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**Optional Protocol to the International Covenant
on Economic, Social and Cultural Rights**

UN General Assembly Resolution of 10 December 2008 (A/Res/63/117)

The General Assembly adopted resolution A/RES/63/117, on 10 December 2008

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

The General Assembly,

Taking note of the adoption by the Human Rights Council, by its resolution 8/2 of 18 June 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

1. *Adopts* the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the text of which is annexed to the present resolution;

2. *Recommends* that the Optional Protocol be opened for signature at a signing ceremony to be held in 2009, and requests the Secretary-General and the United Nations High Commissioner for Human Rights to provide the necessary assistance.

Annex

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Preamble

The States Parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the Universal Declaration of Human Rights¹ proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that the Universal Declaration of Human Rights and the International Covenants on Human Rights² recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Recalling that each State Party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) undertakes to take steps, individually and through international assistance and cooperation,

¹ Resolution 217 A (III).

² Resolution 2200 A (XXI), annex.

especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures,

Considering that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

Article 1

Competence of the Committee to receive and consider communications

1. A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.
2. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Communications

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

Article 3

Admissibility

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.
2. The Committee shall declare a communication inadmissible when:
 - (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;
 - (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;
 - (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
 - (d) It is incompatible with the provisions of the Covenant;

- (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;
- (f) It is an abuse of the right to submit a communication; or when
- (g) It is anonymous or not in writing.

Article 4

Communications not revealing a clear disadvantage

The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

Article 5

Interim measures

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 6

Transmission of the communication

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 7

Friendly settlement

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.
2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

Article 8

Examination of communications

1. The Committee shall examine communications received under article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.
4. When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Article 9

Follow-up to the views of the Committee

1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
3. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

Article 10

Inter-State communications

1. A State Party to the present Protocol may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under the present article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under the present article shall be dealt with in accordance with the following procedure:

- (a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party

may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

(i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the

declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 11

Inquiry procedure

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article.
2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in article 15 of the present Protocol.
8. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 12

Follow-up to the inquiry procedure

1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 11 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 11, paragraph 6, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 13

Protection measures

A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 14

International assistance and cooperation

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party's observations and suggestions, if any, on these views or recommendations.

2. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.

3. A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.

4. The provisions of the present article are without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.

Article 15

Annual report

The Committee shall include in its annual report a summary of its activities under the present Protocol.

Article 16

Dissemination and information

Each State Party undertakes to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

Article 17

Signature, ratification and accession

1. The present Protocol is open for signature by any State that has signed, ratified or acceded to the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 18

Entry into force

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.

Article 19

Amendments

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 20

Denunciation

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation

shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 2 and 10 or to any procedure initiated under article 11 before the effective date of denunciation.

Article 21
Notification by the Secretary-General

The Secretary-General of the United Nations shall notify all States referred to in article 26, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 19;
- (c) Any denunciation under article 20.

Article 22
Official languages

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 26 of the Covenant.



Christine Kaufmann and Mirina Grosz

**Poverty, Hunger and International Trade:
What's Law Got to Do with It?**

German Yearbook of International Law 51 (2008),
p. 75-109

**Poverty, Hunger and International Trade:
What's Law Got to Do with It?***
Current Mechanisms and the Doha Development Agenda

By Christine Kaufmann and Mirina Grosz

A. Facing the Global Food Crisis

Unprecedented increases in the price of food sparked the current global food crisis. From June 2007 to June 2008, the Food and Agriculture Organization (FAO) average food price index rose by 53 % followed by a sharp decline since September 2008.¹ While food prices reached a 50-year high, food aid declined substantially.² In fact, the volume of food aid does not correlate with food crises but the production of surpluses instead, which raises issues of international trade.³

There is a considerable risk that the accumulation of food and financial crisis together with negative impacts of climate change may result in a human crisis with devastating effects on the poor.⁴ The World Bank estimates that the num-

* The title has been inspired by Tina Turner's song "What's love got to do with it?".

¹ See the FAO Food Price Indices, available at: http://www.fao.org/worldfood_situation/FoodPricesIndex/en. As an example, the price of vegetable oil rose by 97 %, for wheat by 127 %.

² World Food Programme, 2007 Food Aid Flows, 1 *et seq.*, available at: www.wfp.org/interfais/index2.htm.

³ Ramesh Sharma/Panos Konandreas, WTO provisions in the context of responding to soaring food prices, FAO Commodity and Trade Policy Research Working Paper No 25, August 2008, 8; Patrick Webb, Food as Aid: Trends, Needs and Challenges in the 21st Century, World Food Programme Occasional Papers No. 1 (2003), 2–5.

⁴ World Bank, Rising Food and Fuel Prices: Addressing the Risks to Future Generations, 12 October 2008, available at: <http://www.worldbank.org>; United Nations Conference on Trade and Development, Addressing the Global Food Crisis: Key trade, investment and commodity policies in ensuring sustainable food security and alleviating poverty (2008), available at: http://www.unctad.org/sections/edm_dir/docs/osg_2008_1_en.pdf.

ber of people suffering from chronic hunger will increase by 44 million in 2008 to reach a total of 967 million.⁵ The world has been shocked by the losses induced by the financial crises. Yet, it seems to care little about the fact that the world food crisis is undermining one of the most fundamental human rights, the right to be free from hunger.

Hunger and poverty not only have serious impacts on the individual but also on the whole society. The deterioration of household food security goes hand in hand with risks to schooling and education and may jeopardize development and growth in the long run, thus creating an ongoing downwards spiral.

Given that more than 75 % of poor people live in rural areas and depend on agriculture,⁶ removing export bans and trade restrictions for agricultural products is necessary to stop hoarding and driving up prices.⁷ The Doha Development Round within the framework of the World Trade Organization (WTO) is designed to serve as an instrument for achieving these goals.

This article will first look at the notion of poverty, followed by an analysis of how poverty is being addressed in international law. It will then attempt to shed light on what role the Doha Development Round may play in achieving the Millennium Development Goals with regard to poverty and malnutrition.

B. Notions of Poverty: Who Are We Calling Poor?

Currently there is no agreement on the definition of poverty in the global context.⁸ A key criterion for identifying poverty is still the level of income. For decades, development was measured as a country's per capita income growth.

⁵ *Ibid.*, 1, 5.

⁶ World Bank, World Development Report, Agriculture for Development (2008), 26, available at: <http://www.worldbank.org>; UN Millennium Project 2005, Task Force on Hunger, Halving Hunger: It Can Be Done (2005), 154. It is however, important to note that the poorest of the poor are not farmers but landless agricultural workers.

⁷ See Robert Zoellick, A 10-Point Plan for the Food Crisis, available at: <http://go.worldbank.org/265A2HPSCO>.

⁸ Christine Chinkin, The United Nations Decade for the Elimination of Poverty: What Role for International Law?, in: Michael D. A. Freeman (ed.), Current Legal Problems 2001 (2001), 553, 554.

Development policies thus primarily pursued the objective of maximizing the rate of GDP (Gross Domestic Product) growth, or national income.⁹

Today, the World Bank considers a person poor if his or her consumption or income level falls below a minimum which is necessary to meet basic needs, the so-called "poverty line." Poverty lines vary among different countries since they are adjusted to the prevalent specific levels of development, social norms and values. With its most recent methodological revision, the World Bank attempts to provide a more reliable reference poverty line in terms of the per capita income or expenditure. It is set at 1.25 Dollar in 2005 purchasing power parity terms.¹⁰

In parallel to more reliable data becoming available, an increasing consensus on a broader understanding of poverty is emerging: In this sense, absence of poverty is seen as a key requirement for empowering people to live and enjoy life as opposed to pure survival. Poverty has many faces: Being poor thus means to be deprived of the means to participate and develop in society, including access to health care, to education and training, to technological as well as economic resources. Poverty, according to this understanding, represents a deprivation of capabilities, *i.e.* the substantive freedoms that a person enjoys to lead the kind of life he or she has reason to value.¹¹ These freedoms are recognized as being fundamentally valuable for minimal human dignity, since without these rights a dignified human existence is not possible. Being poor implies being excluded, living at the margins of society and potentially facing discrimination,¹² it affects human dignity and thus the very core of human rights.¹³

Poverty also has a relative connotation: Being relatively poor in a rich country can be a big capability-handicap, even if a person's absolute income is high compared to international standards. This implies that poor people on one side

⁹ Report of the independent expert Arjun Sengupta, Human rights and extreme poverty, UN Doc. E/CN.4/2006/43 (2006), para. 14.

¹⁰ For the revision of new 2005 purchasing power parity terms and its implication on measuring poverty see Shaohua Chen/Martin Ravallion, The Developing World Is Poorer Than We Thought, But No Less Successful in the Fight against Poverty, World Bank Policy Research Working Paper No 4703, August 2008, 4-6.

¹¹ Amartya Sen, Development as Freedom (1999), 87.

¹² Therefore the deliberate choice of a modest life, *e.g.* the vow of poverty in religious orders in the Roman-Catholic Church, will not be subsumed under the poverty-term.

¹³ Chinkin (note 8), 555; Summary of the Office of the High Commissioner for Human Rights (OHCHR), Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, prepared by Paul Hunt/Siddiq Osman/Manjfed Nowak, March 2004, available at: <http://www2.ohchr.org/english/issues/poverty/guidelines.htm>, para. 6.

of the world do not necessarily experience the same deprivation of capabilities as people living in a different part of the world. Their needs will differ accordingly to the different contexts they are living in. Nonetheless empirical observations suggest, that there is a common core of capabilities that are considered as basic in most societies and against which any poverty reduction strategy should at least be aimed.¹⁴ As a consequence, the focus on income alone is too narrow. While such an approach facilitates calculation and comparability of poverty, it bears the danger of neglecting other, non-monetary aspects of poverty.¹⁵ Indicators, such as mortality, illiteracy, malnutrition, unemployment *etc.* have to be considered in order to develop a comprehensive view of what living in poverty implies and to tailor adequate measures for alleviating it.¹⁶

The relationship between income and capability is a complex one and is influenced by several factors. For example, the ability to earn an income and convert it into capability can be affected by age, gender and social role, disabilities, illnesses, living space, *etc.* An older, or disabled, or seriously ill person may need more income than a young, healthy person to achieve the same goals.¹⁷ As a result, a higher income is no guarantor for ending poverty. Instead, the progression of GDP growth may even be accompanied by an increase in inequality of income and human development, and thus actually contribute to poverty.¹⁸ Public action will not only have to address access to the basic necessities, such as food, water, clothing, medical care or sufficient income, but will also have to ensure that such access is consistent with human rights standards of equity, non-discrimination, participation, empowerment of the poor *etc.*¹⁹ In this

¹⁴ Summary of the Draft Guidelines (note 13), para. 8; OHCHR Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (2004), available at: <http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>, para. 32.

¹⁵ Aline Coudaneu/lesko S. Hentschel/Quentin T. Wodon, *Poverty Measurement and Analysis, Poverty Reduction Strategy Papers Sourcebook*, World Bank (2002), 33 *et seq.* For an overview over the updated estimates of poverty measurement see *Chen/Ravallion* (note 10).

¹⁶ The World Bank Poverty Net (available at: <http://www.worldbank.org/poverty>) provides for information on poverty measurement, monitoring, analysis and reduction strategies. Furthermore, the United Nations Development Programme (UNDP) in its Human Development Reports regularly publishes data regarding such indicators.

¹⁷ *Sen* (note 11), 88 *et seq.*

¹⁸ *Sengupta* (note 9), paras. 24, 25.

¹⁹ OHCHR Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (note 14), para. 18; *Arjun Sengupta*, *Poverty Eradication and Human Rights*, in: Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007), 323–344.

sense, alleviating poverty will in many instances lead to changing the pattern of distribution, eventually tackling issues of social justice.²⁰

C. Poverty as a Legal Challenge?

1. Poverty as a Denial of Human Rights

Such a multidimensional notion of poverty implies addressing not only low income generation but also the lack of access to development and social participation.²¹ From a human rights point of view, poverty can be phrased as the denial of a person's access to a range of basic capabilities.²² Poverty undermines fundamental rights and critically hinders the achievement of development goals as they are contained in the UN Millennium Development Goals.²³ Respective of the question whether human rights exist as moral rights, and are thus independent of normative structures, as pre-existing values, or whether their establishment is traced back to the adoption of legal regulations,²⁴ the existing legal framework on human rights shall be outlined to help substantiate the concrete human rights affected by poverty.

1. The Universal Declaration of Human Rights

The drafting of the Universal Declaration of Human Rights has been largely influenced by the traumatic experiences during the World Wars and *Franklin D. Roosevelt's* "four freedom address" of 1941, in which he included the freedom from want.²⁵ In *Roosevelt's* words, "necessitous men are not free men" not least

²⁰ *Arjun Sengupta* (note 9), para. 24.

²¹ *Ibid.*, paras. 58, 59.

²² Summary of the Draft Guidelines (note 13), para. 7; Human Rights and Poverty Reduction: A Conceptual Framework, March 2004, available at: <http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>, 9; OHCHR Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (note 14), para. 15.

²³ The United Nations Millennium Development Goals originate from the commitments that have been agreed upon with the adoption of the United Nations Millennium Declaration, GA Res. 55/2 of 18 September 2000.

²⁴ *Thomas Pogge*, *World Poverty and Human Rights* (2002), reprinted in (2004), 52 *et seq.*

²⁵ *Franklin D. Roosevelt*, *The Atlantic Charter*, in: Samuel Rosenman (ed.), *Public Papers and Addresses of Franklin D. Roosevelt*, vol. 10, 1938–1950 (1941), 314.

because those who are hungry and jobless "are the stuff of which dictatorships are made."

The Universal Declaration of Human Rights was established in 1948 as a non-binding document.²⁶ It addresses poverty in several ways, yet does not explicitly mention it: Article 25 provides for a right to social security throughout by stating: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Article 28 of the Universal Declaration goes even further: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Surprisingly, Article 28 has not yet garnered the attention that it deserves.²⁷ It does not simply reaffirm what is already in the Declaration, but embraces two interlocking principles that are the core of international human rights: an international order that guarantees the rights and freedoms and the obligation of all actors in international society – not only States – to protect and maintain such an order.²⁸ Such a concept clearly contrasts with the dichotomy of civil and political rights on the one and socio-economic rights on the other hand as it was created with the drafting of two separate UN covenants.²⁹

2. The UN Covenants on Human Rights

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted after lengthy debates within the UN organs. They entered into force in 1976.

²⁶ *Hersch Lauterpacht*, International Law and Human Rights (1950), 397 *et seq.*

²⁷ Apart from *Christine Chinkin* and *Thomas Pogge*, there seems to be no established acknowledgment of the importance of Art. 28 for the eradication of poverty.

²⁸ *Chinkin* (note 8), 559 *et seq.*

²⁹ See the preambles of both Covenants which hold that the two sets of rights in the two Covenants should not be separated but should be mutually reinforced in order to ameliorate the living conditions of people living in poverty.

Both covenants are relevant in the poverty context: the ICCPR contains, *inter alia*, the freedom of expression (Article 19), the freedom of movement, association and assembly (Articles 12, 21 and 22), the freedom from wrongful deprivation of liberty (Article 9), from forced or compulsory labor (Article 8) and the right to participation (Article 25).

The ICESCR provides the provisions most obviously applicable to poverty, *i.e.*: the right to work (Articles 6–8), health (Article 12), education (Articles 13 and 14) and enjoyment of the benefits of scientific progress (Article 15). Article 25 of the Universal Declaration is repeated in Article 9 and Article 11 ICESCR, which specifically grant a right to social security and an adequate standard of living. It is these provisions that are applied the most in the context of poverty elimination. Indeed, Article 11 (2) ICESCR explicitly recognizes "the fundamental right of everyone to be free from hunger" and addresses the necessary measures "taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."³⁰ Taking such approaches one step further, a right to poverty eradication could be framed as a right to escape poverty³¹ or an individual right to development. This has been recognized in the Declaration on the Right to Development of 1986³² and the Vienna Declaration and Programme of Action of 1993.³³

According to a liberal model, human rights were traditionally conceived as protecting individuals' freedom against State intervention, thus in a "negative" way, protecting freedom as absence of State interference.³⁴ Accordingly, the focus was on civil and political rights. In contrast, social and economic rights were introduced in international law not so much because of a philosophical concept but as a product of historical experience with wrongs.³⁵ In other words,

³⁰ On the legal framework for the right to food see *Christine Kaufmann/Simone Heri*, Liberalizing Trade in Agriculture and Food Security – Mission Impossible?, *Vanderbilt Journal of Transnational Law* 40 (2008), 1039, 1048 *et seq.*

³¹ *Marc Fleurbaey*, Poverty as a Form of Oppression, in: *Thomas Pogge* (ed.), (note 19), 133–154.

³² Adopted by General Assembly resolution GA Res. 41/1128 of 4 December 1986.

³³ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (adopted by the World Conference on Human Rights on 12 July 1993); for a detailed discussion *Sengupta* (note 19), 2006.

³⁴ See *Sandra Fredman*, Human Rights Transformed, Positive Rights and Positive Duties (2008), 9 *et seq.*

³⁵ *Cass R. Sunstein*, The Second Bill of Rights: FDR's unfinished revolution and why we need it more than ever (2004), 35 *et seq.*

the legal notion of social justice was framed as an *instrument* to achieve the (higher) goal of democracy and peace. This conception explains why – in their early days – social and economic rights were rarely shaped in a legally binding way but rather as programmatic provisions.

3. Legal Consequences of the Dichotomy

As a consequence of this distinction, implementation varies between the different categories of rights. The States' interest in their sovereignty hindered the adoption of further reaching mechanisms and instruments for the enforcement of the ICESCR. As a consequence, the Covenant does not (yet) provide a procedure for individual complaints, instead monitoring by the Committee on Economic, Social and Cultural Rights (CESCR) is based on Member States' reports.³⁶ Because of the lack of direct sanctions, the CESCR depends on "soft" mechanisms, negotiations and ultimately members' political willingness to implement the international legal framework.³⁷

Additionally, the CESCR publishes General Comments which contain important guidelines for the interpretation of the rights contained in the ICESCR. One of these guidelines with particular importance for the present context was adopted with General Comment No. 3, which introduced the concept of minimum core obligations.³⁸ The Comment provides for a universal basic standard for the different rights in the ICESCR which is applicable to all Member States and can be described as an absolute minimum (as opposed to relative, state-specific core minimums) providing a right for everyone³⁹ and requiring immediate compliance by the States.⁴⁰ In sum, a concept of minimum core obligations seems – on the

³⁶ Arts. 16, 17 ICESCR: for detailed comments see *Eibe Riedel*, Verhandlungslösungen im Rahmen des Sozialpakts der Vereinten Nationen, in: Knut Ipsen (ed.), *Recht, Staat, Gemeinwohl: Festschrift für Dietrich Rauschning* (2001), 441, 441 *et seq.*

³⁷ Studies have shown that the CESCR managed to bring out the maximum of its restricted mandate with regard to the monitoring of State compliance, see *Riedel* (note 36), 452.

³⁸ CESCR, General Comment No. 3: The nature of States Parties Obligations, UN Doc. E/1991/23 (1990), para. 10.

³⁹ See also CESCR General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (2003), para. 44.

⁴⁰ See also *Craig M. Scott/Philip Alston*, Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's

one hand – to facilitate the allocation of available resources to where they are needed the most.⁴¹ On the other hand, defining a set of core obligations inevitably bears the risk of diluting human rights by establishing a hierarchy among them, resulting in some rights being less important than others.⁴²

Furthermore, the seemingly clear distinction between positive and negative rights has been subject to increased criticism in international legal doctrine. As *Sandra Fredman* points out, civil and political rights may just as well give rise to positive duties (e.g. the duty to set up an electoral system to ensure the fundamental right to democratic elections) as socio-economic rights can implicate duties of restraint (e.g. the right to be housed includes a duty of restraint on the State from interfering in home and family life).⁴³ Furthermore, from a human rights perspective, and in particular in view of *Amartya Sen's* "capability theory," conceiving freedom as merely the absence of deliberate State interference seems rather narrow. In favor of effective human rights protection, it would seem more appropriate to consider the extent to which people are actually able to exercise their choices.⁴⁴ By addressing all constraints on the ability of individuals to exercise their rights, independently of whether they stem from State action or poor health, lack of education or poverty, a more comprehensive and realistic understanding of human rights could be achieved.

A glance at the jurisprudence on socio-economic rights reveals a comparable shift in paradigm regarding particular decisions both at the international as well as at the national level.⁴⁵ Such case law includes the acknowledgment of the right to housing and the right to food as enforceable human rights by both the

Promise, South African Journal on Human Rights (S Afr J Hum Right) 16 (2000), 206, 250; *David Bilchitz*, Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance, South African Law Journal 119 (2002), 484, 493; *Murray Wesson*, Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court, S Afr J Hum Right 20 (2004), 284, 304.

