

VOLUME 4

Transnational Corporations on Trial

On the Threat to Human Rights Posed
by European Companies in Latin America

A study by **Wolfgang Kaleck** and **Miriam Saage-Maas**



TRANSNATIONAL CORPORATIONS ON TRIAL



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A study by Wolfgang Kaleck and Miriam Saage-Maaß (concise version)
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FOREWORD

Human rights are universal. However 60 years after the adoption of the Universal Declaration of Human Rights, their application and recognition is still far from ubiquitous. There has at least been progress in international criminal jurisdiction. The permanent International Criminal Court was founded in 1998, making it possible to prosecute war crimes and crimes against humanity on the international level.

Nevertheless, it is still difficult to hold private individuals and transnational companies liable for human rights transgressions outside the borders of their countries. To date, the instruments created to bind companies to human rights standards as well as to social and environmental standards are voluntary. Voluntary instruments are inadequate in conflict situations, as those affected lack the means to secure and monitor their rights. In Latin America today, foreign direct investments are the most important source of external capital. Unfortunately, corporate activities often also involve a risk of human rights violations and environmental destruction.

Shaping globalization at the policy level is one of the greatest challenges of our century. The Heinrich Böll Foundation aims to meet this challenge. In our project “EU-MERCOSUR: Trade, Development, Human Rights,” we take a close look at free trade and association agreements between the European Union and states or groups of states in Latin America. We want to know how European free trade policy affects the ecological, social, and economic quality of life for the people of Latin America. Our research has shown that in European Union foreign trade policy, EU trade interests clearly have precedence over the principle of sustainable development and the protection of human rights. According to “Global Europe – Competing in the World,” the strategy paper introduced by EU Trade Commissioner Peter Mandelson in October 2006, a new generation of comprehensive bilateral agreements shall provide legal protection for European corporate interests abroad, giving European companies a competitive edge and a geographical advantage.

At the 5th EU – LAC Summit between Heads of State and Government from the European Union, Latin America and the Caribbean, EU negotiations with the Andean Community, Central America, and MERCOSUR followed this dictum. Once again, the European Union’s repeated verbal commitment to coherency between trade and investment policy was confined solely to official statements, and was not mirrored in practice.

The Heinrich Böll Foundation commissioned this study in preparation for the EU – LAC Summit. In its first part, the study analyzes existing legal means of holding European transnational companies liable for extraterritorial human rights violations. The authors then examine four representative legal cases against European companies in Latin America that revolve around problems typical in the region.

In the past, civil society action against global corporations took part primarily on the political level, in the form of campaigns or political tribunals. By bringing the

right to adequate investigation into and sanctioning of human rights violations to the fore, this study makes an important contribution to understanding the potential currently inherent in as well as the limitations of international justiciability of human rights. A transnational legal framework is an important component of global governance.

This study also makes it clear that European corporations' involvement in human rights violations and environmental destruction is less severe in Latin America than it currently is in Africa and Asia. In our opinion, this is because the democratic Latin American nations possess a progressive legal system. Furthermore, active civil society organizations have arisen that use the legal resources available to them to control corporate strategies often and effectively.

Strengthening civil society and making globalization sustainable are part of the Heinrich Böll Foundation's main mission. For many years, among other tasks, our offices in Mexico, El Salvador, Rio de Janeiro and, since the beginning of 2008, also in Chile have been working together with non-government organizations and social movements to establish civil society as a force able to observe and influence policy and the economy. Critical analysis of trade relations and corporate activity is a mainstay of this work.

When we presented this study in Germany and at the alternative summit "Enlazando Alternativas 3" in Lima, it met with great interest. That's why we've made the decision to publish not only a Spanish translation, but also a comprehensive English summary.

Finally, we would like to express our thanks to the authors, Wolfgang Kaleck and Miriam Saage-Maaß; it was a pleasure to work with them.

Berlin, September 2008

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A. Introduction

The globalization of economic structures has led European, North American, and Asian companies to expand their activities in the countries of the global South. First seen as an opportunity for economic, political, and social improvements, the development in this region soon showed that it had a dark side:¹ radical changes in social structures, massive environmental problems, growing social disparity, and no economic upswing in sight for the majority of the people who live in the Southern countries.

Furthermore, the power of the private sector is becoming more predominant, whereas nation-states have lost influence.² Transnational corporations determine living conditions in many countries in the Southern hemisphere, though not just through their products. Their de facto power has increased in the current system of international political and economic relationships. The returns of the biggest companies are larger than the gross national product of many countries. Their position vis-à-vis nation-states is growing increasingly stronger, and they have substantial leverage on decisions affecting political, social, and cultural conditions. Consequently, transnational corporations are often directly or indirectly responsible for political, economic, social, and cultural human rights violations as well as for environmental destruction. Recent examples include the environmental catastrophes in Bhopal, India (Union Carbide), the dumping of toxic waste in Côte d'Ivoire (Trafigura), the exploitation of forced laborers in Burma (Unocal, Total), and the funding of bloody civil wars in Liberia and Sierra Leone by the diamond trade. These violations have given rise to public criticism and were brought before court.

As this study shows, international and national law are not yet sufficiently able to protect human rights. National law in both the “host states” (the states in which the companies are active) and the “home states” (the states in which the companies are headquartered) is a rather weak instrument for controlling and regulating the activities of transnational corporations. International law provides only a partial remedy to this situation. There are also instruments consisting of non-binding “soft law,” such as OECD Guidelines and ILO norms. In the past few decades, voluntary standards have been established, such as Global Compact and other ethical codes, which by definition are non-binding and therefore less effective. For this reason, state responsibility for private companies' human rights violations is of decisive importance, as it offers a further means of safeguarding human rights. If a corporation's home state is accountable for the actions of a given company, then this state has a duty to monitor company activities and to adjudicate extraterritorially.

Whether the state can be held accountable for private actions, and whether there is an obligation to exercise extraterritorial jurisdiction in these cases, are much-debated questions sometimes met with skepticism in the literature of public international law and in judicial decisions. Nevertheless, there are many circumstances

1 Joseph Stiglitz, *Die Chancen der Globalisierung*. Bonn, 2006: 25ff.

2 On the growing political role of multinational corporations, see Peter Muchlinski, “Global Bukowina Examined,” in Teubner (ed.). *Global Law without a State*. 1997: 1 and 33–34.

that suggest such a state obligation. Public international law is in flux and therefore offers opportunities to expand the protection of universal human rights in the future. Through more state intervention, the corporations' home states (usually in the global Northwest) could perhaps legally pressure transnational corporations to abide by universal human rights standards.

This study was undertaken in a project supported by the European Union and implemented by the Heinrich Böll Foundation, the FDCL (Forschungs- und Dokumentationszentrum Chile-Lateinamerika), and the Transnational Institute (TCI). The full title of the project is "Trade – Development – Human Rights II: Raising public awareness on the coherency of development and human rights in the interregional association of the European Union (EU) and the Common Market of the South (Mercosur)." We shall first provide a general overview of the national and international debates on corporate liability. In order to illustrate these issues, we then look more closely at four current conflicts in which European corporations have been taken to court for human rights violations because of their activities in Latin American countries. The cases examined are a cellulose factory established by the Finnish company Botnia in Uruguay, the object of national and international legal conflicts between the governments of Argentina and Uruguay; the dispute in the World Trade Organization (WTO) between the Brazilian government and the EU over an import ban on used tires; labor conditions in sweatshops in Greater Buenos Aires that hire mostly illegal Bolivian garment workers to produce sportswear for brand-name European firms such as Puma, Adidas, and Le Coq Sportif; and the violent conflict between the Brazilian landless peasants' movement and private militias surrounding a controversial experimental field of genetically manipulated soybeans cultivated by the Swiss corporation Syngenta.

The four cases were chosen in part because they fulfilled the geographic criterion (Europe – Latin America). They also illustrate a range of typical problems in Latin America, in the context of which transnational corporations have been accused of human rights violations. Furthermore, these case studies make clear the particular difficulties that arise in investigating facts and examining the liability of corporations. In all cases, we must stress the problematic access to sources. An examination of the cases *in situ* was not possible for reasons of cost and time; we therefore had to resort mostly to secondary sources. We had access to the representations and interpretations of non-governmental organizations. We also scrutinized and critically analyzed official legal documents. At the time this summary was completed, nearly all of the proceedings were still not finished. Since the publication of the full version of this study in April 2008, some changes have been made only in the case of the Argentinean sweatshop. On September 1, 2008, Federal Judge Sergio Torres ruled against both the owner of a textile brand and the manager of the workshop in which the brand was manufactured on the grounds of exploitation of undocumented Bolivian migrants. Judge Torres ruled that the machinery used in the workshop be given to the workers – a historical precedent in the struggle for just labor.³

3 *La Alameda*, <http://laalameda.wordpress.com/2008/09/>; "Las máquinas de coser, para los que las trabajan," *Página 12*, September 3, 2008, <http://www.pagina12.com.ar/diario/sociedad/3-110880-2008-09-03.html>.

B. Protection of Human Rights; Violations by Transnational Corporations

I. Introduction to the Basic Legal Issues

Transnational corporations, sometimes also called multinational corporations,⁴ can be defined as enterprises whose activities and participation in the economy extend beyond the borders of one country to at least one other country.⁵ Although smaller, medium-sized enterprises also are subsumed under this definition, multinational corporations comprise the group subject to the most public attention, as their economic power is often greater than that of many states. Yet human rights are often directly violated by local small and medium-sized enterprises that act as suppliers or fulfill functions similar to those of transnational corporations.⁶ These enterprises are rarely subject to, and are less influenced by, public pressure, since they are often owned privately and therefore are not accountable to shareholders. Large transnational corporations, on the other hand, sometimes play a more indirect role in human rights violations.

Historically, human rights are interpreted as the rights of the individual against the state; this still makes sense, considering the power concentrated in the hands of governments to this day. However, non-governmental entities, such as armed groups, criminal organizations, and transnational corporations, also pose a threat to human rights. Transnational corporations commit human rights abuses in the broadest sense in different ways:⁷ they produce or market goods produced under inhuman conditions. They support armed conflicts or authoritarian regimes through legal (taxes) or illegal (bribes) payments. They utilize governments' military and police resources as well as armed opposition groups to ensure the security of their activities, whereby grave human rights violations are committed. The question must therefore be asked how these corporations, or those persons responsible within the corporation, can be held accountable for violations of human rights law.

