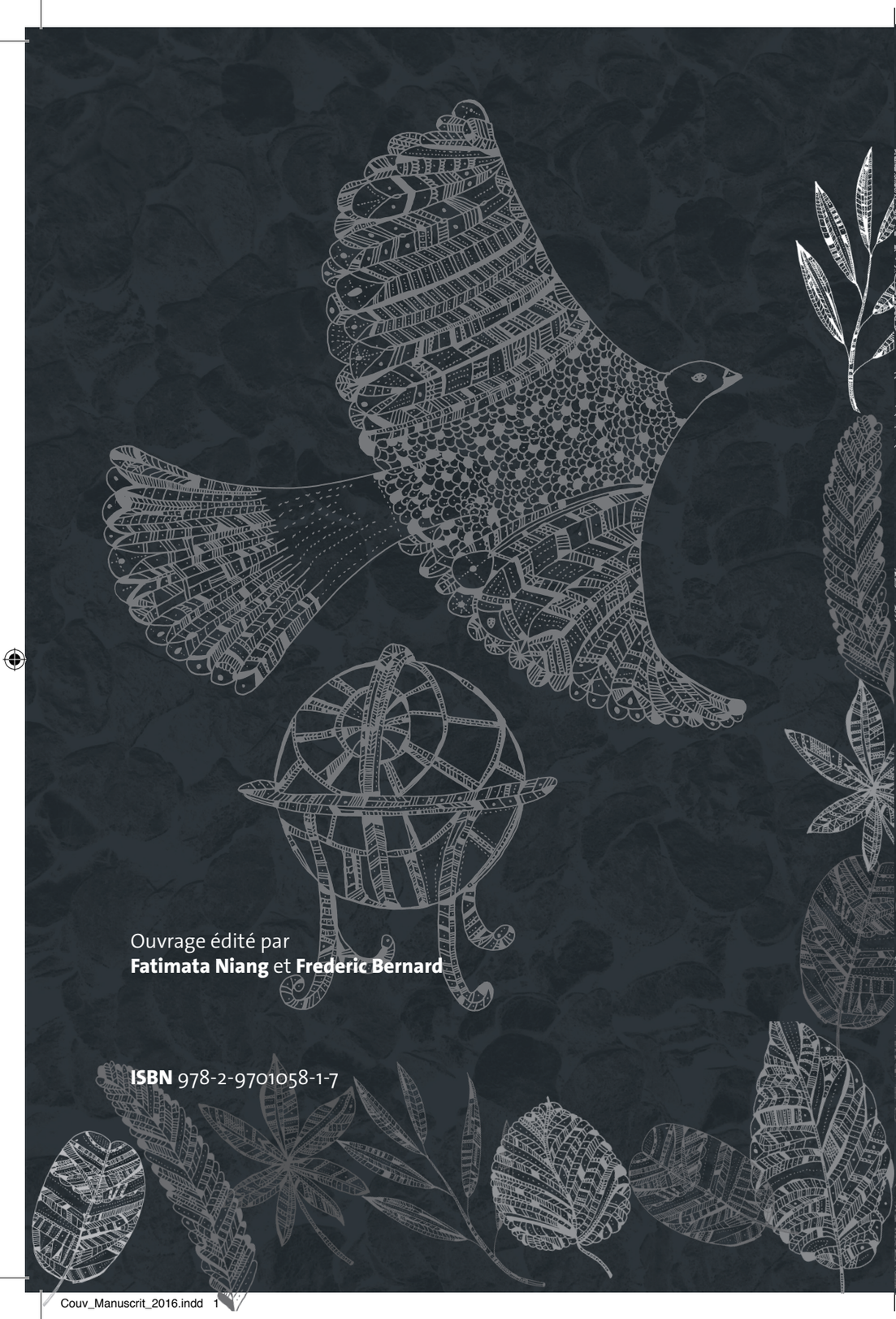

Ouvrage édité par
Fatimata Niang et **Frederic Bernard**

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Avant-propos

Depuis l'automne 2013, l'Université de Genève, sous l'impulsion de Madame la Professeure Micheline Calmy-Rey, organise un colloque consacré aux droits humains.

Après la première édition consacrée à *Universalité et Régionalisation*, la deuxième édition, dévolue à la thématique de la promotion et de la défense des droits de l'enfant, la troisième édition a porté sur les interactions et les défis que soulève le commerce et les droits humains.

Le présent ouvrage réunit les contributions issues du colloque qui s'est tenu les 7 et 8 octobre 2015 à l'Université de Genève. Il est le fruit d'une étroite collaboration entre l'Université de Genève (Dr Frédéric Bernard, Dr Frédéric Esposito, Dr Fatimata Niang), l'Académie de droit international et humanitaire (Prof. Robert Roth), l'Institut international des droits de l'enfant (Prof. Jean Zermatten), le Centre inter-facultaire en droits de l'enfant (Prof. Philip Jaffé) et le Haut-Commissariat aux Droits de l'Homme (Mme Lene Wendland).

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Enfin, tous nos remerciements au Dr Marc Roissard de Bellet pour sa relecture attentive du manuscrit.

Frédéric Bernard et Fatimata Niang, Genève, le 29 septembre 2016

VALENTIN ZELLWEGER *

Réflexions préliminaires sur le thème du commerce et des droits humains

Les entreprises qui respectent les droits humains peuvent apporter une précieuse contribution à la stabilité des communautés dans lesquelles elles opèrent. Elles peuvent, en appliquant un *business model* responsable, contribuer à favoriser le développement et accroître le bien-être de la population.

Notre but doit donc être d'encourager un dialogue constant entre le secteur privé, la société civile, les institutions académiques et les gouvernements. Ce dialogue doit permettre de dégager des solutions *durables* pour renforcer la contribution des acteurs économiques au respect des droits humains, à la paix et à la stabilité, tout en maintenant un cadre propice aux investissements et au développement durable.

En tant que siège de quelques-unes des grandes multinationales, en particulier dans les secteurs de l'industrie agro-alimentaire et pharmaceutique, des services financiers, de l'industrie extractive et du négoce, la Suisse entend assumer pleinement ses responsabilités dans ce débat. Elle participe à la recherche de solutions permettant de garantir le respect des droits humains et d'apporter aux entreprises des conseils avisés.

Je vous propose aujourd'hui de regarder, dans une première partie, les *raisons intrinsèques* qui devraient inciter les entreprises à accorder plus d'attention à la question des droits humains. Dans une seconde partie, nous parlerons *des obligations juridiques des entreprises* et *des manières de s'assurer leur engagement.*

Nous toucherons enfin à la question de la lutte contre la corruption, et comment son dispositif répressif pourrait être avantageusement complémenté et renforcé par la perspective des droits humains. Là, la question de la protection des victimes contre les effets négatifs de la corruption sur les droits humains, qui sera traitée ensuite dans le premier atelier, trouvera sa place dans nos réflexions.

* Représentant permanent de la Suisse auprès de l'office des Nations Unies, ancien Directeur de la Direction du Droit international public.

I. Les raisons de l'engagement des entreprises en faveur des droits humains

Les raisons qui devraient inciter les entreprises à s'engager en faveur des droits humains relèvent non seulement d'un devoir moral, mais les intérêts économiques des entreprises y sont étroitement liés.

D'abord, la *prévention des risques*. Il est évident que les entreprises impliquées dans des violations des droits humains – ou qui y sont associées, à tort ou à raison –, prennent des risques importants: elles s'exposent, par exemple, à des atteintes à leur réputation, à la baisse de leur cote boursière, ou à des actions pénales.

Le nombre croissant de procédures judiciaires en témoigne – et les procédures ne concernent pas seulement les entreprises minières ou extractives, particulièrement exposées. Des entreprises de secteurs tels que l'habillement, l'industrie pharmaceutique et alimentaire, les services financiers ou encore les fournisseurs de services Internet sont aussi l'objet d'actions judiciaires. Par exemple, des actions intentées contre Yahoo à cause de la divulgation de données relatives à des opposants à certains régimes autoritaires.

Rendue possible par les nouvelles technologies de communication et les médias sociaux, la diffusion de rapports faisant état de violations des droits humains par une multinationale permet de mobiliser très rapidement la sensibilité de l'opinion publique, pour la voir transformée en immense pression sur une entreprise et sur le gouvernement de l'Etat où elle a son siège.

Deuxièmement, les entreprises ont tout intérêt à prendre en compte la question des droits humains, parce qu'elles voient ainsi leur capacité d'influence augmentée. Prenons l'exemple d'un opérateur touristique: s'il cherche à influer positivement sur la situation des droits humains dans une région, il contribuera aussi à garantir des conditions de vie décentes et une stabilité propice aux affaires et aux investissements, ce qui servira directement ses intérêts économiques.

L'engagement des entreprises en faveur des droits humains, outre de participer au bien collectif, peut également se répercuter positivement sur leurs activités et leur permettre d'augmenter leur influence politique, par exemple dans les domaines du respect du droit du travail et du devoir de diligence en ce qui concerne les droits humains dans le contexte même de l'entreprise.

II. La nature et la sanction des obligations juridiques des entreprises en matière de droits humains

A. Nature des obligations juridiques

De prime abord, ce thème est relativement complexe, et les juristes ne s'y intéressent que depuis peu. Mais n'oublions pas que la doctrine et la jurisprudence reconnaissent depuis longtemps déjà aux entreprises la possibilité d'être titulaires de certains droits humains. D'un point de vue dogmatique, cette reconnaissance est plutôt surprenante si l'on part du principe que les droits humains – du moins dans la perspective du droit naturel de l'Occident – se fondent sur la dignité humaine, et donc sur la personne humaine, excluant presque par définition la personne morale.

Ce dilemme s'exprime clairement dans la célèbre formule de Gaston Jèze «Je n'ai jamais déjeuné avec une personne morale», ce à quoi un autre juriste français avait rétorqué: « Moi non plus, mais je l'ai souvent vue payer l'addition. »

Il n'en est pas différemment pour les entreprises – du point de vue juridique, elles ont des droits et des obligations, elles sont ainsi des sujets de droit à part entière. Dans sa jurisprudence, la Cour européenne des droits humains relève régulièrement que les entreprises sont en droit d'invoquer les droits humains et les droits fondamentaux pour autant que ceux-ci soient pertinents. Outre la liberté de propriété, les droits fondamentaux les plus fréquemment invoqués sont la liberté de commerce et d'industrie ainsi que la liberté d'expression et d'information.

Si l'on admet que la capacité d'exercer des droits va de pair avec la responsabilité d'assumer des obligations correspondantes, il est légitime de se demander quelles règles s'appliquent aux entreprises, et selon quel degré de contrainte. Cette question est particulièrement pertinente lorsqu'il s'agit d'activités déployées par des entreprises transnationales occupant une position de marché dominante dans des pays où l'Etat de droit est fragile, ou dans lesquelles les structures publiques sont instables.

Ces entreprises, et avec elles leurs pays d'origine, ont plus que jamais le devoir d'assumer leurs responsabilités pour l'application des normes internationales de droits humains.

B. Les garanties du respect des engagements des entreprises

La communauté internationale œuvre déjà à la mise en place de normes et de mécanismes pour éviter que des entreprises ne contribuent, par leurs activités, à générer ou à entretenir des conflits ou des violations des droits humains. Une approche des entreprises fondée sur leur responsabilité sociale complémente pleinement ces efforts.

Dans ces démarches de consolidation des règles et principes, un des plus grands défis est celui de la fragmentation croissante du droit international public et de son application. En effet, la création de nouveaux mécanismes de promotion et de protection des droits humains (aux niveaux nationaux, régionaux, mondiaux), pas toujours coordonnés entre eux, peut se traduire par des problèmes d'interprétation et de mise en œuvre.

Il est donc important de mener une réflexion critique sur les conflits croissants entre des normes applicables. Il en va de la crédibilité même des politiques des droits humains, qui se mesure à leur capacité de garantir, aux niveaux national et international, la mise en œuvre et l'application des droits reconnus par le droit international public.

Les discussions sur les obligations des Etats et la responsabilité des entreprises dans les droits humains mettent parfaitement en lumière ces points. Le cadre de référence «protéger, respecter et réparer» des Nations Unies ainsi que les Principes directeurs relatifs aux entreprises et aux droits humains, adoptés en juin 2011 par le Conseil des droits humains des Nations Unies, constituent les principaux instruments internationaux spécifiques pour le secteur des entreprises et des droits humains.

En vertu de ces principes, les Etats ont l'obligation de protéger les droits humains, y compris pour les activités du secteur privé, tandis que les entreprises sont tenues de les respecter. L'Etat et les entreprises ont aussi l'obligation d'assurer aux individus et aux collectivités l'accès judiciaire et extrajudiciaire à des voies de recours efficaces.

Au cours de ces dernières années, ces principes ont été concrétisés dans plusieurs instruments internationaux auxquels les entreprises peuvent se rallier pour garantir le respect des droits humains.

Pour n'en citer que quelques-uns:

- Tout d'abord, un instrument qui est d'un intérêt particulier pour la Suisse: le Code de conduite international des entreprises de sécurité privées (ICoC,

2010), initiative suisse préparée sur la base du Document de Montreux sur les entreprises militaires et de sécurité privées (2008) avec des représentants de la branche et de la société civile. En le signant, les entreprises s'engagent à respecter les droits humains et à se soumettre à un mécanisme de contrôle indépendant. Désormais reconnu au niveau mondial comme le texte de référence en matière de sécurité privée, le code est utilisé par un grand nombre d'organisations et de gouvernements pour l'élaboration de normes nationales et internationales.

L'Association du Code de conduite international des entreprises de sécurité privées (ICoCA) a été fondée le 20 septembre 2013 à Genève et compte maintenant six Etats (l'Australie, les Etats-Unis, la Grande-Bretagne, la Norvège, la Suède et la Suisse), 14 ONG et plus de 80 entreprises de sécurité privées.

- Les Principes volontaires sur la sécurité et les droits humains, initiative lancée en 2001 par les Etats-Unis et le Royaume-Uni qui s'adresse aux entreprises actives dans le secteur de l'extraction (minière, gazière et pétrolière). Le texte encourage les entreprises à évaluer les risques, et à prendre des mesures pour que les entreprises de sécurité privées, les forces militaires et les forces de police qui sont responsables de la sécurité de leurs opérations respectent les droits humains et les libertés fondamentales des populations locales.
- Enfin, le Guide OCDE sur le devoir de diligence pour des chaînes d'approvisionnement responsables en minerais provenant de zones de conflit ou à haut risque. C'est un processus participatif impliquant des ONG, des gouvernements régionaux, les gouvernements des Etats membres de l'OCDE et tous les acteurs de la chaîne d'approvisionnement en métaux, notamment ceux de la région des Grands Lacs africains, dont des entreprises œuvrant dans le secteur de l'extraction, de l'affinage et de l'utilisation de minerais.

Bien sûr, ces efforts internationaux doivent ensuite être transposés en droit national. En Suisse, différents processus sont en cours:

- Le Conseil fédéral prépare actuellement un plan d'action national pour mettre en œuvre les Principes directeurs de l'ONU relatifs aux entreprises et aux droits humains.
- Outre un Rapport de base sur les matières première préparé par différents départements à l'intention du Conseil fédéral en 2013, celui-ci a soumis lui-même, à la demande du Parlement suisse, un Rapport concernant le respect des droits humains et de l'environnement dans les activités des entre-

prises suisses à l'étranger. Ce rapport esquisse certaines mesures législatives pour la publication d'informations non financières, ou l'introduction d'un devoir de diligence obligatoire pour les entreprises actives à l'étranger. Il incombe maintenant au Parlement d'y donner suite.

- Finalement, un exemple intéressant de comment une recommandation faite sur le plan international peut être convertie en obligation sur le plan national: dans la loi fédérale sur les prestations de sécurité privées fournies à l'étranger, qui est entrée en vigueur le mois dernier, les entreprises de sécurité qui établissent leur siège en Suisse ou qui veulent conclure des contrats avec la Suisse sont obligées d'avoir au préalable souscrit au Code de conduite international des entreprises de sécurité privées. Si d'autres pays choisissaient la même approche, le Code de conduite – un instrument non contraignant – pourrait être rendu obligatoire par les législations nationales. La multiplication de ces règles dans un nombre croissant de pays résulterait en leur application territoriale de plus en plus large, palliant ainsi à l'absence actuelle de règles internationales.

III. Le renforcement du dispositif répressif en matière de lutte contre la corruption

Dans le contexte d'une importance toujours croissante des multinationales ou des acteurs non gouvernementaux, ainsi que des organisations et organismes internationaux – comme le cas de la FIFA nous le rappelle en ce moment –, la corruption est, bien qu'ancien phénomène, d'une grande actualité.

Les interactions entre pouvoirs publics et secteur privé sont porteuses de grands risques, notamment dans les domaines des marchés publics et de la concession de licences, par exemple pour l'extraction de matières premières. Certains secteurs économiques – les matières premières, la construction ou la santé – et certains processus administratifs comme les procédures d'autorisation sont particulièrement exposés.

Les proportions du phénomène sont énormes: le montant des pots-de-vin qui circulent ainsi entre le privé et le secteur public par an se montent – selon certaines estimations – à plus de 1'000 milliards (*1 billion*) de dollars américains. La somme des dommages à imputer à la corruption serait de douze pour cent de l'activité économique brute mondiale.

L'expérience montre que les Etats qui connaissent un taux de corruption élevé enregistrent aussi un piètre bilan en matière de droits humains et se caractérisent par des institutions fragiles.

C'est ce qui ressort notamment de l'indice de perception de la corruption de l'organisation *Transparency International*. En d'autres termes: la corruption et les violations des droits humains tirent leur force du même sol, et ont souvent des racines communes.

C'est bien là notre propos aujourd'hui: corruption et violations des droits humains se *nourrissent mutuellement*. Ainsi, si on s'attaque à un problème, on touche aussi l'autre.

Un changement de perspective dans l'analyse, et dans la manière de combattre la corruption, s'impose donc aujourd'hui. Beaucoup de questions se posent dans ce contexte:

- D'abord, la corruption *peut*-elle être considérée, dans le système existant, comme une violation des droits humains?
- Ensuite, quels droits humains garantis par le droit international sont alors concrètement touchés?
- Est-ce qu'il existe des catégories de victimes différentes en fonction du type de corruption, à petite ou à grande échelle?
- Quels sont les devoirs de protection qui incombent aux Etats?
- Quels sont les avantages d'une intégration de la question des droits humains dans la lutte contre la corruption?
- *Comment* peut-on intégrer les instruments et mécanismes existants du système de protection des droits humains dans la lutte contre la corruption?

Les efforts déployés par la communauté internationale pour lutter contre la corruption se sont beaucoup accrus ces vingt dernières années. Les conventions multilatérales des trois institutions que sont l'ONU, l'OCDE et le Conseil de l'Europe en constituent le socle même. Avec 177 Etats parties, l'instrument le plus complet est de toute évidence la **Convention des Nations Unies contre la corruption**, entrée en vigueur en 2005: elle contient des obligations dans les domaines de la prévention, de la criminalisation et des poursuites pénales, de la coopération internationale, du recouvrement d'avoirs et de l'assistance technique en faveur des pays en développement et des pays à économie en transition.

Mais dans la pratique, l'efficacité de ces instruments est quelque peu limitée. On l'explique par le fait que les outils actuels se concentrent toujours sur les sanctions pénales et sur la responsabilité de *l'individu*. L'accent est mis sur l'incrimination des personnes (ou personnes morales) qui pratiquent la corruption ou se laissent corrompre.

Mais, l'**individu *victime*** de la corruption est laissé de côté. Or, les victimes font souvent partie des populations les plus vulnérables – celles mêmes qui sont déjà le plus fréquemment exposées aux violations des droits humains.

Le fait de se focaliser sur les aspects pénaux a aussi une autre conséquence: ces instruments se fondent en priorité sur la responsabilité des auteurs *individuels* d'actes de corruption, **négligeant celle des gouvernements et des administrations publiques**, qui existent en tant qu'«auteurs systémiques», en quelque sorte. Il n'y a pas *d'instrument* permettant de tenir pour responsables (et de punir) les Etats qui conservent des institutions corrompues, voire favorisent la corruption.

Pour renforcer les instruments de lutte contre la corruption, on devrait commencer à ne plus considérer la corruption comme une seule violation des accords anti-corruption, mais les institutions étatiques corrompues devraient en outre être appelées à rendre des comptes pour violation de leurs obligations en matière de droits humains. Le cas des « white elephants », par exemple – des infrastructures beaucoup trop chères à construire ou maintenir en proportion de leur utilité – peut offrir l'illustration d'une violation concrète des devoirs d'un Etat inscrits dans le Pacte de l'ONU sur les droits économiques, sociaux et culturels. Lorsqu'un Etat laisse faire la corruption, de manière passive ou active, il faillit à son devoir de protection.

Le recours à différents mécanismes du Conseil des droits humains de l'ONU – comme l'Examen périodique universel (EPU), les procédures spéciales ou la procédure de recours – serait envisageable, de façon à ce que la communauté internationale se penche spécifiquement sur les effets négatifs de la corruption sur l'exercice des droits humains. Les rapports périodiques des Etats aux organes de traités seraient aussi un moyen à utiliser pour thématiser la question de l'influence de la corruption sur les droits humains au niveau national. Le Comité pour le Pacte I demande par exemple pour la première fois dans sa *list of issues* adressée à l'Ouganda qu'il fournisse des renseignements sur ses mesures anti-corruption dans le cadre de son rapport initial.

En reconnaissant ces effets négatifs et en se focalisant davantage sur la responsabilité des structures étatiques que sur celle des individus, en prenant compte de manière plus systématique la perspective des **victimes**, il serait alors

possible de mieux répondre à *leurs* préoccupations, et *leur* ouvrir de nouvelles voies juridiques, *leur* permettant ainsi de mieux faire valoir leurs droits en justice.

Le rapport publié en janvier 2015 par l'ONU sur *« Les effets négatifs de la corruption sur la jouissance des droits humains »* ainsi que la résolution de juin 2015 sont les premiers à mettre l'accent sur les victimes et à encourager les procédures spéciales existantes à tenir compte de cette thématique. La Résolution charge aussi le Haut-Commissariat d'établir une compilation des «*meilleures pratiques observées dans la lutte contre les effets négatifs de la corruption sur la jouissance de tous les droits humains*».

D'un côté, donc, on considère la corruption comme un phénomène susceptible d'empêcher, à large échelle, la réalisation pleine et durable de nombreux droits humains – les droits économiques et sociaux (droit au travail, à l'alimentation, au logement, à la santé et à l'éducation), le droit au développement, le principe fondamental de non-discrimination et des droits civils et politiques (droit à une procédure équitable ou droits de participation politique).

De l'autre côté, un renforcement du respect, de la protection et de la garantie des droits humains permet de lutter efficacement contre la corruption. La promotion et le renforcement des droits humains sont donc aussi des **mesures préventives** de la lutte contre la corruption. Avec cette approche "intégrée", les efforts internationaux peuvent se trouver stimulés pour renforcer les instruments de lutte contre la corruption.

Le respect des droits humains et la prise de responsabilités sont désormais des thèmes dont les entreprises et leurs Etats hôtes ne peuvent plus faire l'économie: ils instaurent une **communauté de destin et de responsabilité**, un partenariat appelé à se pérenniser.

MARK PIETH *

The Impact of Corruption in Human Rights

The Human Rights Case against Corruption[1]

For the last 25 years the topics of protecting human rights and combating corruption have largely been addressed side by side by different bodies using separate methods. It is only since a few years that NGOs[2] and academics[3] have begun to point out the communalities of the two agendas. And come to think of it, suddenly the logic of linking the topics seems obvious: Where there is systemic corruption, typically human rights violations are widespread[4]. And just to the North-South balance right: Multinational corporations based in the North have to fend off both the accusations of fostering bribery and of aggravating human rights violations in the South. The overlap of the topics is no mere coincidence: Many examples illustrate that corruption has a serious impact on the human rights situation: Just think of the access to education, health care, housing or, in extreme cases, to food. If the money is stolen, embezzled or otherwise syphoned off into private coffers by officials it will dearly go missing. More so, if judges deny access to courts and to fair trial to those lacking the funds to bribe them, the poor will be excluded from justice. Not only is the justice system biased, it will discriminate against certain parts of the population[5].

Understandably, representatives of those institutions primarily concerned with development (cf. the millennium goals) and human rights have been concerned that corruption is still so widespread and that in many areas of the world no deci-

* Professor of Criminal Law & Criminology at the University of Basel and Chairman of the Board of the Basel Institute of Governance. .

1 Cf. United Nations, Office of the High Commissioner on Human Rights (OHCHR) 2013.

2 International Council on Human Rights Policy and Transparency International (eds), Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities, 2010.

3 Zoe Pearson, An International Human Rights Approach to Corruption, in: Larmour/Wolanin (eds), *Corruption and Anti-Corruption*, Canberra 2001, 30 et seq.; Martine Boersma/Hans Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives*, Cambrigde 2010.

4 Anne Peters, Korruption und Menschenrechte, Juristen Zeitung 2016, 5, pp. 217-268.

5 Cf. United Nations General Assembly, Final report of the Human Rights Council Advisory Committee on the issue on the negative impact of corruption on the enjoyment of human rights, 5 January 2015, (A/HRC/28/73) para. 17 et seq.

sive inroad against corruption seems to have been made, despite increased efforts. The UN Secretary General Kofi Annan made the link already in Merida at the adoption of the United Nations Convention against Corruption (UNCAC) in 2003 when he said "Corruption undermines democracy and the rule of law". The UN High Commissioner for Human Rights, Navi Pillay, became more drastic yet when he said: "Let us be clear. Corruption kills. The money stolen through corruption every year is enough to feed the world's hungry eighty times over."[6]

In 2004 the Office of the High Commissioner on Human Rights (OHCHR), at the request of the Commission on Human Rights, organised a seminar on the topic and in 2006 the UN High Commissioner presented a report which initiated a decisive sequence of steps. The Human Rights Council (HRC) enacted several Resolutions. In June 2013 (Res 23/9)7[7] it once more recognized "that all forms of corruption can have a serious negative impact on the enjoyment of all human rights". In a first stage it decided that further work needed to be done. It further got more specific: It encharged an Advisory Committee to submit a research based report to the HRC. It asked the Advisory Council to seek the views of Member States and other concerned bodies. "The HRC Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights" presented its Final Report on 5 January 2015. This text goes into great depths and makes concrete recommendations.

I. Corruption as an Individual Crime and a Sytemic Challenge

Going into substance, the linkage of the two topics becomes less obvious and trivial[8] as it seems at first sight. Theoretic difficulties start with the term "corruption" being far less clearly defined than one would assume: It has a clearly defined center part around bribery and similar behaviour like trafficking in influence. Around this core the term becomes rather defuse. Bribery of officials is understood as a subset of "graft" (including other forms of subverting public funds for private purposes). Also private to private or commercial bribery falls into the

6 UN OHCHR, 2013, *op. cit*., p. 3.

7 Human Rights Council, Resolution 23/9. The negative impact of corruption on the enjoyment of human rights, 38th Meeting, 13 June 2013.

8 Anne Peters, 2016, *op. cit.*

broader definition. Wider notions yet include all sorts of conflicts of interest involving officials.

The common denominator suggested by the NGO Transparency International, "abuse of power for private gain"[9], makes sense above all from a historic perspective. Corruption has long been used and also advocated[10] as a means to obtain power and to remain in power.[11] In some cultures and periods corruption was even seen as a preferable alternative to brutal force: so for instance English noblemen struck explicit deals in the 18th century to avert bloodshed and to buy and sell public office (parliamentary mandates) instead.

What may seem a historic peculiarity of Europe during absolutism rings a bell with contemporary experiences with corrupt elites in many parts of the world. Corruption may be an expression of personal greed, but – probably more problematic even – it is frequently a means to keep cronies happy and potential rivals at bay.[12] Social scientists[13] have shifted the attention from corruption as a single act by an individual perpetrator to a systemic understanding, focussing on state capture. It is a highly problematic "way of life", confronting a population at large, having to bribe its way through everyday life. For the ordinary citizen every step in his day is hampered. "Petty corruption", when systemic, amounts to a very serious impediment to the enjoyment of human rights.

In business, likewise it has developed into a habit, locally and internationally. However, let's face it, multinational enterprises have taken the attitude to "do as the Romans do" wherever they work. Frequently they are providing major contributions to a fundamental problem together with their counterparts, corrupt elite, systematically exploiting their position for rent seeking. Grand corruption allows kleptocrats to steal grand style and to subvert democracy and the rule of law.

In sum, it makes sense to conceptualize corruption as the illegal act of an individual official, employee or a specific corporation and at the same time as a systemic problem pervading entire societies and states. This dichotomy is also crucial for the understanding of remedies available to tackle corruption subverting human rights.

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9 Georg Moody-Stewart, *Grand Corruption*, Oxford 1997, 4 et seq

10 Niccolò Machiavelli, *Il Principe*, Florence 1513.

11 Bruce Bueno de Mesquit, Alastair Smith, *The Dictator's Handbook: Why Bad Behavior Is Almost Always Good Politics*, New York 2011, passim.

12 Bueno de Mesquita, Smith 2011, *op. cit*., 4 et seq., 119.

13 Michael Johnston, *Corruption Contention and Reform, The Power of Deep Democratization*, Cambrigde 2014, 5, 16 et seq., 86 et seq., 235.

II. The Advantages of Linking the Agendas

What are the benefits of linking the human rights- and the anti-corruption agendas?

Scholars[14] and international bodies[15] have mentioned that the traditional approach to anti-corruption is determined by criminal law, even if e.g. UNCAC contains a chapter on prevention. A multitude of criminalisation conventions have been adopted over the last two decades.[16] Obviously, criminal law has its uses: Corruption should not go unpunished. However, it is by nature focused on individual wrong doing, on specific behaviour by specific natural or legal persons.[17] Civil liability is not far off, even if the remedies are more open towards the rights of victims: Civil remedies focus an annulment of contracts, on damages, restitution etc.[18] But like criminal law they require litigation and evidence of concrete wrong doing.

Human rights mechanisms are able to address concrete infringements. However, the scope of international litigation tools available to an individual victim is limited (cf. European Convention on Human Rights). On a national level they would find it easier to go to Constitutional Courts, provided they are not captured by corrupt elites.

The major challenges to a human rights approach to corruption, however, lie in the notion of the human rights violation itself: whereas, corruption in the form of bribery is an abstract crime requiring evidence at a minimum that an undue advantage was requested or promised, no matter what damage resulted from the bribery, human rights violations require concrete proof of a damage to a victim. Furthermore, as soon as a concrete damage needs to be proven, a causality link

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14 Anne Peters, 2016, *op. cit.*

15 A/HRC/28/73, para. 24.

16 Cf. Council of Europe (Criminal Law Convention on Corruption ETS no. 173, 27/1/1999; Civil Law Convention against Corruption, ETS no. 174. 4/11/1999), Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the EU, 25/6/1997, OAS (Inter-American Convention Against Corruption, 29/3/1996), African Union Convention on Preventing and Combating Corruption, 11/7/2003.

17 Cf. Mark Pieth, Lucinda A. Low, Nicola Bonucci (eds), *The OECD Convention on Bribery, A Commentary*, 2nd edition, Cambridge 2014; Mark Pieth, Radha Ivory (eds), *Corporate Criminal Liability, Emergence, Convergence, and Risk*, Dordrecht et al. 2011.

18 Cf. Council of Europe, Civil Law Convention on Corruption, ETS no. 174; UNCAC 2003, Art. 34, 35.

between the (corrupt) behaviour and the human rights violation needs to be established.

Even where one changes the perspective from the individual act to responsibility of a state for systemic deficiencies, the concrete requirements of human rights doctrine are formidable: They have recently been discussed in great detail by the distinguished scholar Anne Peters, to whose work I refer.[19]

III. The Benefits of Human Rights Mechanisms

The major advantage of the human rights instruments on an international level is their ability to address systemic insufficiencies. However, the methodology is primarily one of "soft law". The substantive basis of human rights instruments is openly worded. They obtain their meaning especially through monitoring procedures. Typically, there is general, periodic reporting, allowing for extensive peer view, debate and publication. Sometimes human rights mechanisms have introduced the nomination of special rapporteur.[20]

The shortcoming of these tools is known, they go as far as publicly exposing. So, as part of the human rights review of the HRC or similar human rights bodies one might touch specifically on the corruption situation of a country and one might address the ability of the country to deal with those risks. Typically, the published reports are quite sweeping in nature, and in the case of the HRC, the Council does not attempt to agree on a specific Recommendation to a specific country for fear that the required consensus would not be achieved.[21]

Overall, it is correct that "integrating a human rights perspective into the fight against corruption"[22] has its uses; it allows to focus more on the systemic nature of corruption and to address the plight of victims.[23] The HRC Advisory Committee expresses its hope that "combining strategies for fighting corruption and for promoting human rights can bolster both objectives".[24]

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19 Anne Peters, 2016, *op. cit*.

20 A/HRC/28/73, para. 52.

21 E.g. the Report of 13 April 2015 on Armenia, A/HRC/29/11 para. 123.

22 A/HRC/28/73, page 12.

23 Ibid, para. 24 et seq.

24 Ibid, para. 33

IV. The Approach of Traditional Anti-Corruption Instruments

What is a traditional international anti-corruption approach? The major international instruments (UN, OECD, Council of Europe) have gradually been supplemented by monitoring mechanisms, copied from the human rights world. The difference is that some of them have developed an edge beyond the traditional "soft law" touch: Especially the OECD Working Group on Bribery (inspired by its sister-organisation, the Financial Action Task Force on Money Laundering (FATF)) has developed a rather forthright form of assessing not only laws and regulation but practice. It is true that the success of the OECD Convention on corruption is still somewhat mixed.[25] However, it is unusual for the world of monitoring to pursue "Recommendations" in the extreme with trade sanctions. And exactly this is the avenue the OECD mechanism has been going down. Parallel to the FATF's sanctions on non-cooperative countries and territories (NCCTs), the OECD has threatened to demand all contracting partners of UK companies to individually apply "increased due diligence" (a term of art for in depth individual oversight) if the UK did not speedily enact new legislation.[26] As we know, the UK has followed suit by enacting the famous UK Bribery Act 2010. Obviously, the OECD Working Group on Bribery needs to follow up on this legislation, and test the implementation and application.

V. Should One Go a Step Beyond Conventions and Monitoring?

Do we need a Supranational Criminal Court for large scale corruption?

