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CRIDHO Working Paper 2013/7



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This paper will appear in a slightly modified form under the title "Corporations and Economic, Social and Cultural Rights" as chapter 4 of Eibe Riedel (ed.), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, Oxford Univ. Press, 2013.

ABSTRACT

This paper is an attempt to dispel certain conceptual misunderstandings concerning the applicability of economic and social rights to the conduct of corporations. It shows that, although international law in principle applies only to States in the international legal process, the rules of international law that define the rights of individuals can be invoked against corporations before a variety of mechanisms, at both domestic and international levels (section II). This applies to all rights, including rights that imply certain positive obligations on corporate actors. It would be artificial and potentially counter-productive, this chapter argues, to limit the corresponding duties of corporations to negative duties to abstain (section III). This was implicitly recognized when the duty to respect human rights was interpreted in the 2011 Guiding Principles on Business and Human Rights to include a duty for corporations to act with due diligence to ensure that such rights are not violated in the course of its activities. Moreover, describing companies' duties in purely negative terms would create an incentive for companies to stay away from situations which they could influence positively, but will be tempted to ignore if this could engage their legal responsibility: the relevance of such positive duties is illustrated by situations where corporations provide certain essential services, or where they are expected to control their subsidiaries or business partners (section IV). Finally, while certain factors may explain the reluctance of courts in enforcing social and economic rights invoked against corporate actors, such reluctance may not be justified: although it may be tempting to treat corporations as "persons" to fit them into predefined legal categories, they are not like individuals whose freedom of thought of conscience should be protected, and although they generally enter into relationships with others through the conclusion of contracts rather than by coercion, contractual freedom should not be considered to trump human rights where a conflict emerges between the two (section V).

1. Introduction

The view that corporations have duties towards society, and not simply towards their shareholders, emerged in the 1930s from the findings of a handful of corporate lawyers and economists linked to the Progressive movement in the United States. In *The Modern Corporation and Private Property*, which they published in 1932, Adolf A. Berle and Gardiner C. Means famously argued that there existed a huge gap between the world of business as described in classic treatises on economics, and the reality they documented.¹ They noted that American business was dominated by a handful of firms: half of the total U.S. corporate assets were in the hands of two hundred top companies, out of several million companies in total. Borrowing from Veblen's famous thesis presented in his 1923 book *Absentee Ownership and Business Enterprise*,² they also remarked that in these giant enterprises, control had passed from the owners, the shareholders, to their agents, the senior managers of the companies, although the latter may have different objectives and priorities than their principals. Berle and others, particularly E. Merrick Dodd, immediately drew the conclusions: since power was exercised in fact not for the exclusive interest of the property owners of companies, who were often not in a position to control effectively the decisions made by corporate executives in their name, the acts of the corporation should be better controlled, and its social service functions -- its contributions to the public good -- should be openly acknowledged as coexisting with its profit-making function.³

The views of these scholars exerted a powerful influence on the F.D. Roosevelt administration's approach to business during the New Deal. But their message was broader, and it is one still worth listening to today. Berle and Means were describing a new world, strikingly different from the world described by marshallian economics. They were making two claims about the modern corporation. First, they argued that large corporations were concentrating such power that the antitrust legislation -- the pressure from competition -- would be unable, in and by itself, to control them effectively: their power was compared to that of the medieval church, or even to the political power in the national state. Second, they noted that the decisions of the corporation, made by largely unaccountable executives (unaccountable even to the owners of stock), had impacts on a wide range of interests, both within and outside the corporation itself. Those were descriptive claims, but the normative implications were evident: they were that, since corporations had gained such an ability to affect the communities in which they operated, responsibilities commensurate with this ability should be imposed on them; as their impacts reached the whole of society, so too could they be asked to contribute to the realization of society-wide goals.

Yet, today, there is still resistance to the idea that economic and social rights may be invoked against corporate actors, and that companies have duties towards them. This chapter seeks to identify the origins of such resistance, and to provide answers to the sceptics. It builds on the considerable progress that was achieved in recent years in clarifying the human rights responsibilities of companies. In June 2011, the Human Rights Council endorsed a set of Guiding Principles on Business and Human Rights that are now seen as the most authoritative

¹ Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, originally published in 1932 by Harcourt, Brace & World, repr. 1991, New York, Transaction Publishers, esp. chap. VI.

² Thorstein Veblen, *Absentee Ownership and Business Enterprise in Recent Times: the case of America*, New York, Trans. Publ., 1923.

³ See Adolf A. Berle, 'Corporate Powers as Powers in Trust', 44 *Harv. L. Rev.* 1049 (1931) (arguing that the management of the corporation should be controlled in order to ensure that they act for the benefit of the shareholders, rather than in their own interest), and E. Merrick Dodd, 'For Whom are Corporate Managers Trustees?', 45 *Harv. L. Rev.* 1145 (1932) (arguing that the corporation is now seen as having, aside from its profit-making function, a social service function).

statement of the human rights responsibilities of corporations and corresponding State duties adopted at UN level.⁴ These Guiding Principles go beyond the plethora of voluntary initiatives, often sector-specific, that existed hitherto. They have been widely endorsed, by business organizations and in intergovernmental settings -- including, notably, by the Organization for Economic Cooperation and Development (OECD) when it revised its Guidelines on Multinational Enterprises in 2011⁵ --. They have also been invoked, albeit at times grudgingly, by civil society. And they are now subject to a follow-up mechanism within the United Nations system, through the Working Group on business and human rights and an annual forum to be held on this issue.⁶ But the questions that are listed below remain, some of them taboo, many of them unanswered -- or, if answered at all, still controversial.

Four questions are examined. This chapter first explores whether international human rights law applies to corporations (Part 2). It then asks whether imposing positive duties on corporations poses specific problems, and how these can be addressed (Part 3). It moves, next, to how such positive duties can be identified and defined (Part 4). Finally, it discusses the role of courts in enforcing such duties (Part 5). Part 6 offers a brief conclusion.

2. Does international human rights law apply to corporate actors?

A first source of confusion concerns the status of international human rights vis-à-vis corporations. The hesitations expressed by the federal courts of the United States are illustrative in this regard. Since it was revived in 1980, the Alien Tort Statute (“ATS”) allows federal courts in the United States to have jurisdiction over tort actions filed by non-U.S. citizens for violations of international law.⁷ In *Kiobel*,⁸ residents of Nigeria claimed that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing serious violations of human rights law. The United States Court of Appeal for the Second Circuit was asked whether the ATS could be invoked to seek damages from corporations.⁹ Relying on the notion that “to attain the status of a rule of customary international law, a norm must be ‘specific, universal, and obligatory’”, as stated by the United States Supreme Court in the only case where it interpreted the ATS,¹⁰ the Second Circuit Court took the view that “there is no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations for violations of human rights”. The Court explained that, while individuals could in some cases be held responsible for violations of international law,

⁴ Human Rights Council Res. 17/4 (16 June 2011).

⁵ The new version of the OECD Guidelines on Multinational Enterprises include a chapter IV on human rights, that is based on the ‘Protect, Respect and Remedy’ framework.

⁶ The Working Group on the issue of human rights and transnational corporations and other business enterprises was established by Resolution 17/4 of the Human Rights Council, at the same time that the Council endorsed the proposed Guiding Principles on Business and Human Rights.

⁷ The ATS provides that : “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” (28 U.S.C. § 1350). Passed by the first Congress in 1789 as part of the First Judiciary Act, the ATS remained largely dormant until, in 1980, it was revived in a decision adopted by the Court of Appeal for the Second Circuit relied on this provision to assert that federal courts had jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (*Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir.1980)).

⁸ *Esther Kiobel, et al., v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, No. 06-4800-cv, 2011 WL 338048 (2d Cir., Feb. 4, 2011).

⁹ Since its revival in 1980, the ATS was used in a number of cases against corporate defendants, but these cases were either still pending when *Kiobel* came to be decided by the Court of Appeal or had been settled. See, inter alia, *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D.Cal.1997), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir.2002); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir.2000); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir.2000); *Flores*, 414 F.3d 233; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir.2007); *Viet. Assoc. for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir.2008); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir.2009); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.2009).

¹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

... the principle of individual liability for violations of international law has been limited to natural persons -- not “juridical” persons such as corporations -- because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an “international crime” has rested solely with the individual men and women who have perpetrated it.

Quite apart from the outcome of that case and from the future use of ATS in human rights litigation,¹¹ the approach of the Court of Appeal betrays a misconception that is as common as it is easily identifiable. International law is addressed primarily to States, and to other subjects of international law. In addition, in some cases international law has developed mechanisms to hold individuals directly accountable for violation of certain rules, particularly those defining international crimes. No such mechanism exists, either at universal or at regional level, to hold corporations accountable for violation of rules set out in international law.¹² However, that is *not* to say that rules of international law cannot be applied directly to corporations if, consistent with their obligation to protect human rights,¹³ this is how States choose to discharge their duties under international law to control the behavior of private persons under their jurisdiction. Indeed, it is common for States to opt for the direct applicability of international human rights law before their domestic courts, as a means of complying with their international obligations. This leads domestic courts to impose on private actors obligations that have their source in international law, although the enforcement mechanisms are defined in national law : in *Kiobel*, the error of the Court of Appeal was that it failed to make this elementary distinction between the primary rules (regulating conduct) and the secondary rules (allocating responsibilities for the enforcement of primary rules). Where international law rules pertaining to human rights are implemented, primary and secondary rules are combined with one another in order to ensure that conduct complies with their requirements : while international law does not contain mechanisms to enforce its prescriptions vis-à-vis corporations, it relies on enforcement mechanisms established at the domestic level to ensure that corporations shall not violate these prescriptions.

