

FUNDAMENTAL HUMAN RIGHTS OBLIGATIONS OF CORPORATIONS

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Abstract: Globalization has in last decades assumed a prominent position in the international trade and in contemporary societies worldwide. In this way, it has stirred a number of positive and negative developments in national and international environments. Globalization has been characterized by the rise of the economic, social and political power of corporations. This article argues that fundamental human rights obligations of corporations derive primarily from national legal orders and only secondarily from the international level, whereas both draw their foundations from a national and international value system. The tenets of every normative system are principles and rules that create rights and obligations of the subjects/participants of that system. Validity of any positive norm derives its legal authority from the membership in a legal order, which gives it a binding force. Legal authority means a source of law where a positive law norm is derived from. Legal scholarship has so far predominantly focused on international legal obligations of corporations. In contrast, the present paper argues that fundamental human rights obligations of corporations derive its legal authority from national normative orders and only secondary from international level. Finally, this paper argues that fundamental human rights obligations of corporations have arguably acquired the status of customary international law.

Keywords: corporate social responsibility, human rights and business, corporate responsibility for fundamental human rights, corporate human rights obligations, fundamental human rights,

OBVEZNOSTI PODJETIJ GLEDE TEMELJNIH ČLOVEŠKIH PRAVIC

Povzetek: Globalizacija je v zadnjih desetletjih zavzela pomembno vlogo v mednarodnem trgovanju in sodobnih družbah po vsem svetu. Tako je sprožila vrsto ugodnih in neugodnih razvojnih teženj v nacionalnih in meddržavnih okoljih. Značilnost globalizacije je tudi porast gospodarske, družbene in politične moči podjetij. V tem prispevku trdimo, da temeljne obveznosti glede človeških pravic izhajajo predvsem iz nacionalnih pravnih redov, le sekundarno pa tudi iz mednarodnega prava, pri čemer oba pravna reda temeljita na sistem vrednot, nacionalnih in mednarodnih. Podlage za vsak normativni sistem so načela in pravila, ki ustvarjajo pravice in dolžnosti udeležencev, podrejenih temu sistemu. Veljavnost vsake pozitivne norme ima pravno avtoriteto v članstvu v danem pravnem redu, ki mu daje moč obvezati. Pravna oblast pomeni izvor prava, iz katerega je izvedena pozitivna pravna norma. Pravna znanost se je doslej osredotočala predvsem na ne mednarodno pravne obveznosti podjetij. Nasprotno pa v tem prispevku trdimo, da temeljne obveznosti glede človeških pravic imajo svojo pravno moč na osnovi nacionalnih pravnih redov in le sekundarno na osnovi mednarodnega prava. Ob koncu trdimo v tem prispevku, da so temeljne obveznosti podjetij glede človeških pravic pridobile status običajnega mednarodnega prava.

Ključne besede: družbena odgovornost podjetij, človeške pravice in poslovanje, odgovornost podjetij glede temeljnih človeških pravic, obveznosti podjetij glede človeških pravic, temeljne človeške pravice

1. Introduction

Globalization has in last decades assumed a prominent position in the international trade and in contemporary societies worldwide. In this way, it has stirred a number of positive and negative developments in national and international environments. Globalization has been characterized by the rise of the economic, social and political power of corporations. These corporations, particularly transnational corporations appear to have benefited the most from the changed and interconnected world. When an individual's human rights have been violated by, or involving, corporations, she should have access to a court or quasi-judicial mechanism at the international level to enforce responsibility of the perpetrator and to remedy her violations.

Corporations account for 45 of the 100 largest economies in the world, and 91 of the 150 largest economies.ⁱ It appears that the precise scale of human rights violations by or involving corporations remains difficult to ascertain. In this regard, the UN Special Representative of the Secretary-General on the Issue of Human Rights of Transnational Corporations and Other Business Enterprises ("SRSG") found that the extractive sector—oil, gas and mining—dominates the account of reported abuses with two thirds of the total.ⁱⁱ The International Council on Mining and Metals notes 38 allegations against mining companies in 25 countries. The

Office of the UN High Commissioner for Human Rights reports more than 300 allegations of corporate human rights abuses from all industry.ⁱⁱⁱ The J. Ruggie Report observes that approximately 60 percent of reported cases accounts for direct forms of company involvement in the alleged violations, meaning that the company has allegedly committed violations through its own acts or omissions.

