

Needs and Options for a New International Instrument In the Field of Business and Human Rights

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In the Field of Business and Human Rights**

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Introduction

The issue of the human rights duties or responsibilities of businesses has for a long time been the focus of attention for the international community. Instances of abuse or negative impact on the enjoyment of human rights have been compounded by the growing pace in economic globalization and increased facilities for businesses to move and operate across frontiers. The international community, particularly States, have, until recently, been slow to respond to the rapidly increasing challenges in this area. A first wave of international collective action to establish rules to govern this field took place in the 1970s when the International Labour Organization (ILO) Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises were adopted. A second wave was initiated by the work of the UN Sub-Commission on the Protection of Human Rights between 1999 and 2002, the establishment of the Global Compact¹ by the United Nations Secretary-General, followed by the work of the Special Representative of the Secretary General, Professor John Ruggie, mandated by the UN Human Rights Council between 2005 and 2011. The UN Framework *Protect, Respect, Remedy*, adopted in 2008, and the *Guiding Principles on Business and Human Rights*, adopted by the UN Human Rights Council in 2011 complement the existing body of standards for the conduct of States and businesses in this area. Important contributions have also come from UN bodies – for example the Committee on the Rights of the Child’s General Comment 16 on *States’ Obligations regarding business impacts on the rights of the child* and a Statement by the Committee on Economic, Social and Cultural Rights – which also provide authoritative guidance for States parties to the respective conventions.

The International Commission of Jurists (ICJ), a non-governmental organization of lawyers, judges and other legal professionals from all regions of the world, working to safeguard and advance the rule of law and human rights, has maintained significant engagement on the issue of human rights and business enterprises, including transnational corporations, since the 1990s. In 2005 the ICJ established a dedicated programme that aims at promoting the rule of law and standard-setting in the context of business and human rights and improving access to justice for those who claim their rights have been infringed by the conduct of business enterprises and/or the dereliction of States in their duty to protect individuals from such conduct.

In the course of elaboration and adoption of these standards, a number of States, individual experts and human rights organizations, including the ICJ, have highlighted the need for a more robust and effective approach. Some have suggested that an international treaty or other inter-governmentally elaborated instrument should be adopted.

The conduct of businesses, especially transnational corporations (TNCs) and other large-scale enterprises, can and does impact the enjoyment of human rights as much as that of States in several respects. Yet the international framework for protection in relation to the conduct of businesses - in normative, institutional and operational terms - has remained underdeveloped when compared with the relatively mature architecture addressing the conduct of States and State agents.

The adoption of the *Guiding Principles on Business and Human Rights* and the continued attention given by the Human Rights Council to the issue of business and human rights is likely to lead to further action and standard-setting in the foreseeable future, not least due to strong continuing advocacy by civil society groups. In this context, the ICJ has conducted a process of consultation aimed at:

¹ United Nations Global Compact, web site available at: www.unglobalcompact.org (accessed 28 March 2014).

- 1) Identifying the existing gaps in the protection of human rights in the context of the activity of business enterprises;
- 2) Determining, in light of these gaps, whether there is a need for a new international instrument that can effectively contribute to filling those gaps; and
- 3) Outlining options as to the nature, scope and elements of any instrument if needed, as well as the appropriate institutional forum for its elaboration and adoption.

The process of consultation consisted of an initial background consultation paper and questionnaire that was sent off to 30 persons (human rights advocates and scholars) and organizations. Initial views from human rights advocates were also sought during collective side-meetings such as the Bangkok People's Forum on Business and Human Rights, on 5-6 November, 2013, or were collected at international conferences, including at the seminar organized by Ecuador and South Africa on 11-12 March 2014. On the basis of that information and its own research, the ICJ prepared a draft report that was distributed on 27 March among those who were initially consulted, a few leading States in the area of business and human rights, and other experts for comments. The ICJ received a series of comments and suggestions from government delegates, human rights advocates, scholars and other experts and officials of intergovernmental organizations on this draft that was also discussed in two consultations (one in Brussels and the other in Geneva, at a meeting convened by the Friedrich Ebert Stiftung). Additional information about governments, civil society groups and business representatives was gathered through bilateral meetings. The present report is the result of this consultation process and ICJ's internal discussions and research.

A significant number of human rights advocates, including non-governmental organizations and government experts, have suggested that there is a need for a legally binding framework, consisting of standards, for business enterprises. Such standards could take any of a number of forms, from operational regulations to guidelines for redress. The possibility and/or desirability of a future international instrument, or instruments, was referred to by the UN Human Rights Council in its resolution on the issue of business and human rights when it adopted the Framework *Protect, Respect, Remedy* in June 2008, and again in June 2011 when it adopted the *Guiding Principles*. The Preambles of Resolutions 8/7 of 2008 and 17/4 of 2011 state that "efforts to bridge governance gaps at the national, regional and international levels are necessary".

Furthermore, Resolution 17/4 notes that the *Guiding Principles* were adopted without prejudice to "any future initiatives, such as a relevant, comprehensive international framework". It also states that adoption of the *Guiding Principles* did "not foreclose any other long-term development, including further enhancement of standards" (OP3), and requested the new Working Group on Business and Human Rights to: "continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas...." (OP6(e)). This understanding has been confirmed in subsequent debates.²

² International Commission of Jurists, 'High Level Discussion on advancing Business and Human Rights in the Human Rights Council', Parallel Event, Human Rights Council 20th Regular Session, 21 June 2012. Available at: <http://www.icj.org/high-level-discussion-on-advancing-human-rights-and-business-in-the-human-rights-council/> (accessed 28 March 2014). Michael Addo, a member of the UN Working Group on Business and Human Rights, speaking in his personal capacity, supported this approach. He stated that there was no basis to think future international instruments are foreclosed, but enough evidence and an appropriate process should be followed to demonstrate the need for such an instrument. At the same meeting, Professor Andrew Clapham stated that an international treaty might provide impetus for national legislation.

More recently, many States, NGOs, and independent experts have suggested that the Human Rights Council should start work on an international legally binding instrument.³ The ICJ together with other leading human rights NGOs have been calling for global standards negotiated and agreed on by States at least since 2007.⁴ A statement signed by more than 50 organizations and international coalitions in advance of the June 2011 session of the Human Rights Council requested that the Council:

“With a view to developing an international legal instrument, analyse the options for addressing weaknesses and inconsistencies in the legal protection of human rights including, but not limited to, those related to gross human rights abuses and make recommendations for action. This analysis might best take the form of a consultative and comprehensive report to be issued with a view to advancing an inter-governmental standard setting process”.⁵

Most recently, the ICJ joined hundreds of organizations in a global call for an inter-governmental process towards a legally binding instrument in the field of business and human rights.⁶

Several organizations dedicated to development cooperation, grouped under CIDSE, also called for international binding instruments at the time the *UN Framework* was adopted.⁷ A recent Declaration adopted by the NGO Forum at the Vienna Plus 20 Conference called for an “international legally binding body” of rules concerning corporations, and a similar call was formulated by civil society organizations in the Regional Forum on Business and Human Rights held in Medellin, Colombia.⁸ Those organizations that have more openly opposed the *Guiding Principles* have also called for binding regulation of transnational corporations.⁹

Professor John Ruggie, the former Special Representative of the Secretary General on Business and Human Rights, made recommendations for an intergovernmental process to focus on gross human rights abuses committed by corporations, as part of measures to follow the end of his mandate in 2011.¹⁰

³ Government statements can be seen in the United Nations webcast archive: ‘Statements by Governments at Human Rights Council Session’, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2011> (accessed 28 March 2014).

⁴ Joint Open Letter to UN Special Representative on Business and Human Rights – 2007, <http://www.escr-net.org/docs/i/548976> (accessed 4 February 2014).

⁵ Advancing the Global Business and Human Rights Agenda, available at: <http://www.hrw.org/en/news/2011/05/13/advancing-global-business-and-human-rights-agenda>. See also: <http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council> (accessed 28 March 2014).

⁶ Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises www.treatymovement.com, and also <http://www.escrnetpeoplesforum.org/joint-statement-binding-international-instrument> (accessed 4 February 2014).

⁷ See CIDSE’s statement to the Human Rights Council “Human rights and transnational corporations and other business enterprises”, 23 May 2008, available at: http://www.fastenopfer.ch/data/media/dokumente/entwicklungspolitik/menschenrechte_frieden/written_statement_ruggie.pdf.

⁸ The Vienna+20 CSO Declaration, 25 and 26 June 2013, p.8. Available at: <http://viennaplus20.files.wordpress.com/2013/07/vienna-20-cso-declaration-final.pdf> (accessed: 28 March 2014). See also: Declaration of the Civil Society Organizations in the Regional Forum on Business and Human Rights, 28 and 30 of August 2013, Colombia, available at: <http://www.business-humanrights.org/Links/Repository/1021569> (accessed 28 March 2014) and <http://www.ecologistasenaccion.org/article26462.html> (accessed 28 March 2014).

⁹ CSOs and social movements before Human Rights Council today: Ruggie’s *Guiding Principles* unsuitable for addressing corporate human rights abuses, accessed 8 July 2013 http://www.fian.org/en/news/article/detail/csos_and_social_movements_before_human_rights_council_today_ruggies_guiding_principles_unsuitabl/ (accessed 28 March 2014).

¹⁰ John Ruggie, Recommendations on Follow Up to the Mandate, <http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf> (accessed 21 March 2014).

Perhaps most significantly, in a joint statement during the September 2013 session of the Human Rights Council, individual States and regional groups together representing more than 80 States called for the conclusion of a legally binding instrument “after a careful process of analysis of options” and committed themselves to work towards that end.¹¹

Against the background of more frequent and numerous calls for a new international legal instrument in the field of business and human rights, the ICJ has conducted consultations and research with a view to assessing and drawing conclusions as to the need for such an instrument. The present report analyses the need for an international instrument, or instruments, and available options to that end.¹² The ICJ formulated the following questions for these consultations:

- 1) Whether there are gaps in international regulation/law or its implementation that would require the conclusion of [a] new international instrument[s] in the broad field of business and human rights, or in any specific field relating to business enterprises operations and their impact on human rights.
- 2) If such a new instrument is seen as necessary, what would be its nature? Would it be a legally binding instrument or a new declaratory (“soft law”) instrument? Who would be its subjects? Would it address the obligation of States to protect from the conduct of business enterprises; the direct responsibility of businesses; or both? Do we need a generalized instrument or a series of sector-specific instruments? What would be the content of such an instrument?; and who are the “stakeholders” who would have to engage in its elaboration (inter-state, independent experts, civil society, and businesses)?
- 3) Which would be the most suitable institutional setting within the United Nations to negotiate and conclude such (a) new instrument?

To address these issues, this report first reviews recent developments in international instruments since the adoption of the *Guiding Principles*, and then analyses the remaining gaps (both normative as well as those concerning implementation) that need to be filled to improve protection of human rights in the context of the operations of business enterprises. The second part focuses on the available options.

¹¹ Declaración en nombre de un grupo de países en la 24^a edición de sesiones del Consejo de Derechos Humanos, available <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf> (accessed 28 March 2014).

¹² An initial group of some 30 persons and institutions received a background note on 15 July. See above for the description of a process. A series of meetings (both bilateral and collective) have taken place, and comments sent to the ICJ, on the basis of a draft Report circulated on 27 March 2014.

PART I

OUTSTANDING ISSUES IN THE INTERNATIONAL LEGAL FRAMEWORK ON BUSINESS AND HUMAN RIGHTS

I. The scope of the report

The field covered under the title “business and human rights” is vast and complex. It encompasses issues relating to the respective role of States and business enterprises, which as such cover a wide diversity of matters. It may address issues relating to incorporation and functioning of corporate bodies in domestic jurisdictions, the financing of economic activities, rules governing transnational investment, State-owned national bodies that promote and insure export and imports, the securities field, and the relationship between the State and private businesses, particularly those operating abroad. It touches upon the law of civil remedies and criminal law, and in many countries it involves constitutional law.

While there are many actors and situations that may exert influence on business behaviour, this report focuses on the identification of gaps in international law and its implementation, which are arguably part of the permissive environment for businesses' abuse of human rights. Business conduct is constrained not only by publicly enacted laws and regulations, the breach of which may be sanctioned by public authorities, but also by a plethora of written and unwritten rules that govern economic interactions in the market, including consumer preferences and State preferences as a consumer of businesses' goods and services. Self-regulation in the form of enterprise codes of conduct responds to those market incentives and can be fairly effective when certain conditions are in place. However, the ICJ and many other actors have been critical of the value of these initiatives as an effective tool for corporate accountability and have warned against over-reliance on them. As a form of regulation of business behaviour, self-regulation is not the focus of this report. Moreover, multi-stakeholder initiatives and codes of conduct as regulatory options have been mapped out during the work carried out by Professor Ruggie during his mandate as Special Representative. To undertake this work again would be duplicative and unnecessary. For the purposes of this report, it suffices to restate the general consensus that a mix of voluntary and regulatory approaches is possible and necessary when addressing business and human rights.

The objective of this report is to identify gaps in international regulation that could justify the need for new international instruments. The report focuses only on those gaps that are: 1) of a normative character, in terms of defining the content and scope of international standards; or 2) relate to the effective implementation of those standards, including access to an effective remedy for victims of abuse.¹³ Significantly, most of those issues have already been effectively addressed in various ways by human rights advocates, scholars and jurists. The report aims at recommending options to address those normative and implementation gaps.

The approach adopted in this report necessarily sets aside a number of issues, namely those relating to deficiencies in the practical application of standards. Most of these issues, such as allocation of financial resources, distribution and accessibility of courts or other protection mechanisms, may be better addressed through improved capacity and effective action by public authorities and do not necessarily reflect problems that an international instrument may help to solve. However, implementation gaps such as those in monitoring, supervision or adjudication are problems that international instruments usually help to solve.

¹³ ICHRP / ICJ / ISHR, “Human Rights Standards: Learning from Experience”, Geneva, 2006. Available at: http://www.ichrp.org/files/reports/31/120b_report_en.pdf (accessed 28 March 2014).

Although some of the publicly made calls for an international instrument allude to a legally binding instrument (an international treaty), the scope of the analysis in this report is to assess the needs and options for a new international instrument without limiting the potential form of such options. An international instrument might, as an interim step, take the form of an instrument of a declaratory or recommendatory nature and could potentially cover some of the same ground as a legally binding instrument.

Finally, in this report the ICJ does not aim to assess the effectiveness of the implementation of existing instruments, such as the Guiding Principles. Implementation by definition can only be assessed over the long run and can always be improved. Still, existing instruments can be assessed for the gaps in their content, such as the adequacy of their regulatory scope.

In relation to existing instruments of a non-binding nature such as the *Guiding Principles*, past experience in treaty making within the UN shows that human rights treaties concluded following the earlier adoption of a declaration or other non-binding instrument on the same subject (e.g. against torture or enforced disappearances), have never been predicated on the failure of those declaratory instruments but, instead, were conceived to enhance and add value to existing standards and help to improve protection of human rights on the ground. The relationship between a new instrument, especially a legally binding instrument, and the *Guiding Principles* or a similar instrument should be seen as one of complementarity and not of opposition.

The *Guiding Principles on Business and Human Rights* have received a high level of acceptance, in particular among European and like-minded countries, although their effective implementation is largely a pending task. However, certain components of the *Guiding Principles* have been more well-received than others. By and large, the principles relating to the human rights responsibilities of businesses, including the need for companies to adopt human rights due diligence, are among those that have been most warmly received. Some of the *Guiding Principles* reflect accepted legal principles. Others are vaguely expressed or of too general a nature to offer effective guidance. Some principles remain contested. The ICJ has highlighted its dissatisfaction that the principles relating to access to legal remedies (GP 26) are so lean. In addition, principles on the obligation to protect come with qualifications that weaken their normative force.¹⁴ However, some of the GPs also represent a good synthesis of practices and useful steps that if more consistently applied may have an impact in reducing or mitigating abuse by business corporations.

This report assumes therefore that any future international instrument in this field will co-exist and mutually reinforce the *Guiding Principles*.