It has become fashionable to suggest creating a supranational court for so called "grand corruption". Assuming it would be possible to distinguish petty and grand corruption, the idea seems interesting: Replacing corrupt states by a supranational institution. However, we are all too familiar with the challenges, the International Criminal Court (ICC) is facing when trying to deal with the most serious forms of collective criminality. Some of the largest powers of the world still abstain from participating in the system of the International Criminal Court. Fur-

[25] Critical: Transparency International, Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery.

[26] OECD Working Group on Bribery 2008, UK Phase 2bis Report, 71.

thermore, the ICC has been less than effective in some of its major areas of application. We should be reminded that the Head of State of Northern Sudan, Al-Bashir, is still able to move freely, at least around Africa. It is possible that on an international anti-corruption court the political dividing lines would run differently than with the ICC. But, this may exactly be one of the problems: Already now, the international perception is that fighting corruption is a US “hobby horse”. It would be a very serious mistake to widen the North-South divide by creating another supranational institution.

Conclusion

It is correct that human rights violations and corruption frequently go hand in hand. It is also a reasonable expectation that “combined strategies for fighting corruption and promoting human rights”[27] can foster both agendas. However, when it comes to the concrete legal and policy tools it is less obvious that the link generates direct benefits, simply because the mechanisms have developed in different directions. Probably, the most fruitful approach is to integrate the topics mutually in the existing monitoring tools on corruption and on human rights. But, one needs to keep in mind that monitoring is frequently still too soft in practice.

[27] A/HRC/28/73, para. 33.

PEDRO VALLS FEU ROSA *

Corruption and Human Rights

“Let us be clear. Corruption kills. The money stolen through corruption every year is enough to feed the world´s hungry eighty times over”. These words, stated by the UN High Commissioner of Human Rights, Navi Pillay, make clear the necessity to face, with sturdiness, the worst cancer of humanity.

Talking about this statement, Professor Mark Pieth, from Basel University (Switzerland), taught that "it is correct that human rights violations and corruption frequently go hand in hand". He concluded that "combined strategies for fighting corruption and promoting human rights can foster both agendas".

That's when I suggest to get down to the details, to the proposal of concrete measures that, by repressing corruption, may impede the human rights violations resulted by it.

I. The Free Press

It is here, defending the access to information as a human right, that we shall fight the greatest of our battles against corruption. After all, as Thomas Jefferson once said, “where the press is free and every man able to read, all is safe”.

The press is not free when bounded to powerful economic groups which interests, most of the times, overlap the public ones. The press is not free when it depends on the government financial help. The press is not free when subjected to a disguised legal system censorship. The press is not free when used by the political and economic power as an instrument to dominate whole countries.

It is paradoxical: in these times of Internet and globalization, the humanity faces its great crisis – the access to information one. Look around and you will realize that in the world only one out of seven people live in countries where the news are freely spoken – and I am not including the more subtle mecha-

* President of the Court of Espirito Santo State (Brasil).

nisms of media control I referred to, and neither the cases of near monopoly.

The greatest consequence of this reality is that we have to live with what I call “geopolitical corruption”, which is responsible for a vast number of artificially provoked wars, with its millions of deaths and refugees, as well as for global economic crisis truly absurd in its causes and effects. Another consequence, equally serious, is that we suffer, as citizens, with the decline of the public services standards as a whole.

We need, as a humanity, to conceive laws protecting the press from inadequate political and economic influences and from disguised censorship mechanisms. Laws imposing to each media company the duty to inform the population about the origins of its revenue. Laws making mandatory total transparency on the activity of establishing what is and what is not "news". Laws able to stop monopolist practices in the media environment. Laws which oblige full transparency regarding the professional links of media employees and their families.

II. The Moral Authority Of The Institutions

For the human race to survive, it is essential to preserve the moral authority of its institutions – and this is something very obvious.

Our institutions loose the people´s trust when its members are chosen through obscure or unfair methods. Our institutions demoralize themselves when their members are subjected to political or economic favor or revenge. Our institutions are eroded from inside when their members, by lack of transparency, are not fairly rewarded or punished. Our institutions become target of mockery when the corrupted ones buy their innocence with the help of the diverted resources.

Here it is another crisis that plagues humanity: the institutional one. Simply take a look at the world and you will see that more than half of its population does not fully trust in its institutions, it does not matter if in the most miserable and primitive countries or in the richest and most sophisticated ones.

The cost of this crisis is the growing difficulty to recruit real welfare advocates – from the most humble employee to the highest authority. The idealistic and serious exercise of a public function is no longer a profession, but priesthood reserved for a few willing to pay a high personal price.

It is possible to change this. A good start is imposing absolute transparency in the legal world. May every single spending by companies with institutions, authorities, politicians and their families be object of mandatory disclosure, no matter what. May the origin of the money spent in judicial defense by corrupts be investigated and proved clean. May the institutions have real budgets and financial independence, based on a percentage of the state collection, not being subjected to any kind of political pressure.

III. The Efficiency of The Legal System

From the old classic times comes the teaching that it is not enough to have rights - one must have instruments to carry it out.

How can we punish the great corruption, mother of the least, when the fortunes that it has conceived transit freely between countries, on its way to tax havens? How can we fight a globalized evil with regionalized weapons? How can we prevent the crime when the cooperation among authorities, institutions and countries is hard to have due to bureaucracy?

So, this is the next crisis: the legal one. Check it out that less than 1% of what happens on the streets get to the world of the laws - a world that is clearly loosing its credibility. Let's start by the fact that we still do not have an efficient way to enforce the digital crime, at local or worldwide levels, be it in a form of a simple computer virus or of a broad terrorist attack. Our States, victims of a bureaucracy conceived to control them, are each day more powerless regarding the demands of the historical moment. And the people, victims of the lack of transparency, do not have an adequate way to follow the progress of the cases of great social interests – including, among those, corruption.

The consequence is a very serious setting of impunity to the powerful ones and of oppression over the weak ones – after all, someone must be punished so that everyone might know that we have laws. And we cannot forget about us: we live less, and we live worse, because of this setting. Finally, forgotten by the laws, reality takes revenge by ignoring them, and stimulating the most cruel and inhuman barbarism.

There is a way to improve this setting. By eliminating the excessive bureaucracy and creating cooperation mechanisms we should reduce the impunity levels. Also, it would help to have a clear dissemination about what is late in the world of laws, for how long and who is responsible for it - yes, let's name and shame

the lazy authorities. For even better results it is essential to create specific sectors to enforce corruption and human rights violations.

IV. The Sobriety Of the Corporate World

We live in the era of gigantic corporations controlled by ruthless employees – and here is one of the greatest known sources of corruption and disrespect to the human rights.

In Africa, millions are loosing their lives in wars caused by pure greed - some companies simply do not want to pay a fair price for very precious natural resources. In Europe and Asia, millions are getting sick victims of pollution levels that only the craziness for richness can explain. In the USA, millions lost their houses and their jobs due to the financial speculation commited by a few corporations.

This is the last of the four great crisis that humanity faces: the corporate one. The employees of these powerful economic groups, in their insatiable quest for profit that will grant them millions in salaries and bonuses, are corrupting our political, legal and even academic system.

I will cite two examples: the first one comes from Africa, where a war had been fought over a mineral resource called "coltan". Such conflict costed already the lives of 5 million people. 157 corrupt western companies were identified as sponsors of this war, and we do not even know their names! The result: each cell phone made with "coltan" from that region carries the blood of two children.

The second example goes by the name of “2008 economic crisis”. It costed millions of jobs and took away the houses and hopes of millions of people. The ones who caused this crisis, supported by a corrupted academic thought, ended up wealthy and untouched by the authorities who should protect us - by the way, they are still in power, despite founded accusations of corruption. Who paid for this absurd? As usual, we did.

I am a capitalism advocate. But I clearly see that the existence of "too big to fail" companies, run by employees motivated by salaries equivalent to the profits they achieve, are the greatest source of disgrace in the modern world. We cannot talk about protecting human rights and preventing corruption without dealing with this problem.

It is possible to change such scenario. First, by regionalizing these corporations, as well as limiting their size, particularly those in the financial area. Second, by reducing to normal levels the earnings of those employees responsible for their management. Third, in the event of a corruption act, may the company also be penalized, including with the prohibition of having any relationship with the public administration.

Conclusion

All these measures are absolutely simple and logic. They do not demand a lot of studies or researches. They are within our reach. They can be easily implanted all around the world. And they would avoid, by preventing numberless cases of corruption, serious violations to the human rights. However, none of us will live long enough to see any of them implemented. None of us.

This is so because we are facing here, actually, the evil on its most pure essence. Therefore this is not a battle to be won by one generation alone. Actually, it confuses itself with the own humanity saga through times.

But may this not cause dismay on us. We are not being defeated. We only didn't realize that our time is not God´s time; that we are actually just walking on a path that we have inherited from others, and that we are expanding, with nobility, new horizons for those who shall come after us, for, as Benjamin Disraeli once said, "life is too short to be little".

THERESA MUSUMHI *

The Role Of The Private Sector In Respecting Human Rights Through The Elimination Of Corrupt Business Practices

Human rights abuses continue to be prevalent in today's society. Abuses are not only widespread, but the rate at which they occur seems also to have increased. To add insult to injury, many human rights violations seep through the cracks as they are not thoroughly investigated, and those responsible for them can hide under the radar, and thus not be prosecuted. The multiple legal instruments, human rights bodies and good will that exists, have not been sufficient in protecting those who need it the most. Amnesty International's 2014/15 report opens by describing 2015 as devastating year for those seeking to stand up for human rights and for those caught up in the suffering of war zones.[1] In some regions of the world, the fight to maintain and retain human rights for its citizens was not won. In East Africa for example, Ethiopia, Burundi, and Uganda experienced worsening restrictions on freedom of speech, assembly, and other rights in the lead up to or after elections. There were also abuses in South Sudan that included attacks on the general population, repression resulting in an extenuating humanitarian crisis.[2] Examining the last two years of the European Union's track record shows that the issue of human rights protection still needs work. Human Rights Watch 2016 report honed in migration and asylum, and concluded that EU state interests were too narrow, and resulted in lackluster policy responses that delayed protection and shelter for helpless people.[3] Human Rights Watch 2015 report pointed to challenge that the European Union faced under the then economic and political environment. Though there was agreement as regards a rule of law mechanism for crisis situations, and recognition of the need for an

* Program Manager at Interise, Boston.

1 See Amnesty International Report 2014/15. *The State of the World's Human Rights* available at https://www.amnestyusa.org/pdfs/AIR15_English.PDF.

2 See Human Rights Watch World Report 2016 available at https://www.hrw.org/world-report/2016.

3 Ibid.

internal EU human rights strategy, the Council was stated to be apathetic when it came to pressing member states on abusive practices.[4]

The examples above show that we can have four main actors in play when dealing with human rights. Two roles are normally constant - the one whose right has been violated and the one who violates the right. The other two actors can have more of a choice in the way in which they will act. The one actor could, by their lack of inaction allow the violation to take place, (or could play more of a pre-emptive role and ensure that this is not so) and the other persona could decide not to properly discipline the one who has violated the right (or could ensure that human rights violations are chastised through prosecution). I do believe that for the promotion and the protection of human rights, knowledge of these actors and they interplay they have with one another is crucial.

It is worthy to note at this point that the human rights dialogue has been placed in many a forum. So the good will is there and instruments exist, but I do believe that the majority of states are still playing 'catch-up' in endeavoring to meet the obligation to respect, protect and fulfill human rights. This is because the protection and enjoyment of human rights is influenced not only by actors, but by the prevailing circumstances that exist. When the prevailing environment is not contributing to the realization of human rights, we find ourselves with a double-edged sword – actors who may actually use these less than ideal circumstances to undermine the human right due to the individual.

Corruption is a less than ideal circumstance. In fact, corruption which is accepted as the abuse of power for private gain should be regarded as a practice that is wrong and unacceptable at any level. However, this is not so. Corruption has become so widely accepted and in some instances is regarded as a normal part of daily life. It is this acceptance of the "normalcy" of corruption that can be detrimental to safeguarding human rights. From OHCR perspective, "corruption negatively impacts the enjoyment of all human rights-civil political, economic, social and cultural, as well as the right to development, which underscores the indivisible and interdependent nature of human rights. Corruption can affect human rights as an obstacle to their realization in general and as a violation of human rights in specific cases."[5]

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[4] See Human Rights Watch World Report 2015 available at https://www.hrw.org/world-report/2015.

[5] See submission by the Office of the High Commissioner on Human Rights on the negative impact of corruption on the enjoyment of Human Rights available at

The relationship between human rights and corruption is not only new but has not been explored in depth. The discussion on the interplay of human rights and corruption becomes a challenge for several reasons. First, these topics have traditionally been brought to the table as linear issues. Second, certain corrupt acts do not necessarily lead to a direct violation of a human right, but *rather impact the enjoyment of that right.* As a result, many bodies in these anti-corruption and human rights camp are still working to ascertain ways in which they can both be mutually reinforcing to each other. Third, the pursuit of human rights protection has existed as a practice for 60 years, while efforts to combat corruption were only institutionalized ten years ago. Fourth the instruments and or treaties that address human rights and those that address corruption, were designed differently. The United Nations Convention against Corruption is pragmatic in it approach and is not generally declaratory of rights. It has compulsory sections, recommendations and guidelines, making it fairly complex to most human rights treaties.[6]

In spite of these challenges, I do believe that because the realization of certain human rights depends on the level of pervasiveness and levels of corruption and so a more concentrated approach that bears these two issues in mind is needed. This was one of the subjects under discussion in the session on Corruption and Human Rights held during the Colloquium on Business and Human Rights at the University of Geneva, in October 2015. There, it was quite a challenge to come up with some plausible prescriptions of how these two agendas could be linked to one another so that they mutually reinforce each other in the aims and objectives they have – that the basic human right is not denied to any individual regardless of the circumstance, and that power is not abused for private gain. I do believe that this work still in progress.

The agenda of linking anti-corruption and preservation of human rights together is advanced in using key stakeholders that find themselves at the intersection of this relationship. One such actor is the private sector.[7] Some of the human rights violations that have taken place in today's society have been because business has been at the forefront of them. Not only that, corrupt business practices have facilitated such an ecosystem. Because of this, business can play a

http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf

6 Phil Matsheza, *Fighting Corruption While Safeguarding Human Rights*, Paper presented at the United Nations Conference on Anti-Corruption, Good Governance and Human Rights, Warsaw, Republic of Poland, p. 8-9 November 2006

7 The private sector is defined as all for-profit businesses that are not owned or operated by the government.

key role in helping control the environment where corruption takes place. It follows then that if business can positively change the environment where corruption is prevalent then we are a step closer to the realization of human rights.

From this then, it is important to intricately examine the how the private sector can respect human rights through the elimination of corrupt business practices. This is not to say that the private sector is the only actor responsible for violating human rights through its corrupt actions. State governments, public officials and private individuals, can be at fault also. Because of this, the various stakeholders whose goal it is to respect protect and fulfill human rights, and the numerous bodies whose goal it is to fight corruption need to work together. The discourse that will ensue takes this into account because the private sector must work in tandem with other bodies.

I. Corruption in the Private Sector- What it is and when it occurs

It has been estimated that corruption costs more than 5% of global GDP (2.6 trillion) and that over $1 trillion is paid in bribes each year. Statistics also reveal that corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries. It is also reported that moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20% tax on foreign business.[8] Corruption at the private sector comes with a huge cost.

At the General Assembly of the United Nations Convention against Corruption in 2003, Kofi Annan described corruption as an insidious plague with a wide range of corrosive effects on societies, stating that it undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish. Corruption is a phenomenon found in all countries, big and small, rich and poor but it is in the developing world that its ef-

[8] See International Chamber of Commerce, Transparency International, the United Nations Global Compact and the World Economic Forum, Clean Business is Good Business; The Business Case Against Corruption, available at https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/clean_business_is_good_business.pdf.

fects are most destructive. [9] On the macro level, corruption alters the ways in which services are delivered and thus received. In fact, the entire functioning of that particular environment where corruption exists is so distorted that what is right and what is wrong is no longer black and white, but remains in the grey.

At the private sector level, corruption is still widespread and the impetus to eliminate corruption still remains weak. What does corruption look like within the private sector and at the business level? Corruption manifests in bribes, abuse of function, extortion, gifts, political and philanthropic contributions, facilitation payments, fraud, embezzlement and kickbacks. I will address a few of these.

OECD defines the act of bribery as the offering, promise or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage. [10] It is very common to find businessmen trying to gain preferential government treatment in tenders or trying to win over competitors in underhanded dealings. Bribery however is not only active, as described in the OEDC definition, but also passive in that those who do accept to receive the bribe are equally to blame.

Extortion is defined as the unlawful use of one's position or office to obtain money through coercion or threats.[11] Brown and Doherty actually explain extortion as criminal offense marked by the use of threats, coercion, or intimidation to obtain money, goods, or services. In fact, extortion is characterized by the willingness of the victim to relinquish money, goods, or services because of the threat of possible violence, force, or harm, but not the imminent danger of that harm.[12] In the business setting, extortion could occur when there is an outside entity compelling payments from a business that is simply trying to go about its day to day activities.

Kickbacks are considered bribes that are used to obtain an undue advantage, where a portion of the undue advantage is 'kicked back' to the person who gave or is supposed to give the undue advantage. The payment of kickbacks is

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9 Kofi Annan, UNODC (2004) Forward to the United Nations Convention against Corruption.

10 See Business Anti-Corruption Portal available at http://www.business-anti-corruption.com/about/about-corruption/vocabulary.aspx#Bribery.

11 See Business Anti-Corruption Portal available at http://www.business-anti-corruption.com/about/about-corruption/vocabulary.aspx#Bribery.

12 See Extortion, Bribery and Corruption available at http://www.brownanddoherty.com/extortion-bribery-and-public-corruption.php.

a corrupt practice which typically occurs in connection with a public procurement process when a company pays a procurement officer to illegally award the contract to the company in return for a bribe.[13] In South Asia for example, several senior officials of two state-owned Procurement Support Agencies (PSAs), hired to manage the procurement process in large, internationally financed health sector projects, demanded kickbacks from bidders and consulting firms in exchange for: contract awards, favorable inspection reports and the prompt processing of invoices. The PSA officials reportedly shared the kickback payments with government officials. In order to execute the scheme, the PSAs manipulated the bidding process to exclude other qualified bidders through a variety of means, including rigging the contract specifications and leaking inside information to favor certain firms.[14] Though the scheme was detected, it was only detected after the fact. This demonstrates how ethically, the way in which procurement is conducted can be endangered.

Facilitation payments are a form of bribery made with the purpose of expediting or facilitating the performance by a public official of a routine governmental action and not to obtain or retain business or any other undue advantage. Facilitation payments are typically demanded by low level and low income officials in exchange for providing services to which one is legally entitled without such payments.[15] Facilitation payments are more of a grey area when considering whether such a practice is corrupt because under most, not all national laws these payments are regarded as corrupt.[16]

Having described some corrupt business practices, it is also important to define when corrupt business practices are most likely to occur. These are most likely to occur when the institutional and administrative make up of a country is weak. Corruption is in essence a reflection of underlying problems, not the problem itself, and as such the trends that sustain it should be addressed. These problems include opaque and obscure laws and regulations, weak enforcement mechanisms, barriers to business, complex tax codes, inefficient government agencies, absence of a public dialogue on corruption, absence of an independent audit, shortage of accountability mechanisms, excessive discretionary powers in the hands of public officials, and a lack of transparency in policy

[13] See Business Anti-Corruption Portal available at http://www.business-anti-corruption.com/about/about-corruption/vocabulary.aspx#Bribery.

[14] See Guide to Combatting Corruption and Fraud in Development Projects accessed from http://guide.iacrc.org/case-examples-of-bribes-and-kickbacks/.

[15] See Business Anti-Corruption Portal available at http://www.business-anti-corruption.com/about/about-corruption/vocabulary.aspx#Bribery.

[16] For the purpose of this entry, facilitation payments will be considered as a corrupt practice.

making and in relationships between business and government. This is in essence as an institutional problem where reform of institutions that allow for the sustainability of corruption is deemed necessary.[17]

It follows then that corporate human rights violations would occur when there is a lack of internal law regulating corporate activity and ensuring corporate responsibility, or when state is either unwilling or unable to enforce existing regulatory law. This is a frequent occurrence when countries are reliant on foreign investment, and creates a crucial gap in governance: the host state is not willing or able to put laws in place and hold others to account, and home states fail to offer justice for the victims.[18]

II. Human rights violations jeopardized as a result of corrupt business practices

A human right by definition is a "universal moral right, something which all [persons], everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because [s]he is human."[19] Rights are in essence due to an individual no matter what, and there is no acknowledgement that is needed for one to deem themselves as being allowed to have that right. The practice of corruption has challenged the everywhere, at all times, possession of, and in general, the existence of this universal moral right. Without a doubt, corruption and more specifically corrupt business practices highjack the delivery of human rights. Specific human rights that are affected by corrupt business acts include economic, social and cultural rights, civil and political rights, and the right to equality and non-discrimination.

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17 John D. Sullivan and Aleksandr Shkolnikov, *Combating Corruption: Private Sector Perspectives and Solutions,* Center for International Private Enterprise Economic Reform Issue Paper, September 2004.

18 See Panel Discussion on Engaging the Private Sector in Post-2015: Human Rights and Accountability available at https://sustainabledevelopment.un.org/content/documents/7903Engaging%20the%20Private%20Sector%20in%20Post-2015.pdf.

19 Maurice Cranston, What are Human Rights?, Bodley Head Publishers, 1973, p. 36.

A. Economic, social and cultural rights

Economic, social and cultural rights include the rights to adequate food, to adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation, and to work. When assessing whether or not a corrupt business practices violates economic, social and cultural rights, two essential obligations should be taken into account: the duty that the business has to take steps to see that these rights are realized; and its duty to prioritize human rights when involved in projects that concern the allocation and access of resources.[20] The rights to food, water, health, and social security can be violated if a bribe is required to gain access to these basic rights.

B. Civil and political rights

Civil and political rights are preserved in the Universal Declaration of Human and the International Covenant on Civil and Political Rights. These are rights that permit people live in freedom and liberty: they include the right to life; the right not to be tortured, enslaved or required to perform forced labour; the right to liberty and security of person, including freedom from arbitrary arrest or detention, the right to be equal before the courts and tribunals and the right to a fair trial; freedom of thought, conscience, religion and expression, opinion, assembly and association, as well as the right to vote; and the rights to equality and self-determination.[21]

We can find business at the intersection violating this right when it comes to forced labour. According to the ILO, forced labour refers to "situations in which persons are coerced to work through the use of violence or intimidation or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities. According to research from the International Labour Organization (ILO) in 2012, around 10% of incidents of forced labour are linked to states, whilst 68% are linked to the private sector. It is a global problem that affects all countries to a greater or lesser extent. According

[20] International Council on Human Rights Policy and Transparency International. Corruption and Human Rights: Making the Connection, 2009, p. 45.

[21] See Avocats sans Frontières, Civil and Political Rights, available at http://www.asf.be/action/asf-programmes/civil-and-political-rights/.

to the ILO, for example, around 21 million people are victims of forced labour, including 11.4 million women/girls and 9.5 million men/boys."[22]

The higher incidence of forced labour in the private sector is not surprising. In November 2015, Nestle discovered and admitted that it had forced labour in its seafood supply chains in Thailand. In this instance, it is positive that the company admitted its wrongdoing, so that a legal arm could take appropriate action. However, more recently, the company was accused of violating a civil right. This linked to the alleged use of child slaves in cocoa farming in the Ivory Coast putting the company in the unfortunate position of disclosing slavery in one part of its operations, while at the same time fighting through the courts to fend off accusations that it exists in another – more profitable – part of its business.[23] One finds then that forced labour or slavery is an abuse of function where an entity does something illegal in order to obtain economic benefit.

C. Right to Equality and Non-Discrimination

Whereas the Universal Declaration of Human Rights, for example, provides that all human beings are born free and equal in dignity and rights, and the International Convention on Civil and Political Rights provides equality as well as equal protection before the law.[24] A useful definition of non-discrimination is contained in Article 1(1) ILO 111, which provides that discrimination includes: 'Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation.' Thus, the right to equal treatment requires that all persons be treated equally before the law, without discrimination. The principle of equality and non-

[22] See International Labor Organization. ILO 2012 Global estimate of forced labour available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf.

[23] See Annie Kelly, Guardian (UK), Nestlé admits slavery in Thailand while fighting child labour lawsuit in Ivory Coast available at http://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast.

[24] See The Human Rights Dimensions of Corruption available at http://www.knchr.org/Portals/0/EcosocReports/Human%20Rights%20Dimensions%20of%20Corruption.pdf.

discrimination guarantees that those in equal circumstances are dealt with equally in law and practice.[25]

A corrupt business act, such as a facilitation payment, can result in inequality and discrimination if a construction company acting as a prime, requests a facilitation payment from a smaller business who desires to be a sub-contractor, on that construction project. Such acts confer the privilege on those who are asking for the facilitation payment which in turn lead to a violation of the right to equality and non-discrimination.

III. The obligation to respect, protect and fulfill human rights – to whom does this belong?

One sees that many of the abovementioned corrupt business acts violate basic rights, so it becomes necessary to ascertain whose responsibility it is to see that rights are maintained. The obligation to respect, protect and fulfill human rights has traditionally been awarded upon the state. The obligation to respect requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states to prevent violations of rights by individuals or other non-state actors; to avoid and eliminate incentives to violate rights by third parties; and to provide access to legal remedies when violations have occurred, in order to prevent further deprivations.[26]

In a perfect world, the state not only acts to respect, protect and fulfill human rights, but sees to it that when there are abuses, legal recourse is taken. The legitimate state, the state that is not itself a prime abuser of human rights, acts to promote human rights and to ensure good governance on the whole. The state has been given a lot of responsibility and ownership in this regard, and in several instances has proved itself to be ineffective. One finds that many more states are

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[25] See International Labour Organization. Substantive provisions of Labour Legislation. The Elimination of Discrimination in Respect of Employment and Occupation available at http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch7.htm.

[26] See Engaging the Private Sector in Post-2015: Human Rights and Accountability available at https://sustainabledevelopment.un.org/content/documents/7903Engaging%20the%20Private%20Sector%20in%20Post-2015.pdf.

struggling in this responsibility because they have either allowed human rights to be disrespected by being the very ones who violate them, or through passivity, allowing other stakeholders to set the tone in how they choose to align with the current human rights standards in that particular state.

IV. The Private Sector Role

The private sector has key roles to play in respecting human rights and also in seeing that it is not an agent that facilitates and contributes to corruption. I address the human rights first because I do believe that regardless of whatever the prevailing environment is human rights need to be respected by all. For the private sector, I believe that the learning curve is longer and therefore more preeminent in this regard. The reason being that most businesses exist to make money, to grow and to scale and to contribute to the economy, and human rights are not really part of that agenda, not until now.

A. The Private Sector as actor who respects human rights

The preamble to the Universal Declaration of Human Rights calls on “every individual and every organ of society” to secure (promote and respect) human rights. In 1999, international law scholar Louis Henkin noted that “every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”[27] At a minimum, business is expected to respect the rights of its labour force and the human rights of the communities in which they operate. Companies are expected not only to ensure that they do not directly or indirectly have negative impacts but that they do not limit or generate impediments to the general enjoyment or exercise of human rights.

The UN Guiding Principles on Business and Human Rights are an essential tool in giving business the framework needed to respect human rights. The framework rests on three pillars. The first pillar concerns the duty of states to protect against human rights abuses committed by third parties, including business,

[27] See Business and Human Rights Resource Centre in Business & human rights - A brief introduction available at http://business-humanrights.org/en/business-human-rights-a-brief-introduction.

through appropriate policies, regulation and adjudication. The second pillar is the corporate responsibility to respect human rights and the third is the need for greater access by victims of human rights violations to an effective remedy.[28] The principles not only assist government but also business. They ensure that companies respect human rights in their own operations and through their business relationships.

On a practical level, this means that a business has human rights policies interlaced within its objectives, and this should apply to all business regardless of size. A business must act in accordance with the relevant laws and respects internationally recognized human rights wherever they operate. A business must also seek ways in which to honor human rights especially when faced with conflicting situations. When a business discovers that it has caused or contributed to a gross human rights violation, it must be seen as a legal compliance issue. Business can also engage with human rights defenders have a more meaningful understanding how its actions or lack thereof, contribute to human rights violations. Further, together with other civil society organizations and non-governmental bodies, they should adopt appropriate due diligence policies to identify, prevent and mitigate human rights risks, and commit to monitoring and evaluating implementation.

B. The Private Sector as an actor who plays a key role in the elimination of corruption

Let it be understood that the private sector in and of itself cannot eliminate corruption. Because corruption is a systemic issue, it is necessary to find solutions that lessen and eventually eliminate instances where corrupt business acts could be rife. For the most part, a reduction of the instances of corruption has failed to gain momentum in the private sector because many business owners are used to it and develop mechanisms to keep it manageable on a daily basis. It is critical to demonstrate to the public, government and the business community that corruption is not permanent and inevitable and should be dealt with.

In order for the private sector to be able to eliminate corruption, it must be aware of its specific areas of vulnerability. Where there is a cumbersome business registration procedure, overregulation of business and a lack of transparency, corruption is more likely to manifest.

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[28] Corinne Lewis. Businesses' human rights responsibilities available at http://www.fmreview.org/preventing/lewis.

According to Sullivan, corporate governance is perhaps the single most effective tool to limit the ability of the private sector companies to participate in corruption. Good corporate governance establishes a system where companies are unable to provide bribes covertly and are easily held accountable for wrongdoing. The core values of corporate governance are fairness, transparency, accountability, and responsibility, and the mechanisms that are involved in building good corporate governance systems guide the relationship between owners, managers, employees, and other stakeholders. Corporate governance ensures that managers act in the interest of a company, board members exercise good judgment, investors receive timely and relevant information, and decision making is not done behind closed doors. By making companies transparent and by holding decision makers accountable for their actions, corporate governance makes it hard for companies to provide bribes or other company resources to government officials in exchange for services.[29]

The private sector has a key role in the preventing and fighting corruption because it knows first- hand those discrepancies that present opportunities for corruption. All business regardless of revenue, staff size, years in operation for example has a part to play. There are companies that explicitly state the consequences that unethical and corrupt behaviors can have for the enterprise, its employees, customers and investors. The same companies, to a large extent, disclose the number of annual internal investigations conducted and sanctions administered, including the number of staff dismissed and contracts terminated as a result of corrupt behaviors by employees and contractors.[30]

On an international level, there are multiple bodies like the UNODC that have actively contributed to the implementation of the 10th principle of the United Nations Global Compact, which states that "business should work against corruption in any form, including bribery and extortion."[31] To this effect, the organization has provided input to a guide to facilitate companies' reporting on this principle; a tool to prevent and fight corruption along the supply chain; and a campaign waged by top business leaders in support of UNCAC. As the result of

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[29] See John D. Sullivan, Corruption, Economic Development, and Governance: Private Sector Perspectives from Developing Countries, International Finance Corporation (2006), available at http://www.ifc.org/wps/wcm/connect/1b03e88048a7e4759d5fdf6060ad5911/Final%2BPrivate%2BSector%2BOpinion%2528Issue%2B2%2529.pdf?MOD=AJPERES.

[30] https://www.unodc.org/documents/corruption/PWC_report/Highlights_from_Anti-Corruption_Policies_and_Measures_of_the_Fortune_Global_500.pdf.

[31] See UNODC Work with the Private Sector available at https://www.unodc.org/unodc/en/corruption/private-sector.html.

these undertakings, on 1 May 2009, chief executive officers from some of the world's leading companies threw their support behind the Convention and called on Governments to more effectively and robustly implement it.[32]

Conclusion : Possible Feasible Solutions for the Private Sector with Both Corruption and Human Rights in Mind

The interplay between corruption and human rights warrants that a feasible solution be found, especially in those instances where on the one hand business is a key instigator in the human rights violation through corrupt business practices, and on the other, where the business can actually play an essential role in ensuring that the way in which it conducts its day to day operations is and remains ethical.

In the more immediate sense, there must be consequences for the human rights violation. When the private sector is responsible for human rights violations through corrupt business practices, it must be held accountable. It is not enough to rely on a voluntary approach or a code of conduct to enforce accountability. It must be made clear that compliance with the UN human rights agenda is more than a social responsibility, it is grounded in fundamental human rights, and violations are punishable by law.

Further, business needs to find ways to be more active in its contribution to respect human rights. Businesses together with private sector representative organizations such as chambers of commerce and business associations can not only approach the government about reform, but also engage the government in a dialogue. The private sector must see itself as an integral actor who respects human rights through the elimination of corrupt business practice.

[32] See UNODC Work with the Private Sector available at https://www.unodc.org/unodc/en/corruption/private-sector.html.

NDIORO NDIAYE *

Migration économique

La migration peut être revendiquée comme un instrument de valorisation, notamment en prenant en compte le double mouvement d'aller et retour entre les pays d'origine et les pays d'accueil, sans oublier les pays de transit.

Mondialisation, changements démographiques, conflits, inégalités de revenus et réchauffement climatique, vont pousser toujours plus de travailleurs et leurs familles à franchir une frontière en quête de travail et de sécurité. Les travailleurs migrants contribuent à la croissance et au développement de leur pays de destination, tandis que les pays d'origine bénéficient grandement de leurs envois de fonds et des compétences qu'ils acquièrent pendant leur expérience à l'étranger.

Pourtant, le processus migratoire implique des défis complexes en termes de gouvernance, de protection des travailleurs migrants, de lien entre migration et développement, et de coopération internationale.

La migration occupe aujourd'hui une place centrale dans les programmes nationaux, régionaux et mondiaux. Elle apporte avec elle un sentiment d'urgence dans les sociétés et parmi les décideurs mais suscite également une série de controverses susceptibles de saper la cohésion sociale si rien n'est fait.

Considérer la libre circulation des personnes comme le pendant naturel de la libre circulation des biens, des services et des capitaux constituerait une simplification excessive et contre-productive.

La migration est le plus souvent motivée par le travail. Mais, même lorsque la recherche d'un emploi décent ne constitue pas la principale motivation de l'émigration, comme dans le cas des personnes qui fuient un conflit ou les effets du changement climatique, il arrive inévitablement un moment où elles doivent trouver un emploi.

* Ex-directrice générale de l'Organisation internationale des migrations, Présidente de l'Alliance pour la Migration, le Leadership et le Développement.

I. Migration économique - Migration de travail: faits et chiffres

En 2010 : 230 millions de migrants internationaux, soient 3 % de la population mondiale (une proportion restée stable sur les cinquante dernières années) **et 740 millions de migrants internes dans le monde, soit 4 fois plus.** Seuls 37% des migrants vont d'un pays pauvre vers un pays riche, 60% se déplacent entre pays riches ou entre pays pauvres et le reste (3%) d'un pays riche vers un pays pauvre.