It may appear that in order to qualify as fundamental, a human rights norm must protect values transcending those of the national and international value systems, because its violation would result in so shocking a result as to be deemed as absolutely unacceptable by the national and international communities as a whole. In identifying the minimum fundamental human rights obligations of corporations, this section here distinguishes between three basic categories of rights. It proposes that fundamental human rights, which corporations are required to observe, can be catalogued in three groups, which include fundamental human rights preserving the security of persons, fundamental labour rights, and fundamental human rights preserving non-discrimination.^{iv} It must be noted, however, that the category of fundamental human rights suffers from inherent vagueness. The exact definition of what constitutes fundamental human right is difficult to pin down and variations occur in the literature.

Following this introduction, the bulk of this article argues that the fundamental human rights obligations of corporations derive primarily from national legal orders, secondarily and complementarily from the international legal system and thirdly from voluntary recognition of corporations themselves. In this way, it argues that corporations are required to observe fundamental human rights preserving the security of persons, fundamental labour rights, and fundamental human rights preserving non-discrimination.

2. Sources of the fundamental human rights obligations of corporations

This article argues that three levels of legal sources can be distinguished from where fundamental human rights obligations derive. First, it is submitted that fundamental human rights obligations derive from national legal orders. Second, the fundamental human rights obligations of corporations may derive from international level. Third, the fundamental human rights obligations of corporations may derive from unilateral voluntary commitments by the corporations themselves. In other words, this article argues that the fundamental human rights obligations of corporations derive primarily from national legal orders and only secondarily from the international level, whereas both draw their foundations from a national and international value system, which in turn derives from national legal orders. In addition, the voluntary commitments of corporations are identified as a third level of sources for the fundamental human rights obligations of corporations. It has to be noted that some legal differences between the three levels are also relevant. The third level obviously presents a source of distinct normative nature as it can not be equated with the normative levels of national legal orders and international legal order. In contrast, the relevance of distinguishing between the first two situations may be less obvious as many national rules derive their origins from the international legal order and vice versa. Nonetheless the distinction between national and international levels can be made and is also legally and practically relevant.

3. Sources of fundamental human rights obligations of corporations in national legal orders

This section argues that fundamental human rights obligations derive primarily from national legal orders. The tenets of every normative system are principles and rules that create the rights and obligations of the subjects/participants of that system. From a theoretical point of view, corporations are already subject to numerous legal regimes under national legal orders. Validity of any positive norm derives its legal authority from its membership in a legal order, which gives it a binding force. Legal authority means a source of law wherefrom a positive law norm is derived. Legal scholarship has so far predominantly focused on the international legal obligations of corporations.^v In contrast, the present article argues that the fundamental human rights obligations of corporations derive legal authority from national normative orders and only secondarily from the international level. Finally, this article argues that the fundamental human rights obligations of corporations have arguably acquired the status of customary international law.

In the absence of a clear and coherent articulation of the positive international fundamental human rights obligations of corporations, it appears necessary to first examine the sources of fundamental human rights obligations in national legal orders. The present study argues that national legal orders are rooted much deeper in a normative system than international law is. This is not different in relation to the fundamental human rights obligations of corporations. A number of international fundamental human rights contained in the various international human rights treaties, or developed through customary international law, are directly enshrined in the national legal orders of several countries. F. Viljoen notes that 'when states ratify human rights treaties, they undertake to domesticate and comply with their provisions'.^{vi} Having said that, it must be recognized that human rights protection was first developed in the domestic environments long before any international human rights treaty was adopted.^{vii} Domestic laws include protection for fundamental human rights that can be enforced against corporations.^{viii}

The fundamental human rights obligations of corporations derive, as noted, legal authority primarily from national legal orders.^{ix} In national legal orders, human rights obligations can be found in constitutions or under ordinary legislation, which are the main written sources of domestic positive law in most countries.^x In addition to this, there are unwritten sources of law, which are general principles enshrined in international law, customary law and case law. Sources of law in national legal orders are binding on all entities in that particular country, governing the legal situation of citizens and other entities (such as legal persons, business operators, associations, organizations) and they determine their rights and obligations of subjects of law in the national legal order. Consistency with the constitution of any particular law can be examined by constitutional courts or regular courts depending on the constitutional structure in the national legal order. Most constitutions include protections of the fundamental human rights preserving the security of a person, fundamental labour rights and non-discrimination. In other words, the fundamental human rights obligations of corporations within the various national legal orders can be readily identified in most instances. Domestic laws have existed in many states, which place fundamental human rights obligations on corporations, particularly in relation to fundamental human rights preserving the security of persons and fundamental labour values and those preserving non-discrimination.^{xi} Constitutions often play a seminal role in the protection of fundamental rights. Most commonly, all natural and legal persons must act in compliance with national constitution laws. Most national legal orders include protections of the fundamental human rights preserving the security of persons, fundamental labour rights and protection of non-discrimination. These rights can be arguably translated into fundamental human rights obligations of corporations. In other words, constitutional protections of fundamental human rights apply to both natural and legal persons. Thematically, the reach of fundamental human rights in national constitutions appears somehow restricted. Of course, the majority of European countries include fundamental human rights in their constitutions. In contrast, inclusion of fundamental human rights in the national constitutions of non-European countries is much more limited. The majority of constitutions in Africa, Northern, Latin and Southern America include, however, fundamental human rights and lend support to the substantive fundamental human rights obligations of corporations, but only a handful in Arabophone and Asian countries include any provision on security and human dignity of persons.^{xii} It must be recognized, however, that only a handful of constitutions contain explicit provisions that constitutional protections of fundamental human rights apply to both natural and legal persons.