4 See also *Lexikon der Wirtschaft. Grundlegendes Wissen von A-Z*. 2nd ed. Mannheim: Bibliografisches Institut & F.A. Brockhaus, 2004.

5 See also Volker Epping, in Knut Ipsen, *Völkerrecht*. 2004, § 8, Rn. 16ff. and further references. The term "transnational corporation" is controversial among economists, as some authors find it does not include business groups. We do not hold this position, which we shall not explore in further detail at this juncture.

6 Karen Ballentine and Heiko Nitzschke, "Unternehmen in Konfliktregionen: Problemfelder und Handlungsmöglichkeiten." *Friedens-Warte* 1–2/2004: 38ff.

7 We are using an expanded definition of human rights which includes not only the classic civil and political freedoms, but also the so-called second- and third-generation human rights, that is, economic, social, cultural, and collective human rights.

II. Transnational Corporations under International Law

In international law, transnational corporations can be made accountable for human rights violations only under certain conditions. That transnational corporations are not generally bound to international treaty law does not correspond with their vast influence on economic, social, and ecological conditions across the globe. Due to their influence on the structure of international relationships, they often participate, albeit usually indirectly, in the generation of international law and international rules.⁸ The actual international influence of transnational corporations is therefore not properly acknowledged by the current international legal system.

1. Transnational corporations as entities with individual rights and duties under international law

In classical international legal theories, both international law and constitutional law are grounded on the fundamental separation of the public (i.e., state) and the private (legal) sphere. This strict separation is not compulsory, but rather the result of convention in legal theory,⁹ yet it remained steadfast in nature until the middle of the twentieth century. Within this classical concept of public international law, nation-states are the only actors and addressees of international law.¹⁰ Because sovereign states agree on treaties under international law, only these states, as international legal entities, are bound to follow the agreement. Individuals – that is, citizens of a nation-state as well as private corporations, or legal persons under civil law – are free from any such international obligations.¹¹ According to this interpretation, individuals can be seen as international legal subjects only if they have rights and duties under international law.

Nevertheless, since the end of World War II, international law has been gradually moving from a system which considers nation-states as the be-all and end-all, to a system which also considers the rights of individuals. The recognition of civil and political human rights is an important indicator of this transformation. As a result of this shift, it is currently general consensus that individuals as well as corporations have rights under international human rights conventions. Corporations, also legal personalities under civil law, have recourse to those human rights based upon statutory international law or common law, as long as the rights can also be applied to

8 See, for example, the role that many transnational corporations, in particular those in the pharmaceutical industry, played in creating the agreement on trade-related aspects of intellectual property rights (TRIPS) in the World Trade Organization (WTO). See also Susan K. Sell, *Private Power*, Public Law. Cambridge, UK, 2003: 1ff.

9 Magdalena Bexell, "Distribution of Responsibility for Human Rights Protection: The Public-Private Distinction." *Friedens-Warte* 79, 1–2/2004: 103–118.

10 International organizations such as the United Nations and the WTO are also legal persons under international public law, because in this case the founding nations have delegated their ability to prescribe law.

11 Paul Heilborn, "Subjekte des Völkerrechts," in Strupp (ed.). *Wörterbuch des Völkerrechts und der Diplomatie*, vol. 2, 1925.

them.¹² Furthermore, a violation of these rights committed by a state can be brought before the regional human rights courts. With respect to these international rights of corporations, one speaks of private entities with partial legal status under international law, meaning that they are seen by governments as international legal personalities in individual cases.¹³

As long as private entities are granted partial international legal rights, they are also bound to public international law. Direct rights and duties for individuals are derived from international criminal law. This fundamental interpretation was first formulated at the International Military Tribunals in Nuremburg and Tokyo and later confirmed in the Nuremburg Principles drawn up by the International Law Commission.¹⁴ These obligations of public international law drawn from international criminal law standards are written into the statutes of the UN tribunals for former Yugoslavia and Rwanda, as well as into the Rome Statute of the International Criminal Court (ICC). Under the Rome Statute, individuals are liable for grave violations of binding public international legal standards such as crimes against humanity, genocide, and violations of some standards of humanitarian public international law. If an individual commits such a crime, he or she can be taken to court whether or not his or her country of origin was involved in or complicit with the act, as long as the country in which the crime was committed has ratified the Rome Statute.¹⁵ Thus, under international criminal law, individuals have their own international legal status completely independent of their country of origin. These obligations also apply to corporations in that their individual employees are obligated to comply with international criminal law. Therefore, legal action can be taken against companies' managers and employees who take part in or support crimes against humanity, genocide, or war crimes; either at the ICC or at a national court which has laws on such crimes within its legal system.

International criminal legal standards in particular are of central importance when examining the accountability of multinational corporations. Corporations participate in international crimes when they take advantage of or even spur on conflicts in order to profit from chaotic and lawless conditions. In numerous conflicts on the African continent, in particular in Sierra Leone, Liberia, and the Democratic Republic of Congo, multinational raw material conglomerates were actively involved in arming and supporting government troops and militant militias in order to continue the extraction of raw materials under their protection. In addition to cases in which companies participate in armed conflicts with the aid of security firms and the military, corporations often profit from the crimes of government or quasi-government actors and therefore aid or incite the main perpetrators. It is first and foremost the responsibility of nation-states, through implementation of the statutes of international criminal law, to take action against crimes committed on their territory. Due to limited capacity, the ICC itself can take on only a fraction of the cases of international

12 On insufficient obligations under international common law, see Karsten Nowrot, "Nun sag' wie hast du's mit den Global Players? Fragen an die Völkerrechtsgemeinschaft zur internationalen Rechtsstellung transnationaler Unternehmen." *Friedens-Warte* 79, 1–2/2004: 130–133.

13 *Ibid.*, 126.

14 *Der Nürnberger Prozess, Amtlicher Wortlaut*, vol. 22: 528.

15 See also *Rome Statute of the International Criminal Court*, Art. 12, para. 2, adopted July 17, 1998 (UN Doc. A/CONF.183/9).

crimes. It is therefore probable that the ICC will first concentrate on those criminals accused of direct participation in crimes. Since corporate employees often play only a supporting role in international crimes, to date they are not a priority of the ICC's legal strategy. As more and more countries ratify the Rome Statute worldwide, there is growing hope that in the future there will be no more impunity in this area.

International criminal law, however, is concerned with only the worst crimes in which people and corporations can be involved. It is not concerned with the bulk of human rights abuses committed by corporations, the violations of economic, social, and cultural human rights. Therefore, in the following we shall examine whether there are developments on the global level to further the obligations of corporations under public international law.

2. Further grounds

The literature on public international law presents a variety of approaches attempting to provide grounds for broadening corporations' obligation to fulfill international legal standards to a greater extent than is granted in classic interpretations.

(a) International codes of conduct derived from the true position of transnational corporations in the public international legal system

Karsten Nowrot, a German legal scholar, believes that an entity's legal personhood under public international law, in the sense of being obligated to adhere to international legal codes of conduct, is no longer solely derived from the rights and duties of states. Nowrot is of the opinion that a de facto powerful position in the international system provides grounds for a refutable presumption that such entities "possess the status of international legal personalities [...] in terms of realizing international matters of public good."¹⁶ This opinion assumes that the binding nature and thus the legal scope of public international law are derived from its function as a peace-keeping measure for the international community of nation-states, and thus also the social life of individuals.¹⁷ Because transnational corporations in reality have a very powerful position and the ability to influence and make peace in international relations, one should grant them the status of international legal personalities, in the sense of having an obligation to adhere to international legal codes of conduct that aid the realization of the international public good. Nowrot further states that the "presumption of conformity with the status of an international legal personality for powerful entities [can] only be refuted if a contrary opinion, expressed by the international legal community in a legally binding form, proves that this category of entities should not be bound to public international legal obligations."¹⁸

(b) Renunciation of the term "international legal personality"

More radical opinions call for the complete renunciation of the term "international

¹⁶ Karsten Nowrot. "Nun sag' wie hast du's mit den Global Players? Fragen an die Völkerrechtsgemeinschaft zur internationalen Rechtsstellung transnationaler Unternehmen." *Friedens-Warte* 79, 1–2/2004: 140.

¹⁷ *Ibid.*, 141.

¹⁸ *Ibid.*, 140.

legal personality.” In order to include powerful non-governmental entities, they speak only of “participants” in international systems,¹⁹ or of “constitutional subjects” of a “global civil constitution.”²⁰ Gunther Teubner and Andreas Fischer Lescano, in particular, not only defend the thesis of a comprehensive constitutionalization of the world order, but also assume that the international legal system is made up of different regulatory regimes that collide with one another. They understand the question of the applicability of human rights to conflicts between private entities not as a problem of compensation between parts of a social whole, but rather as a problem resulting from the expansion of the social system to include the social, human, and natural environments.²¹ Human rights violations are understood not as a conflict between individuals granted basic rights and state institutions or – in the case of human rights violations by private entities – as interpersonal conflicts, but rather as “system/environment conflicts (communication vs. body/psyche or institution vs. institution).”²² The goal of this analysis is the establishment of an international code of conduct for all powerful entities within the international system. “In light of the massive violations of human rights by non-governmental actors,” these authors see a “necessity to expand global constitutional disputes beyond merely bilateral relationships,”²³ and to avoid the “intensely debated but largely sterile question as to whether or not NGOs or transnational enterprises have emerged as new subjects within the international legal order.”²⁴

(c) Alien Tort Claims Act

Under the Alien Tort Claims Act,²⁵ a U.S. American law from the year 1789, different private entities in the United States have been sentenced to compensation payments for human rights violations. American courts assume private entities are bound to public international law particularly in cases of war crimes, genocide, slavery, and forced labor. The courts have not accepted the argument that private personalities are not subject to international law, particularly in cases of international crime which fall under international common law, such as genocide, war crimes, slavery, and piracy. The U.S. Second Circuit Court of Appeals, in the case of *Kadic v. Karadzic*, ruled as early as 1995 that private legal personalities are liable for such crimes also when there

