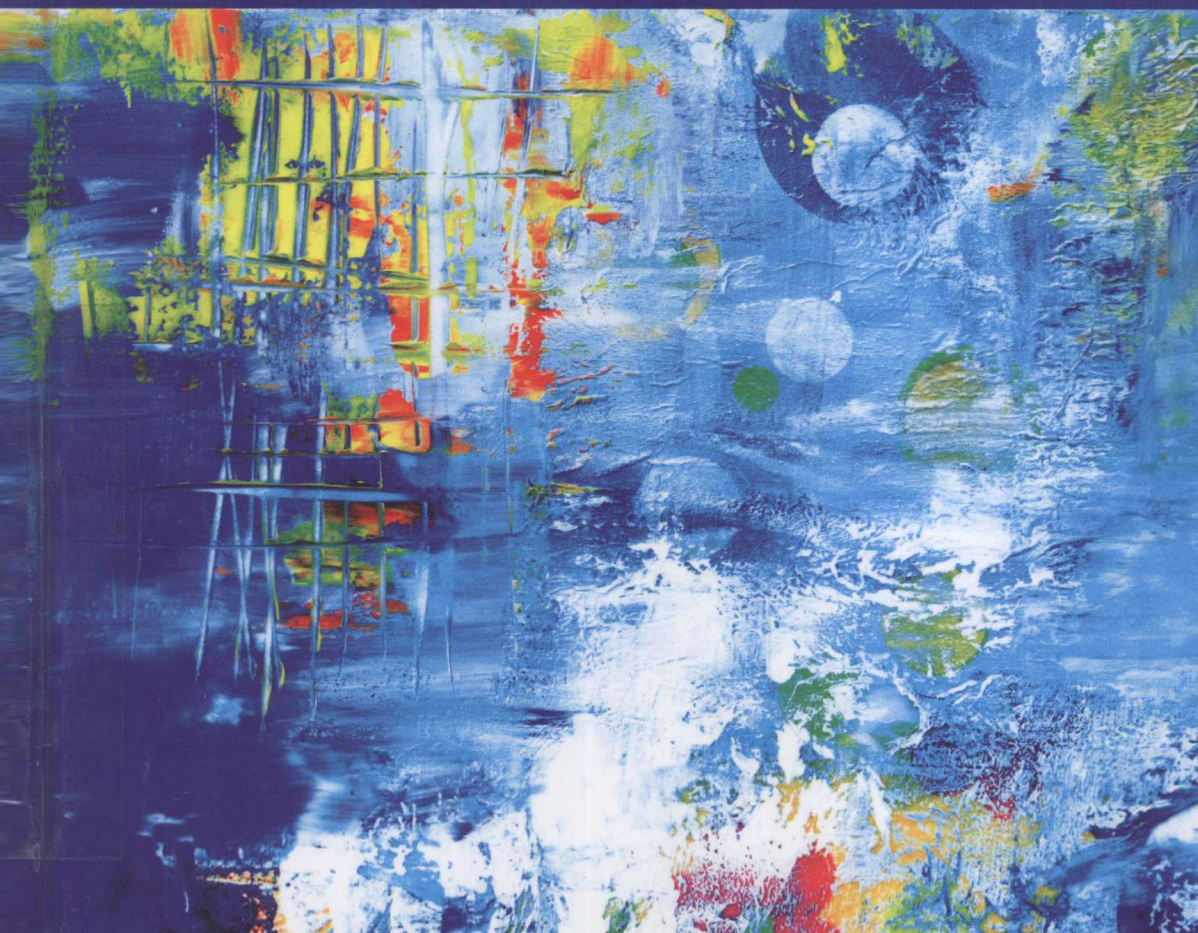


Alexandra Gatto



Multinational Enterprises and Human Rights

Obligations under EU Law
and International Law



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Law

Alexandra Gatto

PhD, LL.M, MA



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A mamma, papà ed Ila

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Introduction

This book addresses the question of how the European Union can ensure that EU-based multinational enterprises (MNEs) respect human rights when operating in third countries. First, it identifies primary obligations on MNEs as developed by international law in order to tackle the above question. Secondly, on the basis of this theoretical framework it investigates how the European Union has acted to promote respect of human rights obligations by MNEs which are based on the territory of one of its Member States. Thirdly, the gap between the EU's commitment to the respect and promotion of human rights, the potential to regulate the conduct of MNEs and the EU's reluctance to impose human rights obligations on MNEs is explored. It is suggested that current human rights law should develop in the sense of considering companies as duty holders, together with States and other non-state actors, for the realisation of human rights. Moreover, a principle of gradation of responsibility is applied to MNEs, according to the specific human right involved, the proximity to the victim and the element of State authority exercised by the company in a particular situation. The above-depicted gradation of responsibility (from the obligation to *respect*, to the obligation to *promote* human rights) should be matched by a gradation of corresponding implementing mechanisms.

Applying this theoretical framework to the EU, three main recommendations have been formulated. First, the EU should more firmly link the promotion of MNEs' human rights obligations to international human rights law and support the constitution of an international law framework within the UN. Secondly, the EU should promote MNEs' human rights obligations, within the limits of its competence, both at the international and at an external level. It has been argued that a proactive attitude in this respect would not require the acquisition of new powers, but simply the recognition of a functional competence on the basis of Article 6 of the Treaty of European Union (TEU) in taking positive (and not merely negative) steps for the promotion of human rights in the areas of its competence occurring in international law and the international framework for MNEs' responsibility. Finally, the EU should not abandon the option of exploring non-binding and incentive measures, both at the international and external levels, to be encouraged as a viable complement to binding measures.

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PART I

Multinational enterprises and human rights: the international legal framework

1 Theoretical framework

1.1 INTRODUCTION