A few examples of national constitutions containing the fundamental human rights obligations of corporations are provided. In South Africa, the provisions of South-African Bill of Rights binds natural and juristic persons to taking into account the nature of the right and the nature of any obligation imposed by the right.^{xiii} An example from Namibia demonstrates that fundamental human rights obligations derive also from constitutions. The Constitution of Namibia provides, for example, in Article 5, that 'the fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'^{xiv} Similarly, the Constitution of Japan provides, for example, in Article 11 that 'the people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.'^{xv} Likewise, the constitution of Columbia also provides that 'each person is individually responsible before the authorities for violations of the Constitution and the laws'^{xvi}, which may suggest that this provision includes also legal persons. Further, Article 12 (2) of the Constitution of Portugal provides that 'bodies corporate enjoy such rights and are subject to such duties as are compatible with their nature.'^{xvii} In this way, the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes 'has found that in a number of countries domestic constitutional or human rights provisions do in fact provide for a direct cause of action against a non-state actor, including companies or company officials, alleging that their conduct infringed a protected right.'^{xviii} It appears hence that corporations have fundamental human rights obligations in national legal orders as much as individuals and the state have them under constitutional and normative framework.

Corporations are obliged to comply with obligations in national legal orders, which also include the protection of fundamental human rights.^{xix} In this connection, as concerns national legislation, there are numerous examples of fundamental human rights obligations of corporation deriving from national legal orders. This section argues that fundamental human rights obligations stemming from ordinary legislation add further evidence to claim that corporate obligations derive from national legal orders. Fundamental human rights obligations derive from ordinary criminal legislation, civil law legislation, consumer protection laws, company law, and national law covering the extraterritorial operations of corporations, such as the United States federal Alien Torts Claims Act 1789, which grants rights to aliens to seek civil remedies in US courts for certain violations of their human rights inside and outside the US.^{xx} Montreux document notes, for example, that private military and security corporations 'are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.'^{xxi}

A number of national legal orders provide for corporate and individual criminal liability for international crimes.^{xxii} In France, for example, Article 213 (3) of French Criminal code provides that 'legal persons may incur criminal liability for crimes against humanity pursuant to the conditions set out under article 121-2.'^{xxiii} In Australia, a corporation can be held liable where corporate culture expressly or tacitly permits the commission of an offence by an employee.^{xxiv} In the United States, federal sentencing guidelines take corporate culture into account in assessing monetary penalties.^{xxv} A corporate obligation to respect human rights exists under Australian Law where corporations are subject to direct human rights obligations.^{xxvi} The fundamental human rights obligations of corporations are also provided in other national legislations. The fundamental human rights obligations of corporations may arise also from, for example, U.S. Securities law.^{xxvii} In spite of the importance of such regulation of corporations in ordinary legislation, this approach may be described as piecemeal. It appears that if corporations are legal subjects in one area they must also be so in another area.

In sum, it appears that there is a growing support that the fundamental human rights obligations of corporations can be derived from constitutional protections and safeguards in ordinary legislations covering, for example, protection of the security of persons, protection of fundamental labour rights and non-discrimination. In other words, it has been argued that corporations must comply with the national constitutional and legislative protections of fundamental human rights by way of complying with provisions of the positive law. In this light, it may be argued that the fundamental human rights obligations of corporations have arguably reached the status of the level of regional customary law, just as the substantive human rights obligations of corporations have arguably reached the status of regional customary law in Europe and possibly elsewhere in the world. This assertion has been backed by a number of national constitutions in Europe, Africa, Americas, Oceania and Asia. Having gained an understanding of fundamental human rights obligations deriving from national legal orders, the next part of this article turns to the development of the international fundamental human rights obligations of corporations.