II. Recent developments in the international legal framework on human rights as applied to business enterprises

International law as a means to regulate relations among international subjects comprises customary international law, treaty law and general principles of international law.¹⁵ Regulation of business enterprises also includes self-regulation in the form of codes of conduct or other similar instruments and multi-stakeholder arrangements that might be said to create a governance system around a set of self-regulatory standards and practices. Multi-stakeholder initiatives (MSI) as systems of governance aspire to represent the interest of three main constituencies: States, the business sector and civil society. Important developments have taken place in this area with the establishment of

¹⁴ The Guiding Principles have been subject to intense scrutiny and criticism in scholarly publications. See in particular the volume edited by Prof Surya Deva and David Bilchitz (ed) *Human Rights Obligations of Business- Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, 2013, in particular the article by the same authors: "The human rights obligations of business: a critical framework for the future", p. 1, in the same volume. See also Mendes, Errol "Global Governance, Human Rights and International Law", 2013.

¹⁵ Art 36 of the Statute of the International Court of Justice.

the Association for the International Code of Conduct for Private Security Providers-ICoCA,¹⁶ and the Global Network Initiative (GNI). However, these initiatives are not intended to be a substitute for international or national law and regulation and, to the contrary, should be seen as complementary to them. In addition, they have been established by and only cover a limited scope of players.

The adoption of the UN Framework *Protect, Respect and Remedy* in 2008, and of the *Guiding Principles* in 2011, represent important contributions to the international framework relating to human rights and business operations. Nevertheless, they do not address all issues nor do they provide solutions to all problems. They should rather be understood as a useful organizing structure that conceptualizes and harbours much of the existing work in this field. Human rights advocates have continued to highlight the limitations of prevailing approaches and persistent problems that are inadequately addressed. Most of the new instruments described below were adopted with the explicit or implicit intention to remedy perceived shortcomings in the existing framework. This overview covers the most important international developments in global legal standards relating to the field of business and human rights since the adoption of the *Guiding Principles on Business and Human Rights*.

International developments

The statement on economic, social and cultural rights and business by the UN Committee on Economic, Social and Cultural Rights

At its forty-sixth session in 2011, the UN Committee on Economic, Social and Cultural Rights adopted a *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*.¹⁷ The Committee reaffirmed the “obligation of States Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities.”

The Committee affirms that the obligation to respect entails that States “shall ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities”. As part of the State’s obligation to protect rights, the Committee stresses that States should take steps to “prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction” without undermining the sovereignty or diminishing the obligations of the host State. It recalls previous General Comments in which the Committee had affirmed these obligations, regarding the rights to water and social security.¹⁸ The Committee states its intention to devote special attention to this issue and calls on States to include relevant information in their periodic reports.

General Comment No 16 by the UN Committee on the Rights of the Child

At its January 2013 session the Committee on the Rights of the Child adopted its General Comment 16 (GC 16) *On State obligations regarding the impact of the business sector on children’s rights*.¹⁹ This General Comment provides important guidance for States to carry out effective implementation of obligations under the Convention on the Rights of the Child by ensuring that business operations do not adversely impact the

¹⁶ International Code of Conduct for Private Security Providers, Available at: <http://www.icoc-ppsp.org/> (accessed 28 March 2014).

¹⁷ Committee on Economic, Social and Cultural Rights adopted a “Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights”, UN. Doc. E/C.12/2011/1, 12 July 2011.

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment 15 The right to water, UN Doc. E/C.12/2002/11, 20 January 2003, and General Comment 19 The right to social security, UN Doc E/C.12/GC/19, 4 February 2008.

¹⁹ Committee on the Rights of the Child, General Comment 16 on State obligations regarding the impact of the business sector on children’s rights, UN Doc. CRC/C/GC/16, 17 April 2013.

rights of the child, creating a supportive environment for business to respect children's rights across business relationships and global operations and ensuring access to a remedy (para. 5). The Convention is especially significant because it has been nearly universally ratified or acceded to and its provisions encompass a wide range of human rights (civil, cultural, economic, political and social). The General Comment also addresses provisions of the first Optional Protocol to the Convention, on sale of children, child prostitution and pornography, as well as the Second Optional Protocol on child soldiers.

General Comment 16 recognizes that the "duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises" (para. 8). Businesses must meet their responsibilities regarding children's rights and "States must ensure they do so". The Convention requires a particular level of protection for children in view of the potentially long-lasting effects of abuses over the child's development, considering the child's special needs and level maturity (para. 24).

General Comment 16 first lays down the implications of the four general principles underpinning the Convention for State action regarding businesses: the right to non-discrimination (paras 13-14); the best interests of the child (paras 15-17); the right to life, survival and development (paras 18-20); and the right of the child to be heard (paras 21-23). It also spells out the requirements under the three levels of obligations - "respect, protect and fulfil" - as regards children's rights and business enterprises. Of special interest is the treatment given to the issue of children's rights in global business operations. 'Host' States in which TNCs operate have the primary responsibility towards children's rights in their jurisdiction. They must ensure business enterprises are adequately regulated so as to prevent any adverse impact of their conduct on human rights or the aiding and abetting of violations of the rights of the child in foreign jurisdictions. 'Home' States have obligations to respect, protect and fulfil children's rights in the context of business enterprises' extraterritorial operations. A State is treated as a 'home' State when there is a reasonable link between the State and the conduct covered, i.e. the enterprise has a centre of activity in the home State, and/or it is registered or incorporated or domiciled or has its main place of business or substantial business activities in the home State (para 43). States must also provide access to effective judicial and non-judicial mechanisms to provide remedies under the same conditions (para 44).

General Comment 16 also includes an analysis on international organizations and States acting within international organizations that provide funding for business operations. It provides recommendations as to measures that States should adopt, such as carrying out child rights impact assessments (CRIA), and requiring children's rights due diligence by business (para 62).

Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights

On 28 September 2011, at a gathering convened by Maastricht University and the ICJ, a group of experts in international law and human rights adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.²⁰

The Maastricht Principles cover the obligations of States to respect, protect and fulfil rights extraterritorially. Concerning the States' obligation to protect (23-27), particularly relevant is Principle 24 of the Maastricht Principles, which provides that States must take measures "to ensure that non-State actors which they are in a position to regulate" do not nullify or impair the enjoyment of economic, social and cultural rights. According

²⁰ The members of the drafting group published a commentary laying out the legal basis for the Principles, published in 34 Human Rights Quarterly (2012) 1084-1169. The Principles and Commentary are available at <http://www.icj.org/protecting-human-rights-beyond-borders/> (accessed 28 March 2014).

to Principle 25, "States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means", *inter alia* "as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned".

According to Principle 9, a State has obligations to respect, protect and fulfil economic, social and cultural rights *inter alia* in "b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory" and "c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law."

Judicial decisions at the national level

Decisions of national courts and tribunals are evidence of State practice, especially when they relate to the application of international law within national jurisdictions. The content of the law or its understanding may also evolve as the result of judicial decisions. For more than a decade human rights advocates have been using courts to claim redress for people allegedly harmed by direct or indirect conduct of business corporations. Until recently, most of these complaints have been presented as civil suits, in particular in the United States. Yet an increasing number of criminal actions have now been pursued, especially in continental Europe and other parts of the world. However, despite a few or partial successes, recent court decisions have seen significant setbacks in attempts to hold corporations legally accountable.

Jurisdiction

An important development impacting upon the current understanding of general international law applicable to business enterprises is the ruling in April 2013 by the Supreme Court of the United States in *Kiobel v Shell Co.* The Court held that the Alien Tort Statute (ATS), a legislative act adopted in the 18th century that had been widely used since the 1980s as the basis of legal suits against both individuals and companies for serious abuses committed abroad, could not be used for the adjudication of cases where the underlying conduct occurred abroad and did not have sufficient connection to the United States jurisdiction so as to displace the application of a "presumption against the extraterritorial application" of laws. The Court held that conduct that occurred in the territory of other States was not actionable under the ATS. Even when claims brought under the ATS:

"touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. [...] Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."²¹

The subsequent jurisprudence of lower courts in the US has shown that the decision in the *Kiobel* case has in fact significantly narrowed the options for this important avenue of redress for victims of corporate abuse. Given that the relatives of the Nigerian victims of alleged summary execution by the security forces of which Shell was accused of being accomplices have practically no chance of effective redress in their own country, they are left without justice in the absence of access to other jurisdictions.

The impact of US judicial decisions is substantial, given the number of transnational corporations based in that country and subject to its jurisdiction. The outcome in *Kiobel* was followed by similar decisions by lower courts dismissing a number of suits under the ATS which had been running for several years, in application of the *Kiobel* doctrine.

²¹ *Kiobel v Royal Dutch Petroleum Co*, Case No 10-1491, 2013 (U.S. Apr. 17, 2013). At 1669

The so-called twin-cases, which related to Apartheid era violations, were subsequently dismissed by the Second Circuit Appeals Court in New York.²² The Court in this latter case adopted an even more restrictive interpretation of the *Kiobel* doctrine by holding that “The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States”, regardless of whether the alleged perpetrator of the offence was a national of the United States. Another long-running case, similarly affected, is the *Sarei et al vs Rio Tinto Plc case*²³ in which 10,000 residents of Bougainville in Papua New Guinea had sought to hold Rio Tinto responsible for its alleged complicity in human rights abuses committed by the Government in the South Pacific island of Bougainville. Several other similar cases have also been dismissed, although some courts have tried to relax these standards and plaintiffs’ lawyers and legal experts continue to put forward alternative arguments.²⁴

A recent decision by the US Supreme Court arguably further reduces the scope of personal jurisdiction in the US courts. In its judgement in *Daimler AG v Bauman*²⁵ - a case concerning alleged collaboration of Daimler’s Argentinian subsidiary Mercedes-Benz Argentina with the 1976-1983 dictatorship in the kidnapping, detention, torture and killing of a number of its workers - the majority of the Supreme Court overturned an earlier decision by the Ninth Circuit Appeals Court that had found that Mercedes-Benz USA (MBUSA) was an agent of Daimler, that MBUSA had the requisite level of activity in California, and that Daimler could be sued in California as its home.²⁶ The Supreme Court held that the activities of MBUSA in California were to be considered in relation to Daimler’s overall corporate activities ‘nationwide and worldwide’.²⁷ Without providing further guidance, the Court implied that the larger and more multinational a commercial enterprise, the less likely personal jurisdiction could be established on the basis of its relative presence in the forum state, however large. This reasoning may lead to more decisions exempting multinational companies from the jurisdiction of national courts.

Regulation and liability of parent companies

A key question in the debates about business and human rights has been the nature of the legal responsibility of parent companies in relation to harm caused or contributed to by their subsidiaries operating in foreign countries. Due to the corporate law doctrines of separate legal personality and limited responsibility of shareholders, together with the fact that business entities operate in different geographical locations, legal contexts and in contact with different stakeholders, the attribution of responsibility to the parent company has always been a challenge. State practice shows three approaches to dealing with the issue of parent company responsibility. One approach involves “piercing the corporate veil”, i.e. separating parent and subsidiary companies when such separation is no more than a fraudulent tool to avoid legal liability. Under a second approach, known as “integrated enterprise”, the acts of the subsidiary may be presumed to be those of the controlling parent company. Following a third approach,

²² *Balintulo v. Daimler AG*, 21 August 2013, p. 20. http://www.ca2.uscourts.gov/decisions/isysquery/751866d1-2b45-4b53-a311-933413280fc5/1/doc/09-2778_opn.pdf (accessed 28 March 2014). The Court of Appeals ordered the lower court to dismiss the case.

²³ *Sarei et al v. Rio Tinto Plc et al*, 9th U.S. Circuit Court of Appeals, No. 02-56256. <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/06/28/02-56256%20web.pdf> (accessed 28 March 2014).

²⁴ *Ahmed v. Magan*, No. 2:10-cv-00342, 2013 U.S. Dist., at *4 (S.D. Ohio Aug. 20, 2013) (report and recommendation of magistrate judge) adopted by, 2013 U.S. (S.D. Ohio Oct. 2, 2013); *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 U.S. at *36-44 (D. Mass. Aug. 14, 2013). See also Cassel, Douglas “Suing Americans for Human Rights Torts Overseas: The Supreme Court leaves the Door Open”, *Notre Dame Law Review*, Vol 89:4, 2014 (forthcoming).

²⁵ *Daimler AG v Bauman*, 14 January 2014 http://www.supremecourt.gov/opinions/13pdf/11-965_1qm2.pdf (accessed 28 March 2014).

²⁶ *Bauman v Daimler AG* <http://cdn.ca9.uscourts.gov/datastore/opinions/2011/05/18/07-15386.pdf> (accessed 28 March 2014).

²⁷ *Daimler AG v Bauman*, Op. Cit., note 25, p. 21.

the parent company may be directly liable when it fails to exercise due diligence in regard to the companies it controls.²⁸

The ICJ Panel's Report on Corporate Complicity encapsulated the responsibility of the parent company in the broad concept of complicity.²⁹ Generally, the basic principle is that the conduct of the subsidiary will not be identified with its parent. In terms of responsibility under the law of civil remedies, the parent company may be civilly responsible for its own acts or omissions if it acted negligently or intentionally and contributed to the causation of harm to others.³⁰ This principle has been affirmed in legal and judicial practice, although crucial areas relating to the responsibility of parent companies for harm to people living in the vicinity of their subsidiaries' operations remains unclear.

There have been at least two recent decisions by European courts in civil law suits that are significant in this context. The Court of Appeals in the United Kingdom ruled in *Chandler v Cape Plc* on the issue of parent company liability.³¹ In this case, the claimant had sued for damages caused by asbestosis contracted as a result of exposure to dust during his employment by Cape Products, a subsidiary of Cape Plc. He alleged that Cape Plc owed him a duty of care, *inter alia* because it employed individuals responsible for overseeing health and safety at Cape Products, in particular the Group Chief Medical Officer. In finding responsibility for the parent company, the Court ruled that:

"...in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection."³²

The Court of Appeal emphatically rejected blanket responsibility of parent companies for all torts committed by their subsidiary, limiting such responsibility only to certain cases in which the parent had control of the relevant affairs of the subsidiary.

In another significant ruling, a district court in the Netherlands, in the twin cases of Nigerian villagers and Friends of the Earth against Shell Plc and its Nigerian subsidiaries,³³ took a different view. This case relates to alleged harm not to an employee of the subsidiary but to the communities who lived in the surroundings of its operations. The District Court ruled:

"4.34. The District Court finds that the special relation or proximity between a parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent company of an international group of oil companies and the people living in the

²⁸ De Schutter, Olivier *Sovereignty-plus in the era of interdependence: toward an international convention on combating human rights violations by Transnational Corporations*. In: P. Bekker, R. Dolzer and M. Waibel (eds), *In making transnational law work in the global economy: essays in honour of Detlex Vagts*, Cambridge University Press : Cambridge (2010), pp. 245-284.

²⁹ Corporate Complicity & Legal Accountability, Report of the ICJ Panel of Legal Experts, 3 vols, Geneva, 2008, vol. 1.

³⁰ *Ibid.*, Vol. 3 Civil Remedies, p. 46 ff.

³¹ *Chandler v Cape plc*, England and Wales Court of Appeal (Civil Division) 25 April 2012, case number [2012] EWCA Civ 525, paras. 69-80. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html> (accessed 28 March 2014).

³² *Ibid.* para. 80

³³ *Milieudéfensie et al v Shell et al*, District Court of the Hague judgment of 30 January 2013, case number C/09/337058/HA ZA 09-1581 and C/09/365482 HA ZA 10-1665, available at: <http://www.milieudéfensie.nl/publicaties/bezwaren-uitspraken/final-judgment-dooh-vs-shell-oil-spill-goi> (accessed 28 March 2014).

vicinity of oil pipelines and oil facilities of its (sub-) subsidiaries in other countries. The District Court is of the opinion that this latter relationship is not nearly as close, so that the requirement of proximity will be fulfilled less readily. The duty of care of a parent company in respect of the employees of a subsidiary that operates in the same country further only comprises a relatively limited group of people, whereas a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries would create a duty of care in respect of a virtually unlimited group of people in many countries. The District Court believes that in the case at issue, it is far less quickly fair, just and reasonable than it was in *Chandler v Cape* to assume that such a duty of care on the part of the parent companies of the Shell Group exists.³⁴

The District Court ultimately cleared Shell Plc, the parent company based in The Netherlands, from civil responsibility in relation to claimants in Nigeria, but an appeal has been lodged. If the District Court decision is affirmed, this ruling may be a further setback to efforts to hold parent companies responsible in relation to the environmental damage emerging from their subsidiaries' operations under the common law of torts. Similar, if not more important, legal obstacles may also arise in relation to attempts to hold one company legally liable for its contribution to harm caused by another company with which it only has a contractual or commercial relationship (and not one of parent-subsidiary).

