the UN-Norms by the Sub-Commission on the Promotion and Protection of Human Rights in August 2003 *Georg Kell*, executive head of the Global Compact, published a statement of the Global Compact to “clarify” the relationship of both. After emphasizing the voluntary and encouraging character of the Global Compact, he stated,

“The Global Compact is meant to complement and not substitute regulation. Regulatory authority lies entirely with governments and governments will have to make decisions on the Norms as adopted by the Sub-Commission of Human Rights. From the perspective of the Global Compact, we always welcome efforts that help to clarify complex human rights questions and that foster practical changes.”<sup>117</sup>

But before looking at the content of the UN-Norms and their legal nature, their origin will be examined.

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<sup>115</sup> There have been prior attempts to create a code in respect to business and human rights, compare Kinley/ Chambers, see note 36, 455 et seq.; see also the comparing overview of the UN-Norms and the Draft United Nations Code of Conduct on Transnational Corporations (U.N. Code of Conduct on Transnational Corporations, *ILM* 23 (1984), 626 et seq.).

<sup>116</sup> For the relation of the Global Compact and the UN-Norms compare, K. Nowrot, *Die UN-Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Gelingener Beitrag zur transnationalen Rechtsverwirklichung oder das Ende des Global Compact?*, Beiträge zum Transnationalen Wirtschaftsrecht No. 21 (2003), 21 et seq.

<sup>117</sup> <[http://www.unglobalcompact.org/newsandevents/news\\_archives/2003\\_08\\_13.html](http://www.unglobalcompact.org/newsandevents/news_archives/2003_08_13.html)> G. Kell, *GC clarifies relation to Norms adopted by Sub-Commission on Promotion and Protection of Human Rights of 13 August 2003*.

### a. Origin of the UN-Norms

In 1999 a working group<sup>118</sup> was established by a Sub-Commission<sup>119</sup> of the former Commission on Human Rights<sup>120</sup> for an initial period of three years<sup>121</sup> which was later extended.<sup>122</sup> The working group decided to work on a “code of conduct for TNCs based on the human rights standards”<sup>123</sup> and to accomplish this aim by involving the relevant business community, NGOs and related UN agencies.<sup>124</sup> The first draft (“Draft Human Rights Code for Companies”), which was published in May 2000, was to be followed by several adapted drafts.<sup>125</sup> The final draft of the UN-Norms together with a commentary on them was then given to the Sub-Commission<sup>126</sup> which adopted both documents in August 2003. The Sub-Commission asked the Commission on Human Rights to also accept the UN-Norms.<sup>127</sup> But the Commission did not decide on the adoption of the UN-Norms. Instead of having a vote, in 2004 the Commission on Human Rights asked the Office of the High Commissioner for Human Rights (OHCHR) to examine not only the UN-Norms, but also the content and legal nature of other initiatives and standards dealing with TNCs and other business enterprises and their impact on human rights.<sup>128</sup> The OHCHR consulted stakeholders,

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<sup>118</sup> Sessional Working Group on the Working Methods and Activities of Transnational Corporations.

<sup>119</sup> Sub-Commission on the Promotion and Protection of Human Rights; until 1999: Sub-Commission on Prevention of Discrimination and Protection of Minorities.

<sup>120</sup> The Commission on Human Rights was replaced by the UN Human Rights Council in 2006.

<sup>121</sup> Sub-Commission Resolution 1998/8 of 20 August 1998, para. 4; Sub-Commission Decision 1999/101 of 3 August 1999.

<sup>122</sup> Sub-Commission Resolution 2001/3 of 15 August 2001, para. 4.

<sup>123</sup> Doc. E/CN.4/Sub.2/1999/9 of 12 August 1999, para. 32.

<sup>124</sup> Doc. E/CN.4/Sub.2/1999/9 of 12 August 1999, paras 32, 37; see also Nowrot, see note 116, 7.

<sup>125</sup> The drafts can be downloaded under <<http://www1.umn.edu/humanrts/links/normsdrafts.html>>.

<sup>126</sup> Sub-Commission on the Promotion and Protection of Human Rights (the renaming was due to ECOSOC Decision 1999/256 of 27 July 1999, lit. b (ii)). This Sub-Commission ceased to exist in 2006.

<sup>127</sup> Sub-Commission Resolution 2003/16 of 13 August 2003, para. 2.

<sup>128</sup> Commission on Human Rights, Decision 2004/116, 60th Sess. See also Doc. E/CN.4/2005/91 of 15 February 2005; N. Ghanea/ L. Rahmani, “A

including all Member States, TNCs, employers' and employees' associations, NGOs, related international organizations and agencies as well as treaty monitoring bodies.<sup>129</sup> After the consultation process the OHCHR gave its report and therein it saw the UN-Norms as "an attempt in filling the gap in understanding the expectations on business in relation to human rights."<sup>130</sup> Due to many critical voices of many states, employer groups and some businesses, the OHCHR did not clearly recommend the Commission on Human Rights to adopt the UN-Norms. Very carefully it stated, "there is merit in identifying more closely the 'useful elements' of the draft Norms .... The High Commissioner therefore recommends to the Commission to maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration."<sup>131</sup> Taking into account that these other initiatives are non-binding, there is no standing proposal to give the UN-Norms a binding status.

Back at its session in 2004, the Commission on Human Rights appreciated the UN-Norms as containing "useful elements and ideas", but it also made very clear that it was only a draft and therefore had no legal standing.<sup>132</sup> One year later, the Commission decided to further examine the subject of businesses and human rights by requesting the appointment of a Special Representative.<sup>133</sup>

#### b. Content of the UN-Norms<sup>134</sup>

The UN-Norms suggest a "shared responsibility" of states and TNCs or other business enterprises with regard to human rights. The idea was to close the gap that exists if only states are under an international obligation. The preamble speaks of "the States" as bearing the "primary re-

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Review of the 60th Session of the Commission on Human Rights", *The International Journal of Human Rights* 9 (2005), 125 et seq. (138).

<sup>129</sup> Doc. E/CN.4/2005/91 of 15 February 2005, para. 2.

<sup>130</sup> *Ibid.*, para. 19.

<sup>131</sup> *Ibid.*, para. 52 (d).

<sup>132</sup> UNCHR Resolution 2004/116 of 20 April 2004. see also Ghanea/ Rahmani, see note 128, 138: "The Commission uses strong language in stating that the draft proposal was not requested, that it has no legal standing and that the Sub-Commission should not perform any monitoring function in this regard."

