CHAPTER 17

Deciphering and Revisiting the (Guiding) Principles on Business and Human Rights

Régis Bismuth

1 Introduction

In this volume dedicated to "general principles and the coherence of international law", it is quite a challenge, not to say an affront, to end so rapidly this unbearable suspense by asserting that there are no genuine general principles of law (as referred to in Article 38 of the ICJ Statute) structuring or cementing the field "Business and Human Rights" or at the root of the corporate social responsibility (CSR) discipline. Indeed, it will be mainly argued that some general principles play a rather peripheral role in how human rights obligations are effectively imposed on corporations. On a more structural level, it will also be asserted that the emerging "Business and Human Rights" framework – more specifically the UN Guiding Principles on Business and Human Rights (UNGPs) developed by John Ruggie and endorsed by the UN Human Rights Council[1] – is doomed to remain of limited interest if it does not adequately capture the genuine nature of corporate power and the need therefore to profoundly call into question principles of domestic law particularly relevant for corporations such as those of separate legal personality and of limited liability.

Before discussing those issues, it seems useful to make some preliminary remarks to better define the contours of the topic. First of all, it is important to note that there are general principles of law related to business activities. The field of international contract law is irrigated by 'general principles of law applicable to international contractual obligations having earned a wide international consensus'.[2] Some of them have been already used in international

1 Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011) [hereinafter: UNGPS] <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 31 July 2017. The UNGPS were developed by John Ruggie as the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/17/31). The UN Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011 (A/HRC/RES/17/4).

2 *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v Westinghouse Electric Corp.*, ICC Award No 7375 (5 June 1996) 11 Mealey's International Arbitration

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investment law,[3] like the principles of good faith and of loyalty within the framework of a public procurement procedure,[4] but those issues of misrepresentation are not particularly relevant for the human rights discipline.

The recognition, for instance in *World Duty Free v Kenya*,[5] of the prohibition of corruption as part of a "transnational public policy" nonetheless establishes a nexus between "general principles" and CSR. Anti-corruption is indeed a key discipline in major CSR instruments such as the UN Global Compact[6] or the OECD Guidelines for Multinational Enterprises.[7] Would it be appropriate to infer from such precedents a salient contribution of general principles to the "Business and Human Rights" discipline? While several studies have established actual links between corruption and the effectiveness of human rights,[8] it would be disappointing to limit this contribution to a general principle which main utility for corporations concerns the validity of "state contracts". The issue must therefore be addressed under a broader perspective and this requires identifying more accurately the emerging "Business and Human Rights" discipline.

To better understand the scope of the "Business and Human Rights" discipline, it is necessary to point out a significant difference between "substantive" and "implemental" norms in relevant international soft law instruments on CSR.[9]

Substantive norms are rules of conduct – sometimes formulated in a very loose way – that should be followed by corporations. For instance, the UN

Report (1996) A-1, A-42. In this case, the arbitral tribunal referred to "the *lex mercatoria* as well as the UNIDROIT Principles".

3 See, Regis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016), 321–50.

4 *Inceysa Vallisoletana SL v The Republic of El Salvador*, ICSID Case No. ARB/03126, Award (2 August 2006), paras 230–239.

5 *World Duty Free Company Ltd v The Republic of Kenya*, ICSID, Case No. ARB/00/7, Award (4 October 2006), paras 138–157.

6 UN Global Compact, Principle 10. The UN Global Compact is a policy framework aimed at ensuring that, through voluntary commitments, companies implement, within their sphere of influence, ten core principles in the areas of human rights, labour and environmental standards, and anticorruption. See: <www.unglobalcompact.org> accessed 31 July 2017.

7 OECD Guidelines for Multinational Enterprises (2011) Part I(VII), 47–50.

8 International Council on Human Rights Policy, Transparency International, 'Corruption and Human Rights: Making the Connection' (2009) <www.ichrp.org/files/reports/40/131_web.pdf> accessed 31 July 2017; Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29 EJIL 1251.

9 A distinction which to some extent is inspired by Hart's distinction between primary and secondary rules. See, Herbert L. Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 79–99.

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Global Compact refers to international human rights, some labour standards (freedom of association, forced labour, child labour, discrimination), environmental protection and anti-corruption. The OECD Guidelines for Multinational Enterprises also includes rules on the protection of consumers' interests, anti-competitive practices and tax compliance. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy focuses on labour standards and, in that respect, its Annex I provides a list of ILO conventions and recommendations considered relevant to this declaration.[10] The UN Guiding Principles make only a short reference to external instruments by mentioning the responsibility of enterprises to respect "internationally recognized human rights – understood, at a minimum, as those expressed" in the 1948 Universal Declaration of Human Rights, the two 1966 UN covenants and in eight ILO core conventions.[11]

Implemental norms are aimed at ensuring effective compliance with substantive norms. For instance, the second part of the OECD Guidelines lists different types of "implementation procedures" (National Contact Points, role of the OECD Investment Committee, etc.) that have been devised 'to promote the effectiveness of the Guidelines'.[12] Likewise, the ILO Tripartite Declaration includes "operational tools" (Annex II) 'to stimulate uptake of its principles by all parties'[13] through follow-up procedures, dialogue or technical assistance. The approach is different for the UN Guiding Principles as they do not rely on such institutional or review procedures. It is rather an 'international framework aiming to provide effective protection of human rights against corporate abuse'[14] by suggesting strategies of implementation for States and enterprises. They revolve around three pillars (protect, respect, remedy): (1) the state duty to protect human rights, (2) the corporate responsibility to respect human rights and (3) the joint responsibility of states and businesses to give access to an effective remedy for those affected. Leaving aside the short *renvoi* they make to some international HRs instruments, the UN Guiding Principles mostly outline the 'complementary [...] duties and responsibilities for States and business entities'[15] so as to ensuring compliance with human rights. This

10 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (5th edn, March 2017).