Le nombre mondial de travailleurs migrants a augmenté deux fois plus vite durant la première décennie de ce siècle que dans les dix années précédentes. Cette tendance s'est infléchie depuis 2010, reflétant dans une large mesure les effets perturbateurs de la crise économique mondiale.

A. Les tendances mondiales de la mobilité des travailleurs

Les données existantes font clairement état d'une dynamique migratoire forte: en l'absence de politiques plus restrictives (voire en leur présence), les migrations s'intensifieront probablement dans un avenir prévisible.

Pour mieux appréhender les facteurs sous-jacents de ces tendances globales, il faut examiner plus attentivement les données relatives aux pays d'origine et de destination. Si les pays développés accueillent actuellement 51% de tous les migrants, les flux migratoires Sud-Nord ont en fait ralenti ces dernières années, parallèlement à une progression des migrations entre pays du Sud. De 2000 à 2013, les mouvements Sud-Sud ont constitué 57 %de l'ensemble des flux migratoires: pour prendre un seul exemple de ce dynamisme particulier, le taux de croissance annuel des migrations vers le Moyen-Orient était de 6,9 % durant la première décennie du siècle par rapport à 0,8 % au cours des dix années précédentes.

L'impact de la migration sur les marchés du travail, dans les pays d'origine comme de destination, a fait l'objet de vives controverses, mais l'on peut raisonnablement conclure que le nivellement des salaires par le bas, notamment en ce qui concerne les travailleurs peu qualifiés ou les segments inférieurs du marché du travail, et l'éviction de la main-d'œuvre locale par les travailleurs migrants sont généralement moins importants que ne le croit la population. Ces problèmes ne doivent pas être sous-estimés ou ignorés, mais ils ont parfois été

amplifiés en raison des demandes de prestations sociales par les travailleurs migrants, par exemple en matière de logement, d'éducation et de soins de santé, notamment lorsque les flux de migrants proviennent essentiellement de certaines communautés et, en période de crise, lorsque le marché du travail est tendu et que la dépense publique se contracte.

B. La migration irrégulière

Par définition, la migration irrégulière est difficilement quantifiable, mais on estime qu'elle représente entre 10 et 15 % du total des flux migratoires. Quoi qu'il en soit, lorsque la politique nationale limite l'immigration à des niveaux sensiblement inférieurs aux attentes des migrants potentiels vers ce pays, bon nombre d'entre eux seront inévitablement relégués dans des formes de travail irrégulier, ouvert ou clandestin. En tout état de cause, lorsque l'absence de contrôles efficaces rend les frontières poreuses, comme dans de nombreuses régions en développement, la distinction entre migrants réguliers et irréguliers devient floue. Ils ont alors tendance à demeurer dans l'informalité, dans le pays d'origine comme dans le pays de destination.

Il est bien connu que la migration en dehors des circuits réguliers expose les travailleurs concernés aux abus et à l'exploitation, souvent les plus extrêmes. Le risque est encore plus grand s'ils ont recours à des passeurs ou à des trafiquants d'êtres humains.

Pour toutes ces raisons, y compris certaines préoccupations connexes, à savoir que certains employeurs peu scrupuleux peuvent exploiter les travailleurs en situation irrégulière pour saper les conditions de travail des autres, il existe un large consensus sur le sujet: la migration devrait être régulière et des mesures devraient être prises pour empêcher les flux incontrôlés de travailleurs sans papiers (aux Etats-Unis : leur nombre était estimé à 11 millions en 2011 , dans l'Union européenne : entre 1,9 et 3,8 millions en 2008).

Les questions qui se posent à cet égard comprennent les difficultés directement liées au travail, comme les conditions insalubres, le rôle de l'inspection du travail et la protection sociale, mais ouvrent aussi un débat plus large sur la criminalisation et l'éventualité d'expulsions forcées, d'une part, ou les conditions de régularisation et de naturalisation, de l'autre.

Il importe également de prendre acte d'une réalité : les inconvénients vécus par les travailleurs migrants ne sont pas tous attribuables à leur statut spécial ou temporaire. Certains travailleurs migrants permanents font également face à

certains problèmes, devant parfois affronter la discrimination et les préjugés directs, même si ces actes sont illégaux.

Dans la pratique, les travailleurs migrants sont généralement concentrés dans des emplois peu qualifiés et mal payés, par exemple: hôtellerie et restauration, santé et soins, agriculture, bâtiment, pêche, fabrication de produits bas de gamme et travail domestique. En moyenne, 16% des travailleurs migrants occupent des emplois peu qualifiés, contre 7% des ressortissants. Cet écart n'est pas attribuable à leur faible niveau d'instruction et de formation, les données disponibles faisant état de niveaux élevés de surqualification parmi ce groupe.

Force est de reconnaître, cependant, qu'une partie de la main-d'œuvre migrante – certes relativement peu nombreuse – jouit de conditions et d'un statut privilégiés sur le marché du travail, ayant été sélectionnée par voie de recrutement international grâce à ses compétences rares et recherchées. Ces travailleurs bénéficient généralement de l'égalité au travail et de conditions préférentielles en vue d'une installation permanente. Ils personnifient toutefois un défi politique d'un autre ordre, mais tout aussi réel: celui de la fuite des cerveaux et d'un capital humain dont leur pays d'origine aurait besoin.

II. Quelques facteurs de migration économique

Les pays se développent à des rythmes différents, à partir de normes socio-économiques très inégales. Les pays où existent les possibilités d'emploi décent ne sont pas nécessairement ceux où les travailleurs résident et, même lorsque des emplois sont disponibles dans un pays donné, les écarts de revenu par rapport aux autres constituent une très forte incitation à la mobilité.

Les facteurs d'émigration comprennent l'absence ou la pénurie d'emplois, les bas salaires et les mauvaises conditions de travail, qui incitent de nombreux travailleurs à tenter leur chance ailleurs. Dès lors, cela peut représenter une forme d'injustice pour les pays d'origine qui ont investi massivement dans leur formation dans le cadre du système d'éducation. En outre, les perspectives de développement de ces pays peuvent être gravement compromises par leur départ, qui représente un transfert plutôt qu'un partage de la prospérité.

Cet état de fait risque peu d'évoluer notablement dans un avenir prévisible, par exemple en raison d'un mouvement général de convergence des revenus du travail au niveau mondial, indépendamment de l'impact que les fluctuations des économies nationales auront certainement à cet égard. En fait, dans un monde

où le creusement des inégalités constitue une préoccupation majeure des décideurs politiques comme des citoyens, ce facteur semble acquérir un poids croissant: les tragédies récurrentes, par exemple les naufrages au large de l'île de Lampedusa, témoignent des risques insensés que les gens sont prêts à prendre pour rechercher une vie meilleure.

Les écarts de revenu coïncident étroitement avec les tendances démographiques – l'autre déterminant essentiel des migrations. L'enrichissement s'accompagne généralement d'une diminution de la taille des familles. Cette corrélation se vérifiant sur une période suffisamment longue, de nombreux pays à revenus élevés se caractérisent par une société vieillissante, qui fait ou devra faire face à de sérieuses pénuries de main-d'œuvre, lesquelles devront être compensées par un apport migratoire s'ils souhaitent maintenir leur croissance, leur niveau de vie et leur système de protection sociale. (ex : *Le vieillissement à long terme de la population en Europe devrait réduire de moitié le rapport entre les personnes en âge de travailler (20-64 ans) et les personnes âgées de 65 ans ou plus, au cours des cinquante prochaines années. Autrement dit, d'ici 2060, le nombre de personnes en âge de travailler en Europe devrait décliner de près de 20 %, soit plus de 50 millions de personnes*).

Conflits, répression et, de plus en plus, les conséquences du changement climatique. Les situations dramatiques auxquelles ces événements donnent lieu excèdent parfois la capacité de réaction des Etats Membres et de la communauté internationale.

III. Les droits des migrants: quelques textes régissant les migrations

A. Le cadre multilatéral

1. Nations Unies

Après une forte affirmation ou réaffirmation du principe de non-discrimination (dans un article de la Convention qui, à lui tout seul, fait l'objet d'un chapitre distinct) la Convention des Nations Unies sur la protection des travailleurs migrants énumère, dans pas moins de 28 articles, les droits de tous les travailleurs migrants, qu'ils soient en situation irrégulière ou non : c'est sans doute une des

innovations majeures ou les plus apparentes de la Convention. On y trouve un catalogue des droits fondamentaux de la personne humaine : citons en particulier le droit à la vie ; le droit de quitter tout pays y compris le sien ; le droit à ne pas effectuer un travail forcé ou obligatoire ; l'interdiction de la torture ou de l'esclavage ; la liberté et la sécurité de la personne.

A ces dispositions viennent s'ajouter des droits spécifiques aux migrants, par exemple : le traitement national en matière de rémunération ; l'accès à l'éducation de base pour les enfants ; l'accès aux soins médicaux d'urgence ; les garanties en cas de détention ; le droit à la protection et à l'assistance diplomatique et consulaire ; l'interdiction d'expulsion collective ; la liberté syndicale ; l'interdiction de confisquer ou détruire les passeports, documents d'identité et permis de travail ; le droit à un nom et à une nationalité pour tout enfant d'un travailleur migrant. Au terme de cette longue liste de droits, la Convention réaffirme que rien ne dispense les travailleurs migrants de l'obligation de se conformer aux lois et règlements de tout Etat de transit et d'emploi ; La Convention précise également que rien ne saurait être interprété comme impliquant la régularisation, ou un droit à la régularisation, de ces travailleurs.

2. OIT : le Programme de migration équitable

Les migrations de main-d'œuvre ont récemment connu un nouvel écho avec la Déclaration du Dialogue de haut niveau de l'Assemblée générale des Nations Unies sur les migrations internationales et le développement en octobre 2013, qui reconnaît l'importante contribution apportée par les migrations à la réalisation des Objectifs du Millénaire pour le développement et estime que la mobilité humaine est un facteur décisif du développement durable.

L'OIT promeut les droits des travailleurs migrants grâce à son corpus de normes, y compris les conventions de l'OIT sur les droits fondamentaux , les conventions n° 97 et 143 de l'OIT sur la protection des travailleurs migrants et la gouvernance des migrations de main-d'œuvre, et les recommandations n° 86 et 151, qui les accompagnent, ainsi qu'à travers le cadre multilatéral. Pour les migrations de main-d'œuvre. L'OIT réunit aussi les acteurs du monde du travail, y compris les ministères du Travail, les organisations d'employeurs et de travailleurs et la société civile pour bâtir un consensus autour d'un programme de migration équitable qui prenne en compte les besoins du marché du travail tout en protégeant les intérêts et les droits de tous les travailleurs.

3. OMC : Mode 4

Le mouvement des personnes physiques est l'une des quatre façons dont les services peuvent être fournis au niveau international. Connu aussi sous le nom de “mode 4”, il s'applique aux personnes physiques qui sont des fournisseurs de services (comme celles qui exercent des professions indépendantes) ou qui travaillent pour un fournisseur de services et sont présentes sur le territoire d'un autre Membre de l'OMC pour fournir un service. Le mode 4 se rapporte à la présence de personnes d'un Membre de l'OMC sur le territoire d'un autre Membre en vue de la fourniture d'un service. Il ne concerne pas les personnes qui cherchent à accéder au marché du travail dans le Membre d'accueil, pas plus que les mesures concernant la citoyenneté, la résidence ou l'emploi à titre permanent.

Les engagements relatifs au mode 4 de la plupart des Membres ont été pris sur une base horizontale, c'est-à-dire qu'ils sont applicables sans distinction à tous les secteurs inscrits dans la liste d'un Membre. Globalement, le degré d'accès qui a été consolidé pour le mode 4 est assez faible. Dans la plupart des cas, les Membres ont inscrit au départ dans leurs listes la mention “non consolidé” (qui signifie qu'il n'y a pas de consolidation des conditions d'accès), qu'ils ont ensuite nuancée en accordant l'admission à certaines catégories de personnes, avec une préférence marquée pour les personnes liées à une présence commerciale (par exemple les personnes transférées à l'intérieur d'une société) et les personnes hautement qualifiées (cadres, dirigeants et spécialistes).

B. Les processus régionaux et sous-régionaux

Les gouvernements établissent le cadre juridique national des migrations de main-d’œuvre. Bon nombre d’entre eux concluent des accords bilatéraux, et certains font de la migration une dimension des processus d’intégration régionale. Ils peuvent également coopérer dans le cadre du système multilatéral pour améliorer la gouvernance de la migration à l’échelle mondiale. En 2004, l’OCDE a recensé 176 de ces accords 7 en vigueur dans ses Etats membres. Le BIT a entrepris l’examen des accords bilatéraux pour mieux les comprendre et en évaluer le contenu; il en analysé 160 à ce jour, en Europe et en Asie.

Dans le même ordre d’idées, les processus d’intégration régionale et sous-régionale qui se développent dans toutes les régions du monde traitent des problèmes de migration, chacun à leur manière et à des degrés divers. Le plus avancé est celui de l’Union européenne, qui établit le principe de la libre circulation des travailleurs dans ses 28 Etats membres.

L'Association des nations de l'Asie du Sud-Est (ASEAN), avec ses quelque 6,5 millions de migrants internes, appelle de ses vœux la libre circulation des travailleurs qualifiés dans son plan d'action économique, et a créé un Forum tripartite sur les travailleurs migrants, chargé d'élaborer des pratiques optimales. Dans les Amériques, le MERCOSUR, le Système d'intégration centraméricain (SICA), la Communauté andine et la Communauté caribéenne (CARICOM) ont mis en place des politiques sous-régionales sur les droits des travailleurs migrants, avec l'aide d'organes consultatifs en matière de travail.

En Afrique, plusieurs organismes sous-régionaux, y compris la Communauté de développement d'Afrique australe (SADC), la Communauté économique des Etats de l'Afrique de l'Ouest (CEDEAO) et la Communauté d'Afrique de l'Est (EAC) ont traité différents aspects des politiques de migration.

Dans les Etats arabes, le document fondamental sur les droits de l'homme, à savoir la Déclaration du Caire sur les droits de l'homme en Islam, a été adopté en 1990 par l'Organisation de la Conférence islamique. Elle interdit la discrimination fondée sur différents motifs. Dans le domaine des migrations, l'accord adopté en 1965 par le Conseil de l'Unité économique arabe prévoit la liberté de circulation, d'emploi et de résidence et abolit certaines restrictions existant auparavant sur ce plan dans la région.

Dans les Amériques : Les normes régionales concernant les droits de l'homme en général sont : la Déclaration américaine des droits et des devoirs de l'homme, adoptée en 1948 par l'Organisation des Etats américains, ainsi que la Convention américaine de 1969 relative aux droits de l'homme, qui condamnent l'une et l'autre la discrimination.

Amérique Latine : le Marché commun du Sud (MERCOSUR) a adopté en 1995 un pacte qui vise à réglementer les migrations à l'intérieur de la région. Afin de renforcer le processus d'intégration, les pays du MERCOSUR ont approuvé en novembre 2002, un accord sur la résidence pour leurs ressortissants. En 1977, les pays membres de l'Accord de Cartagena ou Pacte andin ont approuvé la création de l'Instrument andin sur les migrations aux fins d'emploi (décision nº 116 de la Commission) et la création, en 1996, de la *carte andine de migration*, afin de faciliter les flux migratoires dans la sous-région (décision nº 397).

IV. Impacts de la migration économique

A. Sur le développement du pays d'origine

- Construction de la nation à travers les envois de fonds.
- Les membres de la diaspora préfèrent investir dans leurs propres pays en se lançant dans de petites affaires, dans l'hypothèse qu'ils pourraient retourner chez eux un jour et avoir besoin d'une source de revenu local : création de micros, petites et moyennes entreprises.
- Contribution à l'essor du secteur privé et à l'expansion de la chaîne des valeurs.
- Promotion culturelle/ hausse des exportations des produits locaux et labellisation : la préférence exprimée par les diasporas pour la nourriture de leur terroir ou nourriture ethnique tout en vivant à l'étranger a suscité la multiplication de magasins de produits alimentaires ethniques à tous les endroits où sont concentrés des groupes significatifs de migrants. Cette demande de produits alimentaires ethniques a pu contribuer à améliorer les activités de transformation alimentaire, d'emballage et de commercialisation. De même l'inspection des importations de produits alimentaires dans les pays de résidence des diasporas améliore aussi la sécurité et la qualité des produits alimentaires vendus dans les PMR.
- Participation à la vie politique du pays d'origine (candidature à des postes électifs et contribution financière aux campagnes électorales).
- Implication dans le développement communautaire (activités philanthropiques telles que la construction d'infrastructures de base, d'écoles et de structures de santé, etc.).
- Apport technologique, formalisation et opérationnalisation d'un nouveau projet de société.
- Impact positif sur les liens commerciaux et financiers avec leur pays d'origine :

Premièrement, les migrants possèdent davantage d'informations sur les opportunités d'investissement dans leur pays. Même s'ils n'y retournent pas, ils peuvent donc promouvoir les relations commerciales et financières de leur pays d'origine avec celui d'accueil.

Deuxièmement, la présence de migrants dans le pays d'accueil peut contribuer à pallier le manque d'information – et les préjudices qui en découlent – des natifs sur le pays d'origine des migrants. Non seulement les immigrés peuvent diffuser des informations concernant les échanges et les opportunités d'investissement dans leur pays, mais en plus leur présence, leur dévouement au travail et leurs compétences peuvent indiquer aux natifs que le pays d'origine offre des possibilités d'investissement rentables.

Dans les deux cas, les émigrés qualifiés sont a priori les plus à même de générer ce type « d'externalités de diaspora ».

B. Sur le développement des pays d'accueil

a) L'effort direct sur l'offre de travail qui se traduit par une augmentation de l'offre globale de travail des catégories de main d'œuvre que rejoignent les nouveaux arrivants.

- Une substituabilité ou complémentarité entre la main d'œuvre immigrée, les différentes catégories de main d'œuvre d'origine locale et les autres facteurs de production (en particulier le capital).

- Une baisse de la rémunération de la main d'œuvre locale.

- Un accroissement de la rémunération de la main d'œuvre immigrée qui est complémentaire à la main d'œuvre locale.

b) L'effet sur la demande de biens et services : même quand elle s'accompagne d'une baisse des revenus individuels, la croissance de la population induite par l'immigration conduit à :

- une croissance des revenus ;

- une demande de biens et services qui induisent à une croissance des emplois.

V. Les femmes dans la migration économique

À l'heure actuelle, dans le monde entier, un nombre record de femmes migrent à la recherche d'un travail et d'une vie meilleure. La migration apporte réellement ces avantages à beaucoup de femmes, mais pour d'autres, elle comporte des risques tels que l'exploitation comme domestique et la vulnérabilité à la violence.

48% des migrants sont des femmes. Toutefois, ce chiffre varie considérablement selon les régions: elles représentent la majorité des migrants en Europe, dans les Amériques et en Océanie, mais cette proportion tombe à 45,9% en Afrique et jusqu'à 41,6 % en Asie. Ces écarts peuvent résulter de différents facteurs, en proportions variables: propension inégale à l'émigration; sélectivité des politiques de migration selon le genre; et sexospécificités sur les marchés du travail.

Les femmes représentent aussi la grande majorité des émigrants pour de nombreux pays, en particulier en Asie et en Amérique latine. En 2002, elles ont été deux fois plus nombreuses que les hommes à émigrer du Sri Lanka. Entre 2000 et 2003, elles ont représenté près de 80% de tous les émigrants indonésiens. En 2005, plus de 65% des 3 000 émigrants philippins quotidiens sont des femmes. On observe la même tendance en Amérique latine : en 2001, 70% des émigrants brésiliens et dominicains vers l'Espagne ont été des femmes. Les pays andins envoient également des contingents de femmes beaucoup plus importants que ceux des hommes vers l'Europe. Elles ont également représenté 70% des migrants latino-américains à destination de l'Italie.

Les migrations féminines Sud-Sud longue distance sont également très importantes. Les pays du Golfe représentent une des principales destinations pour les émigrantes asiatiques. Depuis 1995, on estime à 800 000 les femmes asiatiques émigrant chaque année vers le Moyen-Orient. Un million d'Indonésiennes, de Philippines et de Srilankaises travaillent en Arabie Saoudite. Néanmoins, les migrations féminines Sud-Nord sont de plus en plus importantes, les femmes étant majoritairement demandées dans la quasi-totalité des métiers sociaux.

Si leurs envois sont souvent inférieurs à ceux des hommes, c'est que les métiers « féminins » sont la plupart du temps moins bien rémunérés que ceux des hommes. En revanche, toutes les sources indiquent qu'aussi bien les migrantes internationales que nationales (femmes émigrant vers les zones urbaines essentiellement) envoient une proportion de leur salaire plus élevée que les hommes. Les femmes originaires du Bangladesh travaillant au Moyen-Orient rapatrient ainsi en moyenne près des trois quarts de leur salaire. 56% des sommes procurées par ces rapatriements sont investies dans les besoins quotidiens des familles ainsi que pour la santé et l'éducation.

A. Caractéristiques de l'emploi des femmes: les métiers féminins

On trouve les plus fortes concentrations de travailleuses dans les métiers les moins valorisants ou situés aux niveaux inférieurs des hiérarchies profession-

nelles. Elles sont également majoritaires dans les secteurs les plus précaires comme le travail domestique ou les activités du secteur informel, ce qui les rend particulièrement exposées aux abus. Dans tous les pays d'accueil, les femmes travaillent majoritairement dans les métiers de la santé et comme employées de maison (60% des migrantes latino-américaines sont employées de maison dans les pays de destination. En Espagne, 70% de la totalité des immigrantes sont employées dans ce secteur. La proportion est équivalente pour les Ethiopiennes et les Somaliennes travaillant en Italie).

Elles sont aussi majoritairement employées de maison dans les pays du Moyen-Orient, de l'Arabie Saoudite au Liban. Dans les Emirats Arabes Unis, chaque ménage a en moyenne trois domestiques, étrangères pour la plupart.

B. Exploitation et discrimination envers les femmes migrantes

La situation des femmes immigrées n'est pas satisfaisante au regard de l'égalité de traitement entre homme et femme.

Les législations et les politiques migratoires prennent rarement en compte les problèmes spécifiques aux femmes migrantes, d'autant que les statistiques les concernant sont peu nombreuses et parcellaires.

Il est plus facilement fait mention du « migrant économique » – donc d'un homme – que de la « personne migrante », qui inclurait les femmes.

Les structures sociales dans les pays de départ donnent une plus large visibilité économique aux hommes qu'aux femmes, dont la place dans la vie économique est peu comptabilisée.

Le niveau de qualification et de formation est dans la plupart des cas plus élevé chez les hommes migrants que chez les femmes. Une femme a donc moins de chance d'être intégrée dans les structures économiques légales et est souvent « invisible » également de ce point de vue (travail domestique, prostitution…).

L'instrumentalisation des femmes dans le discours politique (considérées comme « les agents privilégiés de l'intégration » en raison de leur place dans la famille) et la méconnaissance de la réalité complexe de ce groupe, sa diversité sociologique interne, sa présence structurelle – croissante – dans le fait migratoire et dans l'économie du pays d'accueil (et des sociétés d'origine).

La violence des employeurs : Dans une grande partie des pays d'accueil, particulièrement au Moyen-Orient, les employées de maison se voient retirer leur

passeport à leur arrivée et sont ainsi totalement dépendantes de leurs employeurs. Beaucoup d'entre eux ne leur versent aucun salaire et les tiennent dans une véritable captivité. Sans aucun recours, elles doivent travailler 7 jours sur 7 jusque tard dans la nuit et sont nombreuses à subir de graves brutalités, pouvant aller jusqu'au viol et à la torture.

Le trafic de femmes et l'exploitation de migrants clandestins représente aujourd'hui la troisième source mondiale de revenus illicites après les armes et la drogue. Le trafic international des êtres humains concernerait chaque année entre 600 000 et 800 000 personnes. Or 80% des victimes sont des femmes.

Les principales régions d'origine des travailleuses clandestines, majoritairement destinées par les trafiquants à la prostitution, sont l'Asie du Sud et du Sud- Est, les pays de l'ex-Union soviétique et de l'Europe centrale. La plus grande partie de ces migrantes forcées sont envoyées dans les pays voisins du leur (principal pays de destination : la Turquie/Les principales destinations internationales sont les Etats-Unis, l'Europe occidentale et le Moyen-Orient). Les autres formes d'exploitation clandestine sont le travail forcé dans l'agriculture et les industries manufacturières. Les migrations de femmes en vue de mariages forcés est également en augmentation, surtout en Asie (Taïwan et Corée du Sud).

Les femmes réfugiées sont particulièrement vulnérables à toutes formes de violence. La majorité des habitantes des camps ont subi des viols. Les violences sexuelles sont devenues une véritable arme de guerre depuis le début des années 90. Elles sont à l'origine de grossesses forcées, de lésions génitales particulièrement graves, et de la propagation du Sida dans la population féminine réfugiée et déplacée.

VI. Recommandations

- Regrouper les instruments juridiques liés à la question migratoire aux niveaux international, régional et national, et faire en sorte d'en faciliter l'accès.
- Organiser des séminaires de formation et des activités de renforcement de capacités dans le domaine du droit de la migration en coopération avec les Etats et les organismes qui travaillent sur la protection des migrants.
- Documenter les violations des droits humains des migrants tout au long de leur parcours migratoire et inciter les autorités nationales à réformer leur lé-

gislation et leurs politiques afin d'assurer la protection des droits des migrants.

- Mobiliser les syndicats pour le respect des droits des migrants
- Mener des campagnes pour la ratification universelle de la Convention sur la protection des travailleurs migrants et de leurs familles, ratifiée jusqu'ici par 45 Etats, notamment du Sud et aucun état du Nord.
- Les législations devraient prévoir plus de protection spécifique pour les abus commis contre les femmes domestiques. De même, les législations concernant le droit d'asile devraient prendre en compte les discriminations sexo-spécifiques.

Conclusion

S'il faut noter un élément clé dans les débats de tous les jours sur les questions de migration, c'est que la perte classique de bien-être, les conséquences négatives de la fuite des cerveaux et la chute des transferts devraient être atténuées par l'impact positif du retour de l'émigration, les incitations à l'émigration qualifiée pour investir dans le capital humain, et la création de réseaux à l'étranger, dont les conséquences sur le commerce et les investissements directs étrangers sont positives. L'arrivée récente des migrants économiques de l'Asie et du Moyen Orient en Europe va transformer le paysage économique de l'Europe. En les intégrant dans son tissu économique, le continent européen va booster ses productions nationales et régionales et reconquérir une base correcte de production intérieure brute. Ceci va avoir des conséquences majeures sur l'Europe : sa population, sa force de production mais aussi sur sa démographie et sa composition sociologique.

Cependant, il est assez peu probable que les principaux pays d'accueil reviennent sur leur position politique actuelle, qui consiste à décourager l'immigration non qualifiée et à favoriser l'entrée de travailleurs qualifiés. Des systèmes de migrations temporaires, qui laisseraient entrer des travailleurs qualifiés et non qualifiés pour une période relativement courte, pourraient être plus courants. Ils pourraient cibler les besoins du marché du travail dans les pays d'accueil et permettraient des transferts soutenus et réguliers. Les travailleurs émigrés rentreraient dans leur pays après avoir acquis d'utiles compétences et pourraient jouer un rôle clé dans la promotion de nouvelles relations commerciales et financières.

CLEMENT VOULE *

L'exploitation des matières premières et les droits de l'homme en Afrique

Selon Wikipédia, une matière première « est un produit à l'état brut (matière extraite de la nature: notion de ressource naturelle), ou ayant subi une première transformation sur le lieu de production pour la rendre propre à l'échange international, utilisé dans la production de produits finis ou comme source d'énergie». On compte parmi les matières premières le gaz naturel, minerais et métaux, caoutchouc, etc. Selon les statistiques, l'Afrique dispose de 30% des réserves mondiales des matières premières minérales non énergétiques.

Ce thème étant vaste, je choisis de me concentrer sur les violations des droits de l'homme liées à l'exploitation de ces ressources naturelles en Afrique par les industries extractives.

I. La dimension des ressources naturelles en Afrique - quelques données

Le secteur minier occupe une place stratégique dans les économies africaines, en ce qu'il constitue le fer de lance pour la croissance de la macro-économie de différents pays africains. Selon la Banque mondiale, le secteur minier est celui qui est susceptible de contribuer le plus rapidement à la croissance nationale si les nombreux obstacles, qui freinent son développement sont levés.[1]

Selon la Commission économique des Nations Unies pour l'Afrique, le continent abrite 54 % des réserves mondiales de platine, 78 % de diamants, 40 % de chrome et 28 % de manganèse. Le PNUD aussi relève que «Dix-neuf des 46 pays d'Afrique subsaharienne possèdent d'importantes réserves d'hydrocarbures, de pétrole, de gaz, de charbon ou de minéraux et 13 pays

* African Advocacy Director and Program Manager at International Service for Human Rights.

1 Banque Mondiale, République Démocratique du Congo, La bonne gouvernance dans le secteur minier comme facteur de croissance, Rapport no 43402-ZR, mai 2008.

explorent actuellement de nouvelles réserves».[2] Pourtant, il est un secret de polichinelle que l'Afrique est le continent le plus pauvre du monde.[3]

Il faut ajouter aussi que l'économie de l'Union européenne est singulièrement dépendante vis-à-vis des minéraux - de 48% pour le cuivre jusqu'à 100% pour le cobalt, le platine, le titane, etc.[4] - et, de manière générale, l'importation de matières premières représente environ un tiers de toutes ses importations.[5] D'un autre côté, l'Afrique, en raison de la faiblesse des États, de l'absence de contrôle du marché et de son manque d'industrialisation, ne consomme pas les minéraux qu'elle produit.[6]

II. Ressources naturelles comme source de pauvreté et de conflits armés - la malédiction des ressources naturelles

Malgré cette richesse, l'Afrique demeure un continent pauvre et beaucoup de pays riches en ressources naturelles telles que les mines ou le pétrole sont ravagés par des conflits armés, ou une instabilité politique, ou parfois gouverné par une dictature qui s'accapare ces ressources au détriment de la majorité de la population.

La plus grande partie de la littérature sur cette épineuse question cite la République Démocratique du Congo (RDC) comme un exemple typique pouvant illustrer le paradoxe de la malédiction des ressources, en ce que sa géologie scandaleusement riche -dotée entre autres de quantités variables de diamants, or, cuivre, cobalt, coltan et étain- loin de contribuer à l'accélération de sa croissance économique et au développement durable de son peuple, a été au centre de

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2 Par: Kingsley Ighobor, L'Afrique veut transformer son industrie minière (Avril 2014), http://www.un.org/africarenewal/fr/magazine/avril-2014/ressources-mini%C3%A8res-la-fin-d%E2%80%99une-mal%C3%A9diction (consulté le 2 mai 2014).

3 Économie de l'Afrique, http://fr.wikipedia.org/wiki/%C3%89conomie_de_l%27Afrique (consulté le 2 mai 2014).

4 Commission européenne (2008), The raw materials initiative – meeting our critical needs for growth and jobs in Europe, Bruxelles, http://ec.europa.eu (consulté le 2 mai 2014).

5 Commission européenne (2012) EU Trade policy for raw materials. Second activity report, Bruxelles, http://trade.ec.europa.eu (consulté le 2 mai 2014).

6 José Luis Gutierrez Aranda Matières premières et consommation globale, http://www.aefjn.org/index.php/materiel-410/articles/matieres-premieres-et-consommation-globale.html (consulté le 2 mai 2014).

tous les troubles sociaux, politiques et économiques interminables, qui ont mis à caution l'émergence économique et la stabilité sociopolitique de ce riche pays.[7]

En sus de la RDC, un autre exemple est celui du Niger qui, malgré sa quatrième place mondiale dans la production de l'uranium, se classe avant-dernier en terme d'Indice de Développement Humain (IDH) : 63 % de la population vit sous le seuil de pauvreté, seuls 17 % des Nigériens sont alphabétisés, le système sanitaire est catastrophique, l'espérance de vie à la naissance s'élève à 44 ans, la mortalité infantile est de 150/1000, la malnutrition chronique touche un enfant sur deux, et il n'y a que 3 médecins pour 100 000 habitants.[8]

Aussi, il n'est pas rare que l'exploitation des ressources naturelles y compris (sinon surtout) les ressources minières soit liée à l'émergence, à l'accentuation ou au prolongement de conflits politiques ou armées. Selon le PNUE, « *depuis 1990, au moins dix-huit conflits violents ont été alimentés par l'exploitation des ressources naturelles. En fait, des recherches récentes suggèrent que quarante pour cent au moins des conflits internes survenus au cours de ces soixante dernières années ont un lien avec les ressources naturelles* ».[9]

Des exemples emblématiques peuvent être soulignés ici. C'est le cas de la guerre civile au Libéria, en Sierra Leone et en Angola.

A. Liberia

La guerre civile libérienne de 1989 à 1997 a été la plus atroce et la plus meurtrière qu'a connue ce pays de la sous-région Afrique de l'Ouest. Elle a coûté la vie à près de 150 000 personnes, pour la plupart des civils, et provoqué l'effondrement total de l'ordre public. Des milliers de déplacés internes et externes ont été enregistrés durant cette période. Près de 850 000 Libériens se sont réfugiés dans les pays limitrophes fuyant les massacres et les viols commis par les différentes milices. Même si le contrôle des ressources naturelles telles que l'hévéa, le bois et les diamants n'a pas été la première cause de cette guerre civile, ces ressources naturelles ont alimenté et entretenu cette guerre.

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7 Thomas Lazzeri et Carleigh Rixon, La malédiction des ressources, http://www.aefjn.org/index.php/materiel-410/articles/la-malediction-des-ressources.html (consulté le 2 mai 2014).

8 François Cellier et Cyril Robinet, Economie politique des pays du Sud et globalisation – La Rente de l'Uranium au Niger (2008), p. 10. Voir aussi Niger: L'uranium – bénédiction ou malédiction ?, http://www.irinnews.org/fr/report/74815/niger-l-uranium-b%C3%A9n%C3%A9diction-ou-mal%C3%A9diction (consulté le 2 mai 2014).

9 PNUE (2009), Du conflit à la consolidation de la paix. Le rôle des ressources naturelles et de l'environnement, http://www.unep.org (consulté le 2 mai 2014).