States obviously have a duty to protect economic and social rights, by the adoption of measures that regulate private actors, including corporations, in order to ensure that these actors shall not adopt conduct that violates these rights. This is an obligation of means, rather than of result. It consists in an obligation to take all measures that can reasonably be adopted

¹¹ The U.S. Supreme Court took the view in June 2013 that there is nothing in the ATS that allows the rebut the presumption against the extraterritoriality of US law, and that therefore, being residents of Nigeria seeking reparation for damages inflicted outside the US territory, the claims should be dismissed: *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, 569 U.S. ___ (2013). The Supreme Court did not pronounce itself on the question of the applicability of international norms to private actors.

¹² In this contribution, the expressions 'corporations', 'companies', or 'corporate actors' are used interchangeably and in a generic sense, to refer to the economic reality of entities that are set up for profit-seeking motives, generally by owners whose liability is limited to the assets that they invest in the company. A distinction shall be made however between those economic entities and the separate legal entities of which they are composed, linked within the corporate group by an investment nexus. I return to that distinction later.

¹³ The Committee on Economic, Social and Cultural Rights has repeatedly stated that their obligation to comply with internationally recognized human rights imposes on States three levels of duties: to respect, protect and fulfil human rights. The duty to protect imposes on the State to control private actors to ensure that they do not violate the rights of individuals that the State is prohibited from violation directly, by the activities of its own organs: see, e.g., Committee on Economic, Social and Cultural Rights, Report on the Twentieth and Twenty-first Sessions (1999), UN Doc. E/2000/22, E/C.12/1999/11, para. 53 and annex IX ; Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5, paras. 14-20; Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999): The Right to Education (Art. 13), UN Doc. E/C.12/1999/10, paras. 46-48 ; Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (2005), paras. 47-48 ; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001) A.H.R.L.R. 60 (15th Annual Activity Report), paras. 44-48.

to ensure that human rights shall not be violated as a result of the conduct of private actors.¹⁴ There is a wealth of cases where the duty of the State to protect human rights extended to economic and social rights, requiring from the State to adequately regulate the conduct of non-State actors.¹⁵ Indeed, among the most famous examples is the finding of the African Commission on Human and Peoples' Rights, based on the same pattern of facts as that presented in *Kiobel*, that Nigeria had failed to protect the rights of the Ogoni people in the Niger delta. These rights were violated by the activities of oil companies exploiting the oilfields of the region : the Commission concluded that 'despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its [obligations under the African Charter on Human and Peoples' Rights] and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis'.¹⁶ Among the rights affected were the right to housing and the right to food.¹⁷

If that were the only channel through which obligations can be imposed on corporations in the area of economic and social rights, we would be bound to conclude that corporations are not concerned by international human rights law, which is only relevant to them *indirectly*, when States have adopted measures by which they discharge their obligation to protect, by clarifying the obligations of corporations in areas such as environmental or labour law, land planning or food safety. However, States may also wish to discharge their obligations towards economic and social rights by imposing on corporations to comply with these rights *directly*, i.e., even in the absence of domestic legislation ensuring the implementation of international human rights norms into the national legal order. While such direct application of human rights norms is encouraged by the Committee on Economic, Social and Cultural Rights,¹⁸ the question arises whether economic and social rights as stipulated in international human rights law can fittingly be applied to corporations : are rules set out for States in international human rights law too vague and indeterminate, or simply unsuitable for application to corporate actors, or is such a transposition possible?

¹⁴ See, for a detailed discussion of the content of this obligation to protect, Olivier De Schutter, *International Human Rights Law*, Cambridge Univ. Press, 2010, chap. 4. Ssenyonjo writes : 'The obligation to protect ... generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws, regulations and other measures so that individuals and groups will be able freely to realise their rights and freedoms. This demands that the state has to protect against harmful activities carried out by [non-State actors] and to prevent violations by [non-State actors] through creating and implementing the necessary policy, legislative, regulatory, judicial, inspection and enforcement frameworks' (Manisuli Ssenyonjo, 'The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' (2008) 12(5) *The International Journal of Human Rights* 725-760, at 729).

¹⁵ See Ssenyonjo, cited supra ; and Aiofe Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"', *Human Rights Law Review*, vol. 9, issue n° 2 (2009), pp. 225-255.

¹⁶ Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Annex to the 15th Annual Activity Report of the African Commission on Human and Peoples' Rights, 8 July 2002, AHG/Dec.171 (XXXVIII), at para. 58; 10 IHRR 282 (2003).

¹⁷ See Communication 155/96, cited above, paras. 63-66.

¹⁸ See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water (articles 11 and 12 of the Covenant), UN doc. E/C.12/2002/11 (2002), para. 57 ('The incorporation in the domestic legal order of international instruments recognizing the right to water can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant'); for an identical statement, Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, UN doc. E/C.12/2000/4 (11 August 2000), para. 60. The use of the term 'incorporation' to refer to the status of the Covenant in the domestic legal order is ambiguous : in its General Comment No. 9: The domestic application of the Covenant (UN doc. E/C.12/1998/24, 3 December 1998), the term is used in para. 6 to designate either the process of copying the provisions of the Covenant into domestic law, while leaving the wording intact, so as to allow the Covenant's rules to be invoked before national authorities, or the direct application of the Covenant, which the Committee recommends (see para. 4: 'In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals').

3. May positive duties be imposed upon corporations with regard to economic and social rights?

There is no shortage of authoritative statements according to which corporations may have responsibilities towards the fulfilment of economic and social rights. The Committee on Economic, Social and Cultural Rights, for instance, has noted :

While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.¹⁹

The key difficulty in addressing the human rights obligations of corporations, however, is that there are important differences between these actors and States. States have a territory over which they exercise sovereignty. They also may exercise jurisdiction over persons and assets, either because those persons or assets are present on their territory, or because of some other jurisdictional link. States also have a power to tax and spend, and thus to provide public services to their population. In all these respects, States do occupy a specific position. And since human rights law has been designed and developed with States in mind, transposing the doctrines that have shaped this body of law to the acts of corporations may present delicate problems of transposition.²⁰

As long as corporations are imposed only 'negative' duties -- to abstain from adopting measures that would result in violations of human rights --, such a transposition is not particularly problematic : indeed, it has been common for domestic legal systems to impose such prohibitions on corporate actors, in particular by allowing victims to file civil claims against the corporation where its 'fault' or 'negligence' has caused an injury, the 'fault' or 'negligence' consisting in a failure to respect human rights. Such "indirect" application is an alternative to the "direct" application of internationally recognized human rights to inter-individual relationships: it consists in courts interpreting notions of domestic law (such as the notions of 'fault' or 'negligence' in civil liability cases, 'good faith' in contracts, 'abuse of rights' or 'public policy') in order to ensure that these notions embody the requirements of international human rights.²¹

This is the classic obligation to 'respect' human rights, and it may apply to economic and social rights just like it may apply to civil and political rights²²: corporations, for instance,

¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, UN doc. E/C.12/2000/4 (11 August 2000), para. 42.

²⁰ For attempts along these lines, see Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale L.J.* 443 (2001); Jordan J. Paust, 'Human Rights Responsibilities of Private Corporations', *Vanderbilt Journal of Transnational Law*, Vol. 35, No.3 (2002), 801-825; Olivier De Schutter, "Human Rights in Employment Relationships: Contracts as Power", *European Journal of Human Rights / Journal européen des droits de l'Homme*, n° 1 (2013), pp. 21-56.

²¹ This is a technique sometimes referred to as '*mittelbare Drittwirkung*', in reference to the practice inaugurated with the 1958 *Lüth* decision of the German Federal Constitutional Court (7 BverfGE (1958)): see, e.g., A. Barak, 'Constitutional human rights and private law', in D. Friedmann and D. Barak-Erez (eds), *Human rights in private law*, Oxford-Portland-Oregon, Hart Publishing, 2001, p. 13, at pp. 21-24 ; S. Gardbaum, 'The 'horizontal effect' of constitutional rights', *Michigan Law Review*, vol. 102 (2003), pp. 401 and ff. For a well-known example, see the position of the South African Constitutional Court in *Du Plessis v. De Klerk*, decided under the South African interim Constitution of 1993 ([1996](3) SA 850 (CC)).

²² As was noted by J. Ruggie, in his official capacity as the UN Secretary-General's Special Representative on the issue of transnational corporations and other business enterprises and human rights, 'there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner' (Protect, Respect and Remedy: A Framework for

may be found liable for violating the right to housing or the right to food of people by encroaching on their land,²³ or for violating their right to water by extracting water from groundreserves in ways that are considered unsustainable or by polluting groundwater reserves.²⁴ In 2013, the High Court of Uganda at Kampala ordered that compensation be paid to 2,041 individuals who had been evicted from their land in August 2001, when the government of Uganda gave the land to a German company to establish what is now the Kaweri-Coffee-Plantation. The Court stated that the investors "had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honorable businessman [*sic*] and investors they should have not moved into the lands unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them."²⁵ This illustrates how courts are in a position to impose on companies that, consistent with their responsibility to respect human rights, they have in place a "human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights", as stipulated in the Guiding Principles on Business and Human Rights.²⁶

But 'positive' duties fulfilling human rights are more contested. States discharge their positive duties to protect and to fulfil human rights by using their regulatory powers or by providing public services to the population, relying on the tool of taxation and following a ranking of the priorities -- education, health, public utilities, national defence, and so forth -- that is settled through democratic debate. Because such tools are not at the disposal of corporations, it may legitimately be asked whether positive duties may be imposed at all on corporations, and if so, how the scope of such obligations is to be defined. Indeed, it is because he believed a negative answer should be given to this question that John Ruggie, as the UN Secretary-General's Special Representative on the issue of transnational corporations and other business enterprises and human rights between 2005 and 2011, concluded that while corporations should respect human rights, they could not be imposed an obligation (analogous to that imposed on States) to protect human rights, even though they might be in a position to influence certain situations. 'While corporations may be considered "organs of society"', he noted, 'they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States'.²⁷

However, while corporations have neither regulatory powers nor the power to tax and spend, their influence over the past half century has increased significantly (as measured by their ability to affect the lives of individuals with whom they interact), both as a result of economic globalization and the accompanying deregulation of economic activities, and because of the

Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises and human rights, UN doc. A/HRC/8/5 (7 April 2008) (hereafter "Protect, Respect and Remedy"), para. 51).

