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THE STATUS OF TRANSNATIONAL CORPORATIONS IN INTERNATIONAL PUBLIC LAW

With Special Reference to the Case of Shell

Willem J.M. van Genugten

1. INTRODUCTION

In the late 1990s, many Transnational Corporations (TNCs) were in the midst of defining their roles in society, including their responsibilities in the field of human rights and related issues. Many TNCs identify and label their responsibilities in terms of 'moral obligations', or similar words: they accept obligations resulting from the need to recognise and implement human rights, but these obligations are considered to be 'only' moral ones, adopted by the TNCs on the basis of self-regulatory arrangements, and not because they are legally binding. The present chapter questions this approach.

2. LEGAL OBLIGATIONS ON DIFFERENT LEVELS

2.1 Internal Codes of Conduct

In the late 1980s and the 1990s, there was a *hausse* in adopting internal codes of conduct by TNCs. Whether it is Shell (to be discussed in more detail later), Nike, Ikea, Adidas or whatever other company, they had already adopted an internal code of conduct, were in a process of doing so, or were challenged to do so because of the fact that other companies took the lead and were trying to reap the fruits of their early investment in their company's image. According to a recently published overview, 38 out of the 100 biggest Dutch enterprises have an internal code of conduct, while several others are in the process of drafting one.[1]

The internal codes of conduct deal with such issues as the absence of corruption, the intention to operate in a way which contributes to sustainable development, and the application of basic social standards, for instance, in the field of child labour, forced labour, freedom from discrimination.

In order to have a clear insight into the legal status of these internal codes of conduct, it is fruitful to make a clear distinction between *generally worded* (provisions in these) codes, and more *specifically worded* intentions. If a com-

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[1] *NRC Handelsblad* [a Dutch daily newspaper], 8 April 1999. The relevant article is based on a report by VNO-NCW, a Dutch employers' organisation.

pany states that it will insist on 'fairness on all levels of its economic activities', such a formulation might be considered valuable from a moral point of view, although even then it can be considered an 'open door' formulation, which lacks specificity. However, legally speaking it is quite useless. Suppose an employee would address a national court, complaining about a lack of fairness of his company management which did not offer him the job that was given to a less qualified colleague, the court would never accept the relevant provision in the internal code of conduct as a source of law. If, however, the code states that the company will pay specific (levels) of wages for specific types of work, or if it explicitly says that the company will not make use of child labour, thereby even specifying what it considers to be child labour, this creates controllable obligations, which can even be used within legal procedures. In that case, the relevant provision of the code of conduct can be woven into a legal defence, as a supportive argument as well as a secondary source of law. A provision like the one related to child labour, for instance, creates expectations which are legally speaking relevant, and which come close to real contractual obligations.

As an illustration, I would like to refer to a Dutch case in the 1970s, concerning the Batco Tobacco Factory in Amsterdam. This factory, part of the multinational British American Tobacco Company, was planning to partly move its production elsewhere without giving notice of these steps to the works council and the trade unions. According to some Dutch trade unions, among others, this plan was not in conformity with the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). In addition, Batco itself, in its annual report of 1978, had stated that its internal policy was in conformity with the OECD Guidelines and that it supported the efforts of the OECD to have these Guidelines implemented on a large scale. The 1978 Batco report thus made the *international* code of conduct made by the OECD – see the next section of this chapter – part of its *internal* code of conduct, in this case, not expressed in the form of a small set of business principles but in one of its annual reports.[2] The Batco case was brought before the Amsterdam Court, which quashed the decision to close the company, arguing, *inter alia*, that the fact that Batco Industries had accepted the OECD Guidelines as guidelines for its policy was 'of considerable importance'. According to the Court, the guidelines implied that, in cases like the one in hand, a dialogue needed to be established with the employees' representatives. In the Court's opinion, under these circumstances, breaking off the required consultation with the unions and the works council by Batco Holland constituted a serious breach of this duty to consult. Evaluating the Court's decision, one can say that the OECD Guidelines,

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2 See Willem van Genugten and Sophie van Bijsterveld (1998), Codes of Conduct for Multinational Enterprises: Useful Instruments or Shield against Binding Responsibility?, *Tilburg Foreign Law Review*, Vol. 7, No. 2, 173.

and their 'translation' into Batco's internal code of conduct, were not [yet] at the centre of the legal line of defence, but they certainly played an important role.[3]

There are, however, other grounds than the one indicated, which can give legal effect to internal codes of conduct. The first relates to the rules of fair competition amongst enterprises. If a company states it will not make use of labour for which it pays less than five times the local minimum wage, and the company uses such an argument when advertising its products, rival companies have a case at the moment that it becomes clear that the 'promising company' doesn't keep its word. The same goes for what I would like to call 'promises to consumers'. Many internal codes of conduct are not only applicable to internal business practices in the more strict sense of the word, but also on chains of contractors, sub-contractors and even buying agents.[4] If a company states in its internal code of conduct that it will not make use of semi-manifactured articles produced with child labour, this again raises legally relevant arguments. Suppose a toy shop sells footballs made under the conditions as described. It would definitely have a case against the company that imported the balls, even if the needlework was done by the company's *sub*contractors. The same would go for a consumers' organisation, making use of the possibility of an *actio popularis* to complain about the company's breach of its self-created obligations. It also would have a case, which, in many ways, resembles the one following from a breach of an official written contract.