4. Sources of the fundamental human rights obligations of corporations at the international level

This section argues that the fundamental human rights obligations of corporations may secondarily derive from the international level. International law standards are the minimum standards agreed and binding on the entire international community or part of it. Arguably, international law is a much shallower normative system than national legal orders, which also applies in relation to the fundamental human rights obligations of corporations. Nevertheless, this section argues that the international system may offer supplementary answers in relation to the sources of the fundamental human rights obligations of corporations. Traditionally, sources of international law^{xxviii} derive from international treaties, customs, general principles of law, and subsidiary sources of law (judicial decisions and academic commentaries).^{xxix} In other words, the most important sources of binding international law are: international treaty laws, customary international laws and peremptory norms of international laws. This is a traditional formalist view of international law. Several international human rights treaties include state obligations to protect fundamental human rights in relation to the activities of corporations.^{xxx} In this light, several commentators have already noted that corporations have obligations under international human rights law^{xxxi}, while others claim that the trend is 'to human rights responsibilities of multinational enterprises as corollary of their ability to bring human rights claims.'^{xxxii} This section attempts to argue that fundamental human rights derive secondarily from the international level and it examines the (in)direct nature of fundamental human rights obligations of corporations under international law.

It appears that international legal obligations to respect fundamental human rights bind corporations to the extent that further national and international measures are taken.^{xxxiii} Most of the international treaties only indirectly regulate corporations as states are their primary addressees, which are then required to translate such international legal obligations into national legislation. In this context, Article 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction states 'each Party shall take such measures as may be necessary, in accordance with its legal principles to establish the liability of legal persons for bribery of a foreign public official.'^{xxxiv} Moreover, nuclear treaties and agreements such as the Paris Convention the Third Party Liability in the Field of Nuclear energy,^{xxxv} hold operators of nuclear facilities liable for damages or loss of life to persons and property from private nuclear accidents.^{xxxvi} Also, the International Convention on Civil Liability for Oil Pollution Damage^{xxxvii} and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of the Council of Europe place responsibilities on businesses by extending their reach to legal persons.^{xxxviii} Both conventions define the persons liable to the convention as 'any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions'.^{xxxix} Reading these international treaties together, M. T. Kamminga correctly notes that 'there are no reasons of principle why companies cannot have direct obligations under international law.'^{xl}

As noted, international treaties, however, bind only states. Yet A. Clapham notes that it 'makes sense to talk about the parties to a human rights treaty rather than use the expression states parties, which indicates that

states are exclusive members of every human rights regime.^{xli} Nonetheless, international human rights treaties are traditionally no exception to the indirect regulation rule. In so doing several international human rights treaties indirectly identify obligations for corporations. Consider, for example, the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which, for example, stipulates explicitly that each state ‘shall prohibit and bring to an end, [...], racial discrimination by any persons, group or organization’^{xlii}, which may appear to include also a private corporation. Admittedly, CERD does not impose an obligation not to discriminate against groups or organizations, but it only addresses states. Similarly, the International Convention on the Suppression and Punishment of the Crime of Apartheid provides that *states* are to declare criminal those organizations, institutions and individuals committing the crime of apartheid.^{xliii} Also, other international human rights treaties address corporate human rights obligations in a similar way.

C. Vasquez argues that ‘if international law imposes obligations on corporations only indirectly’, they would have to observe merely *de iure* only the national law of the states in which they operate.^{xliv} With regard to the fundamental human rights obligations of corporations, it is submitted that such a distinction does not bring any added value. In this way, H. Koh notes ‘how can it be that corporations can be held responsible under international law for their complicity in oil spills, but not for their complicity in genocide? How can corporations be held liable under European law for anti-competitive behaviour, but not for slavery?’^{xlv} In this regard, several answers require to be pinpointed. It remains disputed as to whether the fundamental human rights norms as enshrined in international customary rule bind corporations. What is clear is that obligations included in Section 3 of the UN norms for corporations are already binding on individuals as well as on states.^{xlvi} Having said that, it may appear apt to argue that customary international law directly obliges corporations to observe fundamental human rights norms. S. Ratner has suggested a method for translating obligations under current international human rights law to the corporate context by employing four criteria: the corporation’s ‘relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure.’^{xlvii} He submits that such a theory ‘offers a starting point for global actors to develop a corpus of law that would recognize obligations on businesses to protect human rights.’^{xlviii} He goes on to identify five methods for implementation of his theory.^{xlix}

This section attempted to argue that fundamental human rights obligations of corporations derive at least indirectly from the international legal order. It appears that the positive legal obligations of corporations to observe fundamental human rights derive also from international treaties which are not directly addressed at corporations. What remains clear is that international norm may have applicability to corporations, if there is no international mechanism established for enforcing this norm. Placing direct international legal obligations on corporations may create practical problems of enforcement. For this reason, it seems that human rights are best implemented at a national level.