Les différents belligérants ont fait du contrôle de ces ressources naturelles une priorité afin de pouvoir financer l'achat des armes et entretenir les milices combattantes. C'est le cas du Front National Patriotique du Libéria dirigé par Charles Taylor. En témoigne d'ailleurs l'embargo sur les armes décrété par le Conseil de sécurité des Nations Unies à travers la résolution 1343[10] sur le commerce des armes et des diamants. Plusieurs hommes d'affaires et exploitants de ces ressources naturelles, en contrepartie des armes qu'ils fournissent aux belligérants, ont fait l'objet de gel de leurs biens et d'interdiction de voyage.

La guerre civile libérienne avec son lot d'atrocités a occasionné des violations massives des droits de l'homme documentées par la Mission des Nations Unies[11] au Liberia et la Commission Vérité Réconciliation[12].

B. Sierra Leone

La guerre civile sierra léonaise de 1991 à 2002 a été menée par le Front Révolutionnaire Uni (RUF) dirigé par un caporal de l'armée Foday Sankoh. C'est l'une des guerres civiles les plus atroces qu'a connues le continent Africain.

Les "diamants du sang", expression évocatrice, est probablement le symbole le plus connu du lien qui existe entre ressources naturelles et conflits en Afrique. Du fait de leur petite taille, les diamants sont faciles à transporter et à importer illégalement. Leur prix élevé sur les marchés mondiaux peut servir à acheter de nombreuses armes, à rémunérer des combattants ou à financer par d'autres moyens des activités militaires.

Pendant la guerre civile qu'a connue ce pays une dizaine d'années durant, ce sont les mines de diamants de ce pays qui ont suscité les combats les plus violents. Les diamants exportés illégalement de la Sierra Leone ont également contribué à financer des belligérants dans la guerre au Libéria voisin, tout comme l'exploitation illégale du bois et du fer libérien. Charles Taylor, qui purge une peine de prison de 50 ans pour crime contre l'humanité, fournissait des armes au RUF en contrepartie des diamants que lui livrait cette rébellion.

Durant cette guerre, des atrocités ont été commise sur les populations civiles telles que les viols, les amputations forcées de bras «manches courtes ou manches longues», des exécutions sommaires, torture etc.

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10 http://www.sipri.org/databases/embargoes/un_arms_embargoes/liberia/UNSC_res1343

11 http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1509(2003)

12 http://trcofliberia.org/reports/final-report

C. Angola

Comme en Sierra Leone, la vente du diamant a joué un rôle important dans le financement de la guerre civile angolaise. Malgré des années d'embargo et des sanctions financières décrétées par le Conseil de sécurité des Nations Unies, l'Union Nationale pour l'Indépendance totale de l'Angola (UNITA) de Jonas Savimbi a pu, grâce au troc du diamant, rééquiper ses troupes et reprendre la guerre civile en 1998. Chaque camp disposait d'une source de revenus: le gouvernement contrôlait les gisements de pétrole au large des côtes, tandis que le mouvement rebelle de l'UNITA a subvenu à ses besoins des années durant en exploitant illégalement les mines de diamants. La guerre civile angolaise qui a duré de 1975 à 2000 a fait plus de 300'000 morts et des violations massives des droits de l'homme telles que les viols, la torture, les amputés de guerre pour cause de mines antipersonnelles, etc.

III. Autres formes de violation des droits de l'homme liées à l'exploitation des ressources naturelles

L'industrie minière contribue au phénomène d'accaparement des terres et de l'eau, entrant ainsi en concurrence directe avec l'agriculture paysanne. Par exemple, un rapport de l'ONG FIAN a révélé que, au Ghana, les compagnies minières obtiennent des concessions toujours plus nombreuses et de plus en plus grandes. Dans la région de Tarkwa particulièrement, plus de 70% de la surface est actuellement en concessions, avec des conséquences incalculables sur l'accès des populations locales à l'eau potable, aux terres arables et même à l'électricité.[13]

Aussi, au Zimbabwe, près de 20 % du territoire national est concerné par l'exploitation minière, de sorte que, dans certaines régions, comme Marange, près de 40 % du territoire est sous concession avec autant de terres et d'eau confisquées à l'agriculture paysanne.

L'exploitation du sol est aussi une source d'abus de pouvoir, source de violence car souvent contrôlée par des acteurs liés à la criminalité organisée ou aux chefs

[13] FIAN International, Preliminary Report of a Human Rights Finding Mission, April 2000, p. 2.

de guerre qui se battent pour le contrôle. Les entreprises non régularisés en Afrique se livrent aussi à toutes sortes d'abus en totale impunité.

Le cas des Ogonis du Delta du Niger au Nigeria

Shell Nigeria, une branche de la compagnie Royal Dutch/Shell a été la première de ces compagnies à découvrir le pétrole dans le delta du Niger, la plupart à (ou près de) Ogoniland, en construisant d'imposants puits de pétrole et des pipelines qui traversent les villages des communautés indigènes Ogonis. Les déversements d'hydrocarbures et la pollution de l'air résultant de ces exploitations ont eu pour conséquence la contamination de la plupart des sources d'eau de boisson d'Ogoniland. De profondes couches de pétrole, qui viennent des fuites des puits et des pipelines, ont recouvert les terres fertiles, avec pour résultat que beaucoup d'Ogoni n'avaient plus de moyens de subsistance. Ni le gouvernement, ni la compagnie n'avaient osé informer les populations affectées du Delta du Niger concernant l'impact sur l'environnement des exploitations pétrolières.

Entre les droits bafoués par l'exploitation abusive et non règlementée des matières premières en Afrique, on identifie les violations du droit à l'autodétermination (article 20 de la Charte Africaine des Droits de l'Homme et des Peuples). La vie des peuples autochtones est bouleversée par les activités des industries extractives[14], mettant en péril leur existence.

En outre, le droit à un environnement général satisfaisant constitue à la fois un droit individuel et un droit collectif. Ce droit protège essentiellement le lien étroit existant entre l'homme et son environnement, lien original qui n'est subordonné à aucune condition de lien de propriété ou de lien économique.

Des exemples malheureux d'atteinte au droit à la vie et des restrictions à la liberté et à l'intégrité physique et morale font aussi partie du répertoire des violations des droits de l'homme en lien avec l'exploitation des ressources naturelles. L'exemple le plus récent est celui du massacre de Marikana en Afrique du Sud en août 2012. Cette affaire, qui illustre les conditions de travail inacceptables des travailleurs et la répression des revendicateurs des droits humains dans le contexte des industries extractives, peut être un exemple classique, parmi tant

[14] Article 21 de la Déclaration sur les Droits des Peuples Autochtones : « Les peuples autochtones ont le droit de maintenir et de développer leurs systèmes sociaux, politiques et économiques, d'être surs de jouir de leurs propres moyens de subsistance et de développement et de s'engager librement dans leurs activités traditionnelles, économiques et autres. Ceux qui ont été privés de leurs moyens de subsistance et de développement doivent recevoir une juste et équitable compensation ».

d'autres en Afrique. Ces massacres, qui ont coûté la vie à 44 personnes sans compter des dizaines de blessés, ont commencé par un conflit de travail à la mine de platine de Marikana portant sur l'amélioration des conditions de travail, dont le point d'achoppement était la réclamation d'augmentation des salaires. Les débordements des grévistes se sont heurtés à la répression musclée et disproportionnée de la police sud-africaine.

La Commission d'enquête mise sur pied a pu auditionner toutes les personnes soupçonnées comme auteurs de ces massacres, en particulier les responsables de la police et les actionnaires de la compagnie Lonmin. Elle a clôturé ses auditions en novembre 2014.

Les abus liés à l'exploitation du pétrole au Soudan

Avant la signature de l'accord de paix, le 9 janvier 2005, le Soudan a souffert d'une guerre de vingt-et-un ans marquée par des violations des droits de l'homme. Pendant cette guerre, le gouvernement soudanais a utilisé la stratégie de «divise et déplace» pour faire partir les habitants des camps de pétrole du Sud du Soudan. Pendant les périodes qui ont suivi la découverte de pétrole dans le site, des centaines de milliers de civils en Western Upper Nile/Unity State ont été déplacés par la force sans préavis ni compensation. Il a été allégué que l'armée soudanaise et des troupes armées du gouvernement se sont attaquées aux civils, afin de créer un «cordon sanitaire» pour mener à bien les activités pétrolières sans aucun empêchement et pour dégager le chemin des projets d'infrastructure pétrolière, et que le soutien logistique de Talisman Energy aurait substantiellement contribué à la commission de graves exactions contre les Soudanais non-musulmans, à savoir le génocide, les crimes de guerre et les crimes contre l'humanité.

Dans son rapport, Human Rights Watch a relevé que Talisman Energy, une compagnie pétrolière canadienne a été complice des violations des droits de l'homme au Soudan en ce que, depuis août 1998, jusqu'à la vente de ses actions au Soudan en 2003, Talisman a été le partenaire principal des concessions de pétrole de Greater Nile Petroleum Operating Company (GNPOC) au Soudan.

Dans le contexte des industries extractives, les défenseurs des droits de l'homme sont particulièrement vulnérables aux violations des droits de l'homme. La Déclaration des Nations Unies sur les défenseurs des droits de l'homme reconnaît à chaque individu le droit de promouvoir et de protéger les droits et les

libertés fondamentales reconnus[15]. Malgré cela, on a pu documenter que les défenseurs des droits de l'homme, qui travaillent pour exposer les violations des droits de l'homme commises par les entreprises extractives, font eux-mêmes l'objet de violation de leurs droits. Ils sont souvent menacés, diffamés et traités parfois comme des saboteurs du développement national.[16] Parfois, certains font l'objet de harcèlement judiciaire et d'atteinte à leur intégrité physique.

IV. Les causes des violations

La plupart des abus commis dans ce contexte le sont car il y a un manque de régulation, d'autorité de l'Etat et d'un cadre juridique optimal de gouvernance qui permet de protéger les droits des populations. L'absence d'un état de droit et d'un cadre approprié de gouvernance signifie que les citoyens ne peuvent pas se défendre face à des intérêts gérés par des grands groupes économiques, voire même des groupes criminels souvent présents dans le contexte d'exploitation des ressources naturelles en Afrique, ou des rebelles et hommes armés dans le contexte des conflits.

L'exploitation du sol a lieu dans un cadre institutionnel qui fait la part belle aux entreprises par rapport aux droits des communautés locales. Celles-ci n'ont souvent pas les moyens de se défendre face aux intérêts économiques en jeu. Sont particulièrement affectés par cette situation les peuples autochtones qui ont un lien ancestral et particulier avec la terre.

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15 Le nom officiel de cette déclaration est: « Déclaration sur le droit et la responsabilité des individus, groupes et organes de la société de promouvoir et protéger les droits de l'homme et les libertés fondamentales universellement reconnus ». http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration_fr.pdf

16 www.ishr.ch/sites/default/files/article/files/submission_to_the_african_commission_v2.pdf

Conclusions et recommandations

Au niveau international, la dynamique amorcée par la communauté internationale avec l'adoption des principes directeurs de John Ruggie[17] - et tout récemment par la mise en place du groupe de travail intergouvernemental sur l'élaboration d'un instrument contraignant dans le domaine des entreprises et des droits de l'homme[18] - doit répondre à l'interrogation suivante: comment faire en sorte que l'exploitation des ressources naturelles, dont nous avons tous besoin (Afrique, Asie, Europe, etc.) pour le développement économique et social de nos populations, ne se fasse pas au détriment des valeurs que nous avons tous défendus depuis la 2ème Guerre mondiale, à savoir que chaque être humain a des droits fondamentaux et la jouissance de ces droits nous incombe à tous en tant que communauté internationale ?

Il y a un lien étroit entre abus commis par les industries extractives en Afrique et la fragilité des institutions de l'Etat et la gouvernance en Afrique. Pour protéger les droits de l'homme dans un tel contexte, il faut à la fois investir dans la consolidation de l'état de droit et la gouvernance des pays africains et s'assurer que les entreprises elles-mêmes soient tenues responsables du sort des populations affectées par leur activités.

Il ne suffit pas d'accroître la capacité des défenseurs des droits de l'homme afin de se mobiliser pour protéger les droits de leurs communautés face aux industries extractives. Il faut aussi assurer leur protection, car il n'y a pas de contexte plus dangereux pour les activistes des droits de l'homme que celui où des intérêts économiques et pécuniaires sont en jeu.

La nécessité d'exposer ces violations dans les pays d'origine de ces entreprises - et de faire en sorte qu'elles soient tenues responsables - doit faire partie de la stratégie d'action. En cela je voudrais mentionner le récent rapport de la Déclaration de Berne sur l'origine de la filière de l'or Suisse[19].

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17 http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31_fr.pdf

18 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/53/PDF/G1408253.pdf?OpenElement

19 https://www.ladb.ch/campagnes-et-actions/un-filon-en-or/

MOUHAMED KEBE *

Investment Agreements and Human Rights Issues : The Chad-Cameroon Pipeline Project

The classic idea according to which there is limited scope for human rights in foreign investment is more and more challenged by many Trans-national corporations (TNCs) which have expressly stated that they have strong concerns regarding the issue in the countries where they operate.[1] However, this commitment is not exactly fulfilled when it comes to be enforced, in that the weight and scope of international human rights standards are not given full respect by the TNCs. Consequently, when dealing with investment and human rights, the issue is not whether human rights are taken into account by foreign investment or not; they actually are. The point is how human rights are integrated in the commercial activity.

Prima facie, it may be thought that these issues arise in the Multi Agreement Investments (MAIs) or in the Bilateral Treaty Agreements (BITs). However a careful overview of relevant cases and scholarly writings in relation to the matter over the last few years reveals that these questions come about mostly in the contracts between TNCs and host countries.[2] Some features of the investment contracts may confirm this opinion.

- Given that such contracts are not regulated per se by an investment treaty,[3] they create a special regime that often imposes upon the host states provisions strengthening the TNCs' interests and concerns, which are not mostly those of the populations where their projects will be implemented.
- Another danger carried by the investment contracts lies in the fact that they generally put in place mechanisms that weaken the ability of the populations

* Senior Partner with Geni & Kebe, Senegal.

1 The Equator principles, adopted in 2003 by ten banks are currently endorsed by 83 institutions in 36 countries. See: http://www.equator-principles.com/index.php/members-reporting (visited 11 February 2016).

2 Due to length constraint, human rights and investments in relations to MAIs and BITs will not be addressed here. This paper will focus exclusively on the human rights issues in relation with an investment contract between a TNC and a host state.

3 In the Chad Cameron Pipe line Project, Chad's obligations to investors are not regulated by an investment treaty, but by an investment contract.

to defend themselves via the domestic judiciary system in the case of a breach of international human rights standards or domestic law[4].

- They are framed with special regimes applicable for the lifetime of the project that runs generally between fifteen to seventy years.
- They are often not disclosed to the public.[5]
- They cover mostly activities that constitute the core revenue of the host state.
- They are frequently accountable for many problems impacting health, land, safety, environment, to mention but a few, and when such problems occur, the populations where their projects are implemented realise, once they challenge them, that they are drafted in a way that cannot grant them sufficient legal basis to complain before the domestic courts or even before the international bodies[6].

The purpose of this contribution is to analyse these different issues through the Chad-Cameroon pipeline project[7]. After an overview of the background of the project, we will address the competing interests between human rights and business and how they have been dealt with in the project. The next point will focus on the fundamental rights breached by the investment agreements signed within the project. The concluding remarks will suggest some possible solutions that may help to strike the balance between the above mentioned competing interests.

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4 See infra, note 18.

5 Regarding the question of the unavailability of these contracts for public inspection, see Amnesty International, Contracting out of Human Rights. The document is available at http://business-humanrights.org/en/amnesty-intl-report-on-chad-cameroon-pipeline-says-govts-companies-involved-are-contracting-out-of-their-human-rights-responsibilities#c23861 (visited, 10 February 2016).
The same problem is at stake in Senegal where an investment contract has accorded to Mineral Deposit Limit (MDL), an Australian company, a concession of gold mines in the South East Region of the Country. The Civil Society is still urging the Senegalese State to disclose the terms of the Contract signed without any prior consultation with the local populations living in the area.

6 The principal impediment they face before the domestic courts is the fact that the investment contract is often given precedence over the existing laws. As for the international bodies, generally, the investment contract gives jurisdiction to an arbitrate tribunal which considers as third party any other one than those which have signed the contract. This issue will be debated later (see infra, note 33).

7 It is worth mentioning at the outset that although the study will focus on the Chad-Cameroon pipeline project, the points raised here are at stake in all investment contracts.

I. Background

Chadian oil has attracted many corporations amongst which Exxon Mobil, Chevron, and Petronas. As Chad is a landlocked State, a project to build up a 1070 km pipeline from the exploitation area to the coast, located in Cameroon, has been set up for the transportation of the oil. The project has been funded by the World Bank and other credit agencies and is the biggest one ever funded in Africa (4.2 billions USD).[8]

In order to build up the pipeline and implement the project, a consortium has been set up by the companies involved in the project. This consortium is lead by Exxon Mobil that owns 40% of the private equity.[9] Two joint-venture companies are set up by the consortium and the host states.

In Chad, Chad Oil Transportation Company (TOTCO) owns and operates the portion of the pipeline in the Chadian territory, whereas in Cameroon, Cameroon Oil Transportation Company (COTCO) has been granted the same prerogatives within Cameroon. Both TOTCO and COTCO are owned by the Consortium, which is the majority shareholder, and respectively, the governments of Chad and Cameroon.

Each of these companies has signed with the state in which it operates an investment contract.[10] The Chadian oil drained many interests due to the fact that it has been discovered in a particular context. On the one hand, Chad, a poor country, listed in the last quartile of the least advanced countries, is in a dire need of revenues for poverty alleviation.[11] On the other hand, the discov-

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8 IFC played a key role in the project, an analysis of the subject is available at http://www.ifc.org/wps/wcm/connect/region__ext_content/regions/sub-saharan+africa/investments/chadcameroon (visited 14 February 2016).

9 Aside Exxon Mobil, there are two other companies: Petronas, a Malaysian company, owns 35% and Chevron owns 25%. See World Bank Report at http://web.worldbank.org/archive/website01210/WEB/0__CO-15.HTM (visited 16 February 2016).

10 TOTCO-Chad defines the relationship between the Consortium and Chad, while COTCO-Cameroon governs the agreement between Cameroon and the Consortium. Alongside these both contracts, Chad and Cameroon have signed a bilateral treaty that determines the relationship between the two states for the operation and construction of the project. This treaty deals also with the issue of the exportation of Chadian oil via Cameroon's territory.

11 According to World Bank estimation, the project has generated employment for over 13,000 local people in Chad and Cameroon; over $400 million worth of infrastructure improvements; and over $680 million worth of procurement contracts (see Report, supra, note 8). In

ery of the Chadian oil comes up in a time when the United States considers the African oil in the context of an energy crisis as a ''strategic national interest''[12] and a strong alternative to Middle East energy. In addition, the relationship of Chad with France, China and Libya reinforces the complexity and the array of interests at stake.[13] The complexity and interference of such interests justify partly the collapse of the project.[14] The different steps that have lead to such collapse will not be discussed here; such analysis is beyond the scope of this study.[15]

II. Human Rights Law v. Commercial Interests

An overview of the interests in an investment contract reveals undoubtedly that the tension between the human rights obligations of the host State under the international law and its duties as a party to a contract is the central issue at stake. As a matter of principle, an investment agreement cannot and should not supersede such obligations. However a careful analysis of the content of the agreements signed within the Chad-Cameroon pipeline project and the way the respective parties have fulfilled their duties under the contracts show that there was an undermining of the host States' human rights obligations as well as the human rights responsibilities of the investors.

terms of revenue, the same report points out that oil will increase the revenues of Chad by 45 to 50 % As of June 2008, the oil revenues have generated 3.256 $ billions in cumulative government revenues; 1.858 coming from taxes and 1.240 coming from royalties.

12 Daniel Volman, *The Bush Administration and African Oil: The Security Implications of US Energy Policy*, Review Of African Political Economy (ROAPE) n° 98, 2003, 573-584.
For more details in this issue See also Jeremy Keenan, *Chad-Cameroon Pipeline: World Bank and Exxon Mobil in ''Last Chance Saloon''*, ROAPE n° 104, 2005, 395-405.

13 See Scott Pegg, *Chronicle of a Death Foretold: The Collapse of the Chad-Cameroon Pipeline Project,* African Affairs, (Published by Oxford University Press on behalf of Royal African Society), January 2009, 1-10.

14 The World Bank, after having strongly conveyed concerns on how Chad was breaching the agreements, concluded by all the parties regarding the revenues and the management of the project has been ejected from the project by Chad and has expressly announced in September 2008 that it is no more involved.

15 For an extensive and clear literature on the issue, see Jeremy Kennan, supra note 12, and Scott Pegg, supra note 13. These two authors analyse respectively and very broadly the way the project has been structured, how it has been managed by Chad and the World Bank, the reasons of the divergences between Chad and the investors, and Chad and the World Bank, and why, and how the World Bank has been ejected by Chad from the project.

A. Precedence of Contracts Over Law

Chad 2004 states expressly that the contracts signed between Chad and the Consortium will be bound by the host state's laws and constitution.[16] However a closer look at the content of the contracts shows that such high sounding principles seem to have the ring of hypocrisy in their application.

The first breach of these principles transpires from a few special regulations, standing alongside the domestic statutes of the both host states and entirely autonomous from them.[17] The second offence derives from the fact that the contracts point out explicitly that where national laws and regulations conflict with them, they will supersede.[18] Another transgression of the principle of sovereignty of the host states emerges from the TOTCO-Chad Agreement. It asserts that the project should comply with the Petroleum Code and laws applicable in the host state. It indicates also that the project should indemnify any person affected by the inconsistency of the project with the international standards applicable in petroleum industry. However the Agreements provide in very clear terms that Chad should not impose any regulation that may breach the international petroleum industry standards. In case she does so, the Consortium is allowed to resort to arbitration if it believes that such regulations are unreasonable or inconsistent with the above mentioned standards.[19]

The first upshot of this provision is that it weakens any willingness of Chad to enact regulations that may be challenged by the Consortium; the eventuality of arbitration can make it very hard for her to take such a risk.

The second consequence is that if the regulation envisaged was motivated by a compliance with a human rights obligation of Chad, the renouncement to such envisaged regulation would affect the populations whose the rights are breached by the project.

The last affront of the above mentioned principle arises from the precedence of the ''industry practices'' over international human rights standards.[20]

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16 Chad 2004, article 34 mentions that ''The Consortium must respect the laws and regulations of Republic of Chad.''

17 Article 30 COTCO-CAMEROON Agreement.

18 COTCO-CAMEROON, article 30.2; Chad 1988, Art. 34.4, Chad 2004, article 34.4

19 Article 17.4 of the 1988, and 2004 Chad Agreements.

20 This subject will be dealt with in the paragraph regarding the environment aspects. See infra, note 38.

One conclusion that can derive from the foregoing is that the investment contracts signed between the Consortium and Chad and Cameroon can dilute or annihilate any existing domestic or international rule -whatever the hierarchy of such rule might be- which impedes the interests of the investors. In other words, and as expressed by a leading opinion[21], the investment contracts signed within such a project stand as an ''unofficial constitution'' in that they grant to the investors special derogations which cannot be challenged either on the ground of the existing law or on the basis of the constitution by the people whom they affect

This is a real challenge to the sovereignty of the two host states.''

The stabilisation clause included in the contracts and the way it is drafted both in its insulating and managerial forms[22] suffices to give a flavour of how the interests of the Consortium have been privileged to the detriment of those of the host states and their populations.

B. The negative impact of the Stabilisation Clause in the Project

A stabilisation clause is a clause included in a contract stating, on the one hand, that no future legislation (statutory or administrative) can affect the contract during all its life time,[23] and remoulding, on the other hand, the existing laws in order to adapt them to the new contract.

The main object of the stabilisation clauses is to annihilate or to weaken a risk that can affect an investment contract either in the future or in the interpretation of existing norms.[24] They are included as well in the MAIs or BITs as in the in-

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21 Shelton Leader, *Human Rights, Risks, and New Strategies for Global Investment*, Journal of International Economic Law (JIEL), 2006, 9(657).

22 Regarding the differentiation between insulating form and managerial form of stabilisation, see Shelton Leader, supra, note 21.

23 For a definition, see Paul Comeaux and Stephan Kinsella, *Reducing Political Risk in Developing Countries: BITs, stabilization clauses, and MIGA, Investment Insurance*, 15 New York University Law School Journal of International and Comparative Law, (1994) 20.

24 See, Article 36 of 2003 International Project Agreement (IPA) between Benin, Ghana, Nigeria and Togo and the West African Gas Pipeline Company: If regulatory change (including legislation, court decisions and ratification of international treaties) "causes the benefits derived by the Company from the Project [...] or the value of the Company to the shareholders to materially decrease"; then the state must "restore" the Company to an economically equivalent position it was in prior to such change. In default, it must pay "prompt, adequate and effective.

vestments contracts. However in an investment contract, they are stronger; they provide that whenever the host state re-enacts rules that affect the contract even for valid public purpose such as health, or environment, it will compensate the investor for loss of profit.[25]

According to an analyst[26], this ''insulating form'' of the stabilisation clause can be interpreted in two approaches: the transaction approach, which considers that whatever the reason, (including the compliance with international or domestic rules governing safety, health or environmental standards) invoked by a host state to amend a contract, it cannot be so strong to challenge a stabilisation clause. When such amendment arises, the host state should compensate the investor. In fact in such approach, the unilateral right of the host state to amend the contract is barred by the explicit clause indicating that such amendment is possible only if agreed by the investor.

This is the approach adopted by the arbitrators in *Revere Copper v. OPIC*. The arbitral tribunal held that ''under international law the commitments made in favor of foreign nationals are binding notwithstanding the power of Parliament and other governmental organs under the domestic Constitution to override or nullify such commitments''.[27]

Another approach is the alternative; it claims that despite a stabilisation clause, the contract should be adjusted for public interest or order based on internationally recognised fundamental rights. When this requirement is met, the host State should not be obliged to compensate the investor. This reasoning has been adopted in the NAFTA Methanex Case in which a ruling of the Californian state banning the use of a chemical substance proving to have adversarial effects on health and environment was at stake. Methanex, a Canadian company, challenged the law on the ground that it was tantamount to an expropriation and

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[25] See BTC 2000, Article 7.2 (vi) and COTCO 1997, Article 24.2.

[26] Shelton Leader, supra, note 22

[27] Such approach seems to have been adopted by the ad hoc Arbitrator who held in the LIAMCO case that the measures of nationalisation taken by the Libyan state violated the stabilisation clause included in the concessions signed between Libya and LIAMCO. (LIAMCO v The Libyan Arab Republic, Ad hoc Tribunal, Award of 12 April 1977) More details regarding the case are available at http://www.biicl.org/files/3939_1977_liamco_v_libya.pdf (visited 16 February 2016). It is worth mentioning that in this award, as well as in related awards such the *Texaco*, *Aminoil*, *AGIP* and *Revere Copper* awards the issue at stake was expropriation rather than a regulatory change. Therefore, the dispute here related more on the commitment of the host state not to expropriate rather than to revise the legislation applicable to the investment agreement.

claimed one billion US dollars compensation. The Arbitrate Tribunal rejected the claim and held that ''from the standpoint of international law, the Californian ban was a lawful regulation and not an expropriation''.[28]

The principle set in Methanex is applied by many domestic courts, that have held that a state should not accept a contract provision preventing it from acting for public interest, nor can it be held liable in damages for having taken actions of a general and public character.[29]

This approach set by Methanex and the reasoning of the case law applying does not challenge the validity of a stabilization clause per se, what it addresses is its legitimate scope. In other words, it balances the competing rights at stake when the stabilization clause threatens a state's duty to act for the public good and provide fundamental rights for its citizens. Consequently, it does not imply that any stabilisation clause included in a contract does not bind the host state; it does when the aforementioned duty is not threatened.

An overview of the agreements signed respectively between Chad, Cameroon and the Consortium reveals that they explicitly provide a stabilisation clause[30] for the lifetime of the project with all the consequences attached to such a clause. The main consequence being that if the host state contemplates to revise the contracts without the consent of the investors, or in a way they find adversely affecting their rights, they may resort to arbitration and claim compensation.[31]

A closer look at the provisions of the agreements dealing with the investors' interests also makes known that they are far more beneficial than human rights concerns. A perfect illustration of this is the clause included in one of the Agreements conceding to the Consortium the right to resist any legislation imposed by

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[28] The Arbitrate Tribunal held that ''…as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investment is not deemed expropriatory and compensable…'' (Methanex Corp v United States of America, Award of 3 August 2005.) The award is available at http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (visited 16 February 2016).

[29] The UK Court of Appeal held in Czarnikov Ltd. v Rolimpex (C.A.) [1978] 1 A11 E.R 81, 89 that ''A government cannot fetter its duty to act for the public good. It cannot bind itself, by an implication in the contract, not to perform its public duties''. In the US, it has been held by Federal Courts in Winderlinch Contracting Co v US, 351 F 2d 956 (Ct.Cl.1965) at 967 that ''Actions of a general and public character, implementing program in the national interest are considered to be acts of sovereign for which the USA cannot be held liable in damages.

[30] Chad 1988, Art. 2.2. Chad 2004, article. 34.3

[31] COTCO-Cameroon, article. 24.4. Chad 1988 Annex. Art. 34.3. Chad 2004, article. 34.3. TOTCO-Chad, article 21.3

the host State if it considers such legislation ''unreasonable''.[32] This grants a wide margin of appreciation to the Consortium as to what is ''unreasonable'' and a narrow one to the host state as to what is ''reasonable''. Given the fact that in case of litigation on this specific issue the Consortium can resort to arbitration, the host state will be very reluctant to take the risk to enact any legislation that could be challenged.

Another concern arising here is that victims do not have standing before the arbitrate bodies; they treat them are third parties to the contract and even if a likelihood of their compensation, in case they have suffered a damage, was provided in the contract, they could not stand and claim such compensation before an arbitrator.[33] This does not infer necessarily that an arbitrator, when facing a breach of human rights obligations by a host state or an investor could not address it; indeed he can. Meanwhile this is rare or even non-existent. One cardinal reason is that the arbitrators have not generally a culture or a practice of human rights. They do not look at a contract through the ''lens'' of human rights law but with a business law ''magnifier''. Another determinant reason is that even though the investment contract provides that the host State as well as the investor must comply with the existing domestic rules protecting basic human rights of the populations who may be affected by the investor's activities, such provisions are weakened by the managerial form of the stabilisation clause of the contract providing that nothing in the existing laws could impede or increase the obligations of the investor.[34]

In Chad 2004 for instance, it is explicitly acknowledged that if the existing laws are unreasonable, or are interpreted by the domestic courts, or the administrative or regulatory bodies, in a way that affects the project, it is allowed to the investors to challenge them.[35]

This explains why many breaches of human rights standards have been noted without claim, and without compensation.

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32 Chad 2004, Art. 17.4.

33 It is a general principle of law that third parties cannot refer a contract to an arbitrator. The referral of any dispute arising from the interpretation and execution of contracts is an exclusive prerogative of the parties. It is worth mentioning however that in the Methanex Corporation case, it has been allowed for the first time before an Arbitral Body the submission of Amicus curia. If this precedent allows the possibility to victims to raise their concerns it cannot in any way, allow them to claim damages.

34 Chad 2004, Articles 4.1; 34.2.

35 Chad 2004, Article 17.4.

III. Breach of Human Rights Standards

A. Environnmental Protection

The respect of the environment is a fundamental international standard that all states are obliged to comply with. According to the African Commission, the right to a safe and healthy environment is an economic and social right under the Charter[36] and should be protected by the governments. Not only should they take any necessary measure in this respect, but they should also prevent other parties from breaching such right.[37]

In the Chad-Cameroon project, the issue of environment has been explicitly addressed and dealt with in the different contracts signed between all of the parties. The loan and project agreements signed between the World Bank and Chad mentions clearly that Chad should ensure that all oil transported through the pipeline must be developed in accordance with the Environmental Management Plan (EMP) implemented for the development of the oil fields in the Doba basin.[38] However, these rules have been transgressed.

This transgression comes firstly from the fact that both the host states and the Consortium have given prevalence to the ''industry practice'' over the law. ''Industry practice'' in such context means that the contract is bound not by the local or international standards applicable to the activity but by the industry practice of this activity. Consequently, in case the Consortium operates logistics or means that are not in compliance with the international standards, neither Chad, nor Cameroon are allowed to challenge this breach; and would they be so tempted, they will not have a legal basis as long as such logistic is approved by the industry practice in the same sector. For instance the stationery tanker used by the Consortium to transfer the oil is no more permitted by the International Convention on the Prevention of Pollution from Ships that requires double hulled vessels for this task.[39] It violates also the rules set up by the International Maritime Or-

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36 Daniel Aguirre, *Corporate Social Responsibility and Human Rights Law in Africa*, 5 African Human Rights Law Journal, 239 (2005).

37 African Commission on Human and Peoples Rights, Communication 155/96, The Social and Economic Rights Actions Centre v Nigeria, ACHPR/COMM/A044/1, 27 May 2002

38 See Section 4.10 of the EMP.

39 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL) can be consulted at http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-

ganisation (IMO)[40] requiring that the floating storage and off-loading vessels (FSO) be double hulled.[41] However, if Chad and Cameroon were inclined to require the application of the Convention, the Consortium could ask compensation on the grounds that the use of such a vessel is not prohibited by the industry practice and that complying with the Convention will increase the costs. As a result, the international environmental standards are fully breached by the Consortium. The upshot being serious damages are caused to the environment and the populations living within the perimeter of the project.

The other infringement of the environmental regulations emanates from the fact that the indigenous lands have been largely expropriated. Not only have the indigenous people not been consulted previously[42], but their land has been massively affected. It was suggested at the early stage of the project that to avoid it going through local populations' land, the pipeline route should be relocated. However, such a commitment has not been fulfilled. As a result, wide environmental damages have been done in the Bakola and pygmy lands. The conjunction of these multiple violations raises another concern: the right to an effective remedy.

Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx (visited 16 February 2016).

40 See '' Standards for the double hull construction of oil tankers'' set up by the International Maritime Organization's (IMO) International Convention for the Prevention of Pollution from Ships (MARPOL), specifically Regulations 13F, 13G and 13H to Annex I of MARPOL for new tankers and existing large tankers. Document available at http://www.tc.gc.ca/Publications/en/TP11710/PDF/HR/TP11710E.pdf (visited 17 February 2016).
IMO is the United Nations' specialized agency responsible for improving ***maritime*** safety and preventing pollution from ships. Details are available at www.imo.org (visited 17 February 2016)

41 See Jeremy Kennan, supra, note 15.

42 See, Indigenous peoples' rights in Cameroon, Supplementary report submitted in connection with Cameroon's second periodic report, to the African Commission on Human and Peoples' Rights by Centre for Environment and Development (CED) Réseau Recherches Actions Concertées Pygmées (RACOPY) Forest Peoples Programme (FPP), May 2010 http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/cameroonachprsubmissionmay10eng.pdf (visited 17 February 2016).