11 UNGPs (n 1) Principle 12 (Commentary).

12 See, OECD, 'Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises' C/MIN(2011)11/FINAL (25 May 2011).

13 ILO (n 10) v.

14 Maddalena Neglia, 'The UNGPs – Five Year On. From Consensus to Divergence in Public Regulation on Business and Human Rights' (2016) 34 Netherlands Quarterly of Human Rights 289, 290.

15 Ibid 291.

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is the case for instance of the duty of states to redress human rights abuses occurring within their jurisdiction[16] and the obligation of corporations to carry out human rights due diligence.[17]

The UN Guiding Principles now constitute the most authoritative instrument in the field of corporate accountability. They have been endorsed by the UN Human Rights council, incorporated in the last versions of the OECD Guidelines[18] as well as the ILO Tripartite Declaration[19] and recognized by the International Finance Corporation of the World Bank[20] as well as the Committee of Ministers of the Council of Europe.[21] A recent award in an ICSID arbitration mentions the UNGPs as the 'basic document' of CSR.[22] Given this broad recognition of the UNGPs, it is possible to go back to the original inquiry on the potential interactions between general principles and principles on "Business and Human Rights".

The underlying issue through which the recent ICSID award acknowledged the value of the UNGPs deserves to be mentioned in the first place even though the findings of the tribunal are not as such revolutionary. It will be, however, analysed from a different perspective at the very end of this contribution. In *Urbaser v Argentina*, the investors claimed damages for violations of their rights under a BIT within the framework of their investment in a water and sewage concession. Argentina submitted nonetheless a counterclaim alleging a violation based on the investors' 'failure to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water'.[23] Relying on 'general principles of international law' that were applicable pursuant to the Spain-Argentine BIT,[24] the tribunal considered that the BIT must not 'be construed

16 UNGPs (n 1) Principle 1.

17 UNGPs (n 1) Principle 17.

18 OECD (n 7) Part I(IV), 31.

19 ILO (n 10) 4.

20 International Finance Corporation' Guidance Notes: Performance Standards on Environmental and Social Sustainability (2012) at 3 <www.ifc.org/wps/wcm/connect/c8f524004a-73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES> accessed 31 July 2017.

21 Council of Europe, Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights (16 April 2014).

22 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para 1195 (note 434).

23 *Urbaser* (n 22), para 36.

24 Argentine-Spain BIT, Article X(5) (referring to "*los principios generales del derecho internacional*").

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as an isolated set of rules of international law'.[25] Therefore, the disputes settled within the framework of the BIT are not exclusively limited to those involving the rights of investors but could also be extended to their obligations under international law, if any. Relying on the UNGPs, the tribunal noted that 'international law accepts corporate social responsibility as a standard of crucial importance'[26] and that corporations are subject of international law and have an obligation to act in accordance with international human rights law. However, the tribunal pointed out that the human right to water 'entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service'.[27] It found no 'general principle of international law' extending or transferring all human rights obligations of the State to the investor.[28]

Eventually, we may only disappointingly infer from the UN Guiding Principles an accepted general principle of corporate social responsibility implying that corporations have international human rights obligations. Besides, the possibility of enforcing those obligations in the international legal order remains limited to counterclaims in investment disputes that are submitted by States and not the victims of corporate abuses. The absence of an international remedy makes all the more important the effectiveness of processes through which such obligations could be enforced before domestic courts. It is within this framework that it is possible to decipher the underpinnings of the Guiding Principles and demonstrate that the key disciplines they promote are the result significant tensions between different principles of international or domestic law.

This is also how their fundamental limits and weaknesses can be highlighted. To explain this, we will focus on a rather commonplace situation where the liability of the parent company is sought for human rights abuses committed abroad by one of its subsidiaries. Three types of interactions appear to be particularly relevant: first, the interaction between principles of state Jurisdiction and the principle prohibiting denial of justice (I); then, the possibility of circumventing the principle of separate legal personality (or corporate veil) through the principle of due diligence (II) and, finally, the necessity to revisit the principle of separate legal personality through the principles of state responsibility (III).

25 *Urbaser* (n 22), para 1189.
26 *Urbaser* (n 22), para 1195.
27 *Urbaser* (n 22), para 1208.
28 *Urbaser* (n 22), para 1207.