2.2 International Codes of Conduct

Over the years, several international codes of conduct have been adopted. One can refer, for instance, to the above-mentioned Guidelines for Multinational Enterprises, adopted by the OECD in 1976 (and since then modified several times, while since November 1993 being 'in revision', and to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the International Labour Organisation (ILO) in 1977. Without going into much detail as to the contents of these and other international codes of conduct,[5] one can say that they are highly relevant from the perspective of the present chapter. The ILO code, for instance, states, in relation to the issue of human rights protection:

> 'All the parties concerned by this Declaration (...) should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitu-

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3 Ibid. 174.

4 International Labour Office, Governing Body (1998), *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues*, GB.273/WP/SDL/1, Geneva, 14.

5 See Van Genugten and Van Bijsterveld, Codes of Conduct for Multinational Enterprises: Useful Instruments or Shield against Binding Responsibility?, 163-170.

> tion of the International Labour Organisation and its principles according to which freedom of expression and association are essential to sustained progress.'[6]

In addition, the ILO code refers to a number of specific ILO Conventions that relate to human rights (see the next section).

In relation to international codes of conduct, it is often stated that they are (more or less) meaningless from a legal point of view. They are considered to function on a voluntary basis, to contain morally and – due to the involvement of governments – politically binding provisions, but in terms of legal coercion they are considered next to void. The arguments partly run like the ones concerning internal codes of conducts. The same goes for my counter-arguments. I will not repeat these, but add some which specifically relate to international codes of conduct.

First of all, one can say that some of the international codes have their own implementation mechanisms, which make them at least 'quasi-legally binding'. For the implementation of the OECD Guidelines, for instance, a system has been developed, consisting of three elements: 1) National Contact Points, serving, amongst other things, to gather information on experiences with the Guidelines and to assist in solving problems which may arise between business and labour in matters covered by the Guidelines; 2) the Committee on International Investment and Multinational Enterprises (CIME), whose major task it is to provide clarifications on the interpretation of the Guidelines; and 3) the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), which, *inter alia*, can consult the National Contact Points and can raise issues at the CIME.[7] The system makes the Guidelines more binding than they are normally said to be. The same goes for the ILO Tripartite Declaration, to which the ILO developed a system of questionnaires, asking governments for information about the implementation of the Declaration. The system is based on the ILO code itself, which in its Introduction states that 'triennial surveys are conducted to monitor the extent of the application of the Declaration by governments, employers, workers and MNEs [Multinational Enterprises, WvG].' The ILO presently is currently preparing its seventh full-scale survey, covering the years 1996-1999.[8]

Despite these implementation mechanisms, the legal character of both the OECD and the ILO code is - and can be - disputed. The OECD itself makes the following statement on this issue:

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6 ILO Tripartite Declaration of Principles, par. 8, *Official Bulletin* (Geneva, ILO), 1978, Vol. LXI, Series A, No. 1.

7 For a short overview, see the OECD Website: URL: http://www.oecd.org/daf/cmis/CIME/mneguide.htm. Also see S.C. van Eyk (1995), *The OECD Declaration and Decisions Concerning Multinational Enterprises: An Attempt to Tame the Shrew* (Nijmegen: Ars Aequi Libri).

8 See the report of the Governing Body, April 1997, 79.

> 'The [OECD] Declaration on International Investment and Multinational Enterprises [of which the Guidelines form a part, WvG] constitutes a political commitment, adopted by the Governments of the OECD countries in 1976 with the objective of facilitating direct investment among OECD Members. (...) The Guidelines are voluntary and, consequently, not legally enforceable. This, however, does not imply less commitment by OECD Governments to encourage their observance.'[9]

In addition, the OECD states that the Guidelines 'carry the weight of a joint Recommendation of OECD Governments' and that they 'alongside with national laws (...) form part of the legal infrastructure which promotes responsible behaviour of MNEs.'[10]

Further evidence for their legal status can be found in the codes themselves, in combination with the way they have been adopted, as well as the way implementation and supervision are taken care of. In general, one can say, that *states* are the producers of new international legal instruments – mainly treaties, but one should also think of the ways they contribute to the coming into existence of international customary law – and that, subsequently, states can decide to be bound by it, for instance, by ratifying the treaties they have developed. In the case of the OECD code, however, taking into consideration the involvement by employers' as well as employees' organisations, and even more in the case of the ILO code, which is made by an organisation that is famous for its tripartite structure (governments, employers and employees being represented in all the important ILO policy making bodies), one can say that the standards have been developed, among others, *by the TNCs themselves*. The ILO code, for example, states that 'the principles [set out in this Declaration, WvG] are intended to guide the governments, the employers' and workers' organisations and the multinational enterprises in taking such measures', et cetera.[11] In other words: the employers involved in the process of adopting the declaration, *'order themselves* to live up to it. We then speak about self-regulation, and this word should not be misunderstood as 'without binding force' or 'without engagement', as is often done. Self-regulation has a serious, quasi-legal content in the area of the OECD as well the ILO. In addition, one can think of both codes in even strict legal terms. See the arguments related to the specificity of the provisions and contractual obligations I gave in the section on internal codes. They are relevant *mutatis mutandis* in the case of a breach of international codes like the ones adopted by the OECD and the ILO.

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9 See the previously mentioned OECD Website.
10 Ibid.
11 ILO Tripartite Declaration of Principles, Paragraph 4.