⁴¹ *Wesson* (note 40), 299 *et seq.*

⁴² This discussion is already going on in the context of the core labor rights: *Christine Kaufmann*, Globalisation and Labour Rights (2007), 70–77; *Philip Alston*, "Core Labour Standards" and the Transformation of the International Labour Rights Regime, European Journal of International Law 15 (2004), 457, 488 *et seq.*

⁴³ *Fredman* (note 34), 2.

⁴⁴ *Ibid.*, 11, with reference to *Sen* (note 11), 5.

⁴⁵ For an outline and discussion see *Fredman* (note 34), 92 *et seq.*

South African and the Indian constitutional courts⁴⁶ as well as the acceptance of the right to life to include not only the obligation of the State to refrain from intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.⁴⁷

4. Recent Developments

Quite recently a link has been established between poverty eradication and human rights guarantees: In 1992, the UN General Assembly recognized that "extreme poverty" is a "violation of human dignity" which may amount to "a threat to the right to life."⁴⁸ Numerous statements of the UN High Commissioner on Human Rights and the General Assembly reaffirmed this view.⁴⁹ On 17 October 2002, the International Day for the Eradication of Poverty, the former UN Secretary-General *Kofi Annan* for the first time explicitly stated that "poverty is a denial of human rights." An initiative within the Office of the High Commissioner of Human Rights, funded by the Swiss Development Cooperation, led to the Draft Guidelines on a Human Rights Approach to Poverty Reduction.⁵⁰

Within these developments the shift in focus from "poverty" to "extreme poverty" needs to be put in perspective: the report of the independent expert on human rights and extreme poverty, *Arijun Sengupta*, proposes to define extreme poverty not as an extremely low income but as an accumulation of three categories of poverty, which result from the previous outline, *i.e.* poverty in income, in human-development and social exclusion.⁵¹

⁴⁶ *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SALR 46 (CC); *Oiga Tellis v. Bombay Municipal Corporation (BMC)*, 1985 (3) SCC 545, statement by Chandrachud CJ.; *People's Union of Civil Liberties (PUCL) v. Union of India & others*, Writ Petition (Civil) 196 of 2001. Although the judgment of the Indian Supreme Court is still awaited, several interim orders have been made, available at <http://www.righttofoodindia.org/orders/interimorders.html>.

⁴⁷ ECtHR, *Osman v. United Kingdom*, Judgment of 28 October 1998, RJD 1998-VIII, 3124, para. 115.

⁴⁸ GA Res. 47/134 of 18 December 1992.

⁴⁹ GA Res. 59/186 of 20 December 2004.

⁵⁰ See *supra*, note 13.

⁵¹ *Sengupta* (note 9), para. 60.

The distinction of different categories of poverty allows for the field of action to be restricted to a smaller number of right holders, and reflects political reality when searching for a consensus in international politics.⁵² However, such an approach acknowledges only extreme poverty as a serious denial of human rights. As a consequence, it contradicts the perception of poverty as an infringement on the fundamental guarantee of human dignity, a core value which cannot be limited for whatever reason. The legitimate concern of limited available resources which restrains State's action is addressed in Article 2 ICESCR, a provision that allows for priority to be given to the poorest of the poor in case of limited resources. Therefore, limited resources cannot be invoked as a general reason for restricting the right to be free from poverty to severe poverty and thereby neglect human dignity.

II. Law as a Means for Empowerment

The first advantage of framing poverty as a deprivation of human rights as opposed to a needs-based approach lies in its moving away from an instrumentalist and utilitarian language. Based on a right to be free from poverty, poverty needs to be alleviated not as a tool to enhance economic growth,⁵³ but to empower people and enable them to enjoy their other human rights.⁵⁴ A rights-based approach treats poor people as subjects and not as objects of policies; they become holders of rights, thus entitlements that give rise to legal obligations on the part of others.⁵⁵ Such a concept requires a correlative concept of legal duties, which naturally raises the issue of duty allocation.⁵⁶ Accordingly, entitlements of people are combined with corresponding duties of States. As a result, there is

⁵² *Chinkin* (note 8), 563.

⁵³ This instrumentalist approach was pursued in the Doha Round of the World Trade Organization. The Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, stated that: "International Trade can play a major role in the promotion of economic development and the alleviation of poverty." For a detailed discussion see *Joseph E. Stiglitz/Andrew Charlton*, Fair Trade for All: How Trade Can Promote Development (2005), 55 *et seq.*

⁵⁴ OHCHR Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (note 14), para. 18.

⁵⁵ *Ibid.*, para. 19.

⁵⁶ *Wilfried Hirsch/Markus Stepanians*, Severe Poverty as a Human Rights Violation – Weak and Strong, in: Andreas Follesdal/Thomas Pogge (eds.), *Real World Justice*, (2nd ed. 2007), 295, 297 *et seq.*

no moral judgement of those who are poor but the focus lies instead on the failure of States to comply with international law. In addition, as *Christine Chinkin* pointed out convincingly, a rights-based approach may also serve as a bulwark against the weakening of language and objectives in international law, for example from social security to social safety nets, from development to eradication of poverty, from poverty to extreme poverty.⁵⁷

Secondly, bringing law into the discourse empowers people by allowing them to enforce their rights in *court* and to rely on legal procedures and remedies which are generally more powerful than social policies.

Thirdly, framing alleviation of poverty as a legal right automatically triggers discussions about potential violations of such a right. In a democratic regime, such discourses will take place and include State and non-State actors as well.

With respect to potential concerns about legitimacy, coherence and cultural imperialism,⁵⁸ acknowledging a rights-based approach implies the acceptance that poverty reduction becomes a shared responsibility. Whilst the State is primarily responsible for realizing the human rights of the people living within its jurisdiction, other States as well as non-State actors have the responsibility to contribute to human rights protection and avoid their violation.⁵⁹ Furthermore, such an approach helps including all stakeholders in the development of a legal framework and enhances cooperation among all institutions involved, such as international financial institutions, human rights bodies and the WTO.

Moreover, by empowering poor people as holders of rights, such a concept abandons the traditional Westphalian notion of State sovereignty which encompassed, *inter alia*, social policy measures. It corresponds with modern philosophy: the key reason for a State to exist is its role in ensuring a life in dignity for its citizens. Dignity implies participation and the opportunity to have his or her voice being heard. Poverty deprives a person of the fundamental capabilities to participate in society. A right to be free from poverty is the logical consequence of a legal system that acknowledges democracy and human rights as its building stones.

⁵⁷ *Chinkin* (note 8), 566.

⁵⁸ For a detailed discussion *Sen* (note 11), 227 *et seq.*

⁵⁹ OHCHR Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (note 14), para. 26.

D. Addressing Poverty in Existing World Trade Law

I. Rationale for Addressing Poverty under World Trade Law

Current international trade theory is still to a large extent based on the theory of comparative advantage⁶⁰ and thus the assumption that international free trade can generate global gains, which supply the trading partners with benefits in the short term and produce growth and development in the longer run.⁶¹

As early as in 1919, *John Maynard Keynes* in his critique of the Peace Treaty of Versailles expressed his vision of what the world might be confronted with if the relation between trade and economics on the one hand and securing peace and stability on the other was neglected:

The danger confronting us, therefore, is the rapid depression of the standard of life of the European populations to a point which will mean actual starvation for some (a point already reached in Russia and approximately reached in Austria). Men will not always die quietly. For starvation, which brings to some lethargy and a helpless despair, drives other temperaments to the nervous instability of hysteria and to a mad despair. And these in their distress may overturn the remnants of organization, and submerge civilization itself in their attempts to satisfy desperately the overwhelming needs of the individual. This is the danger against which all our resources and courage and idealism must now cooperate.⁶²

It took another World War for *Keynes'* insights to be introduced in politics. In 1941, the foundations for the establishment of a multilateral economic trading system were laid down in the Atlantic Charter by the President of the United States and the British Prime Minister, *Franklin D. Roosevelt* and *Winston Churchill*. In light of the war-stricken global economy, a stable world trading system was identified as a crucial prerequisite for a better future and a new world order. In 1944, with the end of the Second World War on the horizon and the world economy in a calamitous condition, the political leaders of the time agreed

⁶⁰ For an overview on international trade history see *Michael I. Trebilcock/Robert Howe*, *The Regulation of International Trade* (3rd ed. 2005), 1 *et seq.*, see also *Eva Maria Beker*, *The White Man's Burden, Arbeit und Menschenrechte in der globalisierten Welt* (2007), 279 *et seq.*

⁶¹ *Hening Jessen*, *Trade and Development Law*, in: *Markus W. Gehring/Marie-Claire Cordonier Segger* (eds.), *Sustainable Development in World Trade Law* (2005), 77, 98.

⁶² *John Maynard Keynes*, *The Economic Consequences of the Peace* (1920), Chapter VI.4, available at: <http://www.gutenberg.org/etext/15776>.

to establish a multilateral system of international economic relations at a joint conference in Bretton Woods, USA. In order to stabilize the world economy, three key new international institutions were to be created under the auspices of the United Nations: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank) and the International Trade Organization (ITO), the failed forerunner of the World Trade Organization that was to be established fifty-one years later in 1995. From the draft ITO Charter⁶³ only the General Agreement on Tariffs and Trade (GATT) was provisionally applied since 1948 until consensus on an institutional framework could be reached. Yet, the "interim solution" had almost become permanent when finally, in 1995, the WTO was established.

Whilst the ITO Charter had chosen a rather broad scope and was deemed ahead of its time by encompassing provisions on labor, agriculture and investment, the 1947 GATT primarily focused on tariff reductions with the aim of liberalizing international trade.⁶⁴ Over time, however, the GATT 1947 was further developed to increasingly address subjects beyond mere tariff barriers to trade. Moreover, the particular situation of developing countries in the international trading system was recognized. In 1964, the GATT Committee on Trade and Development was established, followed by the adoption of Part IV of the GATT in February 1965 with the title "Trade and Development." Part IV stipulated guidelines for developed countries to reduce trade barriers and tariffs in favor of improved market access for products from developing countries. At the same time, in 1964, the first United Nations Conference on Trade and Development (UNCTAD) took place in Geneva. Since then, UNCTAD has developed into a leading organization for development policies and research.

Another step in this direction was taken in 1979 with the inclusion of an exception to Article I GATT, the so called "enabling clause" on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries."⁶⁵

⁶³ Havana Charter for an International Trade Organization, 24 March 1948, UN Doc. E/CONF.2/178.

⁶⁴ *Thomas Cottier/Mathias Oesch*, International Trade Regulation, Law and Policy in the WTO, the European Union and Switzerland, Cases, Materials and Comments (2005), 19 *et seq.*

⁶⁵ For an overview on development in the world trade system see *Marie-Claire Cordonier Segger/Markus W. Gehring*, Introduction, in: *Gehring/Cordonier Segger* (eds.) (note 61), 1, 7 *et seq.*

Hopes and expectations rose to an unprecedented high with the Doha Round in the WTO being labeled as "Development Round." Therefore, the next sections will first address how poverty is being tackled within the WTO framework in general, and then examine to what extent the Doha Development Round may contribute to alleviating poverty.

II. Poverty Alleviation under the Marrakesh Agreement

1. Trade and Development: The Linkage Debate

After seven years of negotiations in the Uruguay Round, the member countries of the GATT adopted the Marrakesh Agreement on 19 December 1993, which established the World Trade Organization.⁶⁶ Its Preamble explicitly addresses "development" as an overall objective of the world economy and names international trade as an instrument for achieving this goal. It states:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

... Agree as follows: ...

⁶⁶ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, UNTS 1867, 154 (entered into force 1 January 1995).

Although the Preamble does not explicitly mention poverty, it nevertheless situates the world trading system into the broader framework of enhancing conditions for human life by committing to poverty-related objectives such as raising standards of living and to sustainable economic development. Other documents such as the 1996 Singapore Ministerial Declaration, which clearly linked international trade to the concept of sustainable development, confirm this finding. Furthermore, in 1998, the Preamble of the Ministerial Declaration of the Geneva Ministerial Conference⁶⁷ for the first time, recognized sustainable development to be one of the main objectives of the WTO itself.⁶⁸

Undisputedly, protecting the right to food contributes to raising living standards and thus links the human rights regime to the international trade system.⁶⁹ However, today, world trade policies and human rights issues are still subject to separate discussions with diverging dogmatic starting positions: While international trade lawyers tend to perceive international trade as a motor for growth and development and the promotion of human rights as its logical result, oversimplification on the part of human rights lawyers may result in them viewing the free market as the reason for all evil.⁷⁰ The question remains whether and how the seemingly diverging interests of human rights protection and economic globalization, areas of international law which have largely developed in isolation from one another, can be reconciled. Both the ICESCR and the WTO are treaty regimes with an equal legal status and a large majority of States being signatories to both legal frameworks. As a consequence, from a legal perspective, the question must be addressed with due consideration of the principle that in international law there is a strong presumption against

⁶⁷ Geneva Ministerial Declaration, 25 May 1998, WTM/Min(98)/DEC/1, para. 4.

⁶⁸ See *Cordonier Segger/Gehring* (note 65), 10 *et seq.*

⁶⁹ *Kaufmann/Heri* (note 30), 1041; see *ibid.*, 1056 *et seq.*, on the reconciliation of trade in agriculture and the right to food.

⁷⁰ On this linkage debate see *Christine Breining-Kaufmann*, The Legal Matrix of Human rights and Trade Law: State Obligations versus Private Rights and Obligations, in: Thomas Cottier/Joost Pauwelyn/Elisabeth Bürgi (eds.), Human Rights and International Trade (2005), 95; *Robert Howse/Ruti G. Teitel*, Beyond the Divide, The Covenant on Economic, Social and Cultural Rights and the World Trade Organization, Dialogue on Globalization, Occasional Papers No 30, April 2007, 3, available at: <http://library.fes.de/pdf-files/iez/global/04572.pdf>. *Pogge* perceives our new global economic order as harming the poor, particularly due to the developed countries' advantages in bargaining power and expertise in the international negotiation rounds, see *Pogge* (note 24), 15 *et seq.*; see also *Belser* (note 61), 574 *et seq.*

normative conflict.⁷¹ Moreover, international obligations need to be interpreted and developed in a complementary and consistent fashion to the greatest extent possible.⁷²

Such a comprehensive approach was already chosen at the UN Conference on the Human Environment in Stockholm in 1972 and enshrined in the legally non-binding Stockholm Declaration⁷³ with its differentiation between economic and social development.⁷⁴ Furthermore, the prominent Brundtland Report that framed the concept of sustainable development in 1987⁷⁵ emphasized the mutual interlinkages between environmental, social and economic crises.⁷⁶ In 1992, the UN organized the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, more commonly referred to as the "Earth Summit." Its outcomes were incorporated, *inter alia*, in the Rio Declaration⁷⁷ and Agenda 21.⁷⁸ Principle 5 of the Rio Declaration named the eradication of poverty "an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world." Thereby, the particular situation and needs of developing countries and least developed countries were to be given special priority.⁷⁹ An open international economic system was deemed a prerequisite for economic growth and development.⁸⁰ In 2002, the Johannesburg Plan of Implementation adopted by the World Summit on Sustainable Development (WSSD), stressed globalization as both an opportunity as well as a challenge for sustainable development, and particularly named the special difficulties of

⁷¹ International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by *Martti Koskenntemi*, 13 April 2006, UN Doc. A/CN.4/L.682, para. 37.

⁷² *Breining-Kaufmann* (note 70), 114 *et seq.*; *Howse/Teitel* (note 70), 5.

⁷³ Stockholm Declaration on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14, ILM 11, 1461.

⁷⁴ *Ibid.*, Principle 8.

⁷⁵ World Commission on Environment and Development (WCED), Our Common Future (1987).

⁷⁶ *Ibid.*, 4.

⁷⁷ UN Declaration on Environment and Development (Rio Declaration), 14 June 1992, UN Doc. A/CONF.151/6/Rev.1, ILM 31, 874.

⁷⁸ Agenda 21, 14 June 1992, UN Doc. A/CONF.151/26/Rev.1, ILM 31, 874.

⁷⁹ Rio Declaration (note 77), Principle 6.

⁸⁰ *Ibid.*, Principle 12.

developing countries in addressing such challenges. Urgent need for action was identified, *inter alia*, to promote "open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development."⁸¹

The means available to the WTO to achieve such ambitious goals consist in the liberalization of trade and the guidance of trade according to multilaterally agreed rules and procedures.⁸² World trade law hinges on the core principle of non-discrimination, thus on the equal treatment of all Member States of the WTO. The underlying theory holds that in a world market that is not artificially influenced and distorted, under the assumption that all countries are treated the same, each country has the chance to benefit from the trade system due to its comparative advantages, independent of its political power in international trade law and its categorization as a developed or a developing country respectively. Indeed, it has been estimated that full multilateral trade reform could lift approximately 100 million people out of extreme poverty.⁸³

However, what has proved to be a highly effective recipe for some countries has not stood the test of time for being quite as successful for others: In East Asia and the Pacific region the percentage of people living below 1 US Dollar a day decreased from 66.8 % in 1981 to 9.3 % in 2005, in China alone the figures changed from 73.5 % in 1981 to 8.1 % in 2005. In contrast, in Sub-Saharan Africa the situation seems to have remained rather constant throughout the same period of time: In 1981 42.6 % were living below 1 US Dollar a day, in 2005 still 39.9 % were living under such extreme poverty conditions.⁸⁴ In light of the gap between the rich and the poor becoming bigger and bigger and the fact that poverty, measured according to the World Bank's categories, increased, sustainable development talks were perceived as rather empty words from the perspective of developing countries.⁸⁵ Since the WTO's mandate is constrained to the survey of the functioning of the multilateral trading system, due to concerns that such additional criteria would further restrict market access for them, develop-

⁸¹ Johannesburg Plan of Implementation, 4 September 2002, UN Doc. A/CONF.199/20, para. 47(a).

⁸² Gary P. Sampson, *The WTO and Sustainable Development* (2005), 2.

⁸³ World Bank, *Global Economic Prospects 2007* (2007), 57.

⁸⁴ See *Chen/Ravallion* (note 10), table 7.

⁸⁵ See for example Communication from Cuba, Preparations for the 1999 Ministerial Conference – Trade, Environment and Sustainable Development, Paragraph 9 (d) of the Geneva Ministerial Declaration, 15 November 1999, WT/GC/W/387, para. 1.

ing countries particularly opposed social or environmental provisions to be implemented in world trade law.⁸⁶ Furthermore, WTO members have often reiterated that the WTO is prohibited from influencing the national economic, environmental and social policies adopted by its sovereign Member States.⁸⁷

Nevertheless, it has recently been increasingly recognized that poverty alleviation and sustainable development are important issues for the world trading system. As a global multilateral and consensus-based organization, the WTO is perceived as having the obligation to ensure that all of its members benefit from liberalized trade, without expanding its mandate or becoming a developmental organization.⁸⁸

2. Food Security in Existing Trade Law

a) Agreement on Agriculture

Food security is an essential element in poverty reduction strategies; besides addressing the availability of food the concept also tackles diverse elements such as people's access to food, culture or the survival subsistence of farmers.⁸⁹ The most widely accepted definition of food security can be found in the 1996 World Food Summit Declaration, which understands food security as a situation in which "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."⁹⁰

⁸⁶ See, *inter alia*, *Cordonier Seegger/Gehring* (note 65), 19.

⁸⁷ *Sampson* (note 82), 56.

⁸⁸ See WTO Work Programme on Aid-for-Trade, Background Note prepared by the WTO Secretariat, 29 May 2007, WT/AFT/W/26, paras. 15 and 18.

⁸⁹ *Marsha Echols*, Food Safety and the WTO: The Interplay of Culture, Science, and Technology (2001), 17 *et seq.*, 29 *et seq.*; *Marisol Smith/Judy Pointing/Simon Maxwell*, Household Food Security: Concepts and Definitions, in: Simon Maxwell/Timothy Frankenberger (eds.), *Household Food Security: Concepts, Indicators, Measurement* (1992), 136.

⁹⁰ Food and Agriculture Organization (FAO), World Food Summit Plan of Action, 13 November 1998, FAO Doc. W3613/E, para. 1, available at: <http://www.fao.org/DOCREP/003/W3613E/W3613E00.HTM>.

The key provision on food security from an international trade law perspective is Article 20 of the Agreement on Agriculture (AoA).⁹¹ Under the heading "Continuation of the Reform Process," it reads as follows:

- Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:
- (a) the experience to that date from implementing the reduction commitments;
 - (b) the effects of the reduction commitments on world trade in agriculture;
 - (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the Preamble to this Agreement; and
 - (d) what further commitments are necessary to achieve the above mentioned long-term objectives.

The key objective of the AoA according to its Preamble "is to establish a fair and market-oriented agricultural trading system" through "substantial progressive reductions in agricultural support and protection" while at the same time considering "non-trade concerns, including food security and the need to protect the environment."

The AoA is based on three pillars with all of them being important in providing food security: Increasing market access and reducing subsidies both for domestic producers and for exporting food.⁹²

Annex 2 of the Agreement, the so-called Green Box, specifically addresses food security by exempting certain measures from reduction commitments. While the Green Box applies to both developed and developing countries, special treatment is provided for developing countries with regard to governmental stockholding programs for food security purposes and subsidized food prices for urban and rural poor. The general criteria are that the measures must have no, or at most minimal, trade-distorting effects or effects on production. They must be provided through a publicly-funded government program (including government revenue foregone) not involving transfers from consumers and must not have the effect of providing price support to producers.