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- 19 Rosalyn Higgins, *Problems and Process – International Law and How We Use It*. Oxford, 1994: 50; Philip Allott. *Eunomia*. Oxford, 1990: 372–373.
- 20 Gunther Teubner, “Globale Zivilverfassung: Alternativen zur staatszentrierten Verfassungstheorie.” *ZaöRV* 63, 2003: 3ff.; similarly, Daniel Thürer, “The Emergence of Non-Governmental Organisations and Transnational Enterprises in International Law and the Changing Role of the State,” in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law*. 1999: 51ff.
- 21 Gunther Teubner, “Die Anonyme Matrix: Zu Menschenrechtsverletzungen durch “Private” Transnationale Akteure.” *Der Staat. Zeitschrift für Staatslehre und Verfassungsgeschichte, Deutsches und Europäisches Öffentliches Recht* 45, 2/2006: 165.
- 22 *Ibid.*, 184.
- 23 Gunther Teubner, “Globale Zivilverfassung: Alternativen zur staatszentrierten Verfassungstheorie.” *ZaöRV* 63, 2003: 5.
- 24 Daniel Thürer. “The Emergence of Non-Governmental Organisations and Transnational Enterprises in International Law and the Changing Role of the State,” in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law*. 1999: 53.
- 25 *Alien Tort Statute*, Judiciary Act of 1789, 28 U.S.C. §1350.

is no state involvement.²⁶ In the Unocal case, the Ninth Circuit Court ruled that this accountability applied not only to individuals, but also to corporations, so that they too are liable.²⁷ In this case, the corporations Unocal and Total were held liable for the forced labor, displacement, and murder of Burmese civilians in connection with the construction of a pipeline between Burma and Thailand belonging to the two corporations. Other chambers of the Court of Appeals have also automatically assumed corporate liability.²⁸ The District Court of New York has examined this question intensively and confirmed the liability of corporations in cases of violations of international common law.²⁹ To date, the Supreme Court has not ruled on corporate liability for violations of public international law. These court decisions can be seen as the beginning of a practice in which states recognize that private personalities have direct human rights obligations.³⁰

III. “Soft Law” Regulations

Alongside international legal treaties, states and international organizations can initiate or prepare the process of setting public international law by creating soft law regulations. They are known as “soft law” because these instruments are not yet legally binding. In this case, we see that influences on the behavior of participants in the international system are multifaceted and include steering mechanisms that cannot be traced back to the usual processes of creating law.

All of these instruments start from the assumption that corporate obligations to respect human rights and adhere to certain social and environmental standards are consensual. Without political unity among the nation-states, however, these regulations do not include any mechanisms of sanction. Some – for example the Organisation for Economic Co-operation and Development (OECD) Guidelines or the International Labour Organization (ILO) regulations – do have built-in dispute settlement procedures. Even these, however, are aimed not at sanctions for violations, but at mediation and dispute resolution. A particularly far-reaching instrument, one that specifies the obligations of transnational corporations, is the draft decision of the Sub-Commission on the Promotion and Protection of Human Rights, a sub-commission of the United Nations Commission on Human Rights, itself a functional commission of the Economic and Social Council.³¹

²⁶ *Kadic v. Karadzic*, 70 F.3d, 232, 239–241.

²⁷ *John Doe I v. Unocal*, Ninth Circuit Cal. September 18, 2002.

²⁸ *Wiwa et al. v. Royal Dutch Petroleum Co. et al.*, 226 F.3d 88 (2nd Cir. 2000); *Jota v. Texaco Inc.*, 157 F.3d 153 (2nd Cir.1998); *Bigio et al. v. The Coca-Cola Company et al.*, 239 F.3d 440 (2nd Cir. 2000); *Neanal v. Freeport-Mc Moran, Inc.*, 197 F.3d (5th Cir. 1999).

²⁹ *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc. et al.*, 244 F.Supp.2d, 308-319 United States District Court, S.D. New York (S.D.N.Y.2003).

³⁰ Oliver Dörr, JA, 19/2005, p. 913.

³¹ Sub-Commission resolution 2003/16 of August 13, 2003, para. 1, in Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth Session. UN Doc. E/CN.4/2004/2. E/CN.4/Sub.2/2003/43 of October 20, 2003: 51 ff.

1. The ILO Conventions

The ILO was founded in 1919, and in 1946 it became a specialized agency of the United Nations. Alongside the governments of the 181 member states, employer and employee representatives also sit in the ILO. The ILO's focus is the creation and improvement of international labor and social standards. The fundamental principles of the ILO, stated in a variety of declarations, are freedom of association and the right to collective bargaining, elimination of all forms of forced labor or bonded labor, an end to child labor, and the elimination of discrimination at the workplace. Whereas the ILO Conventions are addressed to nation-states, the "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" is also addressed to corporations. This tripartite fundamental declaration aims to "encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise."³² All of the parties addressed by this declaration should adhere to the General Declaration of Human Rights and correlating international pacts ratified by the United Nations General Assembly, as well as to the Constitution of the International Labour Organization and its basic principles, thus contributing to the realization of the ILO Declaration on Fundamental Principles and Rights at Work.³³

ILO members are obligated by the Constitution of the International Labour Organization as well as by the rules of procedure of the Declaration on Fundamental Principles to deliver annual reports on the implementation of their obligations.³⁴ Every member of the ILO can register complaints against member states or against corporations at the International Labour Office for non-fulfillment of obligations anchored in the Conventions or in the Fundamental Principles.³⁵ A Commission of Inquiry is then set up which writes a report of recommendations and a timeframe for their implementation.³⁶ Unions are more likely to raise objections in the ILO's tripartite structure. For them, it is a more efficient intervention than the dispute settlement procedure, because the national governments involved can put pressure on corporations.³⁷ Non-governmental organizations are not involved in either of these procedures.

³² Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 4th ed., no. 2, Geneva: International Labour Office, 2006; <http://www.ilo.org/public/english/employment/multi/tripartite/declaration.htm>.

³³ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, no. 8.

³⁴ Constitution of the International Labour Organization. Art. 22, Geneva, August 2003; <http://www.ilo.org/ilolex/english/constq.htm>.

³⁵ The procedure for the examination of disputes in the Tripartite Declaration of Principles refers to Art. 24 and 26 of the Constitution of the International Labour Organization.

³⁶ Constitution of the International Labour Organization, Art. 29.

³⁷ According to Cornelia Heydenreich; see *Viele Ansätze – wenig Kontrolle. Für multinationale Unternehmen fehlt bisher ein verbindliches Regelwerk*, p. 1; <http://www.germanwatch.org/tw/kw-inko06.pdf>.

2. The OECD Guidelines

The OECD member states issued their Guidelines for Multinational Enterprises in 1976. These guidelines are explicit recommendations with no legally binding character. They refer to the ILO core labor standards and include recommendations for corporations to comply with human rights and labor rights as well as adhere to regulations on environmental protection, consumer protection, corruption, taxation, and disclosure of information. These non-binding recommendations are only for corporations that are based in a state that has ratified the guidelines.

The Procedural Guidance of the OECD Guidelines contains a dispute settlement procedure for use against individual companies for non-adherence to the guidelines. Since 2000, non-governmental organizations also have had access to this procedure. Every member state must create a so-called National Contact Point, which has the duty of spreading information about the guidelines and also receives complaints.³⁸ If a complaint is filed against a corporation and is deemed worthy of further examination, the National Contact Point offers the company the opportunity to comment on the complaint, and the consultation process begins.³⁹ The National Contact Point attempts to mediate between the two parties; in its role as mediator, it can, if it assists in dealing with the issues, suggest extra-judicial consensual and non-adversarial solutions, such as conciliation or dispute settlement procedures, and facilitate access to such proceedings. Due to the character of mediation or dispute settlement proceedings, these procedures can begin only when both parties agree to them.⁴⁰ If the parties involved are unable to resolve their differences, the contact point writes a final statement. Unlike a legal verdict, this statement does not clearly indicate accountability, nor does it contain sanctions. At most, it contains recommendations for the implementation of the guidelines.⁴¹ The Procedural Guidance clearly states that the National Contact Point must also publish a statement, even if it is of the opinion that no specific recommendation is necessary.

There are some ambiguities in this process, in particular with respect to the interpretation of the OECD Guidelines. The extent to which a corporation can be held accountable for its suppliers, for example, is unclear. Non-governmental organizations demand a variety of improvements on this front: more transparency in the contact point's work, more control by national parliaments, and an impartial body of appeals for contentious cases.⁴²

38 Procedural Guidance of the OECD Guidelines for Multinational Enterprises, revision 2000, no. 1, OECD Ministerial decision of June 2000. In Germany, the National Contact Point is located in the Federal Ministry of Economics and Technology.

39 Procedural Guidance of the OECD Guidelines for Multinational Enterprises, revision 2000, para. I.C.

40 Commentary on the Procedural Guidance of the OECD Guidelines for Multinational Enterprises, revision 2000, para. 17.

41 Commentary on the Procedural Guidance of the OECD Guidelines for Multinational Enterprises, para. 18.

42 Cornelia Heydenreich, *Viele Ansätze – wenig Kontrolle. Für multinationale Unternehmen fehlt bisher ein verbindliches Regelwerk*, p. 2; <http://www.germanwatch.org/tw/kw-inko06.pdf>.

3. The UN norms

The most promising approach to regulating corporations' adherence to human rights obligations and environmental and social standards is the "UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."⁴³ These norms were drawn up by the UN Sub-Commission on the Promotion and Protection of Human Rights, and were presented to the UN Human Rights Commission in 2003 with a recommendation of adoption. They are currently in the non-binding draft stage. As opposed to the instruments described above, however, they are intended to be binding, mandatory norms to codify corporate responsibility.⁴⁴ Nonetheless, the members of the drafting committee also recognize that UN norms do not have the legally binding nature of a treaty of public international law. They are, rather, a step toward the development of public international "hard law."