2.3 ILO 'Human Rights Conventions'

Due to their activities in diverging cultural and economic contexts, TNCs in many ways are concerned with issues like child and forced labour, discrimination, the freedom to establish trade unions and the right to collective bargaining. These issues are covered by the so-called 'human rights conventions' of the ILO: C.29 (1930) on Forced Labour; C.87 (1948) on Freedom of Association and Protection of the Right to Organise; C.98 (1949) on The Right to Organise and Collective Bargaining; C.100 (1951) on Equal Remuneration; C.105 (1957) on Abolition of Forced Labour; C.111 (1958) on Discrimination; and C.138 (1973) on Minimum Age. In addition, it can be mentioned that, in June 1999, the ILO adopted a new Convention (C.182) in the field of The Prohibition and Immediate Elimination of the Worst Forms of Child Labour.

The already existing ILO conventions have been ratified by some two third of the (175) member states of the ILO[12] – that is to say with the exception of the Minimum Age Convention, which has been ratified by 89 states only (situation per 15 April 2000) – which means that, *grosso modo*, some one third of the states did *not* ratify them. In that respect, it is interesting to note that the 1995 Copenhagen Social Summit agreed upon the issue that states have to improve the quality of employment by

> 'safeguarding and promoting respect for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association and the right to organize and bargain collectively, equal remuneration for men and women for work of equal value, and non-discrimination in employment and fully implementing the Conventions of the International Labour Organization in the case of States party to these Conventions, *and taking into account the principles embodied in those Conventions in the case of those countries that are not States party* (...).'[13]

In other words: the above mentioned ILO 'human rights conventions' are declared to have universal value by the (185!) states participating in the Copenhagen meeting. The 1995 text is followed by the Declaration on Fundamental Principles and Rights at Work, adopted by the ILO International Labour Conference in June 1998, which declares that

> 'all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership of the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> freedom of association and the effective recognition of the right to collective bargaining;
>
> the elimination of all forms of forced or compulsory labour;
>
> the effective abolition of child labour; and

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12 C.29: 153 ratifications (per 15 April 2000); C.87: 128; C.98: 146; C.100: 146; C.105: 144; C.111: 142. At the same date, C.182 was ratified by 13 states.

13 *Copenhagen Programme of Action*, March 1995, Paragraph 54(b); emphasis added.

> the elimination of discrimination in respect of employment and occupation.'[14]

At the same session, a new mechanism was developed by the ILO – in addition to a range of already existing reporting and complaint procedures – consisting of the publication of an annual global report on the four areas mentioned, to be reviewed by the – tripartite – Governing Body.[15] The states who are not yet party to the ILO 'human rights conventions' will have to report on the basis of Article 19(5) of the ILO Constitution, which states that, in case an ILO member state does not ratify a convention, it shall – nevertheless – report at appropriate intervals and at the request of the Governing Body, on its implementation of the conventions concerned.[16] It can be added that procedures like this one are taken very seriously within the ILO framework.[17]

In a comment on the new ILO Declaration, Lee Swepston, Chief of the Equality and Human Rights Co-ordination Branch of the International Labour Office in Geneva, rightly mentioned that the debate on the draft Declaration took extra time due to the discussion on the so-called 'Social Clause'.[18] This is, in short, the debate on the issue of whether world-wide free trade, as symbolised in and practised by the World Trade Organisation (WTO), should be linked to respect for labour standards, as embodied in the above-mentioned ILO 'human rights conventions'. [19] At the first Ministerial WTO Meeting in Singapore, in December 1996, it was decided after a long debate that the social clause issue as such will not be linked directly to the WTO activities – as the chairman of the Conference said at the end, the Singapore document 'does not inscribe the relationship between trade and core labour standards on the WTO agenda'[20] – but the decision was taken to ask the ILO to continue its supervisory tasks in this field. At the Second Ministerial WTO Meeting (Geneva, May 1998), it became clear that, in relation to the issue of the 'social clause', as well as with respect to further linking the activities of the WTO and the ILO, no serious progress has

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14 *International Legal Materials*, 1233 (1998), 1237-1238.

15 Ibid. 1239.

16 On this mechanism, as well as on other ILO supervisory and implementation mechanisms, see Willem J.M. van Genugten (1999), *Human Rights Reference Handbook*, second, revised edition (The Hague: Ministry of Foreign Affairs), 128-133. Also available on the Internet: URL: http://www.minbuza.nl

17 See, for instance, L. Betten (1993), *International Labour Law, Selected Issues* (Deventer/Boston: Kluwer).

18 Lee Swepston (1998), Introductory Note, *International Legal Materials*, 1233.

19 On the issue of the 'social clause', see, for instance, Erika de Wet (1995), Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariffs and Trade, *Human Rights Quarterly*, Vol. 17 (also published as ILO discussion paper DP/76/1994). On the Singapore decision, see W.J.M. van Genugten (1997), *WTO, ILO en EG: handelen in vrijheid* [WTO, ILO and EC: Trade in Freedom] (Deventer: W.E.J. Tjeenk Willink), passim.