Multinational enterprises (MNEs) are very powerful actors in the current world order. The turnover of these multinationals is growing faster than the world social product. The universe of MNEs now spans 82 000 parent companies worldwide, with 810 000 foreign affiliates. And their combined value-added accounted for roughly 4 per cent of world GDP, a share that has remained relatively stable since 2000.¹ However, 85 per cent of the largest companies are based in the United States (US), the European Union (EU) and Japan. In particular 54 per cent of them are based in the EU.² About one-third of world trade takes place within groups of MNEs.

The economic power of MNEs has been strengthened by the process of globalization. What is commonly defined as globalization refers to a set of far-reaching changes in the global economy and in the regulation of international trade since the 1970s.³ As a consequence of the collapse of the Bretton-Woods system and the oil crisis, the flexibility of exchange rates stimulated the growth in financial speculation and enhanced dependence on OPEC countries. At the same time, international trade barriers and exchange controls were loosened between North America and Western Europe, so that from the 1980s the integration of global capital and commodity markets intensified.⁴

The reduction of trade and non-trade barriers and the reduction of public control on foreign investment was followed by the reduction of governments' economic role through privatization of public enterprises. This ongoing process was reinforced by the development of

¹ See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, 2009, Geneva, United Nations Publications, at xxi.

² Ibid., p. 230.

³ See C.A. Michalet, *Qu'Est-Ce Que la Mondialisation?* 2004, Paris, La Découverte, at 22.

⁴ See G. Jones, *Multinationals and Global Capitalism: From the Nineteenth to the Twenty-First Century*, 2005, Oxford, Oxford University Press, at 60.

telecommunications and technologies which have allowed enterprises to overcome the former barriers of time and space and, in many respects, the boundaries of national markets.

One of the most important factors in relation to the globalization of the economy is foreign direct investment (FDI) by companies in foreign markets. The attitude towards FDI has deeply changed. Until the 1970s foreign investment was subject to restrictions and requirements concerning profit repatriation, technology transfer, exports, and domestic participation of MNEs.⁵ This was due to the fact that foreign investors wanted to be protected against discrimination *vis-à-vis* domestic investors.⁶ On the other hand, developing countries were concerned that MNEs might exploit the resources of host countries without giving much in return. Today, on the contrary, most governments have enacted regulatory changes in order to attract foreign investment. The settlement of MNEs in developing countries is perceived as beneficial to technology transfer, job creation and the flow of a strong currency.⁷