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2 Interactions between Principles of State Jurisdiction and the Principle Prohibiting Denial of Justice

When the liability for torts of the parent company is sought for acts attributable to the subsidiaries located abroad, this type of litigation usually raises two key difficulties. The first is related to the link between the parent and the behaviour of the subsidiary. The liability of the parent can generally be incurred either by way of attribution of the contentious conduct (lifting the corporate veil) or due to a failure to fulfil a duty of care concerning the activities of the subsidiary. This issue will be addressed in the second part of this contribution. The second difficulty lies in the obstacles to the jurisdiction of the domestic courts of the host State of the parent company. Indeed, the claim usually concerns acts occurring abroad and involving a legal entity not having strong ties with the seized forum.

In that respect, States enjoy a great flexibility under international law since it does neither oblige nor preclude them from exercising their jurisdiction in such situations.[29] The UN Guiding Principles are conservative in that respect and follow the same approach as they do not advocate for a general obligation to exercise extraterritorial jurisdiction. They indeed provide that 'States must protect human rights abuse within their territory and/or jurisdiction'[30] and therefore 'must take appropriate steps to ensure, through judicial [...] means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy'.[31] This follows the usual jurisdictional principles governing the application of international human rights instruments.[32] As a result, the Ruggie's framework does not intend to extend implement more stringent standards concerning corporate liability arising from extraterritorial claims. This has sparked the criticisms of some human rights NGOs[33] perceiving that,

29 As pointed out in the UNGPs, 'at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction' UNGPs (n 1), Principle 2 (Commentary).

30 UNGPs (n 1), Principle 1.

31 UNGPs (n 1), Principle 25.

32 Ilian Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 304.

33 According to Amnesty International, the issue of extraterritoriality 'ha(s) not been adequately addressed in the Guiding Principles' (Amnesty International, United Nations: A Call for Action to Better Protect the Rights of those Affected by Business-Related Human Rights Abuses, Public Statement, IOR 40/009/2011 (14 June 2011) at 2 <https://www.amnesty.org/download/Documents/32000/ior400092011en.pdf> accessed 31 July 2017).

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while adopting the Guiding principles, the UN Human Rights Council simply 'endorsed the status quo'.[34]

There is one specific situation in which the UN Guiding Principles envisages an extraterritorial exercise of jurisdiction, but in an extremely narrow way. Principle 26 – very loosely – provides that States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms which includes 'considering ways to reduce (…) barriers that could lead to a denial of access to remedy'. The commentary cites the examples of the situation where claimants 'that face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim'.[35] Interestingly, it is thus to prevent a denial of justice – the prohibition of which is, in another context, an accepted principle in international law[36] – that the private international law doctrine of "forum of necessity" (or *forum necessitatis*) should serve 'as safety valve'[37] in cases of transnational corporate misconduct.[38]

There have been precedents in which domestic courts have recognised *forum necessitatis* jurisdiction, sometimes in light of Article 6 ECHR guaranteeing access to justice[39] as well as recent legislative developments in the wake

34 Human Rights Watch, UN Human Rights Council: Weak Stance on Business Standards (16 June 2011) <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> accessed 31 July 2017.

35 UNGPs (n 1), Principle 26 (Commentary).

36 Hermann Mosler, 'The International Society as a Legal Community' 140 (1974) 1, 144 (noting about the prohibition of denial of justice that it is "another general principle drawn from municipal law systems"); Francesco Francioni, 'The Rights of Access to Justice under International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007), 1; Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' 20 EJIL (2009) 729; Jan Paulssson, *Denial of Justice in International Law* (CUP 2005); Zachary Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 ICLQ 867. See also, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1994) 16 and 400 (Appendix 2).

37 Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 Utrecht Journal of International and European Law 24.

38 *Forum necessitatis* is a doctrine 'allow(ing) a court to accept jurisdiction in cases where there is no other forum available in which the plaintiff could pursue his/her claims' (Daniel Augenstein and Nicola Jägers, 'Judicial Remedies: The Issue of Jurisdiction' in Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business – Removal of Barriers to Access Justice in the European Union* (Routledge 2017), 28).

39 See for instance the *Comilog* case before the Paris Court of Appeal (Etienne Farnoux, 'L'affaire *Comilog* (Cour d'appel de Paris): L'appréhension du groupe multinational de sociétés par les règles de compétence juridictionnelle', in SFDI, *L'entreprise multinationale et le droit international* (Pedone 2017), 143.

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of the UN Guiding Principles.[40] However, it must be underlined that, when accepted, it is 'an exceptional ground of jurisdiction'[41] generally requiring the existence of several elements, notably, the absence of fair trial in the host State, the reasonableness of requiring the claimant to bring the proceedings in the host State and also some connection with the forum seized of the case.[42]

Finally, stemming from a principle prohibiting denial of justice, the doctrine of *forum necessitatis* referred to in the UN Guiding Principles may open up new opportunities of corporate accountability but leaves a wide margin of appreciation to domestic courts when it comes to its implementation. It is therefore difficult to envisage that it will generate a specific obligation for States to exercise extraterritorial jurisdiction in such situations. The issue of corporate accountability should be addressed in a more structural way by taking into account the organisational dimension of the corporation. Indeed, the root of corporate accountability lies more in the characterization and conceptualization of the link between the parent company and its subsidiary.