The norms assert the duty of corporations to adhere to first-generation human rights, that is, the classic negative rights such as freedom of speech and the right to life and liberty. But second-generation economic, social, and cultural human rights must also be respected by corporations. In the opinion of one member of the commission, David Weissbrodt, the UN norms reiterate existing regulations found in human rights, labor, and environmental conventions, as well as in the areas of consumer protection and the fight against corruption, and are thus a codification of international common law.⁴⁵ They should not be seen as the final destination of legal development in this direction; rather, the norms are open for further development in the area of corporate responsibility. In the UN Human Rights Norms, the Sub-Commission on Human Rights proposes shared responsibility among transnational corporations and nation-states, with a gap-filling rule adding a direct obligation of corporations to the existing state obligation to protect individual rights.

Observance of these duties is guaranteed in a variety of ways.⁴⁶ For example, corporations are bound to create internal structures that ensure and monitor observance of the norms. They are required to report on measures taken to implement the UN norms. What is more, these companies are subject to regular controls by the United Nations.⁴⁷ Corporations must then provide restitution procedures in cases of violation. Additionally, national and international courts set standards for the implementation of the UN norms, and nation-states are obligated to provide adequate sanction mechanisms in cases of violation.⁴⁸ These regulations are intended by the commission not only to codify corporate obligations, but also to make it clear that

43 "UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) of August 26, 2003.

44 David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law* 97 (October 2003): 912.

45 *Ibid.*, 908.

46 See also H. 15.-19 Draft of the UN Norms.

47 H. 15, 16, "Draft of the UN Norms."

48 H. 17-19, "Draft of the UN Norms."

those in responsible positions in business enterprises should take an active role in protecting human rights.⁴⁹

The UN norms have been subject to strong criticism, particularly from representatives of corporations and employer organizations. Among other things, critics accuse the working group which drafted the norms of mixing hard law in an inadmissible manner with non-binding soft law and conventions. They also argue that private entities are unfairly burdened with state obligations of conduct and protection.⁵⁰ Supporters believe that it is exactly this clear and concise compilation, on the basis of selected relevant documents, of the obligations that corporations have with regard to the respect, protection, and fulfillment of human rights, wherever corporate activities affect or could affect these rights, that make the norms a helpful step in the right direction; they make it easier for corporations to meet the complex requirements of human rights standards.⁵¹

4. Voluntary codes of conduct and the Global Compact

In the area of transnational economic transactions, there are a variety of regulations and codes of conduct initiated by governments, international organizations, private companies, and non-governmental organizations that have grown out of the discussion on corporate social responsibility. These codes were first developed with an eye toward repressive regimes, such as South Africa, as well as the discrimination practiced in Northern Ireland.⁵²

A prominent example of the numerous voluntary corporate citizenship initiatives is the “Global Compact.” In contrast to the conventions mentioned above, the Global Compact is not a regulation negotiated by member states. The principles grew in the main from a plan by UN General Secretary Kofi Annan, who called the Global Compact an initiative to “safeguard sustainable growth within the context of globalization by promoting a core set of universal values which are fundamental to meeting the socio-economic needs of the world’s people now and in the future.” At the end of 2000, the UN General Assembly unanimously passed a resolution in support of increased cooperation between the United Nations and the private sector, entitled “Towards Global Partnership.”⁵³ Members of the Global Compact are not primarily state institutions, but corporations, employer and employee organizations, and

49 David Weissbrodt and Muria Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” *American Journal of International Law* 97 (October 2003), 913.

50 International Chamber of Commerce, International Organisation of Employees, Joint View of the ICC and IOE on the Draft “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, March 2004: 8ff.

51 Elisabeth Strohscheid, “UN-Normen zur Unternehmensverantwortung. Schreckgespenst für die Wirtschaft oder notwendiges Instrument zur politischen Steuerung wirtschaftlicher Globalisierung?” *Vereinte Nationen* 4/2005: 138–144 (140).

52 See also Elliot Schrage, *Promoting International Worker Rights through Private Voluntary Initiatives: Public Relations or Public Policy*. 2004: 2–3.

53 UN-Doc. A/RES/55/215, December 21, 2000.

non-governmental organizations in civil society.⁵⁴ More than 3,700 corporations to date have agreed to the ten principles on human rights, labor standards, environmental protection, and fighting corruption. Best-practice examples are exchanged in annual reports, network meetings, and international conferences.⁵⁵ From the beginning, the Global Compact has been criticized in particular by non-governmental organizations. Norman Weiß has remarked that transnational corporations have always rejected binding rules and sanctions, and that they first agreed to the Global Compact “after it had been degraded to a toothless instrument.”⁵⁶ Recurrent criticism led to the introduction of a new control mechanism in mid-2005. In particularly grave cases, it is now possible to exclude members from the pact.⁵⁷

The Global Compact is intended to be a pragmatic forum for dialogue and learning, and one which is open to development. It aims for the cooperative integration of corporations into the work done by the United Nations and its specialized agencies in order to promote the realization of human rights and other common interests of the international community.⁵⁸ Changes to the principles of the Global Compact, as well as other decisions, take place in a transparent procedure of consultation with all members at the Global Compact Leaders Summit. In general, all procedures related to the Global Compact are pragmatic and free of red tape.

The many codes of conduct in existence, as well as the Global Compact, can be seen as an indication that the boundaries between legally binding and non-binding steering mechanisms in the international system are increasingly flexible. Nevertheless, we concur with the majority opinion that codes of conduct alone do not provide a direct basis for viewing and treating transnational corporations as international legal persons and are therefore irrelevant to the question of their direct international legal obligation.

IV. Interim Summary: Limited Corporate Liability under International Law

With respect to the majority of political, economic, social, and cultural human rights violations, neither transnational corporations as entities nor their employees have obligations as the direct result of existing human rights conventions. Therefore, they cannot be held liable for human rights violations in international or regional human rights courts. However, employees of transnational corporations can most certainly be brought to court for violations of international criminal law (e.g., genocide, crimes

54 See also Global Compact, Global Compact Participants; <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.

55 Global Compact, Global Compact Governance; http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html.

56 Norman Weiß, “Transnationale Unternehmen – weltweite Standards? Eine Zwischenbilanz des Global Compact,” *MenschenRechtsMagazin* 2/2002: 88.

57 Global Compact, Integrity Measures, no. 4; <http://www.unglobalcompact.org/AboutTheGC/integrity.html>.

58 See also the UN General Secretary’s speech to the Svenska Dagbladet’s Executive Club in Stockholm on May 25, 1999. UN Press Release SG/SM/7004.

against humanity, war crimes). Even though it is often denied that human rights have a direct third-party effect with regard to the direct obligation of private entities to observe human rights, the opinions on public international law outlined above, as well as U.S. American legal practice, indicate that the discussion on public international law is in flux; alternative approaches are being sought out and have been partly introduced into legal practice.

V. Transnational Corporations under National Law

In light of the difficulties faced in applying treaties of international law directly to transnational corporations, and in light of the fact that there are few compliance mechanisms on the international level, the implementation of human rights standards in national law is of utmost importance. Our examination of the four case studies confirms this conclusion. National and regional courts of law are indispensable in ensuring that transnational corporations meet human rights standards.

1. State of law in the host states

Despite obligatory international common law and numerous human rights conventions, the interpretation of human rights standards varies pronouncedly in different nation-states. This variation is apparent in the current laws in force in the respective host states, that is, in those countries, usually in the global South, in which subsidiaries of large corporations based in Europe or North America are active. In these countries, there are sometimes not only no occupational safety laws or environmental standards, but it is also quite difficult to establish functioning preventative protection mechanisms, to enforce existing standards, or to implement sanction mechanisms in the face of violations. This situation is particularly evident in the many crisis-ridden areas of the world where a functioning state does not – or has ceased to – exist. It is exacerbated by the lawlessness and corruption rampant in many more countries. Additionally, governments are unwilling to take action against transnational corporations' transgressions of law, particularly when the threat, or only the fear, exists that a corporation might move, taking its facilities and production sites with it. Often-times, however, these general statements have little to do with concrete realities, as can be seen in the following analyses of the ongoing proceedings against Botnia in Uruguay, Syngenta in Brazil, and sweatshops in Buenos Aires, Argentina. Despite diverse constitutional weaknesses and political hurdles, each national legal system provides its own starting point for taking legal action in these cases.

2. State of law in the home states

Due to the situation in many of the host states outlined above, the enforcement of human rights obligations and environmental standards in the corporations' home states, which are mostly countries in the global Northwest, is of utmost importance. In these countries, human rights standards are, at least in a rudimentary form, already anchored in national law; thus, there are legal means of enforcing violations of these

standards. Many different paths to legal recourse can be taken; we shall not go into all of them in detail here. Depending on the type of proceedings, either the company itself or individual representatives of the company participate in the trial. Most court cases are either criminal proceedings or tort litigation. In the following, we refer frequently to U.S. American civil law jurisdiction and the Alien Tort Claims Act. In the United States, the Alien Tort Claims Act has been instrumental in the sentencing of private persons and corporations to compensation payments for human rights violations. In many European countries as well, decisive damage compensation trials against corporations have been held or are in progress.⁵⁹ There is an increasing demand for the creation of universal jurisdiction for civil cases, which would make it much easier to ensure that human rights violations in countries outside the global Northwest can be brought before a civil court. Yet when we look at individual cases, there are numerous legal difficulties that arise from the organizational structure of corporations and from the separation of production and distribution. Corporations – in particular transnational corporations – are often not centralized, hierarchical, monolithic institutions, but rather intricate networks with many geographical centers and complex ownership structures, decision-making processes, and business relationships. They are structured more like social organisms than like the traditional form of an entrepreneur and his firm.⁶⁰

VII. State Accountability for Human Rights Violations and the Duty of States to Protect

In light of the limited liability of corporations in international law, it is all the more important to ask how nation-states can be held accountable for the actions of their corporations. If the conduct of a transnational corporation with its headquarters in one country violates human rights standards in another country, albeit through a subsidiary company, both the home state and the host state could be (legally and politically) accountable for the corporation's human rights violations.