On the flip-side of the coin, the liberalization of international trade and the reinforcement of investors have provided MNEs with the option of taking advantage of lower human rights standards or weak systems of governance when they operate in developing countries.⁸ In addition to exercising huge economic power, corporate influence has recently extended into areas previously regarded as the proper prerogative of government. In developing countries with poor infrastructure or otherwise ineffective government, MNEs often carry out governmental functions in regions where their plants and workers are located, for example in the creation of basic infrastructure such as streets, housing and medical assistance. In the Niger Delta, for instance, oil companies invest millions of dollars every year in building infrastructures.⁹ Some MNEs even assume bureaucratic functions such as organizing elections for local committees.¹⁰

⁵ See *ibid.*, at 65.

⁶ See M. Sornarajah, *The Settlement of Foreign Investment Disputes*, 2000, The Hague, Kluwer, at 8.

⁷ See P. Malanczuk, 'Globalization and the Future Role of Sovereign States', in F. Weiss et al. (eds), *International Economic Law with a Human Face*, 1998, The Hague, Kluwer, at 45.

⁸ See S. Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171.

⁹ See A. Eide, et al. (eds), *Human Rights and the Oil Industry*, 2000, Antwerp, Groningen and Oxford, Intersentia.

¹⁰ See C. Hanley, 'The Abuse of Human Rights by European-Based Multinational Corporations: Effective Control Mechanisms for the EU' (LLM thesis on file at the European University Institute, Florence, 2001) at 2.

At the same time, while the risk of expropriation by governmental action is receding, the risk of private disturbance and violence increases, thus corporations become more and more involved in security measures, which may lead to human rights abuses. In the last two decades the role of companies that provide security is larger and different to what it has been since the foundation of the modern State. Private companies now provide more services and more kinds of services, including some that have been considered fundamental military capabilities in the modern era. Today, it is estimated that tens of thousands of private military company (PMC) employees in Iraq are operating on contracts with the Iraqi and US government, as well as with private business.

The rise of PMCs as significant actors in military affairs has been ascribed to a number of factors. After the end of the Cold War, the increased chances of internal conflict, combined with the reluctance of the key States to intervene in distant conflicts, caused weak or failing States to turn to the private sector to fill the security vacuum. Secondly, the demobilization that accompanied the end of superpower rivalry released a workforce of individuals trained by their national militaries but available to the private market. This coincided with a general enthusiasm for outsourcing, though the economic savings of using PMCs rather than maintaining a large standing army are under debate. Thirdly, in States unable or unwilling to provide security to non-state actors, PMCs may be the only option for private companies, multilateral organizations and, increasingly, non-governmental organizations (NGOs). This expansion of activity has been accompanied by a growing concern about the role of private commercial interests in military affairs, and in particular about the unregulated use of lethal violence through PMC personnel. The emergence of PMCs in military affairs poses challenges both to law and to thinking about international security. Regulation in this context has long been based on the assumption that States are the sole legitimate providers of security. Increasingly, however, activities are being outsourced to PMCs, though this outsourcing has not been accompanied by corresponding checks and oversight.¹¹

Over the past few years corporate responsibility has become one of the major issues facing the international community, with initiatives mushrooming at international, regional and national level in recent years. The International Labour Organisation (ILO) Tripartite Declaration of

¹¹ See D.D. Avant, *The Market for Force: the Consequences of Privatizing Security*, 2005, Cambridge, Cambridge University Press, at 178–191.

Principles Concerning Transnational Enterprises and Social Policy first adopted in 1977,¹² has been revised in 2000 and in 2006. The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,¹³ drawn up in 1976 was revised most recently in 2000. In 2003, the United Nations (UN) Sub-Commission for the Promotion and Protection of Human Rights approved the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,¹⁴ which identify a set of human rights principles for business enterprises¹⁵ and have been linked to the UN voluntary initiative Global Compact.¹⁶ Legislation covering corporate codes of conduct was introduced into both the Australian Parliament¹⁷ and the Congress of the United States,¹⁸ where 85 per cent of large companies have already adopted voluntary codes of conduct. Although the impact of self-regulation cannot be overestimated, these initiatives can be welcomed as the first sign of recognition by companies of responsibility towards a number of human rights and more in general towards society at large.