⁹¹ For an in-depth discussion see *Christine Breining-Kaufmann*, *The Right to Food and Trade in Agriculture*, in: Cotiter/Pauwelyn/Bürgel (eds.) (note 70), 341, 344. On further trade-related response measures see *Sharma/Konandreas* (note 3).

⁹² On these three pillars see *Kaufmann/Heri* (note 30), 1043 *et seq.*

Similarly, Article 12 (1) of the AoA requires countries to consider food security in importing countries when exports are reduced or prohibited.

b) Marrakesh Decision on Least-Developed and Net-Food Importing Developing Countries

During the Uruguay Round, negotiators were concerned that agricultural reform could have negative effects on least-developed and net-food importing developing countries (LDCs and NFIDCs) with regard to available supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports. Several analyses had shown that the reform process was likely to increase food import bills as world prices of basic foodstuffs were expected to increase, and that these countries could become more dependent on food imports, while at the same time food aid would decline.⁹³

The response was the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Process on Least-Developed and Net-Food-Importing Developing Countries.⁹⁴ The Marrakesh Decision included four response mechanisms: food aid, short-term financing of normal levels of commercial imports, favorable terms for agricultural export credits and technical and financial assistance to improve agricultural productivity and infrastructure.⁹⁵ The definition of the beneficiaries of the Decision was left to the Committee on Agriculture.⁹⁶

⁹³ FAO, *The Right to Food Guidelines: Information Papers and Case Studies* (2006), 66–67.

⁹⁴ Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries (Marrakesh Decision), 15 April 1994, L/T/UR/D-1/2, part of the Marrakesh Agreement Establishing the World Trade Organization (note 64), 395.

⁹⁵ *Ibid.*, Arts. 3 to 5.

⁹⁶ The Committee applies the UN definition of least-developed countries. As for net food-importing countries, the Committee decided that any developing country which had been a net importer of basic foodstuffs in any three of the past five years for which data was available and which notified the Committee that it wished to be listed as net food-importing developing country would be so listed. See Committee on Agriculture, WTO List of Net Food-Importing Countries, 22 March 2005, G/AG/S/Rev.8. The list of net food-importing developing countries includes Barbados, Botswana, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, Egypt, Gabon, Honduras, Jamaica, Jordan,

The Marrakesh Decision, however, has not been satisfactorily implemented, and as a result, the Doha WTO Ministerial Conference included the Marrakesh Decision as one of the implementation issues.⁹⁷ Notwithstanding its weak implementation, the Marrakesh Decision is important because it calls for “a level of food aid commitments sufficient to meet the *legitimate needs* of developing countries during the reform programme.”⁹⁸ The Marrakesh Decision thereby acknowledges that the joint undertaking of increasing welfare through trade liberalization is coupled with an increase in the legitimate needs for assistance of those countries that are harmed by the process.⁹⁹

c) Conclusion: Mission Unaccomplished

Sadly, the current food crisis brings to light what has been argued by scholars and activists for years: The AoA did not deliver what had been hoped for.

First, apart from a few voluntary commitments, market access did not improve. Developed countries did not significantly open their markets for agricultural products from developing countries. As a result, agricultural production in developing countries did not substantially increase.

Secondly, domestic subsidies were not sufficiently cut: subsidizing domestic production increases surpluses which are then sold internationally at prices which developing countries cannot compete with. As a result, food prices – until very recently – decreased but at the same time hurt the competitive situation of farmers in developing countries.¹⁰⁰

Kenya, Mauritius, Mongolia, Morocco, Namibia, Pakistan, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela: *Joseph McMahon*, The WTO Agreement on Agriculture: A Commentary (2006), 177.

⁹⁷ *Sharma/Konandreas* (note 3), 13.

⁹⁸ Marrakesh Decision (note 94), para. 3 (emphasis added).

⁹⁹ *Kerstin Mechem*, Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture, in: Max Planck Yearbook of United Nations Law 10 (2006), 127, 160.

¹⁰⁰ *M. Ataman Aksoy/Aylin Isik-Dikmelik*, Are Low Food Prices Pro-Poor? Net Food Buyers and Sellers in Low-Income Countries, World Bank Policy Research Working Paper No 4642, June 2008.

Thirdly, reducing export subsidies was praised as one of the major achievements of the Uruguay Round. Yet, its effects on food security are detrimental: As we have seen food aid reached an unprecedented low in 2007, when at the same time prices for food skyrocketed. Clearly, food aid does not correlate with food crises but with the disposal of surpluses.

Finally, the Marrakesh Decision has not been implemented although it contains precisely the measures which according to experts may have mitigated the ongoing food crisis.

The question therefore remains, to what extent the Doha Round can contribute to food security.

E. Poverty Eradication and the Doha Development Round

I. The Doha Round as a Development Round

The increasing global awareness of the alarming dimension of worldwide poverty led to the First United Nations Decade for the Eradication of Poverty (1997–2006) which declared the eradication of poverty an ethical, social, political and economic imperative of humankind. Half way through this time frame, in 2000, the Member States of the UN reaffirmed the need for global cooperation in implementing the “Millennium Development Goals and Targets” (MDGs).¹⁰¹ The first MDG addresses the eradication of extreme poverty and hunger by (i) halving, between 1990 and 2015, the proportion of people whose income is less than 1 Dollar a day, (ii) achieving full and productive employment and decent work for all, and (iii) by halving, between 1990 and 2015, the proportion of people who suffer from hunger. The eighth MDG aims at developing a global partnership for development. It states that by the year 2015, an open trading and financial system shall be further developed that is rule-based, predictable and non-discriminatory.

The MDGs were framed as “development goals,” not as legally binding obligations or human rights. As a consequence, many governments seem to treat these goals as optional acts of benevolence. Not surprisingly, it seems rather unlikely that the MDG-targets will be achieved by 2015. Nevertheless, the

¹⁰¹ See *supra*, note 23.

impact the Millennium Development Goals has had on different fields of international law should not be underestimated: indeed, the comprehension that trade liberalization and sustainable development are mutually supportive was also an underlying motivation for the establishment of the Doha Development Agenda at the Doha Ministerial Meeting in Qatar on 14 November 2001. The Ministerial Meeting launched a new round of multilateral trade negotiations which for the first time explicitly focused on the development dimension of world trade; however, it is remarkable that no reference was made to human rights.¹⁰²

The high aims of the negotiation rounds were stated in the Ministerial Declaration as follows:

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work programme adopted in this Declaration. Recalling the Preamble of the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainability financed technical assistance and capacity-building programmes have important roles to play.¹⁰³

While some developing countries have made impressive progress in economic growth and prosperity, others' trade performance has declined in the same years. Based on these insights, ministers agreed that the trade-restricting and distorting practices which developing and the least-developed countries face, were to be tackled and trade was to be fostered as a development engine.¹⁰⁴ Indeed, LDCs were particularly addressed in the Doha Ministerial Declaration by the commitment to duty-free, quota-free market access for their exports and the statement that the WTO members will take appropriate supporting measures to increase LDCs' market access. Furthermore, the Declaration reiterates WTO accession of LDCs as a particular objective.¹⁰⁵

¹⁰² See *Trebilcock/Howse* (note 60), 498.

¹⁰³ Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/1, paras. 2 and 3.

¹⁰⁴ *Ibid.*, para. 3; see also *Jessen* (note 61), 99.

¹⁰⁵ See Doha Ministerial Declaration (note 103), para. 42.

In view of the high aims of the Doha Development Round, the negotiations were – not surprisingly – overshadowed by difficulties in finding a compromise between the WTO members. The Fifth Ministerial Conference of the WTO in Cancun in 2003 ended without an agreement on how to proceed with the Doha Round. This setback was mirrored in the two following Ministerial Conferences in Geneva in 2004 and Hong Kong in 2005.

In 2005, however, it was finally officially recognized that market access improvements alone would not be sufficient to enhance developing countries' and LDCs' participation in the global trading system and eventually lead them out of poverty. The need for additional aid was recognized, especially regarding insufficient human, institutional and infrastructural capacities. At the Gleneagles Summit, the G-8 leaders recognized the need to provide additional Official Development Assistance (ODA) to help enhance trade-capacity.¹⁰⁶ In Hong Kong, the WTO Ministerial Conference endorsed the initiative by establishing an Aid for Trade package to complement the Doha Development Agenda.¹⁰⁷ Increasing trade opportunities for developing countries was perceived a crucial contribution to development by the WTO.¹⁰⁸ The Hong Kong Declaration called on the WTO Director-General to consult with UN agencies, the World Bank, the IMF, and the regional development banks, to secure additional financial resources.

II. Aid for Trade and Integrated Framework as a New Area of Cooperation

1. *Raison d'être and Objectives*

Aid for Trade has been defined as a tool to foster trade reform and the opening of global markets for countries, which lack the necessary infrastructure to participate in international trade.¹⁰⁹ In order to define the specific objectives of

¹⁰⁶ G8 Gleneagles Summit 2005 documents on trade, available at: <http://www.g8.gov.uk>.

¹⁰⁷ WTO Doha Work Programme, Ministerial Declaration, adopted on 18 Dec 2005, Hong Kong, WT/MIN(05)/DEC, para. 57.

¹⁰⁸ See WTO Work Programme on Aid-for-Trade, Background Note prepared by the WTO Secretariat, 29 May 2007, WT/AFT/W/26, paras. 1–8.

¹⁰⁹ *Sam Laird*, Aid for Trade: Cool Aid or Kool-Aid? UNCTAD G 24 Working Paper Series, No 24, November 2007, 2 *et seq.*

Aid for Trade and to formulate recommendations for further proceedings two task forces were established within the WTO:

In October 2005, a Task Force was set up to present recommendations for enhancing the Integrated Framework (IF). The IF had been established in 1997 as an initiative through which the IMF, the International Trade Centre (ITC), UNCTAD, the United Nations Development Programme (UNDP), the World Bank and the WTO with the support of bilateral donors coordinate their efforts to assist LDCs in enhancing their trade opportunities.¹¹⁰ It entails both coordinating trade-related technical assistance as well as the promotion of an integrated approach. One of the key achievements of the IF was the fact that it developed gradually into a mechanism for mainstreaming trade into national economic plans and poverty reduction strategies.¹¹¹ In addition, an IF Trust Fund was established to finance so called Diagnostic Trade Integration Studies as a monitoring and implementation tool.

Only two months after the establishment of the IF Task Force, in December 2005, the Hong Kong Ministerial meeting called for the establishment of a Task Force on Aid for Trade.¹¹² The Task Force became operational in February 2006. Its focus is broader than the IF: it looks at the scope of Aid for Trade and how it relates to the development dimensions of the Doha Round, the operationalization of Aid for Trade and identification of appropriate delivery mechanisms.¹¹³ Aid for Trade is not limited to LDCs but applies to all developing countries.

2. Participating Institutions

Six institutions are participating in the IF: IMF, ITC, UNCTAD, UNDP, WTO and the World Bank. Their key responsibilities are with the WTO (Secretariat), the World Bank (Diagnostics) and the UNDP (Trust Fund). Donors other than the six institutions are not represented directly in the IF.

¹¹⁰ Report of the 15th Meeting of the Integrated Framework Steering Committee, 17 November 2005, WT/IFSC/M/14, paras. 34–49.

¹¹¹ IMF and the World Bank, Doha Development Agenda and Aid for Trade, 9 August 2006, Box 2.

¹¹² Doha Work Programme, Ministerial Declaration, 22 December 2005, WT/MIN(05)/DEC, para. 57.

¹¹³ IMF and World Bank, Doha Development (note 111), para. 21.

In contrast to the IF, Aid for Trade allows an open participation. Given its close link to the Doha Development Agenda it involves all WTO members and requires the WTO to ensure as an organization that all countries can benefit and participate in world trade. Thus, Aid for Trade to some extent serves as an umbrella framework, encompassing, *inter alia*, the Integrated Framework.

While both initiatives attempt to overcome institutional barriers and to mainstream trade into (least) developing countries development plans¹¹⁴ they operate under different organizational models.

3. Structure and Legal Framework

a) Integrated Framework and Enhanced Integrated Framework

The IF is currently in the process of implementing its transition to the Enhanced IF.¹¹⁵ The IF's organizational structure reflects the fragmented legal environment in which it is operating:

The IF Steering Committee (IFSC) oversees and governs the IF process. Under the Enhanced IF it should provide overall policy direction, review progress and provide a platform for the exchange of experience. It meets once a year. The IFSC is a tripartite arrangement with representation from agencies, donors and LDCs. All WTO members as well as all LDCs – irrespective of their WTO membership – can participate in the IFSC.

Day-to-day management of the IF is in the hands of the IF Working Group (IFWG). It is chaired by the WTO, and consists of representatives of the agencies and two representatives each from LDCs and donor countries. With the Enhanced IF the IFWG will be turned into an IF Board. It will report to the Steering Committee. While it should stay small, membership will be rebalanced in order to better represent LDCs and donors by increasing their number of representatives to three each.

The IF Secretariat provides services to both the IFSC and IFWG. It is housed by the WTO. Under the new Enhanced IF it will be restructured so as to integrate management functions at the global level – which remain fragmented

¹¹⁴ Poverty Reduction Strategy Papers (PRSP) for most LDCs.

¹¹⁵ An Enhanced Integrated Framework, 29 June 2006, WT/IFSC/W/15.

under the Enhanced IF – and to provide for greater accountability. As an Executive Secretariat it will still be housed in the WTO but as an independent body surrounded by a firewall. A new Executive Director will head it.

Finally, the UNDP manages the IF Trust Fund on behalf of the six agencies and donors.

In sum, the IF as well as the new Enhanced IF are organized as relatively loose networks of all stakeholders involved. Such a network structure inevitably raises concerns of legitimacy, technocracy and lack of transparency.¹¹⁶

b) Aid for Trade

The Paris Declaration on Aid Effectiveness of 2 March 2005¹¹⁷ is the key instrument for Aid for Trade. Established in the context of assessing progress on the Millennium Goals, it expresses a consensus among the international community on the direction for reform, on aid delivery and management, and for improved effectiveness and monitorable actions and indicators. It applies to all stakeholders, *i.e.* donors, agencies and beneficiaries. So far 68 countries as well as the European Commission and 26 international organizations have adhered to the Declaration. The five core principles are country ownership, aligning aid to national development strategies, harmonization of donor procedures, result-oriented management and mutual accountability. The Paris Declaration requires Aid for Trade to be provided in a coherent manner.

Aid for Trade in its essence is a mandate, not an organization. The close link of Aid for Trade with the Doha Development Agenda explains why the WTO has taken on a leading role in implementing this assignment while emphasizing at the same time that it is not a “development agency.”¹¹⁸ As it lacks an institutional monitoring process of its own, Aid for Trade relies on WTO mechanisms,

¹¹⁶ For a summary of the ongoing discussion on transnational networks see *Christine Kaufmann*, *Globalisation and Labour Rights* (2007), 270 *et seq.*

¹¹⁷ Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability, High Level Forum, Paris, 28 February–3 March 2005, available at: <http://www.oecd.org>.

¹¹⁸ WTO, Aid for Trade fact sheet, available at: <http://www.wto.org>.

for instance with the proposal to include an assessment of Aid for Trade in the WTO Trade Policy Reviews.¹¹⁹

Despite the absence of a clear structure, apart from the WTO, Aid for Trade has developed around three key organizations: The OECD’s competence for monitoring the effectiveness of Aid for Trade measures and the IMF’s as well as the World Bank’s expertise in tailoring country-specific programs for adjusting to open global trade.

These institutions cooperate in a non-formal, solutions-oriented framework. While cooperation between the WTO and the Bretton Woods Institutions is not new, the first global report “Aid for Trade at a glance” established by the OECD and the WTO in close collaboration is a primer and an example for implementing the Coherence Declaration.¹²⁰

4. Deficits of the Current Structure

a) Integrated Framework and Enhanced Integrated Framework

Other than Aid for Trade, the IF has at least a network-oriented organizational structure, which reflects the fragmented body of international development and trade policies. Yet, the lack of an overreaching institutional framework combined with the fact that the IF – as an unfunded mandate – had a relatively low status in the work plans of its parent institutions, led to unsatisfying and inefficient procedures and results.¹²¹ With trade ministers being the driving force in the IF to keep LDCs engaged in the world trading system, little coherence was achieved with development and finance.¹²² In the words of the IF Task Force:

The Task Force recognizes that the effectiveness of the IF is hindered by the existing fragmental management structure and sub-optimal division of responsibilities among

¹¹⁹ Task Force on Aid for Trade Report, reprinted in: IMF and World Bank, *Doha Development* (note 111), Attachment II, 54.

¹²⁰ Hong Kong Ministerial Declaration (note 112), para. 56.

¹²¹ *Raymond Saner/Laura Pérez*, Technical Assistance to Least-Developed Countries in the Context of the Doha Development Round: High Risk of Failure, *Journal of World Trade* 40 (2006), 467, 472 *et seq.*

¹²² *L. Alan Winters*, Coherence and the WTO, *Oxford Review of Economic Policy* 23 (2007), 461, 470; *Susan Prowse*, The Role of International and National Agencies in Trade-related Capacity Building, *The World Economy* 25 (2002), 1235, 1246.

the different agencies, principally among the WTO (secretariat), the World Bank (diagnostics) and the UNDP (Trust Fund), and by the lack of a clear accountability framework.¹²³

Even with the Enhanced IF, problems have not been solved completely. Responsibilities of agencies and donors are dispersed and not linked to their institutional mandate and remain a concern. For example, a LDC applying for membership in the WTO may benefit from IF funds, yet it is still difficult to put together a coherent assistance package under this framework.¹²⁴ Whether the new secretariat will be able to live up to its role as an independent body with an integrative function and gain legitimacy among stakeholders remains to be seen.

b) Aid for Trade

The establishment of a joint project on fostering coherence in Aid for Trade is certainly a major progress in linking two of the key elements of globalization, trade and development. However, with the WTO taking the lead and acting as some sort of a “clearing house,” cooperation between different agencies is not balanced. Although World Bank and IMF staff submitted a joint paper with proposals on Aid for Trade to the Development Committee and the International Monetary and Financial Committee which led to a call for mainstreaming trade into development and structural assessment programs, the promises of the Doha Development Agenda to mainstream development into trade have not been fulfilled yet. This disappointing result is partly due to the fact that other than the Bretton Woods Institutions, the WTO is interpreting its mandate as being member-driven and therefore not open to an evolutionary implementation by the organization itself.¹²⁵

Since a successful outcome of the Doha Round has become somewhat unsure, it has been emphasized by the Task Force on Aid for Trade that Aid for

¹²³ IMF and World Bank, Doha Development (note 111), Annex I, para. 3.

¹²⁴ *Mamohan Agarwal/Jozefina Cutura*, Integrated Framework for Trade-Related Technical Assistance Addressing Challenges of Globalization: An Independent Evaluation of the World Bank’s Approach to Global Programs – Case Study, World Bank Operations Evaluation Department (OED) (2004), para. 4.13.

¹²⁵ *Debra P. Steger*, The Jurisdiction of the World Trade Organization: Remarks, American Society of International Law Proceedings 98 (2004), 142.

Trade is a complement to the Doha Round but not conditional on its success.¹²⁶ In February 2008, the WTO Committee on Trade and Development approved the 2008 Aid-for-Trade Roadmap. Its objectives are to:

- Increase developing countries’ ownership of Aid for Trade.
- Shift emphasis to monitoring implementation – with a focus on country, regional and sectoral priorities.
- Launch a work program to develop performance indicators and to strengthen self-evaluations.

III. The World Food Crisis and the Doha Round

While it is undisputed that many of the problems regarding the World Food Crisis need to be addressed outside the WTO, the discussion of Aid for Trade and the Integrated Framework shows that the Doha Development Agenda could – and should – serve as a forum for tackling trade related aspects of the food crisis, especially food security.

1. The July 2008 Package

Negotiations on agriculture were close to an agreement when the Doha Round came to a standstill in July 2008. Since discussions have been resumed, the revised draft modalities for agriculture¹²⁷ – the so called July Package – serve as a basis for further negotiations.

With regard to domestic support, the draft contains substantial cuts for developed countries. It also provides for less stringent provisions for stockholding related to food security purposes. Income support for farmers is still allowed but needs to be decoupled from production levels, *i.e.* provided in the form of direct payments.

¹²⁶ Task Force on Aid for Trade Report, reprinted in IMF and World Bank, Doha Development (note 111), Attachment II, 54.

¹²⁷ Committee on Agriculture Special Session – Revised Draft Modalities for Agriculture, 10 July 2008, TN/AG/W/4/Rev.3.