²³ See, for instance, the phenomenon referred to in Brazil as 'grilagem', i.e., the fraudulent appropriation of untitled lands by private persons : according to official estimates, this concerned some 100 million hectares in total in 2009, or roughly 12 per cent of the national territory, and it is particularly rampant in the Amazon region, 45 per cent of the surface of which has not been officially titled, and where low population density invites informal occupation (see for details Report of the Special Rapporteur on the right to food, Olivier De Schutter: Mission to Brazil (12-18 October 2009), UN doc. A/HRC/13/33/Add.6 (March 2010), para. 31).

²⁴ See, for instance, the protracted legal battle fought against the presence of Coca-Cola in the State of Kerala in India, as described on the website of the Special Rapporteur on the right to water and sanitation : <http://www.righttowater.info/ways-to-influence/legal-approaches/case-against-coca-cola-kerala-state-india/> (last consulted on October 15th, 2011). The litigation is based in part on the recognition by the Indian Supreme Court in *M C Mehta v. Union of India* (2004(12) SCC118), that 'groundwater is a social asset' and that 'citizens have the right to the use of air, water and earth as protected under Article 21 of the Constitution (the protection of life and personal liberty)'.

²⁵ *Baleke and Others v. Attorney General of Uganda and Others*, Civil Suit 179 of 2002.

²⁶ A/HRC/17/31, paras. 6 and 17-21.

²⁷ Protect, Respect and Remedy, para. 53.

privatization of a range of public services.²⁸ Corporations do not legislate. They do not dispose of coercive power, in the sense that they cannot impose sanctions on individuals unless these individuals have expressed, at some point, a consent to be thus made dependent on the will on the corporation. Yet, while corporations may not imprison or execute, they do set policies in the areas of recruitment and wage-setting ; they decide at which price and under what conditions to buy from their suppliers, and to sell to their clients ; and they choose which goods and services to provide, and how to produce them.

There is more than the reality of corporate power alone. Once we acknowledge that, in exercising their activities, corporations must take into account human rights, tracing a line between the 'negative' duty to respect human rights and the 'positive' duties to protect and to fulfil them becomes quite contestable, because of the intrinsic continuity between these various dimensions. For instance, in deciding on remuneration, the corporation may not ignore 'fair remuneration' as defined, in the International Covenant on Economic, Social and Cultural Rights, as one that enables workers and their families to enjoy an adequate standard of living, in which the Covenant includes 'adequate food, clothing and housing', and to the 'continuous improvement of living conditions'.²⁹ In setting prices as commodity buyers or in defining standards, agrifood corporations may have to take into account the specific needs of smallholders, and ensure that whichever conditions are set do not result in depriving these producers from their ability achieve a level of incomes that allows them to achieve a decent standard of living.³⁰ In providing water services to the population, companies may have to ensure that they do not compromise equal, affordable, and physical access to sufficient, safe and acceptable water to all.³¹ In all these examples, the frontier dissolves between a (negative) duty to abstain from measures that impact on economic and social rights and a (positive) duty to contribute to the full realization of these rights. What matters is *how the company goes about doing things*, not whether it refrains from acting or takes action : it is the overall conduct of the company that may have to take into account the requirements of human rights, whether that conduct takes the form of actions or of omissions.

Indeed, the contributions of the Special Representative of the Secretary-General on the issue of business and human rights at least implicitly recognize this, where they note for instance that the obligation to respect (or to 'do no harm') 'is not merely a passive responsibility for firms but may entail positive steps - for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes'³²; or where they define the 'sphere of influence' of companies as defined by 'the company's web of

²⁸ See, *inter alia*, K. De Feyter & F. Gomez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation*, Antwerp: Intersentia, 2005.

²⁹ See International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, G.A. Res. 2200(XXII), U.N. GAOR, 21st sess., Supp. No. 16, U.S. Doc. A/6316 (1966), 993 UNTS 3) (Articles 7 (a) (ii) and 11) and Committee on Economic, Social and Cultural Rights, General Comment No. 18: The right to work (Article 6 of the Covenant) (adopted on 24 November 2005), UN doc. E/C.12/GC/18 (6 Feb. 2006), para. 44. See also Christian Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies', *Max Planck Yearbook of United Nations Law*, Volume 11 (2007), p. 317-337, at 326 (n. 6) and, on the need to define a methodology for the definition of a 'living wage' corresponding to the requirements of Article 6 of the Covenant, see *Agribusiness and the right to food. Report of the Special Rapporteur on the right to food*, Olivier De Schutter, UN doc. A/HRC/13/33 (22 Dec. 2009), paras. 14-17.

³⁰ *Agribusiness and the right to food. Report of the Special Rapporteur on the right to food*, Olivier De Schutter, UN doc. A/HRC/13/33 (22 Dec. 2009), paras. 37-45.

³¹ This of course paraphrases what the Committee on Economic, Social and Cultural Rights says about the duty of the States parties to the Covenant to protect the right to water : see Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water (articles 11 and 12 of the Covenant), UN doc. E/C.12/2002/11 (2002), para. 23 ('Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water').

³² *Protect, Respect and Remedy*, para. 55.

activities and relationships'.³³ These contributions also insist that a company 'cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have companies act whenever they have influence, particularly over governments. Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another'.³⁴ This would seem to exclude extending the responsibilities of companies towards human rights to situations which companies could contribute to improving but which they have had no role in causing. However, this apparent simplicity is put into question by what is said in the same reports about the due diligence requirement that is included in the responsibility of companies to respect human rights. That requirement, it is stated, imposes on a company to examine 'what human rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours', as well as 'whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors'.³⁵ Due diligence thus described clearly goes beyond merely 'negative' duties to abstain from certain types of behaviour that could have an impact on the enjoyment of human rights : it in fact imposes on companies to ensure that, as market participants, they contribute to positive human rights outcomes.

These conceptual hesitations illustrate the difficulty of tracing a clear-cut distinction between such 'negative' duties as described above and 'positive' duties to contribute to human rights by exercising one's influence wherever possible. However valid it may be in theory, such a distinction is untenable in practice. And especially, it creates the wrong incentive : it encourages a company faced with certain delicate situations where human rights are at risk to adopt a 'hands-off' approach, in order to escape the accusation of bearing part of the responsibility in the alleged violation of human rights, when what we would need is for the company to be encouraged to exercise its influence for the benefit of human rights. We therefore need something else : a definition of the human rights obligations that should be imposed on corporations, commensurate with their ability to influence certain actors with whom they interact or certain situations over which they make decisions, that recognizes the important role they can play in the fulfilment of human rights.

4. How to define the scope of positive duties imposed on corporations?

It is the difficulty to provide such a definition that has been the main obstacle to the recent attempts to impose human rights obligations on companies. At international level, the attempt to revive the debate on this issue began with the presentation by the UN Sub-Commission for the Promotion and Protection of Human Rights -- made up of independent experts appointed by the Commission on Human Rights to provide expert advice in support of its work -- of a set of 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises', which they approved in August 2003.³⁶ The draft Norms presented themselves as a restatement of the human rights obligations imposed on companies under

³³ Protect, Respect and Remedy, para. 71.

³⁴ Protect, Respect and Remedy, para. 69.

³⁵ Protect, Respect and Remedy, para. 57.

³⁶ UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, which the Preamble of the draft Norms states is 'a useful interpretation and elaboration of the standards contained in the Norms', UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). On the drafting process of these draft Norms and a comparison with previous attempts of a similar nature, see David Weissbrodt & Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* 901 (2003) ; David Weissbrodt & Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in Ph. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, 2005, pp. 315-350.

international law. They were based on the idea that 'even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights', and therefore 'transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments'.³⁷

However, the 'Norms' met with strong opposition both from the business community and from a number of governments.³⁸ Among the concerns that were raised was the vagueness with which the positive duties of corporations were outlined. While acknowledging the primary responsibility of States in the fulfilment of human rights, Principle 1 of the draft Norms stated that:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment 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.

The notion of 'sphere of influence' was therefore key in defining the scope of the positive duties the Norms intended to impose on corporations to support the realization of human rights. The notion had not in fact originated with the Norms: it had been put forward a few years earlier in the 'Global Compact, the flagship initiative of the United Nations in promoting corporate social responsibility, initially proposed by the United Nations Secretary General K. Annan at the 1999 Davos World Economic Forum. Yet, though not entirely unknown, the notion of "sphere of influence" still appeared to be a relatively vague notion. It is best understood as a compromise between two ideas : on the one hand, companies are not to be equated to the States in which they operate, which are primarily responsible for the provision of public services such as health or education, and for the maintenance of law and order; on the other hand, the more companies are powerful, the more it will be justified to impose on them to exercise leverage on their business partners or on the host government to ensure that they, too, comply with the set of internationally recognized human rights. Still, the notion was not sufficiently well delineated in the Norms. To many, it appeared as a potential source of legal insecurity and, if the Norms were to develop into a hard instrument, of endless litigation.