III. Outstanding issues and the need for standard-setting

The last decade has seen important progress in the formulation of standards concerning the conduct of business enterprises, including transnational corporations, and their eventual legal responsibility for harm to human rights. This progress has been coupled with increased visibility of abuses and their transnational nature. Despite this progress, significant areas remain in need of further clarification or development.

The research and consultation carried out by the ICJ confirms its previous findings³⁵ that the most acute challenges and needs in the area of business and human rights relate to the deficits both in ensuring the accountability of companies and in access to effective remedies for victims of abuse. Another area where many consider that more clarity, or at least affirmation, is necessary, is in the definition or application of standards relating to the extraterritorial dimension of the State duty to protect, including measures of prevention. The adoption of standards on gross human rights violations applicable to business enterprises is also a cross-cutting issue that requires attention. International monitoring and supervision is also seen as a necessary factor for improving the domestic application of international standards and the provision of effective domestic remedies. Finally, there is a realization that a formal and robust system of international cooperation in legal matters is needed both for effective investigations, adjudication of cases where necessary, and for the execution of judicial decisions.

Accountability and access to justice

Availability and effectiveness of remedies to provide redress to those who suffer harm as a result of the acts or omissions of business enterprises is perhaps the area where there is the most pressing need for action, including but not only through new international standards.

Under international human rights law, effective remedies for rights violations should generally be judicial, and must be judicial in respect of gross human rights violations, but administrative remedies may also in some instances meet the standard of effectiveness. Administrative mechanisms and procedures take a variety of forms,

³⁴ *Ibid.* para. 4.34, pp. 22-23.

³⁵ *Corporate Complicity & Legal Accountability*, Op. Cit note 29.

including thorough independent or semi-independent public institutions (such as National Human Rights Institutions and Parliamentary Commissions). However, for these administrative processes to constitute an adequate and effective remedy they must at a minimum enjoy independence; have the competence to adjudicate complaints applying fair hearing standards; make declarative determinations as to whether a violation impairing rights has occurred; and order appropriate reparation, including, but not limited to, compensation. Judicial mechanisms typically fulfil these functions and access to them must be afforded to anyone who claims their rights or obligations are infringed, even if only as a matter of last recourse to review the adequacy of administrative processes. Recourse to judicial bodies requires implementing legislation that recognizes the rights and provides protection for them.

Provisions of international human rights treaties, such as Article 2 of the International Covenant on Civil and Political Rights (ICCPR), guarantee the right to access to an effective remedy.³⁶ The UN Basic Principles and Guidelines on the right to remedy for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus of all States at the UN General Assembly in 2005, affirms the duty of States to “provide those who claim to be victims of ...human rights ...violations with equal and effective access to justice...irrespective of who may ultimately be the bearer of responsibility for the violation” and to “Provide effective remedies to victims, including reparation.” Note that this Principle (Principle 3) is applicable in respect of all human rights violations, not only gross violations.

While that right extends to instances of violations of rights by third parties, practice shows that there are significant obstacles – normative and practical - to the application of this right in the context of the abuse of rights by transnational businesses. Those difficulties have to do, among other reasons, with: prevailing rules on jurisdiction; the legal capacity of alleged victims to sue (legal standing) whether individually, in group or as a collective (in the case of indigenous groups); equality of arms (including evidentiary rules and costs in civil proceedings); enforcement of judgements; and a lack of understanding or knowledge among the affected people.³⁷ Many similar obstacles affect people’s access to both mechanisms of a non-judicial nature (administrative bodies, parliamentary commissions and similar bodies) and of a judicial nature. These problems do not call into question the validity of existing standards, but do serve to underscore that more specific standards are needed to guarantee the right to remedies and reparation in the specific context of businesses, especially in respect of their transnational operations.

Concerning access to remedies, the 2008 *Framework on Business and Human Rights* rightly recognized that the “patchwork of mechanisms remain incomplete and flawed. It must be improved in its parts and as a whole”.³⁸ The situation does not seem to have improved since then and, to the contrary, it seems to have gotten worse in some respects.³⁹ The unanimous recognition that the area of remedies needs more urgent attention led the Human Rights Council, when establishing the new Working Group on Business and Human Rights, to request the Working Group “to explore options and make recommendations... for enhancing access to effective remedies”,⁴⁰ a request which has not been meaningfully been complied with to date.

³⁶ See also, Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Articles 13 and 14 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 39 of the Convention on the Rights of the Child; Articles 25 and 63(1) of the American Convention on Human Rights; Article 7(1)(a) of the African Charter on Human and Peoples’ Rights; Articles 12 and 23 of the Arab Charter on Human Rights; Articles 5 (5), 13 and 41 of the European Convention on Human Rights; Article 47 of the Charter of Fundamental Rights of the EU; Article 27 of the Vienna Declaration and Program of Action.

³⁷ See generally, Skinner, G, McCorquodale, R, De Schutter, O. “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business”, ICAR, CORE and ECCJ, 2013.

³⁸ Protect, Respect and Remedy: a Framework for Business and Human Rights, Human Rights Council, UN Doc. A/HRC/8/5, 7 April 2008), para. 87.

³⁹ See review of developments above, p. 9 ff.

⁴⁰ Human Rights Council, Resolution A/HRC/RES/17/4, 6 July 2011, Operative paragraph 6(e).

As mentioned, there is an important accountability deficit in the area of businesses' human rights responsibilities. While business operations continue to expand across frontiers and allegations of abuse continue to emerge, there are in fact very few evident examples of businesses being held to account. This is due to a number of factors. First, the available legal avenues and institutions of accountability are limited, and in some cases have been weakened in recent times. While civil litigation is theoretically possible in almost all countries, it is overall rarely used and in most cases litigators have opted to sue in just a few number of North American and European countries. It is an option that may carry certain advantages, but also additional difficulties for the plaintiffs in terms of distance, transport, expense and knowledge of the forum.

Criminal prosecution is often not a feasible option and when criminal action is pursued it is generally confined to investigation or prosecution of individuals in managing positions within a company, rather than of the company itself. Labour and other administrative systems of inspection and accountability are generally weak in developing countries and those of developed countries rarely extend their reach to practices occurring in other jurisdictions.

At the international level the picture is no better. The *Guiding Principles* were primarily conceived as a tool for positive engagement; as a "game changer" and an instrument for a "paradigm shift" away from "naming and shaming" towards "knowing and showing". As such, its value as an accountability tool is limited, not least because the Principles themselves do not create a material or procedural basis for a cause of action by individuals for a violation of any of its contents. Nor can States that do not comply with the *Guiding Principles* be held accountable for that. Currently, most of the Special Procedures established within the UN Human Rights Council, including the Working Group on Business and Human Rights, do not serve as remedial mechanisms. There may be, however, some limited opportunities to use the complaints procedures of treaties, where the State has recognized the competence of the Committee to receive communications, and to use the Guiding Principles as an interpretive instrument in respect of States' treaty obligations and particularly the duty to protect. Nonetheless, the *Guiding Principles'* character as a non-binding instrument is necessarily a limitation on their possible effectiveness in enhancing remedies.

Companies are subject to a degree of international accountability in the framework of the procedures of the International Labour Organization, in which employers' representatives sit together with workers' representatives and governments. The records and performance of each constituency are addressed in this context, many times in a robust manner, although this does not in itself result in remedial action. To have an impact on potential remedies, the aggrieved party may have recourse to one of the two Special Procedures established by the ILO: the representations procedure (Articles 24 and 25 of the ILO Constitution) and the complaints procedure (Articles 26 and 34 of the ILO Constitution). In both cases workers' unions can institute proceedings against a State party to the relevant convention, but the ILO mechanism does not provide for the possibility of filing complaints against companies or employers.

Human rights treaties set out the general principles under which domestic jurisdictions provide for the right to a remedy and fair trial. In practice, most claims against business enterprises make use of the framework provided by private law in domestic jurisdictions and the corresponding rules set out by private international law on jurisdiction, choice of law and recognition and enforcement of judgements in civil and commercial matters. The international legal regimes in this field have limited geographical scope. The Hague Conference on Private International Law's 1980 Convention on International Access to Justice is especially relevant here but it has been ratified by only 26 of the 87 States which are members of the Hague Conference. The regime created by the European Union Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters (Regulation 44/2001/EC)⁴¹ operates only within the European

⁴¹ Brussels I Regulation Recast, Regulation 1215/2012/EU, to enter into force in January 2015.

Union. The Brussels I Regulation covers matters relating to jurisdiction, choice of law and enforcement of judgments within the EU. Although many of its principles are recognized beyond EU countries, it is binding only on EU Member States.

Private law as a tool to deal with claims relating to human rights violations (many times of a serious nature) offers an important avenue of redress for harm caused, potentially including harm affecting human rights, but it presents many of the inconveniences and impracticalities related to the private nature of legal actions under this regime. In a sense it is a highly imperfect tool that is used for lack of a suitable alternative under public law. One of these problems is that the burden (legal and financial) to carry the claim to completion is left with the claimant or plaintiff. Public legal aid is generally not available, or significantly limited, in private law claims in most countries. In this context, there have been efforts to instil human rights principles and concerns into the regime of private law on responsibility for tort. One recent example is the *Sophia Guidelines and Best Practices for International Civil Litigation for Human Rights Violations adopted by the International Law Association*.⁴² Another difficulty with private law actions relates to the substantive nature of the claims. While many bases for private actions, such as in the law of tort, carry some normative overlap with international human rights standards, the two regimes will rarely be coterminous.

There is currently no general international legal regime on corporate liability for human rights abuses although, in the context of litigation in the United States, it has been asserted that general international law (the “law of Nations”) may provide a subject matter basis for corporate criminal liability. Apart from the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography (OPSC, which provides in Article 3(4) for corporate legal liability),⁴³ and the Council of Europe Convention on the Protection of the Environment through Criminal Law (which also provides a regime of corporate liability in Article 9, but is not yet in force),⁴⁴ there are no other international legal instruments that require legal liability of corporations. Article 3(4) of OPSC provides as follows:

“Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article [sexual exploitation, transfer of organs, forced labour, illegal adoption of a child, child prostitution. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.”

The Convention on the Protection of the Environment through Criminal Law recognizes that a number of serious offences against the environment that endanger life and physical integrity of natural persons should be criminalised under national law. Article 9 of the Convention provides for corporate liability, as follows:

“1. Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative.

“2. Corporate liability under paragraph 1 of this article shall not exclude criminal proceedings against a natural person.

⁴² *Sophia Guidelines and Best Practices for International Civil Litigation for Human Rights Violations*, adopted by the International Law Association, 75th Conference, Sophia, August 2012.

⁴³ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 3(4) of the Optional Protocol builds on the model previously adopted in the UN Convention on organized crime and the Convention against corruption, among others.

⁴⁴ Council of Europe, Convention on the protection of the environment through criminal law, adopted on 4 November 1998, Strasbourg, <http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm> (Accessed 28 March 2014)

"3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 of this article or any part thereof or that it applies only to offences specified in such declaration."

This Convention also contains a section on international cooperation and mutual legal assistance. So far it has been ratified by only one State out of the three needed for it to enter into force. Nonetheless, the Convention has been influential at the level of the European Union where Directive 2008/99/EC on the Protection of the Environment through Criminal Law was adopted modelled on the provisions of the Council of Europe Convention.⁴⁵ No other region in the world has a similar legal regime.

A number of ILO Conventions establish responsibilities of employers (including business enterprises), for instance in relation to health and safety. Article 9 of the Convention 155 of 1981 on Occupational Safety and Health⁴⁶ prescribes that the enforcement of laws and regulations concerning occupational safety and health and the working environment "shall be secured by an adequate and appropriate system of inspection" and that the "enforcement system shall provide for adequate penalties for violations of the laws and regulations". Article 16(1) defines a series of responsibilities for the employers, in that: "Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health"; "chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken"; and, where necessary, to provide "adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health."

Other treaties, such as the Convention concerning Benefits in the Case of Employment Injury,⁴⁷ while guaranteeing entitlements for worker victims of employment accidents and injuries, do not as such require the domestic enactment of legal liability for business undertakings. This particular Convention nevertheless requires States to guarantee the right of appeal against administrative refusals to grant benefits. There are many other technical conventions on specific risks such as cancer, asbestos, radiation and chemicals that define employers' responsibilities. However, while the ILO system is highly relevant as to the substance of standards applicable also to businesses, enforcement and especially accountability and remedies are not optimally developed.

The application of the duty to protect - adoption of national legal frameworks of protection

The obligation of States to protect rights against abuse by third parties, including by business enterprises, is widely recognized.⁴⁸ So is the general duty to establish a national legal framework – i.e. criminal law in the case of protection of the right to life – as a key element for the protection of rights. In principle, it may be argued that the legal framework should also cover business enterprises and contemplate grounds for their liability. This doctrinal formulation has, however, not been met with consistent practice. For instance, in the context of litigation under the ATS in the United States, there has been significant controversy around the question of whether business enterprises are or can possibly be subject to international standards relating to crimes

⁴⁵ Council of Europe, Directive 2008/99/EC on the Protection of the Environment through Criminal Law, 19 November 2008, Official Journal of the European Union, L328/28, 6 December 2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF>.

⁴⁶ Convention concerning Occupational Safety and Health and the Working Environment (Entry into force: 11 Aug 1983) Adopted at 67th ILC session (22 Jun 1981)

⁴⁷ Convention concerning Benefits in the Case of Employment Injury (Entry into force: 28 Jul 1967) Adopted at 48th ILC session (8 Jul 1964)

⁴⁸ John Ruggie, Report on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035, 9 February 2007, paras. 10 and ff.

under international law.⁴⁹ On the other hand, while many States have in their national legal framework provisions establishing legal liability of legal entities (including businesses), many others do not or only partially provide for it. Company directors, as natural persons, normally fall within the scope of application of criminal law, including international criminal law. The result is a patchy system of legal accountability that leads to protection gaps that are more acute in certain jurisdictions than in others.

Research carried out by the ICJ regarding 26 jurisdictions in all continents,⁵⁰ and by other groups,⁵¹ shows that legislation and practice that protects rights *vis a vis* private actors such as businesses is generally insufficient and is widely diverse. In general, jurisdictions adopt a wide range of approaches, doctrines and methods to provide for the protection of rights, and in many cases there are areas where protective action is absent. Such diversity of approaches or lack thereof impacts on the effectiveness of protection afforded across jurisdictions, which could be significant in the context of business operations across frontiers where acts or omissions taking place in one jurisdiction may have impacts on people in another jurisdiction.

The manner in which States must implement their general obligations to protect against abuses by third parties encompasses legislative, administrative and other measures. Diversity of approaches and practices can also be found in this respect. States have diverse approaches as to the direct application of fundamental rights enshrined in their constitutions to legal entities. In Latin America, most States accept the direct application of constitutional rights to private actors, including legal entities (Argentina, Colombia, Ecuador, Guatemala, Venezuela and partially Brazil). South Africa and Philippines partially follow that doctrine, whereas Kenya and Nigeria appear to have inconclusive or contradictory jurisprudence in this respect. In States that accept the direct application of fundamental rights to private parties, the victim of a violation may have direct recourse to the courts seeking justice and remedies through procedural actions named *amparo*, *tutela* or protection action. On the other hand, most European States accept the indirect application of fundamental rights in relations between private parties.⁵²

ICJ research demonstrates that only a limited number of States studied (Australia, United States, The Netherlands, Kenya, Myanmar, Singapore, South Africa, Switzerland in our sample) provide in their national law for legal liability for corporations for all or some, gross human rights abuses; and an even smaller minority of States do so for all human rights violations or abuses. A larger group provide for corporate criminal liability for a limited number of offences relating to economic crimes or environmental crimes (including Argentina, Brazil, China, Spain, Italy, Guatemala, Republic of Korea, Nigeria and Thailand). Other States attach to companies the consequences of criminal conviction imposed on its directors or managers, or when the crime was committed in the course of ordinary company business or to the benefit of the company, but the company itself is not subject to prosecution (including Peru and Colombia). Still others do not provide for corporate criminal liability for corporations, but may allow other forms of responsibility such as administrative sanction. Some States do not recognize corporate liability – other than civil responsibility – at all, including Costa Rica, Poland, Vietnam and the Democratic Republic of Congo.