<sup>133</sup> UNCHR Res. 2005/69 of 20 April 2005, Doc. E/CN.4/RES/2005/69.

<sup>134</sup> For a further detailed illustration of the content, see Backer, see note 31, 142 et seq.

sponsibility” in respect of human rights, and, in the same sentence, mentions corporations to be “also responsible” for human rights. Thus the term “responsibility” is used for both states and corporations alike even though normally only states are legally bound by international law whereas corporations are only bound if international law is transformed into national law and if the provisions are self-executing and horizontally applicable. This idea is repeated right at the beginning of the UN-Norms, in the general obligations which read as follows,

“States have the primary *responsibility* to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the *obligation* to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”<sup>135</sup>

This quotation is perceived to be the guideline for the understanding of the UN-Norms.<sup>136</sup> The “obligations” (a term which even sounds stricter than “responsibility”) of TNCs are quite far-reaching, embracing not only restraint from violating activities, but also the proactive use of their influence for the promotion of human rights.<sup>137</sup>

The following obligations are nearly all put in the wording: “TNCs ... shall/shall not ...”. Thus the norms form a catalogue of obligations for corporations and states in that they are asked to provide the “necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented” by corporations (para. 17).

The list of the particular obligations of corporations starts with the general right to non-discrimination (para. 2). This is followed by rights concerning the security of persons, primarily the prohibition of engaging in international crimes (para. 3). Also the security of persons is in danger when states conclude security arrangements with companies. Those agreements shall be in accordance with international human

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<sup>135</sup> Doc. E/CN.4/Sub.2/2003/12/Rev. 2 of 26 August 2003, para. 1, emphasis added.

<sup>136</sup> *Ibid.*, commentary.

<sup>137</sup> *Ibid.*



rights law as well as the national laws and professional standards (para. 4). The commentary further explains that those agreements “shall not be used for activities that are exclusively the responsibility of the State military or law enforcement services.” Also the principle of proportionality is to be observed when it comes to the use of force by security personnel.

After this section on the security of persons, follows a listing of the rights of workers. The UN-Norms prohibit forced or compulsory labor (para. 5) as well as child labor (para. 6). They oblige businesses to provide a safe and healthy working environment (para. 7) as well as a remuneration that ensures an adequate standard of living (para. 8). The last worker-right concerns the freedom of association and the right to collective bargaining (para. 9). Here companies are requested to grant not only more rights than the state has enacted, but also to protect employees “from procedures in countries that do not fully implement international standards” regarding these freedoms.<sup>138</sup> With this the UN-Norms go beyond a mere responsibility of companies for their own acts but ask them to be a pioneer for human rights where a state fails to implement these standards. It is commendable if companies play this role, but it seems to overshoot the mark if they are legally obliged to do so.

A further section of the UN-Norms deals with the respect for national sovereignty and human rights. Very broadly, corporations are asked to,

“*recognize and respect* applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate” (para. 10, emphasis added). At first glance this norm looks like a very expansive obligation as it refers, *inter alia*, to all applicable norms of international law. But the wording “recognize and respect” could also mean a limited scope in comparison to the phrase “obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights” as used in para. 1. The official commentary on para. 10 especially emphasizes the duty to respect, but in respect of intellectual property rights the commentary additionally speaks of the duty to “protect and apply” these rights. Thus there is much room for interpretation as to the scope of this norm. The duty to respect economic, social

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<sup>138</sup> Ibid., para. 9, commentary (e).

and cultural rights as well as civil and political rights is contained in a further norm (para. 12). The official commentary on para. 12 especially highlights the right to health, food, water and housing. Furthermore, the UN-Norms address the issue of bribery (para. 11).

Also the UN-Norms contain obligations regarding consumer protection (para. 13). The last obligations concern environmental protection. The duties of corporations exceed the fulfillment of national laws as they are also asked to act in accordance with international law as well. Thus even where national standards are poor, corporations shall uphold the higher international standards.

The UN-Norms not only give a list of different obligations, but they further embrace general provisions of their implementation. In so doing, the UN-Norms want to avoid having an agreement regarding high standards that lack any practical consequences. Primarily, the UN-Norms deal with the implementation by corporations before they move on to the implementation via states and intergovernmental bodies or even other actors.<sup>139</sup> The norms embrace both direct and indirect ways of implementing the obligations.<sup>140</sup>

To begin with, business enterprises “shall adopt, disseminate and implement internal rules of operation in compliance with the Norms” (para. 15). Additionally, corporations are asked to give periodic reports on the implementation and to take “other measures” to fully implement them. Thus corporations shall set up rules and train their managers and workers correspondingly. Furthermore, the UN-Norms state that corporations “shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created” (para. 16). The official commentary explains that the UN human rights treaty bodies should supervise the implementation of the UN-Norms in a threefold way: they should establish “additional reporting requirements for States”, they shall give General Comments as well as recommendations how to understand the treaty obligations. Also the commentary states that corporations should create a mechanism for workers to lodge a complaint in cases of alleged

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<sup>139</sup> For the implementation compare, D. Weissbrodt/ M. Kruger, “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights”, *AJIL* 97 (2003), 901 et seq. (915 et seq.).

<sup>140</sup> T.M. Schmidt, “Transnational corporate responsibility for international environmental and human rights violations”, *Cal. W. Int’l L. J.* 36 (2005), 217 et seq. (237).

violations of the UN-Norms. Furthermore corporations are encouraged to give periodic assessments. A subsequent paragraph focuses on the states' duty and thus provides that,

“States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.” (para. 17)

Finally, the UN-Norms address the topic of damages and provide for reparation, restitution, compensation and rehabilitation on the level of the corporations as well as – especially regarding criminal sanctions – on the level of national courts and/or international tribunals (para. 18).

### c. Assessment of the UN-Norms

The UN-Norms were met with a divided response. The supportive voices came primarily from NGOs, but also from states, businesses and even academics.<sup>141</sup> For example, Amnesty International highlighted the UN-Norms in comparison to the OECD Guidelines, the ILO Tripartite Declaration and the Global Compact as “the most comprehensive statement of standards and rules relevant to companies in relation to human rights.”<sup>142</sup> Amnesty International also saw the obligations of states and companies to be in a proper balance. Another appreciating press release was given by the Business Leaders Initiative On Human Rights (BLIHR). The UN-Norms were recognized as an “important contribution” and the promise to consider them for their own work was given.<sup>143</sup> Other positive reactions stress that the UN-Norms would help to “identify the responsibilities of business in relation to specific human rights”<sup>144</sup> and that the Norms help to fill in the gap that arises where a state does not want or is not able to sufficiently protect human

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<sup>141</sup> Doc. E/CN.4/2005/91 of 15 February 2005, para. 19; Kinley/ Chambers, see note 36, 457 et seq.; see further: International Network for Economic, Social & Cultural Rights UN Human Rights Norms for Business: Briefing Kit of January 2005, <[http://www.choike.org/documentos/normas\\_onu\\_dhheng.pdf](http://www.choike.org/documentos/normas_onu_dhheng.pdf)>.