As for market access, tariffs will be reduced according to a formula that prescribes higher cuts on higher tariffs. The cutting of tariffs in developing countries will amount to two thirds of the respective ratio in developed nations. In the food security context it is important that developing countries may also profit from less stringent reductions for special products, *i.e.* products with a crucial importance for a country's development. Moreover, under a Special Safeguard Mechanism (SSM) they are allowed to temporarily increase duties in cases of sharp increases in imports or prices substantially falling.

Finally, export subsidies are to be eliminated by the end of 2013. The draft confirms the members' commitment to maintain an adequate level of food aid by proposing a new Article 10.4 on international food aid to the AoA.¹²⁸ For price stabilization purposes it suggests a new type of intergovernmental commodity agreements.¹²⁹

2. Assessment

The July package leaves many important issues open and addresses other only insufficiently.

With regard to market access, all attempts to clearly define the triggers for taking recourse to SSM have so far failed.

Similarly incomplete are the suggested provisions on domestic support which do not adequately address the important issue of trade in biofuels. In addition, the problem of subsidized farmers in developed countries is not being solved by limiting support to direct payments. Financial support will still lead to negative impacts on markets for food in developing countries.

No progress for food security can be seen in the suggested regulations for export subsidies because, despite the striking lack of correlation between food aid and food crises, no measures have been envisioned to increase the level of food aid to those in need.

Finally, the specific complexity of export restrictions for food is not being addressed although such measures have become common in countries where food riots endanger political stability and call for visible measures. Excluding

¹²⁸ *Ibid.*, Annex L, para. 1.

¹²⁹ *Ibid.*, para. 92.

the issue with reference to the limited mandate of the Doha Round seems not only cynical but, given the long term effects of export restrictions on consumers worldwide, lacks logic.

3. Which Way Forward?

With discussions having resumed in Geneva, there is still hope that the Doha Round may lead to tangible results and contribute to mitigating the food crisis. It is undisputed that the reasons for the food crisis are manifold, with trade issues being just one element. All the more, it is essential that negotiators identify and acknowledge the trade-related problems of the food crisis. In this light, developing regulations for trade in biofuels needs to be on top of the list given the large amount of subsidies attributed to their production.¹³⁰

F. Conclusion: What's Trade Law Got to Do with Hunger and Poverty?

This article shows first that hunger and poverty are closely linked. It then moves on to discuss the implications of a rights-based approach to eradicating poverty. The legal discussions generally distinguish between two notions of poverty: On the one hand, poverty can be comprehended from the point of view of an individual human being, describing the plight he or she bears and experiences every day. On the other, there is the perception of poverty as a global problem, affecting not 'only' the individual fate of a person, but having an effect on global issues. From a legal perspective, hunger and poverty thus need to be tackled in light of human rights and of international trade law. However, this is not an either/or choice. On the contrary: Based on a comprehensive approach of eradicating poverty, international trade law cannot conceal its potential infringements on human rights. At the same time, poverty as a violation of human rights will not cease to be a global problem, which jeopardizes the achievement of the MDGs and raises the myriads of questions related to development and international trade law as well as foreign aid issues.

¹³⁰ On the relationship between biofuels and the food price crisis see, *e.g.*, Kimberly Ann Elliott, Biofuels and the Food Price Crisis: A Survey of the, Working Paper No 151, August 2008, available at: <http://www.cgdev.org> and <http://ssrn.com/abstract=1221668>; see also Sharma/Konandreas (note 3), 18 *et seq.* *above* to *above* PIA 1104.

This finding is at the core of the third part of this article, which discusses the role of international trade in the light of the current food crisis. It shows that the food crisis cannot be isolated from trade issues. And yet, there seems to be no coherent framework for addressing the manifold underlying legal and economic problems, let alone policy considerations.

The WTO took an important step towards achieving coherence between trade and development with the establishment of the Aid for Trade framework. Yet, so far, the call for coherence in Aid for Trade has not been answered by substantial efforts to overcome the present institutional fragmentation. What the Integrated Framework achieved in terms of information sharing and – to some extent – with coordination amongst donors and institutions is important. Moreover, Aid for Trade certainly opened the floor for engaging the WTO in substantial development discussions. However, the outcome of the Doha Development Agenda is still open to speculation.¹³¹ In addition, the ongoing food crisis acerbated differences between industrialized and developing countries.

In many respects, current initiatives for coherence are based on the unsatisfying results of the Uruguay Round regarding the needs of developing countries. With the Millennium Goals being far from implemented the situation is indeed alarming. Reducing the Doha Development Round to an instrument to overcome shortcomings of the Uruguay Round will not help to grapple with the current complex problems of a globalized world where trade, finance development and human rights can no longer be looked at separately. What is necessary is not another administrative and bureaucratic process but a forum where all these issues can be discussed, researched and developed into concrete resolutions.

This is not a call for a new institutional framework but for an intellectual shift in paradigm by addressing problems as they present themselves in the real world in all their complexity rather than dissecting them into different “manageable” questions to be dealt with in different institutions. It is a call not only to the trade community but to development and human rights related institutions alike.

Given the dimension of the crises we are experiencing, building strong institutions in affected countries will be essential in order to enhance their capabilities for integration and participation in the fight against poverty as well as in global trade.¹³²

¹³¹ *Joseph Michael Finger*, *Implementation and imbalance: dealing with hangover from the Uruguay Round*, Oxford Review of Economic Policy 23 (2007), 440, 443.

¹³² *Christopher Stevens*, *Can EU Policy be Coherent?*, in: Sheila Page (ed.), *Trade and Aid Partners or Rivals in Development Policy* (2006), 99.

To end with a concrete proposal as a first step, we suggest a Food Crisis Forum to be conducted within the ongoing talks on agriculture in Geneva. Such over-reaching events have indeed already taken place during the WTO Public Forum this year. With almost a billion people suffering from chronic hunger, it is time that this culture finds its way into the boardroom and to the negotiating table.



Jad Mouawad

**Shell to pay \$ 15.5 Million to settle
Nigerian case**

New York Times, 9th June 2009, p. B1

Shell to Pay \$15.5 Million to Settle Nigerian Case

By JAD MOUAWAD

- 1 Royal Dutch Shell, the big oil company, agreed to pay \$15.5 million to settle a case accusing it of taking part in human rights abuses in the Niger Delta in the early 1990s, a striking sum given that the company has denied any wrongdoing.
- 2 The settlement, announced late Monday, came days before the start of a trial in New York that was expected to reveal extensive details of Shell's activities in the Niger Delta.
- 3 The announcement caps a protracted legal battle that began shortly after the death of the Nigerian activist Ken Saro-Wiwa in 1995. Mr. Saro-Wiwa, Shell's most prominent critic at the time in Nigeria, was hanged by that country's military regime after protesting the company's environmental practices in the oil-rich delta, especially in his native Ogoni region.
- 4 Shell continued Monday to deny any role in the death. It called the settlement a "humanitarian gesture" meant to compensate the plaintiffs, including Mr. Saro-Wiwa's family, for their loss and to cover a portion of their legal fees and costs. Some of the money will go into an educational and social trust fund intended to benefit the Ogoni people.
- 5 In a statement, the company said the agreement "will provide funding for the trust and a compassionate payment to the plaintiffs and the estates they represent in recognition of the tragic turn of events in Ogoni land, even though Shell had no part in the violence that took place."
- 6 "Shell has always maintained the allegations were false," Malcolm Brinded, the company's executive director for exploration and production, said in the statement.
- 7 Shell said that the trust being set up is in addition to the contribution to community development made by Shell-run companies in the Niger Delta. According to Shell, these payments totaled more than \$240 million in 2008.
- 8 Ten plaintiffs, including the son of Mr. Saro-Wiwa and his brother, accused Shell of seeking the aid of the former Nigerian regime to silence the critic, as well as paying soldiers who had carried out human rights abuses in the impoverished region where it operated.
- 9 Mr. Saro-Wiwa, who founded the Movement for the Survival of the Ogoni Peoples in 1990, was one of Shell's most forceful critics because of the damage done to the delta communities, including gas flaring and the destruction of mangroves to make way for pipelines.
- 10 The Niger Delta continues to be marred by violence and ethnic strife. Much of Shell's production in the delta is still the target of militants seeking a larger share of the country's oil wealth.
- 11 The prominent case involving Shell was the latest to challenge the behavior of some of the world's biggest oil companies in developing countries. Companies are increasingly being called to account for their environmental record as well as any collusion with repressive governments.
- 12 The suit was brought under the Alien Tort Claims Act, an arcane United States law that has been increasingly used for lawsuits asserting human rights violations occurring overseas. The Supreme Court ruled 6 to 3 in 2004 that foreigners could bring cases before American courts in some limited circumstances, like crimes against humanity or torture, and the courts have decided that a wide variety of defendants, including multinational corporations, can be called to account. Royal Dutch Shell is headquartered in the Netherlands.
- 13 So far, no corporation has been found guilty under the alien tort law. Last year, a jury cleared Chevron of wrongdoing after it was accused of complicity in the shooting of Nigerian villagers

who occupied an offshore oil barge in 1998 to protest its environmental record and hiring practices.

- 14 In 2004, Unocal, a California oil company that was accused of using slave labor in the construction of a pipeline in Burma during the 1990s, agreed to compensate villagers there. The terms of that settlement were not made public.
- 15 For the Nigerian plaintiffs and their lawyers, Shell's settlement, including publication of the sum involved, is a significant victory. Companies commonly demand that details of such settlements be kept secret, for fear of setting precedents.
- 16 "It has been a really long struggle," said Jennie Greene, a lawyer with the Center for Constitutional Rights, which brought the case on behalf of the plaintiffs. "But this shows that corporations cannot act without accountability."
- 17 Ken Saro-Wiwa Jr., the son of the slain rights advocate, was also satisfied with the outcome.
- 18 "We hope this sends a signal," he said in a telephone interview from London. "It's a relief also that we've been able to draw a line over the past. And from a legal perspective, this historic case means that corporations will have to be much more careful."



Philip Alston

**The “Not-a-Cat” Syndrome: Can the
International Human Rights Regime
Accommodate Non-State Actors?**

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The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?

PHILIP ALSTON*

1. THE 'NOT-A-CAT' SYNDROME

When one of my daughters was eighteen months old she deftly transcended her linguistic limitations by describing a rabbit, a mouse, or a kangaroo as a 'not-a-cat'.¹ In the arenas of international law and human rights an almost identical technique is pervasive. Civil society actors are described as *non*-governmental organizations. Terrorist groups or others threatening the state's monopoly of power are delicately referred to as *non*-state actors. But so too are transnational corporations and multinational banks, despite their somewhat more benign influence. International institutions, including those which wield immense influence while disavowing all pretensions to exercise authority *per se*, such as the International Monetary Fund (IMF) and the World Bank, are classified either as *non*-state entities or as *non*-state actors.

Apart from its ability to obfuscate almost any debate, this insistence upon defining all actors in terms of what they are not combines impeccable purism in terms of traditional international legal analysis with an unparalleled capacity to marginalize a significant part of the international human rights regime from the most vital challenges confronting global governance at the dawn of the twenty-first century. In essence, these negative, euphemistic terms do not stem from language inadequacies but instead have been intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve. Accordingly, for the purposes of

* Thanks to Nehal Bhuta for his excellent research assistance in the preparation of this Chapter.

¹ This description of the not-a-cat syndrome draws on Philip Alston, 'The "Not-a-cat" Syndrome: Re-thinking Human Rights Law to Meet the Needs of the Twenty-first Century', in *Progressive Governance for the XXI Century* (Florence, European University Institute and New York University School of Law, 2000) 128.

international legal discourse—the language of human rights—those other entities can only be identified in terms of their relationship to the state. Just like my daughter's rabbit, anything that is not a state, whether it be me, IBM, the IMF, Shell, Sendero Luminoso, or Amnesty International, is conceptualized as a 'non-a-state'.

It is thus neither accidental, nor perhaps surprising, that the United Nations has an editorial rule which requires that the word 'State' should always be capitalized (i.e. that upper-case format be used).² Apart from recalling the insistence of religious publications that god must always be acknowledged as God, this usage merely encapsulates the assumptions of 1945. But the problem is that it also sets those assumptions in stone at a time when that particular stone is competing with quite a few others as the embodiment of power and even authority. It is revealing that no matter how subversive of the legitimacy of a given state it might be, every human rights document produced under the auspices of the United Nations requires its author(s) to genuflect in this way before the altar of 'State' sovereignty every time the word is mentioned. None of this is to suggest that the state is not important, let alone to endorse the more extreme versions of the 'state is dead' thesis. It is simply to underline the fact that the world is a much more poly-centric place than it was in 1945 and that she who sees the world essentially through the prism of the 'State' will be seeing a rather distorted image as we enter the twenty-first century.

The thrust of this Chapter is that such a uni-dimensional or monochromatic way of viewing the world is not only misleading, but also makes it much more difficult to adapt the human rights regime in order to take adequate account of the fundamental changes that have occurred in recent years. The challenge that it lays down is one of re-imagining, as the social scientists would put it, the nature of the human rights regime and the relationships among the different actors within it. Lawyers, not being noted for their willingness to depart from precedents, might prefer to see the task in terms of re-interpreting existing concepts and procedures rather than re-imagining. Either way, the nature of the challenges that lie ahead emerge clearly from this volume.

Notwithstanding the questionable utility of the terminology, non-state actors are looming ever larger on the horizons of international and human rights law. They are a recognized category of partners for the European Union in development and humanitarian activities,³ they are the subject of a specialized law journal in the field

² Interestingly, the only UN document in which it is not capitalized is the UN Charter itself. That document pays linguistic homage to 'Members' rather than states *per se*.

³ See Article 4 of the Cotonou Agreement of 2000 between the EU and the African, Caribbean, and Pacific states which recognizes 'the complementary role of and potential for contributions by non-State actors to the development process'. It then provides that 'non-State actors shall, where appropriate:

- be informed and involved in consultation on cooperation policies and strategies... and on the political dialogue;
- be provided with financial resources... to support local development processes;
- be involved in the implementation of cooperation project and programmes...;
- be provided with capacity-building support in critical areas...

of international law,⁴ a separate book series has been dedicated to them,⁵ and scholarly articles are emerging at a great rate.⁶ Yet the membership of this group is difficult to define and virtually open-ended. The resulting grab-bag of miscellaneous players ranges from transnational corporations and small-time businesses and contractors, through religious and labour groups, organized epistemic communities, civil society more broadly, and international organizations, to terrorist bands and armed resistance groups.⁷

Not much more than a decade ago the category of non-state actors remained all but frozen out of the legal picture by international law doctrines and had received only passing recognition even from scholars. While the case-law of the regional human rights systems had begun to address some violations committed by private actors, the resulting jurisprudence was neither systematic nor especially coherent. At the international level, human rights groups, along with many governments, treated the category with the utmost caution because they were extremely wary of dignifying the nefarious activities of certain such actors by focusing specifically upon them or by seeking to give even a few among them a place at the international table. The result, somewhat ironically, was that groups classified by international law as non-state actors (human rights NGOs) were lobbying strongly against the recognition of other groups classified in the same way.

Today, however, at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation

⁴ http://europa.eu.int/comm/development/body/cotonou/agreement/ager05_en.htm. See also Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee of 7 November 2002: 'Participation of non-state actors in EC development policy' COM (2002) 598 final, at <http://europa.eu.int/scpplus/leg/en/wb/t12009.htm>.

⁵ *Non-State Actors and International Law*, published by Brill.

⁶ See series entitled: Non-State Actors in International Law, Politics and Governance, published by Ashgate.

⁷ See e.g. J. Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa', 18 *Afr. U. Int'l L. Rev.* (2003) 851; William A. Schabas, 'Theoretical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict', 26 *Fordham Int'l L.J.* (2003) 907; Richard A. Rinkema, 'Environmental Agreements, Non-State Actors, and the Kyoto Protocol: A "Third Way" for International Climate Action?', 24 *U. Pa. J. Int'l Econ. L.* (2003) 729; Michael G. Heyman, 'Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence', 36 *U. Mich. J.L. Ref.* (2003) 767; Norman G. Pinter, Jr., 'The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen', 8 *UCLA J. Int'l L.* 67 *For. Aff.* (2003) 331; Daniel Wilsher, 'Non-State Actors And The Definition Of A Refugee In The United Kingdom: Protection, Accountability Or Culpability?', 15 *Int'l J. Ref. L.* (2003) 68; Rachel Lord, 'The liability of non-state actors for torture in violation of international Humanitarian Law: an assessment of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *Melbourne J. Int'l L.* (2003) 112.

⁸ For three systematic and wide-ranging surveys of the issues see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford, Oxford University Press, 1993); Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 11 *Yale L.J.* (2001) 443; and International Council on Human Rights, *Beyond Voluntarism: Human Rights and the developing international legal obligations of companies* (2002).

in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime's aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors. In practice, if not in theory, too many of them currently escape the net cast by international human rights norms and institutional arrangements.

For practical purposes, much of the focus of the international human rights regime in the years ahead will be on transnational corporations and other large-scale business entities, private voluntary groups such as churches, labour unions, and human rights groups, and on international organizations including the United Nations itself, the World Bank, the International Monetary Fund, and the World Trade Organization. The purposes of this Chapter, apart from surveying the issues raised by the various contributors to this volume, include putting the issue very briefly into some historical perspective, examining more closely the issue of definition, and identifying the key contexts in which non-state actors have risen to the fore in the past couple of decades. The Chapter then explores the nature of, and the reasons for, the reluctance of mainstream international law to accord a real place at the table to non-state actors.

2. THE RAPID EVOLUTION OF THE STATUS OF NON-STATE ACTORS

In the early 1980s I was asked by one of the United Nations' specialized agencies to write a consultancy study on legal aspects of the role of non-state actors in the field of human rights. I am ashamed to say that I was as keen to take on the job as I was perplexed about the real meaning or utility of the assignment. Several then recent developments seemed to suggest that my concern should be with armed opposition groups, national liberation movements, and perhaps transnational corporations, although the human rights dimensions of even those issues were, curiously in retrospect, not especially obvious. In relation to the first group, the 1977 Additional Protocol II to the Geneva Conventions had recently given status to certain types of non-state forces involved in an armed conflict within the territory of a state.⁸ In relation to the second, the United Nations and other international organizations had been making an effort, under pressure from the non-aligned group of developing states, to take account in its own work of the role played by national liberation movements in a number of key conflict areas, such as in Namibia, South Africa, and Palestine.⁹ In relation to the third, the United Nations had been engaged throughout

⁸ For a critique see Antonio Cassese, *International Law* (Oxford, Oxford University Press, 2001), 346–48.

⁹ See Malcolm Shaw, *International Law* (5th ed., Cambridge, Cambridge University Press, 2003) 220–23.

the late 1970s in drafting a code of conduct for transnational corporations.¹⁰ But the bottom line was that the human rights framework remained somewhat distant from these important forays into unknown territory, and the issues were largely absent from the agendas of most international human rights groups. The reasons were not difficult to see: humanitarian and human rights norms were considered separate; national liberation movements were strong on the right to self-determination but not overly concerned with many other rights; and the focus on transnationals had more to do with the New International Economic Order and the sovereignty of host states than with the human rights of workers or anyone else.

But in the space of only a couple of decades, all this has changed. Human rights and humanitarian law have moved much closer together, as the stature of the International Criminal Court attests and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda illustrate. National liberation movements have either gone into the business of government (as in Namibia, Zimbabwe, South Africa, and East Timor) or been pushed towards outlaw status as terrorist groups. The right to self-determination is now a struggle that is expected to be fought at the ballot box rather than through guerrilla warfare in the jungles or urban areas.¹¹ And consumer movements and human rights groups have reignited international concern about the activities of transnational corporations by successfully focusing public opinion on labour, environmental, and human rights abuses in which those corporations are increasingly seen to be involved.

Perhaps most importantly, in the aftermath of the Cold War and the triumph of liberal economic systems, private actors are being asked to undertake a wide range of functions and responsibilities which it had previously been unimaginable to entrust to them.

3. SOME CASE STUDIES TO ILLUSTRATE THE REAL-WORLD CHALLENGES

Using a term such as non-state actors risks transforming the analysis of very concrete issues into a purely academic exercise, detached from the sometimes harsh realities and often very practical dilemmas that arise. In order to avoid such a sanitizing effect, it will be instructive if we bear in mind some case studies which illustrate the ways in which non-state actor-related issues have arisen in international human

¹⁰ For the text of the draft code, work on which was effectively, but not formally, abandoned in 1983 under pressure from the Reagan Administration, see Draft United Nations Code of Conduct on Transnational Corporations, UN doc. E/1983/17/Rev.1 (1983). For a review of this process and its aftermath see Peter Muchlinski, 'Attempts To Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Menna T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000) 97.

¹¹ See generally Philip Alston, 'Peoples' Rights: Their Rise and Fall' in P. Alston (ed.), *Peoples' Rights* (Oxford, Oxford University Press, 2001) 259, at 270–73.

rights law. Four different types of situation are not far below the surface of most of the analyses that are undertaken in the Chapters contained in this volume.