It may be argued, however, that the notion of "sphere of influence" simply seeks to align the human rights responsibilities of companies with the effective power that they exercise. Three examples may serve as an illustration. What these examples have in common is that they show the need to move beyond legal fictions, or an idealized view of a market composed of a multitude of economic actors competing against one another, towards a realistic assessment of the power yielded by large corporate actors, who have the capacity to shape the markets in which they operate,³⁹ and whose influence often extends even beyond national territories.

³⁷ Preamble, 3d and 4th Recital.

³⁸ *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005, UN doc. E/CN.4/2005/91.

³⁹ As noted, memorably enough, by John Kenneth Galbraith in his 1967 book, *The New Industrial State* (Boston: Houghton Mifflin).

A. Corporations as service-providers

Consider first the situation where companies are in such a dominant role that they occupy the same monopolistic position as governments providing public services. The case of *Verein gegen Tierfabriken v. Switzerland* provides an illustration. Verein gegen Tierfabriken (VgT), a Swiss association dedicated to the protection of animals, had been seeking to react to various television commercials of the meat industry. It prepared to that effect a 35-seconds long television commercial aiming to convince the viewers to eat less meat "for the sake of your health, the animals and the environment", as stated in the slogan closing their clip. As VgT wished its film to be broadcast in the programmes of the Swiss Radio and Television Company, it sent the film to the then Commercial Television Company (AG für das Werbefernsehen, renamed Publisuisse after the facts) responsible for television advertising. That company however refused to air the clip, arguing that it had a "clearly political character" and that section 18(5) of the Federal Radio and Television Act prohibited political advertising. The Swiss courts to which VgT applied agreed with the company that, in matters of advertising, the company acted as a private entity and did not fulfil a duty of public law when it broadcast commercials. VgT turned to the European Court of Human Rights, alleging a violation of its freedom of expression guaranteed under Article 10 of the European Convention on Human Rights.

The Court recognized that, in principle, a State party to the Convention may legitimately aim to prevent financially powerful groups from obtaining a competitive political advantage by advertising political commercials. However, it responded to the argument of the Swiss government according to which the association has 'various other possibilities to broadcast the information at issue', that VgT,

aiming at reaching the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland. The Commercial Television Company was the sole instance responsible for the broadcasting of commercials within these national programmes. Private regional television channels and foreign television stations cannot be received throughout Switzerland.⁴⁰

The lesson is this : because the private corporation to which all responsibilities in the area of advertising had been delegated had in effect a monopoly, it was duty-bound to protect the freedom of expression of the applicant association by allowing it to air its commercial.⁴¹ A similar conclusion can be drawn from the case of *Appleby and Others v. the United Kingdom*, decided two years later by the European Court of Human Rights, where the owner of a privately owned town centre denied the applicants the authorisation to collect signatures for a petition, arguing that the owner wished to remain neutral : although concluding in the circumstances that freedom of expression of the petitioners had not been violated, the Court did note that where 'the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights'.⁴²

⁴⁰ Eur. Ct. HR (2nd sect.), *VgT Verein gegen Tierfabriken v. Switzerland* judgment of 28 June 2001 (final on 28 September 2001) (Appl. No. 24699/94), para. 77.

⁴¹ The European Court of Human Rights later found a fresh violation of Article 10 of the European Convention on Human Rights to result from the failure of Switzerland to faithfully execute the 2001 judgment : see Eur. Ct. HR (GC), *Case of VgT Verein gegen Tierfabriken v. Switzerland*, judgment of 30 June 2009 (Appl. No. 32772/02).

⁴² Eur. Ct. HR (4th sect.), *Appleby and Others v. the United Kingdom* judgment of 6 May 2003 (final on 24 September 2003) (Appl. No. 44306/98), para. 47.

Nor is the European Court of Human Rights isolated in this regard. It was inspired, in fact, by the United States Supreme Court's case law in the area of free speech. In the well-known case of *Marsh v. Alabama*,⁴³ a Jehovah's Witness was convicted of trespass after she refused to stop distributing religious literature on the sidewalk near a post office in the town of Chickasaw, a town wholly owned and run by the Gulf Shipbuilding Corporation : although she was on private property, the majority of the Court reasoned, her First Amendment rights trumped the private property of the company owning the town. The Court compared the position of the company to that of a municipality, asking : 'Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?'.⁴⁴ Framing the question thus -- explicitly analogizing the company, because of the position it occupied, to the State -- could lead the Court to no other answer.

In United States constitutional law, the fact that the Bill of Rights appended to the Federal Constitution in principle cannot be invoked against private persons as it only applies to 'State action' has sometimes led to confusion in the case-law.⁴⁵ But in the later case of *Pruneyard Shopping Center v. Robbins*,⁴⁶ the Court did not object to a provision in the Californian Constitution that protected 'speech and petitioning, reasonably exercised, in shopping centers even when the shopping centers are privately owned'⁴⁷: in the eyes of the Court, an obligation imposed on a private shopping center owner to accept the exercise of free speech on their premises does not violate his property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments. In rejecting the argument by the Pruneyard Shopping Center that such an obligation -- confirmed by the Californian Supreme Court⁴⁸ -- amounted to a prohibited taking of property, the United States Supreme Court again reasoned by comparing the situation of the shopping center to that of a municipality. Just like a municipality would be allowed to impose certain time, place and manner restrictions on speech, so a shopping center could impose such restrictions for the sake of preserving its commercial functions : beyond that, States are free to extend the protection of free speech, and may even have to do so.⁴⁹

Company-owned towns are an extreme situation, and there is a world of difference, of course, between the private shopping centre asked to tolerate people distributing handbills on its premises and the company asked to protect access to health, to education or to housing, for the benefit of the communities in which they operate. The point of the comparison, however, is this: what truly matters as we seek to identify the duty-bearers of any particular right of the individual, should not be the private or the public nature of the actor concerned, as it is in the classic State action doctrine in United States constitutional law. The focus should be, rather, on the degree of dependency of the right-holder vis-à-vis the actor concerned, or (what

⁴³ 326 U.S. 501 (1946).

⁴⁴ 326 U.S. 501, 504.

⁴⁵ See, inter alia, *Hudgens v. NLRB*, 424 U.S. 507 (1976); see also *Lloyd Corp. v. Tanner*, 47 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1972) (where a strict 'no handbilling policy' could be imposed by a private shopping center because the petitioners had alternative means of communicating their message to the public and because, in contrast to other cases (*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1972)), the handbilling was unrelated to any activity within the center).

⁴⁶ 447 U.S. 74 (1980).

⁴⁷ Article 1, 2 of the California Constitution.

⁴⁸ 23 Cal. 3d 899, 910, 592 P.2d 341, 347 (1979).

⁴⁹ See 447 U.S. 74, 83: 'There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions'.

amounts to the same) the degree of control over any particular good or resource that the actor possesses. In domestic legal systems that attach a great weight to the private/public distinction in determining when and against whom human rights can be invoked, as the United States system does, that distinction is premised on the idea that market relationships are chosen 'freely', whereas the individual cannot freely choose whether or not to submit to the authority of the State. But the fragility of that presumption has been demonstrated since the realist turn in legal thought.⁵⁰ It is one that clearly falls where companies take over public functions or have a monopoly in the delivery of certain services, holding individuals in subordination just like States may do by the monopoly over enforcement powers. Indeed, it is precisely because the market is not devoid of coercion and of power imbalances that international human rights law imposes on States a duty to protect, which amounts to nullifying the private/public distinction as it is used in the context of State international responsibility⁵¹: if market relationships were always truly free -- if individuals only entered into legal relationships based on their free consent, and on the choice they make between different alternatives -, the protection by the State would be superfluous except in the most extreme of cases.

If, then, we accept to define the human rights obligations that should be imposed on corporations as a function of their ability to influence certain actors with whom they interact or certain situations over which they make decisions, it is evident that where one private actor monopolizes the delivery of education, housing, healthcare services or food, it must be imposed to deliver those goods and services that are essential to a decent life, in order to ensure that they are adequate and available and accessible to all : a State not imposing such an obligation on that private actor would be in violation of its own human rights obligations. We reach the same conclusion where such a monopoly is exercised by a number of private actors, conspiring together rather than competing against one another : antitrust law, in this regard, is a key instrument in ensuring the protection of human rights, since it helps equalizing the relationships in the sphere of the market, and in principle should be a check against the abuse by one actor of the dominant position it has acquired.⁵²

B. Corporations as groups of companies

Delicate questions concerning the "sphere of influence" within which corporations are imposed human rights responsibilities also arise as a result of corporations developing as networks of companies, related to one another through investment or contractual links. Corporate groups today comprise distinct legal entities, each with their own juridical personalities, usually including one parent (controlling) corporation on the one hand, and its (controlled) subsidiaries on the other. This too raises the issue of the scope of the human rights duties of the actors involved. The doctrine of limited liability holds that the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment.⁵³

⁵⁰ Robert Lee Hale was one of the most insightful writers on this apparent paradox. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Political Science Quarterly* 470 (1923). For an excellent comment from an institutionalist economist's perspective, see Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 *U. Miami L. Rev.* 261 (1973).