<sup>142</sup> Amnesty International, AI Index: POL 34/006/2004 of 29 September 2004, para. 4.

<sup>143</sup> BLIHR press release of 9 December 2003, “Defining a role for business in human rights: Business Leaders announce a three-year initiative.”

<sup>144</sup> Doc. E/CN.4/2005/91 of 15 February 2005, para. 21 (b).

rights.<sup>145</sup> Also it is emphasized that the UN-Norms address the issue of a remedy in cases of human rights violation.<sup>146</sup>

One of the critical voices came from the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE),

“If put into effect, it will undermine human rights, the business sector of society, and the right to development.”<sup>147</sup>

The response of the ICC/IOE deals with many different aspects. First, they argue that only states are the addressees of international human rights duties and not private persons. “Only States have legal obligations ... only a State can violate human rights.”<sup>148</sup> However, the ICC/IOE acknowledge that the state has to enact national laws in order to fulfill its international obligations.<sup>149</sup> “But the private person’s breaking of a national law is not a ‘human rights violation’: it is a state law violation.”<sup>150</sup>

Saying this, the ICC/IOE reject all tendencies considering TNCs as (partial) subjects of international law. Therefore the ICC/IOE blame the Sub-Commission for having “misrepresented” human rights law and that the Sub-Commission would have “by its own authority ... changed international law.”<sup>151</sup> Moreover, the ICC/IOE object the UN-Norms as being too vague and arbitrary.<sup>152</sup> Taking these thoughts together, the ICC/IOE point to the fact that private entities as addressees of duties will gain the power to determine the meaning of their vague content which would normally be in the authority of the state.<sup>153</sup>

The UN Special Representative on the issue of human rights and TNCs and other business enterprises (*John Ruggie*)<sup>154</sup> also criticized

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<sup>145</sup> Ibid., para. 21 (g).

<sup>146</sup> Ibid., para. 21 (i).

<sup>147</sup> ICC and IOE, The Sub-Commission’s Draft Norms, March 2004.

<sup>148</sup> Ibid., 3.

<sup>149</sup> Ibid., 4.

<sup>150</sup> Ibid., 5.

<sup>151</sup> Ibid., 18.

<sup>152</sup> Ibid., 20.

<sup>153</sup> Ibid., 23. But the ICC/IOE fail to notice that the interpretation of international law does not necessarily lie in the exclusive authority of the States. Rather, on several occasions, treaty bodies and international courts and tribunals engage in the interpretation of treaty law as well.

<sup>154</sup> See below under Part V.

the UN-Norms quite harshly. In his words, “the Norms exercise became engulfed by its own doctrinal excesses” and they contain “exaggerated legal claims and conceptual ambiguities.”<sup>155</sup> The Special Representative pointed to the fact that there is a contradiction if the UN-Norms on the one hand claim to only display established international legal principles and on the other hand create “non-voluntary” obligations that are directly binding on corporations to a certain degree.<sup>156</sup> The extension of state-based human rights obligations to corporations “has little authoritative basis in international law – hard, soft or otherwise.”<sup>157</sup> Furthermore, the UN Special Representative points to the dubious co-mingling<sup>158</sup> of obligations of states and obligations of businesses. “By their very nature ... corporations do not have a general role in relation to human rights like states, but a specialized one.”<sup>159</sup> The UN-Norms fail to establish a distinction according to the different social roles that states and corporations have. In the end the UN-Norms confer even more duties on corporations than on states because they embrace even treaty-law which is not binding on all states or norms which are not part of a treaty at all. This mixture of duties between states and corporations invites “endless strategic gaming.”<sup>160</sup> Corporations are not democratic entities and thus their duties should not be confused with those of states.

Other critical voices<sup>161</sup> also stress that the approach of the UN-Norms is too negative towards corporations while in fact there are many positive impacts of business. They further accuse the UN-Norms of exceeding the obligations of states in that corporations shall be on duty even where the host-state is not internationally bound. States would become less burdened to implement human rights.

To sum up, the critical points brought forward are quite convincing. Furthermore, if the UN-Norms became a binding treaty, it seems that it would not be possible anymore to argue that TNCs are not subjects of international law.<sup>162</sup> “The de facto assertion of power by TNCs is used

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<sup>155</sup> Doc. E/CN.4/2006/97 of 22 February 2006, para. 59.

<sup>156</sup> *Ibid.*, para. 60; compare also Backer, see note 31, 179.

<sup>157</sup> *Ibid.*, para. 60.

<sup>158</sup> Doc. A/HRC/11/13 of 22 April 2009, para. 58.

<sup>159</sup> Doc. E/CN.4/2006/97 of 22 February 2006, para. 66.

<sup>160</sup> *Ibid.*, para. 68.

<sup>161</sup> Summary given in Doc. E/CN.4/2005/91 of 15 February 2005, para. 20.

<sup>162</sup> Nowrot, see note 116, 26. For the debate about the human rights obligations of corporations as non-state actors during the drafting procedure

as the basis for extending their *de jure* authority into areas usually reserved for state power alone.<sup>163</sup> This is not what states agree on today,<sup>164</sup> although there have been developments in this direction over the last decades.<sup>165</sup> It is very questionable whether one should substantiate the factual and political power of TNCs with a legal one. This empowering could imply the danger that TNCs themselves will begin to decide on their obligations towards human rights. Additionally, it is questionable whether this *de-facto* replacement of parts of domestic corporate law by international law will satisfy the requirements of a democratic legislature.<sup>166</sup> These concerns would even remain if the states agreed to the UN-Norms as binding treaty because of their far-reaching impact.