A. Is there Freedom of Speech in a Private Shopping Centre?

The first case study concerns a case brought under the European Convention on Human Rights involving a private shopping centre in which local residents seek to exercise their right to freedom of speech by collecting signatures on a petition.¹² The issue in question is a matter of considerable importance to the residents of the town, but does not directly concern the owners of the Town Centre, as the area is known. A range of public services such as the police station, the public library, and the health and social services centres are all located either in or very close to it. The owners of the shopping centre insist, however, that it is private property and that permitting citizens to gather signatures would violate their 'stance on all political and religious issues [which] is one of strict neutrality'.¹³ They are supported by the United Kingdom government which rejects the claim that such gathering places for the citizenry can be considered to be 'quasi-public' land, a designation which might be considered to trigger human rights obligations.¹⁴ The European Court of Human Rights upholds the right of the private owners and dismisses the free speech claim brought by the citizens' group, thus giving strong reign to the notion that human rights do not run in the private sphere.¹⁵

B. If the United Nations Administrators a Territory, is it Bound by Human Rights?

A second, generic, case study involves forces sent under United Nations auspices to take control of a territory after the government has collapsed, fled, or been forced out of office as a result of internationally endorsed measures. The forces take directions from a UN civilian administrator and are subject to exclusive United Nations command. In seeking to establish law and order in a hostile environment they promulgate a range of orders which are not in compliance with international human rights law but which many observers feel are justified under the circumstances. When criticized, UN officials point out that the UN is not a state, and does not have the capacity to become a party to the International Human Rights Covenant, and that it cannot therefore be bound by specific human rights requirements.

A variation on the same theme is illustrated by the position taken in relation to human rights obligations by the International Monetary Fund, and to which various other international organizations would probably be happy to subscribe if they

¹² *Appleby and Others v. United Kingdom*, Application no. 44306/98, 6 May 2003.

¹³ *Ibid.*, para. 16.

¹⁴ *Ibid.*, para. 38.

¹⁵ For an excellent critique of this case see Oliver Gearty, 'What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law', 17 *Canadian Journal of Law and Jurisprudence* (2004) 61.

could. Human rights treaties are addressed to states; international organizations are not permitted to become parties; they were not involved in any way in the drafting, they do not and cannot report to the relevant treaty bodies, and nor can they participate in electing the expert members. Because of the importance of maintaining a workable division of labour within the international system it must be for the human rights bodies to promote and seek to uphold human rights and for the more functionally oriented agencies to do what they, in turn, have been mandated to do. If the governments of the world had wanted all international agencies to have a human rights mandate they would have given them one or would do so now. But they have chosen not to, and the conclusion is that the relevant agencies are, for these purposes at least, non-state actors upon whom human rights obligations do not and cannot fall directly.

C. Are there any Human Rights-Based Constraints on the Actions of Private Security Contractors?

The third case study addresses the role of private contractors in the reconstruction of Iraq following the invasion in 2003. A starting point is to acknowledge that, although Iraq has been the best publicized of the cases in this area, it is not the first and will not be the last, since the 'privatized military industry has been estimated at US\$100 billion in annual global revenue'.¹⁶ In Iraq, the number of contractors working as civilian security guards is agreed to be between 15,000 and 20,000. The roles they play range 'from handling military logistics and training the local army, to protecting key installations and escorting convoys'.¹⁷ It has been reported that their conduct 'more and more [gives] the appearance of private, for-profit militias'.¹⁸ According to other reports some of these civilian contractors, who were working as translators and interrogators, were deeply implicated in the torture and humiliation of inmates in the Abu Ghraib prison. A secret report prepared for the U.S. military, but subsequently leaked, recommended disciplinary action for those employees.¹⁹

But the issues go much further than those well publicized incidents. As a recent report noted: 'Stressed and sometimes ill-trained mercenaries operate in Iraq's mayhem with apparent impunity, erecting checkpoints without authorisation, and claiming powers to detain and confiscate identity cards'.²⁰ Security contractors who are asked to carry out tasks normally undertaken by public authorities, be they police or military, are in a position to infringe dramatically on the rights of the citizens

¹⁶ Peter Singer, 'Warriors for Hire in Iraq', *Salon.com*, 15 April 2004, at <http://www.brook.edu/views/articles/follows/singer20040415.htm>.

¹⁷ Peter Singer, 'Outsourcing the War', *Salon.com*, 16 April 2004, at <http://www.brook.edu/views/articles/follows/singer20040416.htm>.

¹⁸ David Barrow, 'Security Companies: Shadow Soldiers in Iraq', *New York Times*, 19 April 2004, p. 1.

¹⁹ Report by Major-General Antonio Taguba, at <http://www.globalsecurity.org/security/issu/iraq/attack/law/2004/0430orture.htm>, p. 48.

²⁰ 'The Baghdad Boom: Mercenaries', *Economist*, U.S. Edition, 27 March 2004, p. 25.

whom they are, in effect, being called upon to police. The situation is thus about as close as one could possibly get to replicating all the elements that underpin the classic doctrine of state responsibility for human rights violations. And yet, the private nature of the forces involved would argue, according to classical international law theory, that there is no human rights accountability. Rather than looking at the individual contractors or the transnational corporations which employ them, the response is that only one or other of the relevant governments can be held to account.

The principal problem is that the legal situation of the contractors, and the means by which they might be held accountable for human rights breaches, remain very unclear. Under an order issued by the Coalition Provisional Authority in 2003, renewed in June 2004, and the content of which the 'sovereign' Iraqi Government was requested to renew or extend for the period following 30 June 2004, all 'Contractors', 'Private Security Companies', and 'International Consultants' are granted immunity from 'Iraqi legal process' with respect to all acts and omissions committed. This would include serious violations of human rights standards. While their home state governments could opt to subject them to their home jurisdiction for crimes committed, there is no obligation to do so. The very first preambular paragraph of the Order signed by Paul Bremer notes that it is being issued in accordance with 'the laws and usages of war, and consistent with relevant U.N. Security Council resolutions...'²¹

While the private contractors could be charged with war crimes under international law, this is a relatively high threshold to meet and will not cover a very wide range of human rights violations that might be committed in their daily work. Human Rights Watch has noted that there are various U.S. Federal laws under which contractors could be prosecuted,²² and indeed the Center for Constitutional Rights filed a lawsuit in June 2004 in a U.S. Federal Court under the Alien Tort Claims Act and the Racketeer Influenced and Corrupt Organizations Act (RICO).²³ Nevertheless, *The Economist* has observed that 'the standards of proof required by a American court are unlikely to be met in Iraq—or in any other war zone, for that matter'.²⁴ In response to the fear that these contractors have been permitted to operate within a legal vacuum, a group of Democrats in the U.S. Senate has called upon the Pentagon to 'adopt written guidelines, with supporting legal justification, for the rules of engagement security contractors should follow'.²⁵ But such guidelines were actually being sought by the security companies before that initiative and, according to reports, an initial draft would give the contractors 'the right to detain

civilians and to use deadly force in defence of themselves or their clients'.²⁶ The bottom line might still be a set of guidelines that lie beyond the reach of either United States or international courts.

D. What Can be Expected of a Transnational Corporation in a Situation in which it is a Dominant Actor?

The fourth and final case study, concerning transnational corporations, is explored in some depth in recognition of the centrality of this issue to a number of the Chapters that follow in this volume. It concerns the Shell Oil Company and its operations in Nigeria. In the early 1990s the Movement for the Survival of the Ogoni People, led by a well known playwright Ken Saro-Wiwa, protested against environmental damage caused by the activities of the oil companies, and in particular Royal Dutch/Shell, in Ogoniland, an oil-rich state whose people lived in dire poverty. In response, Shell 'acknowledged frequent spills but has said the Ogoni movement exaggerated their impact'. The protesters also demanded that a fairer share of Nigeria's oil wealth should be spent in Ogoniland. The response by the military regime was to mount 'a kind of scorched-earth campaign against the Ogoni, burning villages and committing murders and rapes', and to declare that the death penalty would be carried out against anyone who interfered with efforts to 'revitalize' the oil industry. In November 1995 Saro-Wiwa and eight other protesters were executed.²⁷

In March 1996 a complaint was submitted to the African Commission on Human and Peoples' Rights alleging that a consortium consisting of a Nigerian state-owned oil company and Shell had 'exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways... [caused] numerous avoidable spills in the proximity of villages [resulting in] serious short- and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems'.²⁸ The complaint also alleged that the government had 'condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies'.²⁹ Although the Commission did not publish its response to the complaint until 2002, it sent an investigative mission to Ogoniland in March 1997 and kept the matter under active review in the meantime.

Non-state actors were among those bringing pressure to bear on Shell. The Body Shop launched a campaign under the headline 'Someone's Making a Killing in

²¹ Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, doc. CPA/ORD/27 June 2004/17, at http://www.cpa-iraq.org/regulations/2004/06/27_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

²² Human Rights Watch, Private Military Contractors and the Law, at <http://hrw.org/english/docs/2004/05/05/iraq8547.htm>.

²³ See text accompanying note 53 below.

²⁴ 'Dangerous Work: Private Security Firms in Iraq', *Economist*, 10 April 2004, pp. 26–27.

²⁵ David Barstow, 'The Struggle for Iraq: The Contractors', *New York Times*, 9 April 2004, p. 1.

²⁶ Barstow, note 18 above.

²⁷ Howard French, 'Nigeria Executes Critic of Regime, Nations Protest', *New York Times*, 11 November 1995, p. 1.

²⁸ African Commission on Human and Peoples' Rights, Decision Regarding Communication 155/96 (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*), 27 May 2002, Case No. ACHPR/COMM/A04/4/1. At <<http://www.unm.edu/humants/aftrca/comcases/allcases.html>>, para. 2.

²⁹ *Ibid.*, para. 3.

Nigeria'. Underneath it was a picture of a petrol pump nozzle looking like a smoking gun. The message about the role of the oil companies was clear but the private enterprise messenger was unusual.

In 1996 Shell produced a 'Plan for Ogoni' in which it committed itself to cleaning up oil spills and underwriting community development. In 1999 Human Rights Watch (HRW) produced a lengthy report which noted allegations that the company had collaborated with the military regime in suppressing protests and violating human rights on a significant scale. 'A document alleged to be a leaked government memorandum from 1994 implicated Shell in planned "wasting operations" by the Rivers State Internal Security Task Force, stating that the oil companies should pay the costs of the operations'. The report also noted that detained protesters had 'alleged that they were detained and beaten by Shell police'.³⁰

HRW used the occasion of this report to spell out a long list of demands directed to the various international oil companies operating in Nigeria, but Shell was singled out for a range of specific recommendations which throw into sharp relief the authors' vision of the appropriate limits of human rights-friendly corporate responsibility. Among the recommendations of general applicability were calls to: develop guidelines on making or maintaining investments in or withdrawing from countries where there is a pattern of ongoing and systematic violation of human rights; adopt explicit company policies in support of human rights; establish procedures to ensure that company activities do not result in human rights abuses....

It was explicitly suggested that Shell should:

... call for and cooperate with an independent judicial inquiry into the situation in Ogoni, including the role of Shell staff and contractors, as well as the security forces, in past human rights violations ...
 ... call on the Nigerian government to allow freedom of assembly, association and expression, in particular with respect to grievances directed against the oil industry ...
 ... call on the Nigerian government to release unconditionally all those detained for exercising their rights ... and to ensure fair and prompt trials before independent tribunals for all those charged with criminal offences ...
 ... review programs of community assistance to ensure that development projects are planned by people who are professionally trained, that all members of communities can participate in devising development plans ...
 ... develop and publicize policies to provide compensation to victims of human rights abuse committed by the Nigerian security forces or oil company private security ... Consider establishing independently and professionally administered funds for this purpose ...
 ... arrange independently funded verification, by national and international nongovernmental organizations and other appropriate bodies, of compliance by the company with international human rights and environmental standards.

³⁰ Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York, 1999).

In 2003, after riots and clashes with security forces around the city of Warri in the Niger Delta in which scores of people were killed, HRW addressed itself to both the Nigerian government and the multinational oil companies in calling for measures to prevent further violence. The companies, including Shell, were urged 'to publicly state that the response of government security forces must not be disproportionate to the threat; that they should only resort to force as absolutely necessary in accordance with international standards; that their operation should be conducted in a manner that ensures respect for due process and fundamental human rights; is focused on arresting and prosecuting the actual perpetrators rather than retaliating against whole communities; and any allegations of human rights violations should be thoroughly and impartially investigated and the perpetrators brought to justice'.³¹

The basis upon which HRW invoked the responsibility of these corporations was their approval of the Voluntary Principles on Security and Human Rights in the Extractive Industries,³² which had been adopted in 2000 under the auspices of the U.S. and U.K. governments, in conjunction with concerned companies and human rights NGOs. The Principles state, *inter alia*, that '[i]n their consultations with host governments, Companies should take all appropriate measures to promote observance of applicable international law enforcement principles; urge investigations of violations; and actively monitor the status of investigations and press for their proper resolution'. Highlighting the complexity of seeking to hold oil companies account in this way was the fact that even before HRW had sent its letters, the three big foreign oil companies had announced the shutdown of their operations and the evacuation of their staff.³³ In March 2004 Shell indicated that it was planning to cut a significant percentage of its jobs in Nigeria, close various offices, and move more of its drilling activities offshore. These developments meant, as *The Financial Times* put it, 'that the company will need less land-based infrastructures and is likely to experience fewer problems with community protests'.³⁴

This final case study, which could readily have been concerned instead with a range of other transnational corporations operating either in the extractive industries or in a wide range of others such as apparel or footwear manufacturing, serves to raise the key issues with which those wanting to apply human rights standards in their fullness to private entities need to grapple. They include the following. Are there any fundamental differences in the nature of the human rights obligations that fall upon governments and those that fall upon corporations? If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their 'spheres of influence', as the Global Compact puts it, how

³¹ Human Rights Watch, 'Letter to Shell Petroleum Development Company of Nigeria', 7 April 2003, at <http://www.hrw.org/press/2003/04/nigeria040703shell.htm>.

³² Available at <http://www.state.gov/g/drl/rls/2003/1.htm>.

³³ Shell, Chevron and Elf all Quit Nigerian Delta' 24 March 2003, at http://www.sirimedia.com/artman/publish/article_466.shtml.

³⁴ M. Peel, 'Nigerian Moves Come at Time of Turbulence for Shell', *Financial Times*, 22 March 2004, p. 25.

are the latter to be delineated? Does Shell's sphere of influence in the Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the rights to physical integrity and due process? But if the private sphere is distinguished from the public sphere by virtue of its emphasis on autonomy, risk-taking, entrepreneurship, and the rational pursuit of self-interest, what are the consequences of saddling it with all of the constraints, restrictions, and even positive obligations which apply to government? Are all of the demands articulated by Human Rights Watch reasonable under the circumstances? If many or most of them are, to what extent do similar obligations apply to smaller corporations, and at what point can a corporation plead that although it does not have the resources to fulfil such obligations it is nevertheless in the interests of all concerned that its business enterprise should proceed? And what are the limits of concepts such as complicity to which Human Rights Watch and the International Council on Human Rights Policy³⁵ have attached such importance?

4. DEFINING NON-STATE ACTORS

Although much discussed in the literature, definitions of the concept of non-state diverge widely.³⁶ Indeed the concept is often left undefined. As Kamminga notes below, the same is true of the term non-governmental organizations and there are some authors who would define both categories as embracing multinational corporations, national liberation movements, and voluntary agencies.³⁷ A recent 'Report of the Panel of Eminent Persons on United Nations—Civil Society Relations' bravely begins with a glossary of terms but then goes on to concede that '[t]here is considerable confusion surrounding [the term NGO] in United Nations circles'.³⁸ NGOs are then described mainly in terms of the roles accorded them within the UN, while civil society is defined very broadly but in a way which excludes the private and public sectors. The problematic nature of such attempts at definition is illustrated by the description of the private sector which notes that although 'the category includes small and medium-sized enterprises, some of these are supported by non-governmental organizations or are cooperatives and may also have characteristics closer to civil society'. It is perhaps noteworthy that, while the report does use the term non-state actors, it does not attempt to define it, although it

³⁵ *Beyond Voluntarism*, note 7 above, 121–42.

³⁶ Richard A. Higginot *et al.* (eds.), *Non-State Actors and Authority in the Global System* (2000); Bas Arts, Maat Noortmann, and Bob Reinhold (eds.), *Non-State Actors in International Relations* (2001); Panel, 'Human Rights and Non-State Actors', 11 *Pace Int'l L. Rev.* (1999) 205; 'Non-State Actors and the Case Law of the Yugoslavia War Crimes Tribunal', 92 *Am. Soc'y Int'l L. Proc.* (1998) 48; Beards, 'International Security: Multiple Actors, Multiple Threats—Countering the Threat Posed by Non-State Actors in the Proliferation of Weapons of Mass Destruction', 92 *Am. Soc'y Int'l L. Proc.* (1998) 173; Fattori, 'State Responsibility in a Multiactor World: State Responsibility for Human Rights Abuses by Non-State Actors', 92 *Am. Soc'y Int'l L. Proc.* (1998) 299.

³⁷ Kamminga, Chapter 3 below, n. 7.

³⁸ *We the Peoples: Civil Society, the United Nations and Global Governance*, UN doc. A/55/817 (2004), p. 13.

seems to include, in addition to civil society, at least firms, parliamentarians, and local authorities.³⁹ The latter two are odd inclusions since they would normally be included in the public sector.

For some groups, the term non-state actors has assumed a specific meaning within their own context. The International Campaign to Ban Landmines, for example, uses the term to refer to 'armed opposition groups who act autonomously from recognised governments'. They thus encompass 'rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, and *de facto* territorial governing bodies'.⁴⁰ About 190 such non-state actors have been formally recognized on this basis.⁴¹ While this is an understandable approach in the arms control area, such a definition will not get us very far for general purposes. Similarly the European Commission defines non-state actors as groups which: are created voluntarily by citizens; are independent of the state; can be profit or non-profit-making organizations; have a main aim of promoting an issue or defending an interest, either general or specific; and, depending on their aim, can play a role in implementing policies and defending interests. In trying to be more specific the EU indicates that they can include: 'non-governmental organisations (NGOs); trade unions, employers' associations, universities, associations of churches and other confessional movements, cultural associations, etc.'⁴²

Another definition includes 'all those actors that are not (representatives of) states, yet that operate at the international level and are potentially relevant to international relations'.⁴³ The last of the criteria requires an actor to be sizeable, have a substantial and multinational constituency, to have been granted at least informal access by governments and intergovernmental organizations to political arenas, and to show that it is 'consequential to international politics'.⁴⁴ Although Bas Arts seems to adopt a fairly broad interpretation of his criteria, this definition clearly has a potentially quite restrictive set of requirements and one which, albeit not explicitly, seems tailored to fit fairly traditional patterns of international relations scholarship. It is unlikely for example that many of the Landmine Campaign's 190 non-state actors would qualify.

Perhaps the most comprehensive definition put forward in the scholarly literature is that crafted by Josselin and Wallace. It includes all organizations:

- largely or entirely autonomous from central government funding and control; emanating from civil society, or from the market economy, or from political impulses beyond state control and direction;

³⁹ *Ibid.*, p. 25.

⁴⁰ <http://www.icbl.org/wg/nsa/nsa brochure.html>.

⁴¹ This does not include farmers, drug cartels, or many of the smaller loosely organized non-state actors. Margaret Busé, 'Non-State Actors and Their Significance', at http://maic.jmu.edu/journal/5/3/features/maggie_buse_nsai/maggie_buse.htm.

⁴² The Commission estimates that 20% of EU development assistance is channeled through non-state actors. 'Participation of non-state actors in EC development policy', note 3 above, p. 1.

⁴³ Bas Arts, *Non-State Actors in Global Governance: Three Faces of Power*, Max Planck Project Group on Common Goods, Bonn, Working Paper 2003/4, p. 5.

⁴⁴ *Ibid.*

- operating as or participating in networks which extend across the boundaries of two or more states—thus engaging in ‘transnational’ relations, linking political systems, economies, societies;
- acting in ways which affect political outcomes, either within one or more states or within international institutions—either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities.

Several characteristics of this definition are worthy of note. First, it is very wide-ranging and has the potential to accommodate a hugely diverse range of actors. Secondly, the focus is on those actors whose activities have a transnational dimension. Actors engaged solely at the national level in one state or another are not part of the definition. Thirdly, there is no necessary commitment to particular values or principles, as has often been suggested should be part of the appropriate definition of a human rights NGO (non-governmental organization). Fourthly, the definition is endlessly debatable, as the very first criterion illustrates: what level of governmental funding, support, or encouragement might disqualify a group as a non-state actor? Fifthly, the category is so open-ended that it will have limited utility as a basis for making specific policy prescriptions in the context of international law or the appropriate approaches to be followed by international organizations.