The general principle of public international law – state responsibility for private action – is derived from court decisions by the International Court of Justice in The Hague and from the UN Draft Articles on the Responsibility of States by the International Law Commission. Such law is applicable only between states and therefore can be applied in court only by one state against another. Thus, it is irrelevant to victims of human rights violations who wish to seek prosecution and restitution for the injustice done to them.

⁵⁹ Many countries, including Austria, Belgium, Denmark, Finland, France, Germany, and Greece, allow the introduction of civil damage compensation trials on grounds of universal jurisdiction; see “Brief of the Amicus Curiae European Commission Supporting Neither Party.” *Sosa v. Alvarez-Machain*, no. 03-339, U.S. Sup. Ct., January 23, 2004, n. 48.

⁶⁰ See also Wilhelm Bürklin, “Globalisierung als Chance für Wohlstand und Arbeitsplätze.” *Politik und Zeitgeschichte* 48/2000: 114.

1. The duty of states to protect under human rights conventions

States, as the addressees of human rights conventions, are committed to three levels of human rights obligations: to respect, protect, and fulfill.⁶¹ Human rights are therefore not only negative rights, but also obligations of states to protect their citizens. Such obligations can be found in the European Convention on Human Rights, in the Inter-American Commission on Human Rights, and the International Pact on Civil and Political Rights. From these conventions, we can derive an obligation to protect human rights which includes protecting individuals from threats to their legal position by third parties. This duty becomes an obligation to prevent human rights violations from occurring, as well as an obligation to take action against human rights violations through legal recourse.⁶²

UN Special Representative John Ruggie has examined state accountability for corporate activities. After a comprehensive analysis of ten international treaties for the protection of civil/political and economic/social human rights as well as an analysis of the recommendations and commentaries of said treaties, he came to the conclusion that many international treaties directly or indirectly oblige member states to prevent human rights violations by third parties.⁶³

In this case, human rights obligations do not apply directly to transnational corporations, but rather indirectly to the sovereign state on whose territory these transnational corporations act.⁶⁴ That is not to say that every private undertaking that affects human rights in some form or another cannot be controlled by state bodies. In reasoning that the state is accountable for corporate activity, our aim is not the total control of every private activity in order to prevent any possible human rights violation. Aside from the fact that this aim could hardly be realized, it is also not in the interest of human rights to demand that the state prevent any injustice to its citizens.

We should also remember that this obligation to protect is for the moment applicable only to the respective sovereign state and the citizens within its borders. The question of obligation in extraterritorial jurisdiction shall be examined separately.

61 UN Special Rapporteur on the Right to Food, Report to the UN Human Rights Commission of 2005. UN Doc. E/CN.4/2005/47; Art. 2 IPBR; “Maastricht Guidelines on Violation of Economic, Social and Cultural Rights,” *Human Rights Quarterly* 20, 1998: 691; Sarah Joseph, *Corporations and Transnational Human Rights Litigation*. Oxford, 2004.

62 Danwood Mzikenge Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights,” *Melbourne Journal of International Law* 5/2004: 11; Schneider, *Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte*. Berlin: Deutsches Institut für Menschenrechte, 2004: 33.

63 John G. Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations’ Core Human Rights Treaties*. Prepared for the mandate of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises; February 17, 2007, para. 12–17.

64 Sarah Joseph, “An Overview of the Human Rights Accountability of Multinational Enterprises,” in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*. The Hague, 2000: 78.

2. The duties of states

In agreement with the conclusions of UN Special Representative Ruggie's report, a study by FIAN and Bread for the World and an investigation by Amnesty International describes state obligations with regards to human rights violations by corporations as follows:⁶⁵

■ The obligation to set effective standards to regulate corporate activity: first, human rights violations (e.g., discrimination, forced labor, child labor, inhuman working conditions) must be banned and countered with sanctions. Second, it is necessary to establish a legal framework that makes it possible to oversee large economic projects, such as the construction of dams, the extraction of raw materials, and the development of large manufacturing plants, in order to ensure that human rights are respected.

■ The obligation to set up effective monitoring mechanisms: control mechanisms must ensure compliance with, for example, labor and environmental standards, and also secure access to sufficient water, food, and health care.

■ The obligation to take action against human rights violations: there must be available legal means and recourse mechanisms that make it possible to charge corporations with human rights violations. Furthermore, state bodies are obligated to sufficiently investigate human rights violations and to initiate action against them. If political and civil human rights are violated, states are obligated to provide sufficient legal mechanisms or other procedures to redress the abuses and provide restitution. Consequently, the obligation to begin criminal court proceedings may arise, as may the duty to impart administrative sanctions and to provide legal means by which these abuses can be brought before a court of law.

■ The obligation to provide compensation mechanisms: compensation is meant here in the broadest sense and includes financial compensation, redress in the form of public apologies, changes to the law, and restitution of former property, as well as the guarantee that there will be no recurrence of the abuses.

■ The obligation to economic policy that takes aspects of fundamental human rights and social and ecological sustainability into account.

These obligations apply both to the state in which the legal abuses take place and to the state in which the corporation responsible for the abuses has its headquarters. We must, however, emphasize that to date there is no binding public international law which regulates these obligations. As we have seen, it is often difficult for the countries in which legal abuses occur to fulfill their human rights obligations. Weaknesses in their administrative and legal systems make it difficult for them to assert their authority in the face of corporations willing to make investments. Nevertheless, they should not be absolved from responsibility. As studies on the influence of raw material deposits in conflict areas have shown, whether these deposits have a

65 Ute Hausmann and Rolf Künemann, Germany's Extraterritorial Human Rights Obligations: Introduction and Six Case Studies. Report for Brot für die Welt, FIAN, and Evangelischer Entwicklungsdienst, October 2006: 12f. Amnesty International, 05/2006 INTERN amnesty international, Wirtschaftliche, Soziale und Kulturelle Rechte – im Überblick, Teil 1 1.6.

negative or a positive influence on the region depends mostly on whether there are state structures to rein in corruption and promote economic policies geared toward the general good.⁶⁶ Moreover, in states in which the worst human rights violations by companies occur, it is imperative to create frameworks that prevent or impede such abuses or that at least are able to punish them appropriately.

3. States' extraterritorial rights and obligations

The obligations formulated above apply most of all to states in whose territory a company acts, that is, within whose legal system a company possesses rights and duties. It is in dispute whether "home states" are also obligated to protect against human rights abuses outside their territory or even to take legal action against extraterritorial human rights violations by corporations. The principle of state sovereignty speaks against state extraterritorial obligations. Under this principle, the territory of one state is fundamentally off limits for other states, and no state may interfere in another's territory or sovereign functions, including the legal jurisdiction and enforcement of another state.

(a) Extraterritorial or international obligations to protect human rights

The tripartite classification of human rights obligations does point toward state obligations with respect to extraterritorial activities. The obligation to respect human rights is interpreted as meaning that a state may not violate the economic, social, and cultural rights of a citizen of another state by imposing a food embargo, for example.⁶⁷ From the duty to protect, we extrapolate states' obligations to regulate and control, and in some circumstances even to take legal action against, corporations with regard to human rights in extraterritorial activities. The obligation to protect also means that states, in their role as members of international organizations such as the World Bank or the WTO, should do their utmost to ensure that human rights are furthered and respected; thus, they may not support any project which could result in human rights violations.⁶⁸ The obligation to fulfill human rights leads to a duty of states to provide developmental aid or other forms of financial support.⁶⁹

Although the obligations described above may under some conditions apply to the rights of individuals, they usually apply only to general living conditions. Particularly problematic is their legal enforcement, as these obligations are currently only vaguely formulated duties, useful as guidelines for state action. In recognition of this

66 Daniele Ganser, "Brauchen wir eine Ökonomie des Friedens? Eine Schweizer Perspektive auf die Verbindung der Wirtschaft mit Gewaltkonflikten," *Friedens-Warte* 2/2004: 143ff.

67 Fons Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights," in Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*. Antwerp, 2006: 192–193.

68 Ute Hausmann, Germany's Extraterritorial Human Rights Obligations in Multilateral Development Banks: Introduction and Case Study of Three Projects in Chad, Ghana and Pakistan. Report for Brot für die Welt, FIAN, and Evangelischer Entwicklungsdienst, October 2006: 11.

69 Fons Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights," in Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*. Antwerp, 2006: 195–196.

problem, we suggest that one speak not of extraterritorial obligations, but rather of international political guidelines.⁷⁰

(b) Extraterritorial jurisdiction

Extraterritorial jurisdiction is the application of national law by a state to activities that extend beyond its borders or take place in another state's territory without any connection to its own territory. The manner in which and the extent to which a state may apply its national law to actions outside its territory under public international law is controversial and the subject of numerous legal discourses.

With respect to the question of the liability of transnational corporations, extraterritorial jurisdiction is important because it provides one method of bringing corporations in Europe or North America to court for human rights violations in Southern countries. This possibility allows for the utilization of the relatively well-developed legal systems of the Northern countries. Unfortunately, the principle of territoriality, as an expression of state sovereignty, speaks against a right or obligation to extraterritorial jurisdiction. Nevertheless, it has long been accepted that it is also a matter of state sovereignty to be able to apply laws extraterritorially as long as there is no violation of international law.⁷¹ In our use of the term "extraterritorial jurisdiction," we differentiate between the jurisdiction to prescribe, to adjudicate, and to enforce. The conditions under which states may act extraterritorially depend on the respective type of jurisdiction in question.

No connection whatsoever is necessary in the case of international criminal law. In this case, the principle of universal jurisdiction has prevailed. In cases of grave violations of international criminal law, one can say that these crimes are the connecting factors for all states. For good reasons, some hold the opinion that universal jurisdiction should also apply to civil compensation claims for grave human rights violations.⁷² The Brussels Convention, however, hinders European countries from the unrestricted application of the principle of universal jurisdiction to civil cases, as this convention restricts the extraterritorial jurisdiction of EU Member States among themselves.⁷³ A consensus similar to that with respect to international criminal law has yet to be reached in the interpretation and practice of public international law.