5. Voluntary recognitions of fundamental human rights obligation by a corporations

This section identifies a third potential layer of sources of the fundamental human rights obligations of corporations. It can be argued that these fundamental human rights obligations may derive from unilateral voluntary commitments by corporations themselves. The voluntary commitments of corporations in human rights and business field can be most often found in internal human rights policies or codes of conduct. The OECD defines codes of conduct as ‘commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace.’¹ Similarly, the ILO defines a code of conduct as ‘a written policy, or statement of principles, intended to serve as the basis for a commitment to particular enterprise conduct.’^{li}

Codes of conduct are voluntary initiatives adopted by companies in order to improve their public reputations and to answer to demands for more responsibility in their activities. They include the normatively non-binding obligations/commitments of corporations. In other words, codes of conduct do not create legal, but at most moral obligations.^{lii} They are drafted by corporations themselves because it is in their interests to adopt them. The codes of conduct include principles, standards or guidelines.^{liii}

A number of corporations have formally and publicly acknowledged responsibility for ensuring that their actions are consistent with fundamental human rights, starting with the UDHR. For the purposes of this study, the human rights policies of the ten largest corporations will be examined. It must be noted that all ten have drafted and included human rights strategies into their business policies. Shell, for example, notes that ‘operating companies ... have a responsibility to identify existing and potential human rights issues which may arise in their area of operations’^{liv} For instance, the following corporations all refer in one way or another in their policies to human rights protections: Wal-Mart Stores^{lv}, Exxon Mobil^{lvi}, British Petroleum^{lvii}, General Motors^{lviii}, Toyota, Chevron^{lix}, Daimler-Chrysler^{lx}, Conoco-Philips^{lxi}, and Total^{lxii}. As noted, some 125 corporations refer to the UDHR, whereas a further 72 have explicit human rights policies.^{lxiii} More than another 5,600 corporations have expressed commitment to the U.N. Global Compact.^{lxiv}

While it is correct that voluntary initiative codes of conduct have never worked to alter corporate behaviour, they can nonetheless contribute to some extent to corporate observance of fundamental human rights.^{lxv} This study therefore argues that the voluntary commitments represent the third and additional layer of corporate obligations. Codes of conduct of corporations are essential in promoting fundamental human rights amongst corporations and they offer the often required balance between normative protections and voluntary corporate social responsibility. F. MacLeay observes that ‘a well drafted and implemented code can be used to bring about real improvements in employee rights, particularly where the host State has little commitment to such rights and where independent civil society and unions are weak or non-existent.’^{lxvi} In other words, corporations may encourage local authorities in developing an effective protection of human rights.^{lxvii} In contrast, it appears, however, that they cannot be used as a camouflage against attempts to strengthen the normative responsibility and accountability of corporations for their activities as they affect the fundamental human rights of individuals and communities.

Corporate codes of conduct also have a number of weaknesses. They are often vaguely defined and include only some human rights, whereas other human rights are omitted. In addition, most of them do not support the mechanisms and independent monitoring of their implementation. It may appear that they can be described as *lex imperfecta*. It is clear, however, that codes of conduct do not have the same normative value as the first two levels of sources of fundamental human rights obligations. They nonetheless provide an additional layer from where corporate commitment to observe fundamental human rights derives. Identifying the fundamental human rights obligations of corporations is a large exercise, of which voluntary commitments of corporations are only a small but important part.

6. Conclusion

International law and national legal orders are two autonomous legal orders joined in a coherent pluralistic whole. The present section has argued that the fundamental human rights obligations of corporations derive primarily from national legal orders, and alternatively from an international law level. It appears *non sequitur* to expect that only a normatively shallower system of international law could break the conundrum of fundamental human rights obligations that normatively fully-fledged national legal orders have difficulties with. Taken together, national legal orders and international systems impose fundamental human rights obligations on corporations. In addition, voluntary commitments may offer a further evidence of such obligations. In this light, sources of the fundamental human rights obligations of corporations should be treated as mutually complementary not as mutually exclusive. The fact that international jurisdictions for legal persons are yet to be developed does not imply that a corporation does not have any legal obligations. This is because the fundamental human rights obligations of corporations primarily derive from national legal orders. To the contrary, it would be too futile to argue that a substantive obligation only arises when joined with a jurisdiction: who can enforce it. In this way, it appears that corporations are obliged to *pro forma* observe the fundamental human rights of individuals. This not only matters on a normative level, but also beyond the form, beyond the pure normative, when corporations are *de facto* faced with a decision as to what kind of business policy to adopt. In other words, the problem is not that corporations and their officers would not have fundamental human rights obligations. The real, and far deeper, structural problem is that individuals do not have recourse to enforce their fundamental human rights and ideals. The fore-going discussion shows that there are no conceptual obstacles in imposing obligations on corporations.