B. The Right to an Effective Remedy

Both Chad and Cameroon have ratified the Universal Declaration of Human Rights as well as the two Covenants and the African Charter. These instruments provide the right to an effective remedy.[43] However, such a right has not been taken into account in the agreements. The project undoubtedly affects thousands of families and populations in their rights to health, safety, land, environment, etc. Not only have the populations concerned been excluded from the inception of the project, but their rights to file an action against the Consortium have been undermined in the agreements in that it is explicitly provided that the host state will deny any action taken in order to intrude on the project.[44] The only aspect of the agreements that refer to the right to a remedy is the grievance procedure set up by the Consortium, following World Bank Guidelines for Individuals.[45] But the procedure put in place with regard to such guidelines refers only to the claims that arise during the initial stages of the project, and deals with matters regarding expropriation of the land during the construction of the pipeline. It leaves off all the problems occurring during the operation phase of the project.

The other weakness of this procedure is its unfairness. Victims submit their claims to agents acting on behalf of the Consortium. They define whether the claim is ‘’reasonable’’ or not before providing compensation if any. No recourse is afforded to the victims in case the claim is declared ‘’unreasonable’’, or when the redress granted, if any, is disproportionate to the damage, or in case a compensation allowed is not enforced.

The other procedure that can allow individuals to complain is the judicial or administrative action before the domestic jurisdictions. However, such complaints could be barred or impeded by the fact that the Agreements seem to prevail over domestic laws and the Consortium has the right to challenge any administrative or judicial decision that can undermine the project.

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43 UDHR, Art. 8; ICCPR, Art 2.

44 See infra, note 44 See infra, note 46. The African Commission held in Zimbabwe Human Rights NGO Forum v Zimbabwe, Comm.No.245 (2002), that the right to an effective remedy encompasses access to justice as well as compensation.

45 World Bank Operational Directive 4.30, Involuntary Resettlement (OD.4.30).

C. The Right to Freedom of Expression and Freedom of Assembly

It is expressly mentioned in the contracts that the host States protect the Consortium from any activities which may interfere with the project.[46] In other words, the violation of the labour rights of the workers, as well as breach of the basic human rights of the populations living in the perimeter of the project, cannot be duly challenged if such challenge may interfere with the project. The upshot of this is that in addition to the right of effective remedy that such provisions deny to the populations, they undermine fundamental rights recognised by the UDHR, the two Covenants and the 1998 Charter of International Labour Organisation such as the right to freedom of expression[47] and the right to freedom of assembly[48] as well as the principle of non-discrimination and equality before law.

D. The Right to Health and To Safe and Healthy Conditions

The international instruments ratified both by Chad and Cameroon acknowledge the right to safety and to safe and healthy conditions. The African Commission has explicitly recalled the importance of such rights under the African Charter.[49] In the Purohit and Moore Case, it held that ''states parties must inter alia take concrete targeted steps while taking full advantage of their available resources to ensure that the right to health is fully realised in all its aspects without any discrimination of any kind.''[50] The willingness of the host states to comply with such standards seems real, and stems from several provisions of the contracts specifying that the Consortium should respect the domestic law. However such provisions are compromised in one hand by other ones which point out that the Consortium can challenge any decision taken by Chad or Cameroon that may affect its interests, and on the other hand, by those referred to in the contracts and prohibiting any person to undertake activities which can impede the project.

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46 TOTOCO-CHAD, article 23.12 (b); COTCO-CAMEROON, article. 27.8(b) prohibiting any person to undertake activities which can interfere with the construction, operation, and maintenance of the project.

47 Articles 19 ICCPR; 9 ACHPR.

48 Article 21 ICCPR; 11 ACHPR.

49 See Article 16.

50 Communication 241/2000, Purohit and Moore v The Gambia (2003) AHRLR 96 (ACHPR 2003).

It flows from the numerous examples and cases afore mentioned that the human rights concerns have not been adequately addressed in the Chad-Cameroon pipeline project. This conclusion does not imply however that there is no possibility to strike the balance between human rights standards and commercial imperatives. The fact that both interests have been brought up in the contracts means that the parties were aware that they have to be addressed. Thus, the point is how to do so.

IV. Reconciling Commercial Imperatives and Human Rights Standards

A. Revising the Stabilisation Clauses

The stabilisation clauses as such drafted in the abovementioned agreements undermine the human rights standards. Consequently, they affect adversely the populations and the environment where the project is implanted. Many investment contracts now exclude stabilisation clauses' effects to fundamental human rights standards.

In Kazakhstan's North Caspian PSA investment agreement for instance, the stabilisation clause is excluded to apply to environmental, healthy and safety laws. Article 40.2 of the contract mentions that any law except environmental, health or safety law that affect the consortium’s profits will force an adjustment of the terms of the contract to restore the rate of profits.[51]

In the OECD countries, stabilisation clauses are restricted and cannot encompass all aspects of law. The same approach is adopted under the rules set up by

[51] See Friends of the Earth Report available at : www.profundo.nl/files/download/FoEE0712.pdf.

UNCITRAL[52] and UNCTAD.[53] They state very clearly that all business organisations are subject to changes in law and generally have to deal with the consequences that such changes may have for business. The interest of these rules is that they take into account the fact that an investment contract cannot be frozen for all its lifetime and should allow the parties, but above all the host state, when facing a problem of national order or interest, or a human right concern, to amend the contract without being obliged to compensate. This principle seems to have been applied in the Methanex Case[54].

Therefore, in order to avoid the adversarial consequences of these freezing clauses, the host states and the Consortium should revise them both in their insulating and managerial forms and include in the agreements renegotiation clauses which explicitly allow the amendment of contracts for objective reasons without any threat from the Consortium to challenge such an amendment before an arbitrate body.[55]

B. Strengthening Basic Human Rights

When negotiating an investment contract, both host states and investors should give prevalence to human rights standards. This is a rule accepted now by many states signing bilateral or multilateral agreements as well as by many TNCs through the Equator principles.

In the field of the right to health for instance, there is a growing consensus recognizing that such rights should supersede private interests.[56] This is why in the negotiating interests with Chile and Singapore, the United States has advanced the rights to health by emphasizing that ‘’except in rare circumstances, non-

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52 UNCITRAL: ‘’All business organizations... are subject to changes in law and generally have to deal with the consequences that such changes may have for business . . . General changes in law may be regarded as an ordinary business risk”. Compensation should only be paid where investor could not reasonably have taken changes in law into account.’’.

53 UNCTAD: ‘’A balance should be struck “between the legitimate commercial expectations of the investor party and the right of the host country party to oversee the evolution of the resulting relationship in a manner that is consistent with national development priorities”.

54 See, supra, note 27.

55 See Muthucumaraswamy Sornarajah, Supremacy of Renegotiation Clause in International Contracts, 5, Journal of International Arbitration p. 97.

56 See the US Trade Promotion Authority Act proposed by the President Bush to the Congress which in return instructed him to ‘’take into account…the protection of legitimate health or safety …interests’’ when negotiating future trade agreements.

discriminatory measures designed to protect public health, and the environment do not constitute indirect expropriations".[57]

These standards constitute good examples that Chad and Cameroon can be inspired by in their relationship with the Consortium. The parties could for instance agree on the fact that any provision included in the investment agreements should be considered void if it limits the host states' duties under international human rights treaties to which they are parties, and in case of conflict, the human rights obligations will prevail. Another relevant example can be found through the Bakou- Tbilisi-Ceyhan (BTC) project[58] where the contract was amended in order to comply with the human rights concerns. The document known as Human Rights Undertaking has four elements:

1. a commitment on the stabilization clauses excluding the seeking of compensation for actions taken by the host state when it takes measures required on human rights, labor and health, safety and environment grounds.
2. a commitment to recognize the obligation of host states to work towards the progressive realization of certain human rights and to refrain from claiming before domestic courts or international arbitration when such a claim will be inconsistent with health, safety, environmental and human rights standards.
3. a commitment not to exclude jurisdiction of domestic courts, and
4. a commitment on adequate domestic remedies.

The Chad-Cameroon pipeline project constitutes a relevant example of the competing interests between human rights and business. It shows that although more and more TNCs express their commitment to comply with human rights standards when operating in host countries, these commitments are not always fulfilled. However this does not infer that business is incompatible with the respect of human rights. If the host states, the TNCs and the arbitrate bodies commit themselves to do so, the balance can effectively be struck between both interests.

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[57] See Charles Brower, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 Vanderbilt Journal of Trans national Law, 1533, p.6.

[58] For more details about the human rights issues in the BTC project, see Amnesty, Human Rights on the Line, The Baku-Tbilisi-Ceyhan Project at http://www.amnestyusa.org/business/humanrightsontheline.pdf
Regarding the Human Rights Undertaking, see http://www.amnesty.org.uk/content.asp?CategoryID=10128#concerns.

OLIVIER DE SCHUTTER *

Towards a Treaty on Business and Human Rights

On 26 June 2014, the Human Rights Council adopted a resolution calling for the establishment of an Intergovernmental Working Group (IGWG) "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[1] The resolution was tabled by Ecuador and South Africa, and it was co-sponsored by Bolivia, Cuba and Venezuela. Though strongly supported by an impressive coalition of civil society organizations who formed a "Treaty Alliance" in support of a binding treaty[2] and although it gained support from a plurality within the Human Rights Council, the proposal was highly divisive: within the 47-members large Human Rights Council, it was supported by 20 Member States[3] and opposed by 14 States, including the United States and the Member States of the European Union[4]; 13 Member States of the HRC abstained.[5]

In striking contrast, it is by consensus that, on the following day, the Human Rights Council adopted a resolution tabled by Argentina, Ghana, Norway, and Russia, that explicitly built on the process launched by the Guiding Principles on

* Professeur de droit international public à l'Université catholique de Louvain, membre du Comité des droits économiques, sociaux et culturels.

1 HRC Res. 26/9, 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* par. 9.

2 Some 600 non-governmental organisations have formed the Treaty Alliance (or Global Movement for a Binding Treaty): see http://www.treatymovement.com/statement/ (last consulted on 15 July 2015). Notably, however, neither Amnesty International nor Human Rights Watch, two major international human rights non-governmental organizations, have joined.

3 Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam, voted in favor of the resolution.

4 The States who voted against the resolution are Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the United States of America.

5 Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates abstained.

Business and Human Rights endorsed in 2011.[6] The resolution "call[ed] upon all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles".[7] It also expressed a strong support from the work of the Working Group on Business and Human Rights, the body of five independent experts established in 2011 to support the implementation of the Guiding Principles.[8] The resolution encourages the Working Group to provide for the adoption by States of national action plans on business and human rights, and to promote "the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument": the Working Group is tasked to prepare a report on how to achieve this, for consideration by the Human Rights Council at its thirty-second session to be held in June-July 2016.[9]

This paper assesses the prospects of a new, legally binding instrument on business and human rights.[10] It argues that the gap between the States supporting the proposal by Ecuador and South Africa and the other States - including all industrialized countries members of the OECD club - is less wide than the voting patterns seem to suggest. The suspicion towards the Ecuador-South Africa proposal is in fact largely a matter of perception, to be explained by the connotation attached to the initiative. Many see this proposal as an attempt to reopen a battle fought during the 1970s, when the regulation of transnational corporations was a major component of the attempts to establish a "New International Economic Order", or as a resurrection of the proposal made in 2003 by the UN Sub-

6 HRC Res. 26/22, UN doc. A/HRC/26/L.1/Rev.1.

7 Id., par. 3.

8 The Working Group on the issue of transnational corporations and other business enterprises and human rights was established by resolution 17/4 adopted by the UN Human Rights Council in June 2011. Resolution 26/22 extends its mandate for another three years, for the period 2014-2017.

9 Id., par. 8.

10 It is the short version of a previous publication, *Towards a Legally Binding Instrument on Business and Human Rights*, July 2015, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668534. It builds on previous contributions of this author, including 'Sovereignty-plus in the Era of Interdependence : Towards an International Convention on Combating Human Rights Violations by Transnational Corporations', in: P. Bekker, R. Dolzer and M. Waibel (eds), *Making Transnational Law work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge: Cambridge University Press, 2010) 245-284; and 'La responsabilité des Etats dans le contrôle des sociétés transnationales : vers une Convention internationale sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales', in: Isabelle Daugareilh (ed.), *La responsabilité sociale des entreprises* (Bruxelles: Bruylant, 2011) 707-777.

Commission for the Promotion and Protection of Human Rights for the adoption of a set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises.[11] These attempts failed due both to the resistance of the business community and of capital-exporting countries, and to a certain naïveté in transposing to corporations norms designed to be addressed to States.[12]

Can we learn from the mistakes commited in the past, in order to build on the momentum that has emerged for a new binding instrument on business and human rights? This paper examines four options for the negotiation of such an instrument. The two first options — to clarify the scope of the States' duty to protect human rights and to oblige States to present national action plans on business and human rights, demonstrating their progress in improving accountability and in aligning economic and policy incentives with legal requirements — essentially aim to strengthen the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011,[13] by transforming the recommendations they contain into binding legal obligations. The third and fourth options would aim, respectively, at establishing a new mechanism to monitor compliance of corporate actors with human rights obligations, or to provide for duties of mutual legal assistance in order to ensure adequate access to effective remedies for victims. Although these options are more ambitious, they too build on existing precedents in international law.

By contrasting these options, this paper seeks to help to guide the discussion on the framework to be established, without being trapped into the models inherited

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[11] UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). On the drafting process of these draft Norms and a comparison with previous attempts of a similar nature, see David Weissbrodt et Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* 901 (2003) ; David Weissbrodt et Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 315-350. The Sub-Commission on Human Rights (as it was colloquially known) was a body of 26 independent experts advising the UN Commission on Human Rights, the intergovernmental body to which the Human Rights Council succeeded in 2007.

[12] For a systematic overview, see Olivier De Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors", in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publ., 2006) 1-40.

[13] HRC Res. 17/4 (16 June 2011). For a critical appraisal, see Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business. Beyond the Corporate Responsibilty to Respect?* (Cambridge: Cambridge Univ. Press, 2013).

from the past. The four options outlined here are not necessarily mutually exclusive, however. Any internationally legally binding instrument in the area of business and human rights could contain elements of each. In closing, this paper considers which combination of these various items could achieve the best balance between the need to improve the protection of victims, and the need to move towards proposals that are politically achievable.

I. Strengthening the Duty of the State to Protect Human Rights

The duty of the State to protect human rights by regulating the behavior of private (non-State) actors is for the most part well understood, and it now belongs to the acquis of international human rights law.[14] Under the International Covenant on Civil and Political Rights, the Human Rights Committee takes the view that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities".[15] This is also the position adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights.[16] Regional human rights courts or expert bodies under regional human rights instruments have routinely affirmed that the responsibility of the State may be engaged as a result of its failure to appropriately regulate the conduct of private persons.[17]

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14 See for a systematic exposition Olivier De Schutter, *International Human Rights Law* (Cambridge Univ. Press, 2nd ed. 2014), 427-526.

15 Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 8.

16 Committee on Economic, Social and Cultural Rights, *General Comment No. 12 (1999): The right to adequate food (Art. 11)*, UN doc. E/C.12/1999/5, para. 15 ('The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food').

17 It is not possible here, given space constraints, to provide even an overview of these developments. Suffice it to note that the duty to protect imposed on States includes a duty to regulate corporations under the jurisdiction of the State concerned, in order to ensure that they do not violate human rights through their activities. See, e.g., under the European Social

The principle is that States are expected to take all measures that could reasonably be taken, in accordance with international law, in order to prevent private actors from adopting conduct that may lead to human rights violations. The international responsibility of the State shall be engaged where such violations do occur which the State could have prevented without this imposing on the State an unreasonable burden. The duty to protect includes a duty to provide access to remedies where a violation did take place (i.e., the preventive measures failed or were insufficient). Thus, the duty to protect corresponds to the first and (in part) third pillar of the framework developed by the Guiding Principles on Business and Human Rights.[18] What would be the value of an instrument contributing to the progressive development[19] of international law, by clarifying the scope of the duty of the States to protect human rights in situations where the harms have their source in the conduct of corporations?

A. An Extraterritorial Duty to Regulate Corporations

We may note first that there is one area where the Guiding Principles set the bar clearly below the current state of international human rights law: that concerns the extraterritorial human rights obligations of States, including, in particular, the

Charter of the Council of Europe, European Committee of Social Rights, complaint n° 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 October 2005, para. 14 ('the state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator'); or, under the African Charter of Human and Peoples' Rights, see African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Comm. No. 155/96 (2001) A.H.R.L.R. 60 (ACHPR 2001) (15th Annual Activity Report) (on the duty of Nigeria to protect the Ogoni people from the impacts of the activities of oil companies in the Niger delta).

18 See especially Principles 1-10 and 25-27, as well as Principle 31.

19 Building on Article 13, par. 1 of the UN Charter, Art. 15 of the Statute of the International Law Commission (adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981) makes a distinction "for convenience" between "progressive development" of international law as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" and "codification" as meaning "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

duty of States to control the corporations they are in a position to influence, wherever such corporations operate. The Guiding Principles do provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" (Principle 2). Though this includes operations abroad, the Commentary to the Guiding Principles qualifies this principle by stating:

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support.

In contrast to this position, the United Nations treaty bodies have repeatedly expressed the view that States should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, that have their main seat or their main place of business under their jurisdiction. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should 'prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.[20] Specifically in regard to corporations, this committee has further stated that: 'States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant'.[21] Similar views have been expressed by other human rights treaty bodies. The Committee on the Elimination

[20] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 (2000), para. 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (26 November 2002), para. 31.

[21] Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights', E/C.12/2011/1 (20 May 2011), para. 5.

of Racial Discrimination considers that State parties should also protect human rights by preventing their own citizens and companies, or national entities from violating rights in other countries.[22] Under the International Covenant on Civil and Political Rights, the Human Rights Committee noted in 2012 in Concluding Observations addressed to Germany:

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.[23]

It is noteworthy that these statements, while they confirm the views of the human rights treaty bodies that these bodies had expressed in the past, were reiterated after the endorsement by the Guiding Principles on Business and Human Rights by the Human Rights Council. In defence of the Guiding Principles, it can perhaps be said that they are not a restatement of international law: they are a tool, meant to provide practical guidance both to States and to companies, in order to ensure that all the instruments at the disposal of both to improve compliance with human rights in the activities of business shall be used to that effect. Nevertheless, by adopting such a cautious approach to the extraterritorial obligations of States, the Guiding Principles in fact may have been encouraging States reluctant to accept such obligations to challenge the interpretation of human rights

[22] See Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, CERD/C/CAN/CO/18, para. 17; Concluding Observations: United States, CERD/C/USA/CO/6, para. 30.

[23] CCPR/C/DEU/CO/6, par. 16.

treaty bodies,[24] despite the support the position of these bodies received both from legal doctrine and civil society,[25] and from the International Court of Justice itself.[26]

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[24] When the idea of extraterritorial human rights obligations in the area of the right to health was referred to by the then Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Mr. Paul Hunt, the country concerned, Sweden, vehemently challenged that such obligations existed (see *Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Mr. Paul Hunt, Addendum: Missions to the World Bank and the International Monetary Fund, Washington, D.C.* (20 October 2006) and Uganda (4-7 February 2007), UN doc. A/HRC/7/11/Add.2 (5 March 2008)), paras. 47-88; *Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Mr. Paul Hunt, Addendum: Mission to Sweden*, UN doc. A/HRC/4/28/Add.2 (28 Feb. 2007), paras. 110-115). Though that discussion focused on the the duty of international assistance and cooperation, including a duty to provide support to developing countries — certainly the most contentious dimension of extraterritorial human rights obligations broadly conceived – –, strong disagreements persist even as regards the comparatively more modest claim that States have a duty to control the non-State actors, including corporations, over which they can exercise influence when such actors operate abroad: at its 114th session (29 June 2015-14 July 2015), the Human Rights Committee questioned Canada on its duties to regulate Canadian corporations and to provide access to remedies to victims when rights are violated abroad by such corporations. The Committee commented that "A country could not just provide corporate identity to a company and then be unperturbed by whatever the company could do around the world." As Canada challenged the extra-territorial reach of the Covenant, the Committee felt compelled to remind the Canadian delegation that "The final arbiter for the interpreting the Covenant was the Committee, not individual States." (The author is grateful to Bert Thiele for having provided him with this information).

[25] The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted in Maastricht on 28 September 2011 by a number of human rights experts, non-governmental organizations and academic research institutes, testify to the growing consensus around this requirement. See in particular O. De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', *Human Rights Quarterly*, vol. 34 (2012), pp. 1084-1171; Fons Coomans and Rolf Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, Intersentia, 2012; Malcolm Langford, Wouter Vandehole, Martin Scheinin and Willem van Genugten (eds), *Global Justice, State Duties. The extraterritorial scope of economic, social and cultural rights in international law*, Cambridge Univ. Press, 2013 (as regards the duty of the State to regulate corporations, see in particularly the chapter by Smita Narula). The Maastricht Principles are increasingly referred to by the Special Procedures of the Human Rights Council, as well as by the UN Office of the High Commissioner for Human Rights: see, e.g., *Analytical study on the relationship between human rights and the environment. Report of the United Nations High Commissioner for Human Rights*, UN doc. A/HRC/19/34 (19 Dec. 2011), para. 71.

Given the weak formulation chosen in the Guiding Principles as regards the extraterritorial implications of the duty to protect, a legally binding instrument that would clarify the content of the State's duty to protect human rights could be explicit about the extraterritorial reach of this duty, in order to dispel any such confusion as might have been created as a result.[27] This would essentially consist in imposing on the State concerned a duty to protect human rights by regulating the corporations over which the State may exercise influence, by any means compatible with international law.

The competence of the State to regulate the conduct of its nationals abroad is well established under international law, which refers in this regard to the principle of active personality.[28] The implication is that a State could be imposed a duty to protect as regards corporations that are registered under its laws, or that have their principal place of business under the State's jurisdiction, or that have located their central place of administration on the State's territory. In the absence of any particular mode of determination of the nationality under international law, there is of course a risk that the modes of determination of the nationality of the corporation will be manipulated in order to allow a State, relying on the principle of active personality, to extend its jurisdiction to extraterritorial situations – including acts adopted by companies incorporated abroad – which it might otherwise be prohibited under international law to reach.[29] However, the criteria listed

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[26] The International Court of Justice has affirmed the extraterritorial reach of human rights instruments on a number of occasions. Most noteworthy in this regard are its Advisory Opinion on the construction by Israël of a wall to protect its territory from potential incursions by terrorists (Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 109) and its judgment concerning armed activities in the DRC (*Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), judgment of 19 Dec. 2005, paras. 178-180 and 216-217.

[27] Specifically, such an instrument could seek inspiration from Principles 24 and 25 of the Maastricht Principles (see above, note 25) which, though developed for the area of economic, social and cultural rights, and though not focused exclusively on transnational corporations, in fact could be extended to all human rights.

[28] See, e.g., *Restatement (Third) of the Foreign Relations Law of the United States* (The American Law Institute, Vol. 2, American Law Institute Publishers, Washington, 1987), § 402, (2) ('...a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well as within its territory').

[29] Yitzhak Hadari, 'The Choice of National Law Applicable to the Multinational Enterprises', *Duke L.J.* (1974) 1-57, at p. 16 (noting that the determination by the United States of the rules of the nationality of the corporation has occasionally been relied upon in order to allow for an extension of United States law to corporations whose main connections may be to foreign countries).

above are generally accepted, denoting a sufficiently effective link between the State and the corporation to justify the exercise of State jurisdiction.

The main difficulty in this regard concerns the organisation of the multinational enterprise. Such an entity typically operates in different States by establishing separate legal entities, registered under the laws of different States, and linked by an investment nexus. Doubts have sometimes been expressed as to whether it should be considered allowable for States to seek to regulate the conduct of legal persons incorporated under the laws of another country, but which are managed, controlled, or owned, by natural or legal persons which have the nationality of the State concerned. Should States be allowed to treat as their 'nationals' legal persons incorporated under the laws of another country, but which are thus supervised by natural or legal persons of the State concerned ? In the *Barcelona Traction* Case, the International Court of Justice did seem to exclude, at least in the context of diplomatic protection, basing nationality of the corporate entity on the nationality of its shareholders. In finding that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain, the Court recalled that, in municipal law, a distinction is made between the rights of the company and those of the shareholders, and that 'the concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights'.[30]

However, this ruling does not necessarily prohibit a State from treating a company incorporated in another State but controlled by a parent company incorporated in the State seeking to exercise extraterritorial jurisdiction, as having the nationality of that State for the purposes of exercising such jurisdiction. Already in its *Barcelona Traction* judgment of 5 February 1970, the International Court of Justice noted that the veil of the company may be lifted in order to prevent the misuse of the privileges of legal personality, both in municipal and in international law.[31] Therefore, where the separation of legal personalities is used as a device by the parent company to limit the scope of its legal liability, it may be justified to lift the corporate veil. In addition, the recent proliferation of bilateral investment treaties under which States seek to protect their nationals as investors in foreign countries even in cases where they have set up subsidiaries under the laws of the host country, has shed further doubt on the validity of the classical rule enun-

[30] International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, 184.

[31] Id., at 38-39.

ciated by the *Barcelona Traction* judgment, according to which a State may not claim a legal interest in the situation of foreign companies, even where its nationals are in control.[32] The 2012 Model U.S. Bilateral Investment Treaty for instance defines as an 'investor of a Party' protected under such a treaty 'a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party', the 'investment' meaning in turn 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[33] There is no doubt that, under these definitions, investments made by U.S. nationals in a State bound by a BIT concluded with the United States are protected under the treaty, even when (and, indeed, in particular when) their investment consists in a controlling participation in a company incorporated in the host country. Similarly, under the draft Multilateral Agreement on Investment negotiated within the framework of the OECD between 1995 and 1998,[34] the investments made in each Contracting Party by investors from another Contracting Party comprised '[e]very kind of asset owned or controlled, directly or indirectly, by an investor', including, *inter alia* 'an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation)' and 'shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom'.

The practice of determining the nationality of the corporation on the basis of the nationality of its shareholders, particularly of the nationality of a controlling parent company, while not usual, is not unknown. For instance, while the practice of the United States has generally been to determine the nationality of the corporation

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[32] Doubts were raised at an early stage concerning the relevance of the *Barcelona Traction* case beyond the exercise of diplomatic protection: see Stanley Metzger, 'Nationality of Corporate Investment Under Investment Guaranty Schemes-The Relevance of Barcelona Traction', *American Journal of International Law*, 65 (1971) 532-543.

[33] See Article 1 of the 2012 United States Model Bilateral Investment Treaty, listing the definitions (available from the website of the United States Department of State: http://www.state.gov/documents/organization/188371.pdf (last consulted on 15 July 2015)). These definitions were identical in the 2004 version of the United States Model Bilateral Investment Treaty.

[34] See above, note 22.

on the basis of the company's place of incorporation,[35] it is occasionally defined by reference to the nationality of its owners, managers, or other persons deemed to be in control of its affairs. This is the case, in particular, in the tax area[36] ; but there seems to be no reason why this could not also justify the exercise of foreign direct liability regulation in other domains. It should therefore not come as a surprise if the *Third Restatement on Foreign Relations Law* of the American Law Institute does not exclude the regulation of foreign corporations, i.e., corporations organised under the laws of a foreign State, 'on the basis that they are owned or controlled by nationals of the regulating state'.[37]

It would therefore be plausible for a new instrument to impose on the States parties that they control corporations over which they can exercise jurisdiction, including corporations established under the laws of another (host) State that are managed, controlled, or owned, by legal or natural persons that are considered to have the 'nationality' of the State concerned, because they are incorporated under the jurisdiction of that State, of have their principal place of business or central administration on the territory of that State. Such a solution would arguably be consistent with existing international law. Whether it would also be diplomatically acceptable, however, is doubtful, as it would be interpreted as questioning the sovereign right of host States to regulate investment under their (territorial) jurisdiction. Moreover, this solution presupposes that it will always be possible to determine which is the controlling company, where an alleged violation of human rights is caused by the conduct of a corporate entity which is partly or fully owned by a foreign investor.

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35 *Restatement (Third) of the Foreign Relations of the United States*, cited above note 69, at 213, n. 5. On this question, see generally Linda Mabry, 'Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality', *Geo. L. J.*, 87 (1999) 563-631.

36 As noted by Linda Mabry ('Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality', cited above note 76), this allows the aggregation of the different corporate entities integrated within the multinational group and treating them as one single enterprise whose benefits will be taxed on a consolidated basis, reflecting the operations of both domestic and foreign subsidiaries. She refers to *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). This decision upheld California's unitary basis test, which consists in taking into account 'the combined world-wide income of all of the corporate components of the enterprise'. However, the two questions are not necessarily linked : the choice to treat on a consolidated basis the benefits of the multinational enterprise for taxation purposes does not follow necessarily from the choice to consider as 'American' the subsidiaries controlled by the American parent corporation.

37 *Restatement (Third) of the Foreign Relations of the United States*, cited above note 69, § 414.

Another approach may therefore be preferable. It would consist on States parties to the new international instrument that they impose on parent corporations domiciled in that State both an obligation to comply with human rights wherever they operate (i.e., even if they operate in other countries), and an obligation to impose compliance with such norms on the different entities it controls (its subsidiaries, or even in certain cases its business partners). Under this approach, sometimes referred to as *parent-based extraterritorial regulation*, no question of extraterritoriality arises : the parent corporation is imposed certain obligations by the State of which it has the 'nationality' (or where it is domiciled), and the impacts on situations located outside the national territory are merely indirect, insofar as such impacts would result from the parent company being imposed an obligation to control its subsidiaries, or to monitor the supply chain.

B. Overcoming the Problem of the Corporate Veil

This approach would also help overcome a second problem that the Guiding Principles on Business and Human Rights have not adequately addressed: that is the problem of the corporate veil. As noted above, the Guiding Principles include a human rights due diligence requirement as part of the corporation's responsibility to respect human rights. However, the extent to which this requirement imposes on a corporation to ensure that other corporate entities with which it has an investment link comply with human rights, remains unspecified. Yet, in practice, in the absence of such a duty being imposed, victims of transnational corporate human rights abuses may face important hurdles. Within the multinational corporation as a group of companies, the parent (controlling) corporation on the one hand, its (controlled) subsidiary on the other, form two distinct legal entities, each with their own juridical personalities; and according to the doctrine of limited liability, the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment.[38] This make it difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent company, before the national jurisdictions of the home State of that company. In theory, three paths may be explored in order to overcome the problem of the separation of legal entities.

[38] *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ('Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception' (citations omitted)); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ('A corporation and its stockholders are generally to be treated as separate entities').

1. The First Approach : Piercing the Corporate Veil

The classical 'piercing the corporate veil' approach requires a close examination of the factual relationship between the parent and the subsidiary in order to identify whether the nature of that relationship is not more akin to the relationship between a principal (the parent) and an agent (the subsidiary), or whether, for other motives, there are reasons to suspect that the separation of corporate personalities does not correspond to economic reality. Thus, in exceptional circumstances, the United States courts will allow claimants to establish that the parent company exercises such a degree of control on the operations of the subsidiary that the latter cannot be said to have any will or existence of its own,[39] and that treating the two entities as separate (and thus allowing the parent to shield itself behind its subsidiary) would sanction fraud or lead to an inequitable result.[40] In such cases, the 'piercing of the corporate veil' will be admitted, on the basis that the subsidiary has been a mere instrument in the hands of the parent company[41] or that the parent and the subsidiary are 'alter egos'.[42]

Alternatively, it may be shown that the subsidiary was acting in a particular case as the agent of the parent company.[43] This will be allowed, again in rather exceptional circumstances, where the parent company controls the subsidiary and where both parties agree that the subsidiary is acting for the agent: in such a case, 'the acts of a subsidiary acting as an agent are, from the legal point of

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39 Taken alone, neither majority or even complete stock control, nor common identity of the parent's and the subsidiary's officiers and directors, are sufficient to establish the degree of control of required. What is required is 'control (...) of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction has at the time no separate mind, will or existence of its own' (*Lowenthal v. Baltimore & Ohio R.R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div.), aff'd, 6 N.E.2d 56 (1936), cited by Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', *Hastings Int'l & Comp. L. Rev.*, 24 (2001) 297-330, at 304)..

40 See *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939) ('the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice').

41 *Chicago, M. & St. P. R. Co. v. Minneapolis Civic and Commerce Assn.*, 247 U.S. 490, 501 (1918) (principles of corporate separateness 'have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose (…) of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company').

42 See, eg, *United States v. Betterfoods*, 524 U.S. 51 (1998).

43 As Justice (then Judge) Cardozo summarized in *Berkey v. Third Avenue R. Co.*, 244 N. Y. 84, 95, 155 N. E. 58, 61 : 'Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent'.

view, the acts of its parent corporation, and it is the parent that is liable'.[44] An example is the reasoning followed in the case of *Bowoto v. Chevron Texaco*, where Judge Illston concluded that CNL, the subsidiary of Chevron in Nigeria, which allegedly had acted in concert with the Nigerian military in order to violently suppress protests against Chevron's activities in the region, could be considered as the agent of Chevron, in view in particular of the volume, content and timing of communications between Chevron and CNL, notably on the day of a protest when 'an oil platform was taken over by local people'.[45] These and other indicia showed that Chevron 'exercised more than the usual degree of direction and control which a parent exercises over its subsidiary'.[46]

In order to establish either that the corporate form has been abused – by a parent artificially seeking to shield itself from liability by establishing a subsidiary which has in fact no existence of its own – or that the subsidiary has been acting in fact as the agent of the parent corporation, it will be required to bring forward a number of circumstances, which will serve to demonstrate that the separation of legal personalities is a mere legal fiction to which the economic reality does not correspond and which should not be admitted, as this might sanction fraud.[47] This approach thus may constitute a source of legal insecurity, since the criteria allowing the 'piercing of the veil' are many, without either the list of admissible criteria or their hierarchisation being authoritatively identified; and it imposes a heavy burden on complainants seeking to invoke the indirect liability of the parent corporation for the acts of its subsidiary, which results in a situation where, in fact, very few such attempts to 'pierce the veil' end up succeeding.[48]

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[44] Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', supra note 39, at 307.

[45] *Bowoto v. Chevron Texaco*, No C 99-2506 SI, 2004 US Dis LEXIS 4603 (ND, Cal 2004). The case is discussed by Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford and Portland: Hart Publishing, 2004), at pp. 132-133.