(c) Alien Tort Claims Act

U.S. American legal decisions under the Alien Tort Claims Act have played a pioneering role with respect to civil extraterritorial jurisdiction. The Alien Tort Claims Act makes extraterritorial jurisdiction possible, but with one restriction: it allows only cases against persons residing in the United States and over whom U.S. courts

⁷⁰ *Ibid.*, 184.

⁷¹ For a summary of the debate, see Oscar Schachter, *International Law in Theory and Practice*. Boston, 1991: 252.

⁷² Among many others, Donald F. Donovan and Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction." *American Journal of International Law* 100 (2006): 142ff. A summary of national civil jurisdiction can be found in: Amnesty International, "Universal Jurisdiction - The Scope of Universal Civil Jurisdiction." AI Index, July 2007, IOR 53/008/2007.

⁷³ For more detailed information, see Beth Stevens, "Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for Human Rights Violations." *Yale Journal of International Law* 27, 2007: 22ff.

have personal jurisdiction. Furthermore, only grave human rights violations may be brought to court, such as piracy, forced labor, genocide, disappearing people, torture, or rape.⁷⁴

4. Conclusion on the duties of states

Even if one takes all current state obligations with respect to political, economic, and social human rights into account, these obligations provide only an indirect means of opening proceedings against transnational corporations that have committed human rights violations. Although it is possible to bring cases before human rights courts to ensure that states better control and regulate the economic activities of transnational corporations, one must first exhaust the national legal system before proceeding with other means of justice. Therefore, initiating proceedings is a long and protracted process. On the national level, this could prevent indirect human rights violations by corporations, as long as the states were obligated by the rulings of human rights courts to introduce appropriate laws of protection and set up appropriate administrative procedures. In doing so, it must be taken into account that extraterritorial jurisdiction can be applied only in exceptional cases. It is not possible to postulate a general obligation of extraterritorial jurisdiction, as the jurisdiction of states to prescribe law outside their borders is greatly restricted by the territoriality principle of public international law. To date, exceptions can be found solely in international criminal law. There is, in addition, the toleration of national damage compensation laws such as the Alien Tort Claims Act.

74 The first case (Filártega) in which the Alien Tort Claims Act was applied dealt with police violence and torture in Peru. Because the policemen charged were in the United States, a trial against them was possible. *Filartega v. Pena-Irala*, 630 F.2d 876 (2nd Court 1980).

C. Case Studies

I. Uruguay/Argentina – the Cellulose Factory on the Río Uruguay

Since 2003, the conflict over the construction and operation of a cellulose factory built on Uruguay territory on the banks of the Río Uruguay has strained relations between Uruguay and Argentina. Despite massive protests, the factory began production in November 2007.⁷⁵ The € 820 million project is one of the largest foreign investments in Uruguay to date. The investors are a Finnish group of cellulose and paper producers: M-real Oyj, Metsäliitto Osuuskunta, and UPM-Kymmene Oyj, the owners of Oy Metsä-Botnia AB, one of the largest wood and paper industry companies in Europe.

The conflicts over the cellulose factory on the shore of the Río Uruguay, the river which forms the border to Argentina, take place not only on the diplomatic level between the governments of Argentina and Uruguay. Argentinean citizens and environmental organizations have built a broad coalition against the construction project. Citizens in Uruguay have also protested against the project. Opponents of the cellulose factory fear on the one hand massive pollution of the environment, particularly of the air and the river water. They also take issue with the site of the factory, which is in a recreation and vacation area. To date, however, no grave environmental impact has been observed that can be definitively ascribed to the factory.⁷⁶ On the Argentinean side, the non-governmental organization Centro de Derecho Humanos y Ambiente has taken comprehensive legal steps against the cellulose project. It has charged both the management of the Uruguay factory as well as the directors of the Finnish corporation in Argentina with an alleged violation of Argentine environmental criminal law;⁷⁷ it has made a complaint to the Inter-American Commission on Human Rights;⁷⁸ and it has lodged OECD complaints against Botnia and the Finnish and Swedish credit institutes which financed the project in Finland and Sweden. The states of Argentina and Uruguay have also taken each other to the International Court of Justice,⁷⁹ and the Mercosur Arbitration Tribunal decided, following

75 Terra Actualidad, “Obreros paralizan trabajos de Botnia tras estar expuestos a tóxicos,” August 17, 2007; http://actualidad.terra.es/nacional/articulo/obreros_botnia_paralizan_trabajos_estar_1786128.htm. The article “Thousands of Argentines Protest Planned Startup of Uruguayan Pulp Plant,” International Herald Tribune, November 10, 2007, mentions 20,000 demonstrators.

76 “Green Cross Argentina Investigates Environmental Impact of Botnia Papermill,” January 22, 2008; <http://www.gci.ch>. However, these findings have been criticized; see La República, “Organismo oficial argentino descalifica informe de Green Cross,” January 23, 2008; <http://www.larepublica.com.uy/politica/295151-argentina-descalifica-informe-sobre-botnia>.

77 “Formula Denuncia Penal por la posible comisión del delito tipificado en el Art. 55 de la Ley 24.051, en Grado de tentativa,” January 19, 2005; http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/denuncia-penal-botnia-ence-spa.pdf.

78 Petition of September 19, 2005; http://www.cedha.org.ar/en/initiatives/paper_pulp_mills.

79 All documents can be found at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=au&case=135&k=88>.

Uruguay's complaint, that the Argentinean protest movement's road blocks represent a violation of the freedom of traffic of goods.⁸⁰

The Argentinean protest movement focuses on the technical and legal aspects of the cellulose factory. These critics support residents' interest in unhampered touristic utilization of the river and its surroundings, and pay particular attention to the – in their opinion – hazardous means of production. The impact of certain cellulose production processes is, in this case and in similar cases as well, quite controversial. In order to present well-grounded criticism and take legal action, technical, biological, and chemical expertise is needed. The protest therefore easily becomes a conflict between experts over technical and biological details. The difficulty of proving pollution caused by particular production processes also makes building a legal case more difficult.

A more far-reaching discussion of the larger environmental issue behind construction of the factory – cellulose production and its impact – rarely takes place. Fundamentally, the Botnia case is one of outsourcing “dirty” industries from Europe to the global South. The spread of monocultures, tree plantations among others, is furthered by European investments such as Botnia's.⁸¹ The corporations profit most from the cheaper production conditions in Uruguay. While the European environment is being conserved and former sites of monocultures return to their natural states, large land areas in Uruguay are being transformed into green deserts. Europe profits in another manner too: because the monoculture forests bind carbon dioxide, the CO₂ saved can be sold on the emissions trading market, helping to improve European countries' environmental performance.

The conflict over the construction of the cellulose factory on the banks of the Río Uruguay has received a remarkable amount of international attention, if one takes into account the actual extent of the environmental problems predicted. There are, at first glance, many indications that the conflict between Uruguay and Argentina is actually a “surrogate conflict,” which only ostensibly has to do with environmental issues. According to some political observers, it is actually a conflict about the sovereignty of the smaller country Uruguay with its larger neighbor Argentina, and about the role of the small partner countries in Mercosur.

II. WTO Dispute Settlement Procedure EC v. Brazil

The conflict between the European Community (EC)⁸² and Brazil over Brazil's import ban on retreaded tires for environmental reasons was decided in December 2007 by

⁸⁰ Laudo del Tribunal Arbitral “Ad Hoc,” September 6, 2006. http://www.cedha.org.ar/en/initiatives/paper_pulp_mills.

⁸¹ Stefan Thimmel, “Papier aus dem Süden. Aufgrund der Fabrikeröffnung des finnischen Multis Botnia geht der ‚Zellulose-Krieg‘ zwischen Argentinien und Uruguay in eine neue Runde,” *Lateinamerika-Nachrichten* 403, January 2008.

⁸² The European Union is not a WTO member; the European Community is a WTO member, and only it has been authorized to initiate WTO dispute settlement proceedings.

the Appellate Body of the WTO's dispute settlement procedure.⁸³ Brazil had banned retreaded tires imported from Europe because the Brazilian government could not provide for a safe disposal of wasted retreaded tires. Wasted tires cannot be recycled, and they pose environmental and health dangers if not properly disposed of.

Although at first the decision favored the position of the EC, and therefore supported free trade, this decision could nevertheless set a precedent with respect to future WTO cases on environmental issues. The decision of the WTO Panel and the Appellate Body is only a partial victory for the EU Commission. Should Brazil be able to implement the ban on retreads without discriminating, the measure would be justified as necessary and Brazil would be allowed to ban the import of retreaded and used tires.

It is interesting that the WTO standards (the grounds of justification in Art. XXb) were at least implicitly weighed and balanced with international environmental law standards (the Basel Convention, among others). This approach implies strengthening environmental protection and human rights interests in the WTO system.⁸⁴ There have been earlier WTO decisions in which restrictions on trade were deemed justified for environmental protection and public health reasons;⁸⁵ however, these decisions dealt with state measures taken directly against polluting or health-endangering measures, or with measures taken to protect specific animal species. In the current decision, the area in which justifications for trade restrictions may apply is expanded to include measures that have a preventive character. This difference gives member states leeway in their choice of methods to protect the environment and public health. The environmental protection measures taken must only make a contribution to achieving the protective aim; they do not have to be the only effective remedy, and they also can have a preventive character. It is also important that the Appellate Body's decision does not require a quantification of the degree of necessity to implement the protective measures. This situation simplifies the position of the party introducing the trade barriers, as they must not provide comprehensive proof of the effectiveness of their protective measures. Finally, in weighing less restrictive alternatives (as compared to the disputed measures), the capacities of the countries in question must be taken into account.⁸⁶ In particular, the financial and institutional conditions of Southern countries must be taken into consideration.

This WTO judgment helps to clarify the circumstances under which governments may implement trade-restrictive measures in order to protect the environment, health, and life of humans, animals, and plants;⁸⁷ nonetheless, each individual instance will

83 Panel Report of June 12, 2007, and Appellate Body Report of December 3, 2007; http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

84 Julia Ya Qin, "WTO Panel Decision in Brazil – Tyres Support Safeguarding Environmental Values," *ASIL Insight* 11, no. 23 (2007).