20 Yeo Cheow Tong, quoted in *WTO-Focus*, January 1997, 14.

been made during the last two years.[21] The same goes for the meeting in Seattle, in November 1999. Nevertheless, it is also clear that the ILO is broadening its activities in the field of the implementation of the internationally recognised labour standards – see above – which will also have direct consequences for the WTO activities as well as for the TNCs being active within the jurisdiction of the WTO member states. It might also be good to repeat that the latest ILO steps in this field, such as the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work, have been supported by the employers active in the tripartite International Labour Conference. It makes the Declaration and its follow-up mechanism an interesting combination of self-regulation and supervision from outside. The same goes for the 1999 Convention on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour. The tripartite Committee on Child Labour, preparing the Convention, consisted, among others, of 50 employer members, who gave their full support to the Convention.[22]

2.4 Other Human Rights Standards

Especially since – and due to the atrocities of – the Second World War, many human rights standards have been adopted which also create obligations for non-state actors, such as TNCs. As the 1948 Universal Declaration of Human Rights states, this document is

> 'a common standard of achievement for all peoples and nations, to the end that every individual and *every organ in society*, keeping this Declaration constantly in mind (...) shall strive (...) to promote respect for these rights and freedoms and (...) to secure their universal and effective recognition and observance.'[23]

Furthermore, Article 29 of the Declaration refers to '*everyone's* duties to the community', while Article 30 says that no 'State, *group* or person' has the right to engage in activities which aim 'at the destruction of any of the rights and freedoms' of the Declaration.[24] The Declaration is generally considered to belong to international customary law, although one can question this in relation to some articles, which would not easily stand the 'customary law test', as developed by the International Court of Justice.[25] For now, I would like to concentrate on the issue of *Drittwirkung* or 'horizontal force', a label related to the idea that private

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21 Report on the meeting by the Dutch government to the Dutch Parliament, 1997-1998, 25074, No. 11.

22 International Labour Conference, 87th Session, Geneva, June 1999, Discussion in Plenary. URL: http://www.ilo.org/public/english/10ilc/ilc87/com-chil.htm

23 Preamble of the Declaration; emphasis added.

24 Emphasis added. Similarly: Nicola Jägers (1998), Transnational Corporations and Human Rights, in: Mielle Bulterman, Aart Hendriks and Jacqueline Smith (eds), *To Baehr in Our Minds* (Utrecht: Netherlands Institute of Human Rights), Special No. 21, 83.

25 See, for instance, its judgements in the Asylum Case (20 November 1950); the North Sea Continental Shelf Cases (20 February 1969); the Nicaragua Case (27 June 1986); and the Nuclear Weapons Case (8 July 1986).

parties – like individuals and companies – can also violate human rights.[26] In the case law of supervisory bodies like the (former) European Commission and the European Court on Human Rights ('Strasbourg') as well as the UN Human Rights Committee ('Geneva'), one can see a trend towards broadening the scope of the *Drittwirkung*. In that respect, one can think of a series of cases related to such issues as the way schools treat their pupils – is corporal punishment by school teachers to be seen as degrading treatment in the sense of international and regional human rights treaties?[27] – or to the combination of 'classical' human rights, like the right to (family) life, with social as well as environmental threats to these rights, for which also companies are held responsible.[28]

In addition, the UN Human Rights Committee has decided that a series of rights, contained in the 1966 International Covenant on Civil and Political Rights (ICCPR), has the character of peremptory standards, that is to say, standards from which no deviation is allowed (also called: *ius cogens*). Among these provisions are not only the one on torture and cruel, inhuman or degrading treatment or punishment, but also the ones on advocacy of national, racial and religious hatred, and minority rights with regard to culture, religion and language.[29] The peremptory character of the these provisions, combined with their horizontal force, can directly affect activities of TNCs. One can think of wishes brought forward by (migrant) workers, e.g, in relation to specific religious free days.

As to the horizontal force of rights outside the ICCPR framework, one can think of many 'core' rights within other human rights treaties. To mention just one other example: Article 32 of the 1989 UN Convention of the Rights of the Child – which probably is the UN's best ratified Convention[30] – obliges the states parties to the Convention to protect children against economic exploitation and 'from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.' In addition, the article requires states to take 'legislative, administrative, social and educational measures to implement the present article', in particular related to issues such as minimum age, hours

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[26] Nicola Jägers (1998), Transnational Corporations and Human Rights, 75-77. See also Fried van Hoof (1998), International Human Rights Obligations for Companies and Domestic Courts: An Unlikely Combination?, in: Monique Castermans-Holeman, Fried van Hoof and Jacqueline Smith (eds), *The Role of the Nation-State in the 21th Century; Human Rights, International Organisations and Foreign Policy* The Hague/ Boston/London: Kluwer Law International), 54-57.

[27] See, for instance, the case *Costello-Roberts v. UK* (European Commission on Human Rights, Application No. 13134/87, report of 8 October 1991).

[28] Compare the decisions in the cases *Arondelle v. UK* (European Commission on Human Rights, Application No. 1889/77, report 15 July 1980) and *López Ostra v. Spain* (European Court of Human Rights, Application No. 16798/90, judgement of 9 December 1994).

[29] 'General Comment' on the issue of reservations, UN Doc. CCPR/C/21/Rev.1/Add.6, 11 November 1994, par. 8.

[30] 191 ratifications per 1 July 1999.

and conditions of the employment, and to 'provide for penalties and other sanctions to ensure the effective enforcement of the present article.' The article has again, beyond doubt, horizontal force for the TNCs falling within the jurisdiction of the states that ratified the Convention, i.e., given the number of ratifications, almost all TNCs world-wide.