[46] *Bowoto v. Chevron Texaco*, cited above n. 86.

[47] See, e.g., *Labor Board v. Deena Artware*, 361 U.S. 398, 402 (1960).

[48] Since the New Deal period, therefore, an alternative line of cases has emerged in the United States courts, which has led a number of these courts to set aside the classical tests for allowing the piercing of the corporate veil in order to ensure that the legislative policy will not be defeated by the choice of corporate forms. See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944) ('It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement'); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.,* 417 U.S. 703, 713 (1974) ('the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy') ; *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) ('the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies').

The European Court of Justice has taken a quite similar view in antitrust cases.[49] In the leading case of *Imperial Chemical Industries*,[50] the Court considered that where an undertaking established in a third country, in the exercise of its power to control its subsidiaries established within the Community, orders them to carry out a decision amounting to a practice prohibited under the competition rules of the EU (then the European Economic Community), the conduct of the subsidiaries must be imputed to the parent company. The separation of legal personalities should not shield the parent company from liability for the acts of its subsidiaries, 'in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'.[51] The parent company and the subsidiary will be considered to form one single 'economic unit' – allowing for the acts of the subsidiary to be imputed to the parent company – where two cumulative conditions are fulfilled: first, the parent has the power to influence decisively the behaviour of the subsidiary;[52] second, it has in fact used this power on the occasion of the adoption of the contested acts.[53] In such circumstances, 'the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition'.[54] In more recent cases, the Court of Justice of the European Union confirmed that, for the purposes of application of competition law, 'the conduct of a subsidiary may be imputed ... to the parent company particularly where, although having separate

However, the abandonment of the classical 'piercing the corporate veil' test has been piecemeal rather than systematic, and this has not contributed to legal certainty.

49 See generally on the approach followed in Europe, E.J. Cohn & C. Simitis, ''Lifting the Veil' in the Company Laws of the European Continent', *I. C. L. Q.*, 12 (1963), pp. 189-225; Yitzhak Hadari, 'The Structure of the Private Multinational Enterprise', *Mich. L. Rev.*, 71 (1973), pp. 729-806, at p. 771, n. 260; J.M. Dobson, ''Lifting the veil' in four countries : the law of Argentina, England, France and the United States', *I. C. L. Q.* ., 35 (1986), pp. 839-863 ; K. Hofstetter, 'Parent responsibility for subsidiary corporations: evaluating European trends', *I. C. L. Q.*, 39 (1990), pp. 576-598 ; Lucas Bergkamp and Wan Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts', *Maastricht Journal of European and Comparative Law*, 8/2 (2001), pp. 167-188.

50 Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619 (judgment of the Court of 14 July 1972).

51 Ibid, para. 133.

52 Thus, the Court remarks that 'at the time the applicant held all or at any rate the majority of the shares in those subsidiaries' (para. 136) and 'was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in the common market' (para. 137).

53 Id., at para. 137-139.

54 Id., at para. 140.

legal personality, that subsidiary does not autonomously determine its conduct on the market but essentially applies the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which unite those two legal entities'; it also established a presumption that the parent company exercises a decisive influence on the subsidiary where the parent company holds all or almost all of the capital in a subsidiary.[55]

2. The Second Approach : the Presumption of Control in the Integrated Enterprise

A second approach (though it could be seen as a variation on the first) is based on the idea that multinational corporations are groups of formally separate entities, but whose interconnectedness is such that it may be justified to establish a presumption according to which any act committed by one subsidiary of the group should be treated as if it were adopted by the parent. In this perspective, the transnational corporation is seen as 'a conglomeration of units of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, supervision and finance. Insofar as injuries result from negligence in respect of any of the parent company functions, then the parent should be liable'.[56]

This technique has been used in the United States not only in New Deal legislation and by courts and agencies seeking to ensure that legislation protecting employees would not be circumvented by the abuse of the corporate form, but also in order to define the conditions under which certain legislations protecting employees from discrimination could extend to the operations of subsidiaries of American undertakings operating overseas.[57] The 1990 American with Disabilities Act is an example. The Act prohibits discrimination against persons with disabilities, and it provides for the extraterritorial scope of the prohibition, by establishing a presumption according to which 'If an employer controls a corporation whose place of incorporation is a foreign country, any [discriminatory] practice [...] engaged in by such corporation shall be presumed to be engaged in

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55 Case C-508/11 P, *Eni SpA* v *Commission*, paras. 46-47 (judgment of 8 May 2013); Joined Cases C-93/13 P and C-123/13 P, *Versalis SpA et al.*, paras. 40-41 (judgment of 5 March 2015).

56 Richard Meeran, 'The Unveiling of Transnational Corporations', in Michael Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague : Kluwer Law International, 1999), at 170.

57 Blumberg, Accountability supra note 39, at 313-315.

by such employer'.[58] This is equivalent to imposing on all American employers covered by the Act an obligation to monitor the compliance of all the corporations they control in foreign countries with the prohibition of discrimination on grounds of disability. The Act also provides that the determination of whether an employer controls a corporation shall be based on

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.[59]

Similar provisions may be found, for instance, in Title VII of the Civil Rights Act of 1964[60]: American employers are presumed, under this statute, to engage in any discriminatory practice engaged in by a corporation whose place of incorporation is a foreign country, if they control such foreign corporation. The modalities of determining the existence of such control are identical to that provided for in the American with Disabilities Act.[61]

In the *Amoco Cadiz Oil Spill Case*, the District Court of Illinois adopted such an 'enterprise' approach, even in the absence of any legislative mandate, in order to conclude that the parent corporation should be held liable for environmental damage caused by an oil spill from a tanker off the coast of France: the close degree of control of the parent corporation over its subsidiaries allowed the court to overcome the separation of legal personalities.[62] It has also been proposed in legal doctrine to adopt a similar approach in the Alien Tort Statute, where, it has

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58 Pub. L. 101–336, title I, § 102, July 26, 1990, 104 Stat. 331; amended by Pub. L. 102–166, title I, § 109(b) (2), Nov. 21, 1991, 105 Stat. 1077; codified as 42 U.S.C. § 12112 (c) (2) (A) (1994). In order to remain within the boundaries of extraterritorial jurisdiction as defined by the principle of active personality, the presumption does not apply with respect to 'the foreign operations of an employer that is a foreign person not controlled by an American employer' (42 U.S.C. § 12112 (c) (2) (B) (1994).

59 42 U.S.C. § 12112 (c) (2) (C) (1994).

60 Pub. L. 88-352 (Title VII), 42 U.S.C. § 2000e and ff., as amended by the Civil Rights Act of 1991 (Pub. L. 102-166).

61 42 U.S.C. § 2000e-1, (b) and (c).

62 See *Amoco Cadiz Oil Spill*, 1984 A.M.C. 2123, 2 Lloyd's Rep 304 (N.D. Ill. 1984): 'As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, standard [the American parent corporation] is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalies AIC and Transport'.

been argued, the fact that the subsidiary has allegedly violated the law of nations should be sufficient to allow for piercing the veil, and impose a liability on the parent (controlling) company unless it is proven by the latter that 'no reasonable effort would have discovered evidence from documents of any applicable government, non-governmental organizational documents and reports, employee information, or anecdotal information in the state that would have moved a reasonable person to inquire further'.[63]

Insofar as it is based on the presumption that the 'controlling' parent company may effectively influence the behaviour of the subsidiary – which justifies attributing to the parent company the acts of the subsidiary –, the 'integrated enterprise' approach is in line with the contemporary evolution of multinational firms. The ability of the multinational firm to move large volumes of goods swiftly and cost-effectively, as well as the standardization of products across the globe, has transformed the classical understanding of the relationship between the parent and the subsidiary. In many cases, the multinational appears as a coordinator of the activities of its subsidiaries, which function as a network of organisations working along functional lines rather than according to geographical specialization.[64] In this process, the new organizational structures 'give global corporate managers authority over country and regional managers'; incentive systems are devised to 'encourage cooperation among employees working for different affiliates'; and 'programs and practices designed to instill in diverse groups of employees scattered around the globe a common sense of purpose and common methods of operation'[65]: in sum, the head office reasserts its role, as the integration of the group is deepened.

3. The Third Approach : the Direct Liability of the Parent Corporation for Failure to Exercise Due Diligence

Finally, a third avenue consists in abandoning the idea of linking the behaviour of the subsidiaries to that of the parent altogether, and to focus instead on the direct liability of the parent company arising from the failure to exercise due dili-

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63 Scott Coye-Huhn, 'No More Hiding behind Forms, Factors and Flying Hats: A Proposal for a per se Piercing of the Corporate Veil for Corporations that Violate the Law of Nations under the Alien Tort Claims Statute', *U. Cin. L. Rev.*, 72 (2003) 743-770, at 758. In contrast with this proposal, however, the presumption established under statutes such as the Civil Rights Act or the American With Disabilities Act is non-rebuttable.

64 Linda Mabry, 'Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality', cited above note 76, at 565.

65 *Ibid*.

gence in controlling the acts of the subsidiaries it may exercise control upon. The liability of the parent corporation thus relates not only to the actions of parent firm, but also to its omissions. Indeed, a regime in which the liability of the parent company would be engaged for its actions alone (for the role it played in aiding and abetting the subsidiary to commit the alleged violation, in particular) could create a disincentive on parent companies to monitor the behaviour of their subsidiaries, because any amount of 'excessive' control might allow to conclude either that the subsidiary is merely acting as an agent of the parent, or that the implication of the parent in the operations is such that it should be held liable alongside the subsidiary.[66]

The case of *Connelly v. RTZ Corporation plc and Others* may serve as an illustration.[67] The claimant in that case was a former employee for Rossing Uranium Ltd. (R.U.L.), a Namibian subsidiary of the defendant corporation (RTZ Corporation plc, incorporated in the United Kingdom). He had been employed by R.U.L. in an uranium mine, following which it was discovered, three years after his return, that he was suffering from cancer of the larynx, apparently due to exposure to radioactive material in the mine. According to the description by the House of Lords, the claim was based on the allegation that 'R.T.Z. had devised R.U.L.'s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy', and that 'an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine'. The argument was therefore not (as in classical piercing-the-veil analysis) that separation between the parent and the subsidiary should be treated as a mere fiction, a fraudulent means of limiting the liability of the parent corporation, without any correspondence in economic reality: it was that R.T.Z. corporation had itself contributed, by its acts, in causing the damage for which the victim sought compensation. Such an argument would have had no chance to succeed if, instead of being involved in defining the policy of its subsidiary on health and safety or environmental issues, R.T.Z. corporation had simply ignored any risks associated with the mining of uranium, and had acted merely as a shareholder, monitoring the financial per-

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66 Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, supra note 45, at 134 (citing A.J.. Natale, 'Expansion of Parent Corporate Shareholder Liability through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary', *Univ. of Cincinnati L. Rev.*, 57 (1988) 717-750, at 736 ; and J. Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law', *Cumberland L. Rev*., 31 (2000) 311-335, at 326).

67 *Connelly v. RTZ Corporation plc and Others* [1997] UKHL 30; [1998] AC 854; [1997] 4 All ER 335; [1997] 3 WLR 373 (24th July, 1997).

formances of its subsidiary, but without seeking to be informed about, let alone participate in, the definition of its everyday policies in such areas.

In *Connelly*, the direct liability of the parent corporation was asserted on the basis of the *actions* it had taken in defining the policies of its subsidiary. By contrast, the *omissions* of the parent corporation were at stake in *Lubbe and 4 Others v. Cape plc*, which the House of Lords was presented with again only three years later.[68] Over 3,000 plaintiffs claimed damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos in South Africa, either upon working in mines owned by the defendant (until 1948) or by a fully-owned South African subsidiary of the defendant, or as a result of living in an area contaminated by the mining activities of the defendant or its subsidiaries. As noted by the leading opinion of Lord Bingham of Cornhill, 'the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, *failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group*. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)'.[69]

Central to the *Cape plc* case was, therefore, the question 'whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company'.[70] It does not matter whether the parent company in fact was closely involved in setting up the procedures aiming at protecting the health and safety of the workers in the subsidiary: all that matters for the duty of care to be established, is that the relationship between the parent company and the subsidiary was such that the parent could have done more to ensure that such procedures provide adequate protection to the employees.

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68 On 14 December 1998, the House of Lords had already refused to allow leave to the defendants for filing a further appeal against an initial decision by the Court of Appeal. Following this, over 3,000 new plaintiffs emerged, fundamentally transforming the nature of the litigation presented before the United Kingdom courts.

69 Emphasis added.

70 As indicated by the opinion of Lord Bingham of Cornhill, this is the issue as reformulated during the first Court of Appeal hearing in the case.

This approach was confirmed the more recent case of *Chandler*, also concerning Cape plc.[71] In confirming the conditions under which a company owes a duty of care to its employees, the Court of Appeals in Chandler considered that a parent company may be liable for the conduct of its subsidiary in certain circumstances. Among the factors that have to be taken into account in this regard, is that "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", for the purpose of which determination "it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary", as it would be sufficient to show that "the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues".[72] The same judgment states explicitly that the imposition of a duty of care is unrelated to the lifting of the corporate veil ("A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company"[73]). It is clear however that the two problems are closely interrelated: the imposition of a duty of care dispenses the victim from the burden of having to pierce the separation between the two legal entities.

4. Comparing the Different Approaches to the Problem of the Corporate Veil

To summarise, the obstacles created by the separation of legal personalities within the corporate group may be overcome in three ways : first, we may seek to affirm the derivative liability of the parent corporation for the acts of its subsidiary, where the corporate veil could be lifted because it has been abused ; secondly, the 'integrated enterprise' approach could be adopted, which is an intermediate approach predicated on the understanding that the multinational enterprise is organised as an integrated group, allowing for a presumption that the acts committed by the subsidiary will be imputed to the parent; thirdly, the direct liability of the parent corporation could be affirmed for its own actions or omissions, including the omission to exercise due diligence in controlling the subsidiary. Two important consequences follow from these distinctions.

The first approach, based on 'derivative liability' of the parent corporation, creates a disincentive on the parent company to exercise a strict control over the

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71 *Chandler v Cape plc*, [2012] EWCA (Civ) 525. The Court of Appeals confirms the approach of the High Court in *Chandler v. Cape plc*, [2011] EWHC 951 (QB).

72 *Chandler v Cape plc*, [2012] EWCA (Civ) 525, par. 80 (emphasis added).

73 Id., par. 69.

activities of the subsidiary, even in situations where it could exercise such control in fact. Indeed, to the extent that the relationships between the parent and the subsidiary remain fully consistent with the norms of corporate behaviour, i.e., do not lead to the suspicion that the parent-subsidiary separation has been misused in order to artificially insulate the parent from liability for the behaviour of the subsidiary, the corporate veil will not be pierced : only where it has been established that the control by the parent company is such that the subsidiary has no existence of its own (has no 'separate mind'), will the separation of legal personalities be overcome. Thus, insofar as this serves to limit its potential legal liability, it will be in the interest of the parent company, not to monitor closely the everyday operations of the subsidiary, but on the contrary to abandon broad discretion to the subsidiary as to how to implement the general policies set for the multinational group. By contrast, if – under the 'integrated enterprise' approach – we establish a presumption that the parent is liable for all the acts adopted by the subsidiaries within the multinational group, or if we seek to engage the 'direct liability' of the company for failing to exercise due diligence in controlling the activities of its subsidiary, close monitoring of the subsidiary will be in the interest of the parent : instead of making it vulnerable to attempts to pierce the corporate veil, it may be seen as a way to avoid liability or as an insurance against the risk of being accused of being negligent in exercising oversight over the subsidiary's activities.

The second consequence of this distinction is related to the question of State jurisdiction. The *ICI* case of the European Court of Justice presents us with a rather unfamiliar situation where the applicability of the law of the forum was extended to the acts of a parent company, incorporated in a foreign country, because of the acts committed by the subsidiaries of that company on the territory of the forum (more precisely in the *ICI* case, the behaviour of the subsidiaries produced effects on the common market of the European Economic Community).[74] In general however, the situation is exactly the reverse: the extraterritorial

[74] A situation presenting certain similarities presented itself in the *Doe v. Unocal* case, in which the U.S. District Court for the Central District of California considered that it has no personal jurisdiction over Total, the French partner in the Yadana pipeline project in Burma of the Californian company Unocal (*Doe v. Unocal*, 27 F Supp 2d 1174 (CD Cal 1998), aff'd 248 F 3d 915 (2001)). The class action suit against Unocal and Total was based on the Alien Tort Statute, adopted as part of the First Judiciary Act 1789. The ATS provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' (28 U.S.C. §1350). Under the ATS, in order for the United States federal courts to be able to exercise 'personal jurisdiction', the defendant must have 'minimum contacts' with the forum, and this in principle requires 'systematic' and 'continuous' contacts with the forum (see *International Shoe v.*

application of the law of the forum State is sought to be justified by the fact that the subsidiaries, though established in foreign States, in fact are controlled by the parent company, domiciled in the forum State. In this scenario, direct liability of the multinational corporation or the adoption of the 'integrated enterprise' approach[75] present over derivative liability the advantage that they can be based on the territoriality principle, combined with the criminal law doctrine of ubiquity where the extraterritorial legislation is of a criminal nature, or at least on the active personality principle. In addition, in litigation before the United States federal courts based on the Alien Tort Statute (provided, of course, the strong restrictions to the extraterritorial impacts of the ATCA as expressed in *Kiobel* are overcome[76]), the adoption of the 'direct liability' or the 'integrated enterprise' approaches would facilitate overcoming the barrier represented by the *forum non conveniens* doctrine, since the connection to the forum will be stronger if the parent company is sued directly for its own actions, rather than for those of its subsidiaries.[77]

By contrast, under the first approach based on the derivative liability of the parent for the acts of its subsidiaries, it may be more difficult to justify imposing on foreign subsidiaries the law of the forum State, even if the objective is to reach, via the direct liability of the subsidiaries, the parent corporation itself the exercise of jurisdiction over which will be easier to justify.

Washington, 326 U.S. 310 (1945); of *Hanson v. Deckel*, 357 U.S. 235 (1958), and their progeny). The U.S. District Court for the Central District of California took the view that it had no 'personal jurisdiction' over Total, since the Californian subsidiaries of Total were not its 'alter egos' in the classical 'piercing the veil' approach.

75 Under the 'integrated enterprise' approach, the law of the forum State is extended to foreign corporations on the basis that they are part of one single economic group, coordinated by the parent corporation : indeed, as illustrated by the examples of the Civil Rights Act and the American Disabilities Act mentioned above, this approach has been adopted precisely in order to justify the extraterritorial reach of the concerned statutes.

76 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12 (2013) (where the Supreme Court concludes, in a unanimous decision authored by Chief Justice Roberts, that "the presumption against extraterritoriality [of United States legislation, based on the idea that "United States law governs domestically but does not rule the world" (*Microsoft Corp. v. AT&T Corp.*, 550 U. S. 437, 454 (2007)], applies to claims under the ATS, and that nothing in the statute rebuts that presumption"). The concurring opinions that four Justices appended to the judgment would allow for the Alien Tort Statute to apply in relation to harms caused outside the United States, however, in certain limited circumstances, including when the defendant is a company incorporated in the US.

77 Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, cited above note 86, at 134 (citing M. J. Rogge, 'Towards Transnational Corporate Liability in the Global Economy: Challenging the Doctrine of *Forum non Conveniens* in *Re: Union Carbide, Alfaro, Sequihua*, and *Aguinda*', *Texas International Law Journal*, 26 (2001) 299-330, at 313-314).

For both these reasons, the most advisable solution to avoid the parent corporation from shielding itself behind the subsidiary where it would have been able to control the subsidiary more effectively, would seem to consist in imposing directly on the parent corporation an obligation, defined by statute, to effectively monitor the behaviour of the subsidiaries which it 'controls'. The notion of control, for the purposes of the application of such a statutory obligation, should be defined on the basis of the stock ownership,[78] without there being a need to identify, on a case-to-case basis, whether the parent company has in fact been involved in the policies of the subsidiary or whether the latter has a 'mind of its own'. Only where the parent company could demonstrate that it was unable to effectively avoid the contested behaviour of the subsidiary company from occurring, despite having exercised due diligence and despite its best efforts to seek information about such behaviour and to react accordingly, should its liability be excluded. Just like in the 'integrated enterprise' approach above, a presumption should therefore be established that the acts committed by the subsidiaries which it 'controls' may be attributed to the parent company as such, although such a presumption could conceivably be rebutted in certain instances where, despite the safeguards in place, the parent company failed to prevent certain tortious or otherwise illegal acts from being adopted.

5. The Due Diligence Obligation: the Parent-Subsidiary and co-Contractor Relationship

The solution proposed above to the problem of the corporate veil is fully consistent with the emphasis placed by the Guiding Principles on Business and Human Rights on human rights due diligence as a component of the corporation's responsibility to respect human rights. It may be added that this solution can be relatively easily transposed to the other mode of transnationalization of a company's activities, which relies on the establishment of contractual relationships with suppliers, sub-contractors or franchisees, rather than on an investment nexus. Where a company sources supplies from other countries, or subcontracts certain parts of a production process to contractors located abroad, it is even more difficult to measure the exact degree of influence one company (for instance, the buyer or the franchisor) exercises over another company (for instance, the supplier of the franchisee). Therefore, it is particularly advantageous

[78] For instance, sections 747 to 756 and Schedules 24 to 26 of the United Kingdom Income and Corporation Taxes Act 1988, rely on the notion of the 'controlled foreign company', defined as a foreign company in which the resident company owns a holding of more than 50%.

to define the potential liability of the buyer (or of the company sub-contracting a part of the production process) in terms that are grounded in the duty of that entity to ensure that it seeks to identify the human rights impacts of its policies and that it prevents and mitigates impacts thus identified — a duty that is independent from the reality of the influence exercised on the other economic actors with whom that entity interacts. The human rights due diligence requirement has a *normative* function to fulfil, that does not depend on the *de facto* degree of control exercised by the corporation concerned on the other companies which it owns (in part or even in full) or with whom it entered into contractual relationships.

The advantages of such an approach are twofold. First, as mentioned above, this avoids the temptation for the company concerned to abstain from seeking to influence the behavior of the entities to which it is linked, by either either an investment or a contractual nexus: instead, the more it does seek to influence such behavior, the easiest it will be for that company to prove that it has acted with due diligence to ensure that human rights are not negatively impacted by its activities or those of its affiliates or partners. Secondly, this solution contributes to legal certainty: rather than aligning the degree of responsibility of the company with the measure of the *de facto* influence it exercises, a measure that it always elusive and bound to be contested, such responsibility is to take all measures it can reasonably take in order to avoid negative human rights impacts. While this criterion remains fact-dependent to a certain degree (which measures a company can reasonably be expected to adopt depends on the situation of that company), and may evolve with the practices emerging in the sector concerned (the scope of the due diligence obligation will vary in accordance with best practices within that sector), the benchmark is nevertheless more objective than one that would try to assess the reality of the influence exercised in any particular instance.

The question of access to remedies

If it were to seek to clarify the scope of the duty of States to protect human rights by regulating transnational corporations, the new legally binding instrument could also contribute to defining with greater precision the requirement to ensure that victims of transnational harms have access to effective remedies. The Guiding Principles on Business and Human Rights provide that : As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. (Principle 25)

The Commentary acknowledges that "[l]egal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed" include the situation "[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim". This makes it abundantly clear that Principle 25 implies a duty of the home State to provide access to remedies in its domestic courts for human rights violations occurring in a host State, whenever victims cannot have access to effective judicial remedy in that State.

This is not a revolutionary idea. The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights for instance explicitly mention such a duty,[79] encouraged perhaps by the examples of the Alien Tort Statute in the United States[80] and by the equivalent instrument, the so-called "Brussels I" regulation in the European Union.[81] A 2011 report of the Office of the High Commissioner for Human Rights also refers to such a duty in the context of environmental rights.[82] There is a growing concern, however,

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79 See Principle 27 (Obligation to cooperate) and Principle 37 (General obligation to provide effective remedy). As discussed further below, the duty to provide an effective remedy to victims, which in situations where transnational human rights are concerned is a duty both for the host State (under whose territorial jurisdiction the damage occurred) and a duty of the home State (under whose juridiction the transnational corporation is domiciled), can only be effectively discharged if the two States cooperate with one another. This explains the close link established, within the Maastricht Principles (see above, note XXX), between the right to an effective remedy on the one hand, and the duty of States to cooperate on the other hand.

80 See above, note XXX.

81 Council Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1 (now succeeded by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351/1). For an early assessment of the potential of this instrument to ensure that EU-based transnational corporations shall be liable for human rights violations committed in their activities abroad, see O. De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law", in Ph. Alston (ed.), *Non-State Actors and Human Rights*, Collected Courses of the Academy of European Law (Oxford: Oxford Univ. Press, 2005) 227-314.

82 *Analytical study on the relationship between human rights and the environment. Report of the United Nations High Commissioner for Human Rights*, UN doc. A/HRC/19/34 (19 Dec. 2011), para. 72 (calling for "the recognition of the extraterritorial obligations of States allows victims of transboundary environmental degradation, including damage to the global commons such as the atmosphere and dangerous climate change, to have access to remedies. Those who are adversely affected by environmental degradation must be able to exercise their rights, irrespective of whether the cause of environmental harm originates in their own

that unless States do more to remove the obstacles victims of transnational human rights harms encounter when seeking to have access to effective remedies in the home State of the transnational corporation allegedly responsible for such harms, whatever remedies may be proclaimed in principle will remain a dead letter, impossible to exercise in practice. An indicator of this is that when work was launched on the revision of the Brussels I Regulation, the European Commission suggested that it might be useful to include such a *forum necessitatis* rule, "which would allow proceedings to be brought when there would otherwise be no access to justice".[83] The objective of such a clause[84] was to avoid negative conflicts of jurisdiction, potentially leading to a denial of justice. Following an initial consultation launched by its 2009 Green Paper, the European Commission proposed various revisions to the 'Brussels I' Regulation,[85] In particular, it suggested a new Article 26 in the Recast 'Brussels I' Regulation, worded as follows :

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or

(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seised.

State or beyond its boundaries and whether the cause of environmental harm lies in the activities of States or transnational corporations").

83 Green Paper on the Review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final of 21 April 2009.

84 A source of inspiration was Article 7 of Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1. This Regulation covers cross-border maintenance applications arising from family relationships. It establishes common rules for the entire European Union aiming to ensure recovery of maintenance claims even where the debtor or creditor is in another country.

85 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the regulation and enforcement of judgments in civil and commercial matters, COM(2010) 748 final of 14 December 2010.

Though it was finally not retained,[86] such a "forum necessitatis" provision would have allowed the courts of an EU Member State to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned. This would have extended the jurisdiction of the national courts of the EU Member States to defendants which are not domiciled in the forum State, under a condition of subsidiarity (the national courts of one State should only have jurisdiction where no other court is competent), and provided there exist certain connections with the forum State.

Conclusion

The duty to protect of States is well established under international human rights law, and its contours have been gradually clarified by human rights courts and expert bodies, as well as by Special Procedures of the Human Rights Council. If combined with new, robust oversight mechanisms that would allow such an instrument to be more effective than the already existing human rights treaties, a restatement of this duty under a new legally binding instrument nevertheless could have added value. Such a restatement could further clarify the implications of the duty to protect in some areas. A new legally binding instrument clarifying the content of such a duty could clarify that such a duty extends beyond the national territory of the State concerned; that it includes a duty to impose a due diligence obligation on companies to control the entities which they own or with which they enter into contractual relationships, whether or not those entities are established under the jurisdiction of the State concerned; and that it requires that victims of transnational harms attributable to corporate conduct may have access to effective judicial remedies in the State concerned. On the other hand, this clarification process is now taking place through other means, by the interpretation given to international human rights by courts and non-judicial bodies or experts — including, in particular, by the Committee on Economic, Social and Cultural Rights and the Working Group on business and human rights. It is unlikely that a treaty would achieve more.

[86] The idea of the *forum necessitatis* was rejected in the course of the preparation of what became the Recast "Brussels I" Regulation, which entered into force on 1 January 2015: see above, note XXXX.

II. A Framework Instrument

The second option for a new legally binding instrument on business and human rights would take the form of a Framework Convention on Business and Human Rights. A framework convention is one which defines general obligations of result, while leaving a broad margin of appreciation to States as regards the means of implementation, as well as as regards the speed at which to adopt the measures required. For instance, the Framework Convention on Tobacco Control (FCTC),[87] which was adopted in 2003 when, for the first time, the World Health Organization (WHO) chose to resort to a legally binding international instrument, could attract ratifications at an impressive speed (it has now 180 States parties), in part because the key obligation is for each Party to "develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party".[88] The FCTC lists a number of actions that States parties are required to take, covering a large number of fields, but it leaves it to the States themselves to define the content of such measures, although they are to "submit to the Conference of the Parties [to the FCTC], through the Secretariat, periodic reports on [the] implementation of [the FCTC], which should include [...] information on legislative, executive, administrative or other measures taken to implement the Convention".[89]

There are strong arguments in favor of such an approach being followed for the adoption of a legally binding instrument in the area of business and human rights. First, the UN Working Group on Business and Human Rights[90] strongly encourages all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights. The Working Group also developed guidance for the development of such action plans in December 2014, emphasizing in particular the importance of participation,[91] and the International Corporate Accountability Roundtable (ICAR) and the Danish

87 WHO Framework Convention on Tobacco Control, opened for signature in Geneva on 21 May 2003, entered into force on 27 February 2005 (2302 UNTS 166).

88 WHO Framework Convention on Tobacco Control, art. 5.1.

89 Id., art. 23, a).

90 See above, note XII..

91 See the relevant page of the website of the Working Group on the issue of human rights and transnational corporations and other business enterprises, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (last consulted on 15 July 2015).

Institute for Human Rights (DIHR) have proposed a toolkit for the establishment of such plans. To date, seven States have adopted such an action plan,[92] and 21 other States are in the process of finalizing one. The momentum around the adoption of such action plans may facilitate reaching a consensus on a new binding instrument making this obligatory, and establishing a systematic exchange of information between States parties around the content of such plans, thus increasing accountability.

A second argument in favor of such an approach is that the Guiding Principles on Business and Human Rights cut across a wide range of issues and policies. This is in particular because of the emphasis they place on *policy coherence*, i.e., on the need to ensure that companies face an incentives structure that encourages them to take into account their responsibility to respect human rights (and to act accordingly), rather than to circumvent such responsibility. This requirement of coherence, under the Guiding Principles, is intended to ensure both that States have in place all the necessary policies, laws and processes to implement their international human rights law obligations (vertical policy coherence), and that they support and equip "departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations" (horizontal policy coherence).[93] It may be easier to address the full range of sectors concerned for such a consistent approach towards imposing on companies that they respect human rights, by the adoption of a comprehensive action plan ensuring a coordination across different policy areas and levels of governance.

Finally, a framework instrument is a tool to accelerate collective learning, and the gradual convergence on certain practices that, at the level of implementation, have proven their effectiveness. This may be particularly appropriate, since certain key elements of the Guiding Principles on Business and Human Rights remain vague, and would require to be gradually clarified by comparing systematically how they are implemented in particular settings. This is true, in particular, as regards "due diligence" as a component of the corporation's responsibility to respect human rights; the requirement to provide access to "effective" remedies, particularly in transnational situations where the host States' courts fail to comply

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92 These are the United Kingdom, The Netherlands, Italy, Denmark, Spain, Finland and Lithuania.

93 See the Commentary to Principle 8 of the Guiding Principles on Business and Human Rights.

with requirements of independence or impartiality; or the need for States to maintain "adequate domestic policy space to meet their human rights obligations" when they conclude trade or investment treaties or host government agreements with investors.[94] However, to a certain extent, the need to ensure a consistent implementation of these notions, and to encourage States to share into collective learning in this regard, are already met by the establishment of the Working Group on Business and Human Rights, which has been tasked with the follow-up to the Guiding Principles.

It may be thought that a framework instrument such as outlined here would be more acceptable to States politically, as such an instrument gives the impression of being less restrictive of States' margin of discretion is designing measures to ensure adequate protection from the human rights harms caused by transnational corporations. However, a framework instrument typically is quite demanding on States, since it will oblige them to launch a process at domestic level exposing them to demands from various segments of civil society. Resistance from States may emerge once they will realize the burden of such a reporting process, which goes beyond the kind of reporting they are already accustomed to under existing United Nations human rights treaties. Moreover, in order to be effective, such a Framework Convention would normally require a robust follow-up mechanism at international level, in order to monitor those national-level processes: the WHO FCTC, for instance, required the establishment of a new secretariat, as well as the launching of a new peer-review process across States. The budgetary implications cannot be ignored, in a context in which Governments are highly reluctant to invest more resources in international monitoring. In other terms, whereas the benefits of the establishment of a framework imposing on States a duty to report on the adoption and implementation of national action plans on business and human rights could be significant, the political feasibility seems highly questionable.

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[94] See Principle 9 of the Guiding Principles on Business and Human Rights; as regards the requirement that States do not make undertakings under trade or investment treaties that would create obstacles to their ability to regulate the conduct of corporations under their jurisdiction, see the *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter: Addendum*, UN doc. A/HRC/19/59/Add.5 (19 December 2011); on contracts between host States and investors, see *Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

Conclusion

A new legally binding instrument in the form of a Framework Convention on Business and Human Rights would consolidate the acquis of the Guiding Principles on Business and Human Rights endorsed in 2011, making into a legal obligation what is currently merely encouraged, i.e., the adoption and implementation of national action plans on business and human rights in order to align the policies pursued in different sectors with the need to strengthen the human rights accountability of corporations by building on the State's duty to protect, on the corporations' responsibilities to respect, and on the duty of both to ensure that victims have access to remedies. This approach would also take into account the need for the adoption of multi-sectoral national action plans in order to align all relevant policies (in the areas of trade and investment in particular) with the need to ensure that corporations are not encouraged to violate human rights or to encourage such violations, thus ensuring that economic incentives will support a legal framework on accountability, and strengthening the preventive dimension of such strategies. However, the added value of this approach as compared to the already existing mechanisms is relatively minimal. It is unclear, moreover, whether this option would be able to attract wide support from States, once we take into account the resources required, both at domestic and at international level, for the effective monitoring of a framework convention thus conceived.