3 Circumventing the Principle of Separate Legal Personality through the Principle of Due Diligence

At the heart of the second pillar of the UN Guiding Principles (the corporate responsibility to respect human rights) lies the duty of enterprises to carry out 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'.[43] This requirement implies a duty for the parent company to examine the adverse human rights impacts of its subsidiaries and its suppliers or subcontractors. To some

40 Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe: The Promises Held by Forum of Necessity-based Jurisdiction' <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Business-and-Human-Rights-Litigation-in-Europe.-The-Promises-Held-by-Forum-of-Necessity-based-Jurisdiction.pdf>.

41 Augenstein and Jägers (n 38) 28.

42 Nwapi (n 37) 33. It is also noteworthy to mention the "Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations" adopted by the International Law Association. Its article 2.3 (Forum of Necessity) provides that 'the courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice (*which occurs if*) no other court is available or the claimant cannot reasonably be expected to seize another court' (ILA Resolution No. 2/2012).

43 UNGPs (n 1), Principle 15(b). The discipline concerning the "human rights due diligence" is specified in principles 17 to 21.

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extent, this due diligence imperative could be parallel with the general principle *sic utere tuo ut alienum non lædas* according to which one must never use his own property in such a way as to do any injury to his neighbour. This has been the basis of the international law principle recognizing the duty of States to exercise due diligence in order to prevent harm to other States[44] as well as Principle 21 of the 1972 Stockholm Declaration referring to the responsibility of States 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[45]

The due diligence discipline in CSR has emerged to overcome the difficulties for affected parties of corporate abuses to pierce the corporate veil. Indeed, holding parent companies liable for acts committed by their subsidiaries can first be envisaged through an approach where the acts of the subsidiaries are directly attributed to the parent. This possibility has been recognized only following very strict standards to the extent that it calls into question the principle of separate legal personality. Without necessarily exposing all the nuances and subtleties of the issue,[46] different regimes of corporate veil piercing (or other doctrines leading to an equivalent result) are applicable depending on the domestic legal systems.[47] In France, we usually refer to the notions of "*abus de personnalité morale*" ("abuse of legal personality") or of "*transparence de la personnalité morale*" ("transparency of legal personality"). In common law systems, notions of "instrumentality", "alter-ego", "agent", "dummy" or "cover" are used. One of the most emblematic precedents of corporate veil piercing where the acts of a subsidiary were attributed to the parent is the *Amoco Cadiz* case in which a US federal court considered that the parent 'exercised such control

44 *Corfu Channel Case* (*United Kingdom v Albania*) [1949] ICJ Rep 4, 22 (noting the 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States').

45 In the field of international environmental law, see, Malcolm N. Shaw, *International Law* (6th edn, CUP 2008) 851; Philippe Sands, *Principles of International Environmental Law* (2nd edn, CUP 2003) 241; Neil Clark, *The International Law of Environmental Impact Assessment* (CUP 2008) 62.

46 Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 215; Marguerite Kocher, Emmanuel Leroux and Pedro Nicoli, 'Groupe d'entreprises' in Kathia Martin-Chenut and René de Quenaudon (eds), *La RSE saisie par le droit: Perspectives interne et internationale* (Pedone 2016) 151.

47 For a cross-cutting study, see Karen Vandekerckhove, *Piercing the Corporate Veil* (Kluwer 2007) 27; Stephen M. Bainbridge and Todd Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar 2016) 86.

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over its subsidiaries AIOC and Transport that those entities would be considered to be mere instrumentalities'.[48]

Without listing all criteria applied by domestic courts, it is important to note that the sole existence of constant intra-group relations is not sufficient. Lifting the corporate veil requires evidence showing the absence of separation of business activities, continuous interferences in the business of the subsidiary, the existence of common executives and directors in the two entities and/or a chronic undercapitalization of the subsidiary due to a siphoning off the profits of the subsidiary.

The difficulties surrounding corporate veil piercing have left a gap in the accountability of multinationals. This explains why emerging CSR disciplines, notably the UNGPs, have focused on the obligations of the parent company – among which its duty of care/diligence in relation to the activities of its subsidiaries and suppliers. This new credo of CSR is based on the idea that the parent has an obligation to be interested in the activities of its subsidiaries regardless of whether they enjoy wide management autonomy. The rationale for the duty of care of the parent is both to prevent harmful conduct as well as to institute a fixing point (the parent) to which the responsibility is assigned. If the parent fails to comply with its due diligence obligations, it can be sanctioned and has the obligation to compensate the prejudice that could have otherwise been prevented. The due diligence principle has progressively been incorporated into domestic statutes. The UK Bribery Act of 2010 has introduced an obligation to develop "adequate procedures" of due diligence to prevent bribery.[49] A similar due diligence obligation has been incorporated in the recent French anti-bribery statute adopted in 2016.[50]

On a much larger scale, the French Parliament adopted in March 2017 a new Statute implementing a general "duty of vigilance" (*devoir de vigilance*) of companies with respect to the activities of their subsidiaries and suppliers.[51] This statute imposes on companies of a certain size an obligation to establish, publish and implement a "vigilance plan" which includes reasonable measures

48 *In Re Oil Spill by the "Amoco Cadiz" off the Coast of France on March 10*, 1978 MDL Docket No. 3 76 ND III, American Maritime Cases (1984) at 2123–2199. See also, Vandekerckhove (n 47) 85.