The future impact of the UN-Norms is not quite clear. They aspire to establish a binding framework and thus exceed the voluntary ILO Tripartite Declaration and the UN-Global Compact.<sup>167</sup> But to date they do not have the status of any binding treaty nor do they form part of customary international law<sup>168</sup> and their place between other soft-law mechanisms is not entirely clear. Even if the Commission on Human Rights or the Human Rights Council had adopted the UN-Norms,

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compare, C. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", *German Law Journal* 4 (2003), 1065 et seq. (1070 et seq.); Backer, see note 31, 176.

<sup>163</sup> Backer, see note 31, 176.

<sup>164</sup> Kirchner, see note 2, 91: "For the time being, though, TNCs neither have the status nor the obligations under international law which would be adequate given their factual economic power." (but see also his "communication approach" above note 37); R. Schwartmann, *Private im Wirtschafts-völkerrecht*, 2005, 454.

<sup>165</sup> For a dissenting opinion see Kinley/ Chambers, see note 36, 479: "It is only through the behaviour of the principal actors, states, that we can establish which entities have legal personality. The behaviour of states in respect of TNCs indicates, at the very least, an emerging recognition of their legal personality."

<sup>166</sup> Backer, see note 31, 164: "... it reflects a clever idea: assert the autonomy and supremacy of international law over domestic law by imposing international law standards through private law, thereby making state acceptance of those standards less relevant to implementation."

<sup>167</sup> Weissbrodt/ Kruger, see note 139, 913.

<sup>168</sup> Kinley/ Chambers, see note 36, 482, who also emphasize that this does not exclude that some Norms in their respect to states might display existing treaty-law or customary international law.

they would not have the legal character of a binding treaty.<sup>169</sup> Amnesty International assumed that these Norms could be a “catalyst for national legal reform” as well as a “benchmark to judge the adequacy of national law and regulations.”<sup>170</sup> These effects would have to be assessed, but they do not display the original conception of the UN-Norms as binding TNCs independent of states and their commitment to these Norms. As long as they are neither transferred to a binding treaty nor “hardened” into customary international law nor placed into the setting of another broader soft-law initiative, they will have only indirect effect influencing the further developments in this area on the national and international level. Thus they might be referred to as means interpreting binding treaty law even though not in a formal sense.<sup>171</sup> Whether the UN-Norms will gain even more impact in the future, for example, by being adopted as a General Assembly Resolution or by moving on to become customary international law,<sup>172</sup> cannot be foreseen today. Yet for the latter, there is a long way to go and despite many writers dwelling on this eventuality of becoming part of customary international law, it should be borne in mind that the norms put forward a new legal attitude towards corporations which will not be easily adopted by the state practice and *opinio iuris* of states. It even seems that for this new category of international law, the practice and *opinio iuris* of TNCs should also be claimed.

## V. Developing a New UN-Framework – The UN Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (2005-2011)

### 1. Appointment of the Special Representative

The setback that the UN-Norms suffered at the intergovernmental stage was at the same time the birth of a new means to elaborate further

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<sup>169</sup> Kinley/ Chambers, see note 36, 483.

<sup>170</sup> Amnesty International, see note 142, para. 4.

<sup>171</sup> Kinley/ Chambers, see note 36, 485.

<sup>172</sup> Schmidt, see note 140, 240.

on this controversial topic.<sup>173</sup> In February 2005 the OHCHR identified in its report the need for further consideration and a more detailed study of several issues.<sup>174</sup> In July 2005, the Secretary-General appointed Mr. *John Ruggie* (United States of America) as Special Representative on human rights and transnational corporations and other business enterprises. Thus it was again under Kofi Annan, that a new track of examining the relationship of human rights and TNCs was initiated.

The strength of the appointment of a Special Representative lies in its independence from other UN-organs and in its potential to profoundly analyze problems. Thus *John Ruggie* could combine academic research, extensive consultations and broad empirical studies while enjoying the standing and respect of his highly esteemed position which opened many doors.

## 2. Initial Mandate: Establishing the “Protect, Respect and Remedy” - Framework

His first mandate lasted from 2005 to 2008 and goes back to a Resolution of the United Nations Commission on Human Rights.<sup>175</sup> In this resolution the requested mandate was described as follows,

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<sup>173</sup> Business & Human Rights Resource Centre, UN Secretary-General’s Special Representative on Business & Human Rights, Introduction by the Special Representative to his work, <<http://www.business-humanrights.org/SpecialRepPortal/Home/Introduction>>.

<sup>174</sup> Doc. E/CN.4/2005/91 of 15 February 2005, para. 52 (e): “The principal issues that would benefit from further clarification and research include the concepts of ‘sphere of influence’ and ‘complicity’; the nature of positive responsibilities on business to ‘support’ human rights; the human rights responsibilities of business in relation to their subsidiaries and supply chain; questions relating to jurisdiction and protection of human rights in situations where a State is unwilling or unable to protect human rights; sector specific studies identifying the different challenges faced by business from sector to sector; and situation specific studies, including the protection of human rights in conflict zones.”

<sup>175</sup> UNCHR Resolution 2005/69 of 20 April 2005, Doc. E/CN.4/RES/2005/69. Votes against this resolution came from the United States and Australia as they refused any international binding code of human rights for TNCs, while South Africa’s vote against the resolution was due to its desire for a stronger mechanism.



(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence;”

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises;”

Furthermore, the resolution asked the Special Representative explicitly to consult all stakeholders, namely the Global Compact, international and regional organizations as well as other UN initiatives. By this means the Special Representative can profit from and be a link to these different stakeholders.

During this initial mandate, the Special Representative reported three times to the Commission on Human Rights and then to the Human Rights Council. The interim report of February 2006<sup>176</sup> to the Commission on Human Rights starts with a short analysis of the changes that globalization brought about. He recalls the fact that in 1945 “States were the sole international decision-makers of any significance,”<sup>177</sup> so that the UN established a “State-based international order.” This has changed radically, especially from an economical point of view.<sup>178</sup> The Special Representative shows a business-friendly attitude already in this first report: “economic development, coupled with the rule of law, is the best guarantor of the entire spectrum of human rights.”<sup>179</sup> He goes on to differentiate between different industry sectors and their inclination to neglect basic rights. Then he analyzes how the social-political context is a decisive marker for the infringement of human rights. He states that due to the lack of effective public institu-

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<sup>176</sup> Doc. E/CN.4/2006/97 of 22 February 2006.

<sup>177</sup> *Ibid.*, para. 9.

<sup>178</sup> *Ibid.*, para. 10.