3. THE LEGAL STATUS OF TNCs: CONCLUDING REMARKS

TNCs are the main actors within the globalising economy, alongside the states and their inter- and supranational organisations. And at the end of the 20th century, it is generally agreed upon that TNCs have their own responsibilities in the field of 'governing the world'. In the words of the Commission on Global Governance:

> 'Business must be encouraged to act responsibly in the global neighbourhood and contribute to its governance. (...) The international community needs to enlist the support of transnational business in global governance and to encourage best practices, acknowledging the role the private sector can play in meeting the needs of the global neighbourhood. Wider acceptance of these responsibilities is likely if the business sector is drawn to participate in the processes of governance.'[31]

As a second illustration of the new roles corporations are charged with, one can have a look at the 1997 Universal Declaration of Human Responsibilities, adopted by the 'InterAction Council', a body consisting of a group of former leaders from all over the world, and supported by a number of intellectuals as well as representatives of some NGOs and intergovernmental bodies. The Declaration stresses the responsibilities of, *inter alia*, corporations, stating that they have to look for and live up to common ethical standards, and that 'economic and political power must not be handled as an instrument of domination, but in the service of economic justice and the social order' (Article 11). According to the Press Statement issued by the InterAction Council at the occasion of the presentation of the Declaration, this article directly addresses the combination of 'governments and big corporations'.[32]

The quotes serve to illustrate that talking about moral responsibilities as well as of co-responsibilities for TNCs in the field of governance and human rights is 'in the air' again. But what does this mean in terms of legal personality for the TNCs in the field of international law? My answer would be: inevitably a lot, in the short run (a situation which can be considered *de lege lata*, i.e., the already existing legal position; see above) as well as in the long(er) run, *de lege ferenda*, law that still has to come into existence. Law basically reflects (or rather: tries to

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[31] Commission on Global Governance (1997), *The Report of the Commission on Global Governance: Our Global Neighbourhood*, Chapter 5: Reforming the United Nations, 3.

[32] See the press statement, entitled 'It is time to talk about responsibilities', as well as the Declaration itself, published on 1 September 1997.

reflect) dominant moral conceptions, be it on the national level or on the level of the world community of states. It is not a static phenomenon, which does not adapt itself to new situations and demands. As such, it is obsolete to think that states, and to some extent individuals, are the only subjects of international law. Apart from what is going on in such fields as the rights of non-state actors as national minorities and indigenous peoples, one can think of TNCs, or corporations more in general. In several cases and situations, they have already been accepted as subjects of international law. For instance, at the Iran-United States Claims Tribunal, created in 1981 as part of the settlement of the Teheran hostage crisis and established to deal with claims between nationals and companies from the two states, individuals and companies which are nationals of one of the two parties under certain conditions have legal standing.[33] Other examples relate to the European Community. Over the years, several cases were brought before the Court in Luxembourg, in which companies – be it in the role of applicant or in that of defendant – were subject to Court decisions in the field of tensions between economic activities and respect for human rights. One can think, for instance, of the case *J. Nold v. the European Commission*, in which it was stated, *inter alia*, that, due to Community measures, the right to property of the applicant, a German undertaking, was violated. The principal meaning of the Court's decision was, as a matter of fact, that the Court undertook to examine the submissions of the applicant in the light of 'the general principles of law, the observance of which it [the Court, WvG] ensures' and of the 'constitutional traditions common to the Member States'.[34] In later judgements, the Court has further elaborated upon this argument.[35] The general conclusion is that Community activities have to be in conformity with regional and international human rights standards, as formulated in, especially, the European Convention on Human Rights. This trend, emerging from successive judgements by the Luxembourg Court, has been codified in the 1992 Treaty of Maastricht and the 1997 Treaty of Amsterdam, respectively (the last one being in force since 1 May 1999). Corporations that feel disadvantaged by Community actions, can use the relevant procedure to address the Court – since 'Amsterdam': Article 230 of the EC Treaty, which states that 'any natural or legal person may (...) institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'

The conclusion, to be drawn from this material, is that the legal personality of TNCs – corporations in general – in the field of international public law is

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[33] See P. Malanczuk (1997), *Akehurst's Modern Introduction to International Law*, seventh revised edition, (London/New York: Routledge), 101.

[34] Judgement of the Court of 14 May 1974 (Case 4/73).

[35] Report 2/1994 of 28 March 1996, paragraph 34. Other relevant cases are, *inter alia*: *Hoechst v. Commission* (Cases 46/87 and 277/88), Judgement of 21 September 1989, and *Orkem v. Commission* (Case 374/87), Judgement of 18 October 1989.

granted to corporations by the states, and as such can be considered to be more or less a gift. In addition, the number of cases available to illustrate this situation is limited. However, there is an undeniable trend to broaden the scope, and to admit as well as urge other actors, including TNCs and other corporations, to enter the playing field of international law. This is basically related to the new 'division of labour' in today's world: states accompanied by the 'civil society' in setting standards and discussing implementation procedures, and the free market ideology asking states to partly (!) withdraw themselves from the scene and to make room for enterprises. It is a trend which can be seen on the level of, for instance, the World Trade Organisation as well as in regional arrangements like the European Union, which asks for the application of public international law rules on private business activities. In the words of Leigh Hancher, Professor of EC Law: 'The role of the EC competition principles is thus taking on a new dimension, imposing positive obligations on those who hold market power as well as seeking to regulate their conduct.'[36] The quote is about European core business: competition regulation. These activities, however, have to be carried out with full respect for the above-mentioned human rights principles. It is my prediction that what is now going on in Europe will sooner or later be the situation on the WTO level as well. TNCs and other companies will have to act in accordance to international human rights law, whether they like it, and say so in their self-regulatory codes, or not.