⁵¹ On the private/public distinction in the international law on State responsibility and the duty to protect in human rights law, see Olivier De Schutter, 'The responsibility of states', chap. 2 in S. Chesterman and A. Fisher (ed), *Public Security, Private Order. The Outsourcing of public services and its limits*, Cambridge Univ. Press, 2009, pp. 17-37.

⁵² See, for instance, United Nations Special Rapporteur on the right to food, "Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power", Briefing Note 3 (1 December 2010); and Aravind R. Ganesh, *The Right to Food and Buyer Power*, 11 *German Law Journal* 1190-1244 (2010).

⁵³ *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ('Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception' (citations omitted)); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ('A corporation and its stockholders are generally to be treated as separate entities').

The doctrine may play a role also a role in international law, where States' duties to control corporations are invoked. In the *Barcelona Traction Case*, the International Court of Justice followed the classical approach to corporate entity law and appeared to accept its consequence – that the piercing of the corporate veil should remain limited to exceptional cases.⁵⁴ As regards the determination of nationality for the purposes of the exercise by a State of its right to diplomatic protection, it noted that a distinction should be made between the legal situation of the corporation and that of its shareholders : "Separated from the company by numerous barriers", the Court said, "the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights".⁵⁵ It is highly doubtful whether this position should be considered as determinative beyond the narrow field of diplomatic protection.⁵⁶ Indeed, warning against the abuse of the corporate form, the International Court of Justice explicitly acknowledged already in its judgment of 5 February 1970 that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances:

Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. (...) In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.⁵⁷

⁵⁴ Case Concerning *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, [1970] I. C. J. Rep. 3. Following the adjudication in bankruptcy in Spain of Barcelona Traction, a company incorporated in Canada and having its head office, Belgium sought reparation for damage alleged to have been sustained by Belgian nationals, both natural and legal persons, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State. One of the preliminary objections of the Spanish Government was to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company even if the shareholders were Belgian. This objection was joined to the merits and, by fifteen votes to one, the Court agreed with this contention of the Spanish government. The Court found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain. The Court reasoned that since, in municipal law, a distinction is made between the rights of the company and those of the shareholders, when an act is committed against a foreign company, in alleged violation of international law, it is for the national State of that company alone to file a claim to diplomatic protection (in this case, Canada) ; the shareholder's national State (Belgium) has no right to do so.

⁵⁵ Case concerning *The Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, 184.

⁵⁶ On the relevance of the *Barcelona Traction* case beyond the exercise of diplomatic protection, see already the doubts expressed by Stanley D. Metzger, 'Nationality of Corporate Investment Under Investment Guaranty Schemes-The Relevance of Barcelona Traction', 65 *American Journal of International Law* 532 (1971).

⁵⁷ Case concerning *The Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, cited above, at pp. 38-39.

But the principle of limited liability, and lifting the corporate veil having to remain exceptional, remains the dominant one. Consistent with this doctrine, the liability of the parent company may not be engaged solely on the basis of the fact of the control it exercises on the subsidiary, where the latter commits human rights violations or contributes to such violations. This may make it difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent company. How can this obstacle be overcome?

A first approach, classically described as the ‘piercing the corporate veil’ approach, requires to examine the factual relationship between the parent and the subsidiary in order to identify whether the nature of that relationship is not more akin to the relationship between a principal (the parent) and an agent (the subsidiary), or whether, for other motives, there are reasons to suspect that the separation of corporate personalities does not correspond to economic reality. This approach is the one alluded to by the International Court of Justice in the *Barcelona Traction* case, where it cautions against the risk of abuse. It is the technique mostly relied upon, for instance, in South Africa⁵⁸ or in the United States. Thus, the United States courts will allow claimants to establish that the parent company exercises such a degree of control on the operations of the subsidiary that the latter cannot be said to have any will or existence of its own,⁵⁹ and that treating the two entities as separate (and thus allowing the parent to shield itself behind its subsidiary) would sanction fraud or lead to an inequitable result.⁶⁰ In such cases, the corporate veil will be lifted: the subsidiary, in such circumstances, is a mere instrument in the hands of the parent company,⁶¹ so that the parent and the subsidiary are ‘alter egos’.⁶² Alternatively, it may be shown that the subsidiary was acting in a particular case as the agent of the parent company.⁶³ This will be allowed, again in exceptional cases, where the parent company controls the subsidiary and where both parties agree that the subsidiary is acting for the agent: in such a case, ‘the acts of a subsidiary acting as an agent are, from the legal point of view, the acts of its parent corporation, and it is the parent that is liable’.⁶⁴ An example is the reasoning followed in the case of *Bowoto v. Chevron Texaco*, where Judge Illston concluded that CNL, the subsidiary of Chevron in Nigeria, which allegedly had acted in concert with the Nigerian military in order to violently suppress protests against Chevron’s activities in the region, could be considered as the agent of Chevron, in view in particular of the volume, content and timing of communications between Chevron and CNL, notably on the day of a protest when ‘an oil platform was taken over by local people’.⁶⁵ These and other indicia showed that Chevron ‘exercised more than the usual degree of direction and control which a parent exercises over its subsidiary’.

⁵⁸ International Commission of Jurists, *Human Rights Abuses Involving Corporations: South Africa*. Geneva, 2009, pp. 10 and ff.

⁵⁹ Taken alone, neither majority or even complete stock control, nor common identity of the parent’s and the subsidiary’s officers and directors, are sufficient to establish the degree of control of required. What is required is ‘control (...) of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction has at the time no separate mind, will or existence of its own’ (*Lowenthal v. Baltimore & Ohio R.R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div.), aff’d, 6 N.E.2d 56 (1936), cited by Ph. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’, *Hastings Int’l & Comp. L. Rev.*, 24 (2001), pp. 297-330, at p. 304).

⁶⁰ See *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939) (‘the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice’).

⁶¹ *Chicago, M. & St. P. R. Co. v. Minneapolis Civic and Commerce Assn.*, 247 U.S. 490, 501 (1918) (principles of corporate separateness ‘have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose (...) of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company’).

⁶² See, eg. *United States v. Betterfoods*, 524 U.S. 51 (1998).

⁶³ As Justice (then Judge) Cardozo summarized in *Berkey v. Third Avenue R. Co.*, 244 N. Y. 84, 95, 155 N. E. 58, 61 : ‘Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent’.

⁶⁴ Ph. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’, *Hastings Int’l & Comp. L. Rev.*, 24 (2001), pp. 297-330, at 307.

⁶⁵ *Bowoto v. Chevron Texaco*, No C 99-2506 SI, 2004 US Dis LEXIS 4603 (ND, Cal 2004).

In order to establish either that the corporate form has been abused – by a parent artificially seeking to shield itself from liability by establishing a subsidiary which has in fact no existence of its own – or that the subsidiary has been acting in fact as the agent of the parent corporation, claimants will have to establish that the separation of legal personalities is a mere legal fiction to which the economic reality does not correspond and which should not be admitted, as this might sanction fraud.⁶⁶ This approach thus may constitute a source of legal insecurity, since the criteria allowing the ‘piercing of the veil’ are many, without either the list of admissible criteria or their hierarchisation having been authoritatively identified. It also imposes a heavy burden on plaintiffs seeking to invoke the indirect liability of the parent corporation for the acts of its subsidiary. This results in a situation where, in fact, very few such attempts to ‘pierce the veil’ end up succeeding.⁶⁷

Because of the limitations of this first approach, it has been suggested, as an alternative, that corporate groups are formed of entities, legally separate perhaps, but whose interconnectedness is such that a presumption should be allowed according to which any act committed by one subsidiary of the group should be treated as if it were adopted by the parent. In this perspective, the corporate group is seen as ‘a conglomeration of units of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, supervision and finance. Insofar as injuries result from negligence in respect of any of the parent company functions, then the parent should be liable’.⁶⁸

This technique has been used in the United States not only in New Deal legislation and by courts and agencies seeking to ensure that legislation protecting employees would not be outplayed by the abuse of the corporate form, but also in order to define the conditions under which certain legislations protecting employees from discrimination could extend to the operations of subsidiaries of American undertakings operating overseas⁶⁹: the 1990 American with Disabilities Act⁷⁰ or Title VII of the Civil Rights Act of 1964 provide examples.⁷¹ The District Court of Illinois also took this approach in the *Amoco Cadiz Oil Spill* case, even absent a clear legislative mandate, in order to conclude that the parent corporation should be held liable for environmental damage caused by an oil spill from a tanker off the coast of France: the close degree of control of the parent corporation over its subsidiaries allowed the court to overcome the separation of legal personalities.⁷² It has also been proposed in legal doctrine to adopt a similar approach in the Alien Tort Statute, where, it has been argued, the fact that the subsidiary has allegedly violated the law of nations should be sufficient to allow for piercing the veil, and impose a liability on the parent (controlling) company unless it is

⁶⁶ See, e.g., *Labor Board v. Deena Artware*, 361 U.S. 398, 402 (1960).

⁶⁷ For this reason, courts may be tempted to set aside the classical tests for allowing the piercing of the corporate veil in order to ensure that the legislative policy will not be defeated by the choice of corporate forms. See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944) (‘It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement’); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703, 713 (1974) (‘the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy’); *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) (‘the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies’).

⁶⁸ R. Meeran, ‘The Unveiling of Transnational Corporations’, in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague : Kluwer Law International, 1999), at p. 170.

⁶⁹ Blumberg, *Hastings Int’l & Comp. L. Rev.*, 24 (2001), pp. 297-330, at 313-315.

⁷⁰ Pub. L. 101-336, title I, § 102, July 26, 1990, 104 Stat. 331; amended by Pub. L. 102-166, title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077; codified as 42 U.S.C. § 12112 (c)(2)(A) (1994).