85 US-Gasoline (WT/DS 2 and 4/R; May 20, 1996); asbestos ("European Communities – Measures Affecting Asbestos and Asbestos-Containing Products," WT/DS135/R; September 18, 2000); sea turtles ("United States – Import Prohibition of Certain Shrimp and Shrimp Products," WT/DS58/R 15.05.1998).

86 McGivern, White & Case International Trade, December 2007; <http://www.whitecase.com>.

87 See also the press release of the German NGO Forum on Environment & Development, September 5, 2007; McGivern, White & Case International Trade, Geneva, June 2007; Schloemann, "Brazil Tyres-Policy Space Confirmed under Article XX," *Bridges Trade BioRes – Trade & Environment Review*, March 2008: 10ff.

still be decided on a case-by-case basis by the WTO dispute resolution bodies. Therefore, it is doubtful that this decision truly represents a breakthrough with respect to taking environmental concerns into account in the WTO free trade system. As recently as 2006, the WTO, in its panel report *USA v. European Communities*,⁸⁸ gave priority to free trade over any questions of environmental protection with respect to the dispute over the EU moratorium on genetically modified food and plants. We may be farther away from our goal of giving priority to issues of environmental and human rights over global fair trade than we had thought.

The case also shows that the EU, within EU territory, has relatively progressive environmental laws and policies, when viewed on a global scale. In its foreign trade policy, however, the EU clearly advocates the interests of the European economic lobby. Not only are environmental and health issues in the global South neglected; so too is proper waste disposal outside the EU. The EU also acts against the effective implementation of environmental standards as soon as European economic interests are at stake.

III. Syngenta v. Brazil

Since 2006, in the south of Brazil, legal and political battles have been raging over an experimental camp of the Swiss agrochemical company Syngenta, located in the state of Paraná. This camp does research on genetically modified soybeans. In the course of the conflict, the company was dispossessed and forbidden to sow crops. The private security guards from the NF Company hired by Syngenta continued to violently suppress protests by the landless peasants' movement. The most violent incident was on October 21, 2007, when around 150 campesinos from the two landless peasants' movements Movimento de Trabalhadores Rurais Sem Terra and Via Campesina occupied the experimental camp in the morning and disarmed the four NF security guards present. By midday, around forty armed guards from the NF Company entered the grounds. During the conflict, the 42-year-old peasant Valmir Motta de Oliveira was killed by two gunshots. Four more peasants, Gentil Couto Viera, Jonas Gomes de Queiroz, Domingos Barretos, and Hudson Cardin, were badly wounded. One peasant woman, Izabel Nascimento de Souza, was badly abused and spent a long time in a coma. One guard was also killed and three were wounded,⁸⁹ whereby the causes of death and injury have not yet been ascertained.⁹⁰

The current conflict between Syngenta and the landless peasants' movement with respect to the experimental field in Santa Tereza do Oeste centers on two key contentious areas in Brazilian agricultural policy: the regulation of the cultivation

⁸⁸ European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Dispute DS291); http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm.

⁸⁹ Letter by the human rights organization Terra de Direitos (Letter no. 204/07 TDD) to the president of the Federal Chamber of Deputies' Commission for Human Rights and Minorities, Luiz Couto, dated October 22, 2007. The authors have a copy of this letter in their possession.

⁹⁰ According to Amnesty International, first reports of the incident suggest that the security guard was shot by his own colleagues; see Urgent Action 276/07, October 25, 2007. See also <http://www.amnesty.org>.

and trade of genetically manipulated organisms, and the hiring of private militias by agricultural companies to fight landless peasants. These areas of conflict are only mirrored by the legal conflict.

Because there are currently no comprehensive laws regulating genetic engineering on the international level, nation-states can (still) decide whether and to what extent they permit it. In the international debate, the focus is less on the basic question of whether genetic engineering should be allowed or not, and more on how it can be regulated. This emphasis is not just a result of international dependencies and pressure from the agricultural lobby. The Brazilian discourse also moves between these poles. Critics were, for example, able to at least preliminarily achieve a suspension of the authorization of the cultivation and commercialization of genetically modified organisms for a period of several years. Regine Rehaag has reported on how non-governmental organizations were able to win complex and drawn-out court cases by utilizing “possibilities of intervention built into the Brazilian legal system, such as so-called precautionary measures or class action lawsuits.”⁹¹ Not until President Lula’s government pushed through a presidential decree – breaking a promise made in the election-campaign – was the cultivation of genetically modified, herbicide-tolerant soybeans (Roundup Ready) allowed in the harvests of 2003 to 2005.

In the conflict over Syngenta’s experimental field, genetic engineering critics seem to have won, at least temporarily, as the provincial governor and the environmental authority IBAMA have accepted their arguments; moreover, the District Court of Cacavel has upheld both the ban on cultivation of genetically modified crops by Syngenta and the fine that the company must pay. Although this legal victory was grounded only in the fact that the experimental field did not adhere to the regulation on minimum distance to the Iguaçu nature park, it is nevertheless significant. After all, a presidential decree was deemed inconsequential, and the decision counters the explicit interests of a global player on the agricultural market as well as its local allies. In the fundamental conflict over genetically modified seeds, however, a strong case still needs to be built. To win, the landless peasants’ movement and other critics need to utilize the media attention and the symbolic nature of the case in order to change the course of agricultural policy in Brazil.

Syngenta’s use of the private security firm NF and the incidents in October 2007 show which methods agricultural conglomerates and large landowners are willing to employ in the fight against unwanted opposition, as well as how high the stakes can be for the landless peasants’ movement in Brazil. As Amnesty International and other organizations have stressed in statements on the death of Valmir Motta de Oliveira, the incident fits into a pattern of human rights abuses related to land conflicts in Brazil. For years, human rights activists have criticized the use of private militias hired by landowners, and have catalogued their human rights violations. All further evaluations of individual cases depend on the careful and complete investigation of these events. Only when the exact relationship between Syngenta and NF – beyond the contract of July 2007 – and the informal agreements made on the use of force are clear, can legal action be taken against members of Syngenta or against the company itself. Otherwise, the unsatisfying situation will persist: underpaid and untrained

91 Regine Rehaag, “Die Weichen sind gestellt: Brasilien auf dem Weg in die transgene Landwirtschaft,” *Lateinamerika-Jahrbuch* 31: Rohstoffboom mit Risiken, 2007; <http://www.boell.de>.

militiamen, who increasingly are passed off as employees of a “security firm,” are brought to criminal court and sentenced according to local power constellations, while their bosses and clients hide behind the argument that the security guards used excessive force, enabling them to evade any criminal or civil legal charges.

Moreover, the phenomenon of private security forces can be viewed as an indication and problem of weak states. The Brazilian state is either not able or not willing to completely establish or maintain the state monopoly on the legitimate use of force and insist upon constitutional standards. In this way, one could argue that the Brazilian government must take responsibility for NF security guards’ use of loaded weapons. Under Article 1 of the American Convention on Human Rights, Brazil has a state duty to protect its citizens. If state institutions have been informed about, among other things, the illegal possession of weapons by security companies, then there are grounds for state complicity in the later misuse of these weapons. The justified criticism of private actors such as transnational corporations and private militias should not cause us to forget the continued dominant role of the state as guarantor of human rights.

IV. Clothing Companies in Argentina

Since 2005, members of the non-governmental organization Fundación La Alameda have brought charges against 85 different clothing retailers, including brand-name companies such as Adidas, Puma, and Le Coq Sportif.⁹² These companies have been charged with producing clothing under conditions similar to slavery.⁹³ These cases are still under investigation.

For years in Buenos Aires, a system of exploitation of mostly Bolivian garment workers has been established, tacitly allowed by local and national authorities. Brand-name companies are charged with selling clothes on the Argentinean market which are produced under working and living conditions that satisfy neither Argentinean law nor international standards.

La “superexplotación”, as the NGO calls it, means that workers, despite clear laws limiting long working hours, often are forced to sew between twelve and sixteen hours a day. Many of these workers are employed illegally. Consequently, no pension plan or benefits are paid. Salaries are usually far below union wages; often garment workers are paid only by the piece. Frequently, they live in the same room in which they work. The workshops are usually locked, so that workers can leave only on weekends at certain hours. The working environment is poorly lit and badly venti-

92 Most charges since 2005 have been made by members of the newly founded non-governmental organization Fundación La Alameda. Support was sometimes given by the Defensoría del Pueblo (ombudsman/citizens’ representation) of Buenos Aires and by the State Undersecretary for Labor; see http://www.asambleas-argentinas.org/article.php3?id_article=1236. Reports are founded on the comprehensive material of the prosecution’s case, which the lawyer Rodolfo Yanzón made available to the authors of this study. The authors are in possession of the prosecution’s charges in Spanish.

93 To date, there has been no decision on any of these cases (e-mail of January 7, 2008, from Defensoría del Pueblo).

lated; sanitary facilities do not meet minimum standards of hygiene. Furthermore, the workshops often have improper emergency exits and insufficient protection against fire. Electrical lines are usually poorly installed and therefore dangerous.

This system of exploitation is very complex. Many workers were lured to Buenos Aires by false promises made by the factory owners in their home countries. Once they arrived in Argentina, they had to work and live illegally without papers in the sweatshops. Most of the garment workers are from Bolivia. Sweatshop owners take advantage of the precarious situation of the workers, whose lives, due to their unlawful residential status,⁹⁴ are plagued by insecurity and fear. Under such circumstances, workers do not have the opportunity to organize themselves or even to get in touch with existing trade unions. The owners of these sweatshops use such methods in order to be able to withstand the pressures put on them by brand-name companies and their retailers, who insist on tight schedules and low prices. The fact that garment workers usually have no legal residency is one of the main pillars of the broad network of exploitation.

On the topicality of slavery today, Heiner Bielefeldt has written that “the reality of slavery and human trafficking still exists today in many places.” For this reason, it is “important to go beyond the traditional definition of slavery [...] and also to look at those relationships which consist of a one-sided dependency; these relationships are *de facto* slavery, or very nearly so.”⁹⁵ Although Bielefeldt was writing about African and Asian relationships, the situation in the hundreds of sweatshops in Argentina gives cause for thought, as Argentina is considered to be a country with democratic and constitutional structures.