4. A DISCUSSION OF SHELL'S HUMAN RIGHTS APPROACH

4.1 A Short Description of Shell's Position

Shell, an oil company, consisting of some 2,400 companies operating in more than 140 countries, employing some 100,000 people, and engaging some 240,000 contractors,[37] is well known for its advanced position in the field of expressing corporate responsibilities concerning human rights. Triggered by, amongst other things, the 1995 Nigeria crisis which led to the execution of Ken Saro-Wiwa and eight other members of the Ogoni people, followed by the question of whether or not Shell had done enough to avoid the executions – a question which will not be discussed here[38] – the company started to formulate its

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[36] Leigh Hancher (1999), Community, State, and Market, in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press), 742.

[37] Data taken from *The Shell Report 1999, People, Planet & Profits, an Act of Commitment* (London: Shell International), 1999, and from:+
URL: http://www.shell.com/values/content/1

[38] Apart from a huge number of publications in the years 1995 and later, see most recently: Human Rights Watch (1999), *The Price of Oil. Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York/ Washington/London/Brussels: Human Rights Watch). Also see *The Shell Report 1999*, 29-30.

responsibilities in the field of human rights and related issues. It issued, *inter alia*, a new version of its Business Principles ('Statement of General Business Principles', 1997), published a detailed brochure on human rights ('Business and Human Rights; A Management Primer', 1998), and started discussing human rights aspects in its yearly reports[39] and on its websites.[40] Some quotes will be taken from these sources, to illustrate Shell's approach of the human rights issue. The quotes relate to, successively, Shell's internally oriented aims; its aims as to its relations with its (sub)contractors; and Shell's approach of its responsibility towards society at large.

On the first level, the 1997 Shell Business Principles state, *inter alia*, that Shell companies aim 'to respect the human rights of their employees' and 'to provide their employees with good and safe conditions of work'. In addition, *The Shell Report 1999* states that the 'lowest paid Shell employee earns US $ 50 per month, which is three times (1.6 times in 1997) the statutory national minimum in that country.' The report adds that, in countries where Shell operates, 'the minimum monthly wage is, in most cases, between one and five times, and in all cases between one and 150 times any statutory national minimum.'[41] On the issue of child labour, the report says that 'in every country where we operate, our employees are above the local legal age of employment. The youngest company employee, who is 15 years old, is employed part time and works in Europe.'[42] On the same issue, it is stated that 'Shell companies in 84 countries have a specific policy to prevent the use of child labour in any of their operations. Contractors and/or suppliers are screened against the use of child labour in 52 countries.'[43] In *The Shell Report 1998*, it is also said that, because the use of child labour is more prevalent in certain parts of the world, specific screening procedures are required in these regions: 'For example, Shell China formally checks that no child or forced labour is used and Bharat Shell in India specifically monitors its contracts for the use of child labour.'[44]

The last quotes on Shell's policy in the field of child labour can serve as a bridge to the second level: how about the human rights practices by contractors and subcontractors? The revised 1997 Business Principles state that Shell seeks 'mutually beneficial relationships with contractors, suppliers and in joint ventures' and wants 'to promote the application of these principles in so doing', followed by the statement that 'the ability to promote these principles effectively will be an important factor in the decision to enter into or remain in such relationships.' In the 1999 report, it is added that 'in 97 countries (..) our Statement of General Business Principles is provided or explicitly discussed as a normal

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39 See *The Shell Report 1998, Profits and Principles - Does There Have to Be a Choice?* (London: Shell International),1998, and the above-mentioned 1999 report.
40 URL: http://www.shell.com/values/content/...
41 *The Shell Report 1999*, 16.
42 Ibid. 17
43 Ibid.
44 *The Shell Report 1998*, 13.

part of major contract negotiations with both contractors and suppliers.'[45] In addition, it is said that in 1998 'at least 69 contracts (...) were cancelled because of non-compliance with our Business Principles or specified HSE [Health, Safety and Environment] standards.'[46]

At the third level, relating to Shell's responsibility to society at large, the Business Principles state that Shell companies will 'express support for fundamental human rights in line with the legitimate role of business (..).' The 1998 report states that there

> 'is still considerable debate on whether business can or should use its influence with the governments of the countries in which it operates to address broader issues of human rights. (...) Most multinationals choose to stay politically neutral and not to interfere in what they see as national issues. But companies that play a major economic role in a country are coming under increasing pressure from human rights groups and others to speak out against human rights abuses or to divest – particularly when complaints to governments fail.'[47]

This general observation is followed by, *inter alia*, Shell's statement that 'we speak out in defence of human rights when we feel it is justified to do so', and that 'we engage in discussion on human rights issues when making business decisions.'[48] In addition, Shell shows, in several documents, to be willing to support human rights (related) projects, as a visible investment in local societies.