49 Obligation stemming from Section 7 of the UK Bribery Act titled "failure of commercial organisations to prevent bribery".

50 *Loi* 2016–1691 of 9 December 2016 *relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*.

51 *Loi* 2017–399 of 27 March 2017 *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

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aimed at identifying and preventing serious breaches to human rights and adverse impacts on health and on the environment stemming from the activities that a company controls, directly or indirectly, through subsidiaries or suppliers with which it has an established commercial relationship.[52] If the company fails to meet its obligations of vigilance, the statute provides that it will have to compensate for the harm that the proper fulfilment of its obligations would have avoided.[53] While the claimant would still have to prove a causal link between the fault of the company and the damage they have suffered, the new system aims at circumventing legal obstacles arising out the principle of separate legal personality and the stringent standards applicable to corporate veil piercing.

As a side note, it is possible to consider that the UN Guiding Principles are somehow useful in order to protect such statutes at the international level. Indeed, a foreign investor owning in France a parent company falling within the scope of the new law could consider that, by transferring somehow the liability from the subsidiary to the parent, it contradicts the principle of separate legal personality and violates its legitimate expectations under a BIT. While States do not yet have under international law an obligation to implement this due diligence standard into domestic law, the broad recognition of the UN Guiding Principles seems to endorse the idea that the principle of separate personality could be subject to some limits in case of human rights abuses.

This new statute implementing the "due diligence" standard of the UN Guiding Principles has nonetheless some weaknesses that could diminish its effectiveness. The vigilance plan increases the accountability and awareness of corporations but it could be designed to optimize the protection of the parent. There is indeed a considerable uncertainty surrounding some notions listed in the statute.[54] It indicates that the "vigilance plan" must incorporate a "risk mapping" (*cartographie des risques*), "assessment procedures" (*procedures d'évaluation*) of subsidiaries and suppliers, "risk mitigation" tools, and

52 French Commercial Code, Article L225-102-4-I.

53 French Commercial Code, Article L225-102-5.

54 Besides, the French Constitutional Council declared that some provisions of the Statute were unconstitutional. Indeed, it considered that the broad wording and the indeterminacy of some key elements of the statute ("human rights", "fundamental freedoms") contradicted the principle of the legality of criminal offences and penalties since the obligation to implement a due diligence plan is, subject to criminal penalty in case of non-compliance. (Conseil Constitutionnel, *Décision* 2017–750 DC (23 March 2017) *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*).

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a "warning mechanism" (*mécanisme d'alerte*")[55] – thereby transplanting in French law very broad tools of CSR. Implementation measures will probably clarify such requirements but this must not overshadow that due diligence obligations will generate a legal-managerial engineering to conceive vigilance plans that would eventually shield the parent company from liability. The statute indeed specifies it is a failure to comply with requirements relating to the vigilance plan that could eventually lead to an obligation to compensate the harm suffered.[56] The UK Bribery Act includes a provision which perfectly illustrates this philosophy by underlining that 'it is a defence for (a commercial organisation) to prove that (it) had in place adequate procedures designed to prevent persons associated with (it) from undertaking such conduct'.[57] It is also possible to anticipate exculpatory synergies stemming from this indefinite due diligence coupled with the common law doctrine of the "business judgment rule" which – provocatively put – can be described as the "managerial margin of appreciation" pursuant to which it is not the province of courts to assess the economic or strategic opportunity of executives' decisions taken in good faith.[58]

As a consequence, when it comes to the responsibility of multinational corporations, the fortress of corporate veil could eventually be protected by the managerial shield of due diligence. On a side note, one can be surprised that the standard of responsibilisation and of responsibility implemented under the UNGPs and such domestic statutes are similar for the activities of subsidiaries and of suppliers. It is clear that the influence exerted over suppliers can be as significant as that exerted over subsidiaries. To that extent, the obligation to control suppliers is a useful step forward. Would it be appropriate, however, to consider that the position of subsidiaries is different since they belong to the capital structure of the enterprise and that, as a result, their acts should be deemed attributable to the parent?

55 French Commercial Code, Article L225-102-4.-I.

56 This is particularly blatant if we consult parliamentary proceedings. An MP stressed that the statute has not implemented an "obligation of result" but rather a "best effort obligation". He also pointed out that 'if an accident occurs, which could unfortunately happen, the corporation would have to prove that it took precautionary measures, for instance to prevent the cascade of subcontractors from being to opaque, and this will be sufficient to escape liability' (Declaration of MP Dominique Raimbourg). See, Assemblée Nationale and Sénat, Rapport fait au nom de la Commission mixte paritaire (Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) (2 November 2016), 6.

57 UK Bribery Act, Section 7(2).

58 Nancy K. Kubasek, Bartley A. Brennan and M. Neil Browne, *The Legal Environment of Business: A Critical Thinking Approach* (6th edn, Pearson 2011) 466.