These findings are consistent with those of comparative research commissioned by the European Union in relation to criminal legal liability of legal entities (including business

⁴⁹ See, *Sosa*, 542 U.S. at 732; *Brief of Amicus curiae Professor James Crawford in support of conditional cross-petitioner, The Presbyterian Church of Sudan et al. V Talisman Energy Inc. No. 09-1418, June 23, 2010.*

⁵⁰ See country studies on Access to Justice: Human Rights Abuses involving corporations, at <http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/> (accessed 28 March 2014).

⁵¹ Ramasastry, A, and Thompson, M., *Commerce, Crime and Conflict: Legal Remedies for Private sector Liability for Grave Breaches of International Law*, FAFO 2006; Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, 2008.

⁵² ICJ Access to Justice studies, see Peru, Colombia, Argentina, Costa Rica, South Africa, among others.

enterprises).⁵³ This research found that 50 per cent of EU Member States have introduced general criminal liability in their legal systems and 41 per cent recognize criminal liability of legal entities only for specific offences. Among those States that recognize only administrative liability of legal entities, 39 per cent have introduced general administrative liability, whereas 33 per cent have liability for specific offences. Countries that adopt legal liability of legal entities only for specific offences do so mostly with regard to trafficking in human beings, sexual exploitation of children and child pornography, environmental crime, illicit trade in human organs and racism and xenophobia.⁵⁴ It is possible to observe a correlation between the recognized offences susceptible to be committed by legal entities and the international conventions that explicitly require States to do so in relation to human trafficking, child pornography and others.

The doctrinal concepts used to attach criminal liability to a corporation also differ across jurisdictions. Some States use the theory of identification, whereby the acts and mental state (*mens rea*) of the manager or CEO may be treated as the “directing mind” of the corporation and this mental state is attributed to the corporation. Others use the theory of *respondat superior* whereby the company as employer is responsible for the acts of its subordinates, as in the relationship of employer-employee or superior-subordinate. A third group uses a more novel concept of “corporate culture” to identify the corporate policies and procedures that have created a culture permissive or conducive to the commission of the offense. Many States use one or more, or a combination of these approaches.⁵⁵

Beyond criminal law, the law of civil remedies universally applies to harm committed also by companies.⁵⁶ Specific laws on consumer protection, environmental harm, employment relations may also establish grounds of legal liability for corporate bodies, which similar to the law of civil remedies may also fulfil the function of protecting rights without using the term explicitly.

Differences in approaches, legal doctrine and traditions are a common feature in comparative law and practice and are not *per se* a sign of dysfunction or lack of protection. The main concern has been that the level of protection that legal systems afford to individuals and groups must be at least consistent with what is required under international law and functionally equivalent with each other. The existing diversity of approaches largely originates in the different legal traditions and systems that form the basis of flexible provisions requiring States to adopt legal liability for legal entities (including business corporations). Thus, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography provides in Article 3(4) that:

Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article [sexual exploitation, transfer of organs, forced labour, illegal adoption of a child, child prostitution]. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.⁵⁷

⁵³ *Liability of Legal persons for offences in the EU*, G. Vermeulen, W. De Bondt, Ch. Ryckman, IRCP-Series, Vol. 44, Antwerpen, 2012- p. 79 and ff.

⁵⁴ *Ibid.* p. 83.

⁵⁵ Wells, Celia, “Corporate Liability Principles” paper for the ICJ Panel on Corporate Complicity (on file); Stewart, James G. Corporate war crimes, Open Society Justice Initiative, 2012.

⁵⁶ ICJ, *Op. Cit.* note 29

⁵⁷ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 3(4) of the Optional Protocol builds on the model previously adopted in the UN Convention on organized crime and the Convention against corruption, among others.

Beyond the existence of a legal framework in each State making, excluding or limiting legal accountability for businesses, lack of implementation and enforcement of such frameworks are key factors to explain several instances where individuals' rights have not been adequately protected or where victims of abuse have been unable to obtain redress. Lapses in enforcement and the provision of remedies and reparation can be explained by a complex set of factors that vary for each country but also present some common features. Among the most common problems are those related to: weakness in the rule of law (including regarding the independence of the judiciary and the work of the legal profession); public officers who are unaware or poorly equipped to uphold the law according to international standards; corruption; limited resources of protection mechanisms (including the judiciary); high court costs and costs of legal representation in legal suits; compounded by other procedural hurdles that create a system of disincentives to litigation against companies. All these factors are further compounded by the lack of strong international monitoring and supervision machinery to help States improve their domestic application of international standards in this area.

Legal framework for protection against gross/serious corporate human rights abuses

Some stakeholders consulted by the ICJ have referred to a special area of acute protection gaps in which further standard-setting may be suitable, namely "gross corporate human rights abuses."

In 2011, Professor Ruggie made a series of proposals for the follow-up to his mandate as SRSG to finish in June that year. Among those proposals, he called for a multilateral process to clarify the application of standards pertaining to gross human rights violations or abuses in relation to the conduct of business enterprises. He noted that "national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes". These abuses, he said, "typically arise in areas where the human rights regime cannot be expected to function as intended, such as armed conflict or other situations of heightened risk. Such divergence can only lead to increasing uncertainty for victims and business alike."

This is an area where "greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach", Ruggie proposed, either through a Special Procedure, and/or an intergovernmental working group. More clarity on the application of standards prohibiting gross human rights violations will lead to the application of "standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction."⁵⁸

Professor Ruggie reiterated his proposals in the context of the First Forum on Business and Human Rights, held in December 2012. He described the "applicability to companies of international standards prohibiting gross human rights abuses, potentially amounting to international crimes" as an area "that requires more immediate international attention". According to John Ruggie "courts have issued conflicting interpretations of what precisely the international standards stipulate. Greater legal clarity is needed for victims and companies alike". Ruggie suggested that "[o]nly an intergovernmental process can provide that clarity".⁵⁹

⁵⁸ Professor Ruggie suggested three options to accomplish this task: first, "an expert individual mandate or an expert Working Group"; second an "intergovernmental process of drafting a new international legal instrument to address the specific challenges posed by this protection gap". He went on to suggest the UN Convention against Corruption as a model to follow. A "third option would be to have an individual or Working Group mandate prepare the ground for an intergovernmental process". Recommendations on Follow Up to the Mandate, <http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf> (accessed 28 March 2014).

⁵⁹ Opening Address United Nations Forum on Business and Human Rights Geneva, Switzerland. John G. Ruggie 4 December 2012, available at:

The concept of "gross human rights violations"

One of the first issues to be considered in this context is the scope and content of the concept of "gross human rights abuses" in relation to the conduct of business enterprises. The concept of "gross human rights violations", or variations of that expression, has been used in different contexts within the United Nations. The former procedure under ECOSOC Resolution 1503 (XLVIII) – nowadays the Human Rights Council 'Complaint Procedure' under Resolution 5/1⁶⁰ – addressed situations that appear to reveal "a consistent pattern of gross and reliably attested violations of human rights".⁶¹

The term has also been used in the context of the work leading to the adoption by consensus of the resolution of the General Assembly in 2005 of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of international human rights law and serious violations of international humanitarian law (UN Basic Principles)*, the Vienna Declaration of 1993 and the Guidelines on Forced Displacement. It has now also been included in provisions of the Optional Protocols to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as discussed below. Over time, the international community's understanding of that term has evolved. In 1993, Theo Van Boven – the then Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – noted that "no agreed definition exists of the term "gross violations of human rights", and adopted an indicative and non-exhaustive list of elements comprised by that term. He noted that the term 'gross' indicated "the serious character of the violations but that the word 'gross' is also related to the type of human right that is being violated".⁶² Ultimately, the *UN Basic Principles* on the right to remedies defined the term as directed at "violations...which, by their very grave nature, constitute an affront to human dignity".⁶³ This definition leaves the concept open. During the negotiations and drafting of the Basic Principles, proposals to include a list of particular violations were discarded because they could not be agreed upon.

Theo Van Boven's earlier study had provided an "indicative or illustrative" list of gross violations which would include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender. His study at the same time recognized that under international law "the violation of any human right gives rise to a right to reparation for the victim".⁶⁴ Moreover, the structure and content of the *UN Basic Principles* show that they are not confined only to crimes under international law (for which special articles are devoted, i.e. Section III). Principles 3 and 4 defining the scope of the obligation to "respect, ensure respect for and implement international human rights law and

<http://www.business-humanrights.org/media/documents/ruggie-forum-address.pdf> (accessed 28 March 2014).

⁶⁰ HRC Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007, para. 85 and ff. In the context of the Human Rights Council, there is a complaint procedure to address "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances." The claimed violations have to relate to human rights and fundamental freedoms, and there is no further definition of terms that is publicly available.

⁶¹ See Philip Alston, *The Commission on Human Rights*, in Philip Alston (Ed.), *The United Nations and Human Rights*, Clarendon Press, Oxford, 1995, p. 144.

⁶² Commission on Human Rights, Theo Van Boven, Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", UN document No. E/CN.4/Sub.2/1993/8, 2 July 1993, para. 8. Online Version: http://www1.umn.edu/humanrts/demo/van%20Boven_1993.pdf.

⁶³ Adopted and proclaimed by the General Assembly resolution 60/147 of 16 December 2005.

⁶⁴ Van Boven, Op. Cit. note 62, para. 13.

international humanitarian law..." refer to the obligation to prevent, investigate and provide access to justice and remedies for violations (not only gross violations).

The ICJ Panel of Legal Experts' report on *Corporate Complicity & Legal Accountability* describes "gross human rights abuse" as:

"an infringement of a flagrant nature that amounts to a direct and outright assault on internationally recognized human rights. Gross human rights abuses include for example, crimes against humanity, enforced disappearances, extrajudicial executions, prolonged arbitrary detention, slavery and torture. The concept of gross human rights abuses is continuously developing and expanding, and abuses that were once not considered to amount to gross abuses, are now widely accepted as encompassed by the term".⁶⁵

This evolving understanding of "gross violations" began in the 1990s when the international community included more violations to the recognised list of gross violations. *The Vienna Declaration and Programme of Action* includes: "all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law", as gross violations or obstacles to the enjoyment of human rights.⁶⁶ And the *Basic Principles on Evictions and Displacements* declared that "[f]orced evictions constitute gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement".⁶⁷ More recently, Article 11 of the Optional Protocol to the ICESCR contemplates the possibility of an inquiry commission into allegations "indicating grave or systematic violations" of any of the economic, social and cultural rights set out in the Covenant. This builds on the similar provisions of Article 8 of the Optional Protocol to the CEDAW, and Article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. These instruments are relatively new and they have not yet generated jurisprudence on the subject, but they clearly incorporate within the international legal system the concept of gross violations pertaining to economic and social rights, women's rights against discrimination and the rights of persons with disabilities.

It can therefore be concluded that the content of the concept of "gross human rights abuses" as applied to business enterprises should also be understood as a concept broader than crimes under international law. It must go not only to the nature of the right violated, but to the degree and scope of the violation, such that no particular substantive violation is necessarily excluded from its ambit. If a new international instrument is to address those violations and abuses, and depending on the object and purpose of such an instrument, the content of the concept will need to be spelt out with sufficient clarity, similar to the way in which this has been done within Article 3 of the Optional Protocol to the CRC on the Sale of Children.

It is important to underscore that the *UN Basic Principles* concerned themselves not only with gross human rights violations, but also with "serious violations of international humanitarian law". While international humanitarian law violations are not human

⁶⁵ *Corporate Complicity and Legal Accountability*, Vol. 1, Op. Cit note 29, p. 5. According to the OHCHR Interpretative Guide on the Guiding principles: "Other kind of violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups" OHCHR, *The Corporate Responsibility to Respect Human Rights : An Interpretative Guide HR/PUB/12/02*, 2012.

⁶⁶ *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 30.

⁶⁷ Human Rights Council, *Basic Principles and Guidelines on Development based Evictions and Displacement*, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Document No. A/HRC/4/18. Online Version: http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf.

rights violations *stricto sensu*, there is necessarily considerable overlap between the two regimes, and certain wrongful conduct may give rise to both kinds of violations. In respect of business enterprises, violations of international humanitarian law (IHL) will typically arise in the context of armed conflict and where private military and security companies operate. In addressing business and human rights concerns, it is important not to sever artificially IHL concerns from human rights for treatment by the UN and other international domestic human rights institutions.

It should also be noted that the expression “*serious* human rights violations” has also been used instead or next to that of “*gross* human rights violations”. It is generally taken to reflect certain violations that are punished under criminal law. For instance, the Council of Europe’s Guidelines “Eradicating impunity for serious human rights violations” defines “serious human rights violations” as those acts in respect of which States have an obligation under the European Convention on Human Rights, and in the light of the Court’s case-law, to enact criminal law provisions.⁶⁸ More recently, the term was used in the context of the United Nations Arms Trade Treaty.⁶⁹

The application of standards on gross human rights violations to business enterprises

Professor Ruggie observed that: “national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes”. Although gross human rights violations as standards applicable to natural persons are clearly defined, there seems to be disagreement as to their applicability to legal entities (including business enterprises). An overview of national law and practice also shows a diversity of approaches and practices to legal liability of business enterprises (or more broadly legal entities). This diversity of approaches is somewhat more pronounced regarding corporate criminal legal liability where States adopt different formulas with variable scope of application and enforcement.

However, as already noted, international law is not totally silent on the matter of gross human rights violations committed with the participation of legal entities. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children (OPSC) provides in Article 3(4): “Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative”. The law and practice of many States also shows that several types of gross human rights violations already give rise to legal liability, even if the underlying domestic law is not always couched within a human rights framework. But the panorama is far from homogenous and there are important divergences that generate gaps in the protection afforded by the law. There are strong legal and policy arguments for strengthening the requirements under international law regarding legal entities’ liability for human rights violations, in particular the most serious ones. Here, as in other areas, the international legal regime is highly deficient.

The impact of existing gaps in the international legal framework and diversity in approaches in the protection afforded by courts and tribunals can be illustrated with some recent cases. Some US courts have held, in the context of litigation under the

⁶⁸ “Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to liberty and security (Article 5, paragraph 1, of the Convention) and of the right to respect for private and family life (Article 8 of the Convention). Not all violations of these articles will necessarily reach this threshold.” Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies, available at http://www.coe.int/t/dgi/publications/others/h-inf_2011_7en.pdf.

⁶⁹ United Nations Arms Trade Treaty, 2013, available at: https://unoda-web.s3.amazonaws.com/wp-content/uploads/2014/03/Ch_XXVI_08.pdf#page=22 (accessed 28 March 2014).

Alien Tort Statute, that customary international law relating to crimes under international law does not apply to corporations. The Court of Appeal for the Second Circuit in New York in *Kiobel v. Shell*⁷⁰ held that the “law of Nations” does not bind corporations and considered that the international rules concerning the prohibition of international crimes were not directly applicable to corporate entities. This view, which is challenged by many human rights organizations, was not later reconsidered by the Supreme Court, which in *Kiobel v. Shell* dismissed the case on the grounds of lack of jurisdiction *ratione materiae*.

As noted above, international humanitarian law, while not falling under the human rights regime *stricto sensu*, contains overlapping protection with human rights law, and victims of serious international humanitarian law violations are entitled to an effective remedy and reparation. In addition, most such violations give rise to individual criminal responsibility for the perpetrators, particularly those amounting to grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocol I and other crimes falling under the Rome Statute for the International Criminal Court.

In this connection, it is useful to highlight a case on appeal before the High Court of Versailles in France, challenging the legality of a concession contract signed by Israel and the corporation Citypass (created by Israeli companies with French Alstom, Alstom Transport and Veolia). The Court held that the provisions of international humanitarian law did not apply to the concerned companies. Among the international humanitarian law provisions the companies had allegedly breached were those concerning grave breaches of the Fourth Geneva Convention (the transfer of a population to an occupied territory). In this civil case, the Court held that the provisions would not apply to companies under any title, whether as treaties or custom, even if the underlying norms had the status of *jus cogens*. The Court did not address the issue of whether the companies’ conduct would constitute international crimes under French law.⁷¹ In France, the Penal Code recognizes criminal responsibility for legal entities such as corporations.

This state of the law in US federal and French jurisprudence is to be contrasted with existing legislation in the Netherlands, Australia and Canada to cite a few examples. In the latter two, incorporation of the Statute of the International Criminal Court (ICC) into the national legal system, where common law recognizes corporate criminal liability, has had the effect of automatically applying the crimes in the ICC Statute to corporations. In the Netherlands, the law establishes criminal liability for corporations. Whereas in Canada and Australia the law remains generally untested, in the Netherlands there have been some instances of vigorous application of the law.