ⁱ Compare World’s Largest Corporations (Global 500), Fortune, 21 July 2008, at 165, <http://money.cnn.com/magazines/fortune/global500/2008/full_list/>, with World Bank, World Development Indicators: Gross Domestic Product 2007, <<http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>> (last visited 15 January 2009). Also, see generally, Rhett A. Butler, Corporations Agree to Cut Carbon Emissions, 20 February 2006, <<http://news.mongabay.com/2007/0220-roundtable.html>> (stating that corporations now make up roughly two-thirds of the world’s 150 largest economies) (last visited 15 January 2009); S. Anderson & J. . Cavangh, Institute for Policy Studies, Top 200: Rise of Corporate Global Power, i, tbl.2 (2000), <<http://corpwatch.org/downloads/top200.pdf>> (calculating that in 1999, “[o]f the 100 largest economies in the world, 51 are corporations) (last visited 15 January 2009).

ⁱⁱ SRSg, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights of Transnational Corporations and Other Business Enterprises, para. 24–27, delivered to the Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/97 (22 February 2006) (prepared by John Ruggie) . The Special Representative of the Secretary-General surveyed 65 instances of abuses reported by NGOs in 27 countries. Ibid. at 27.

ⁱⁱⁱ Summary Report on Geneva Consultation, Geneva, Switz., Dec. 4–5, 2007, Corporate Responsibility to Respect Human Rights, at 2, <<http://www.reports-and-materials.org/Ruggie-Geneva-4-5-Dec-2007.pdf>> (last visited 15 January 2009).

^{iv} This categorization will be explored in more detail in another forum.

^v S. R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 *Yale Law Journal* 443 (2001), N. Jaegers, *Corporate Human Rights Obligations*; Declaration of C. Greenwood, Presbyterian Church of Sudan v. Talisman Energy Inc., Civil Action No. 1 CV 9882 (AGS), (7 May, 2002) at 8, para. 20. (on file with author); and Declaration of J. Crawford, Presbyterian Church of Sudan v. Talisman Energy Inc., Civil Action No. 1 CV 9882 (AGS), (7 May, 2002) at 12, para. 25 (on file with author).

^{vi} F. Viljoen, 2007, 10.

^{vii} See Magna Carta (1215), English Bill of Rights (1689), French Declaration of the Rights of Man and of the Citizen (1789), United States Declaration of Independence (1776).

^{viii} For a detailed discussion on human rights obligations in domestic law see respectively: S. Fitzgerald, Corporate accountability for human rights violations in Australian domestic law, (2005) *Australian Journal of Human Rights*, 2, <<http://www.austlii.edu.au/au/journals/AJHR/2005/2.html>>. S. van Bijsterveld, Human Rights and Private Corporations: A Dutch Legal Perspective, vol. 6.4, *Electronic Journal of Comparative Law*, December 2002, S. Joseph (2000) An overview of the human rights accountability of multinational enterprises in M. Kamminga and S. Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law* Kluwer Law International, The Hague; C Heyns and F Viljoen (2002): *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Kluwer Law International, The Hague.

^{ix} See and cf. OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, 15. <<http://www.oecd.org/dataoecd/26/21/36885821.pdf>>, noting that corporations are expected to comply with their legal obligations. (last visited 20 February 2009).

^x See M. T. Kamminga, *Corporate Obligations under International Law*; Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004, noting that 'In domestic law, it has long been accepted that legal persons such as companies have legal obligations - for example under labour and environmental law - and that they may be held liable for breaches of these obligations.' 3.

^{xi} See similarly S. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart, Oxford, 2004, 11, See also J.J. Paust; Human Rights Responsibilities of Private Corporations, (2002) 35 *Vanderbilt Journal of Transnational Law*, 801, 808-809, S. Joseph, *Liability of Multinational Corporations: International and Domestic Laws and Procedures*, (2007) in Malcolm Langford (ed.) *Social Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press.

^{xii} *Ibid.*

^{xiii} See Section 8 (2) of the Bill of Rights.

^{xiv} Similar provision can be found in Article 18 of the Constitution of Gambia: 'The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by all organs of the executive and its agencies, the legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the courts in accordance with this Constitution.' Also, the constitutions of Ghana (Article 12 (1)) and Malawi (Article 15 (1)) include similar provisions.

^{xv} Constitution of Japan, Article 11.

^{xvi} Constitution of Colombia, Article 6.

^{xvii} Constitution of Portugal, Article 12 (2), < http://www.servat.unibe.ch/icl/po00000_.html>. (last visited 20 February 2009).