¹² Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th (March 2006) Sessions.

¹³ See Organisation for Economic Cooperation and Development (OECD), *The OECD Guidelines for Multinational Enterprises*, OCDE/GD 97/40 (2000), 2000, Paris, OECD, available at: <http://www.oecd.org/daf/investment/guidlines/mnetext.htm> (accessed 5 April 2002).

¹⁴ See United Nations (UN), 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN.4/Sub.2/2003/12/Rev.2 (2003). Approved 13 August 2003, by UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, E/CN.4/Sub.2/2003/L.11 (2003), at 52.

¹⁵ See UN, 'Draft Fundamental Human Rights Principles for Business', E/CN.4/Sub.2/2002X/Add, E/CN.4/Sub/2002/wg.2/wp.1/Add, available at: <http://www.lumn.edu/humanrights/ltns/principles11-18-200.htm> (accessed 14 March 2002).

¹⁶ See UN, *Guidelines for Cooperation between the United Nations and the Business Community*, available at: <http://www.unglobalcompact.org> (accessed 15 March 2006).

¹⁷ See 'The Corporate Code of Conduct Bill 2000' sponsored by Senator Vicky Bourne. See *Report on the Corporate Code of Conduct Bill 2000*, June 2001, Commonwealth of Australia.

¹⁸ Corporate Code of Conduct Act to require nationals of the United States that employ more than 20 persons in a foreign country to implement a Corporate Code of Conduct with respect to the employment of those persons, and for other purposes (H.R. 5377), introduced by Cynthia McKinney.

Recently a number of lawsuits pending before US¹⁹ and UK²⁰ courts and consumer awareness campaigns²¹ have brought to the attention of public opinion egregious human rights violations committed by US and European MNEs.

In the European context, the attention on the responsibility of MNEs in Europe dates back to the 1970s, within the realm of the European Economic Community (EEC). Apart from two isolated initiatives in the context of political cooperation, the interest in European MNEs' activities in third countries was not revived until 1993, when the President of the European Commission, Jacques Delors, called on business to take part in the fight against social exclusion. The appeal to European companies was strengthened at the European Council in Lisbon in March 2000,²² when companies' social responsibility was linked to Europe's new strategic goal for 2010: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion. This goal was then articulated in the Commission's European Social Agenda,²³ which emphasized the role of Corporate Social Responsibility in addressing the employment and social consequences of economics and market integration. The subsequent

¹⁹ Cases pending before US courts under the Alien Tort Claims Act have been dealt with by B. Stephens, 'Corporate Liability: Enforcing Human Rights Through Domestic Litigation' (2001) 24 *Hastings International and Comparative Law Review* 401.

²⁰ See for instance *Lubbe and Others v Cape plc* [2000] 4 All ER 268, [2000] 1 WLR 1545, [2000] 2 Lloyd's, Rep 383 (HL). An update on British cases is provided by R. Meeran, *Access to Courts for Corporate Accountability: Recent Developments*, available at: <http://www.johnpickering.co.uk> (accessed 11 November 2006).

²¹ A number of international human rights and environmental non-governmental organizations constantly monitor MNEs' activities worldwide. Consumer campaigns have proved effective in changing corporate policies in some cases, in particular on companies involved in the apparel and garment industries. A list of current campaigns can be found on www.corporatewatch.org and www.amanestyinternational.com. For an assessment of recent consumer campaigns see Chris Avery, 'Business and Human Rights in a Time of Change', in M.T. Kamminga and S. Zia Zafiri (eds), *Liability of Multinational Corporations under International Law*, 2000, The Hague, Kluwer Law International, at 17–73 and R. O'Brien, 'NGOs, Civil Society and Global Economic Regulation', in S. Picciotto and R. Mayne (eds), *Regulating International Business. Beyond Liberalisation*, 1999, London, Macmillan Press, at 257.

²² This development is traced in the European Union website, http://www.europa.eu.int/comm/employment_social/soc-dial/csr (accessed 5 May 2003).