<sup>179</sup> *Ibid.*, para. 21.

tions in some countries, responsible TNCs might undertake some part in governmental operations. Others, however, would take advantage of their influential and powerful position.<sup>180</sup>

The second (interim) report was given one year later to the Human Rights Council in February 2007.<sup>181</sup> In this report the Special Representative dwells on five subjects: (1) the State Duty to Protect, (2) Corporate Responsibility and Accountability for International Crimes, (3) Corporate Responsibility for Other Human Rights Violations under International Law, (4) Soft Law Mechanisms, and (5) Self-Regulation.

The states' duty to protect against human rights abuses by third parties is vital in the concept of international law as put forward by *John Ruggie*. From a legal perspective, states are still the main players in international law. Both the core human rights treaties and customary international law not only oblige states to respect the given rights, but also to protect their citizens from a third party's abuse. A key issue is the topic of extraterritorial jurisdiction. The report states that the question whether the protection of human rights allows for extraterritorial jurisdiction is not solved yet.<sup>182</sup>

Even if it comes to corporate responsibility and accountability for international crimes, the report shows that any criminal or civil liability takes place mainly at the national level because the ICC has no jurisdiction over corporations.<sup>183</sup> As to the question of corporations being subjects of international law, the report does not clearly favor any answer. But it seems that the report follows a traditional legal approach. It does not assume direct responsibility of corporations for human rights violations under international law.<sup>184</sup> The report then turns to the soft law mechanisms and examines different non-binding obligations such as the ILO Tripartite Declaration and the OECD Guidelines. It concludes that these different soft-law mechanisms, which aim at holding corporations accountable, are preparing the way for binding norms. Finally, the report deals with self-regulation. Those regulations are imposed by the corporations themselves in order to meet the expectations of consumers, civil society and local communities.

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<sup>180</sup> Ibid., para. 29.

<sup>181</sup> Doc. A/HRC/4/35 of 19 February 2007 (advance edited version).

<sup>182</sup> Ibid., para. 15.

<sup>183</sup> Ibid., paras 15-32.

<sup>184</sup> Ibid., para. 44.

After these two interim reports, the final report was given in April 2008.<sup>185</sup> Here the three-pillar-concept (also called UN-framework) “protect, respect and remedy” is fully displayed. Thus *Ruggie* identifies (1) a State duty to protect against human rights abuses by third parties, (2) a corporate responsibility to respect and (3) the need for access to remedies.<sup>186</sup> Knowing that his concept will not solve the whole problem, he acknowledges, “There is no single silver bullet solution to the institutional misalignments in the business and human rights domain.”<sup>187</sup> In a way some passages read as if the report wants to apologize for not giving the one solution; for example, it recalls that international law is not adapted to the “complexities and dynamics of globalization.”<sup>188</sup> Globalization has not yet been accompanied by necessary national and international legal changes. One handicap is the legal construction according to which a parent company is legally distinct from its subsidiaries and cannot, as a rule, be held responsible for the acts and omissions of the subsidiary.<sup>189</sup>

The report sees the three pillars as a “complementary whole”. In a nutshell, the importance of these three elements is put in the following words,

“the State duty to protect ... lies at the very core of the international human rights regime; the corporate responsibility to respect ... is the basic expectation society has of business; and access to remedy [is vital], because even the most concerted efforts cannot prevent all abuse.”<sup>190</sup>

The three pillars are not isolated from one another, but are in their distinctiveness at the same time complementary. The 2008-report holds, according to its more traditional approach, that the states are to be pri-

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<sup>185</sup> Doc. A/HRC/8/5 of 7 April 2008.

<sup>186</sup> As shaped through the following Report, the formula reads today: “The State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.” (Doc. A/HRC/14/27 of 9 April 2010, para. 1).

<sup>187</sup> Doc. A/HRC/8/5 of 7 April 2008, para. 7.

<sup>188</sup> *Ibid.*, para. 10.

<sup>189</sup> *Ibid.*, para. 13.

<sup>190</sup> *Ibid.*, para. 9.

marily responsible.<sup>191</sup> States are aware of their duty to protect, but they have often not grasped the “diverse array of policy domains” through which they could implement their duties.<sup>192</sup> Measures that could be taken range from establishing a corporate criminal accountability to better co-operation on the international level. However, some of the suggestions remain very vague and do more to display the problem than to give any guidance.<sup>193</sup> Turning to the second principle, the corporate responsibility to respect, one has to bear in mind that *Ruggie’s* mandate followed the lack of intergovernmental acceptance for the UN-Norms. This might be one reason for his quite careful approach to any corporate norms. The term “responsibility” falls short of a “duty” and refers to non-binding instruments<sup>194</sup> – this use of the language differs from the UN-Norms which describe with the term “responsibility” the binding duty of states. The corporate responsibility to respect embraces soft law (such as the Tripartite Declaration), as well as any other commitments undertaken due to social expectations. Against the background of the UN-Norms, the report dismisses the idea of a “limited set of rights” for which corporations are responsible as well as “primary” obligations of states versus “secondary” obligations of corporations.<sup>195</sup> Corporations shall respect human rights as given in the international bill of human rights or the relevant ILO-conventions, even though they are not formally bound by them. This means that corporations have to adopt due diligence practices in order not to infringe these human rights. Thus to respect human rights is not merely passive, but involves an active part.<sup>196</sup> The report goes on, according to the mandate as set out above, to differentiate between the “sphere of influence” and “complicity” of corporations.<sup>197</sup>

Finally, the report turns to the access to remedies. This pillar of the concept helps to give effect to both the first and second concept. Remedies can be either non-judicial or judicial, state-based or non-state-

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<sup>191</sup> *Ibid.*, para. 50: “The human rights regime rests upon the bedrock role of States. That is why the duty to protect is a core principle ...”.

<sup>192</sup> Doc. A/HRC/8/5, see note 187, para. 27.

<sup>193</sup> For example, para. 38 where the states and other actors are asked to “work towards developing better means to balance investor interests and the needs of host States to discharge their human rights obligations.”

<sup>194</sup> Doc. A/HRC/8/5, see note 187, para. 23.

<sup>195</sup> *Ibid.*, paras 51 et seq.

<sup>196</sup> For more details of this active part, *ibid.*, para. 59 et seq.