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4 Revisiting the Principle of Separate Legal Personality through the Principles of State Responsibility

As noted above, the emerging due diligence discipline has some significant shortcomings. Perhaps more importantly, this new cornerstone of CSR fails to adequately capture the economic reality and the genuine political dimension of private business organizations. The writings of Jean-Philippe Robé have been seminal in understanding multinationals from both sociological and political science angles and how this vision impacts the way CSR could be devised.[59]

Multinational enterprises are not *de plano* legal subjects. There is indeed a distinction between an enterprise actually taking decisions as an economic structure and corporations into which the enterprise has been fragmented and which formally take decisions as distinct legal entities. As underlined by Robé, an *enterprise*, as 'a unique organization coordinated by a single management team exists in reality, although it does not exist as such in the legal system'.[60] It is therefore possible to identify a kind of hiatus or discontinuity between these two notions in which a form of legal irresponsibility can take root.[61] In this gap between form and substance has deployed a legal engineering to optimize the circulation of assets throughout the enterprise – generally composed of limited liability companies – while allowing for a compartmentalization of liabilities. This potential for legal engineering is amplified for multinational enterprises (MNEs) since the characteristics of different legal orders can be exploited to optimize the circulation of rights and the segmentation of obligations.[62]

This has recently been endorsed by Ruggie who has shown some interest for Robé's work. It seems that the former was not fully aware of the latter's writings when he drafted the Guiding Principles. Moreover, it is after writing the

59 Jean-Philippe Robé, 'Globalization and Constitutionalization of the World Power System' in Jean-Philippe Robé, Antoine Lyon-Caen and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World Power System* (Routledge 2016) 11. See also, Jean-Philippe Robé, *Le temps du monde de l'entreprise: Globalisation et mutation du système juridique* (Dalloz 2015).

60 Robé, 'Globalization and Constitutionalization of the World Power System' (n 59), 14. See also, Robé, *Le temps du monde de l'entreprise* (n 59) 90.

61 Juliette Tricot, 'Personne(s) morale(s) et personne(s) physique(s): Comment renouveler l'approche personnaliste? Réflexions à partir du droit pénal' in Kathia Martin-Chenut and René de Quenaudon (eds), *La RSE saisie par le droit*: *Perspectives interne et internationale* (Pedone 2016), 173.

62 Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' 72 Washington and Lee Law Review (2015) 1769.

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foreword to a book Robé co-edited in 2016 on the issue[63] that, one year later, Ruggie published an article calling for a 'paradigmatic shift'[64] and pointing out that 'the disjuncture between economic reality and legal convention is the single most important contextual factor shaping the global institutional status of multinationals (which) creates a global governance gap that defies standard and simple solutions'.[65]

4.1 *The Necessity to Re-examine the Historical Evolution of Corporate Law*

The current situation cannot be fully understood without a historical analysis of the evolution of corporate law. Such analysis shows indeed that the current situation limiting the possibility of a genuine enterprise liability eventually constitutes an anomaly. Three key ruptures occurred in the nineteenth century. In that respect, the writings of Robé but also Paddy Ireland,[66] Philip Blumberg[67] as well as Stephen Bainbridge and Todd Henderson[68] are extremely instructive.

The first rupture concerns the changing nature of joint stock companies. The creation of the first joint stock companies was not originally a right accessible to anyone but rather a privilege granted by the state for the implementation of projects of public interest (building bridges, exploitation of mines, etc.). In the idealistic vision of liberal society that prevailed after the French Revolution, there can be no recognition of any form of authority of intermediate bodies interposing themselves between the State and the individual. Following the ancient "companies" that needed to be recognized pursuant to a Royal charter in the seventeenth and eighteenth centuries, the first joint stock companies were only incorporated in France after an authorization granted by the government. The process was particularly long and costly[69] and archives show

63 John Gerard Ruggie, 'Foreword' in Jean-Philippe Robé, Antoine Lyon-Caen and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World Power System* (Routledge 2016) xii-xvii.

64 John Gerard Ruggie, 'Multinationals and Global Institution: Power, Authority and Relative Autonomy' (2018) 12 Regulation and Governance 317–333.

65 Ibid.

66 See for instance, Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' 34 Cambridge Journal of Economics (2008) 837.

67 Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (OUP 1993).

68 Bainbridge and Henderson (n 47).

69 Anne Lefebvre-Teillard, *La Société anonyme au XIXe siècle – Du Code de commerce à la loi de 1867 : Histoire d'un instrument juridique du développement capitaliste* (PUF 1985) 21.

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that the "public interest" objective of the entity was scrupulously scrutinized.[70] While procedures were different in the US and the UK, the same "public interest" criterion was required. Besides, some authors underline that the limited liability granted to those entities fulfilling public objectives derived from the principle of absolute sovereign immunity that was then prevalent and that such entities could be perceived at that time as an extension of the State.[71]

However, by mid-nineteenth century, most of those requirements have been progressively dismantled in the US due to regulatory competition between federated states willing to be more economically attractive. A similar evolution was observable in Europe after the main occidental powers adhered to economic liberalism.[72] This evolution constituted a historic turning point that has allowed the constitution of private powers and, as a consequence, the coalition of affected stakeholders.[73] It is not a coincidence that at the same time was adopted in France the *Loi Ollivier* in 1864 abolishing the criminal offense of coalition and subsequently the *Loi Waldeck-Rousseau* in 1884 recognizing trade union freedom.