There have also been some official attempts in the context of the work of international organizations to come up with a definition of the term. Thus in the Coronou Agreement between the EU and ACP states, in which a variety of specific roles is accorded to non-state actors, the term is defined as encompassing three groups: the private sector; ‘economic and social partners, including trade union organisations’; and ‘Civil Society in all its forms according to national characteristics’.⁴⁵ This wholly benign definition contrasts dramatically with the usage which has evolved in the context of the UN Security Council. This is best illustrated by reference to a 2004 resolution dealing with non-state actors in the context of efforts to contain the spread of nuclear, chemical, and biological weapons. Unusually, the resolution actually contains a definition of the term, albeit said to be for the purpose of this resolution only. It is any ‘individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution’.⁴⁶ Further elucidation is provided by a later reference to the ‘threat of terrorism and the risk that non-State actors such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery’. The so-called ‘Resolution 1267 Committee’ oversees the implementation of sanctions imposed on ‘individuals and entities belonging or related to the Taliban, Usama Bin Laden and the Al-Qaida organization’.⁴⁷

⁴⁵ Coronou Agreement, note 3 above, Article 6(1).

⁴⁶ Security Council res. 1540 (2004), first preambular para.

⁴⁷ Security Council res. 1267 (1999), para. 6. The Committee’s work is described at <http://www.un.org/Docs/scsl/committees/1267/>.

Resolution 1373 (2001) was adopted in response to the attacks of 11 September 2001 in the United States and applies to ‘entities or persons involved in terrorist acts’.⁴⁸ The conclusion then is that the term non-state actors has come to be associated, at least in this central United Nations context, with terrorist groups. This is further evidence of the extent to which the meaning attributed to the phrase has become heavily context-dependent.

For present purposes, therefore, it seems more helpful to identify some of the key factors which are propelling non-state actors to greater prominence within the international human rights regime. They include, but are by no means limited to, the following:

Privatization. At the national level, the tidal wave of privatization that was unleashed in the 1980s has led, in many countries, to private actors being given responsibility for arrangements relating to social welfare services, prisons, asylum processing, schools, adoptions, health care provision for the poor, the supply of water, gas, and electricity, and a great many other functions previously provided or overseen by public actors.

Capital mobilization and private foreign investment flows. Globalization—driven by deregulation, the liberalization of trade, expanded opportunities for foreign investment, and the active promotion by the governments of industrialized countries and international agencies of a free enterprise economic environment—has facilitated an immense expansion since the 1970s in the wealth and power of transnational corporations. In terms of revenues, the 2003 sales of the world’s biggest company (Wal-Mart at US\$256 billion) made it larger than the economies of all but the world’s thirty richest nations.⁴⁹ Its sales on a single day alone are greater than the annual Gross Domestic Product (GDP) of thirty-six countries in the world. In Mexico, for example, it has become the largest private employer, accounts for 2 per cent of the country’s GDP, and is credited with single-handedly reducing the national inflation rate.⁵¹

Trade liberalization and its employment consequences. In 1994 the ILO began a process of reinvigorating and adapting its approach to international labour standards. It culminated in the adoption of the International Labour Organization’s (ILO) 1998 Declaration on Fundamental Principles and Rights at Work. In launching the process the Director-General of the ILO identified the growing role of non-state actors as one of the principal challenges flowing from globalization. The problem for the ILO, he noted, lies in ‘the “state-centred” nature of ILO standards, in other words, the fact that the obligations arising from Conventions apply directly only to States’.⁵²

⁴⁸ Security Council res. 1373 (2001), para. 2(a).

⁴⁹ Tim Weiner, ‘Wal-Mart Invades, and Mexico Gladly Surrenders’, *New York Times*, 5 December 2003, A1 at A9.

⁵⁰ Jerry Useem, ‘One Nation Under Wal-Mart’, *Fortune Magazine*, 3 March 2003, at http://www.ufe.wv135.org/~news/ln_under_wm.htm.

⁵¹ Weiner, note 49 above.

⁵² *Defending Values, Promoting Change: Social Justice in a Global Economy: An ILO Agenda*, Report by the Director General for the International Labour Conference 81st Session, 1994, p. 56.

The expanding horizons of multilateral institutions. The United Nations and many other international organizations were recognized as long ago as the early 1950s as enjoying a form of international legal personality. But the implications of this status have changed radically since the end of the Cold War as these organizations and agencies are called upon to exercise a wide range of governmental functions in areas ranging from Kosovo and East Timor, to Afghanistan, and Iraq. Along with this dramatic expansion of functions have come many questions about the relationship between international human rights and humanitarian law and the personnel operating under the relevant international mandates.

The unmaking of civil society. Until the early 1990s the term non-governmental organizations seemed more than adequate to describe the role played by voluntary organizations in relation to the international community. Since then the opening up of all societies in response to global political changes and to the pressures and opportunities of globalization has created vast new opportunities. Civil society organizations today often have multi-million dollar budgets, employ very large staffs, and are engaged in a large number of countries. Their functions are by no means confined to issue advocacy. Many of them are highly operational and exercise great leverage in communities in which they oversee the expenditure of huge amounts of aid, provide a wide range of basic services, or implement major projects in the fields of environment, disarmament, and much else.

The privatization of security provision. While the 1980s saw widespread condemnation of the role of mercenaries in a range of different conflicts, the 2000s are seeing a broad and potentially almost unlimited role being accorded to private contractors in conflict situations. In Iraq for example a class action lawsuit was brought in the US Federal Court in June 2004 against two corporations (Titan International and CACI International) accused of having conspired with U.S. officials to 'humiliate, torture and abuse persons detained' in Iraq. The contractors provided a range of services to the U.S. government, including carrying out prisoner interrogations, a role they had also played in Guantánamo.⁵³

The changing nature of conflicts. Although humanitarian law has always sought to reach out to all of the parties to armed conflicts, groups and individuals basing themselves upon the framework of international human rights law were much more way of following suit. In recent years, however, this has changed significantly. Perhaps the best illustration of this is the work of the Special Representative of the UN Secretary-General for Children and Armed Conflict. Basing himself to a significant extent on the Convention on the Rights of the Child, as well as the Geneva Conventions, the Special Representative has in recent years sought and obtained commitments from groups as diverse as the Sudan People's Liberation Movement, the Revolutionary United Front in Sierra Leone, the Liberation Tigers of Tamil Eelam in Sri Lanka, and the Revolutionary Armed Forces of Colombia.⁵⁴

⁵³ The text of the class action lawsuit is available at http://www.ccr-ny.org/v2/legal/september_11th/docs/AL_Rawit_v_Titan_Complaint.pdf

⁵⁴ <http://www.un.org/special-rep/children-armed-conflict/English/Commitments.html>.

In all of these contexts the result of recent developments has been to highlight and/or expand the *de facto* roles played by non-state actors in national and international affairs. But the challenge confronting the international human rights regime in particular, and international law in general, is to establish a framework which acknowledges the rights and responsibilities of these diverse actors, while at the same time protecting the principles upon which the regime is based. A refusal to recognize and accommodate the new realities in relation to non-state actors will only serve to marginalize the existing arrangements and underscore the need to bypass it in devising future arrangements. An international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or of ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.

5. THE RESPONSE OF MAINSTREAM INTERNATIONAL LAW TO THE EMERGENCE OF NON-STATE ACTORS

By the standards of formal international law the question of the status enjoyed by non-state actors is a remarkably straightforward one. Indeed the issue is almost determined before the question can be asked as a result of the very terminology long favoured by international lawyers—the phrase 'non-state actors' makes it abundantly clear that, as far as international law is concerned, the key actors are divided into two categories: states and the rest. And what distinguishes the motley crew that make up the rest is overwhelmingly, if not entirely, the very fact that they are not states and can never aspire to be such. But the concept of international legal personality, and the acknowledgement by the International Court of Justice in its famous comment in 1949 that the 'subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community',⁵⁵ holds open the possibility that the categories might be meaningfully reconsidered in time.

As a result, international lawyers have long debated the circumstances under which entities other than states might also be characterized as 'subjects' of international law. The bottom line for the great majority of commentators is that while various actors have been accorded some form of international legal personality for specified purposes, this does not justify the conclusion that international law should treat them as subjects, and thus place them on a par, for at least some limited purposes, with states. In this sense, the term 'subjects' has been treated as a term of art in international law and one which can meaningfully be contrasted with the 'objects' of international law. Indeed the latter category can be defined not only with flexibility but even with generosity since no particular significance was thought to attach to the concept. Any entity could be deemed an 'object' as long as states chose

⁵⁵ Reparations for Injuries Case, 1949 ICJ Rep. 178.

to treat it as such. The phrase non-state actors, on the other hand, conveniently avoids confronting these terminological debates. From an international legal perspective the term 'actor' is a category seen as quintessentially derived from political science and thus, while carrying useful descriptive power, is (fortunately) unable to capture or convey any significant sense of legal capacity or personality.

International law textbooks continue to be remarkably faithful to this general line of thinking despite its ever-diminishing capacity to describe the evolving reality. This is not the place to enter into a systematic review of the shortcomings of the traditional reasoning but suffice it to say that the exclusionary nature of the conclusions reached almost always reflected the application of somewhat circular tests which were more or less intentionally designed to ensure a highly restrictive outcome. One example is enough. Writing at the beginning of the 1990s in a very lengthy international law textbook which emerged from a major UNESCO-sponsored endeavour, Bin Cheng defined international legal personality as 'the capacity to bear rights and obligations under international law'. It was an eminently reasonable definition but the set of criteria which he then laid out gave a very clear indication of just what types of entity might be able to satisfy the necessary requirements. To ascertain if an actor has international personality all we have to do is to ask if it possesses any duties or rights under international law:

Concrete examples include the right to send and receive diplomatic missions ('rights of legation'), to conclude agreements ('right of treaty'), the right... to engage in legitimate armed conflicts; the right to a maritime flag; the right of diplomatic protection of nationals; the right to bring an international claim, to sue and be sued on the international plane; the enjoyment of sovereign immunity within the jurisdiction of other States; and the right to be directly responsible for any breach of one's own legal obligations... without forgetting above all acknowledged territorial sovereignty over a portion of the surface of the earth.⁵⁶

Any entity can aspire to international personality, but it will need to look an awful lot like a traditional state in order to meet the requirements. Lest it be thought that Bin Cheng's approach reflects a pre-Cold War analysis, it is instructive to compare the response of international lawyers and political scientists in response to developments in international relations over the past fifteen years or so. The great majority of political scientists would endorse the view that since the end of the Cold War, 'state power [has been] in retreat across the globe and [there is] increasing evidence of the influence of transnational private actors in international and domestic politics'.⁵⁷ It follows that analytical frameworks, even for the realists, have to be expanded to take account of a wider range of actors than states. But do normative frameworks need to be expanded as a result?

⁵⁶ B. Cheng, 'Introduction to Subjects of International Law', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Paris, UNESCO, 1991) 23 at 38.

⁵⁷ Josselin and Wallace, 'Non-State Actors in World Politics: A Framework', in Daphné Josselin, and William Wallace, *Non-State Actors in World Politics* (Houndmills, Palgrave, 2001) 11–12; for a detailed bibliography tracing the relevant international relations and political science literature see Arts, note 43 above, 41–53.

International lawyers have been much less favourably disposed towards such heretical thinking than political scientists or economists. One exception is Michael Reisman who argues that the state-dominated 'international decision process' embodied in the UN Charter has been replaced in recent years by a process in which the lawfulness of international actions is assessed, be it retrospectively or prospectively, by a group consisting not only of governments but also of 'inter-governmental organizations, non-governmental organizations and, in no small measure, the media'. In his view this new 'international legal process is more able than constitutive structures of the past to provide remedies for grave human rights violations'. But Reisman regrets the limitations of the media and the lack of representativeness of some of the NGOs, and ends by calling upon international lawyers 'to improve the world constitutive process so that it can address humanitarian and other issues and thus obviate unilateral action'.⁵⁸ While more recent events in relation to the invasion of Iraq by a 'coalition of the willing' do little to encourage a sense that a more improved constitutive process would lead to better decision-making or would eliminate the resort to unilateral action, his analysis is nonetheless amenable to a greatly enhanced role for a wide range of actors. Notably, however, he does not mention transnational corporations as one of the players in the new constellation.

The great majority of international lawyers, however, have been much less sanguine about the possibility of expanding the range of key actors given a place at the top table. Indeed, most of them have shown a marked reluctance to contemplate any fundamental rethinking of the role of the state within the overall system of international law. Various explanations might be suggested: an intrinsic lack of imagination; a natural affinity with the status quo; a deeply rooted professional commitment to internationalism, albeit one premised on the continuity of the system of sovereign equality; a reluctance to bite the hand that feeds; or simply the conviction that respect for that system has taken a great deal of time and human suffering to achieve and that it continues to offer a better prospect than any alternative that has so far been put forward.

It is instructive to consider a cross-section of the responses. A good illustration of affection for the status quo is to be found in the approach of a leading international lawyer in the context of a symposium which sought to explore the implications for the concept of statehood of 'increasing tendencies towards pan-European, international—and, indeed, supranational—institutionalism'.⁵⁹ Asked to reflect on the issue, Ian Brownlie wrote dismissively: 'Seeking signs of the "rebirth of statehood" is more than a little premature: there is no evidence that the State has died. It is an intellectual fashion to preach the end of the State and to attack sovereignty. But such iconoclasm has had no impact on the real world.' The fact

⁵⁸ Michael Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *European Journal of International Law* (2000) 3, at 18.

⁵⁹ Malcolm Evans, 'Statehood and Institutionalism in Contemporary Europe: An Introduction', in M. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Ashgate, 1997) 1.

remains that since 1945 the existence of states has provided the basis of the legal order.⁶⁰

He went on to identify two culprits. The first consists of certain (unnamed) powerful states which encourage talk of the demise of sovereignty in order to use it as a justification for projecting their own power. The second set of culprits are the political scientists who use their 'repertoire of facile abuse' to attack the concept of the state.⁶¹ Insofar as it was useful to ask whether there might be alternative approaches to the traditional state-centrism, Brownlie suggested that those could only be the 'alternative models familiar to international lawyers: the condominium, trusteeship, and federation'. Since they tend to be both 'complex and transitional in purpose' they offer no real solace and so we are back to the state.⁶²

Other international lawyers are more willing to comprehend the novelty of the challenges facing the international system but equally convinced that the state system must remain the bedrock of any workable approach. Richard Falk is an example of one who has long challenged the received wisdom in most aspects of the field and who has characterized 'global civil society as a bearer of a hopeful and progressive vision of the future of world order'.⁶³ Indeed for Falk and his collaborators in the World Order Models Project, transnational civil society holds the key to the future.⁶⁴ Firmly committed to the promotion of shared values in terms of peace, ecological awareness, and human rights, and animated by shifting political identities which transcend territorial boundaries, these groups will play an increasingly central role in overall governance structures. Ultimately, to the extent that 'global civil society becomes a reality in the imagination and lives of its adherents, the reality of territorial states will often recede in significance even though it may never entirely disappear'.⁶⁵

But when it comes to the question of whether multinational corporations, the single most relevant category of non-state actors, currently have either moral or legal obligations, Falk answers in the negative. They have no 'established moral obligations beyond their duties to uphold the interests of their shareholders'; the efforts they make to 'improve their public image in relation to human rights are a matter of self-interest that does not reflect the existence or acceptance of a moral obligation'; and even long-term compliance with the standards contained in voluntary codes of conduct would take a long-time to 'ripen into a moral obligation'. He concedes that a 'framework of international legal obligations' for corporations would help protect human rights but applies strong caveats in that respect. Such a framework would

⁶⁰ Ian Brownlie, 'Rebirth of Statehood', *ibid.*, 5. ⁶¹ *Ibid.* ⁶² *Ibid.*

⁶³ Richard Falk, 'Democratizing, Internationalizing, and Globalizing', in Y. Sakamoto (ed.), *Global Transformation: Challenges to the State System* (Tokyo, United Nations University, 1994) 475, 488.

⁶⁴ E.g. Richard Falk, 'The World Order Between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions', in Daniele Archibugi and David Held (eds.), *Cosmopolitan Democracy* 163 (Cambridge, Polity Press, 1995).

⁶⁵ Richard Falk, *On Human Governance: Towards a New Global Politics* (Cambridge, Polity Press, 1995) 212.

need to be widely endorsed at both the regional and international levels, by states rather than corporations, and in any event they would be likely in the short-term to 'accentuate human suffering' because international standards would reduce the competitiveness of the poorest countries.⁶⁶ Presumably he has in mind the much-contested case of labour rights,⁶⁷ rather than the charges of slavery, forced labour, and other fundamental abuses of which various corporations operating in places such as Myanmar have been accused.

Christian Tomuschat, another leading international lawyer with impeccable credentials as a human rights expert, is slightly less categorical than Falk. He emphasizes in a recent book that '[i]n human rights discourse, the State is the key actor', but by the same token he concedes that a 'concept that would visualize human rights exclusively as a burden on the governmental apparatus would be doomed from the very outset'. Lest this be taken as making a case in favour of imposing responsibilities on non-state entities, he adds that it 'does not mean that the individual as a holder of rights should concomitantly be subjected to legal duties either under domestic or international law'. His optimistic prescription is that '[g]overnments have always found ways and means to enforce [their] policies' and all that is really needed is 'that the intellectual frame of society [should condition] its practices in the field of human rights'.⁶⁸ In relation to transnational corporations he sums up the received wisdom with remarkable brevity. In response to various claims by human rights lawyers that such corporations should be subject to human rights obligations, he notes that: 'It is true that in particular in developing countries transnational corporations bear a heavy moral responsibility because of their economic power, which may occasionally exceed that of the host State. But on the level of positive law, little, if anything has materialized'.⁶⁹ In other words there is a strong moral case to be made but positive international law has not budged in the face of such amorphous pressures.

Finally, mention should be made of the law of state responsibility itself. In 2001 the International Law Commission adopted a set of final Articles on the Responsibility of States for Internationally Wrongful Acts.⁷⁰ These were approved by the U.N. General Assembly, which took note of them and commended them 'to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'.⁷¹ One of the questions that arose in the context of the drafting process was whether various developments relating to the role of non-state actors in invoking international the rules of state responsibility at the international level in areas such as human rights, foreign investment, and environmental protection,

⁶⁶ Richard Falk, 'Human Rights', *Foreign Policy*, March–April 2004, 18, at 20–22.

⁶⁷ For a survey of the literature see Dursilla Brown, *International Trade and Core Labor Standards: A Survey of the Recent Literature*, Department of Economics, Tufts University, Discussion Paper 2000–05 (2000).

⁶⁸ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford, Oxford University Press, 2003) 320.

⁶⁹ *Ibid.*, 90–91.

⁷⁰ UN doc. A/56/110 (2001).

⁷¹ General Assembly res. 56/83 (2001), para. 3.

should be reflected in the Articles. In the end, the draft goes out of its way to protect any such acquired rights by providing that the part of the Articles dealing with the content of state's responsibility 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.⁷² This provision was included even though the commentary on the Articles, as approved by the Commission, made clear that they do not 'deal with the possibility' of the invocation of responsibility' by non-state actors.⁷³ That, in other words, is a matter to be determined by the primary rules agreed to by states in whatever context and the Commentary notes that some procedures may well be available which would enable a non-state entity 'to invoke the responsibility on its own account and without the intermediation of any State'.⁷⁴

Thus, from a non-state actor's point of view, the Articles are essentially neutral in that they neither discourage nor seek to promote those trends which favour an enhanced role for non-state actors in terms of invoking state responsibility. By the same token, they very clearly leave the door open for further developments in the future. Nevertheless, the Articles have been criticized by some commentators for not having gone further. Edith Brown Weiss, in arguing that more could have been done, points to two steps that might have been taken. One would have been to confirm that non-state actors are entitled to invoke state responsibility 'if the obligation breached is owed to them or an international agreement or other primary rule of international law so provides'.⁷⁵ That step would not seem to add a great deal but it would have made the existing approach more explicit. The other step would have been to recognize that non-state actors 'of one state *may* be entitled in certain circumstances to invoke the responsibility of another state if the obligation is owed to the international community as a whole'.⁷⁶ This second step would have been more dramatic and it is not surprising that the Commission, anxious to complete work which had taken too many decades already, did not wish to provoke the fears of states with the inclusion of such an additional element.

In its subsequent work, begun in 2002, the Commission has adopted an equally cautious approach but also one which does not close the door to non-state actors in its examination of the topic of the 'responsibility of international organizations'.⁷⁷ Draft Article 2 defines the term 'international organization' as referring to 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations

⁷² Draft Articles, UN doc. A/56/10 (2001), Art. 33(2).

⁷³ The Commentary has been reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), Art. 33, para. 4.

⁷⁴ Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 *AJIL* (2002) 798, at 816.