<sup>197</sup> *Ibid.*, paras 65 et seq.

based. The Special Representative finds these mechanisms to be insufficient and identifies the need for action as well for a single remedy as for the whole concept.<sup>198</sup> The 2008-report concludes with a statement that is self-evident and at the same time crucial for the question of what the UN can do to improve the situation,

“The United Nations is not a centralized command-and-control system that can impose its will on the world – indeed it has no ‘will’ apart from that with which Member States endow it. But it can and must lead intellectually and by setting expectations and aspirations.”<sup>199</sup>

This shows the frame of what the UN can accomplish. The UN cannot enact any binding regulations, the states themselves must act. But the UN can intellectually lead the states, offer visions and elaborate ways states could go.

### 3. Extension of the Mandate: Identifying Practical Ways for the “Protect, Respect and Remedy” - Framework

In 2008 the mandate was extended until 2011 by the Human Rights Council.<sup>200</sup> In its resolution the Council very much appreciated the work of the Special Representative and his “comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions”. The Council agreed in its resolution with *Ruggie* “stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the state”. TNCs are said to have – just in line with *Ruggie* – a “responsibility to respect human rights.” Thus the Human Rights Council shares the view that international law is legally binding only on states which leads to the problem of “weak national legislation and implementation” which “cannot effectively mitigate the negative impact of globalization on vulnerable economies.” The Human Rights Council unanimously approved the “protect, respect and remedy” approach. The new mandate of the Special Representative builds on the findings of the given reports and asks him to provide practical steps for the three-pillar-policy framework.

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<sup>198</sup> Ibid., para. 87.

<sup>199</sup> Ibid., para. 107.

<sup>200</sup> Human Rights Council Resolution 8/7 (2008).

The report of the Special Representative given in April 2009 was published under the impact of the economic crisis.<sup>201</sup> The report further elaborates on the “protect, respect and remedy” policy framework. As to the state duty to protect, it states that this duty refers to “a standard of conduct, and not a standard of result.”<sup>202</sup> This means that the states cannot be blamed for the fact that a corporation violated a concrete human right, but the state can be held responsible for its failure “to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.”<sup>203</sup> The special problems of TNCs are their extraterritorial branches. But exactly this extraterritorial part of the “duty to protect” is still unclear. The 2009-report holds in line with prior reports that “States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met.”<sup>204</sup> However, the CESCR has encouraged home states to take on legal or political means to prevent infringements by subsidiaries and to establish extraterritorial liability.<sup>205</sup> The 2009-report of the Special Representative further examines how states should fulfill their duty to protect and in this regard addresses the need to change national corporate law.<sup>206</sup> Here the insufficiencies are grounded in the fact that traditionally corporate law and human rights law are two different branches which are not closely related to one another. But there are examples of changes to this traditional separation. The report gives “best practices” of improvements in this area and points to new legal developments in different national laws. In addition to an improvement of their corporate law, states are asked to change their practice of investment agreements. Those agreements are concluded between home-states and host-states in order to

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<sup>201</sup> Doc. A/HRC/11/13 of 22 April 2009.

<sup>202</sup> *Ibid.*, para. 14.

<sup>203</sup> *Ibid.*, para. 14.

<sup>204</sup> *Ibid.*, para. 15.

<sup>205</sup> Most recently CESCR, Doc. E/C.12/GC/19 (2008) of 4 February 2008, General Comment No. 19, para. 54 “States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.”

<sup>206</sup> A/HRC/11/13, see note 201, paras 24 et seq.

minimize certain risks for the foreign investor. Yet in the past, there have been treaty clauses which impeded the host-state's legitimate policy objectives, such as the implementation of human rights obligations.<sup>207</sup> Therefore, the report points to a Norwegian draft model bilateral investment treaty (BIT) which was made public in December 2007 and tries to better balance the protection of investors with the public goods of the host-state.<sup>208</sup> Yet this example is already out-dated as Norway has given up this draft model. There were critics from both sides, civil society claiming that the protection of investors would impair legitimate interests of the host-states and other groups that held the protection of the investor to be insufficient.<sup>209</sup> The 2009-report then examines how international cooperation could help the states to better fulfill their duty to protect. In the understanding of the Special Representative, this means "States working together through awareness-raising, capacity-building and joint problem-solving."<sup>210</sup> These efforts are not limited to initiatives by the UN. States' cooperation is most needed in conflict situations such as civil war. Typically in these conflict settings the most serious human rights abuses by corporations are taking place.

The 2009-report further elaborates on the corporate responsibility to respect. Again the Special Representative emphasizes that corporations – apart from binding national law – only have the responsibility to obey "social norms". But this "social license", as he calls it, could be decisive for the success of the business. Yet the Special Representative does not provide concrete steps and guidance to the business in the 2009-report. He only gives more details on how to understand this concept of corporate responsibility to respect. Thus he points to the problem that human-rights-treaties are "written by States, for States."<sup>211</sup> This makes it difficult for corporations to understand them and to apply these rights to their company. The OHCHR has pushed the development in this area with a publication that "translates" these

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<sup>207</sup> Ibid., para. 30.

<sup>208</sup> The BIT and the Commentary on the BIT can be downloaded via Investment Treaty Arbitration, <<http://ita.law.uvic.ca/investmenttreaties.htm>>.

<sup>209</sup> Investment Treaty News (ITN), published by the International Institute for Sustainable Development, <<http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>>.

<sup>210</sup> Doc. A/HRC/11/13, see note 201, para. 38.

<sup>211</sup> Ibid., para. 57.

rights into a business context.<sup>212</sup> The report also mentions the dilemma of different standards in national and international law. This concerns, above all, the freedom of association, gender equality, freedom of expression and – with a view to the internet and telecommunication – the right to privacy.

Addressing the third pillar “access to remedy”, the 2009-report identifies a substantive need for action. Even though there is a “State obligation to provide access to remedy” there is not yet laid down a corresponding “individual right to remedy” in many human rights conventions.<sup>213</sup> Also the international law is not entirely clear on the question of whether national law should establish litigation for corporate entities (and not only managers acting on behalf of the corporation) and whether states have the obligation to implement overseas liability. The first Addendum of the 2009-report dwells on these legally and politically important questions regarding how far the states are obliged to grant access to remedy in cases of infringement of rights by non-state parties.<sup>214</sup> Remedy also involves non-judicial mechanisms. Those can be found on the company level, national level and international level. Non-judicial mechanisms on the international level are integrated into some voluntary initiatives, but often they are not realized. Therefore the Special Representative launched a new website: Business and Society Exploring Solutions – A Dispute Resolution Community.<sup>215</sup> In cases of disputes between a company and its external stakeholders this internet platform offers information on how to settle the differences in a non-judicial way. With this, the Special Representative made an effective contribution of giving effect to voluntary based initiatives.