The example of the criminal investigations into human rights violations in Argentinean sweatshops shows that there are methods available for punishing workshop owners for the exploitation of garment workers. A positive factor is that Argentinean law both sets legal protection standards to counter inhuman working conditions and provides means by which organizations and individuals can take legal recourse against such conditions. Furthermore – and imperative for safeguarding every human right – there is an infrastructure of lawyers, non-governmental organizations, and segments of the trade unions willing to take up cases of human rights violations and seek political and legal redress.

In general, the infamous conditions in the garment industry, disparaged by critics worldwide, are highlighted in the case of Argentinean sweatshops. European and North American brand-name companies limit their business activities to marketing their logos; production takes place somewhere else. Licensees in dependent countries are responsible for regional marketing. Supply chains are difficult to follow beyond the relationship between the licensee who commissions the order and the local producers who fill it. Because the local producers profit from the margin between the selling price and production costs, they often agree to deliver more than they are able to produce and farm out the work to homeworkers and illegal sweatshops. The

94 The homepage of the Bolivian Consulate in Argentina refers to official rulings on the situation of Bolivian garment workers without papers; see <http://www.consuladoboliviano.com.ar/habtalleres.htm>.

95 Heiner Bielefeldt, “Zwischen Apologetik und Kritik: Sklaverei als Thema in der europäischen Geistesgeschichte,” *Jahrbuch Menschenrechte* 2008, 2007: 32.

garment workers are at the end of this chain. When they work illegally without valid papers, they are at the mercy of inhuman working conditions and have no protection. Even when these conditions are discovered and made known, whether as a consequence of a dramatic fire or the work of non-governmental organizations, only the workshop owners directly responsible are taken to court. The licensees, and particularly the brand-name companies at the end of the supply chain, can claim innocence and insufficient control by local producers. Only because of unusually worker-friendly laws do the current cases at least have a chance of breaking this pattern and bringing to trial those individuals who actually profit from working conditions that violate human rights.

D. Democratic Law as a Precondition for Just Societies

Both the overview of the international and national discourses on the liability of transnational corporations for human rights violations and our analysis of four exemplary proceedings against European corporations for their activities in Latin America lead us to three main conclusions:

- 1. The current international and national legal systems provide only limited means of taking legal action against transnational corporations for their human rights violations and abuses.
- 2. When the focus is on legal proceedings and individual cases only, there is a tendency to ignore the important social, political, and economic aspects of the conflicts and their larger social dimensions.
- 3. Despite these limitations, legal instruments offer an independent means of investigating human rights violations in which transnational corporations are involved, and of administering sanctions. The globalization of universal human rights standards and the increasingly transnational organization of the human rights movement have greatly increased the chances of success for legal actions.

It is undeniable that private entities, particularly powerful transnational corporations, endanger and violate human rights. The legal instruments available are insufficient to investigate and prosecute these activities and enforce human rights. In the countries in which corporations are active, particularly those in the global South, inadequate legal frameworks often make it difficult to make transnational corporations liable for their actions. This study also shows, however, that Argentinean and Brazilian systems offer more opportunities for legal action than do many African and Asian legal systems. Difficulties are often exacerbated by weaknesses in the judiciary system and the lack of political will to take action against transnational companies that commit human rights violations.

In the corporations' home states, trials under national law often have better chances of success, because human rights violations can be investigated under the legal system of the home state, in relatively well-functioning legal proceedings. Even in this case, however, such proceedings quickly reach their legal and political limits. First, existing laws are insufficient to deal with human rights violations of a transnational character. This situation is especially difficult if the violation, as in the Argentinean case, consists of inhuman working conditions. Second, there are significant problems involved in the research and interpretation of the facts necessary to provide grounds for a lawsuit. When we look at individual cases, many legal difficulties arise from the organizational structure of corporations and from the diverse components of production and distribution, as evident in the Argentinean case study. Transnational corporations often are not centralized, hierarchical, monolithic institutions, but rather complex networks with many geographical centers and complex owner-

ship structures, decision-making processes, and business relationships. In contrast to state institutions, corporations are not obliged to make their decision-making processes, distribution of responsibility, and other confidential information public. In the end, nation-states have an enormous responsibility despite their waning influence. Thus, nation-states are legally bound to create laws that require corporations within their territory to observe human rights in their business activities; they are also bound to monitor these activities and to investigate and punish human rights violations.

International criminal law is the most promising field for making transnational corporations liable for their activities; in some states, this approach also includes the possibility of civil restitution. Under these laws, individuals who have responsibility within transnational corporations can, under the principle of universal jurisdiction, be made liable for crimes committed outside the territory of the prosecuting state and, depending on the legal structure, sometimes also without any factors connecting the crime to the home state. Thus, bringing international criminal charges against corporations has long been part of the repertoire of non-governmental organizations, as has bringing charges under the Alien Tort Claims Act.

Human rights violations by corporations cannot be dealt with solely on the conventional juridical level. Political, economic, and social mechanisms need to be utilized as well. General societal solutions and even global solutions must be found. Legal proceedings can help in building these solutions, particularly when national legal systems are well developed and existing United Nations initiatives are supported. They can even help in realizing an international convention that, as a minimum standard, obligates states to monitor the activities of transnational corporations within their territory in order to protect human rights.

The globalization of universal human rights standards has led to the improved and increasingly transnational organization of the human rights movement. It is now generally accepted that universal human rights standards exist. How well they are protected, however, particularly in the case of second- and third-generation human rights, varies greatly in many regions of the world. Even when legal recourse is taken, steps forward are always accompanied by setbacks, and well-founded legal claims must contend with political hurdles.

We can summarize the four cases studied in this context as follows: Despite the fact that the Argentinean environmental movement fixated on the case of the Botnia cellulose factory in Uruguay, it is nevertheless an expression of the transnationalization of human rights work. Owing to the work of Argentinean non-governmental organizations in cooperation with numerous foreign partners, all legal channels were exhausted in the attempt to prevent the factory from operating. Proceedings in courts of law as well as soft law instruments were utilized unsuccessfully in an attempt to stop the factory from opening in the first place. Whether or not the legal means employed – from the charges filed in Argentina to the proceedings at the International Court of Justice – resulted in a positive outcome from the organizations' points of view, it is remarkable how they made use of all legal means at their disposal. Conflicts centered on human rights and environmental issues require focal points as symbols through which societal problems can be tackled by legal means. Botnia is such a symbol. It is the duty of stakeholders of civil society to guide the public consciousness from the individual case to the larger problem, and to bring about real social change in the

face of corporations and left-leaning national governments. Whether the organizations in Argentina and Uruguay are able to do so shall be decided by the success of their protest, independent of the actual outcome of the individual legal proceedings.

In the WTO dispute settlement proceedings between Brazil and the EC, environmental organizations also played an important role. They not only commented on the proceedings and demanded that EU foreign trade policy be oriented toward environmental protection goals; they also supported Brazil in the proceedings by submitting expert statements in the form of *amicus curiae* briefs (advisor to the court).

In the conflict over Syngenta's experimental field, genetic engineering critics have won at least a temporary victory in that the provincial governor and the Brazilian environmental authority IBAMA have accepted their arguments; moreover, the District Court of Cacavel upheld both the ban on cultivation for Syngenta and the fine that the company must pay. Although the grounds for their success were only that the experimental field did not have the required minimum distance to the Iguaçu nature park, the partial legal victory is significant. After all, a presidential decree was deemed inconsequential, and the decision counters the explicit interests of a global player on the agricultural market and its local allies. However, in the conflict over the fundamental question of genetically modified seeds, the case is at most one step on the way to victory. To win, the landless peasants' movement and other critics must be able to utilize the media attention and the symbolic nature of the case in order to change the course of agricultural policy in Brazil.

The investigations into human rights violations in Argentinean sweatshops clearly show not only that Argentinean courts now prosecute sweatshop owners for the exploitation of garment workers, but also that other responsible figures along the supply chain are to be investigated. Argentinean law has a number of positive features in this regard: it sets out material and legal protection standards in order to define and work against inhuman working conditions, and it offers organizations and individuals means of taking legal recourse against such conditions. Furthermore – and this is imperative for securing every human right – there is an infrastructure of lawyers, non-governmental organizations, and segments of the trade unions willing to take up cases of human rights violations and seek political and legal redress. Legal prosecution, however, is still difficult due to corruption, the long period of time needed for legal proceedings, and the Federal Law Enforcement Agency's lack of human and other resources.

In all four cases, it is clear that despite all of the limitations, members of non-governmental organizations were able to utilize means of protecting human rights and the environment. The transnational human rights and environmental movements are now involved in the creation and application of law on many different levels and through quite diverse means. When, due to these efforts, people who used to live under almost complete lawlessness find access to legal proceedings, when seemingly omnipotent actors such as nation-states, former and current state leaders, and transnational corporations must answer for their actions in courts of law and their behavior is at least partially met with sanctions, then law has become more democratic. Democratic law, in turn, is one of the preconditions for a socially just, democratic, and ecological society.



Human rights are universal. However 60 years after the adoption of the Universal Declaration of Human Rights, their application and recognition is still far from ubiquitous. There has at least been progress in international criminal jurisdiction. But it is still difficult to hold private individuals and transnational companies liable for human rights transgressions outside the borders of their countries. The instruments created to bind companies to human rights standards as well as to social and environmental standards are voluntary. Voluntary instruments are inadequate in conflict situations, as those affected lack the means to secure and monitor their rights. In Latin America today,

foreign direct investments are the most important source of external capital. Unfortunately, corporate activities often also involve a risk of human rights violations and environmental destruction.

Shaping globalization at the policy level is one of the greatest challenges of our century. The Heinrich Böll Foundation commissioned this study in preparation for the EU - LAC Summit. The study analyzes existing legal means of holding European transnational companies liable for extraterritorial human rights violations. The authors examine four representative legal cases against European companies in Latin America that revolve around problems typical in the region.

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