⁷⁵ *Report of the International Law Commission on the Work of its 54th Session*, UN doc. A/57/10 (2002), chap. VIII, para. 458.

may include as members, in addition to States, other entities'.⁷⁸ The second sentence makes clear that the draft will not apply to any entity which is not composed, at least in part, by states or state organs or agencies.⁷⁹ The Commentary on the draft points out that it is designed to accommodate 'a significant trend in practice' according to which international organizations have a mixed membership including private entities. The report gives the World Tourism Organization as an example in that respect.⁸⁰

6. OUTLINE OF THE BOOK

A. The Framework for Non-State Actors

As noted at the outset, the potential scope of an analysis dealing with non-state actors is almost without limit. In certain contexts, and particularly from a political science perspective of trying to map and navigate the new terrain, a wide-ranging approach is both appropriate and necessary. But in the context of a book dealing with the ways in which the international human rights regime has sought to come to grips with the rapidly changing role of non-state actors a significantly narrower approach is called for. In particular, the most important current debate relates to the role of 'transnational corporations and other business enterprises', to use the formula agreed upon by the drafters of the Norms proposed by the UN Sub-Commission for the Promotion and Protection of Human Rights in 2003. For that reason, the majority of the contributions to this volume address the legal and practical difficulties of holding such entities to account for conduct which violates international human rights law but is not adequately dealt with by the domestic law of the state in which the entity is operating. The remaining Chapters address the case of non-governmental organizations and of a particular international organization, the International Monetary Fund.

Before focusing individually on specific actors, August Reinsch in 'The Changing International Legal Framework for Dealing with Non-State Actors' (Chapter 2 below) provides an overview of the current state of the law. He notes that the increased concern with trying to hold corporations accountable for human rights violations represents a shift in the conventional understanding of human rights principles as limitations on state power.⁸¹ Indeed, the focus on corporate behaviour may be regarded as an instance of a broader movement towards concern with the actions of non-state actors in international law. There has been a quantitative and qualitative proliferation of institutions concerned with human rights, from the more

⁷⁸ *Report of the International Law Commission on the Work of its 55th Session*, UN doc. A/58/10 (2003), chap. IV, para. 41.

⁷⁹ *Ibid.*, para. 41.

⁸⁰ *Ibid.*, para. 13.

⁸¹ August Reinsch, 'The Changing International Legal Framework for Dealing with Non-State Actors' at p. 42.

traditional treaty-based bodies to internal review mechanisms such as the World Bank's Inspection Panel.⁸²

Reinisch highlights the increased interest over the last twenty years in using voluntary codes of conduct as a means of regulating corporations. He notes, however, that United Nations efforts to formulate a comprehensive set of principles failed in the early 1980s, and that in more recent years organizations such as the OECD and the ILO have developed codes relevant to their areas of activity. A novel development has been work on codes of conduct applying to international organizations themselves and to their operations in the field, as well as to codes governing NGOs. Reinisch argues that the heightened interest in codes of conduct emerged out of the increased demands for 'good governance' made on states,⁸³ which ultimately spilled over into a concern for good governance on the part of non-state actors. The key difficulty is that codes of conduct for both corporations and international organizations do not provide for strong supervisory or enforcement mechanisms. They do, however, offer a lightning rod for external pressure and scrutiny of conduct, and may engender such responses as consumer boycotts, negative publicity, and shareholder action if public opinion is mobilized around breaches of codes to which the non-state actor has professed adherence.⁸⁴

Despite the fact that most codes lack enforcement mechanisms, there is a diverse range of national and regional laws which could be used to regulate the extraterritorial conduct of non-state actors in certain circumstances. Apart from the well known Alien Torts Claims Act in the United States,⁸⁵ there has been a revival of extraterritorial laws within the EU legal framework.⁸⁶ To the extent that there is a genuine effort by states to enforce international law through extraterritorial legislation, this may be a promising mechanism for the decentralized enforcement of international law. One dimension of this trend is a willingness to treat transnational corporations (TNCs) as 'accomplices' to human rights violations committed by states in which they operate subsidiaries.⁸⁷

Reinisch traces the changing roles of international organizations and NGOs over the last thirty years, from a situation in which they were the 'good guys', and powerful states were the 'bad guys', to a context in which international organizations are increasingly challenged in terms of their own human rights performance.⁸⁸ Despite the intellectual energy now devoted to holding non-state actors accountable, Reinisch notes that international law still lacks an adequate conception of non-state actors as subjects.⁸⁹ There is some basis for the view that human rights obligations bind legal persons as well as states, but this is an implied rather than express consequence of existing human rights treaties.

The origins of the new preoccupation with non-state actors is argued to derive from a structural change in the international legal order, with a decrease in, and partial

disappearance of, the concept of the state as a mediating factor between international law and individuals.⁹⁰ Moreover, the state's role as regulator and guarantor of human rights is diminishing due to the pervasive privatization of state functions. Tendencies towards outsourcing state regulatory functions or permitting greater degrees of self-regulation of corporate entities dovetail with the hegemony of neo-liberal economic doctrines and the accelerated mobility of finance capital.⁹¹ The information revolution may also have increased the timeliness of information about the activity of non-state actors, making human rights violations more visible and better known in real time.

A promising development in the enforcement of human rights laws is an increased willingness for regional human rights courts such as the European Court of Human Rights to hold states responsible for non-state actors' conduct on their territory.⁹² The direct accountability of non-state actors before international courts remains underdeveloped, something underlined by the International Criminal Court's lack of jurisdiction over legal persons.

B. Non-Governmental Organizations

Strong claims have been advanced in the past few years for the view that the role of NGOs, or more broadly of civil society, is indispensable in the building of a more equitable and effective international order. It has been argued, for example, that the active engagement of civil society, along with the corporate sector, 'is a critical if not imperative component in delivering policy outcomes that are timely, effective and legitimate. Creative institutional innovations are needed that connect governments, international organizations, civil society, and the corporate sector.'⁹³

Memo Kamminga⁹⁴ traces the evolution of the one non-state actor which has long been recognized by international institutions: the non-governmental organization. He begins by noting the unease of many observers about the role which NGOs have come to play in certain important international contexts. He highlights the comments by the former President of the International Court of Justice, Gilbert Guillaume, who was highly critical of the fact that NGOs played important roles in relation to the Advisory Opinion on the legality of nuclear weapons and expressed the hope in response to an NGO letter-writing campaign to the Court that governments and inter-governmental institutions would be able to 'resist the powerful pressure groups which besiege them'.⁹⁵ Others have expressed similar concerns about the excessive influence wielded by NGOs, and the complaint has been expressed in strong terms by the Bush administration and its supporters in the United States.⁹⁶

⁹⁰ See p. 77. ⁹¹ See pp. 80–2. ⁹² See pp. 83–5.

⁹³ Jan Martin Witte, Wolfgang H. Reinicke, and Thorsten Benner, 'Beyond Multilateralism: Global Public Policy Networks', at http://www.ftes.de/IFG/fig2_2000/arw/witte.html.

⁹⁴ 'The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?', Chapter 3 below.

⁹⁵ John Bolton, 'Should We Take Global Governance Seriously?', 1 *Chicago J. Int'l L.* (2000) 205 (It is no exaggeration to say that, in United Nations circles, the demands of civil society to participate in

⁸² See p. 42.

⁸³ See p. 53.

⁸⁴ See pp. 55–6, 74–5.

⁸⁵ See Steinhardt for detailed discussion.

⁸⁶ Reinisch, see pp. 62–64.

⁸⁷ See pp. 71–2.

⁸⁸ See p. 69.

⁸⁹ See pp. 76–8.

In an effort to clarify the focus of the Chapter, Kamminga seeks to define NGOs and, after noting that they are usually explained by reference to what they are not (governmental) rather than by what they are, explains the UN system for according certain degrees of status to such groups. He proceeds to see how NGOs measure up against the criteria proposed as traditional indicators of international legal personality. In relation to the capacity to conclude treaties he notes that any such right exists only under national law, if at all. His main focus is the International Committee of the Red Cross which, despite having the characteristics of a Swiss NGO, has been accorded international juridical capacity. In terms of the capacity to participate in international treaty-making he notes the case of the ILO, in which employers and workers' representatives participate in the negotiation of treaties, and then reviews the important drafting and lobbying roles that have been played by NGOs in various other treaty-drafting contexts. These include the UN Convention against Torture, the Framework Convention on Climate Change, the Landmines Convention, and the Statute of the International Criminal Court.

Under the heading of the capacity to bring international claims Kamminga notes that there are few if any pure cases of this sort but then reviews the rights accorded to NGOs and individuals enabling them to lodge complaints under various human rights treaties. Finally, he looks at liability under international law and concludes that there are rarely anything more than minor procedures for sanctioning them. In conclusion he observes that NGOs are certainly playing an increasingly prominent role in various international contexts. But while this role is sometimes reflected in their formal status, it remains generally 'extremely weak'.⁹⁷ Even if a set of proposals made by a panel of eminent persons in 2004 designed to enhance the role of civil society, and NGOs in particular, within the United Nations system were to be adopted, it is not clear that their roles would be greatly strengthened.⁹⁸ It should also be noted that Kamminga's analysis does not deal with NGOs in general and that the conclusions reached in relation to a chapter dealing with the role of business and other groups in the area of international economic law would differ in important respects.

C. International Organizations

While international organizations like the United Nations itself, the international financial institutions, or the World Trade Organization are regularly attacked for decision-making on a level functionally equivalent to national governments are all but conceded'.⁹⁹ Ibid., 216); Kenneth Anderson, 'The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations', 2 *Chicago J. Int'l L.* (2001) 371 ('[I]nternational organizations really do believe that they and international organizations ought to rule the world (with some help from Ottawa and Paris)'. Ibid., 388).

⁹⁷ See p. 109.

⁹⁸ *We the Peoples: Civil Society, the United Nations and Global Governance*, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, UN doc. A/58/817 (2004).

one or another of their policies they are nevertheless often overlooked in discussions of the role of non-state actors in relation to human rights. There are several plausible explanations for that neglect. The first is that they are not considered to be non-state actors, since they are effectively acting as surrogates for states in some of the things that they do, and in any event their 'lords and masters' are states. The second is that they are usually conceded to enjoy a degree of international personality and thus their status *vis-à-vis* states is not considered to be as dramatically different as is the case with other non-state actors. A third explanation is that most of their activities are considered, although not by a good many NGOs, to be essentially benign. And a fourth, closely related to the others, is that they don't seem to fit easily into the category of non-state actors since the latter is often assumed to consist of groups, albeit as diverse as corporations and terrorists, who don't have a natural affinity with human rights and cannot plausibly proclaim their adherence to the relevant norms.

Against that backdrop, François Gianviti⁹⁹ focuses on the three aspects of the relationship between the International Monetary Fund (IMF) and one of the principal international human rights treaties, the International Covenant on Economic, Social, and Cultural Rights. They are: do the provisions of the Covenant have some 'legal effect' on the IMF; is the IMF obligated to contribute to the achievement of the rights recognized in the Covenant; and to what extent can the Fund, acting in accordance with its Articles of Agreement, take account of the relevant rights?

This Chapter is of particular interest because it is the first time that a senior official of the IMF (its Legal Counsel) has addressed these issues in a systematic fashion in the context of a careful legal analysis of the various considerations. His analysis does not deal with the broader question of whether some of the rights contained in the Covenant are part of customary law, along with some or all of those recognized in the other Covenant—the International Covenant on Civil and Political Rights—and might thus be binding on that basis on an international organization such as the IMF.

In relation to the Covenant he emphasizes the fact that it is a treaty addressed to states, and an instrument to which they can become parties. But the relevant rights are neither addressed to an international agency such as the IMF nor is it permitted to become a party, even if it wished to do so. Moreover, the relationship agreement entered into between the UN and the Fund creates a relationship between 'sovereign equals', as a result of which the Fund is not required to give effect to resolutions of the General Assembly or to international agreements entered into by UN member states. He attaches considerable importance in his analysis to an otherwise little noted provision of the Covenant (Article 24), which in his words: 'explicitly recognizes that "[n]othing in the present Covenant shall be interpreted as impairing the provisions . . . of the constitutions of the specialized agencies which define the respective responsibilities . . . of the specialized agencies in regard to the matters dealt with in the present Covenant"',¹⁰⁰

⁹⁹ 'Economic, Social, and Cultural Rights and the International Monetary Fund', Chapter 4 below.

¹⁰⁰ Ibid., see p. 118.

In quoting this provision, however, he omits a reference after the first ellipsis to the Charter of the UN and after the second to the responsibilities 'of the various organs of the United Nations'. As a result he emphasizes that the IMF's Articles of Agreement could only be modified by a formal amendment, but does not address the argument that permitting the IMF to remain altogether aloof from the treaty regime might impair the provisions of the UN Charter and thus itself require a Charter amendment in order to be sustainable.

Gianviti concludes that the Fund can still contribute through its policies and programs to the realization of the objectives spelled out in the Covenant, even if it has neither a legal obligation nor a constitutional mandate to do so systematically. But the bottom line is that the Fund 'is not free to disregard its own legal structure for the sake of pursuing goals that are not its own mandated purposes',¹⁰¹ even if those 'goals' are human rights. If a stronger involvement with human rights is desirable then the appropriate course is to seek an amendment to the Fund's Articles of Agreement.

D. Corporations

The question of terminology looms large in this respect with different authors opting to focus on 'transnational corporations', 'multinational corporations', or 'multinational enterprises'.¹⁰² Similarly each international organization which addresses these issues—including the UN, the ILO, the Organization for Economic Cooperation and Development (OECD), and the EU—seems to have its own terminological preference and usually offers a variety of reasons why its choice is better than the alternatives. At the end of the day, the differences do not seem especially compelling and thus no attempt has been made in this volume to standardize the terminology. The phrase transnational corporations (TNCs) is used in the present Chapter primarily because it has long been the term of choice in the context of the United Nations' deliberations on the matter.

The picture that emerges from the Chapters in this volume that address corporate responsibility is that international law's capacity adequately to regulate the cross-boundary activity of TNCs lags considerably behind the social and economic realities of globalized production and trade. Existing domestic and international legal mechanisms are, to a considerable extent, unable to ensure that their enforcement of human rights obligations is effective when it comes to the activities of TNCs and other non-state actors. Partly as a result, the past decade has seen a proliferation of efforts to formulate codes of conduct, guidelines, ethical principles, and other voluntary and non-binding arrangements. They all attempt to provide a lightning rod for consumer and public awareness campaigns that endeavour to regulate

¹⁰¹ 'Economic, Social, and Cultural Rights and the International Monetary Fund', Chapter 4 below, at p. 138.

¹⁰² Multinational corporations are said to reproduce their activities in a range of different nations, primarily in order to overcome barriers to trade, while transnational corporations are single firms pursuing an international division of labour in different countries. See generally Higgott *et al.* note 36 above.

corporate conduct indirectly by threatening brand reputations or affecting investor confidence. Several of the contributions to this volume address different dimensions of these diverse efforts.

Ralph Steinhardt¹⁰³ argues that despite the fragmentary and seemingly weak regulatory structure that is emerging at the moment, there is a real potential for the slow crystallization of a new *lex mercatoria* governing the conduct of corporations. He locates the principal sources for this new *lex mercatoria* in four areas: market-based regimes, domestic regulation, civil liability, and international 'quasi-regulation'. Like Reinisch, Steinhardt highlights the important role of international public opinion, and corporations' exposure to campaigns against their brands on the basis of their conduct. He considers the mixed experience of voluntary codes of conduct embraced by TNCs operating in apartheid South Africa, and the newer phenomena of 'rights-sensitive' product lines.¹⁰⁴ Social accountability auditing and ethical investment organizations are relatively recent practices which attempt to link market incentives more directly with corporate social responsibility.¹⁰⁵ Some of these campaigns have had high profile successes in persuading countries to cease activities in countries where human rights violations are endemic, due in no small part to concerted NGO advocacy and activism.

Steinhardt discusses five instances of domestic legislation intended to restrain or discourage TNC involvement with human rights violations abroad.¹⁰⁶ The U.S. Foreign Corrupt Practices Act of 1977 (designed to prohibit bribery of foreign governments by U.S. corporations) has been an effective standard setter for U.S. business, and appears to have been influential in shaping similar laws in other countries. Some states, including France and the United Kingdom, use securities laws to require companies to report to the market on human rights and environmental compliance. Import and export control laws continue to be used as a means of discouraging involvement with human rights-abusing countries, and government procurement and public expenditure laws may include human rights conditionalities that require companies to meet certain standards in their foreign operations before they can be eligible for public monies. Finally, specific legislation has been introduced in the U.S. to penalize insurance companies that fail to pay valid claims by Holocaust survivors. As Steinhardt points out, laws such as these seek to create a nexus between market-based regimes and legislative regulation, by creating requirements that expose companies to market censure through exposure of human rights violations, or threatening companies' access to public financing and government contracts.

The Alien Tort Claims Act has become a primary vehicle in the U.S. for attempting to hold TNCs accountable for human rights violations abroad.¹⁰⁷ Despite considerable procedural hurdles, several civil claims against corporations

¹⁰³ Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*, Chapter 6 below.

¹⁰⁴ See p. 184.

¹⁰⁵ See pp. 180–7.

¹⁰⁶ See p. 194–6.

¹⁰⁷ See p. 183.

alleged to be complicit in grave human rights violations in foreign countries have survived strike-out motions. The cases have the potential to open up new understandings of corporate complicity in state human rights abuses, and Steinhart summarizes the main kinds of wrongs which are actionable under ATCA.¹⁰⁸

Finally, Steinhart considers the regime of international 'quasi-regulation' that is emerging through international organizations. He points to bodies of principles promulgated by the ILO and OECD, and initiatives for a social clause under consideration by the WTO,¹⁰⁹ as evidence of an emerging 'carrel of values'. He then reviews some of the philosophical issues raised by imposing human rights obligations upon corporations, arguing that this imposition can be justified on a number of different grounds: deontological, utilitarian, and positivist.¹¹⁰ There is no longer any basis for considering corporations to be the equivalent of purely private individuals, nor any convincing reason why a corporation should not be accountable for violations of international human rights law in the same way that it is liable for violations of domestic tort law or criminal law. Nevertheless, questions arise about how much corporate knowledge and involvement is required to hold a company responsible for human rights violations committed by a state in which it operates.¹¹¹

Despite the limitations of existing mechanisms, Steinhart is confident that together they promote the emergence of practices and habits that could form a new *lex mercatoria*: a body of law that is transnational in scope, grounded in good faith, reflective of market practices, and ultimately codified in the commercial law of nations and in international law. Codes of conduct, market-based regimes, civil litigation, and international principles reflect an intersection of the law and the marketplace.

David Weissbrodt and Muria Kruger¹¹² describe from the inside the process by which one of the most comprehensive attempts at formulating a corporate code of conduct was undertaken by the UN Sub-Commission for the Promotion and Protection of Human Rights, through its Working Group on the Working Methods and Activities of Transnational Corporations. Over a period of three years, the Working Group developed several drafts of what were initially called the Universal Human Rights Guidelines for Companies.¹¹³ Weissbrodt himself was the key person in this endeavour and he and Kruger note that while there was a common desire to establish a binding code, the Working Group accepted the reality that political controversy would prevent the adoption of a treaty regulating TNCs and other businesses. Instead, the Working Group decided to implement the Guidelines as 'soft law' principles, and thereby introduce them into international law discourse and practice. In 2002 it adopted a revised draft entitled 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human

Rights' (the Norms'). Until such time as they are adopted by the Commission on Human Rights or another UN body such as the Economic and Social Council or the General Assembly, the document remains a draft, but it has been the subject of extensive consultations with human rights NGOs and companies.

The Norms seek to synthesize developments in treaty law which expressly or implicitly expand the scope of human rights obligations to non-state actors such as businesses, and clarify the extent of the obligations that apply directly to businesses.¹¹⁴ The document pursues implementation through a number of avenues. First, it calls on businesses to adopt and implement the principles, and disseminate them amongst employees.¹¹⁵ It also encourages businesses to conduct internal and external assessments of the extent to which current practices meet the standards in the Norms, and submit the assessment to an independent verification. Civil society entities, such as NGOs, trade unions, and business associations, are encouraged to take up the standards and use them as benchmarks for measuring performance, while inter-governmental organizations may also use them to inform the formulation of their own standards. States could use the Norms as a model for legislation, and domestic courts may also have regard to them. Thus, the hope is that the Norms will inform both business and state practice in setting standards and rules for business conduct, and so contribute to a harmonization of the substance of regulatory approaches.

Celia Wells and Juanita Elias¹¹⁶ confront the difficulties inherent in attempting to hold corporations criminally liable for grave violations of human rights. The considerable barriers to enforcing the criminal liability of corporations in a domestic context are compounded internationally, not only due to the absence of an international criminal law specifically dealing with corporations, but also because of the complex corporate forms that are produced by relations of production in the age of globalization. Outsourcing, vertical disintegration, global commodity chains, and other production strategies complicate the legal attribution of responsibility where law (international and domestic) still largely presupposes discrete political communities defined in terms of territory.¹¹⁷

Wells and Elias review three different theories of corporate criminal responsibility: the agency principle, the 'controlling mind' approach, and the 'corporate culture' approach.¹¹⁸ The first two theories seek to equate corporate responsibility with that of an individual actor, while the third takes a more holistic approach. The tendency to require an identification between the acts of an individual employee or manager and the corporation as a prerequisite to liability makes establishing an offence difficult in many common law countries. Within the EU there has been some convergence in corporate criminal liability frameworks,¹¹⁹ and there appears to be a recent willingness among civil law countries to contemplate corporate criminal liability.

¹⁰⁸ See pp. 198–202.