²³ See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Social Policy Agenda COM* (2000) 379 final, 28 June 2000.

Commission Communication, Corporate Social Responsibility²⁴ recognized a role for the European Union in encouraging Corporate Social Responsibility and in setting up a framework to ensure that environmental and social considerations were integrated into companies' activities. In March 2006 the Commission of the European Union issued a Communication, Implementing The Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility.²⁵ Through this initiative the Commission reaffirms its preference for non-binding initiatives and promotes the creation of a businesses alliance for Corporate Social Responsibility.

1.2 MNEs AND HUMAN RIGHTS

It is difficult to deny that MNEs exercise considerable influence and perhaps some power over the direction of economic and social policy. While MNEs cannot be said to have replaced the State as the unit of official power, it must be admitted that decisions and activities of MNEs carry considerable weight in national and international policy making.²⁶ Today's leadership of MNEs in economic affairs, especially in the fields of trade, investment and financial services is a culmination of an evolving process of policy development. Not only have MNEs enhanced the commercial aspects of traditional human endeavours in agriculture, health and medicine, transport and clothing, but in many countries of the world MNEs are also responsible for the provision of public services such as water, electricity, telephone, and household gas, leaving only a few, if any at all, aspects of human life untouched by corporate activities.²⁷

At the same time, the expanding role of private corporations is taking place in a period of steady reduction of governmental involvement in commercial and social undertaking, for corporations now perform some of the tasks relinquished by governments. As a result, such is the power of MNEs that they can affect the economic policy of the countries in which they

²⁴ *Communication from the Commission concerning Corporate Social Responsibility: a Business Contribution to Sustainable Development* COM (2002) 347 final, 2 July 2002.

²⁵ *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM (2006) 136 final, 22 March 2006.

²⁶ See Michalet, *supra* n. 3, at 78. See also Sornarajah, *supra* n. 6, at 8.

²⁷ Michalet, *supra* n. 3 at 14.

operate. Consequently, their impact on human rights and development can be considered more significant than that of domestic firms.

The relationship between MNEs and human rights is a complex one. Three aspects can be distinguished. First, MNEs can be direct violators of human rights, for example, by making use of forced labour. Secondly, they can indirectly violate human rights by supporting a regime that violates human rights. An example of this is the intended investment by a subsidiary of the Dutch MNE IHC Caland in Myanmar.²⁸ Thirdly, besides the fact that they may threaten an effective enjoyment of human rights, they can also have a positive influence. In general, the presence of MNEs can raise the standard of living and improve respect for economic, social and cultural rights.²⁹

1.2.1 MNEs as Violators of Human Rights

MNEs can have a substantial impact on the enjoyment of economic, social and cultural rights. Their influence on the right to work, the right to just and favourable conditions of work and the right to form a trade union is evident. MNEs can breach labour rights by mistreating and exploiting their labour forces, by preventing the creation of trade unions, by the use of child labour and discriminatory practices in recruiting. However, they can also affect civil and political rights; for example, the prohibition of discrimination. Another example is the right to life. The accident with the subsidiary of the American MNE Union Carbide in Bhopal, India in 1984 is an example of the effect that MNEs can have on this right.³⁰ MNEs can cause environmental damage that can impact on the right to health, life, minority rights and the right to self-determination.³¹ Inefficient rules on

²⁸ See N. Jägers, 'Multinational Corporations under international law', in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, The Hague, Kluwer Law International, at 260.

²⁹ O. de Schutter, 'Transnational Corporations as Instruments of Human Development', in P. Alston and M. Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement*, 2005, Oxford, Oxford University Press, at 403–44.

³⁰ The accident, which was the result of inadequate safety measures, is the worst industrial disaster of the twentieth century. It killed over 8000 people in its immediate aftermath and caused injuries to over 500 000. See *Re Union Carbide Corporation Gas Plant Disaster* 809 F. 2d 195.

³¹ See e.g. *Wiva Royal Dutch Shell Petroleum Co.* 226 F. 3d, 88 (2d Cir 2000). See also S. Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in Kamminga and Zia-Zarifi, *supra* n. 21, 75 at 79.