The second rupture deals with the incidental emergence of corporate groups. Until the end of the nineteenth century, more particularly in the US, only individuals had the right to hold corporate shares. It was prohibited for corporations unless a specific authorization was granted by Statute. Those restrictions have been progressively dismantled following several reforms adopted by the state of New Jersey in 1888, 1889 and 1893.[74] The states of New York, Delaware and Maine followed suit as they wished to preserve the fiscal resources resulting from incorporation of businesses. This has led to the formation of large corporate groups which 'replaced trusts as the preferred technique for achieving corporate concentration'.[75] It is also not a coincidence that at the same time competition law emerged in the US with the adoption of the Sherman Act of 1890 and the creation of the Federal Trade Commission in 1914. Besides, in 1910, US President Taft proposed the Congress to adopt a prohibition of intercorporate ownership of stock but the initiative had eventually been unsuccessful.[76]

The third rupture concerns the expanding scope of the limited liability of legal persons. Originally, when it came to limited liability, a distinction existed

70 Robé, *Le temps du monde de l'entreprise* (n 59) 86.
71 Bainbridge and Henderson (n 47) 25.
72 Robé, *Le temps du monde de l'entreprise* (n 59) 88–90.
73 Ibid 101.
74 Blumberg (n 67) 56.
75 Ibid 57.
76 Ibid 58.

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between contractual liability and liability for torts.[77] There had been nonetheless a debate in US courts as to whether limited liability of shareholders for *debts* should extend to its *liabilities* for tort claims. The solution depended on how were drafted the corporate laws of federated states. For instance, California law made a distinction between responsibility for contractual debts (with limited liability) and for torts (no limited liability) until the 1930s.[78] But for the great majority of state legislation, only a reference was made to the limited liability of shareholders for *debts*. The US Supreme Court, following the position of New York courts, considered in *Chase v Curtis* in 1885 that, if no distinction existed in state legislation, limited liability shall apply to the responsibility for both debts and torts.[79] When it concerns tortious liability (which includes human rights abuses and environmental damage), corporations have therefore also benefited from the advantages stemming from the corporate veil.

Those contracting with a limited liability entity can assess and eventualy accept the risks stemming from that limitation. Affected third persons suffering from a prejudice caused by a limited liability entity have not consented to such limitation. One may challenge the legitimacy of its effectiveness against third-parties. The question is all the more legitimate that the parent company can benefit from the profits generated by some subsidiaries while circumscribing the losses of others exceeding their contributions. This could induce enterprises to lodge hazardous activities in specific subsidiaries.[80]

Each of these three evolutions is of a certain importance but they are absolutely fundamental when taken as a whole. Indeed, they have enabled the development of a legal engineering aimed at the optimization of corporate structures relying greatly on limited liability and the principle of separate legal personality. Within the framework of an international law analysis, this historical and critical reinterpretation of corporate law should prompt us to rethink the issue of enterprise responsibility from a different angle.

4.2 *The Relevance of State Responsibility Principles to Enterprise Responsibility*

Corporations generate wealth but are also externality-producing devices.[81] Wealth can move almost freely throughout the corporate structure. It is for

77 Skinner (n 62) 1792.

78 Bainbridge and Henderson (n 47) 40–42.

79 *Chase v Curtis*, 113 U.S. 452 (1885). See also, Skinner (n 62) 1793–4.

80 Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Liability for Corporate Torts' 100 Yale Law Journal (1991) 1879, 1881.

81 Robé, *Le temps du monde de l'entreprise* (n 59) 393.

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instance the case for the payment of taxes at the group level or the transfer of dividends. However, when it comes to address the negatives externalities generated by the subsidiaries, the parent company is generally shielded from liability. It is therefore necessary to redress this asymmetry in order to align the rights and obligations of multinationals.

Given the similarities between the structures of corporations and of states, one relevant option would be to follow the rules of state responsibility concerning the attribution of an internationally wrongful act. One of their key principles concerning the attribution of conduct is the irrelevance of the State internal legal structure: whatever is the horizontal or vertical separation of powers within the State, the conduct of one of its organ is deemed one of its own,[82] regardless of its level of independence and even in case of *ultra vires* acts 'if it exceeds its authority or contravenes instructions'.[83] It is also noteworthy to mention the case of persons or entities not within the structure of a State but whose conducts are attributable to the state of they are 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct' (*de facto* organs).[84]

A parallel can be drawn with corporations: they can choose to carry out their activities in-house or through subsidiaries, subcontractors or suppliers. In that respect, three things ought to be pointed out. First, if a corporation decides to subsidiarise its activities, those activities are carried out within the same economic structure. The possible offences or torts committed by the subsidiary should therefore be attributable to the parent, even in case of *ultra vires* acts, namely if the subsidiary does not respect the "vigilance" or "due diligence plan" implemented by the parent. In that sense, a subsidiary can be regarded as an organ of the enterprise just like a political subdivision of a State is one of its organ under international law.