III. An Instrument Imposing Direct Legal Obligations on Corporations

Though primarily focused on the strengthening of the States' duty to protect human rights, the impressive coalition of civil society organizations who rallied behind the proposal for a new legally binding instrument on business and human rights also refers to a third option for such an instrument.[95] This option would be to conceive of the new legally binding instrument directly addressing corpora-

[95] The Statement of the Treaty Alliance includes a paragraph stating that: "The treaty should provide for an international monitoring and accountability mechanism. A dedicated unit or centre within the United Nations may improve the international capacity for independent research and analysis and for monitoring the practices of transnational corporations and other business enterprises. The needs and feasibility of a complementary international jurisdiction should be discussed."

tions. Such a demarche is of course reminiscent of the "Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises" proposed in 2003 by the independent experts of the UN Sub-Commission for the Promotion and Protection of Human Rights.[96] Indeed, while the draft Norms ostensibly presented themselves as a restatement of the human rights obligations imposed on companies under international law, they were in fact effectuating a silent revolution by being addressed directly to companies, rather than to States alone.

The "Norms" proposed in 2003 are not isolated in this regard, however. More recently, the draft Statute establishing a World Court of Human Rights — produced by a Panel of Eminent Persons appointed by the Swiss Government[97] — anticipated that business entities would be allowed to recognize the jurisdiction of such an international jurisdiction,[98] with the option of choosing, upon making such a declaration, which human rights treaties or specific provisions thereof would be subject to the jurisdiction of the Court.[99] In this draft Statute, the attempt to define the duties of business entities directly under international human rights law is pushed rather far: the role of the World Court of Human Rights, according to the drafters of the project, is to "determine whether an act or omission is attributable to a State or Entity [having made a declaration accepting the Court's jurisdiction, such as a business corporation] for the purposes of establishing whether it committed a human rights violation. In so doing, the Court shall be guided by the principles of the international law of State responsibility which it shall apply also in respect of Entities subject to its jurisdiction, as if the act or omission attributed to an Entity was attributable to a State".[100] The proposal envisages that, where an Entity such as a business corporate accepts the jurisdiction of the World Court for Human Rights, it "may in its declaration [accepting such jurisdiction] identify what internal remedies exist within its own structures".[101] According to the logic of the draft Statute, an applicant alleging to be a victim of a violation resulting from an act or an omission of a corporation having

96 See above, note 11.

97 The draft Statute for a World Court of Human Rights was prepared by the Ludwig Boltzmann Institute of Human Rights (Manfred Nowak and Julia Kozma) and Martin Scheinin (professor at the European University Institute in Florence) at the end of 2010. See J. Kozma, M. Nowak and M. Scheinin, *A World Court of Human Rights — Consolidated Statute and Commentary* (Graz: Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte / COST, 2010).

98 See Article 51, para. 1.

99 Id., Article 51, para. 2.

100 Id., Article 6, para. 1.

101 Id., Article 9, para. 3. See also the *Commentary*, at 41.

accepted the Court's jurisdiction should first rely on those internal remedies as well as on any domestic remedies available both in the host State and, wherever possible, in the home State of the transnational corporation, before filing the complaint with the World Court.

It is often argued that any mechanism imposing direct obligations on companies under international law is bound to fail due to the sheer number of the actors involved: the Special Representative of the Secretary-General on Business and Human Rights, for instance, noted that "we live in a world of [...] 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms",[102] and the implicit suggestion is that an accountability mechanism addressed to such a large number of actors would be immediately overwhelmed by the number of instances it would have to deal with. This argument is unconvincing. The sheer number of transnational corporations (however reliably that number is estimated) is not in fact an obstacle to the establishment by a new international instrument of a mechanism specifically dedicated to monitoring corporate behavior, no more than in a domestic setting, legal prohibitions are bound to remain a dead letter because they are addressed to a large range of individuals. Indeed, such mechanisms to hold transnational corporations accountable already exist, to a certain extent at least. The Working Group on Business and Human Rights may receive complaints from aggrieved individuals or communities, and send communications to States or business entities on that basis in the form of urgent appeals or letters of allegation. This is also a prerogative other Special Procedures of the Human Rights Council have been recognized and routinely use.

In fact, the reason why the approach followed by the advocates of the World Court on Human Rights is unsatisfactory is not because they cast the net too wide, but instead because they are too modest. They would make the jurisdiction of the Court conditional upon business entities having voluntarily joined the system. The establishment of any mechanism to improve the accountability of transnational corporations that would depend on the corporation joining a supervisory system on its own motion almost per necessity would remain deeply unsatisfactory, however. First, it would put the companies showing the greatest goodwill at a disadvantage vis-à-vis their competitors. Secondly, it would in fact do little else than add another voluntary mechanism to the voluntary mechanisms that already exist, in which the scope of the obligation of the corporation depends on its acceptance of certain mechanisms freely entered into. Can another system be imagined? Two scenarios appear plausible and worth exploring.

[102] A/HRC/17/31, para. 15.

Both go beyond the protection already afforded by the human rights treaty bodies and the Special Procedures of the Human Rights Council. And in neither of these scenarios is the supervisory mechanism to be established made to depend on the willingness of the corporations concerned to be monitored, as in the draft Statute for a World Court for Human Rights.

The first and perhaps most plausible form a new legally binding instrument imposing direct human rights obligations on transnational corporations could take is that of a treaty, open to the signature and ratification of States, by which they would accept that all transnational corporations under their jurisdiction[103] are subjected to some form of control, more robust than the existing monitoring mechanisms recalled above. By ratifying this instrument, a State would express its consent to a new monitoring mechanism applying directly to the transnational corporations under its jurisdiction: where it is alleged that a human rights violation has been committed by such a corporation, that State would agree that the corporation itself would have to respond to such allegations before an international mechanism, unless the violation has been addressed either by the internal grievance mechanisms of the corporation concerned, or through legal remedies available within the State concerned.

A treaty thus conceived could provide a significant incentive for the State to improve the remedies available in the domestic legal order to victims of corporate human rights harms, as well as for the corporations concerned to prevent, and where necessary remedy, any such harm. However, it would be important to avoid a situation in which the possibility to directly engage the responsibility of a corporation under such a mechanism, would allow a State to circumvent its own specific duty to protect human rights by regulating the conduct of corporations under its jurisdiction. Thus, ideally, this first scenario should be seen as complementary to a reaffirmation (and perhaps a strengthening) of the duty of the State to protect human rights and at clarifying the scope of such a duty.

The second and perhaps most plausible form a new legally binding instrument imposing direct human rights obligations on transnational corporations could take is that of a new mechanism, conceived per analogy with existing international criminal tribunals or the International Criminal Court, but established specifically to address serious human rights violations that are committed by corpo-

[103] "Transnational corporations under the jurisdiction" of the State concerned could be defined, for the purposes of such an instrument, as any corporation which has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned, or whose parent or controlling company presents such a connection to the State concerned.

rations or in which corporations are complicit. This new mechanism should be of a judicial nature if it is to add value in comparison to the existing mechanisms referred to above. Under the present Statute of the International Criminal Court (ICC)[104] legal persons are not included in its jurisdiction.[105] However, national and international legislation increasingly contemplate the criminal liability of corporations; and as recalled by a number of authors who have returned to the British and American war crimes tribunal set up after the Second World War,[106] the involvement of corporations in the international crimes over which the ICC has jurisdiction can be generally imagined in the form of complicity.

For such scenarios to be viable, the instruments establishing them should address two issues that deserve a brief comment. First, it is likely that reference shall be made in such instruments, rather than to any violation of human rights by transnational corporations and other business enterprises, either to "serious violations of international human rights" or to violations of international humanitarian law (in the form of war crimes, crimes against humanity, genocide, or crimes of aggression). The burden that would fall on any new mechanism to be established otherwise may be seen as too heavy.

Yet, whereas violations of international humanitarian law are well circumscribed in particular as their definitions are provided in the Rome Statute of the International Criminal Court (with the exception of the crime of aggression), the notion of "serious violation of international human rights law" is much more elusive. This is curious, since references to the seriousness of a violation are not unusal in human rights law. For instance, the former "1503 Procedure" before the United Nations Commission on Human Rights (now replaced by the Complaints Procedure before the Human Rights Council) examined situations that "appear to reveal a consistent pattern of gross and reliable attested violations of human rights and fundamental freedoms",[107] but the situations examined under that procedure

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[104] Rome Statute of the International Criminal Court, signed in Rome on 17 July 1998, entered into force on 1 July 2002, 2187 UNTS 3. The Statute currently has 123 States parties (status of ratifications on 15 July 2015).

[105] See, for a detailed examination of the negotiations of the Statute of the International Criminal Court on this issue, Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons : Lessons from the Rome Conference on an International Criminal Court', in Menno Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 139-195.

[106] See in particular Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations', 20 *Berkeley J. Int'l L*. 91 (2002).

[107] ECOSOC Resolution 1503 (XLVIII), 27 May 1970, para. 1. See now UNGA Res. 60/251

were identified on an *ad hoc* basis, and no definition is provided of what qualifies as "a consistent pattern of gross violation of human rights": the attempts by authors to clarify the notion illustrate the scope of disagreement.[108] Similarly, the 2005 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 refer to "gross" and "serious" violations, but they do not define these notions, although the Preamble states that such violations "by their very grave nature, constitute an affront to human dignity".[109]

Three factors seem to play a role in international practice in determining the "serious" nature of a violation of international human rights law. First, the nature of the rights matters. Violations of the right to life, the right not to be subjected to torture or slavery, the right to liberty and security, freedom of expression, freedom of religion, the right to privacy, freedom of assembly and the prohibition of systematic racial discrimination, as well as certain violations of economic, social and cultural rights (particularly the rights to housing, health, food, and education) have all been identified as serious.[110] However, only the violations of the rights to life, physical integrity and liberty, and the prohibition of slavery have been identi-

establishing the Human Rights Council (mentioning, in OP3, that " the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon"), and Human Rights Council Res. 5/1 (Institution-building of the United Nations Human Rights Council), Annex (establishing a complaint procedure, modeled on the former "1503" procedure, "to address consistent patterns of gross and reliably attested violations" of human rights and fundamental freedoms (par. 85)).

108 See, e.g., Felix Ermacora, "Procedures to deal with Human Rights Violations: A Hopeful Start in the United Nations?", *Revue des droits de l'homme/Human Rights Journal*, vol. 7 (1974), 670, at 679; M.E. Tardu, "United Nations Response to Gross Violations of Human Rights: The 1503 Procedure", *Santa Clara L. Rev.*, vol. 20 (1980), 559, at 583-584.

109 UN GA Res. 60/147, 16 December 2005.

110 See, *inter alia, Case of Gomes Lund Et Al. ("Guerrilha Do Araguaia") v. Brazil,* (Preliminary Objections, Merits, Reparations, and Costs), Judgment, IACtHR, 24 November 2010, para. 105; Decision 1 (63) Situation in the Lao People's Democratic Republic, 21 August 2003, CERD Annual Report A/58/18, at 17, para. 2; Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, 27 January 2005, CEDAW/C/2005/OP.8/MEXICO, at 42, para. 263; Middle East (Lebanon), SC Res. 2004, 30 August 2011; Somalia, SC Res. 2010, 30 September 2011; Middle East (Syria), SC Res. 2043, 21 April 2012; Middle East (Syria), SC Res. 2042, 14 April 2012; Situation of human rights in Iran, GA Res. 66/175, 19 December 2011, Opp. 2. See also Theo van Boven, 'Distinguishing Criteria of Human Rights' in: Karel Vasak (ed.) and Philip Alston (ed. English edition), *The International Dimensions of Human Rights*, Vol. I (Greenwood Press, Westport, Connecticut, 1982), 43-59, at 48.

fied as serious independently of the presence of any other factors. Secondly, a quantitative element is included in the assessment, referring to the number of victims or violations: this is often designated as the *widespread or massive character of violations*. Thirdly, a violation will be deemed "serious" due to its *systematic* character. For instance, systematic racial discrimination is considered to be a gross violation.[111] 'Systematic' in this context means that a certain number of violations are committed in an organised manner, forming a pattern and affecting a certain number of victims. Although such systematic violations can be committed by States and by non-State actors alike, it will be much easier to prove the systematic nature of a violation where it is condoned as an official policy. We encouter a paradox once we try to apply these criteria, that are implicit in international practice, to the question of the conduct of corporate actors: indeed, the more "serious" and "systematic" the violation of human rights by such actors, the more such violation shall reveal a failure by the State to discharge its duty to protect, implying that the State may engage its international responsibility.

This leads to the question of complicity, the other issue that any attempt to establish a new mechanism enforcing direct obligations under international law on corporations will necessarily have to address. Just like the notion of "sphere of influence" with which it shares a common history,[112] the idea of "complicity" as applied to corporate misconduct has sometimes been criticized for its vagueness.[113] The notion has been a constant preoccupation of legal doctrine since the debate on the human rights obligations of transnational corporations was relaunched in 1999-2000.[114] It serves to identify the responsibility of companies

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111 Section 702 (g), *Restatement (Third) of the Foreign Relations Law of the United States*, cited above note 69.

112 In the Commentary to the "Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises" proposed by the UN Sub-Commission for the Promotion and Protection of Human Rights, corporations were expected to "use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware", a responsibility that extended to all situations falling within the "sphere of influence" of the company concerned. This implied in particular that: "Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses".

113 See, eg, Gregory Wallace, 'Fallout from Slave-Labor Case is Troubling', 150 *N.J.L.J.* 896 (1997).

114 Useful attempts are, e.g., Andrew Clapham, "Corporate Complicity in Violations of International Law: Beyond Unocal", in Wybo Heere (ed) *From government to governance: the growing impact on non-State actors on the international and European legal system. Pro-*

where another entity, their business partners (their suppliers or sub-contractors) or the host government, commits human rights abuses, which are considered as criminal offences under either international or internal law.

There is a growing consensus that "complicity" includes four sets of circumstances.[115] It includes, first, situations where a company aided and abetted the commission of the violation. Under the case-law of the international criminal tribunals, for instance, which in turn inspired the United States federal jurisdictions for the application of the Alien Tort Statute, such assistance will be considered to lead to a finding of complicity where it has a substantial effect on the commission of the abuse, and where it is given with the knowledge that it would have such an effect, whether or not the accomplice shares the *mens rea* of the direct perpetrator. [116] Secondly, where a company *is in a joint venture with the*

ceedings of the Sixth Hague Joint Conference held in the Hague, The Netherlands, 3-5 2003 (The Hague: T.M.C. Asser Press, 2004) 227-38; Andrew Clapham, "State responsibility, corporate responsibility, and complicity in human rights violations", in: Lene Bomann-Larsen and Oddny Wiggen (eds), *Responsibility in World Business. Managing Harmful Side-effects of Corporate Activity* (Tokyo-New York-Paris: United Nations University Press, 2004) 50-81; Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001), available at: http://business-humanrights.org/en/categories-of-corporate-complicity-in-human-rights-abuses (last consulted on 15 July 2015); and from the same authors, for a more academic version and under the same title, 24 *Hastings International and Comparative Law* 339 (2001).

115 *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005, UN doc. E/CN.4/2005/91, para. 34 (citing International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, (Geneva, February 2002), pp. 125-136). See also the *Report of the United Nations High Commissioner for Human Rights to the 56th session of the General Assembly*, UN Doc. A/56/36 (2001) (distinguishing direct, beneficial and silent complicity); or the OHCHR Briefing paper, 'The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity', reproduced in *Embedding Human Rights into Business Practice. A joint publication of the United Nations Global Compact and the Office of the High Commissioner for Human Rights* (no date (presumably 2003)) (available at: http://www.ohchr.org/Documents/Publications/Embeddingen.pdf (last consulted on 15 July 2015)), 14-26 at 19.

116 Under the Alien Tort Statute, it has been authoritatively held that the standard for aiding and abetting is 'knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime' : *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (judgment of 18 September 2002). This standard is borrowed from the approach of international criminal tribunals. See, e.g., *Prosecutor v. Furundzija*, IT-95-17/1-T (10 Dec. 1998), *reprinted in* 38 I.L.M. 317 (1999), where the International Criminal Tribunal for the former Yugoslavia (ICTY) held that 'the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a

host government or with another private actor and *has knowledge of, or should have known of*, human rights violations committed by that partner in the fulfilment of the agreement, the company should be considered complicit in the violation for not having put an end to the business relationship. Thirdly, a company may be said to be complicit when it *benefited* from the abuse, for example in instances where the state security forces repress peaceful protest against business activities. Finally, when in the face of systematic or continuous human rights violations in the host country, the company *remains silent*, refusing to denounce these abuses which the company was aware of or should have been aware of, we may ask whether it should not be considered the 'silent accomplice' of those violations : apart from the fact that, in such situations, direct complicity may be alleged – insofar as by remaining silent in the face of violations the company lends its moral support to those crimes, thus contributing to the instigation of such crimes[117] –, there exists a 'growing acceptance within companies that there is something culpable about failing to exercise influence in such circumstances'.[118]

Whether the consensus around these different shades of complicity is strong enough remains to be seen. If and when work is launched on a new international

substantial effect on the perpetration of the crime' (at § 235). As emphasized by the *Unocal* judgment delivered on 18 September 2002 by the United States Court of Appeals for the 9th Circuit, the ICTY considered that in order to qualify, 'assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal' (*Furundzija* at § 209; *see also Prosecutor v. Kunarac*, IT-96 -23-T & IT-96-23/1-T, § 391 (22 Feb. 2001) ('The act of assistance need not have caused the act of the principal')) : it suffices that the acts of the accomplice 'make a significant difference to the commission of the criminal act by the principal' (*Furundzija,* at § 233). Under the criterion used by the ICTY, which borrows from the precedents set by the American and British military courts and tribunals dealing with the Nazi war crimes in the aftermath of the Second World War, the acts of the accomplice will have the required '[substantial] effect on the commission of the crime' where 'the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.' (*Prosecutor v. Tadic*, ICTY-94-1, § 688 (7 May 1997)). The International Criminal Tribunal for Rwanda also considers that the *actus reus* for aiding and abetting consists in any act of assistance, whether physical or moral, which substantially contributes to the commission of the crime : *Prosecutor v. Musema*, ICTR-96-13-T (27 January 2000).

117 For instance, in the Trial Chamber judgment delivered in the case of *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda convicted a village mayor as an accomplice as it considered that his presence 'sent a clear signal of official tolerance for sexual violence', thus in effect encouraging the offence (*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998, §§ 693 and 694).

118 *Report of the United Nations High Commissioner for Human Rights to the 56th session of the General Assembly*, cited above note 163*,* par. 111.

instrument establishing a mechanism to impose direct human rights obligations on coporations, the question shall arise whether the notion of "due diligence", given its now consensual nature, should not be preferred to the more contested notion of "complicity". Even if such a choice is made, however, the substantive questions that may arise from the fact that the corporate actor is involved in certain human rights violations without having actively caused them, shall have to be addressed.

Conclusion

This section briefly outlined two potential scenarios under which a new mechanism could be established under international law, specifically designed to address corporate abuse. This could be achieved either by providing that States bound under the new instrument accept that the corporations operating under their jurisdiction can be attributed human rights wrongs where the domestic remedies available to victims have proven insufficient to remedy such harms; or by providing that corporations under the jurisdiction of the State concerned can be prosecuted for serious human rights violations or violations of humanitarian law amounting to international crimes, where national jurisdictions have failed to address such international crimes. These are of course highly ambitious scenarios. For this very reason, they are politically attractive to non-governmental organisations and human rights advocates, because of the symbolic nature of such a victory: whereas the international machinery has been traditionally addressed to States, with the narrow exception of international criminal law, it would now be extended to reach directly non-State actors. However, the option poses conceptual difficulties. Almost inevitably, since it would seem too restrictive to limit this option to violations of international humanitarian law, it would require defining the content of "serious" human rights violations, "serious" in the sense that they affect essential values of the international community, that they are committed on a broad scale, and that they are "systematic", i.e., form part of a policy rather than remain separate occurences. And it would require addressing the difficulties associated with the notion of "complicity" where the responsibility of the corporation, as in many cases, will be only indirect — the result of the activity of the corporation being entangled with that of the State.

Because it is ambitious and politically sensitive, it is likely that, were it to be proposed, this option would initially raise strong objections from a range of States, particularly from the Western European and Others Group (WEOG). The only plausible format under which this option may achieve a certain degree of consensus across States is one in which a mechanism would be established to allow transnational corporations and other business entrerprises conducting transnational activities to be held accountable for violations of international hu-

manitarian law — war crimes, crimes against humanity, crimes of genocide and crimes of aggression. This however will seem excessively restrictive to many. While some corporations could conceivably commit human rights violations that would also qualify as international crimes,[119] a large range of human rights violations, even though potentially "serious" in nature, would escape such qualification.

IV. An Instrument in Support of Mutual Legal Assistance

One weakness of the various solutions explored above is that, for the most part, they overlap at least in part with already existing instruments or mechanisms. This is the case even for our third option, apparently the most innovative, focused on the establishment of a new mechanism to enforce directly human rights obligations on companies under international law: after all, Special Procedures of the Human Rights Council, including (although not limited to) the Working Group on Business and Human Rights, already perform such a function in principle — although admittedly with limited success. Overlap as such may not necessarily be a problem, where it leads to systems operating in parallel to mutually strengthen each other. It may be of greater concern in the present context, however, in which a strong consensus exists to build on the Guiding Principles on Business and Human Rights and to encourage States to work towards implementation (since any parallel process may be seen as distracting from this priority[120]), and in which existing mechanisms have already moved towards clarifying the scope of the duty to protect imposed on States, as well as various

[119] See in particular *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (complicity of Unocal with human rights abuses committed by the Burmese military, amounting to crimes against humanity due to the systematic and widespread nature of the forced labour practiced by the military).

[120] This point was made forcefully by John Ruggie, most explicitly in a brief posted on the website of the Institute for Human Rights and Business: see John Ruggie, "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors" (9 September 2014) (noting that unless the sponsors of a new legally binding instrument on business and human rights do more to support the full implementation of the Guiding Principles, "they will fuel the suspicion voiced by opponents that the treaty initiative has less to do with achieving practical improvements in business and human rights than it does with using this sensitive issue in the pursuit of other international political aims").

components of the corporations' responsibility to respect human rights.[121] Keeping in mind this background, one should be cautious about proposals that could be competing with these developments, not only because of the limited added value of such proposals, but also because of the risk of new initiatives undermining existing dynamics.

In contrast the the other avenues mentioned above, the fourth option therefore would be strictly subsidiary to the current efforts. It would target one specific obstacle to the ability of such efforts to benefit victims: the weakness of cooperation between States in providing effective remedies to victims of human rights harms that have their source in the conduct of transnational corporations. The lack of effective cooperation between the different States across which such corporations operate, indeed, appears as a major source of impunity in this area. In order to tackle such impunity, States may have to cooperate where the activities of the transnational corporation cross borders for the collection of evidence, for the freezing or seizure of assets, or for the execution of judgments. It is on this obligation of cooperation that the instrument could build.

Two well-know examples come to mind to illustrate the problem. The first example has been ongoing since thirty years. On 3 December 1984, a toxic gas was leaked from a plant operated by Union Carbide India Limited (UCIL) in the Indian city of Bhopal. According to the most conservative estimates, about 5,200 people died, and several thousand other individuals suffered severe disabilities — the unofficial figures are significantly higher. UCIL was owned by the US-based company Union Carbide Corporation (UCC), which was the majority shareholder, as well as by other investors, including Indian financial institutions. The legal reaction came in two forms. First, already on 7 December 1984, just days after the disaster, a class action was filed by victims against the parent company before the New York District Court. Secondly, on 29 March 1985, the Bhopal Gas Leak Disaster (Processing of Claims) Act was adopted, essentially allowing the Government of India to act "*parens patriae*" as the sole representative of the interests of victims of the disaster. Having received this mandate, the Government of India filed a complaint on 8 April 1985 in the Southern District of New

[121] In addition to the work of the Working Group on Business and Human Rights, one should mention the contribution of the UN human rights bodies, including the Committee on Economic, Social and Cultural Rights (in addition to various Concluding Observations on States parties' reports and to General Comments, see its *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, UN doc. E/C.12/2011/1 (20 May 2011)), and the Committee on the Rights of the Child (see its *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN doc. CRC/C/GC/16 (17 April 2013)).

York on behalf of all victims of the Bhopal disaster, similar to the purported class action complaints already filed by individuals in the United States. According to the Federal Court of Appeals that reviewed the initial judgment adopted in the case, "The [Union of India's] decision to bring suit in the United States was attributed to the fact that, although numerous lawsuits (by now, some 6,500) had been instituted by victims in India against UCIL, the Indian courts did not have jurisdiction over UCC, the parent company, which is a defendant in the United States actions."[122] These actions by the victims of the gas plant disaster in Bhopal and by the Government of India failed, however. UCC moved to dismiss the litigation on the grounds of *forum non conveniens*, a motion granted by the court on the condition that UCC accept the civil jurisdiction of the Indian courts to hear the cases.[123] The dismissal was affirmed on appeal.[124] On 5 October 1987, the U.S. Supreme Court declined to review.[125]

In September 1986, once it had become clear its chances to be successful in its complaint before the United States federal courts were weak, the Government of India instituted a civil suit against Union Carbide Corporation (UCC) in the Court of the District Judge in Bhopal, on behalf of all victims of the disaster. When the proceedings eventually reached the Indian Supreme Court in 1988, the Court urged UCC, Union Carbide India Limited (UCIL) and the Indian Government to reach a final global settlement. In two successive orders of 14 and 15 February 1989, the Supreme Court recommended a 470 million USD global settlement. This was accepted by UCC, UCIL and the Indian government, although it was negotiated without participation of the victims.[126] Following payment by UCC and UCIL, a fund was established, to be administered by the Bhopal Gas Victims Welfare Commissioner, in order to compensate the victims.

Criminal proceedings were launched in parallel to the civil claims. The Indian Central Bureau on Investigation (CBI) initiated prosecution in December 1987, accusing UCC Chairman Warren M. Anderson, seven managers of Union Car-

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122 *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 198 (2d Cir. 1987).

123 *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F.Supp. 842, 54 USLW 2586 (S.D.N.Y. May 12, 1986).

124 *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987).

125 Executive Committee Members v. Union of India, 484 U.S. 871 (Oct. 05, 1987) (NO. 86-1719); and Union of India v. Union Carbide Corp., 484 U.S. 871 (Oct. 5, 1987) (No. 86-1860).

126 *Union Carbide Corporation v. Union of India and Others*, A.I.R. 1990 Supreme Court 273. Although, as activists were quick to point out, this sum represents less than 10,000 USD per victim (in fact, the recoveries were between 2,500 USD and 7,500 USD per person for deaths and between $1,250 and $5,000 for permanent disabilities), subsequent attempts to re-oped the litigation by questioning the equity of the settlement failed.

bide Indian Limited (UCIL) and three corporate entities — UCC, Union Carbide Eastern and UCIL — with "culpable homicide not amounting to murder," the most serious offense charged. Although the Supreme Court of India held in 1991 that the criminal case could proceed despite the settlement that has been reached on the civil claims, Mr. Anderson and UCC refused to appear before the Indian criminal court in 1992, alleging that the court lacked criminal jurisdiction over them and arguing that the criminal charges had been quashed as part of the global settlement. The Chief Judicial Magistrate, Bhopal (CJM), declared them absconders and directed that a warrant be issued against Mr. Anderson to initiate proceedings for extradition. Though the Indian Government formally requested the U.S. to extradite Mr. Anderson to India, the request was denied in June 2004; the Indian defendants, on their part, were convicted in June 2010. Mr. Anderson died in September 2014, when a new request for extradition filed in 2010 was still pending.

Finally, a third procedure was launched in 1999, in the form of three class action lawsuits filed for environmental damage (including, subsequently, for groundwater contamination) in the U.S. District Court for the Southern District of New York against UCC and former UCC Chairman Warren M. Anderson. On 15 November 1999, the first a class action lawsuit (under the name of *Bano v. Union Carbide*) was filed by seven individual survivors and five survivors' organization, seeking compensation for the impacts of the pollution around the UCC-Bhopal plant; the action was dismissed, *inter alia*, on grounds of the expiration of the statute of limitations.[127] In November 2004, a similar lawsuit was filed against Union Carbide on behalf of other plaintiffs who were injured by the water pollution at Bhopal, by plaintiffs whose claims were not barred ("Sahu I"); and in March 2007 a third suit was filed on behalf of other plaintiffs alleging property damage ("Sahu II"). A judgment of the United States Court of Appeals for the Second Circuit, adopted in June 2013, put a provisional end to the proceedings.[128]

The second example orginated in the environmental pollution caused in Peru and Ecuador by the activities of Texaco (to which Chevron has now succeeded) between 1964 and 1992. Although the Ecuadorian government had authorized Texaco to launch oil exploration activities in the Amazon in 1964, the massive

[127] *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y., 28 August 2000), *affirmed in part, vacated in part by*: *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2nd Cir. (N.Y.) 15 Nov 2001) (No. 00-9250); o*n remand*: *Bano v. Union Carbide Corp.*, 2003 WL 1344884 (S.D.N.Y., 18 March 2003), *judgment affirmed in part, vacated in part by Bano v. Union Carbide Corp.,* 361 F.3d 696 (2nd Cir. 2004); *on remand: Bano v. Union Carbide Corp.*, 2005 WL 2464589 (S.D.N.Y., 5 Oct. 2005).

[128] *Sahu et al. v. Union Carbide Corp. et al.*, No. 12-2983-cv, (27 June 2013).

pollution of forests and of rivers in both Ecuador and Peru led victims to file two class actions in reparation in the Southern District of New York, alleging that the pollution led to damage to their property and to their health.[129] The claim was dismissed on *forum non conveniens* grounds.[130] The victims then turned to the Ecuadorian courts, obtaining an initial judgment in *Aguinda v. Chevron* (Chevron had succeeded Texaco in 2001) ordering the defendant company to pay over 18 billion USD in compensation for the environmental damage caused. The subsequent litigation was closed by a final judgment on 12 November 2013 from the Ecuador Supreme Court finding Texaco/Chevron liable for environmental damage, though reducing the assessment of the damages to 9.51 billion USD. The judgment however is still pending execution, due to the legal battle fought by Texaco/Chevron before the US courts. The case has a long and complex history, involving the reliance on international arbitration by Chevron (arguing that Ecuador had violated a bilateral investment treaty between Ecuador and the United States) and accusations filed against the representatives of the Ecuadorian plaintiffs that they had been manipulating witnesses and conspired to extort damages from Chevron before Ecuadorian courts, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act.[131]

These cases, spanning decades and each presenting a number of different legal ramifications, are too complex to be described in any detail here. Yet, they do illustrate at least some of the difficulties victims face in transnational cases in which corporations operating across various jurisdictions allegedly have caused, or contributed to, human rights violations.[132] How could such obstacles to effec-

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[129] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (No. 94 Civ. 9266), 1994 WL 16495105 (claims filed by residents of the Oriente region of Ecuador suing Texaco for environmental and personal injuries that allegedly resulted from Texaco's exploitation of the region's oil fields); *Ashanga v. Texaco Inc.*, S.D.N.Y. Dkt. No. 94 Civ. 9266 (similar allegations made by certain residents of Peru, who live downstream from Ecuador's Oriente region).

[130] *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (holding that hold that dismissal on the ground of *forum non conveniens*, as decided by the district court, is erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming the lower court's decision to dismiss the case).

[131] 18 U.S. Code Chapter 96.

[132] These obstacles were systematically collected in a report co-authored by G. Skinner, R. McCorquodale and O. De Schutter, with case studies by A. Lambe, *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable (ICAR), CORE, and the European Coalition for Corporate Justice (ECCJ), Dec. 2013). The appendix to the report includes a detailed description of seven case studies that illustrate the various obstacles faced by victims of human rights violations caused by the activities of transnational corporations, stemming from the fact that such activities span across a number of jurisdictions.

tive access to justice for victims be overcome? Significant progress could be achieved by setting out in detail the duties of States to cooperate in order to put an end at the impunity of corporations for human rights violations. Extraterritorial obligations of international cooperation are contained in several human rights treaties. For example, States parties to the Convention on the Rights of Persons with Disabilities, among the most recent of the core human rights treaties, "recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention" and commit to "undertake appropriate and effective measures in this regard..."; the Convention also lists illustrative measures to fulfil this commitment. [133] A duty to cooperate for the full realization of human is also included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which 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".[134] A comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.[135] The first two Optional Protocols to the Convention on the Rights of the Child oblige States to cooperate to prevent and punish the sale of children, child prostitution, child pornography and the involvement of children in armed conflict. The two Protocols require States to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes.[136]

The above-mentioned Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights provide in this regard that:

All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to

[133] Convention on the Rights of Persons with Disabilities, art. 32.

[134] Art. 9 (1).

[135] Article 15 provides that "States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains."

[136] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 10. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Art. 7.

hold them to account for any such abuses, and to ensure an effective remedy for those affected.[137]

The restatement of the duties of States included in the Maastricht Principles can be extended to all human rights. The implication is that, in transnational situations, States should cooperate in order to ensure that any victim of the activities of transnational corporations that result in a violation of human rights has access to an effective remedy, preferably of a judicial nature, in order to seek redress. A new instrument could usefully list the duties of States in this regard.[138] Such a list could include assisting foreign courts in taking evidence or statements from persons; in effecting service of judicial documents; in executing searches and seizures, in freezing evidence, in providing originals or certified copies of financial, corporate or business records, or in identifying and tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; in facilitating the voluntary appearance of persons in the requesting State. It could also include cooperating in the execution of judgments, by identifying, freezing and tracing proceeds of crime or facilitating the recovery of assets.

Conclusion

An instrument focused on mutual legal assistance does not present the ideological dimension of an instrument imposing on corporations new, far-reaching human rights obligations. Nor does it create a new accountability mechanism as such: rather, it allows the mechanisms existing at domestic level, through which States discharge their duty to protect, to function more effectively, overcoming the barriers that may result from the transnational dimension of the activities of transnational corporations and other business enterprises as they are defined in the resolution.

One advantage of this approach is that it would overcome what appears to be an important stumbling block in the current discussions. As all observers of the current process are well aware, the resolution adopted by the Human Rights Council following the proposal of Ecuador included a footnote, stating that: '"“Other business enterprises” denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local

[137] Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, cited above note 51, Principle 27.