4.2 A Critical Analysis of Shell's Approach

Taking into consideration that framing an explicit human rights policy is a long term process, I basically appreciate Shell's approach. In addition, Shell, to my mind, has embarked upon an irreversible road, which in the long run can only lead to a more detailed commitment. That is not to say, however, that Shell should stick to the present level, leaning back, and waiting for other TNCs to follow. In that context, I have three critical comments.

Specificity of standards

The first issue relates to the specificity of the standards Shell adheres to. Although one can find several detailed standards in Shell's texts – see, for example, the remarks on child labour, quoted above – one can also say that Shell too often refers to human rights in general, without being specific. In this context, it is interesting to note, that in its 1999 report Shell refers to some rights more specifically, *inter alia*:

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45 *The Shell Report 1999*, 16.
46 Ibid.
47 *The Shell Report 1998*, 32.
48 Ibid. 33.

- 'Employee rights' (the report refers to, e.g., equal opportunities, freedom of association, pay and conditions, as well as to the new 1998 ILO Declaration (see above)).
- 'Security policy' (the report refers to, e.g., standards and training).
- 'Community rights' (the report refers to, e.g., indigenous people, social equity, and the right to development).[49]

Looking at this list, I am glad that the focus is no longer exclusively on the 1948 Universal Declaration of Human Rights – which, by the way, should have been included in the revised Business Principles – but also on important rights following from the ILO 'human rights conventions', as well as from developments like the adoption of the 1986 Declaration on the Right to Development,[50] and (the discussion on) the draft Declaration on the Rights of Indigenous Peoples.[51] On the other hand, one might say that Shell refers to these rights only in vague terms, which makes it easy to adhere to these standards or, to put it more negatively, to cut a dash with mentioning some right and topics. The real issue, however, is about accepting the human rights standards the way they have been formulated in treaties or have gained the level of customary law, as well as the way these standards are interpreted by the specially created bodies like the European Court of Human Rights or the UN Human Rights Committee.

Here, we find a serious dilemma. In order to be trustworthy, it would be good for Shell to formulate the company's human rights obligations as precisely as possible, with references to concrete articles in concrete human rights instruments. The risk, however, is that the company will be charged immediately with or indicted for violations of these specific provisions. Suppose Shell were to support a specific provision like Article 30 in the above-mentioned draft Declaration on the Rights of Indigenous Peoples, which states that 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands (...).' This would lead to trials in case Shell only makes a deal with the government concerned. In internal codes of conduct, more specific references would be required, but they will also cause troubles which go far beyond those following from a general allegation that a company is not living up to its Business Principles, including *the* human rights. The devil is in the detail. Of course, it can and, for reasons of intellectual honesty, should be added that, in practice, it will not be easy to elaborate upon all the consequences which the numerous and often detailed human rights provisions would have on the human rights practice of TNCs. Nevertheless, a TNC which takes its own human rights policy seriously, would have no alternative but to go as far as it can

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[49] *The Shell Report 1999*, 29.
[50] Adopted by UN General Assembly Resolution 41/128 of 4 December 1986.
[51] See E/CN.4/Sub.2/1994/2/Add.1.

on this difficult road, knowing that states took centuries to pass the same point of no return.

External control

The issue of the specificity of standards strongly relates to my second comment: to what extent is Shell prepared to accept external control of its human rights practices? Many TNCs, among them Shell, are of the opinion that they themselves should control whether or not the company lives up to its own standards. For that purpose, Shell developed, for instance, the instrument of annual letters to be written by the local managers of Shell companies. Every year, the managers of Shell companies have to write three such letters: on Business Integrity, on Health, Safety and Environment, and on the implementation of the Statement of General Business Principles. The letters of the last category are required since 1997.[52] The system of the letters can be seen as a form of self-regulation as well as self-control, because the letters are quite detailed and are considered reliable, due to the fact that the managers who sign the letters are held personally responsible for the accuracy of the contents.[53] In addition, every year, a Verification Statement is made by KPMG Accountants and PricewaterhouseCoopers.[54]

The present practice raises the question of whether there should not be a real open external check of the company's results in the field of respect for human rights. My idea would be that a company like Shell should not be afraid of external verification by a committee consisting of, for instance, representatives of employers' and workers' organisations, a staff member of a well-respected NGO, and an independent human rights expert. Shell's human rights policy has developed far enough, that it should no longer be afraid of such an external investigation. The company could even profit from it, telling the general public, including its consumers, that it has a 'quality stamp', symbolising that the company has nothing to hide in the human rights field. In its 1999 report, Shell notes that it is committed 'to increasing the scope of verification in the social area', that 'traditional verification methods may not be able to encompass all aspects of social performance (for example, in some areas of human rights)', and that the company should think about other methods, which 'might include inviting an independent organisation to review policy and performance in areas such as human rights (...).'[55] Asking the question is answering it: Shell should cross the Rubicon. It would be a matter of taking the full consequences of its human rights approach.

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52 *The Shell Report 1999*, 4-5.
53 Ibid. 4.
54 See, for example, the latest Verification Statement, printed in *The Shell Report 1999*, 20.
55 Ibid. 37.

'Division of labour'

As we saw, Shell is in a process of finding its role in the midst of other actors, such as NGOs and governments, towards a manageable 'division of labour' in the field of the realisation of human rights. The question then is, what it means to speak in terms of the intention to 'speak out in defence of human rights when we feel it is justified to do so' (see above).