The most recent report of the Special Representative was given in April 2010.<sup>216</sup> This report dwells on how to further operationalize and promote the three-pillar-framework and it prepares the final set of guiding principles which will stand at the conclusion of the Special Representatives’ mandate in 2011. The 2010-report recalls the initial idea of “principled pragmatism” which means that the approach is not

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<sup>212</sup> Castan Centre for Human Rights Law, International Business Leaders Forum, and Office of the United Nations High Commissioner for Human Rights, *Human Rights Translated. A Business Reference Guide*, 2008.

<sup>213</sup> Doc. A/HRC/11/13, see note 201, para. 88. But see also A/RES/60/147 of 21 March 2006, principle 3 c.

<sup>214</sup> Doc. A/HRC/11/13/Add.1 of 15 May 2009.

<sup>215</sup> <<http://baseswiki.org>>.

<sup>216</sup> Doc. A/HRC/14/27 of 9 April 2010.



merely academic (upholding human rights in principle), but also pragmatic with a clear view to what works best. For that reason, the Special Representative has collected rich material from research, consultations and practical experiments.<sup>217</sup> The strategy was to embrace different stakeholders and to test the new framework.

In his 2010-report, the Special Representative once more stresses the “primary role” that states have in respect to human rights and business and identifies the states’ insufficient “policies and regulatory arrangements” in order to manage the complex relation of business and human rights.<sup>218</sup> One predominant problem is the omission to enforce existing laws. Often public departments and agencies, responsible for different aspects of business such as corporate law, investment and insurance, are not working together, but in isolation from one another. In light of this, the Special Representative recognizes five “priority areas through which States should strive to achieve greater policy coherence and effectiveness as part of their duty to protect.”<sup>219</sup>

(1) Safeguarding the ability to protect human rights. A great effort would be made if bilateral investment treaties were reviewed in such a manner that human rights policies of the host-state are enabled. Also contracts between host-states and foreign investors should not make exemptions from new social or environmental laws (“stabilization clauses”).

(2) Doing business with business. In cases, where states are owners of business, they can serve as a good example in their recognition of human rights. Also, if states enter into a contract with non-State-corporations, they can choose to only make a deal with corporations that aim at observing human rights.

(3) Fostering rights-respecting corporate cultures. This includes that states should refer to international human rights standards when they establish Corporate Social Responsibility (CSR) guidelines. Also the report strongly encourages CSR reporting policies.

(4) Conflict-affected areas. In these areas human rights are typically very poor and governments are asked to provide information so that reputable corporations do not unintentionally take part in abuses committed by others.

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<sup>217</sup> Doc. A/HRC/14/27, see note 216, paras 7 et seq.

<sup>218</sup> *Ibid.*, para. 18.

<sup>219</sup> *Ibid.*, para. 19 et seq.

(5) Extraterritorial jurisdiction. This last topic is very controversial and the report only gives rough ideas, while promising to further elaborate on these questions.

As for the “corporate responsibility to respect” the 2010-report again stresses that international human rights law currently does not impose direct obligations.<sup>220</sup> The Special Representative claims to offer a “strategic concept for addressing human rights systematically”<sup>221</sup> by giving a pathway as to how to avoid infringements of human rights. Key elements are the improvement of compliance with domestic laws as well as to create an awareness of where human rights are at risk (“due diligence process”). The exercise of “human rights due diligence” shall, in the perspective of the 2010-report, lead to more responsibility. Finally it shall be “a game-changer for companies: from ‘naming and shaming’ to ‘knowing and showing’.”<sup>222</sup>

The last pillar of the framework, access to remedy, is examined by providing information about company-level, state-based non-judicial, as well as judicial mechanisms, and collaborative and international mechanisms.<sup>223</sup> The 2010-report identifies significant gaps in all of these types of mechanisms to provide remedies in cases of infringements of human rights by corporations. In particular, as to the state-based “judicial mechanisms”, the 2010-report again highlights the difficulties concerning the liability of parent companies. Legal concepts of “negligence”, “complicity” or the concept of “agency” have enabled liability in some national jurisdictions, but many legal questions remain unclear to date.<sup>224</sup> Furthermore, problems relating to extraterritorial jurisdiction demand clarifying and a “principled approach” of the different domestic laws.<sup>225</sup> In addition to that, the 2010-report identifies practical obstacles as to the proper functioning of judicial mechanisms.

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<sup>220</sup> Ibid., para. 55.

<sup>221</sup> Ibid., para. 56.

<sup>222</sup> Ibid., para. 80. This is further explained: “Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights, Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence.”

<sup>223</sup> Doc. A/HRC/14/27, see note 216, paras 88 et seq.

<sup>224</sup> Ibid., para. 106.

<sup>225</sup> Ibid., para. 107.

#### 4. Assessment of the Mandate of the Special Representative

The work of the Special Representative has been appreciated by the Human Rights Council, many states, leading business entities as well as some NGOs. Yet it has also been criticized as not having brought any groundbreaking new ideas, and as being very state-oriented.<sup>226</sup> Some might blame the Special Representative for not being courageous enough as he did not identify binding duties for companies on the international level and did not make proposals in this direction. But as we have learned from the history of the UN-norms, despite globalization and despite TNCs being mighty global business players, states, as the most important subjects of international law, still favor a more traditional approach. Thus it is not astonishing that the reports of the Special Representative gained much affirmation by states as they fear that their sovereign rights would be damaged if companies were bound directly on international level.

The mandate of the Special Representative was and still is very helpful on the complex issue of TNCs and human rights. All his findings are firmly rooted in international law and are not mere political claims. They shed light on the many different and difficult problems going on with this issue. Of course, political claims and visions can foster the development of international law, but if they have no legal basis, they cannot achieve sustainable changes.

The focus on states should be appreciated as states should realize that they have a duty to protect and that this duty implies a range of different obligations up to the establishment of access to remedy.<sup>227</sup> With this, the Special Representative does not let TNCs off the hook. On the contrary, he insists on a comprehensive corporate responsibility to respect. These are the first steps to enforce those responsibilities on the basis of non-judicial mechanisms, but more importantly, civil society today carefully watches the behavior of TNCs and puts social pressure on them.

So, what did the Special Representative accomplish? He has identified a new workable framework which rests on the three said pillars.