The International Crimes Act⁷² in the Netherlands prohibits the commission of war crimes and crimes against humanity by Dutch nationals, including companies. Acts that amount to complicity in crimes, such as the facilitation or the aiding or abetting of crimes, are also criminalized. After three years of investigations, the Dutch Public Prosecution authority announced in May 2013 a decision not to continue investigation and prosecution against Lima Holding B.V., a company member of the Riwal Group and owner of the Israeli branch, for alleged involvement in war crimes (contribution to the transfer of Israeli population to occupied Palestinian territory). In analysing the company’s allegedly illegal conduct, the prosecutor weighed Riwal’s contribution against the entire settlement enterprise including the Wall, and deemed such contribution as minor (not substantial). The prosecutor argued that the restructuring of the company, following public investigations, had effectively served to terminate activities within Israel.⁷³ Riwal executives came under legal and political scrutiny as a result of the

⁷⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. September 17, 2010).

⁷¹ *Affaire Association France-Palestine Solidarité AFPS c/ Société Alstom Transport SA*, Cour d’Appel de Versailles, 22 March 2013.

⁷² International Crimes Act 2003 (Wet Internationale Misdaden), art. 2(2). See also Access to Justice: Human Rights Abuses Involving Corporations- The Netherlands, ICJ, Geneva 2010, p. 7.

⁷³ Al Haq, *Prosecutor dismisses war crimes case against Riwal*, <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal> (accessed 3 June 2014)

investigation The publicity and public pressure surrounding the case prompted Riwal to take steps to disassociate itself from its subsidiary and its operations in the OPT (now an Israeli company). Two prior warnings from the Dutch Ministries of Foreign Affairs and Economic Affairs to the company had not been sufficient for the company to take meaningful measures. Action by the prosecutor, seizure of evidence in Riwal's office and its executives' homes, combined with the inevitable publicity in these kind of cases appear to have led to bold company action and change of behaviour.

The qualification of conduct as a "gross human rights abuse" has implications for a number of standards relating to their application and enforcement. Professor Ruggie suggested that a decision on the application of these standards to business enterprises "should help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction".

Indeed, the recognition of certain conduct as a gross human rights abuse and, more specifically, as a crime under international law usually carries with it a series of consequences. Among them are the enhanced responsibilities of States to investigate, prosecute and punish, as well as a system of extraterritorial jurisdiction – including universal jurisdiction – to ensure those involved in serious violations and abuses do not escape punishment. For instance, the Convention against Torture (CAT) defines torture as a crime and requires ratifying States to criminalize it under national law (Article 4). It also provides for States to take measures to "establish its jurisdiction over the offences referred to in article 4", including when the offender is a national of the State or the victim is its national. In the case of an alleged offender present in its territory (even if it is not its national) States parties are obliged to establish jurisdiction if they do not extradite the alleged offender to another State with jurisdiction (Article 5). Similar obligations, but far more detailed, are contained in the international Convention for the Protection of All Persons from Enforced Disappearance (Articles 3-14).⁷⁴

These and other human rights treaties are, of course, limited to individual criminal responsibility and not that of a legal entity. The OPSC and the Convention on Trafficking of human beings are the exceptions to this approach.

The OPSC requires States parties to establish their jurisdiction over offences defined in the Optional Protocol along the same lines as the provisions in the Convention against Torture referred to above. The UN Convention against Transnational Organized Crime⁷⁵

⁷⁴ In addition, the UN Human Rights Committee has affirmed in its General Comment 31 that for certain obligations under the ICCPR there is an obligation for States to criminalize, at the very least, conducted amounting a violation of the right to life (eg, extrajudicial executions), torture and cruel, inhuman or degrading treatment or punishment and enforced. Regional human rights treaties also provide explicitly or through jurisprudence for obligations to criminalize such human rights violations. The Human Rights Committee has stated in General Comment 31:

"Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7)." para. 18

⁷⁵ United Nations Convention against Transnational Organized Crime, and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, adopted by General Assembly resolution 55/25, and entered into force on 25 December 2003. Similarly, the UN Convention against Corruption, adopted by the General Assembly by resolution 58/4 of 31 October 2003 and entered into force in 2005, provides also for legal responsibility of legal entities (article 26).

provides also for legal liability of legal entities (Article 10). It also provides for prosecution, investigation and jurisdiction over those offences (Article 15(2)) as follows:

"2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State Party;
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
- (c) The offence is:
 - (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;
 - (ii) One of those established in accordance with article 6, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1(a)(i) or (ii) or (b)(i), of this Convention within its territory"

The Protocol to the Convention against Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was concluded with the objective "to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases" and "to protect and assist the victims of trafficking in persons with full respect for their human rights".⁷⁶

With respect to gross violations that constitute crimes under international law, the *UN Basic Principles and Guidelines* contain a series of provisions regarding protection, investigation, remedy and justice. States have the duty to investigate and, if appropriate, prosecute and punish. States should also cooperate with one another and assist international judicial organs competent to investigate (Principle 4). Where appropriate, States should enact provisions for universal jurisdiction (Principle 5), not apply statutes of limitations to gross violations (Principle 6) and provide remedies to the victims, including "(a) Equal and effective access to justice, (b) Adequate, effective and prompt reparation for harm suffered, (c) Access to the relevant information concerning violations and reparations mechanisms (Principle 11)".

The *Basic Principles* also devote extensive attention to access to justice and reparations. Principle 12 provides that: "A victim... shall have equal access to an effective judicial remedy... Obligations... to secure the right to access to justice and fair and impartial proceedings shall be reflected in domestic laws...", including to provide assistance to victims seeking access to justice and the development of procedures for collective claims. It should be noted that the *Basic Principles* restate the obligation to provide access to justice for victims of all violations, and not only those classified as "gross violations" and "irrespective of who may ultimately be the bearer of responsibility for the violation..." (Principle 3), making this standard potentially applicable to abuses by business enterprises. To some extent, the *Basic Principles* provide an answer – at the level of a declaratory instrument – to Professor Ruggie's concerns cited above.

An additional highly relevant instrument are the *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, recommended to all States by the UN Human Rights Commission.⁷⁷ These Principles provide detailed prescriptions for States about human rights violations and serious crimes under international law. Serious crimes under international law under the Principles "encompasses grave breaches of the Geneva Conventions of 12 August 1949

⁷⁶ United Nations Office on Drugs and Crime, web site: <http://www.unodc.org/unodc/treaties/CTOC/> (accessed 28 March 2014).

⁷⁷ Resolution 2005/81, Commission of Human Rights, ECN.4/2005/102/Add 1

and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.”

Although the *Basic Principles* and the *Impunity Principles* take the form of a declarative instrument and its content reflects established international law. Any new proposal for another declarative instrument should show how such an instrument would add value to what has already been provided for in the *Basic Principles*.

State obligations to protect against human rights abuse by third parties, and its extraterritorial dimensions

The jurisprudence of international courts, quasi-judicial mechanisms and UN bodies regarding the obligations of States’ duty to protect *vis a vis* non-State actors confirms a generally formulated obligation of due diligence to take appropriate measures to prevent abuses by these parties, to investigate and, as appropriate, to punish perpetrators and/or provide redress. The Human Rights Committee has affirmed that:

“violations of rights may arise as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.⁷⁸

The Inter-American Court of Human Rights and the European Court of Human Rights have gone fundamentally in the same direction.⁷⁹

The specific measures that States should take to prevent possible abuses have been defined in the jurisprudence of regional human rights courts by reference to specific rights in certain conventions and on a case-by-case basis. In a broad fashion, those measures have been summarized in the *Guiding Principles* as monitoring, regulation, adjudication (investigation, and if appropriate prosecution and punishment) and/or redress.⁸⁰

However, apart from the desirability of more specific obligations applicable to the specific realities of businesses’ operations, a good part of the debate in the field of business and human rights pertains to the practical issues brought up by the extraterritorial dimensions of the State duty to protect rights. The *Guiding Principles* recommend: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”. States would have strong policy reasons to set out those expectations, but

⁷⁸ General Comment 31 The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, para. 8; *Velasquez Rodriguez case*, Judgment of 29 July 1988, Inter-American Court of Human Rights, paras. 166-174. See *State Responsibilities to Regulate and Adjudicate corporate Activities under the United Nations’ core Human Rights Treaties Individual report on the ICCPR (Report No. III)*, Prepared for the mandate of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises with the support of the Office of the UN High Commissioner for Human Rights June 2007.

⁷⁹ For instance the following holding:

“The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these erga omnes obligations embodied in Articles 1(1) and 2 of the Convention.(emphasis added)

Case Massacre of Mapiripan v. Colombia, judgment 15 September 2005, para 111. See also *Case of the Moiwans Community*, judgment of July 15, 2005, series c no. 124, note 4. para 211; *Case of the Sarayaku Indigenous People. Provisional Measure*, July 6, 2004 Order.

⁸⁰ HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. A/HRC/17/31, 21 March 2011, GP 1.

not a legal obligation because, according to the author of the *Guiding Principles*, international human rights law does not require States “to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction”.⁸¹ This has been by far one of the provisions in the *Guiding Principles* that has attracted most criticism from a diversity of commentators.⁸² Most instruments adopted subsequently have distanced themselves from that approach.

The approach adopted by the Committee on ESCR is consonant with that of the Maastricht Principles when stressing that, as part of their obligation to protect, States should take steps to “prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction” without undermining the sovereignty or diminishing the obligations of the host State.⁸³ Likewise, General Comment 16 of the Committee on the Rights of the Child explains that home States have obligations to respect, protect and fulfil children’s rights by business enterprises’ foreign operations when there is a reasonable link between the State and the conduct concerned, namely where the enterprise has a centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State (para 43).

General Comment 16 identifies a number of measures that States can take to prevent harm abroad, including making public finance and other public support conditional to carrying out a process to identify, prevent or mitigate any negative impacts on children’s rights in their overseas operations, taking into account the prior record of business enterprises for the same purposes; and ensuring that State agencies such as export credit agencies also take steps to identify, prevent and mitigate adverse impacts of projects they support.

The Maastricht Principles take the same approach. According to Principles 24 and 25, States must take measures “to ensure that non-State actors which they are in a position to regulate”, do not nullify or impair the enjoyment of economic, social and cultural rights. Under Principle 9, a State has obligations to respect, protect and fulfil economic, social and cultural rights *inter alia* in “b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;” and “c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law”.

The commentary to Guiding Principle 2 recognizes that at present States adopt a diversity of approaches to the issue, and some of the *Guiding Principles* (for instance Principles 3, 7 and 10) are potentially relevant for the protection of human rights outside the frontiers of a given State. A number of stakeholders have suggested that States should require businesses to undertake a process of due diligence with respect to their whole global operations as part of States’ obligation to prevent and ensure respect of human rights by businesses. States should affirm the “duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations”, including the parent company’s obligation to monitor the activities of its subsidiary and to seek to prevent and mitigate damage caused by its business relationships.⁸⁴ Similarly, it has been proposed that “States must enact parent company liability for human rights violations by its subsidiaries and subcontractors in its supply chain”.⁸⁵

⁸¹ Guiding Principle 2 and commentary; see also Report State Responsibilities to regulate, UN Doc. A/HRC/4/35/Add. 1, paras 85-92.

⁸² See, D. Augenstein and D. Kinley “When human rights ‘responsibilities’ become ‘duties’: the extra-territorial obligations of states that bind corporations”, in: Deva & Bilchitz, Op. cit. note 14, pp. 271- 294.

⁸³ Statement on ESCR and business, Op. Cit. note 17.

⁸⁴ Skinner, G, McCorquodale, R, De Schutter, Op. Cit. note 37, p. 65.

⁸⁵ CIDSE, Human Rights Due Diligence: Policy Measures for effective implementation, September, 2013, p. 12.

Regulatory extraterritorial jurisdiction, while not strange to State practice, is always a matter of controversy. Some States may resent the fact that other States “impose” their laws or standards over economic actors (subsidiaries) operating on their soil. There is also a fear that business enterprises operating across jurisdictions through subsidiaries, agents or contractual suppliers will thereby be subject to conflicting requirements in different jurisdictions. This would occur if the home State (where the parent company or investor is based) requires some conduct (i.e. certain form of due diligence) when the host State (where the subsidiary or investment take place) requires something different or nothing at all. Finally, there is a serious obstacle relating to the monitoring and enforcement of any requirement of due diligence or other kind of conduct that extends to conduct in other jurisdictions. States would usually face difficulties in monitoring or verifying the performance of such obligations by subsidiaries or suppliers based in other countries. To avoid or mitigate these risks it is necessary to have a set of common standards for all States, a system that assigns responsibilities or rights to regulate and create a framework for cooperation among States, and an international system of monitoring and supervision.⁸⁶

International cooperation for investigation and enforcement

The general obligation of international cooperation is one running throughout international human rights law, beginning with the UN Charter itself. Articles 55 and 56 of the Charter: “All Members Pledge themselves to take joint and separate action in cooperation with the Organizations” to achieve certain purposes, including “universal respect for, and observance of, human rights and fundamental freedoms...” Particular obligations of international cooperation appear throughout international human rights law.⁸⁷

The need to guarantee people’s access to justice and remedies in cases of alleged violations of their rights with the involvement of business enterprises raises a number of practical issues relating to investigations across jurisdictions, some of which had been illustrated in the Lima Holding /Rival case described above. Some of the same practical challenges also apply to the adoption of preventative measures with extraterritorial reach since, it may be argued that, it will be difficult for the home State to monitor compliance in third States without the cooperation of the host State.

Similarly, to effectively investigate allegations of gross human rights abuses or any human rights abuse committed abroad it will often be necessary to obtain the cooperation of police and judicial authorities in the host State. An effective investigation in accordance with international standards is essential to determine if prosecution is appropriate and likely to be successful. Gathering the necessary evidence in the context of transnational offences is particularly challenging and can only be aggravated by the complexity of corporate structures and the unfriendliness of procedural rules in this context. Cooperation among States is thus essential, as it is in the context of other transnational crimes such as the bribery of foreign public officials.

The Rival case illustrates the substantial challenges faced by investigations at the transnational level. The Dutch prosecutor was not confident in obtaining the necessary evidence for a conviction, much of which was located in the OPT and Israel and the collection of which would have required cooperation from the relevant authorities as well as important resources. In weighing all the factors, the prosecutor decided not to move forward. It is not difficult to imagine similar situations arising in other countries.

In the area of international legal and judicial cooperation and mutual legal assistance, there are a number of instruments of regional and international scope but they

⁸⁶ Skinner, G, McCorquodale, R, De Schutter Op. Cit. note 37.

⁸⁷ Universal Declaration of Human Rights Articles 22 and 29; Convention on the Rights of People with Disabilities-CRPD, article 32; CAT article 9(1); CESC (articles 2(1); 11(1), 22); among others.

constitute at best a patchy system of rules that so far has not enabled efficient cooperation across the board.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States parties to provide each other “the greatest measure of assistance in connection with criminal proceedings” relating to torture, including “the supply of all evidence at their disposal necessary for the proceedings”. A similar obligation is contained in the International Convention for the Protection of all Persons from Enforced Disappearances. The first two Optional Protocols to the Convention on the Rights of the Child also oblige States parties to cooperate in order to prevent and punish the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict.

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, determines that States parties must co-operate in connection with investigations, or criminal and extradition proceedings in relation to the offences set forth in the Protocol, “including assistance in obtaining evidence at their disposal necessary for the proceedings”.⁸⁸ In addition, under Article 6(2), States must fulfil their obligations arising from other treaties of mutual legal assistance that may exist between them. The OPSC is the only treaty within the human rights system that provides for legal liability for legal entities (which includes business corporations).

The UN Convention against Transnational Organized Crime, the UN Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials contain extensive provisions on State cooperation and mutual legal assistance that are useful precedents to take into account. Such cooperation extends to areas relating to exchange of information and data, judicial and administrative proceedings, gathering and securing evidence.