⁷¹ Pub. L. 88-352 (Title VII), 42 U.S.C. § 2000e and ff., as amended by the Civil Rights Act of 1991 (Pub. L. 102-166).

⁷² See *Amoco Cadiz Oil Spill*, 1984 A.M.C. 2123, 2 Lloyd’s Rep 304 (N.D. Ill. 1984): ‘As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, standard [the American parent corporation] is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities AIC and Transport’.

proven by the latter that 'no reasonable effort would have discovered evidence from documents of any applicable government, non-governmental organizational documents and reports, employee information, or anecdotal information in the state that would have moved a reasonable person to inquire further'.⁷³

Finally, a third avenue consists in abandoning the idea of linking the behaviour of the subsidiaries to that of the parent altogether, and to focus instead on the *direct* liability of the parent company arising from the failure to exercise due diligence in controlling the acts of the subsidiaries it may exercise control upon. The OECD Guidelines on Multinational Enterprises appear to follow this approach, where they state that they "extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries."⁷⁴ This formulation amounts to imposing on a parent company a duty to monitor the activities of the subsidiary, consistent with the emerging notion that corporations have a due diligence obligation to ensure that human rights are complied with within their sphere of influence.

This approach creates an incentive for the parent company to ensure that the subsidiaries which it can influence comply with human rights. In contrast, a doctrine requiring that claimants bring forward elements justifying the lifting of the corporate veil (as in the first of the three approaches discussed here) creates an incentive for the parent company to remain at arm's length from the activities of its subsidiary, in order not to be held liable for its behaviour.⁷⁵ A comparison between the cases of *Connelly v. RTZ Corporation plc and Others* and *Lubbe and 4 Others v. Cape plc*, which both concerned violations of the right to health of workers employed in the extractive industry, provides an illustration.

In *Connelly*,⁷⁶ the claimant was a former employee for Rossing Uranium Ltd. (R.U.L.), a Namibian subsidiary of the defendant corporation (RTZ Corporation plc, incorporated in the United Kingdom). He had been employed by R.U.L. in an uranium mine, following which it was discovered, three years after his return, that he was suffering from cancer of the larynx, apparently due to exposure to radioactive material in the mine. According to the description by the House of Lords, the claim was based on the allegation that 'R.T.Z. had devised R.U.L.'s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy', and that 'an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine'. The argument was therefore not (as in classical piercing-the-veil analysis) that separation between the parent and the subsidiary should be treated as a mere fiction, a fraudulent means of limiting the liability of the parent corporation,

⁷³ S. Coye-Huhn, 'No More Hiding behind Forms, Factors and Flying Hats: A Proposal for a per se Piercing of the Corporate Veil for Corporations that Violate the Law of Nations under the Alien Tort Claims Statute', *U. Cin. L. Rev.*, 72 (2003), pp. 743-770, at p. 758. In contrast with this proposal, however, the presumption established under statutes such as the Civil Rights Act or the American With Disabilities Act is non-rebuttable.

⁷⁴ OECD Guidelines on Multinational Enterprises (as revised on 25 May 2011), II. General Policies, Commentaries, para. 9.

⁷⁵ As noted by Sarah Joseph, where direct liability attaches to parent companies only in cases of actions rather than omissions 'parents will be discouraged from intervening in their subsidiary's operations, even though they may have superior knowledge and technical expertise. Alternatively, parent companies might maintain 'strategic control' but avoid responsibility by delegating operational matters, which are more likely to give rise to tortious consequences' (S. Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford – Portland, OR : Hart Publishing, 2004), at p. 134 (citing A.J. Natale, 'Expansion of Parent Corporate Shareholder Liability through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary', *Univ. of Cincinnati L. Rev.*, 57 (1988), pp. 717-750, at p. 736 ; and J. Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law', *Cumberland L. Rev.*, 31 (2000), pp. 311-335, at p. 326)).

⁷⁶ *Connelly v. RTZ Corporation plc and Others* [1997] UKHL 30; [1998] AC 854; [1997] 4 All ER 335; [1997] 3 WLR 373 (24th July, 1997).

without any correspondence in economic reality: it was that R.T.Z. corporation had itself contributed, by its acts, in causing the damage for which the victim sought compensation. Such an argument would have had no chance of succeeding if, instead of being involved in defining the policy of its subsidiary on health and safety or environmental issues, R.T.Z. corporation had simply ignored any risks associated with the mining of uranium, and had acted merely as a shareholder, monitoring the financial performances of its subsidiary, but without seeking to be informed about, let alone participating in, its daily operations in such areas.

The direct liability of the parent corporation in *Connelly* was asserted on the basis of the *actions* it had taken in defining the policies of its subsidiary. By contrast, the *omissions* of the parent corporation were at stake in *Lubbe and 4 Others v. Cape plc*, which the House of Lords was presented with again only three years later.⁷⁷ Over 3,000 plaintiffs claimed damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos in South Africa, either upon working in mines owned by the defendant (until 1948) or by a fully-owned South African subsidiary of the defendant, or as a result of living in an area contaminated by the mining activities of the defendant or its subsidiaries. As noted by the leading opinion of Lord Bingham of Cornhill, ‘the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, *failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group*. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)’.⁷⁸

Central to the *Cape plc* case was, therefore, the question

whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company.⁷⁹

This approach, the third in our typology, may be relied upon in all legal systems that impose a "duty of care" on companies, understood as a duty to exercise due diligence, obliging parent companies to monitor the subsidiaries. In German law for instance, obligations derived from the duty of care (*Verkehrspflichten*) would include a duty of the parent company to control the subsidiary whose behavior it can influence, and where that subsidiary adopts conduct that leads to human rights violations, the parent company would only escape liability by showing that it put in place all the monitoring systems that could be reasonably expected, and that would have had an effective chance of preventing the realization of the risk of violation.⁸⁰

⁷⁷ On 14 December 1998, the House of Lords had already refused to allow leave to the defendants for filing a further appeal against an initial decision by the Court of Appeal. Following this, over 3,000 new plaintiffs emerged, fundamentally transforming the nature of the litigation presented before the United Kingdom courts.

⁷⁸ Emphasis added.

⁷⁹ As indicated by the opinion of Lord Bingham of Cornhill, this is the issue as reformulated during the first Court of Appeal hearing in the case.

⁸⁰ G. Wagner, § 823. In: Münchener Kommentar zum BGB, vol. 4. München, Beck, 2009, para. 99 ; Emmerich, V., and M. Habersack (2010): Aktien- und GmbH-Konzernrecht. Kommentar, § 311: para. 13.

To summarize, there are three ways of dealing with the complexities resulting from the distinction between the economic reality of the corporate group and its organization into separate legal entities bound through an investment nexus. The first approach, based on 'derivative liability' of the parent corporation, creates a disincentive on the parent company to exercise a strict control over the activities of the subsidiary, even in situations where it could exercise such control in fact. Indeed, to the extent that the relationships between the parent and the subsidiary remain fully consistent with the norms of corporate behaviour, i.e., do not lead to the suspicion that the parent-subsidiary separation has been misused in order to artificially insulate the parent from liability for the behaviour of the subsidiary, the corporate veil will not be pierced : only where it has been established that the control by the parent company is such that the subsidiary has no existence of its own (has no 'separate mind'), will the separation of legal personalities be overcome. Thus, insofar as this serves to limit its potential legal liability, it will be in the interest of the parent company, not to monitor closely the everyday operations of the subsidiary, but on the contrary to abandon broad discretion to the subsidiary as to how to implement the general policies set for the multinational group. By contrast, if – under the 'integrated enterprise' approach – we establish a presumption that the parent is liable for all the acts adopted by the subsidiaries within the multinational group, or if we seek to engage the 'direct liability' of the company for failing to exercise due diligence in controlling the activities of its subsidiary, close monitoring of the subsidiary will be in the interest of the parent : instead of making it vulnerable to attempts to pierce the corporate veil, it may be seen as a way to avoid liability or as an insurance against the risk of being accused of being negligent in exercising oversight over the subsidiary's activities.

C. Corporations as networks of business partners

Supply chain management is the third area where the ghost of the "sphere of influence" continues to haunt discussions on the human rights duties of corporations. Here too, a due diligence obligation is emerging, that largely responds to the same concerns that the notion of "sphere of influence" initially sought to address, and replicates its solutions. Principle 17 of the Guiding Principles on Business and Human Rights provides that human rights due diligence should cover "adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships". Similarly, the OECD Guidelines on Multinational Enterprises, as revised in 2011, provide that business enterprises domiciled in OECD should "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts." The Commentary to these Guidelines explains that meeting this expectation:

would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. 'Business relationships' include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.⁸¹

The OECD Guidelines on Multinational Enterprises also provide that:

⁸¹ OECD Guidelines on Multinational Enterprises (as revised on 25 May 2011), Commentary, para. 43.