In a recent report, published by the Dutch sections of Amnesty International and Pax Christi International, the question was brought forward of whether TNCs have an own duty to raise their voices in case of gross human rights violations in the countries in which they operate. As to the report, 'companies must avoid being seen as supporting or endorsing the government's conduct', even if it is 'only by being silent'. In addition, the report states that the responsibility to act is especially strong if human rights are violated which can be considered to belong to the core rights, above labelled as *'ius cogens'*, while 'the obligation to uphold human rights standards, most notably the ILO fundamental human rights Conventions or the *ius cogens*, may [even] force a company to stretch its interpretation of national laws and policies.'[56] It might be interesting to know that nine Netherlands-based multinationals – ABN AMRO Bank, Heineken, ING Group, Royal Ahold, KPMG Accountants, Philips, Rabobank, Shell and Unilever – as well as Dutch employers' and workers' organisations participated in the process of preparing the report, and endorsed its conclusions (although, as the report notes, their contribution to it 'does not make them accountable for its findings'[57]). The approach described here can be seen as another step towards the full acceptance of the role TNCs have to play in the field of human rights realisation. They broadly accept such roles, although, again, the devil is in the detail, while the real challenge is in the field of practising what sounds so well in general. In that respect, TNCs are right when they underline that a human rights policy should always be tailor-made: specific situations in specific countries ask for reactions, and it is often too easy and not very fruitful to say what should be done in general. This is also applicable to their own roles in concrete situations of human rights violations. But 'difficult' should not be understood as a pretext to refrain from taking action.

The division of labour between TNCs and states is part of a set of expectations in society as to the role of both actors. TNCs are then generally considered strong actors, while, in the 1990s, the state was (is) often labelled with terms such as 'failed' or 'withdrawing'. Analysing this issue, it would, first of

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[56] The Dutch Sections of Amnesty International and Pax Christi International (1998), *Multinational Enterprises and Human Rights* (Utrecht: Pax Christi/Amnesty International). The author of the present chapter was one of the co-authors of the report (together with Sylvie C. Bleker-Van Eyk and Egbert G.Ch. Wesselink), and acted as the chairman of a Supervisory Council, guiding its preparation.

[57] Ibid. 8.

all, be good to keep in mind that TNCs, as they often emphasise themselves, should not to be seen as a substitute for state power. States have their own responsibility in the field of the realisation of human rights, and should not be given the chance to hide behind 'mighty TNCs', nor behind free market rhetoric. In addition, states are indispensable to the establishment and the maintenance of a legal infrastructure within which TNCs can fruitfully operate. Isn't it a reality is that TNCs, in many cases, do not invest in countries, due to the fact that the political (and therefore also: the legal) situation is not safe enough? But how about taking over the role of the 'third party state', which is involved in an active debate on the human rights situation, in a country in which one or more TNCs are active? In the words of Shell's former Chairman of the Committee of Managing Directors, Cor Herkströter, speaking about human rights abuses in Nigeria, Shell is not in a position 'to solve these issues on [its] own', but it recognises that it has 'a role to play in the countries in which we operate, whether in Nigeria, the Netherlands or elsewhere.'[58] 'A role to play', as part of a plural system in which a range of actors have a 'role to play', varying from states, NGOs and the media, to, not the least, TNCs. They should not underestimate their possibilities to positively influence human rights practices.

In addition to the 'division of labour' between states and TNCs, there is the one between TNCs and NGOs. Sometimes they can be each others' opposites, for instance, in debates on investment decisions related to 'dubious countries', while in other situations they can be seen as partners. NGOs can, indeed, serve to irritate a TNC into, for instance, raising its voice in a situation which the relevant TNC does not consider ripe for intervention, but in other cases NGOs can serve as an antenna for what is going on in society. My general approach would be that TNCs and NGOs should commit themselves to a maximum of transparency and precision in their internal relations, as well in the way they react to society. If not, they will somehow be found out and punished by such effective and world-wide operating systems as the Internet, one of the main instruments in the hands of a further developing global civil society. On that global 'playing field', TNCs as well as NGOs are important actors, that both should realise their responsibilities in the field of the realisation of international laws as well as their duty to act in conformity with the standards of important actors. That is to say, they are both part of a system of 'global accountability',[59] which is a goal in itself as well as a synonym for acting in a responsible and reliable way.

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[58] Cor Herkströter (1998), Respecting and Supporting Human Rights, in: Barend van der Heijden and Bahia Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights; A Fiftieth Anniversary Anthology* (The Hague/Boston/London: Martinus Nijhoff Publishers), 158.

[59] Statement by Ms. Hilde F. Johnson, Minister for International Development and Human Rights of Norway, 55th Session of the UN Commission on Human Rights, 26 March 1999, 1.

5. CONCLUDING REMARKS

Clients can punish TNCs more severely than a judge ever can. For that matter, many TNCs have utilitarian, economic reasons to live up to human rights standards. Given the developments in international law, as described and analysed in the first part of this chapter, TNCs, however, are no longer in a position to freely decide whether they accept their responsibilities in the human rights field or not. Taking international law seriously means that one also has to accept the consequences. In Shell's 1998 *Human Rights Primer*, it is stated that 'the impact of business activities on the environment has now led to a new and developing area of debate on international law and standards in this area.'[60] I think the same is going on in the human rights field. And as said before: this is a path of no return.

[60] Shell International (1998), *Business and Human Rights; A Management Primer.*