Beyond State cooperation and mutual legal assistance for investigation, international cooperation is also essential for the execution of civil judgments, or criminal orders for forfeiture and the like. Once prosecution has concluded and a conviction has been secured, or a civil suit has been successful, the resulting orders need to be enforced so that plaintiffs and victims obtain redress. Enforcement of judicial decisions is an essential element of an effective judicial remedy. The case *Lago Agrio vs Texaco/Chevron in Ecuador*, in the Amazonian jungle of Ecuador, is an example of the difficulties plaintiffs may experience in seeking redress for corporate wrongdoing. In the original lawsuit in the United States, the plaintiffs asserted that from 1972-1992, Texaco (later acquired by Chevron) released massive quantities of highly toxic petroleum waste into waters used for bathing, fishing, drinking and cooking, and that Texaco sprayed this waste onto local roads. In a decision on 16 August 2002, the US Court of Appeals for the Second Circuit dismissed the case on the basis of the *forum non conveniens* doctrine. The plaintiffs pursued the case before Ecuadorian courts and obtained a favourable final ruling ten years later, which Chevron is challenging before US courts as “fraudulent”. However, given that Chevron no longer holds assets in Ecuador, the plaintiffs now have the daunting task of pursuing enforcement of the ruling in other jurisdictions where Chevron holds assets. Some countries may argue that enforcement of judgments by an Ecuadorian court is precluded without a bilateral agreement that allows for recognition and enforcement.

There are some international instruments on mutual legal assistance and judicial cooperation in the enforcement of foreign judgments that have been concluded within the Hague Conference on Private International Law,⁸⁹ although none of these have

⁸⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002, article 6. Available Online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

⁸⁹ For example the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958), and the Convention on the Choice of Court (1965).

entered into force. In 1971, the Hague Conference concluded the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, which provided that any judicial decision adopted by a Court of a Contracting State shall be entitled to recognition and enforcement in another Contracting State if the court issuing the decision has jurisdiction, and if the judgment is final.⁹⁰ The Convention has been ratified only by Cyprus, Netherlands, Portugal and Kuwait. The *Brussels I* regulation has in practice superseded this agreement in relation to the three ratifying States that are members of the EU.

Negotiations in 2001 led to the conclusion of the *Hague Convention on Choice of Court Agreements*.⁹¹ Under Article 8 of this Convention, a judgment given by a designated court of a Contracting State shall be recognized and enforced in other Contracting States without any other review of the merits of the case and the judgment. This Convention only applies to civil and commercial matters, excluding, for instance, interim measures of protection from its purview. Currently, only Mexico has acceded to it. The United States and the European Union signed the Convention in 2009 but are yet to deposit instruments of ratification.⁹²

Other international instruments contain obligations for States to cooperate with other States in the recognition and enforcement of judicial decisions and procedures. For example, the *Convention on Civil Liability for Oil Pollution Damage* (1969), replaced by the Protocol of 1992,⁹³ states under Article 10:

"1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

- (a) where the judgment was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

"2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

Finally, Article 18 of the United Nations *Convention against Transnational Organized Crime* provides that State Parties have the obligation to afford one another the necessary co-operation and mutual assistance in investigations, prosecutions and proceedings in relation to the offences covered by the Convention. Although the Convention does not directly refer to the recognition and enforcement of judgments, under Article 16(12) a State Party shall consider the enforcement of a judgment imposed by another Party when a request for extradition, submitted with the purpose of enforcing a sentence, is refused because the person sought is a national of the requested State Party.

These instruments form a patchy framework for international cooperation in the investigation, prosecution and enforcement of judicial sentences. This system is in clear and pressing need of improvement to respond to the challenges of guaranteeing access to effective remedies for victims.

⁹⁰ The Hague Conference on Private International Law, *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Concluded on February 1971, art. 4. Available Online: http://www.hcch.net/index_en.php?act=conventions.text&cid=78 (accessed 28 March 2014).

⁹¹ Hague Conference on Private International Law, *Convention on Choice of Court Agreements*, concluded 30 of June 2005. Available Online: <http://www.hcch.net/upload/conventions/txt37en.pdf> (accessed 28 March 2014).

⁹² See: http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (accessed 28 March 2014).

⁹³ *Convention on Civil Liability for Oil Pollution Damage*, adopted 9 November 1969; Entry into force: 19 June 1975; replaced by 1992 Protocol: adopted 27 November 1992; Entry into force: 30 May 1996. Available Online: http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf (accessed 28 March 2014).

PART II

OPTIONS FOR AN INTERNATIONAL INSTRUMENT

There have been several calls for international instruments in the broad field of business and human rights, including for those of a legally binding nature. To date, the only instruments developed at the institutional level within the UN human rights system are the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted in 2003 by the expert Sub-Commission on the Promotion and Protection of Human Rights, but which were never adopted by an intergovernmental political body, and the Guiding *Principles on Business and Human Rights*. At the current stage of the debate, it is clear that there is growing support among a number of stakeholders for a legally binding instrument, although there is still disagreement about the content and timeliness of the idea.

The objective of the present part of the report is to focus on options for an international instrument. Such an instrument would likely take the form of a treaty but it is also possible that a declaratory instrument might emerge as an alternative interim step, should a binding instrument be seen as not politically feasible at present. Given that many States and the majority of civil society organizations agree on the need for a legally binding instrument, which in any event must be seen as the ultimate objective, the emphasis in the following sections will be on that particular option. It should be noted that a declaratory instrument might be formulated in such a way as to form the basis for a future treaty. Such an instrument may also be considered as a complementary option to a treaty, and also as a means for facilitating progress in regional initiatives, such as those presently underway in the Council of Europe.

The analysis in the preceding part of this report showed a number of clear reasons as to why there is need for a treaty, highlighting arguments in favour of enhancement, clarification and development of international standards mechanisms in several areas. An international instrument would help to codify and crystallize national progressive legislation and practice providing clarity and more certainty to States and business enterprises. The issues that emerge as suitable subjects for standard setting broadly point to the need to enhance accountability of business enterprises and remedies and reparation for victims. These issues include: an enhanced system of legal liability for companies, in particular in cases of abuses with strong transnational elements; related issues of corporate human rights due diligence; remedies and reparation (particularly judicial remedies); and international cooperation for investigation and adjudication of cases.

These issues can certainly be addressed by a combination of international approaches and instruments. In a sense, a “smart mix” of mandatory and voluntary initiatives would appear to be optimal at the international level. The *Guiding Principles* take the form of a non-binding instrument and many stakeholders do not see the need, at this point in time, for another such instrument of a general nature at the global level. Many States and civil society actors see more favourably an instrument that will work in complementarity with other existing instruments, including the *Guiding Principles*, rather than substituting for them.

Any international instrument should contribute to increased convergence of legal standards and approaches. From the point of view of business enterprises and their interests, the differences among national jurisdictions in laws and enforcement may result in an uneven playing field for businesses that operate in jurisdictions where there is a higher risk of liability in comparison with other jurisdictions where standards and their enforcement are weaker. Business actors may be uncertain as to the level of liability to which they may eventually be exposed in jurisdictions and this uncertainty can lead to some enterprises trying to capitalize on those differences to their own benefit and to the detriment of human rights. These differences may also foster an environment for a “race to the bottom” among States attempting to attract foreign investment and in response to the demand of some business enterprises for a more

favourable and flexible “business-friendly” environment. The race to the bottom can be expressed not only in terms of legislation but also in terms of ability or willingness to enforce the law.

Most stakeholders appear to favour an international instrument that would focus on additional specific obligations for States to regulate and make business enterprises accountable. Although there are a good number of scholars and organizations that would prefer to focus on developing the direct legal duties for transnational corporations and other business enterprises. The present report takes the former option, not because of doctrinal but practical reasons. In the current state of law and international institutions, the establishment of legal duties for business actors may gain political traction but might need State institutions to be implemented domestically through legislation and enforcement. Nevertheless, a new legally binding instrument may also pave the way for later developments for the direct duties of companies.

The final decision on whether a binding instrument is appropriate and/or feasible will depend in part on its potential contents. Part of the present debate as to content has focused on whether a treaty should or should not be restricted in its scope to “gross human rights abuses”,⁹⁴ or rather should extend to human rights more generally. There are important stakes in that debate but it will be important to ensure that the real issues are not lost from sight, namely: what may or may not be achieved by elaborating an instrument solely on “gross human rights abuses”? In practice, the main proponents of restricting the scope to “gross abuses” do not appear to have articulated arguments as to why it would be better to focus on those abuses and not more broadly. It certainly makes sense to give priority focus to the worst forms of abuse in terms of pursuing remediation and accountability. In addition, the issue of “gross abuses” as it relates to crimes under international law is in part a legacy of the unfinished business left by the Statute of the International Criminal Court that leaves legal entities such as business enterprises outside the jurisdiction of the Court. For some it seems necessary that any new instrument has a narrow focus, as opposed to one of general nature or a framework treaty.⁹⁵ On the other hand, there is a difference in identifying gross abuses as a priority and in proposing that such focus be exclusive.

The following sections will discuss the main ideas and arguments around each option, taking into account that the debate at the international institution level is still at an early stage. The report draws from some of the main discussions the ICJ has taken part in or observed so far during the year 2014, its own research and the views of stakeholders.

During March 2014, two important meetings were held where experts debated the need and contents of a legally binding instrument in a focussed way: a seminar co-organized by Ecuador and South Africa at the United Nations (11- 12 March 2014, in Geneva) and a hearing in the European Parliament (19 March 2014, in Brussels). Some of the issues considered in the following sections were raised on those occasions.⁹⁶

I. Legally binding instruments

The analysis developed in the first part of this report highlighted that international treaties are effective tools for prompting domestic legal reform and creating a framework for domestic remedies. Although States still face enormous challenges in the implementation of international obligations contained in existing human rights and labour treaties, the operation of a clear set of international standards in human rights

⁹⁴ See also: John Ruggie, “A UN Business and Human Rights Treaty? An Issues Brief, 28 January 2014.

⁹⁵ Remarks by John Knox, in Ecuador/South Africa “Workshop of Human Rights and Transnational Corporations: Paving the way for a Legally Binding Instrument”, 11 March 2014. http://www.southcentre.int/wp-content/uploads/2014/05/Ev_140311_Final-Report.pdf (accessed 3 June 2014)

⁹⁶ The video of the hearing in the European Parliament is available at: <https://docs.google.com/file/d/0ByNjAuHXn85NcF8wUTNpRGkxYms/edit?pli=1> (accessed 21 March 2014).

and related fields has proved to be effective. As a general rule, these instruments have been widely ratified, and their implementation has been facilitated by a series of non-binding instruments such as declarations, guidelines, principles, General Comments, resolutions containing normative elements, or model laws. The same can be done in the field of business and human rights.

Experience shows that the few cases of corporate human rights abuse that have ended in a remedial result for the victims or have been successfully addressed by public authorities were possible because of the existence of legal frameworks that allow for causes of action in civil litigation or define offences attributable to businesses. Such legal frameworks have been enacted in response to obligations set out in international treaties such as the Rome Statute of the International Criminal Court (under which framework, for instance, The Netherlands enacted the International Crimes Act that enabled public prosecutors to investigate and prosecute a number of corporate abuse cases, e.g. the Riwal case, cited above); or the Basel Convention on the Disposal of Toxic Waste (under which the European Union enacted a Directive binding also on The Netherlands and enabling prosecutors to successfully prosecute the *Trafigura case*⁹⁷); or the Protocol to the Convention on Transnational Organized Crime on Trafficking in Persons, especially Women and Children; or the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography (under which a number of national laws have been enacted enabling the prosecution of child trafficking and pornography cases).

National legislation duly enacted and compliant with international standards is a necessary element for the implementation of the State duty to protect rights and the provision of effective remedies. National authorities, including principally judicial authorities, act within the framework of the rule of law and base their acts and decisions on the law. National policies and programmes for the realization of rights also need to be framed in national law. International law and standards serve as common parameters and guidance for action by individual States.

As underscored above, remedies and accountability are priority areas for many stakeholders. An international treaty can be an effective tool to enable States to enact legislation defining business enterprises' responsibilities and establishing liabilities in cases of non-observance of the law. At the same time, national law so enacted can define causes of action and procedural avenues to guarantee victims' right to an effective remedy. Practice across States shows that national authorities (Parliaments or the executive) are more readily compelled to take action when this concerns an international obligation, the non-observance of which may entail international responsibility for the State.

The possibility for victims to sue companies directly in their domicile (whether it is in the host or home State) will help to redress the widely perceived inequality in rights and obligations that exist between companies on one side and people on the other side. According to some evaluations, the growing web of bilateral or multilateral agreements on investments and trade often grant business enterprises the right to sue governments before international arbitral tribunals, a right that individuals and communities do not have in relation to companies that pollute their environment or affect their rights. An international treaty that guarantees remedies for harm caused by companies is seen as a corrective instrument in this respect.⁹⁸

International monitoring and supervisory mechanisms fulfil the needed function of providing support to States to implement obligations under international treaties at the domestic level, identify the obstacles to this end and the potential means of overcoming them. Human rights treaties usually provide for such monitoring or supervisory

⁹⁷ See Business and Human Rights Resource Centre web site: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire> (accessed 28 March 2014).

⁹⁸ Remarks by Martin Khor, in seminar Ecuador/South Africa, 11 March 2014. Op. Cit note 95.

mechanisms. States parties often also set up a forum for State dialogue and decision-making through conferences of States parties. The function of such a supervisory mechanism, in addition to monitoring the compliance of States with the provisions of an international instrument, is to also provide commentary or jurisprudence, thus facilitating consistent implementation of the treaty across jurisdictions. The Conference of States parties would be a crucial step in creating an institutionalised forum within the United Nations to deal with issues of implementation and taking stock of new challenges and developments.

The conclusion of an international instrument, as critically important as it is, would not, in and of itself, constitute the sole solution to the protection gaps that exist across jurisdictions. An international instrument could be the basis for additional protocols, model laws, codes of conduct and other complementary instruments and jurisprudence. The establishment of an international judicial body – whether arbitral or not – may also be possible at a later stage using as its basis the main convention. Effective implementation at the domestic level depends very much on national will, capacity and resources. The present report recognizes that a number of issues concerning access to justice in cases of business human rights abuse may be addressed by initiatives concerning capacity building and facilitation of resources.⁹⁹ A legally binding instrument would be compatible with such initiatives.

An international instrument of a legally binding nature may also create a system of international cooperation in judicial and legal matters built on the basis of the principle of shared responsibility.¹⁰⁰ International cooperation would be necessary in several areas to realize the objectives of such a treaty. One crucial area is the area of mutual legal assistance in the investigation, collection of evidence, prosecution and recognition and enforcement of sentences in both criminal and civil cases. Such cooperation has been deemed necessary, and has proven effective, in various existing international legal regimes, e.g. for combatting corruption and organized crime. It is also considered increasingly necessary to combat international crimes under the Rome Statute.

One issue that will need to be examined carefully is the extraterritorial reach of regulatory jurisdiction, as opposed to adjudicatory jurisdiction. As explained above, regulation of conduct that takes place in other territories, even if it is imposed on the basis of the nationality of the enterprise, generates problems of possible conflicting regulatory regimes and, most importantly, a challenge of monitoring and verification.

On this point, expert Olivier De Schutter has suggested a possible international convention focussed on a system of rules that allocate responsibilities among States to regulate transnational corporations: “The adoption of an International Convention on Combating Human Rights Violations by Transnational Corporations would go beyond [such] unilateral measures” and “seek to minimize positive conflicts of jurisdiction by clarifying the conditions under which, where the host State authorities remain passive, the home State should compensate for such passivity by exercising extraterritorial jurisdiction over corporations of its nationality”.¹⁰¹

To minimize the risks of conflicts of law, Professor De Schutter suggests the Convention “could provide for consultations between both States where the home State intends to exercise extraterritorial jurisdiction”. The instrument “could also include provisions allowing a State on whose territory certain violations have taken place in which a TNC is implicated, to request the home State of the parent company to file proceedings against

⁹⁹ See in this regard the proposals contained in Zerk, Jennifer, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law remedies- A report prepared for the Office of the UN High Commissioner for Human Rights*, 2014, p. 11 and 111 ff.

¹⁰⁰ See generally Gowland, V. et al. (Ed.) *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, Martinus Nijhoff, 2000; p. 142.

¹⁰¹ De Schutter, Olivier. *Sovereignty-plus in the era of interdependence: toward an international convention on combating human rights violations by Transnational Corporations*. In: P. Bekker, R. Dolzer and M. Waibel (eds), *In making transnational law work in the global economy: essays in honour of Detlex Vagts*, Cambridge University Press: Cambridge (2010), p. 245-284 [footnotes omitted].

this company, international cooperation thus being put at the service of the effective implementation of the host country's legislation".¹⁰²

An International Tribunal for corporations?