In addition to addressing adverse impacts in relation to matters covered by the *Guidelines*, [multinational enterprises should] encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*.⁸²

Business enterprises increasingly operate as part of large networks of suppliers, sub-contractors and clients, and it may be difficult for the enterprise to systematically monitor the activities of all its business partners. However, due diligence may be exercised in two ways. First, a reference to human rights, including the core labour rights and economic and social rights such as the right to health or the right to food -- all of which can be directly affected by corporate behavior --, could be inserted systematically in any contract that establishes a long-term, ongoing relationship between an enterprise and its business partner.⁸³ Secondly, "where due diligence on every individual relationship is impossible, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence. This would include, for example, agricultural products sourced from suppliers in an area known for child labour; security services provided by contractors or forces in areas of conflict or weak governance and rule of law; and drug trials conducted through partners in areas of low education, literacy and legal safeguards".⁸⁴

The leverage a business enterprise may exercise on its business partners is usually referred to as an element to be taken into consideration in order to assess whether it has acted with the required due diligence as regards that partner's impacts on human rights. In scenarios where the business partner is not in fact dependent, such influence may be difficult or indeed impossible to exercise. This may be the case, for instance, of a supplier with a large number of clients, or one on whom the buyer depends for an essential supply for which they are few or no other sellers on the market. However, the option of cutting off relationships must always be considered, even if the business partner cannot be influenced, at least where the partnership is not essential to a core activity of the business enterprise concerned. In addition, there are a number of tools business enterprises could use in order to ensure that they manage the supply chain responsibly, taking into account their human rights due diligence responsibilities. The OECD Guidelines on Multinational Enterprises refer for instance to influencing suppliers "through contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements",⁸⁵ adding:

22. Appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage.

⁸² OECD Guidelines on Multinational Enterprises (as revised on 25 May 2011), II. General Policies, para. 13.

⁸³ On the rise of this tendency, see Larry Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator", *Univ. of Connecticut L. Rev.*, vol. 39(4) (2007), pp. 1739-1784.

⁸⁴ The Corporate Responsibility to Respect Human Rights - An Interpretive Guide, Office of the High Commissioner for Human Rights, advance unedited version (November 2011), para. 7.8 (internal quotation marks omitted).

⁸⁵ OECD Guidelines on Multinational Enterprises (as revised on 25 May 2011), II. General Policies, Commentaries, para. 21.

23. Enterprises may also engage with suppliers and other entities in the supply chain to improve their performance, in co-operation with other stakeholders, including through personnel training and other forms of capacity building, and to support the integration of principles of responsible business conduct compatible with the *Guidelines* into their business practices. Where suppliers have multiple customers and are potentially exposed to conflicting requirements imposed by different buyers, enterprises are encouraged, with due regard to anti-competitive concerns, to participate in industry-wide collaborative efforts with other enterprises with which they share common suppliers to coordinate supply chain policies and risk management strategies, including through information-sharing.⁸⁶

Imposing on corporations certain obligations in the area of economic and social rights is thus justified theoretically, where they exercise a command over goods or resources that are essential to the enjoyment of those rights (whether as a result of the position they acquired in the market or whether by decree). It has also come to be accepted that corporations have a duty to control the economic actors over which they can exercise an influence, due to investment links within the corporate group or through supply chain management. Though the notion of "sphere of influence" has fallen into disrepute, what it aimed at effecting is now achieved, to a large extent, by the notion of "due diligence", which has become its functional substitute.

Courts, nevertheless, have been reluctant to impose on corporations duties on the basis of economic and social rights such as the right to health, to education, or to food. The next section discusses two motives that could explain this reluctance. One is that corporations should be left free to pursue the objectives they see fit for them, and that they should not be imposed to contribute to broader aims related to social justice. Another is that freedom of contract, which companies exercise when they hire, when they buy or when they sell, should be respected as fundamental. Both of these ideas betray a common misunderstanding: they equate the corporate body with a natural person, elevating a profit-making device to the dignity of the individual human being.

5. May courts enforce economic and social rights against corporate actors?

Courts have routinely imposed on corporations certain duties that correspond to economic and social rights. They have done so for instance by enforcing minimum wage legislation, or by imposing levels of compensation in cases of unfair dismissal that take into account the cost of living and the rate of inflation.⁸⁷ The direct application of human rights law in private litigation -- the so-called 'horizontal' application of human rights law -- has been developing in recent years, and it has extended to labor rights and to economic and social rights.⁸⁸

Yet, this development has not gone unchallenged. Courts may fear that the application to 'horizontal' private relationships of norms designed to regulate the 'vertical' relationships between the State and the individuals under its jurisdiction, will draw them into political controversy, and oblige them to make difficult choices between the application of private law

⁸⁶ *Ibid.*, paras. 21-23.

⁸⁷ See Argentine Supreme Court, *Jáuregui, Manuela Yolanda c. Unión Obreros y Empleados del Plástico*, of 7 August 1984, cited by Courtis, p. 331, note 23. Courtis cites a range of cases decided by the Argentine Supreme Court that impose on the State to define the minimum wage, the level of state pension, or social security allocations, taking into account these requirements; these determinations as a matter of course reflect on the duties of the employer towards the employees.

⁸⁸ Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors', 11 *Buffalo Human Rights Law Review* 21 (2005); Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (New York: Routledge Cavendish, 2007) (providing a comparison of the role of human rights in inter-individual litigation in a range of jurisdictions).

doctrines and the requirements of human rights law. For instance, when it was proposed in South Africa to make certain of the provisions of the Interim Bill of Rights applicable to other bodies and persons than State organs 'where just and equitable', thus leaving it to the courts to decide when such horizontal application of constitutional rights was justified,⁸⁹ the judiciary expressed its scepticism. It stated:

This clause will create great uncertainty and confusion. The reference to the application of the Bill to "other bodies and persons" implies the horizontal application of the Bill. This entails the application of the Bill to, inter alia, the actions of companies and corporations (whether public or private), partnerships, societies and clubs, and all individuals. In consequence, all private relationships will be governed by the Bill of Rights. The phrase quoted above can, and notionally will, be interpreted to mean that the provisions of the Bill override the common law.⁹⁰

Taking into account these concerns, in part at least, the 1996 Final Constitution now uses a formula that is more cautious as regards the direct applicability of the Bill of Rights to private relationships.⁹¹ But it remains important to inquire about the reasons for the scepticism that was expressed then. Two reasons, we may suppose, explain these doubts. First, in contrast to States, corporate actors are not supposed to act in pursuance of the public interest: imposing on them that they contribute to the fulfilment of economic and social rights therefore leads to a conflict with their primary purpose, which is to make profit, and this is a conflict which the courts may find difficult to arbitrate. Second, most cases in which they are asked to take human rights into account, are cases where corporations in fact have entered into contracts with other parties, on the basis of mutual consent. Though such contractual arrangements may lead to restrictions to the human rights of those concerned, whether the underpaid employee, the small farmer supplying raw materials to the processing company, or the client to which water is being delivered, should this element of consent not suffice to remove all doubts as to the acceptability of the restriction?

A. Corporate actors and the public interest

It is of course the duty of the State to act in the public interest, and it is the duty of courts to ensure that, in imposing restrictions on human rights, it remains faithful to what the public interest requires. In contrast, private persons pursue a variety of aims, and it would violate an elementary principle of moral pluralism to impose on all individuals that they only act in accordance with some predefined notion of what serves the common good.

But the situation of corporations is different. With the exception of organizations whose ethos is based on religion or conviction or which are set up for political aims -- what the German doctrine calls *Tendenzbetriebe*⁹²--, corporations in general are established for one main

⁸⁹ Seventh Report of the Technical Committee on Fundamental Rights (29 July 1993).

⁹⁰ M. Corbett, Memorandum submitted on behalf of the Judiciary of South Africa on the Draft Interim Bill of Rights (3 September 1993) at 3 (cited by Jörg Fedtke, 'From Indirect to Direct Effect in South Africa: A System in Transition', chap.11 in Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere*, cited supra, at 369). The controversy was put to rest even before the adoption of the Final Constitution in 1996, by the insertion into the 1993 Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) of Section 35(3), providing that '[I]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects' of the Bill of Rights.

⁹¹ See Constitution of South Africa, section 8: "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. For a discussion, see Johan van der Walt, "Progressive Indirect Application of the Bill of Rights: Towards a Co-operative Relation Between Common-Law and Constitutional Jurisprudence", *South African Journal of Human Rights*, vol. 17 (2001), pp. 341-363.

⁹² Courts have recognized that legal persons may in certain circumstances invoke a right to "expressive freedom of association". This benefits not only churches, but also (non-religious) organizations who wish to convey certain messages or

purpose, which is to create wealth for their owners. Unlike individuals, they have neither a life plan, nor a conscience. The directors of the corporation in principle should act according to their fiduciary duty to the shareholders, and they should aim therefore at maximizing profits. Therefore -- and this was the central message of jurists like Adolf Berle or E. Merrick Dodd, writing in the 1930s --, it is entirely legitimate to impose on corporations that they also pursue other aims, serving the public purpose, and contributing, in particular, to the fulfilment of economic and social rights which they may help realize. There is no freedom of conscience issue at stake here, nor is there any right to privacy to be opposed: by imposing on corporations that they comply with certain requirements related to the human rights of those whom they interact with, the State simply does indirectly, through them, what it otherwise would do directly, through the acts of public authorities.

The way courts assess restrictions to the rights of workers provides a good illustration of this. Such restrictions, in principle, should only be allowed based not on the "tastes" of the employer or any view the employer holds about the "good life", but based only on "business necessity", i.e., the constraints of a competitive market environment. The market itself may be seen to occupy an intermediate position, between the public sphere (in which the State seeks to fulfil the public interest) and the private sphere (in which individuals are free to make choices that correspond to their beliefs and convictions, whether or not these are aligned with those of the majority): in the market sphere, economic actors are expected to behave according to certain norms that can be objectively ascertained, and in which their subjective preferences should in principle be irrelevant, or play at best a marginal role.