^{xviii} Corporate Complicity and Legal Accountability, Volume 3: Civil Remedies, Accountability Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Geneva, September 2008. 7.

^{xix} See J. Ruggie's 2008 report, 54.

^{xx} 28 U.S.C. § 1350 (2000).

^{xxi} Montreux document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict, Montreux, 17 Sep 2008, < [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents.pdf)>, para. 22. (last visited 20 February 2009). The Montreux document is 'the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted'. *Ibid.* 1.

^{xxii} See also A. Ramasastry & C. R. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, 2006, <www.fafo.no/liabilities>. (last visited 20 February 2009).

^{xxiii} Article 213 (3) of the French Criminal Code.

^{xxiv} See Allens Arthur Robinson, *Brief on Corporations and Human Rights in the Asia Pacific Region* (August 2006), <<http://www.reports-andmaterials.org/Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf>>.

^{xxiv} The 2005 Federal Sentencing Guidelines read as follows: ‘organizational culture that encourages ethical conduct and a commitment to compliance with the law’: §8B2.1(a).

^{xxv} The 2005 Federal Sentencing Guidelines read as follows: ‘organizational culture that encourages ethical conduct and a commitment to compliance with the law’: §8B2.1(a).

^{xxvi} See Corporate Duty and Human Rights Under Australian Law, Allens Arthur Robinson law firm on behalf of the International Bar Association, Mar 2008. See Parliament sends message to businesses on human rights, Oxfam Australia, 23 June 2008, <<http://www.business-humanrights.org/Links/Repository/398887>>. (last visited 20 February 2009).

^{xxvii} See A. M. Snyder, Holding Multinational Corporations Accountable: is Non-Financial Disclosure the Answer?, *Columbia Business Law Review*, issue 2, 565-613.

^{xxviii} Article 38(1) of the Statute International Court of Justice states: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

^{xxix} H. Thirlway, The Sources of International Law, in M. Evans (ed.), *International Law*, 115-140, 2006. For critical analysis cf. for example, J. Kammerhofer, Uncertainty in the formal Sources of international Law: customary international Law and some of its Problems, (2004) 15 *European Journal of International Law* 523-553; A E Roberts, ‘Traditional and modern approaches to customary international law: a reconciliation’ (2001) 95 *American Journal of International Law* 757-791; K. Wolfke, Some persistent controversies regarding customary international law (1993) 24 *Netherlands Yearbook of International Law*, 1-16. P. Alston, *The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* in *Non-State Actors and Human Rights* (P. Alston, ed.), OUP (2005).

^{xxx} See J.H. Knox, *Concept Paper on Facilitating Specification of the Duty to Protect, prepared for UN SRSG on Business and Human Rights*, 14 December 2007.

^{xxxi} A. Clapham, 2006, 266-270, N. Jägers, 2002, Chapter IV, 75-95, D. Weissbrodt & M. Kruger, Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) 97 *American Journal of International Law*, 913-5, 921; D. Kinley and J. Tadaki, 962-992; P. T. Muchilinski, *Multinational enterprises and the Law*, OUP, 2007, 519-524. N. Stinnet, Note: Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses, 28 *Boston College International and Comparative Law Review*. 211 (2005).

^{xxxii} P. T. Muchilinski, 2001, Human Rights and Multinationals - is there a Problem?, *International Affairs*, 77. 31-47.

^{xxxiii} C. M. Vasquez, 2005, at 942. See David Weissbrodt, International Standard – Setting on the Human Rights Responsibilities of Businesses, *Berkeley Journal of International Law*, Vol. 26 (2), 6.

^{xxxiv} OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 December 1997, S. Treaty Doc. 105-43 (1998), 37 ILM, entered into force 15 February 1999.

^{xxxv} Paris Convention on the Third Party Liability in the Field of Nuclear energy, done 29 1960, 956 U.N.T.S. 251.

^{xxxvi} The Brussels Convention Relating to Civil Liability in the field of Maritime Carriage of Nuclear Material, 17 December 1971, 974 U.N.T.S.

^{xxxvii} The International Convention on Civil Liability for Oil Pollution Damage, 29.11.1969. It states: ‘The owner of a ship at the time of accident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident’. Article 3 (1)

^{xxxviii} The COE Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21. 6. 1993, <<http://conventions.coe.int/treaty/en/treaties/html/150.htm>>. (last visited 20 February 2009).

^{xxxix} The International Convention on Civil Liability for Oil Pollution Damage, 29.11.1969, Article 1 (1). See also Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 22.3.1989. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Article 2 (6).

^{xl} M. T. Kamminga, *Corporate Obligations under International Law*; Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004. 4.