The creation of an international tribunal to which people alleging harm caused by business enterprises may turn to seek justice and remedies has been proposed by some organizations. If there is support for this idea, an international treaty will be needed to create such a tribunal. This can be done in the main treaty or in a protocol to it.

Several models of international judicial adjudication can be considered as a possible basis for such a tribunal. At the moment, a group of experts has formulated a proposal for an international arbitral tribunal for businesses.* The present report is not the place to carry out a detailed assessment of that proposal but it should be recognized that arbitral tribunals have generally proved to be effective and relatively expeditious avenues to settle disputes. However, many human rights advocates are sceptical whether this kind of tribunal would be accessible to most people, since the costs of operations of such bodies normally must be borne by the parties to the dispute.

There is also a campaign underway for the establishment of an European Criminal Tribunal on the Environment and Health as a first step towards the establishment of an International Criminal Court on the Environment and Health.** However, it is not clear yet how these proposed tribunals would exert jurisdiction over business corporations.

To assess the feasibility of an international tribunal, regard should be had to the record of other existing international tribunals and the existing proposals for new international courts. At the moment only regional human rights courts exist in Europe, America and Africa, all of them with jurisdiction only over States. Proposals to establish a World Court of Human Rights, advanced by an initiative of Switzerland and endorsed at the Vienna plus 20 conference, which would have jurisdiction over States, has so far not been taken up by an intergovernmental body, although the question is under discussion by the Human Rights Council Advisory Committee of Experts.***

International tribunals are an important avenue to ensure justice and remedies for victims of rights violations. The impact of these tribunals is not only with respect to the number of cases they settle over time, which although significant for the victims is at the end only a modest number, but with respect to their impact on national laws and procedures that align themselves with the requirements and jurisprudence generated by tribunals.

* Cronstedt, Chambers, Margolis, Ronnegard, Thompson and Tyler, *An International Arbitration Tribunal On Business & Human Rights – Reshaping The Judiciary*, April 2014, available at:

http://www.globalgovernancewatch.org/docLib/20140430_International_Arbitration_Tribunal_BHR.pdf

** See Charter of Brussels, at <http://iecc-tpie.org/en>

*** See Swiss initiative, *Agenda for Human Rights*, project on a World Court for Human Rights, <http://www.udhr60.ch/research.html>; see also International Commission of Jurists, *Towards a World Court of Human Rights*, <http://www.udhr60.ch/docs/World-court-final1211%20.pdf>

¹⁰² Ibid.

So far most objections to a legally binding instrument relate to the timeliness of the proposal. In general, many States and other stakeholders look at a treaty as something desirable or possible within a period of time. Others advise caution and/or show scepticism, arguing in favour of an overriding need to preserve the positive atmosphere of dialogue and constructive engagements by all sides, which was laboriously achieved during the process of elaboration of the *Guiding Principles*. According to some of them, it would be too early to start discussing a treaty without allowing more time for implementation of the *Guiding Principles* – adopted only three years ago – and for them to show their effectiveness and without first demonstrating their “failure”. Some do not see the need for a treaty “at this moment”. Some opponents to a treaty express doubts about the sincerity of the proponents’ intentions and commitments to human rights – given that the proposals come from States facing important challenges to fully respect human rights – and tend to see other hidden reasons behind the proposals of a treaty. Ultimately, they warn, who will ratify such a treaty? It is likely that any new treaty will be ratified or acceded to by a few States only, making it ineffective. A few others fear that their particular initiatives to promote the implementation of the *Guiding Principles* or other instruments or statements will be clouded by increased visibility and attention towards a legally binding instrument.

On the other hand, many of those who favour an international treaty argue that such an instrument does not necessarily imply the failure of the *Guiding Principles* but constitutes a step forward in a path opened up by the *Principles* and will build on them. A treaty could enhance some of the *Guiding Principles* and provide States with the means for better implementation. Polarization is hardly inevitable, as feared by some people. To the contrary, dialogue and debate in an inter-governmental setting would likely be the best way to avoid poorly expressed arguments and confrontation based on misunderstandings and misimpressions. An inter-governmental forum within the UN Human Rights Council, and open to all stakeholders, would be the proposed venue for such a dialogue. Many public officials agree, in private, that it is worth exploring the option of an international treaty and that it is possible or desirable to move in this direction.

Models and options

Several existing treaties have been offered over time as models for a new treaty on human rights and business, or as examples of negotiation processes to follow. For instance, on the occasion of a consultation on the operationalization of the Framework *Protect, Respect and Remedy*, held in 2009, the ICJ suggested the possibility of expanding the jurisdiction of the International Criminal Court to legal entities, including corporations, a proposal which had been made by France at the 1998 Rome Conference, but ultimately rejected. This proposal was intended to address only one aspect of the question, not as a comprehensive strategy. Others highlighted the World Health Organization Framework Convention on Tobacco Control as a useful precedent on the kind of approach John Ruggie should adopt.¹⁰³ Other organizations suggested taking the process towards the Anti-Personal Land Mines Convention (Ottawa Treaty) and the ICC Statute as inspiration for bold action to set the pace and build consensus over time.¹⁰⁴ In 2008 John Ruggie had declined to follow the treaty path,¹⁰⁵ but in 2011 he suggested

¹⁰³ Corporate Accountability International, Comments to OHCHR Consultation: Operationalizing the “Protect, Respect, Remedy” framework presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 5-6 October 2009 (2009)

<http://www2.ohchr.org/english/issues/globalization/business/docs/CorpAcctIntl.pdf>; International Commission of Jurists, Submission to Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 5-6 October 2009 (2009)

<http://www2.ohchr.org/english/issues/globalization/business/docs/ICJ.pdf>.

¹⁰⁴ Misereor & Global Policy Forum Europe *Problematic Pragmatism: The Ruggie Report 2008, Background, Analysis and Perspectives*, June 2008 at 14 available at <http://www.wdev.eu/downloads/martensstrohscheidt.pdf>.

¹⁰⁵ John Ruggie: Business and human rights – Treaty road not travelled. 6 May 2008. www.ethicalcorp.com/content.asp?contentid=5887.

as one of the options for follow-up to his mandate an intergovernmental process on “gross human rights abuses”, using the UN Convention against Corruption as a model.¹⁰⁶

Concerning Professor Ruggie’s suggestion to use the UN Convention against Corruption as a model,¹⁰⁷ it has been pointed out that this model should be used with caution.¹⁰⁸ First, this and other similar conventions focus on one single issue or conduct (i.e. corruption) whereas a possible treaty in the field of business and human rights will have to deal with a range of conduct, even if it focuses only on the most serious offences, and thus is likely to be far more complex. There may also be important differences as to the incentives and driving forces for States to conclude a new treaty in the field of business and human rights as compared with anti-bribery conventions.

The Council of Europe *Convention on the Protection of the Environment through Criminal Law*, adopted in November 1998,¹⁰⁹ may also be considered as a source from which to borrow elements. An *International Convention on Environmental Crimes* largely based on this convention has recently been proposed, but it is not yet clear whether this proposal would focus on business enterprises.¹¹⁰ Under this proposed treaty, States would commit to “recognize, investigate, and prosecute a specific set of clearly defined environmental crimes under domestic law and provide mechanisms to enhance international cooperation and build domestic capacity for such investigations and prosecutions”. These offences would to some extent cover serious violations of the rights contained in the International Covenant on Economic, Social and Cultural Rights.

The Convention on the Protection of the Environment through Criminal Law recognizes that a number of serious offences against the environment that endanger life and physical integrity of natural persons should be criminalized under national law. Article 9 of the Convention provides for corporate liability, as referred to above. The Convention contains a section on international cooperation and mutual legal assistance. As mentioned, it has so far been ratified by only one State out of the three needed to enter into force. Nonetheless, the Convention has been influential at the level of the European Union where Directive 2008/99/EC on the Protection of the Environment through Criminal Law was modelled on the provisions of the Council of Europe Convention.¹¹¹

One of the advantages of this Convention is that it provides agreed definitions of offensive conduct that are regarded by many as crucial to address in a new instrument. In this regard, the 1991 Draft Code of Crimes against Peace and Security of Mankind, prepared by the International Law Commission, defined in Article 26 “wilful and severe damage to the environment” as an international crime.¹¹² This definition was not retained in the final project of 1996. These offenses are closely connected with the protection of some of the internationally recognized economic and social rights.

¹⁰⁶ Op. Cit note 10, p. 5 “Another possibility might be an intergovernmental process of drafting a new international legal instrument to address the specific challenges posed by this protection gap. The UN Convention against Corruption could provide an appropriate precedent and model for such an effort.”

¹⁰⁷ United Nations Convention Against Corruption, General Assembly resolution A/RES/58/4, 31 October 2003 https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

¹⁰⁸ Zerk, Op. Cit. 89, pp. 106-107.

¹⁰⁹ Council of Europe, Convention on the protection of the environment through criminal law, adopted on 4 November 1998, Strasbourg <http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm> (accessed 28 March 2014).

¹¹⁰ One Justice Project web site available at: <http://www.onejusticeproject.org/proposed-instruments/convention-on-environmental-crimes/> (accessed 28 March 2014).

¹¹¹ Council of Europe, Directive 2008/99/EC on the Protection of the Environment through Criminal Law, 19 November 2008, Official Journal of the European Union, L328/28, 6 December 2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF> (accessed 28 March 2014).

¹¹² Report of the International Law Commission on the Work of its forty-third session in Yearbook of the International Law Commission 1991, vol. 2, part 2, New York, 1994 UN Doc A/CN.4/SER.A/1991/Add.1.

Optional Protocols to ICCPR and /or ICESCR

One possible format for a legally binding instrument could be through the adoption of a further Optional Protocol to one or the two Covenants on human rights (the ICCPR and ICESCR). Such a protocol could establish the obligation of States parties to those Covenants to take preventative measures and also enact legal accountability for business enterprises that commit or are complicit in serious abuses of the rights contained in those treaties. One of the advantages of this model would be that it already provides a set of clearly defined rights as set out in the Covenants, making the task of defining the corporate offences to each of those rights easier. It would also cover a very large part of internationally recognized rights. In the case of the two Covenants there are also monitoring bodies, whose powers can be enlarged or fine-tuned as necessary, and a conference of States parties, which would provide a forum for the discussion of the initiative and its implementation. This model may face some resistance from States who see the two Covenants as very different instruments. Another difficulty, this time regarding content, is that the two Covenants do not cover collective rights, except in the case of common Article 1 concerning self-determination. Collective rights are seen by many as a key issue in today's debate concerning human rights and business and in need of greater protection.

The idea of an Optional Protocol has also been proposed with reference to the ICESCR alone and in relation to "the most serious violations of that covenant" that would be treated as crimes.¹¹³ Since this proposal is in the process of development, it is not clear at this stage whether it would target corporate offences and/or prescribe specific rules of conduct for business enterprises that States should enforce at the national level. In any case, an approach restricted only to ESC rights would probably be too limited.

Most likely a new treaty will have to draw from several existing models to deal with the unique and complex issues in the field of business and human rights. Some models may be appealing in relation to certain issues while others may be more attractive to deal with other issues. International human rights treaties offer a rich and diversified set of possible substantive provisions and monitoring mechanisms, and the experience gained through years of implementation can be very useful in identifying the areas in need of improvement. Very useful lessons may be drawn from this practice with a view to creating a new instrument that has the clear potential to be effective.

Possible content

The possible content of a potential treaty is currently under discussion among experts and civil society groups, although this discussion is preliminary to the main debate that should take place in an inter-governmental setting.

An international instrument, it has been suggested under one model, should focus on the issue of "gross human rights abuses" potentially amounting to crimes under international law committed by corporate entities.¹¹⁴ Those abuses are said to most likely occur in contexts where State protection institutions do not work as originally intended, such as areas in conflict or of "heightened risk". Because these proposals have not been the subject of elaboration so far, it is difficult to analyse them in detail. The focus on offences that are likely to occur in conflict situations seem to limit them to those defined as war crimes under international law, and complicity with those crimes, unless the term "conflict" is defined in a broader sense. On the other hand, situations of "heightened risk" seem to be still a vague concept that would need to be defined in the context of the international human rights system.

¹¹³ Jodoin, Sébastien, Explanatory Note on the Protection of Economic, Social & Cultural Rights through Criminal Law, 15 January 2014, available at: <http://www.onejusticeproject.org/wp-content/uploads/2013/12/Explanatory-Note-on-ESCR-and-Criminal-Law.pdf> (28 March 2014).

¹¹⁴ Ruggie, John, Op. Cit. note 10; see also intervention by John Knox in Ecuador/South Africa seminar 11-12 March 2014.

Terms such as “conflict-affected” areas, “heightened risk” and “weak governance” have been used within the OECD to provide guidance for responsible investments in those situations and cannot be automatically transplanted to the field of human rights without substantive clarifications. For instance, the OECD defines “conflict-affected” areas as those areas where there is “presence of armed conflict, widespread violence or *other risks of harm to people*”, which can hardly correspond to the meaning of conflict under humanitarian law.¹¹⁵ “Weak governance” zones are areas where the authorities are unwilling or unable to protect rights, provide public services and “ensuring that public sector management is efficient and effective”¹¹⁶ and “create a need for heightened managerial care... in order to ensure compliance with legal obligations and observance of international standards”.¹¹⁷ It is clear that the usefulness of these terms in the human rights field is limited. Besides, “gross human rights abuses” can occur at any time and circumstance and not only in conflict situations or “conflict-affected areas”.

Jennifer Zerk has highlighted some of the problems that a focus on “gross human rights abuse” would face at the level of implementation at the national level. Initiatives for higher convergence of national standards in this area would entail, for some States, the creation of separate rules, including on corporate complicity, for gross human rights abuses or the alignment of their general law with any new international standards. The former would be problematic due to the likely existence of “overlap between crimes relating to gross human rights abuses and crimes under general criminal law”. The creation of separate causes of civil action for gross human rights abuse would also be difficult to justify in policy terms.¹¹⁸ In many countries, criminal offences are not classified as “gross” or not but their degree of gravity is reflected in the sentencing or award phase of criminal or civil cases.

Many human rights organizations and experts take the position that any new instrument in the field of business and human rights should focus on the broad universe of human rights rather than on any specific set of rights or of violations thereof.¹¹⁹ They argue that focussing on “gross human rights abuses” that amount to crimes under international law would be insufficient and limiting of the whole array of problems that deserve attention. It would mean a focus on violations mostly of civil and political rights to the exclusion of economic, social and cultural rights, the violations of which can also be deemed as “gross abuse” depending upon the circumstances, scope and right(s) in question. This approach would go against the principles of indivisibility, universality and interdependence of all human rights and the many recent efforts and gains in the area of justiciability of economic and social rights.

The debate at the international institutional level on the content of any new instrument is in its early phases and has not focussed extensively yet on the other parts or sections of a possible treaty, other than the issue of corporate legal liability (whether focussed on gross abuses or on all abuses). In the light of the analysis carried out in the present report, and against the background of several examples of international instruments, a legally binding instrument will thus probably comprise several parts.

Given the current strong emphasis on prevention and preventative measures, as well as the growing attention and development of the principle of human rights due diligence by business enterprises, the inclusion of a section focussed on prevention would be highly

¹¹⁵ OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Organization for Economic Co-operation and Development, 2013, p. 13. Available at: <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf> (accessed 26 March 2014).

¹¹⁶ Ibid., p. 42.

¹¹⁷ OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, Organization for Economic Co-operation and Development, 2006, p. 21. Available at: <http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf> (accessed 26 March 2014).

¹¹⁸ Zerk, Op. Cit. note 99, pp. 108-109.

¹¹⁹ See statements by ESCR-Net, FIDH, and Franciscans International, and Surya Deva at http://www.business-humanrights.org/Documents/Legally_Binding_Instrument_Business_Human_Rights (accessed 25 March 2014).

desirable. Such a section may ideally contain some provisions concerning enterprises' due diligence in their global operations and human rights impact assessments.

A component on accountability may contain, apart from an important component focussed on the definition of corporate offences, both of a criminal and civil or tortious character, as well as provisions concerning effective remedies. Provisions concerning jurisdiction of national courts, modelled or building on existing instruments, may also be included in this section. Another section may contain provisions on suitable national and international mechanisms for monitoring and oversight, which should build on the accumulated experience of human rights treaty bodies and in particular on the innovative models of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention against Torture in relation to national and international monitoring bodies.