This may not always be easy to apply. For instance, the conduct of an employer based exclusively on what is objectively in the interest of the business enterprise may lead to defer to the 'tastes' of the public, that may be tainted by social norms and discriminatory attitudes.⁹³ But the point made here is normative, not factual: It is that it would not be acceptable for an employer, or for any other market actor, to adopt decisions on the basis of such illegitimate motives, for instance by refusing to recruit an employee who would be in contact with the clientèle from which hostile reactions are feared, or who may not be welcome by his colleagues.⁹⁴

Once it is acknowledged that corporations are legal constructs, without a "will" of their own, and that they are established from the start as a means to fulfil certain social ends -- in particular, to encourage risk-taking and the growth of competitive markets --, it follows naturally that such ends can be redefined and expanded in the name of human rights. Consider for instance the consequences that follow from the recognition of the right to work in international human rights law. Such a right has been variously described as imposing on

values. It may for instance justify them in choosing whom to employ on the basis of criteria that may otherwise be suspect, or in choosing who can join as a member (for US federal courts, see in particular *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Boy Scouts of America and Monmouth Council, et al. v. Dale*, 530 U.S. 640 (2000); in the case-law of the (now abolished) European Commission on Human Rights, see *Van der Heijden v. the Netherlands* (Appl. No. 11002/84, dec. of 8 March 1985, *D.R.*, 41, p. 264; and see Eur. Ct. HR (4th sect.), *Case of Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom* (Appl. No. 11002/05), judgment of 27 February 2007, para. 39 ('Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership. By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals')). This is not the place for exploring the specific case of such organizations, although it cannot be excluded that, in some case, this will justify exempting them from duties they would otherwise be imposed to contribute to a certain economic or social right: the case of catholic hospitals which may refuse to perform abortions or to provide euthanasia, or that of catholic schools refusing to teach other religions, illustrate this.

⁹³ See, e.g., Cass Sunstein, 'Why Markets Won't Stop Discrimination', *Social Philosophy and Policy*, vol. 8 (1992), p. 21 (reproduced in *Free Markets and Social Justice*, Oxford Univ. Press, Oxford, 1997).

⁹⁴ See for instance before the European Court of Justice, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, [2008] ECR I-5187, and especially the opinion of AG Poiares Maduro (citing the work of Cass Sunstein referred to above, and noting that it would not be acceptable for an employer to justify discrimination on grounds of ethnicity by referring to the preferences expressed by its clients).

States a duty to formulate and implement an employment policy with a view to “stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment”,⁹⁵ or to adopt “effective measures to increase the resources allocated to reducing the unemployment rate, in particular among women, the disadvantaged and marginalized”.⁹⁶ But a core obligation of States in this regard - one that States must comply with even if they face important resource constraints -- is also to ensure non-discrimination and equal protection in employment, and thus in particular to ensure “the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity”.⁹⁷ It follows again that “business necessity” alone is not sufficient, if that leads to take as given certain routine ways of organizing the workplace, of recruiting the workforce, or of defining the tasks of the individual workers, that result in excluding certain categories of workers (or potential workers) and prohibiting them from acceding to employment or from realizing their full potential within the organization. In short: there is nothing sacro-sanct about the market as an institution, and nothing certainly that compares to the freedom individuals are recognized in choosing their life plans.

B. Freedom of contract

In *Carna Foods Ltd v Eagle Star Insurance Co Ltd (Ireland) Ltd*,⁹⁸ where the issue arose whether an insurance company could without providing a justification refuse to renew an insurance contract when the prospective client had no other insurance company to turn to, McCracken J expressed concern as to the effect of imposing constitutional rights directly in the context of purely commercial relationships between private parties, describing it as a ‘serious interference in the contractual position of parties in a commercial contract’. This, we may suspect, is a second reason why courts have sometimes been reluctant to impose on corporate actors that they contribute to economic and social rights. As noted by Heilbroner, any power such actors may exert, though it may be considerable in fact, remains qualitatively distinct from that of the State: “Even if we imagined that all capital was directed by a single capitalist, the sentence of starvation that could be passed by his refusal to sell his commodities or to buy labor power differs from the sentence of the king who casts his opponents into a dungeon to starve, because the capitalist has no legal right to forbid his victims from moving elsewhere, or from appealing to the state or other authorities against himself. Thus, the domination of the merchant, for instance, resides in his legal right not to sell to those who will not meet his price – a right that can involve great social deprivation, as in the case of a famine, but that is nonetheless entirely free of direct personal coercion: the merchant cannot require a potential buyer to become an actual one (...). However harsh the domination of capital may be, it therefore always operates at a remove, and with a degree of voluntary submission implicit in the potential refusal of the other party to accept the capitalist’s terms, an option generally absent from precapitalist modes of domination”.⁹⁹

This however should not imply that freedom of contract, even where it has been exercised, should always trump the requirements of human rights. As recognized by Heilbroner, though

⁹⁵ ILO Convention (No. 122) concerning Employment Policy, 1964 (entered into force on 15 July 1966), article 1, paragraph 1.

⁹⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights) (2005), UN doc. E/C.12/GC/18 (6 February 2006), para. 26.

⁹⁷ *Id.*, para. 31.

⁹⁸ [1995] 1 IR 526 (HC); [1997] 2 ILRM 499 (SC). For a discussion, see Siobhan Mullally, “Equality Guarantees in Irish Constitutional Law - The Myth of Constitutionalism and the Neutral State”, in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution, 1937-97: Collected Essays*, Hart, 1998, pp. 147-162.

⁹⁹ Robert L. Heilbroner, *The Nature and Logic of Capitalism*, W.W. Norton & Co., New York and London, 1985, at 40.

it may be of a different kind, private compulsion may exercise an equally powerful constraint on the free will of the individual right-holder. In situations where the right-holder is in a situation of need and where he or she faces few alternatives (or none at all, as in situations of monopoly or monopsony), in particular, the possibility for the private actor with whom the right-holder interacts to withhold certain goods or services (such as food, life-saving medical treatment, or a waged employment) may in fact lead to a form of coercion equivalent in practice to that at the disposal of the State.¹⁰⁰ Particularly since the rise of large-scale private organisations in the early 20th century, it is understood that the liberty of the individual whether or not to submit to certain conditions which another actor seeks to impose on him is not always more present in interindividual (or 'horizontal') relationships, particularly in market relationships, than in the ('vertical') relationships between the State and the individual.¹⁰¹

It is therefore fitting that human rights courts have generally considered with suspicion the argument that the State should be allowed not to intervene in private contractual relationships, out of respect for the 'free will' embodied in such contracts. On the contrary, they have generally adopted the view that, while the consent of the individual may be *necessary* to justify certain restrictions to his/her rights, such a consent, as expressed in contractual clauses, should never be considered, as such, a *sufficient* justification.¹⁰² They have also recognized the dangers of allowing powerful private actors, such as large employers, to use their financial might to induce individuals to make certain choices, for instance as regards membership in a union: because of the strong imbalances of power in private relationships, it is the duty of the State to intervene and to impose compliance with human rights where such rights could be threatened as a result of such imbalances.¹⁰³

6. Conclusion

In 1933, Justice Brandeis, then in his fifteenth year as a Justice on the United States Supreme Court, was the first magistrate to draw the full consequences of the findings of Berle and Means. Only months after the publication of their book, he noted :

Able, discerning scholars have pictured for us the economic and social results of [...] removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders -- results not designed by the states and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution -- an

¹⁰⁰ In addition, even in situations where 'coercion' is not present and where the right-holder seems to have consented 'freely' to certain restrictions, the State would be justified in seeking to remove certain obstacles to the individual making fully rational choices, for instance because of phenomena of addiction or myopia (i.e., the individual placing his short-term desires above his long-term interests): see R. Thaler and C. Sunstein, *Nudge. Improving Decisions About Health, Wealth, and Happiness*, Yale Univ. Press, 2008 (reviewing how individual choices may be guided -- not forced -- by reshaping the context in which they are made).

¹⁰¹ See, in particular, Robert Lee Hale, 'Force and the State : A Comparison of Political and Economic Compulsion', *Columbia Law Review*, vol. 35 (1935), p. 149 ; Robert Lee Hale, 'Our Equivocal Constitutional Guarantees', *Columbia Law Review*, vol. 39 (1939), p. 563.

¹⁰² Eur. Ct. HR (1st sect.), dec. of 7 November 2002, *Madsen v. Denmark*, Appl. n° 58341/00 (inadmissibility); and Eur. Ct. HR (4th sect.), dec. of 9 March 2004, *Wretlund v. Sweden*, Appl. n° 46210/99 (inadmissibility).

¹⁰³ See, e.g., Eur. Ct. HR (2nd sect.), *Wilson, National Union of Journalists and Others v. the United Kingdom* (Appl. nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002, § 47 (finding that the United Kingdom had failed to protect freedom of association, as guaranteed under Article 11 of the European Convention on Human Rights, because "domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation", thus substantially reducing the ability for unions to gain the support of workers).

institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control, and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners, and of the general public are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system, and to lead other men of insight and experience to assert that this "master institution of civilized life" is committing it to the rule of a plutocracy.¹⁰⁴

Brandeis intended the reference to Berle and Means -- he also quoted Veblen -- to support his view that the constitutionality of restrictions imposed on the operations of business should be based on facts, not ideology -- on an appreciation of the real power that companies yield, rather than on an idealized representation of the marketplace. Then still unorthodox, this view now enjoys such a currency that it may be difficult to imagine how the opposite view ever could have prevailed. Yet, three generations later, we still are to draw the full consequences from the concerns that he was expressing.

¹⁰⁴ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 564-565 (1933) (Brandeis, J., partially diss.).