^{xli} A. Clapham, 2006, 91.

^{xlii} International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, Article 2 (d).

^{xliii} International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, *entered into force* July 18, 1976.

^{xliv} C. M. Vasquez, 2002, 937.

^{xlv} H. Koh, Separating Myth from Reality About Corporate Responsibility Litigation, 7 *Journal of International Economic Law* 263, 265 (2004).

^{xlvi} ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

^{xlvii} S. Ratner, 2001, 496-497.

^{xlviii} *Ibid.* 530.

^{xlix} *Ibid.*

¹ OECD Directorate for Financial, Fiscal and Enterprise Affairs *Codes of Corporate Conduct: Expanded Review of their Contents*, May 2001. Working Papers on International Investment November 2001/6. See generally on corporate codes of conduct F. MacLeay, Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle, *Global Law Working Paper* 2005/1.

^{li} International Labour Organisation Governing Body, Working Party on the Social Dimensions of the Liberalization of International Trade, *Overview of global developments and Office activities concerning codes of conduct, social labeling and other private sector initiatives addressing labour issues* Executive Summary, GB 273/WP/SDL/1, 273d session Geneva, November 1998.

^{lii} N. Bernaz et P.-F. Morin, *L'Onu et sociétés transnacionales: La nécessité d'une collaboration opérationnelle en matière de droits sociaux internationaux*, in L. Boisson de Chazournes et R. Mehdi, *Une Société internationale en mutation: Quels acteurs pour une nouvelle gouvernance?*, Bruylant, 2006. 75.

^{liii} See, for example, S.D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, *Columbia Journal of Transnational Law*, vol. 43, afl. 2, pages 389-433, 2005; M. B. Baker, Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?, *Connecticut Journal of International Law*, vol. 23, 123-163, 2007.

^{liv} See Shell, Business and Human Rights, A Management Primer, 23.

^{lv} See Wal-Mart, requirements for suppliers, <<http://walmartstores.com/Suppliers/248.aspx>>, See Equal Opportunity Practices. (last visited 20 February 2009).

^{lvi} See Exxon Mobil, <http://www.exxonmobil.com/Corporate/community_local_rights.aspx>. (last visited 20 February 2009).

^{lvii} See British Petroleum, Human rights: A guidance note, 2005, 12.

^{lviii} See General Motors, <<http://www.gm.com/corporate/responsibility/reports/00/vision/social/human.html>>, (last visited 20 February 2009).

^{lviii} See British Petroleum, Human rights: A guidance note, 2005, 12.

^{lix} See Chevron Corporation, Human Rights Statement, <<http://www.chevron.com/globalissues/humanrights/>>, (last visited 20 February 2009).

^{lx} See Daimler-Chrysler, <<http://www.daimler.com/dccom/0-5-880434-1-881989-1-0-0-0-0-0-8-876574-0-0-0-0-0-1.html>>. (last visited 20 February 2009).

^{lxi} See Conoco-Phillips Corporation, Human Rights Position, <http://www.conocophillips.com/social/values_policies/humanrights/index.htm>. (last visited 20 February 2009).

^{lxii} See Total Corporation, Code of Conduct, 10.

^{lxiii} See Business and Human Rights Resource Centre,

<<http://www.business-humanrights.org/Documents/Policies>>. For a detailed account see Michael Wright and Amy Lehr; *Business Recognition of Human Rights*, research fellows, Mossavar-Rahmani Center for Business & Government., Kennedy School of Government, Harvard University, under direction of UN Special Representative John Ruggie, 12 Dec 2006

^{lxiv} UN Global Compact, <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>>. (last visited 20 February 2009).

^{lxv} See, for example, Patricia Rinwigati Waagstein, From 'Commitment' to 'Compliance': The Analysis of Corporate Self-Regulation in the BP Tangguh Project, Indonesia, *Jurnal hukum internasional UNPAD*, vol. 5, issue 2, page 100-117. She concludes that 'the discussion on corporate self-regulation in the Tangguh Project reveals that corporate self-regulation is not merely a corporate commitment. It can inspire, highlight, sharpen, modify, and even supersede existing regulation. In this case, commitment can actually act as a co-regulation and reaffirm existing standard or lay new standards or precedent'. 117.

^{lxvi} F. MacLeay, Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle, *Global Law Working Paper 2005/1*, 19.

^{lxvii} See S. D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 *Columbia Journal of Transnational Law*, 389 (2004-2005), 398-399 and Ilias Bantekas, Corporate Social Responsibility in International Law, 22 *Boston University International Law Journal* 309 (2004), 314, suggesting that multinational corporations often have the capability to influence government policies and practices.