[138] In order to clarify what might be included in a new international instrument providing for legal mutual assistance to combat human rights violations by transnational corporations, inspiration may be found in chapter IV of the United Nations Convention against Corruption (UNCAC) (opened for signature by UN General Assembly Res. 58/4 of 31 October 2003, entered into force on 14 December 2005; 2349 UNTS 41.

businesses registered in terms of relevant domestic law." The footnote ostensibly aims at clarifying the meaning of the expression "transnational corporations or other business enterprises". It is, however, unworkable. Transnational corporations are simply corporations that have activities that span different jurisdictions, either because they operate directly outside the national territory in which they are domiciled (for instance, because they have set up a branch or built a production plant in another jurisdiction), or because they own (in part or in full) a subsidiary company established in another jurisdiction, or because they are supplied by, or sub-contract part of the production process or other activities, to business partners located abroad. In other terms, "transnational corporations" *are* "business enterprises that have a transnational character in their operational activities", although they also are "local businesses registered in terms of relevant domestic law", albeit local business that have "transnationalized" some of their operations. As John Ruggie puts it, the definition of "other business enterprises" proposed "is unlikely to survive the first round of critical scrutiny and go on to serve as the basis of any viable treaty instrument".[139]

However artificial and ill-informed, the dispute that arose about the footnote can be easily circumvented if the new legally binding instrument negotiated within the Open-Ended Intergovernmental Working Group established under Human Rights Council resolution 26/9 were to be focused on mutual legal assistance. Indeed, by the very nature of the obligations such an instrument would impose, such an instrument would only apply, in fact, to businesses whose activities are far-reaching enough to reach outside the jurisdiction in which they are established. The diplomats will not have to quarrel about ways to avoid the local grocery store or the shoemaker at the corner of the street having to worry about the prescriptions of the new treaty: only if these actors develop business relationships abroad or own stock in foreign companies, shall the treaty be of any potential relevance to them.

Conclusion

Some of the suggestions examined above, that could inspire the discussions within the Open-Ended Intergovernmental Working Group, simply replicate what is already done, though less visibly and perhaps less effectively than might be desirable: that is the case of the suggestions to clarify the scope of the States'

[139] John Ruggie, "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors", cited above, note 169.

duty to protect human rights and to oblige States to present national action plans on business and human rights, the first and second options explored respectively in Parts II and III. The suggestion to establish a new mechanism to monitor compliance of corporate actors with human rights obligations, our third option, may seem revolutionary; in fact, it is not without precedent, and would by no means result in moving international human rights law into entirely unchartered territory. Finally, the last option, to impose on States duties of mutual legal assistance in order to ensure adequate access to effective remedies for victims, may seem to lack ambition, and to prioritize procedure over substance. It is probably, however, the single most effective contribution a new legally binding instrument could make towards combating impunity of corporations for transnational human rights harms they contribute to, and it is a response tailored to the reality of the problem the international community faces.

Perhaps the most promising route is one that combines elements of the different scenarios above. Specifically, the solution that appears to achieve the best balance between what is politically feasible and what represents a true improvement for victims, may be a hybrid solution building on elements of the first and the fourth option discussed above. States may have to be reminded to their duties to protect human rights extraterritorially, by regulating the corporate actors on which they may exercice influence, even where such regulation would contribute to ensuring human rights outside their national territory. The exercise of extraterritorial jurisdiction where a State seeks to directly regulate foreign companies remains highly controversial, however, even where such foreign companies are owned, wholly or in part, by individual or legal persons that are nationals of the State concerned. The most effective means to discharge this extraterritorial duty to protect, therefore, is through *parent-based extraterritorial regulation* — by imposing on the parent corporation certain obligations to control its subsidiaries —, or by imposing on the company domiciled under the jurisdiction of the State concerned to monitor the supply chain to ensure that it does not entertain business relationships with partners that violate human rights. We have also noted the other advantage that such a solution presents: It allows to overcome the vexing problem of the so-called "corporate veil": once a duty of care is imposed on the parent, requiring that it effectively controls the companies in which it owns stock, there is no need to (somewhat artificially) impute to the parent company the conduct of a subsidiary, by examining whether, as a matter of fact, the parent has influenced that conduct. The relevant question is not anymore whether such influence has been exercised in fact; it is the normative question whether it was reasonable to expect that it should have been exercised.

A duty to protect thus conceived builds on the first pillar of the "Protect, Respect and Remedy" framework of the Guiding Principles on Business and Human Rights, while strengthening it further in the areas in which these principles either are behind international human rights law (as is the case as regards extraterritorial human rights obligations), or remain ambiguous (as they are where the relationship of the human rights due diligence requirement to the "corporate veil" problem is concerned). But such a duty to protect can only be discharged effectively if States cooperate with one another in order to put an end to the accountability gaps that may emerge from the ability of transnational corporations to operate across different national jurisdictions. A reinforcement of inter-State cooperation, based on the mutual trust of States in their respective legal systems when they seek to address human rights violations by corporate actors, is the price to pay for ensuring effective access to remedies for victims of transnational corporate harms. This is what the fourth option discussed in Part V aims to achieve. The negotiations opened in July 2015, at the first meeting of the Open-Ended Intergovernmental Working Group on the new legally binding instrument on business and human rights is convened, represent a unique opportunity to move in this direction.

JENNIFER ZERK & LENE WENDLAND *

Improving accountability and access to remedy for victims of business-related human rights abuses: the OHCHR "Accountability and Remedy Project"

I. Background

The UN Guiding Principles on Business and Human Rights[1] are the authoritative global standard on business and human rights. They set out the implications of the UN "Protect, Respect and Remedy" framework[2] for States and business enterprises in respect of each of the three "pillars" of the framework.[3] However, since the 2011 endorsement by the Human Rights Council of the UN Guiding Principles, the "Access to Remedy" pillar has arguably received the least attention of the three. To contribute towards redressing this imbalance, the Office of the High Commissioner for Human Rights ("OHCHR") in November 2014 launched the "Accountability and Remedy Project", the aim of which was to "contribute to a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses."[4]

* Dr Jennifer Zerk is an independent consultant specializing in legal issues relating to business and human rights, and was the lead legal consultant to the OHCHR on the Accountability and Remedy Project. Any opinions expressed in this article are personal to the author and do not reflect the views of any organization.
Ms Lene Wendland is a senior adviser on business and human rights at the OHCHR, Geneva, and was project leader for the Accountability and Remedy Project. Any opinions expressed in this article do not necessarily reflect the views of the United Nations.

1 A/HRC/17/31.

2 A/HRC/8/5.

3 The three "pillars" of the UN Guiding Principles are the "State Duty to Protect" (pillar I), the "Corporate Responsibility to Respect" (pillar II) and "Access to Remedy" (pillar III).

4 www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

The project themes and methodology, discussed further below, reflect the findings of previous research relating to access to remedy, including a preparatory study commissioned by OHCHR in 2013.[5] The aim of this preparatory work was to consider "the aspects of domestic law responses that require more development in order to contribute to a better-functioning system of domestic law accountability for business involvement in gross human rights abuses."[6] Describing the current system of domestic law remedies as "patchy, unpredictable, often ineffective and fragile",[7] the study recommended a series of activities and processes aimed at clarifying certain fundamental issues of principle and policy and exchanging knowledge and experiences "so that … examples of good practice are identified, analysed and replicated."[8]

Upon publication of the preparatory study in February 2014, OHCHR invited feedback from stakeholders on the findings and recommendations.[9] Then, at its twenty-sixth session, on 27 June 2014, the Human Rights Council passed a resolution requesting the UN High Commissioner for Human Rights to:

"*continue the work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group, and to organize consultations with experts, States and other relevant stakeholders to facilitate mutual understanding and greater consensus among different views*."[10]

The Accountability and Remedy Project was launched in response to this request from the Human Rights Council, and as part of the OHCHR's broader mandate to advance the protection and promotion of human rights globally.

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5 Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies", February 2014, copy available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

6 Ibid, p. 7.

7 Ibid.

8 Ibid, p. 11.

9 A summary and analysis of the written submissions provided to OHCHR in response to the call for comments is available via http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyProject1.pdf.

10 A/HRC/Res/26/22, paragraph 7.

II. Scope of Project and main areas of focus

The Accountability and Remedy Project focussed in particular on (a) judicial mechanisms and (b) corporate accountability. This is not to suggest that non-judicial mechanisms are unimportant. On the contrary, the UN Guiding Principles make it clear that "States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse."[11]

However, "effective judicial mechanisms are at the core of ensuring access to remedy."[12] The extent to which there is access to remedy in any jurisdiction depends ultimately on the existence of strong and effective judicial mechanisms. Such mechanisms are required, not only as a means of enforcement in the event that non-judicial mechanisms do not deliver a satisfactory outcome, but as a way of ensuring proper implementation of the remedies that have been agreed or determined. Regardless of which process is used to enforce rights or to resolve a dispute, the presence of judicial mechanisms in the background offers encouragement to all parties to participate in good faith. Furthermore, there will be cases, especially where the human rights impacts are severe, where reference to judicial mechanisms will be the only response that is in keeping with State duties to protect against human right abuses.

Similarly, the focus on *corporate* accountability does not in any way diminish the importance of *individual* liability. The possibility of individual liability for business-related human rights abuses can be a potentially powerful deterrent to wrongdoing and the imposition of criminal sanctions upon individuals may, in some cases, form part of an "effective remedy" for victims. However, the focus on corporate accountability (as opposed to individual liability) is appropriate and timely for two reasons; first because of the limitations of individual liability in responding to problems of managerial or systemic fault and, second, in order to explore ways that domestic law remedies for business-related human rights abuses (especially "severe" or "gross" human rights abuses) can contribute to compensatory and restorative needs, as well as fulfilling a "punitive" function.[13]

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11 UN Guiding Principles on Business and Human Rights, n. 1 above, Guiding Principle 27.

12 Ibid, Guiding Principle 26, Commentary.

13 See, for instance, 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

Victims of business-related human rights abuses face many and varied challenges and barriers to remedy in all jurisdictions that, in many cases, mean that there is a real risk of denial of access to remedy altogether.[14] Due to constraints of time and resources, and in order to meet the reporting timetable set out in the Human Rights Council Resolution 26/22,[15] it was necessary to limit the scope of the Accountability and Remedy Project to a limited number of priority areas to ensure that the research was manageable and available resources well used. Following a further round of consultations with experts, the following were chosen as strategically important "focus areas" for the project on the basis either of their "foundational nature" (i.e. because further clarification was necessary as a precursor to legal development) or because they are areas requiring urgent attention, and where developments were capable of delivering practical improvements in the short to medium term. The six "project components" selected on this basis were as follows:

1. Domestic law tests for corporate legal liability;

2. Roles and responsibilities of interested States in cross-border cases;

3. Overcoming financial obstacles to private law claims;

4. Criminal and quasi-criminal sanctions;

5. Civil remedies;

6. Supporting the work of domestic prosecution bodies.

Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, esp. Article IX.

14 See UN Guiding Principles, n. 1 above, Guiding Principle 26, Commentary.

15 See n. 10 above. Under this resolution, the High Commissioner for Human Rights was requested to publish a progress report before the twenty-ninth session of the Human Rights Council (June 2015), and a final report to be considered by the Council at its thirty-second session (June 2016).

III. Research Methodology and Process

The programme of work for the Accountability and Remedy Project, published in February 2015,[16] reflected OHCHR's desire to ensure that any future guidance or recommendations take proper account of the diversity of legal structures, cultures and traditions, as well as stages of economic development, while recognising that OHCHR did not have unlimited time and resources to carry out this research. The solution adopted was a two-pronged information-gathering process comprising an "Open Process" (in which contributions were invited from practitioners and stakeholders in all jurisdictions via a specially designed on-line consultative tool) and a "Detailed Comparative Process" (in which detailed information relating to domestic legal systems would be invited, using a standard research template, from practitioners in a sample group of "focus jurisdictions", chosen to reflect geographical and regional diversity, as well as a diversity of legal systems and traditions and levels of economic development).[17]

The Open Process took place between the end of April 2015 and the beginning of August 2015. Respondents were invited to answer a range of questions on domestic law tests for corporate liability, financial obstacles to legal claims, criminal law sanctions and civil law remedies, and the work of domestic prosecution bodies within their own jurisdictions, and could participate in English, French or Spanish. The process was designed to be as accessible as possible, bearing in mind that the objective was to gather technical legal and practical information from as many jurisdictions as possible. To this end, many of the questions were posed as multiple choice questions, with space for additional detail should respondents wish to clarify their answers further.[18]

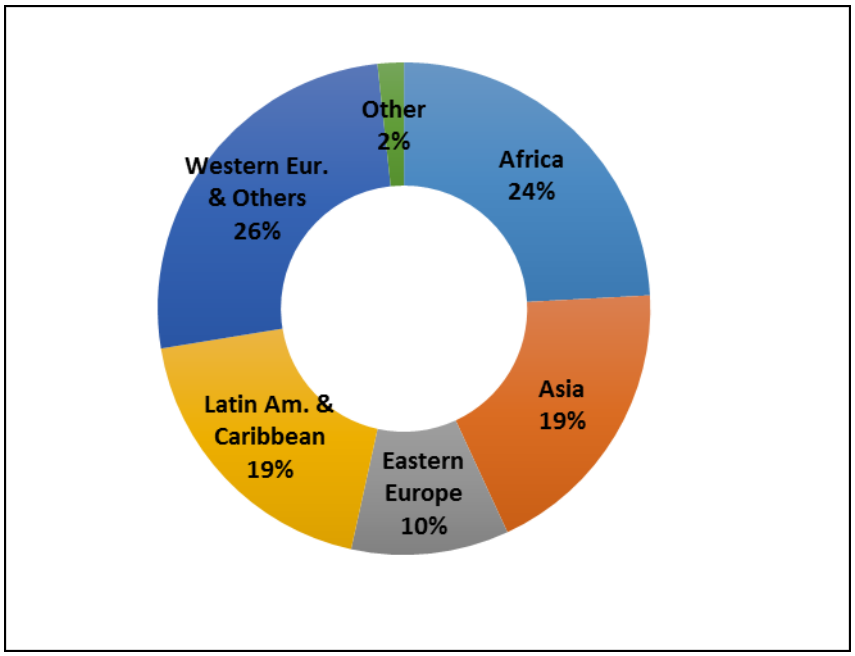
More than 130 responses were received to the Open Process from around 60 different jurisdictions. The distribution of responses (in terms of the jurisdictions for which data was received) is shown in Fig 1 below.

[16] www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyWorkPlans.pdf.

[17] Ibid, p. 7. For further information, see the OHCHR's progress report to the Human Rights Council, 7 May 2015, A/HRC/29/39, paras. 14-20.

[18] The questions posed in the course of Open Process can be viewed at http://business-humanrights.org/en/ohchr-accountability-and-remedy-project/consultation-and-events.

Fig 1: Distribution of responses to the Open Process by subject jurisdiction.



During 2015, further targeted research activities were carried out, aimed at clarifying and gathering evidence of State practice relating to project components 2 and 6 of the Accountability and Remedy Project in particular (i.e. "roles and responsibilities of interested States in cross-border cases", and "the work of domestic prosecution bodies"). These included a study of State interventions in Alien Tort Statute cases in the US,[19] a study of State implementation of ILO treaties with a connection to cross-border business and human rights issues[20] and a

[19] OHCHR, 'State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)', April 2015, copy available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf.

[20] OHCHR, 'Cross-border regulation and cooperation in relation to business and human rights issues: a survey of key provisions and state practice under selected ILO instruments', April 2015, copy available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/PreliminaryILOtreaties.pdf.

study of the use of Joint Investigation Teams in the European Union in responding to allegations of criminal activity with a cross border element.[21]
Following the conclusion of the Open Process, the responses were analysed and compared with information gathered in the course of the Detailed Comparative Process, and other targeted research activities. An early consultation draft of the future guidance was published in October 2015 in advance of the 2015 UN Forum on Business and Human Rights, which included several sessions and meetings relating to various project components of the Accountability and Remedy Project. OHCHR also convened a two day multi-stakeholder meeting to discuss the contents of the early consultation draft, which took place in Geneva in mid-November 2015, immediately after the conclusion of the 2015 UN Forum.

A further consultation draft of the proposed guidance was published in February 2016 with a call for written comments and feedback prior to finalisation of the High Commissioner's final report. In addition, two workshops for representatives of States relating particularly to project component 2 ("roles and responsibilities of interested States") took place in Geneva in January 2016 and March 2016.

IV. Key Themes and Challenges

OHCHR research over the course of the Accountability and Remedy Project revealed a number of themes and challenges which are potentially important to future legal development in this field, at both domestic and international levels, and therefore deserve special mention here.

A. Recognising the diversity of Legal Systems and Approaches

No two jurisdictions are the same. There are many variations in terms of legal structures, constitutional arrangements and traditions, all of which have implications for future law reform. For instance, some legal systems are highly codified, whereas others place more reliance on legal development through judicial deci-

[21] OHCHR, International operational-level cooperation with respect to criminal investigation: a short study of the work of Joint Investigation Teams ("JITs") in the European Union, July 2015, copy available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/Project6_a_study_JIs_in_EU.pdf.

sions and precedent. Some legal systems are "dualist" and some are "monist".[22] Some domestic legal systems are adversarial, whereas others are inquisitorial, and some contain elements of both. Some legal systems are federal, or devolved in nature, whereas others are unitary. Some legal systems provide for corporate criminal liability, and some do not. The upshot of this is that solutions to business and human rights challenges that may work in some jurisdictions may be ineffective or even counterproductive in others. Particular legal features may respond best to particular legal structures or social or legal conditions, or may only function properly in conjunction with other factors, and may not therefore be so easily transplantable to other jurisdictions.

In addition, many of the challenges (e.g. with respect to domestic tests for corporate legal liability, or jurisdictional issues) are not "business and human rights specific". In other words, any changes to domestic law to deal with business and human rights challenges would have to be made against the background of domestic law rules of more general application. In reality, business respect for human rights is regulated at domestic level by many different regimes; criminal law and tort law as well as a range of more targeted regimes covering subject matter ranging from consumer and environmental law to labour law to laws relating to public health, security and privacy. Because of the wide range of potential human rights impacts of business activities, "business and human rights law" is not so easily compartmentalised. This gives rise to a dilemma for policy makers: to what extent it is appropriate and realistic to create special legal regimes to respond to "business and human rights" challenges? And, if special legal regimes are the answer, what are the implications for other existing regimes relating to the regulation of business activity and the coherence of the legal system as a whole?

B. Clarifying Corporate Liability under domestic Legal Regimes

In the light of the comments immediately above, it will not come as a surprise that there are also many different approaches under domestic law to attributing

[22] "Dualist" legal systems are those which view international law and domestic law as separate systems, a consequence of which is that the provisions of treaties executed by the State do not automatically have force of law within that jurisdiction, but require further implementation through legislation. However "monist" legal systems may recognise the provisions of a treaty, once ratified, as being part of the domestic law without the need for further legislative steps.

liability to corporate entities. Corporate liability for business-related human rights abuses may either be "primary" liability (i.e. on the basis that the company was the main perpetrator of the abuse) or "secondary" (or "complicity") liability (i.e. on the basis that the company had contributed to the human rights abuses of another person or organisation in some way). There is considerable variation between jurisdictions, and from domestic regime to domestic regime, in terms of how legal liability is attributed to companies in different circumstances. For instance, under some regimes, corporate criminal liability will only attach if it is possible to identify an individual whose knowledge, actions and intentions can be attributed to the corporation. Other regimes make use of more flexible notions of "collective fault" and some may base corporate liability on management failures leading to a poor "corporate culture". There is also considerable variation between domestic legal regimes when it comes to assessing corporate liability based on theories of "secondary" (or "complicity") liability, for instance in terms of the extent to which there must have been shared intent with the main perpetrator to commit an offence and the causal relationship between the secondary party's actions and the offence (e.g. whether the secondary party's actions were the direct cause of the offence or merely made it more likely).

Domestic legal regimes are not always clear as to the methods that will be used to attribute actions, knowledge and intentions to corporate entities for the purpose of determining corporate legal liability, or even whether corporate entities are covered by the regime at all. Furthermore, domestic legal regimes are often highly flexible (or, in some cases, simply unclear) as to the modes and levels of contribution to human rights abuses of a third party that will give rise to corporate legal liability on the basis of theories of "secondary" liability. This appears to be a particular problem with regimes that rely to a greater extent on development through legal precedent than codification.

This lack of clarity or legal certainty in many jurisdictions is not only problematic from a corporate compliance perspective; it also raises questions with respect to policy coherence. The design of legal tests for corporate legal liability can play a vital role in influencing corporate behaviour, by providing a system of incentives for good and responsible management, and creating disincentives in respect of risk-taking and poor behaviour. For instance, "objective" standards of knowledge may provide more incentives to companies to engage in thorough human rights due diligence activities than "subjective" standards.[23] On the other hand, there

[23] "Objective" tests for legal liability take account of what the "reasonable person" (or in this case the "reasonable company") would have known and done in the circumstances.

may be circumstances in which "strict" or "absolute" liability is more appropriate.[24] Similarly, concepts such as "wilful blindness"[25] in domestic law regimes help to overcome the disincentives that might otherwise exist to make proper inquiries as to the risks of causing or contributing to harm. However, these benefits are not obtained without clear, purposeful regimes which take account of, and respond well to, corporate accountability and access to remedy needs in different regulatory contexts.

C. Overcoming financial obstacles to private claims

Past academic research suggests, and the work done by OHCHR over the course of the Accountability and Remedy Project appears to confirm, that many claimants in private law actions face serious financial obstacles to remedy in virtually every jurisdiction. The challenges are such that it was decided that financial obstacles to private law claims warranted a specific work stream in the Accountability and Remedy Project methodology. On the other hand, it is acknowledged that the problems of legal costs and lack of funding are not limited to business and human rights cases. Nor are they easily addressed, as they are frequently the consequences of wider problems, such as policies on public spending, lack of resources for courts, delays in court processes due to the operation of procedural rules and, in some cases, corruption and lack of respect for

Whereas "subjective" tests for legal liability only take account of what the defendant *actually* knew.

24 For instance, as a way of ensuring a fairer allocation of burdens of proof in circumstances where there is asymmetry in access to information between corporate defendants and individual claimants, or because strict or absolute liability offences are thought to bring about a better balance in the circumstances between considerations of fairness to defendants and the need to ensure protection of the public from harm. Offences of "absolute liability" do not require proof that the defendant intended the relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence. However, the relevant domestic public law regime may permit the company to raise a defence on the basis of its use of "due diligence" to prevent the prohibited event. Where this is the case, the offence may be described as one of "strict liability" (rather than absolute liability).

25 "Wilful blindness" is the deliberate failure of a defendant to inform him or herself of the matters which would make that defendant criminally liable. The concept of "wilful blindness" prevents defendants from invoking a defence to a public law offence based on lack of knowledge in circumstances where the relevant knowledge would have been relatively easy to obtain. This means that the defendant cannot avoid criminal liability for failing to make reasonable enquiries, and take appropriate steps, where the risks of a serious crime being committed would have been apparent to a "reasonable person".

the rule of law. While the wider problems were beyond the scope of the Accountability and Remedy Project, participants in the Open Process were invited to provide information from different jurisdictions about different sources of funding for legal claims in business and human rights cases, measures and initiatives taken in different jurisdictions to make private claims more affordable for individual claimants in such cases, approaches to judicial costs awards and cost shifting, and the availability of alternative methods of dispute resolution.

The OHCHR research has highlighted various ways in which State action can help overcome financial obstacles for claimants. State-based legal aid is a key source of funding for low income claimants. However, in many jurisdictions this is becoming increasingly difficult to access in practice and, where it is available, is unlikely to cover the full costs of legal proceedings. While legal aid is important, current pressures on public spending budgets, and a lack of financial resources in many jurisdictions, means that it is also necessary to look beyond State funding for solutions. A multi-pronged approach is called for aimed at both increasing and diversifying funding options, and also reducing the exposure of claimants to financial risk, especially claimants on low incomes. In identifying areas for reform, States could potentially examine the professional and legal rules that may inhibit the development of new funding sources, court fee structures, procedural rules that contribute to inefficiencies and unnecessary delays in judicial processes, mechanisms for “collective” or “group” actions, opportunities for mediation, rules on security for costs and cost shifting and technologies that have the potential to promote greater access to judicial processes and improve court efficiency.

D. Recognising enforcement Challenges in Public Law Cases

As the Commentary to the UN Guiding Principles on Business and Human Rights makes clear, “failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.”[26] Earlier research commissioned by OHCHR suggested that, while there was some enforcement activity in the private law sphere, there are few if any cases where public law enforcement authorities (e.g. public prosecutors) have taken enforcement action against companies for involvement in se-

[26] See UN Guiding Principles on Business and Human Rights, Guiding Principle 3 and Commentary.

vere human rights abuses.[27] While there have been prosecutions of individual employees or executives involved in human rights abuses where there is a business context,[28] prosecutions of corporate entities for similar offences are almost unheard of.

In order to gain a better understanding of the reasons behind the apparently very low levels of activity by domestic prosecutors, a dedicated work stream was established, as part of the Accountability and Remedy Project, to focus specifically on the challenges facing domestic prosecution bodies in these kinds of cases, with a view to developing practical recommendations for States on different ways that these challenges could be addressed and better support provided. In order not to duplicate other similar, contemporaneous research, OHCHR collaborated with the International Corporate Accountability Roundtable and Amnesty International with respect to some information gathering and stakeholder consultation.[29] In addition, OHCHR conducted a series of interviews with prosecutors from a diverse range of jurisdictions.

Challenges facing prosecutors are legal, political and practical in nature. Legal challenges include the structural complexity of corporations and the difficulties identifying the responsible parties. Some prosecutors also highlighted gaps, inconsistencies and uncertainties in underlying legal regimes. Political challenges including balancing a public role with the need for independence and freedom from outside interference; challenges which are exacerbated where there may be issues of corruption or undue business influence over governmental or judicial decision-making. Frequently mentioned practical challenges were lack of resources, lack of training and lack of access to information and expertise, especially in a cross-border context. The need to ensure adequate protection for witnesses from reprisals and intimidation in such cases was a further, and vitally important, theme emerging from the research and consultations.

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27 See Jennifer Zerk, n. 5 above, p. 90.

28 Ibid. For a more recent example, note the successful 2014 prosecutions in the US of employees of the security services provider Blackwater USA for charges arising from the 16 September 2007, shooting at Nisur Square in Baghdad, Iraq, that resulted in the deaths of 14 civilians. For a summary of the case see https://www.justice.gov/opa/pr/four-former-blackwater-employees-found-guilty-charges-fatal-nisur-square-shooting-iraq.

29 For further information see http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ICAR_AI_JointStatement.pdf.

E. The importance of effective cooperation in cross-border cases

Although there are recognised principles of international law with respect to when States *can* exercise extraterritorial jurisdiction, there is less clarity as to when they *should* or *must* exercise such jurisdiction in the context of business-related human rights abuses. Against this background, some international treaty bodies have recommended that home States take steps to prevent and punish abuse abroad by business enterprises domiciled within their respective jurisdictions.[30]

States have entered into formal arrangements to allocate regulatory roles and responsibilities between themselves with respect to cross-border issues and problems such as bribery and corruption[31] and transnational organised crime.[32] Some of these international regulatory regimes provide for the mandatory use of extraterritorial jurisdiction in certain cases,[33] or may lay down bases on which States will have an option to exercise jurisdiction (e.g. on the basis of the nationality of a victim).[34] Provisions on the use of extraterritorial jurisdiction can be found in several international instruments relevant to the regulation of business respect for human rights.[35] However, in practice, while States do extend their regulatory regimes extraterritorially in respect of *individual* offenders (notably in relation to the offences of child sex tourism and human trafficking), assertions of direct extraterritorial jurisdiction in respect of *business enterprises* are only resorted to rarely in practice, even where States are strongly encouraged under

30 See, for example, Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, paras 38-46. See also E/C.12/2011/1, para. 5; International Labour Organization recommendation 190, para. 15, available from www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm.

31 See, for example, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; UN Convention against Corruption.

32 See UN Convention Against Transnational Organized Crime.

33 See, for example UN Convention Against Transnational Organized Crime, Article 15; UN Convention against Corruption, Article 42.

34 Ibid. See also Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography , Article 4.

35 See UN Convention Against Transnational Organised Crime (n.b. Protocol to Prevent, Suppress and Punish the Trafficking of Persons); Convention on the Rights of the Child (n.b. Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography); Protocol (P029) (n.b. not yet in force) to the ILO Convention on Forced Labour (C029), Article 4.

the relevant regimes to consider the use of extraterritorial jurisdiction to combat abuses by their own nationals.[36]

On the other hand, States have also entered into many different kinds of arrangements relating to the provision of mutual legal assistance which have potential relevance to access to remedy in business and human rights cases with a cross-border dimension. These arrangements may be formal (e.g. treaty-based) or informal, bilateral or multilateral, on-going or ad hoc. The operation of these arrangements, and their relevance to cross-border cooperation in business and human rights cases, were explored in two workshops for State representatives convened by OHCHR. OHCHR research and consultations also noted the growing popularity and incidence of mechanisms for operational level cooperation between prosecutors and investigators from different jurisdictions, for example through the use of joint investigation teams.[37]

However, the work carried out during the course of the Accountability and Remedy Project also highlighted a number of implementation problems which have the potential to undermine the speed and effectiveness of international cooperation in some cases, such as lack of information about appropriate contact points in other jurisdictions, lack of awareness of formats and procedures for making requests, difficulties ascertaining whether requirements for "double criminality"[38] are satisfied or not, lack of ready access to information about foreign legal and evidential requirements and investigative standards, dealing with differences between jurisdictions in legal standards and sanctions, and language barriers and costs of translation.

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[36] See OHCHR Working Paper, 'Cross-border regulation and cooperation in relation to business and human rights issues: a survey of key provisions and state practice under selected ILO instruments', April 2015, available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/PreliminaryILOtreaties.pdf. See further Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, 7 May 2015, A/HRC/29/39, paragraphs 38-40. Copy available at www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

[37] See further OHCHR Working Paper, 'International operational-level cooperation with respect to criminal investigation: a short study of the work of Joint Investigation Teams ("JITs") in the European Union', July 2015, copy available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/Project6_a_study_JIs_in_EU.pdf

[38] "Double criminality" in this context refers to the requirement that, before mutual legal assistance will be given, there must be similarity between offences in both the requesting and the requested State.

F. Ensuring Effective Remedies for victims

Even where victims and enforcement agencies are able to overcome the many enforcement challenges outlined above, it is unlikely that the legal action will result in an "effective" remedy. The punitive sanctions that follow a finding of corporate liability for a public law offence may not reflect the gravity of the abuse, and the damages that may be awarded in private law cases are unlikely to fully compensate for the losses suffered (especially in cases of damage to collective resources, or cultural loss), and in many cases will fall far short of this goal. For these reasons, the Accountability and Remedy Project included two work streams relating to sanctions and remedies in business and human rights cases: one relating to the sanctions applied in cases where there is public law enforcement, and one relating to the remedies that may be obtained in private law cases.

Information on sanctions and remedies under domestic law regimes in a diverse range of jurisdictions was collected via the Open Process and the Detailed Comparative Process. As with the other work streams, the research revealed a range of approaches at domestic level both in relation to the remedies provided for in different domestic regimes and in relation to corporate sentencing in practice. While a financial penalty or monetary damages award remains the most likely judicial response, public law regimes are increasingly providing for alternative sanctions (e.g. ineligibility for public procurement or contracting opportunities, or cancellation of licences) and are offering regulators and judges greater flexibility to fashion more bespoke "packages" of sanctions and remedies, which may include compensatory elements, or features aimed at reducing the risk of recurrence of wrongdoing. OHCHR research and consultations also included a consideration of the effectiveness and adequacy of the various remedies that might be obtainable in private law cases, in light of relevant international standards.[39]

G. Recognising the inter-linkages between different issues and problems

The methodology for the Accountability and Remedy Project recognised the interrelatedness of the various themes which formed the focus of different project

[39] For example, the 2005 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, n. 15 above.

work streams. As the project progressed, different research tasks and consultations helped to shed more light on the nature of these linkages, and their implications. For instance, lack of clarity in domestic legal standards can have an adverse impact on the ability of prosecutors to pursue cases (in the public law sphere) as well as the ability of affected persons to pursue private claims. Likewise, lack of clarity about the jurisdictional reach of certain domestic law regimes can add to legal complexity and court delays, with potentially adverse affects on access to remedy. The financial remedies that may be available following a successful private law claim will in many cases have a direct bearing on the ability of potential claimants to access different sources of litigation funding. In cross-border cases, the extent to which there are effective arrangements for cooperation between investigators and prosecutors and their counterparts in other interested States will often have a direct bearing on the efficiency and feasibility of law enforcement action.

Awareness of these linkages, including the practical and economic effects of different interventions, is needed to avoid piecemeal regulatory responses to business and human rights challenges, and to ensure that domestic legal regimes are internally consistent and coherent, so that developments and innovations with the potential to have a positive impact on access to remedy are not undermined by problems elsewhere.

IV. Final report to the Human Rights Council: structure and rationale

The Final Report of the United Nations High Commissioner for Human Rights was published in May 2016.[40] The report is accompanied by an explanatory addendum which sets out additional contextual information.[41]

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[40] See 'Improving accountability and access to remedy for victims of business-related human rights abuse
Report of the United Nations High Commissioner for Human Rights', UN Doc. A/HRC/32/19, 10 May 2016, copy available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf.

[41] See 'Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance', UN Doc. A/HRC/32/19/Add.1, 12 May 2016, copy available at

The final report takes the form of a narrative section and a technical annex. The opening narrative section outlines the background to the OHCHR's work, the research methodologies used, and three important "cross-cutting issues" which have particular implications for access to remedy in cases of business-related human rights abuses.[42] The technical annex sets out key findings from the Accountability and Remedy Project in the form of a series of recommendations for States to improve corporate accountability and access to judicial remedy for business-related human rights abuse. These recommendations will be supplemented further by a collection of illustrative examples of State practice, gathered from OHCHR research over the course of the Accountability and Remedy Project, to demonstrate how the various recommendations can be implemented in practice.

The recommendations set out in the annex are deliberately flexible and have been drafted in recognition of their need to be relevant and readily adaptable to a wide range of different legal systems, traditions and contexts. The annex is structured by reference to a series of policy objectives which are supplemented by elements that States could consider in order to meet those objectives. However, as is recognised in the report, the annex should not be read as an exhaustive list of possible solutions. While the recommendations in the annex have been informed by different elements of States practice identified in the course of Accountability and Remedy Project, there may be other, as yet undiscovered, ways of achieving the same underlying goals. Nevertheless, the package as a whole is a significant new resource for States seeking to improve the effectiveness of domestic legal responses to business and human rights challenges (including the various legal and implementation challenges identified above), and potentially other stakeholders. Beyond this, the guidance offers a possible platform for future dialogue, cross-fertilization of ideas, innovation and progress.

http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_Add.1_AEV.pdf.

42 These are (a) structural and managerial complexity of business enterprises, (b) challenges particular to cross-border cases and the importance of international cooperation and (c) the need for policy coherence.