Another component of a possible treaty may focus on establishing an international system of cooperation in matters of mutual legal assistance for the exchange of information, investigation and recognition and enforcement of sentences. A treaty would also necessarily contain various procedural and other formal elements common to international treaties, including provisions on ratification, procedures for amendment, reservations, entry into force, secretariat services and similar amenities.

In any event, the content of any future instrument must be discussed in a forum and through procedures open to participation by all relevant stakeholders, and with full transparency. Whatever the final content, it would be very important that a new treaty has a clear focus and that its object and purpose is clear and well defined.

An indicative list of some elements of a possible treaty is included in the annex to this report.

Complementary tools to promote implementation of a treaty

A degree of scepticism has arisen among some stakeholders over what an international treaty might accomplish, particularly in view of the limited capacity of some governments to implement domestically international obligations and hold business enterprises accountable. Capacity building and resources are issues in the implementation process. A new instrument should be able to tackle this problem by creating or reinforcing duties and mechanisms to facilitate domestic implementation. This can be done, for instance, through provisions for model laws, as suggested by Professor Errol Mendes,¹²⁰ or even by the preparation of a Code of Conduct for transnational companies and investors, which could be annexed to the treaty or prepared at a later stage.

II. Non-binding instruments

Non-binding instruments, as discussed above, may take a variety of forms, such as declarations, principles, guidelines, resolutions or model laws. Depending on the content and developments subsequent to the adoption of a non-binding instrument, such an instrument may be a self-standing one or the prelude to a legally binding instrument. In the field of business and human rights few actors have suggested this kind of instrument as an option. One of the reasons for this is that the *Guiding Principles*, in the eyes of many, already occupy the place of a non-binding instrument, even if it was not negotiated among governments.

A declaratory instrument could be a viable option to make progress in the definition of standards that were not addressed, or were insufficiently addressed, in the *Guiding Principles*. This includes, for instance, the definition of corporate offences. Since States are generally less reticent to engage in standard setting that does not create binding legal obligations, this option may prove to be a viable one in the short term should

¹²⁰ Ecuador/South Africa workshop 11-12 March 2014, Op. Cit. note 95.

sufficient support for a binding instrument not be achieved at this point in time. Beyond provisions on corporate offences, a non-binding instrument may also contain elements that address issues of enterprise due diligence, remedies, and international cooperation.

The added value of an instrument aimed at defining rules of jurisdiction and cooperation may be limited when measured against the standards already set forth in instruments of similar nature, such as the UN Basic Guidelines and Principles on the right to Remedy and Reparation. Moreover, a declaratory instrument is likely to be an imperfect instrument to create institutions or oversight mechanisms, to establish a system of international cooperation, mutual legal assistance, and define jurisdictional issues.

A declaratory instrument may contribute to establishing a uniform definition of corporate human rights abuses so as to facilitate the conclusion of a binding instrument on the same at a later stage. This path was followed in the case of the Convention against Torture, the Convention on Enforced Disappearance, among others, which were preceded by the adoption of Declarations. A declaration could enumerate and define the content of gross abuses for which States should enact legal liability, including criminal when appropriate. Such a declaration would be complex, no more than the elaboration of a treaty, but not unfeasible. At the end the international stakeholders will need to evaluate whether it is worth undertaking this exercise, taking into account the amount of energy and resources it will consume, if it is envisaged that the next step would be a binding instrument requiring a similar amount of energy.

In his presentation in the seminar of 11-12 March 2014, Professor Surya Deva suggested a Declaration on the Human Rights Obligations of Business, along the lines of the Universal Declaration of Human Rights. Such a declaration would focus on the direct duties of businesses rather than on States' obligations to protect and to take action to regulate businesses. This Declaration, according to Professor Deva, would be an intermediate step towards the adoption of a legally binding instrument at a later stage.

There are important examples of non-binding instruments in this area. One of these is General Comment 16 by the Committee on the Rights of the Child. Other instruments are in the process of preparation. At its session of 26-29 November 2013, the Steering Committee on Human Rights (CDDH) of the Council of Europe adopted the draft Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights prepared by an expert group in which the ICJ participated. The expert group (CDDH-CORP) has also been given the mandate to elaborate a draft non-binding instrument in the field of business and human rights. Civil society organizations are proposing that such an instrument focuses on the issue of access to justice.

III. Views of stakeholders

This section presents in a summary fashion the views of States and stakeholders (business and civil society) obtained through consultations, bilateral conversations or the seminar that Ecuador and South Africa hosted on 11 and 12 March 2014 in Geneva, and other meetings.

A large group of States have joined Ecuador in its statement of September 2013 with the commitment to work towards the establishment of a legally binding instrument. The reasons for their choice vary and are reflected in the discussion on a legally binding instrument (above). Paramount among their concerns is the lack of balance of rights and obligations that accrue to transnational corporations. While investment and free trade agreements provide investors with high levels of protection and rights to sue governments, the international legal system does not provide for corresponding obligations and liabilities. Many business enterprises are perceived to have much more power even than many governments, and easily escape from national accountability mechanisms. Other States, including many among the Western Group (WEOG), have expressed opposition to the idea of a legally binding instrument, arguing existing commitments to the *Guiding Principles* and should focus on their implementation rather than distracting energy and resources from them and towards new initiatives.

Frequently, the consensus around the *Guiding Principles* is seen as a key element for its effectiveness and something that would be at risk if proposals for legally binding instruments go ahead.

The International Organization of Employers (IOE), which represents the interests of some business sectors, speaking at the Geneva seminar in March 2014, expressed scepticism and concern over the idea of a legally binding instrument. The IOE is committed to the implementation of the *Guiding Principles* and seems to see a conflict between working with the *Guiding Principles* and working towards the elaboration of an international treaty.

A large sector of civil society, in particular many non-governmental organizations, has expressed support to the initiative towards establishment of a legally binding instrument, as referenced in the introduction of the present study. They believe that there are important areas that need international regulation and stronger international mechanisms. However, there is also a sub-group of NGOs that, while not opposed to the objective of an international instrument have expressed concerns that States will treat the treaty-making process as an excuse not to take immediate measures under the *Guiding Principles*. All organizations believe that working towards a treaty in the field of business and human rights should not be the sole priority in this area, but that other priorities such as improving access to justice under existing international and domestic law, standards and mechanisms, should be maintained. There are also fears that processes will be concentrated in Geneva and will not allow for wider participation.

Some others believe that discussion of legally binding standards will be divisive and confrontational. They propose that the consensus-based environment around the *Guiding Principles* will be lost. One observer noted: "States and businesses will go back to their trenches" and a confrontational period will start. Some business representatives notably share that view that the progress and commitment to the implementation of the *Guiding Principles* by business enterprises will be lost and businesses will stop the implementation process. Some corporate social responsibility consultants expressed the concern that high levels of energy may go towards the negotiation of a treaty and this would jeopardize or upset their work, planning and investments carried out in creating tools and methodologies to work with businesses. This set of concerns argues in favour of a strategy of "decoupling" the new process of standard setting from the process of implementation of the *Guiding Principles*. In the circumstances, this strategy might prove to be the most viable.

Finally, some government delegates argue that a treaty in this area may attract a low level of ratification, thereby limiting its effectiveness, as has proven to be the case in respect of the Convention on the Rights of Migrant Workers. States that are most concerned or potentially affected in the area may not become parties. However, many civil society and government delegates remain optimistic at the prospects of wide ratification as a result of strong campaigning on a good international instrument. One argument in this respect holds that this project should take the long view. Even if such a treaty does not attract immediate wide-scale adherence, once a treaty is in force States will increasingly be enticed to become parties over time. Experience with other human treaties has shown that the process of widespread ratification is often gradual. Some delegates also argue that a treaty focussed on obligations for States will face the same, if not more, challenges of implementation than other human rights treaties.

CONCLUSIONS

Despite recent progress in the development of international and domestic law, standards and practice there are substantive areas of the relationship of business and human rights that remain in need of international regulation. The areas of legal accountability and remedies stand out as needing priority attention in a possible new international instrument. Effective implementation and modalities of operation of any such new substantive standards will also require the development of procedural standards and mechanisms: from international monitoring and supervision to improve domestic application to international corporation for investigation, sharing of information and enforcement of domestic judicial decisions. It is also in the implementation of existing standards that needs are patent.

International standards are powerful driving forces to operate changes in national laws and policies towards more convergence and coherence. Standards can take the form of both binding and non-binding instruments. This report finds that the proposal for a legally binding instrument at this moment enjoys wide support from a diversity of stakeholders, especially from civil society, and could be an effective instrument to address the existing gaps in regulation and the related lapses in protection. A non-binding instrument might also be an option, as a complementary instrument.

The elaboration of a legally binding instrument in the field of business and human rights will be a complex task, and instant results may be elusive. To be of added value, such an instrument should not only build on present achievements but also address outstanding issues. The complexity of the task should not be a deterrent. The international community has undertaken similar if not more complex tasks than this one. In the area of business and human rights, however, there is now substantive accumulated experience and models at the national and international levels from which ideas can be drawn, and in respect of which there remains space to innovate.

Since much of the scepticism or opposition to the idea of a legally binding instrument is grounded on fears that the achievements of the *Guiding Principles* in implementation and dialogue may be lost, the new process of standard setting should be carried out in such a way that any negative impact in this regard is mitigated or eliminated. At the same time, all relevant stakeholders, including States, should be able to take part in the process, including international organizations, all forms of civil society and victims of human rights abuses by businesses. In this regard, the most appropriate forum to carry out the elaboration of an international treaty is the primary UN human rights organ, namely the Human Rights Council. Nonetheless, ILO bodies, which hold a substantial stake in the process and outcome, should be kept closely involved. A formula for a joint ILO-UN process should therefore be explored.¹²¹

¹²¹ There is already some precedent on this. A Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART) was established to monitor the [ILO/UNESCO Recommendation concerning the Status of Teachers](http://www.ilo.org/sector/Resources/sectoral-standards/WCMS_162034/lang--en/index.htm), adopted on 5 October 1966 at a conference held in Paris at the UNESCO headquarters and organized in close cooperation with the ILO. http://www.ilo.org/sector/Resources/sectoral-standards/WCMS_162034/lang--en/index.htm (accessed 4 June 2014)

ANNEX

INDICATIVE ISSUES FOR AN INTERNATIONAL INSTRUMENT IN THE FIELD OF HUMAN RIGHTS AND BUSINESS AND TRANSNATIONAL COMPANIES

It will be necessary to reaffirm the principles that States have a duty to protect human rights and that businesses should respect human rights, with States taking measures to ensure they do so.

Prevention

State action, pursuant to their obligations to protect under international human rights law, in requiring businesses to assess and prevent risks of rights abuses is paramount. There are several options in this respect, and the forthcoming discussion should help to elucidate the degree of overlap or complementarity between them.

States must take measures, including legislation where appropriate, to ensure business enterprises under their jurisdiction, with due regard to their size and nature, adopt policies and implementation processes with a view to detecting, preventing or mitigating and remedying the violation or abuse of human rights in their operations, or complicity therein (human rights due diligence based on the *Guiding Principles*). Business enterprises under such obligation, especially those of substantial size and scope of operation and those engaging in transnational operations, may be required to submit their adopted policies consistent with international standards, before a national body which may conduct random verification of the policy's compliance with international standards and of its implementation in practice.

As an alternative, or in addition, States could prescribe that companies of a certain size and scope of operation and those engaging in transnational operations (to be defined according to the branch and international exposure) must adopt and implement a human rights code of conduct. The code must foresee the availability of remedies and reparation awarded by an independent body in which victims of alleged violations or abuses may file a complaint. Such a code must then be approved by a national focal point, able to receive and take into account objections and comments from host States, civil society, trade unions, clients and other persons affected by the business of the company. The focal point would not be empowered unilaterally to amend the code, but would make suggestions. As long as the code is insufficient, it would not be approved.

Consideration may also be given to subject prospective investments abroad, of a certain size and scope of operations, to the obligation to carry out impact assessments, with a clear human rights component, before the investment or funding decision (if it is a funding agency) is approved.

A national body (national contact point, such as existing national human rights institutions or ombudsmen) of multi-stakeholder composition, shall be given the power to monitor and promote these provisions at the national level. This provision may build on precedents in the Convention on the Rights of Persons with Disabilities (article 33(2), establishing a national body for monitoring and promotion), and the Optional Protocol to the Convention against Torture (establishing national mechanisms of prevention).

Accountability

The establishment of provisions on legal accountability of business enterprises will be of critical importance. They may contain obligations to enact legal liability for businesses (following the example of the Council of Europe Convention on the protection of the environment through criminal law) or generally for legal entities (following the model of the UNODC Convention on Transnational organized Crimes and the Optional Protocol on

the sale of children) for a series of offences that must be defined in the text of the treaty. Elaboration of this part is likely to be a complex exercise. Corporate liability should not exclude the liability of the natural persons (company managers or agents). As per existing international practice, the kind of legal liability to be enacted will need to depend on the legal system of each State (criminal, civil and/or administrative).

The definition of corporate offences may be developed, as explained in the body of this report, by using either of two techniques. One option is to elaborate a list of offences. The other, especially relevant if the treaty takes the form of an Optional Protocol to an existing human rights treaty, is to simply refer to violations of the rights recognized in the 'parent' treaty.

States may be bound to enact corporate or legal entity liability for acts of participation and/or complicity or other forms of accessory liability. This provision should be able to cover issues arising from parent-subsidiary company responsibility by clarifying in which cases the parent company can be responsible for contributing to the wrongful conduct of its subsidiary or company under its control, and/or in which cases it can be directly responsible for the wrongful conduct of its subsidiary. The rules on jurisdiction of national courts defined in the treaty should cover conduct that takes place outside the territorial jurisdiction of States, according to existing models in the above-mentioned treaties.

This section should also include provisions on adequate, effective and dissuasive penalties to be applicable to corporations or legal entities.

Remedies

This is another key section. States should undertake to provide effective remedies, including access to judicial remedies, for those who claim that their rights have been violated or impaired. The right of action should arise in relation to all rights recognized under national law. Those who have not obtained a satisfactory remedy before the internal company mechanism should be able to access remedies through public avenues, including the courts.

States should take appropriate measures to ensure effective access to remedial mechanisms, overcoming existing barriers. The level of detail to be included here requires further discussion, whether concerning provisions on legal standing, legal aid, or the like. The inclusion of detailed provisions concerning such issues may not be desirable, in order to avoid overloading the treaty. These issues might instead be addressed through guidelines or other complementary protocol or even a declaratory instrument. The possibility of an international individual communication procedure, perhaps through an optional provision or separate protocol, should be discussed. It might be included or reserved for future elaboration.

A provision defining the scope of jurisdiction of national tribunals is necessary. It should be fashioned based on the precedents in the Convention on Transnational Organized Crime or similar conventions. A State may also establish its jurisdiction over: offences defined in the treaty when the offence is committed against a national of that State; offences committed by a national of that State or has substantial activities in it; the victim is a national of that State; or the offence is committed outside the State territory with a view to the commission of a serious offence within the State territory. Certain offences should be subject to the principle of universal jurisdiction.

International monitoring and supervision

An international supervisory mechanism should be contemplated in the treaty. It may adopt certain innovations not reflected in existing human rights treaty bodies and be able to carry out visits to countries to monitor and promote compliance with the provisions of the treaty. Such a mechanism may build on the model of peer review under the OECD Anti-Bribery Convention, or the model of the Sub-Committee on

Prevention of Torture created under the Optional Protocol to the Convention against Torture. Both mechanisms involve visits to countries and the issuing of subsequent reports, in addition to other tasks. Such a monitoring body may work with national focal points, established under a separate provision.

International judicial cooperation and mutual legal assistance

Provisions on international cooperation to enable the exchange of information, investigation and, if appropriate, prosecution or adjudication of transnational cases or offences defined in the treaty should be included. Several existing treaties offer interesting models to follow in this respect.

International cooperation may also be needed for the recognition and enforcement of civil orders and/or criminal sentences. There may be in this respect some overlap with existing legal frameworks, and discussions at the inter-governmental level may help to elucidate the extent to which these provisions are viable.

Miscellaneous provisions

Miscellaneous provisions should deal with the establishment of a conference of States parties to the convention in which issues concerning implementation of the treaty, as well as proposals for amendment, can be addressed. It could also be the appropriate forum for consultations between States (home States and host States) regarding legislation and judicial proceedings that may pose problems for them, or situations in which one State may want another State to take action.

The usual provisions on ratification, entry into force, reservations and denunciation should also be included.

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