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<sup>226</sup> N. Rosemann, "Zweiter Bericht von John Ruggie bleibt hinter den Erwartungen zurück", Informationsplattform humanrights.ch, 14 July 2009, <[http://www.humanrights.ch/home/de/Themendossiers/TNC/Na\\_chrichten/idart\\_5154-content.html?zur=404](http://www.humanrights.ch/home/de/Themendossiers/TNC/Na_chrichten/idart_5154-content.html?zur=404)>.

<sup>227</sup> Compare von Bernstorff, see note 54, elaborating on the responsibility of states in the context of human rights and TNCs.

This framework avoids a competition between states and TNCs, but allocates both of them broad and far-reaching homework. It is the basis upon which this field of business and human rights will be shaped in future. The impact that this will have for the future mainly depends on how this framework will be filled with concrete acts, initiatives and commitments.

## VI. Conclusion

The United Nations has gone different ways to regulate TNCs. In line with traditional international law, international conventions oblige states to control TNCs in several respects. While there is no single binding convention including a more or less comprehensive list of state duties in respect of TNCs, the state duties in respect of human rights (including social rights) and environmental standards are spread over a number of conventions. Yet international treaty law fails to adequately consider the globalized character of TNCs that are not subject to the jurisdiction of one sole state. Different legal drawbacks and the uncertain willingness of most states to effectively implement international obligations, have signaled the necessity of finding new approaches.

In particular, one early and more specific way to improve TNCs' consciousness of international human rights standards was the Tripartite Declaration of the ILO as a specialized agency of the UN. The Tripartite Declaration is distinct from mere inter-state-declarations in that apart from governments, employers and workers also have a say. This Declaration has had at least a reasonable impact for the further discussion and awareness of the problem on the international stage. Its soft law character does not automatically negate its actual influence. In addition, binding conventions also struggle with serious deficits in their enforcement machinery. Yet finally, the Tripartite Declaration largely remained a set of rules on paper that could not bring about the necessary changes.

Against the background of these insufficiencies, the UN initiated a truly new approach with the Global Compact. This is an interactive instrument to improve the adherence of TNCs to human rights and environmental standards. It is based on the communication of different stakeholders and can be characterized as a decentralized way to accomplish observance of the 10 principles. The Global Compact is not a vertical taming of TNCs, but rather a horizontal shaping of them. Yet there are considerable loopholes which enable companies to take part in

the Compact and at the same time fail to effectively foster essential changes. Thus the Compact is a necessary, but very insufficient means to make TNCs observe human rights standards and environmental norms.

If the UN-Norms had been adopted in form of a treaty, the lack of binding character of the Global Compact would have been compensated. But, at the same time, the UN-Norms would have considerably undermined essential pillars of international law by upgrading TNCs to the level of states and signaling the transformation of corporations from business-entities into political-entities.<sup>228</sup> Indeed, it cannot be excluded that international law might move in that direction in the future, thus reflecting a new world order. But in the view of the present author, this should not be the aim, and to date, the majority of states rejects the far-reaching implications that would come with the issuance of binding norms at the UN-level. It seems that the traditional international legal order that rests primarily on sovereign states, despite all its weaknesses, guarantees freedom and human rights more effectively compared with a conception of international law which is not based on these predominantly democratic<sup>229</sup> entities.

The unsatisfactory situation led to the appointment of the United Nations Special Representative to analyze the problem and develop further practical ways to go. Instead of providing broad visions, the Special Representative has built his three-pillar framework on the contemporary understanding of international law. This gave reason for criticism as he did not satisfy the expectations of some people to move towards a new world order. Nevertheless, it seems that the Special Representative fulfilled his role very well in light of the fact that he acts on behalf of the UN as an international organization based on the idea of sovereign member states. Accordingly, the Special Representative emphasizes the state duty to protect and thus clearly does not abdicate the states from their responsibilities. Even though the problem of TNCs cannot be

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<sup>228</sup> Backer, see note 31, 177: “The *Norms* effectively transform the corporation from an entity whose primary purpose is to maximize profits—that is, from a purely economic creature—into an entity whose principal purposes are encompassed in the great human rights treaty framework of the United Nations ...”.

<sup>229</sup> <[http://www.bpb.de/wissen/4D631K,0,0,Verbreitung\\_demokratischer\\_Staaten.html](http://www.bpb.de/wissen/4D631K,0,0,Verbreitung_demokratischer_Staaten.html)>. Bundeszentrale für politische Bildung, *Verbreitung demokratischer Staaten (in absoluten Zahlen und Anteil an allen Staaten von 1989 bis 2008)*.

solved on the national stage, it would be inadequate to shift it solely to the international arena and to expect the UN to develop a solution merely at the supra-national-level. Although or because the Special Representative did not create a “new international order” for business and human rights, his framework is increasingly accepted by governments, international organizations and business.<sup>230</sup> As a result, the Special Representative has been quite successful in strengthening the human rights with a view to business. Arguably, it is just because the Special Representative built his three-pillar concept on international law as it stands, that he could achieve more and could suggest improvements which in the end will result in a further development of human rights law.

As the Special Representative precisely put it, there is “no single silver bullet solution.” In other words, there have to be attempts from different stakeholders at different levels. Therefore, the existing approaches (such as binding conventions, soft law declarations and global networks) all make some contribution to solve the problems. It is not all about law and its enforcement, but also about communication between the different stakeholders and also about enhancing the awareness of businesses that exploitation of human and environmental resources will not pay in future. Healthy and stable conditions – politically, socially as well as environmentally – are the basis for a sustainable economy.

To sum up, the UN has launched several initiatives to “tame” TNCs, which will have to be better connected in the future as they are, so far, quite isolated from one another. The UN will have to further monitor the developments, to improve existing mechanisms and to think ahead for new options. The mandate of the Special Representative should be extended in some form in the future as his reports are an important “think tank”, as he communicates intensively with different stakeholders and identifies paths which rest on a necessary consensus to be practical. The Special Representative himself reminds us that “unless an advisory and capacity-building function is anchored firmly within the United Nations” all effort by the Special Representative as a “de facto United Nations focal point for business and human rights” will cease.<sup>231</sup>

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<sup>230</sup> A. Hughes/ R. Nicolson/ C. Shavin, *Focus: Latest UN report provides guidance on human rights for business*, May 2010, <[http://www.aar.com.au/pubs/ldr/foldrmay10\\_01.htm](http://www.aar.com.au/pubs/ldr/foldrmay10_01.htm)>.

<sup>231</sup> Doc. A/HRC/14/27, see note 216, para. 126.