Second, if the activities are outsourced or subcontracted to a different entity, a distinction must be drawn between two different situations. If a decisive economic influence is exerted over the supplier or subcontractor, it is a situation of *de facto* control over the external entity and, consequently, its behaviour should be attributed to the client company. This approach is reflected in the case *Doe v Nestle* in which a US federal court held that the client company exerted 'their control over the cocoa market' and that they 'continue to supply

82 Article 4(1) of the Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts (ILC Yearbook (2001) vol II(2) 26–143) [hereinafter: ILC Articles]. See, James Crawford, *State Responsibility – The General Part* (CUP 2013) 116.

83 Article 7 of the ILC Articles (n 82). See also Crawford (n 82) 136.

84 Article 8 of the ILC Articles (n 82). See also Crawford (n 82) 141.

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money, equipment, and training to Ivorian farmers, knowing that these provisions will facilitate the use of forced child labor'.[85]

Third, if the client company does not exert a decisive influence over the supplier or subcontractor, the former nonetheless owes a duty of care with regard to the activities of the latter and it should cut its economic ties if it knew or ought to have known that the supplier or subcontractor was involved in serious breaches to human rights, environmental regulations or anti-bribery laws. Interestingly, when adopted in domestic legislation, the duty of care/vigilance applies to the corporation in exactly the same way for subsidiaries and suppliers or subcontractors with which it has an established commercial relationship. Our position is that it should apply only with regard to suppliers or subcontractors over which the corporation does not exercise a decisive influence. The applicable standard in the recent French legislation – allegedly a revolutionary one – turns out not to jibe with the economic reality of business organizations.

5 Conclusion

A historical and critical reinterpretation of the evolution of corporate law shows that limited liability corporations were an accident of history stemming from a regulatory race to the bottom.[86] It also shows that it is both legitimate and economically appropriate for the parent to bear the responsibility for the conduct of its subsidiaries. An analogy with the international responsibility of states leads to the same result. Besides, it would be curious that, for the same violation of international law (for instance international human rights), a State could not raise its domestic legal structure as a defence (for instance the contentious act was committed by a province enjoying a status of independence in the federal State) while a parent would be in a position to do so (for instance the contentious act was committed by a subsidiary).

This is also why the due diligence principle of the UNGPs is eventually a very poor standard of CSR. Paved with good intentions, this duty of care has probably improved corporate groups practices. However, it overshadows the need for a radical upheaval in order to better address contemporary challenges implied by the activities of multinationals. In order to be in line with the economic and political reality of business organizations, a new general principle of enterprise liability should emerge.

85 *Doe et al v Nestle et al*, No. 10–56739, D.C. No. 2:05-CV-05133- SVW-JTL (9th Cir. Sep. 4, 2014).

86 Vandekerckhove (n 47) 9 (noting with regard to limited liability 'its possibly historically accidental nature and (…) its alleged lack of economic justification').

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The issue is of course to determine what would be the optimal strategy to ensure the emergence of a new principle of attribution of the subsidiary's conduct to the parent – taking into account that such a principle may appear as revolutionary and even shocking.[87] We will only give a brief summary of a conceivable proposal we have made to that effect.[88]

Amending domestic laws or drafting a treaty to that end would lead to many resistances and are not realistic and politically feasible options. A possibility would be to rest on codes of conduct or other types of unilateral commitments adopted by corporations as part of their CSR strategy. While such undertakings are most of the time exploited as public relations tools, the outreach would be different if corporate groups would unilaterally accept (1) to bear the liability stemming from the conduct (2) of any entity included in the group's accounting consolidation scope (thus including subsidiaries)[89] and (3) to consent to the jurisdiction of the domestic courts of states where it is incorporated or where the group conducts business activities. The corporation's unilateral consent has the advantage of neither requiring a modification of domestic corporate laws nor necessitating for states to accept an international binding instrument. This new mechanism would rely exclusively on the unilateral consent of corporations and therefore could be gradually implemented.

We have already noticed that general principles of law play a rather peripheral role in the "Business and Human Rights" discipline as reflected in the UNGPs. It is also clear that if we decrypt the genuine nature of corporate power, a consistent "Business and Human Rights" discipline shall draw its inspiration from the principles of state responsibility. Using this framework as a new CSR yardstick would eventually lead to profoundly call into question, not to say sacrifice, some principles of corporate law.

87 Pierrick Le Goff, 'Faut-il supprimer les sociétés à risque limité ? Apport et critique de l'analyse économique américaine du droit des sociétés' 51 Revue Internationale de Droit Comparé (1999) 593, 595.

88 Régis Bismuth, 'La responsabilité (limitée) de l'entreprise multinationale et son organisation juridique interne: Quelques réflexions autour d'un accident de l'histoire', in SFDI, *L'entreprise multinationale et le droit international* (Pedone 2017) 429, 443.

89 The group's accounting consolidation scope seems to be the most relevant criterion in order to identify entities whose contentious conduct is eventually attributable to the parent. Indeed, there are international standards on that matter adopted by the International Accounting Standard Board (IASB) specifying different forms of corporate control in order to determine what constitutes a "single economic entity" (IFRS 10). It is also through the accounting consolidation scope that corporate groups present themselves to a large categories of actors (shareholders, financial institutions, financial regulatory authorities, etc.).

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