¹¹¹ See pp. 215–7.

¹¹² Human Rights Responsibilities of Businesses as Non-State Actors', Chapter 8 below.

¹¹³ See pp. 328–35.

¹⁰⁹ See pp. 202–12.

¹¹⁰ See pp. 213–4.

¹¹⁴ See pp. 335–8.

¹¹⁶ 'Catching the Conscience of the King: Corporate players on the International Stage', Chapter 5 below.

¹¹⁸ See pp. 156–57.

¹¹⁹ See p. 159.

¹¹⁵ See p. 341.

¹¹⁷ See pp. 150–4.

Wells and Elias then review the complicity principles that might be applied to corporations in international law, distinguishing between first order and second order direct complicity (where corporations either actively assisted in implementing policies that violate human rights or knew that their cooperation would result in human rights violations) and indirect complicity,¹²⁰ where a corporation's activities help maintain a regime's financial and commercial infrastructure. They argue that domestic criminal law concerning complicity should not be used too readily in the development of international criminal law, as the domestic law is uncertain and conflicted.¹²¹ Wells and Elias also consider the complicity principles contained in Article 25 of the Rome Statute, which contain three routes to accessory liability: instigation, assistance, and joint enterprise. However, the Rome Statute does not apply to legal persons, so can best offer guidance to domestic courts applying international law to the conduct of TNCs. The present potential for applying international criminal law to companies remains limited, as the international enforcement of corporate responsibilities is secondary to the protection of the economic rights of corporations.¹²²

Olivier De Schutter¹²³ reviews the European Union framework for the accountability of TNCs for human rights violations. He first considers the general international law principles governing state responsibility for the protection of individuals within their jurisdiction, and notes that in current international law there is no state responsibility for the private acts of nationals abroad.¹²⁴ As such, states are responsible for human rights violations committed by non-state actors on their own territory, but not for the extraterritorial conduct of TNCs domiciled in their territory. Nevertheless, in a context where developing nations compete for foreign investment from TNCs, states may not have the incentive properly to regulate TNC activity on their own territory, or may not have the means.¹²⁵

De Schutter explores whether the European Convention on Human Rights provides any basis upon which developed states can be required to hold TNCs domiciled in their territory accountable for human rights violations committed abroad. Recent case-law appears to hold that states are not responsible for human rights violations committed by their nationals extraterritorially, unless that territory is under the effective control of the state (as was Iraq, for example, under the terms of the Coalition occupation).¹²⁶

EU trade and development policies provide a means for the EU to provide uniform incentives for developing states to enforce human rights standards, but raise the concern that trade conditions may be perceived as a form of protection.¹²⁷ Moreover, De Schutter argues, the use of trade conditionalities is at best a clumsy and indirect means of regulating TNCs.¹²⁸

¹²⁰ See p. 161. ¹²¹ See p. 163. ¹²² See p. 166.

¹²³ 'The Accountability of Multinationals for Human Rights Violations in European Law', Chapter 7 below.

¹²⁴ See pp. 235–6. ¹²⁵ See pp. 240–9. ¹²⁶ See pp. 253–60.

¹²⁷ See pp. 253–60. ¹²⁸ See pp. 260–2.

In the realm of civil liability, De Schutter contends that there is some scope under the terms of European Community Law for a TNC domiciled in an EU country to be sued in the courts of that country for a tort committed outside the EU, creating a possible analogy with the ATCA.¹²⁹ It seems, however, that this possibility remains untested, and a number of complex doctrinal questions, such as *forum non-conveniens* and the problem of applicable law, would have to be clarified by EU national courts, before such a claim could proceed.¹³⁰ There is also the problem of attributing the acts of a non-EU located subsidiary to an EU-domiciled parent company. De Schutter shows that the applicable principles are not free from controversy in EU courts.¹³¹

There does not exist an EU-wide corporate criminal code governing extraterritorial TNC conduct, but De Schutter suggests that suitable models for the formulation of such a legal regime could be found in existing initiatives to criminalize the extraterritorial sexual exploitation of children, and in the Belgian universal jurisdiction laws.¹³² He recommends that such legislation should be based on the active personality principle and should apply universally recognized principles of international human rights law, rather than domestic standards.¹³³

Finally, De Schutter reviews the EU experience with codes of conduct, particularly the attempt to apply a code of practice to EU companies dealing with the apartheid regime in South Africa, and the 1998 code of conduct concerning arms exports. These experiences suggest that in order for codes of conduct to be effective, two conditions must be met: the codes should impose clearly verifiable obligations on companies and violations should be sanctioned, and the standards set should be as uniform as possible.¹³⁴ He notes that the EU Green Paper on Corporate Social Responsibility stresses the importance of monitoring compliance with codes of conduct, and that some steps have been taken to create a European Monitoring Platform.¹³⁵ There would also appear to be considerable potential for the EU to set procurement and export credit conditions which require TNC compliance with human rights principles or codes of conduct, subject to the non-discrimination requirements of EU economic law.¹³⁶

7. CONCLUSION

This Introduction sets the scene for the various analyses that follow. In particular, it has sought to shed some light on the approaches advocated by mainstream international lawyers to the challenges presented by the emergence of an important, and in many contexts powerful or at least influential, array of non-state actors.

The received wisdom that emerges very clearly from the analyses of most international lawyers may be summarized in the following terms: (i) the international

¹²⁹ See pp. 262–7. ¹³⁰ Discussed at pp. 267–72. ¹³¹ Discussed at pp. 272–6.

¹³² Discussed at pp. 283–6. ¹³³ See p. 286. ¹³⁴ See p. 299.

¹³⁵ See pp. 304–5. ¹³⁶ See pp. 301–2.

legal framework is and will remain essentially state-centric; (ii) there is a very limited formal role for other international actors, although their participation in international decision-making processes is often desirable; (iii) transnational corporations should perhaps accept some moral obligations; but (iv) they have no clear legal obligations in respect to human rights apart from compliance with the law of the particular country in which they are operating. This is hardly a clarion call for reform, and it certainly has limited potential for responding effectively to the widely held perception that new approaches are indispensable if the accountability of non-state actors is to be promoted, thus ensuring that the international human rights regime is able to come to grips with one of the most pressing challenges confronting it.

For most international lawyers the assumption would be that it is possible within the confines of the existing system to do what needs to be done. That might include, for example, regulating transnational corporations, taking much more systematic account of the views of civil society, regulating the activities of private actors in cases where human rights values are otherwise left in jeopardy, and achieving these objectives by working through the state-centred mechanisms of international law. Whether this is in fact possible is a question to which many of the contributors in this volume address themselves. By way of conclusion it is striking to note how frequently notions of sovereignty, and of the prerogatives that are perceived to attach to it, are invoked within international settings to prevent developments which seek to adapt the overall system in order to enable it to respond adequately, or even just plausibly, to the new challenges.



**Organizational Irrationality and Corporate
Human Rights Violations**

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ORGANIZATIONAL IRRATIONALITY AND CORPORATE HUMAN RIGHTS VIOLATIONS

The problem of how to bring transnational corporations within the reach of international law has grown increasingly urgent for human rights scholars and activists. Today, individual corporations can wield as much power and influence as entire nations.¹ Unfortunately, that influence is not necessarily wielded for good, as corporations have been implicated in a broad range of human rights abuses. Companies that engage in the extraction of natural resources, such as the Shell Group and Unocal, have been accused of supporting abuses such as torture, rape, and forced labor, and pollution resulting from their activities has threatened the health and livelihood of local communities.² Labor practices of transnational corporations have also been a central human rights concern, with evidence of unsafe working conditions and physical abuses emerging from major clothing and toy companies.³

Because international law has traditionally been limited to state actors, the literature on business and human rights largely focuses on whether transnational corporations can be held responsible under international law.⁴ Less attention is paid to the question of what leads corporations to violate human rights in the first place. When they do address that question, most writers assume that violations occur because corporations make rational decisions to pursue profits without regard to potential victims.⁵

This Note aims to provide a more nuanced account of the reason for corporate human rights violations, drawing from social science re-

¹ Cf. HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1388 (3d ed. 2008) (“[Wal-Mart’s] 2003 sales of \$256 billion made it larger than the economies of all but the world’s 30 richest nations.”).

² Radu Mares, *Introduction* to *BUSINESS AND HUMAN RIGHTS* xv, xv (Radu Mares ed., 2004).

³ *Id.* at xvi.

⁴ See, e.g., Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 *CONN. J. INT’L L.* 1 (2003); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443 (2001). Under the Universal Declaration of Human Rights, corporations can be held accountable for direct violations of human rights that take place “within their area of control and sphere of influence.” Irene Kahn, Sec’y Gen., Amnesty Int’l, *Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws*, Speech at the Business Human Rights Seminar (Dec. 8, 2005), in STEINER ET AL., *supra* note 1, at 1389, 1390; see also Universal Declaration of Human Rights, G.A. Res. 217A, at 71–72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). The difficulty arises in attempts to hold corporations accountable when their complicity is more indirect.

⁵ See, e.g., Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 *HASTINGS INT’L & COMP. L. REV.* 401, 401 (2001) (“There is tremendous profit to be made from abusive behavior, and in the absence of effective regulation, corporations often seek to maximize profit at the expense of basic rights.”).

search on organizational irrationality. It may well be possible to explain many human rights violations as rational profit-maximizing behavior: if detection is unlikely and enforcement is weak, then a company may perceive a violation to be in its self-interest. However, the literature on organizational irrationality suggests that violations that are against a company's self-interest may also take place. If corporations do not always act rationally, then current efforts to change the self-interest calculation by increasing sanctions or inculcating norms will not suffice to achieve full compliance. Thus, a comprehensive human rights agenda should include assistance to corporations in overcoming irrational tendencies.

Part I of this Note provides an introduction to and an initial critique of the rational choice model as applied to business and human rights. Part II explores how concepts from the study of organizational behavior can shed light on the problem of human rights violations by transnational corporations. Part III uses this nuanced understanding of irrational organizational decisionmaking to evaluate existing compliance mechanisms and to suggest ways in which they might be improved.

I. THE RATIONAL CHOICE MODEL

The standard rational choice account for corporate misconduct is that companies facing competitive pressures "will violate the law to attain desired organizational goals unless the anticipated legal penalties . . . exceed additional benefits the firm could gain by violation."⁶ To the extent that this model explains some proportion of human rights violations, the natural response is to seek increased deterrence by improving monitoring and strengthening sanctions.⁷

Yet scholars have criticized the rational choice model on various levels and across domains. In corporate law, one complexity to consider is that an organization comprises diverse actors with distinct interests, making the ideas of a unified purpose and monolithic decisionmaking seem implausible.⁸ Similarly, scholars discuss the role that social norms play in individual and group decisionmaking, suggesting that corporations may act against their narrow, profit-minded interest and in accordance with other values.⁹ Finally, even if a corporation has a

⁶ Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 *LAW & SOC'Y REV.* 23, 23 (1998).

⁷ See *id.* at 24.

⁸ See Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 *GEO. L.J.* 1, 16 (1984).

⁹ See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 22 (1992); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 *U. PA. L. REV.* 1811, 1811-12 (2001).

unified purpose, it, like individuals, can fail to pursue that end in a fully rational manner.¹⁰ It is the last of these issues, irrational organizational decisionmaking, on which this Note focuses.

The practical significance of irrationality depends, of course, on the extent to which corporations would rationally choose to comply with human rights norms. But this Note's argument does not depend on a particular theory of compliance. It is possible that strong incentives to comply currently exist because corporations have internalized human rights norms into their utility function.¹¹ Alternatively, compliance with human rights norms could be profit-maximizing behavior, even under a narrow definition of self-interest. Corporations themselves have indicated that they consider ethical behavior to be good for business,¹² and human rights violations trigger both significant reputational costs and potential litigation expenses.¹³

One useful piece of evidence that irrational decisionmaking causes human rights violations that might not occur otherwise is the existence of violations by companies that are widely regarded to have made good-faith commitments to the human rights cause. Two prominent examples include Levi Strauss & Co. and Reebok, both of which have been at the forefront of developing human rights codes of conduct but continue to struggle with violations.¹⁴

Moreover, to understand how decisions can go wrong, it is important to keep in mind that human rights violations do not necessarily involve binary choices to commit or not to commit. Rather, the choice may be about what sorts of precautions to take.¹⁵ For example, Unocal likely could have avoided the harms it ultimately caused in Burma by taking precautions such as alternative security arrangements.¹⁶ Undertaking an objective impact assessment "would have demonstrated to Unocal that the cost of importing or training security paled in comparison to the liability incurred from human rights violations."¹⁷

¹⁰ See Metzger, *supra* note 8, at 16–23.

¹¹ For an attempt to develop a rational choice model for corporations that incorporates environmental norms, see Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55 (2003).

¹² See U.N. GLOBAL COMPACT & OFFICE OF THE U.N. HIGH COMM'R OF HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE 31 (2004), available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf (quoting statements by business leaders).

¹³ See Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135, 159 (2007).

¹⁴ See Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 686 (1995).

¹⁵ Even where there is more direct involvement, such as when a manager orders a particular action, the decision could still be irrational if the manager miscalculates the corporation's interest.

¹⁶ See Maassarani et al., *supra* note 13, at 163–64.

¹⁷ *Id.* at 164.

Of course, such steps were not guaranteed to be effective at prevention, and identifying a given choice as irrational requires a determination of the ex ante probabilities, which are difficult to assign. Nevertheless, the Unocal example illustrates how an apparently irrational choice not to take precautionary steps could lead to complicity in costly and unintended human rights violations.

Of course, isolated instances where violations proved costly do not mean that the general incentives for compliance are sufficient. Existing compliance mechanisms still lack enforcement measures, and even reputational costs and the threat of lawsuits are circumscribed by the human rights community's limited monitoring capacities and litigation resources. An analysis of what the socially optimal level of deterrence is, and whether it has been achieved, lies beyond the scope of this Note. Most of the reforms proposed below are intended to be consistent with continued efforts to strengthen deterrence. The idea driving these proposals is twofold. First, even when the optimal level of deterrence has been established, organizational irrationality is an obstacle that must be overcome along the way to full compliance. Second, most of the suggested reforms involve less intrusive, more feasible interventions that could have immediate payoffs to the extent that corporations already view compliance as within their self-interest.

II. ORGANIZATIONAL IRRATIONALITY

In an attempt to deepen our understanding of how irrationality leads corporations to violate human rights, this Part explores three strands of research from the study of organizations. The first strand builds off of research on individual cognition to explain how biases at that level might either persist or be aggravated in the organizational structure, leading to irrational decisionmaking. The second strand looks at the effect that an organization's environment has on decisionmaking, and the third focuses on the structure and processes of the organization.¹⁸

A. Cognitive Biases

Through empirical testing, social scientists have uncovered a broad range of cognitive limitations that undermine the rational choice model. These findings have led legal scholars to reconsider principles and

¹⁸ This three-part framework tracks the one used by sociologist Diane Vaughan in her study of organizational misconduct. See Diane Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 ANN. REV. SOC. 271, 274 (1999). However, the discussion within each of the strands draws on a variety of sources and fields.

doctrines that were rooted in that flawed model.¹⁹ Research relating to cognitive biases in the organizational context suggests that the application of the rational choice model to corporate human rights violations should similarly be reconsidered. Professor Donald Langevoort has identified four biases that are relevant for the present discussion.²⁰

First, “cognitive conservatism” leads people to interpret information in a manner that is consistent with previously held attitudes.²¹ When individuals have to work together on teams, the challenges of cooperation require further simplification of information.²² Second, the optimism bias leads people to overestimate their abilities, and studies suggest that organizations can exacerbate this tendency,²³ because they reward optimism in the hiring and promotion processes.²⁴ Third, the commitment bias leads people who have committed to a given path to interpret subsequently obtained information in a way that reinforces their original reasoning.²⁵ Such tendencies are even stronger in an organizational context, first because individuals become more invested in positions they have to pitch to others in the organization, and then, after a position has been adopted, because “costly implementation procedures [have been] put in motion.”²⁶ Fourth, the self-serving bias leads employees to interpret information in a manner that furthers their personal interests.²⁷ The organization suffers either because no one catches their flawed inferences or because other employees bring their own self-serving perspectives to complicate or aggravate the mistakes.²⁸

With these four biases on the table, it is possible to develop a story for how a corporation can become complicit in a human rights violation that is not in its rational self-interest. Consider the paradigmatic case of an oil company employing private security forces in a developing country. The cognitive conservatism bias might lead individual

¹⁹ See, e.g., Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–79 (1998).

²⁰ Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997).

²¹ *Id.* at 135 (internal quotation marks omitted).

²² *Id.* at 137.

²³ *Id.* at 139–40. *But see* Jolls et al., *supra* note 19, at 1525 (suggesting that overoptimism is likely to have a smaller effect on firms than on individuals, because “firms that make systematic errors in judgment will be at a competitive disadvantage”).

²⁴ Langevoort, *supra* note 20, at 140.

²⁵ *Id.* at 142.

²⁶ John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 21 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

²⁷ Langevoort, *supra* note 20, at 144.

²⁸ See *id.* at 145.

employees to underestimate the risk of conflict with the local population, perhaps because they are aware of a past operation of a similar nature that was successful. The optimism bias might lead the same group to overestimate the company's ability to deal with the risk that it had already downplayed, despite knowledge that other companies in similar circumstances had been implicated in human rights atrocities. Once the team has committed to a course of action on such flawed grounds, there could be increasing momentum to resist more negative information as it is subsequently attained. Finally, the self-serving bias might color inferences drawn at all three of these levels: the initial assessment of risk, the initial evaluation of capabilities, and the continuing reconsideration of both in light of new information. This story demonstrates that corporations can violate human rights without ever making a self-interested decision to do so. That is, organizations can stumble into irrational violations even when they think they are avoiding them.

B. Organizational Environment

The environment of an organization shapes decisionmaking in at least two important ways. First, the organizational culture influences an individual's understanding of the available information and choices. Sociologist Diane Vaughan explains how, as a result of this "largely unconscious cultural knowledge, individuals . . . formulat[e] a definition of the situation that makes sense of it in cultural terms, so that in their view their action is acceptable and nondeviant."²⁹ The effect of culture is related to, and interacts with, the cognitive biases described in the previous section. Both ultimately operate on the level of individual decisionmakers; the distinction lies in their origin.

A second way in which the organizational environment contributes to irrationality focuses on group decisionmaking as such. Psychologist Irving Janis coined the term "groupthink" to describe the "mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."³⁰ Professor Ronald Sims, in elaborating on Janis's work, identifies factors contributing to groupthink that will often apply in corporate boardrooms, including "high cohesion, insulation from experts, limited methodological search and appraisal procedures, directive leadership, and high stress."³¹

²⁹ Vaughan, *supra* note 18, at 280–81.

³⁰ IRVING L. JANIS, *GROUPTHINK* 9 (2d ed. 1982).

³¹ RONALD R. SIMS, *ETHICS AND ORGANIZATIONAL DECISION MAKING* 62 (1994).

As with organizational culture, the problem of groupthink interacts with the effects of individual cognitive biases. Even when individual group members hold reasonable views, group dynamics that suppress dissent will lead to less than fully reasoned decisions. And when members bring to the table views that have been distorted by individual biases, the groupthink theory suggests that the group will fail to engage competing interpretations effectively to remove these biases and reach the optimal decision. Even worse, research on group polarization suggests that group discussion in the absence of sufficient viewpoint diversity will exacerbate errors in reasoning, leading to more extreme views.³²

The oil company paradigm developed in the previous section can be illustrative here as well. As members of the decisionmaking group view information through the lens of their organizational culture, their individual biases get filtered through an additional layer of excessive confidence in the company's capacities and deeply held commitment to (their perception of) the company's ends. For example, an organizational culture emphasizing competitive advantage can convince individual employees that the company is well equipped to overcome risks of complicity in human rights violations, while a culture valuing growth and opportunity can lead them to be biased in favor of undertaking a new project. The problem of groupthink prevents effective consideration of alternative ideas or dissenting views and potentially results in the group feeling even more confident in its plans — and thus less focused on shoring up its risk strategy.

C. Organizational Structure and Processes

Both the cognitive bias and organizational environment explanations for irrationality ultimately point to a discrete decisionmaker making an identifiable error. This third section considers structural deficiencies that prevent organizations from ever putting the necessary pieces together. Just as an individual's reliance on heuristics could be rational "in a global sense,"³³ these organizational deficiencies may arise from the very structures that make a firm efficient in a macro sense.³⁴

A first structural difficulty identified by the social psychologist John Darley is the diffusion of information within an organization.

³² Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000).

³³ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000).

³⁴ Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 417 (2006).

Using the example of a harmful product, he explains that an organization could have collected all the information it would have needed to recognize a risk without any one individual or team putting the pieces together.³⁵ The fragmentation of responsibility poses a similar challenge. Mistakes could be the product of minor lapses or oversights that combine into a major harm that cannot clearly be attributed to any one individual or unit.³⁶

A second set of structural difficulties involves upward and downward communication. As Professor Kenneth Bamberger explains, an efficient firm will have information asymmetries whereby high-level managers possess more information about the company's broad goals, while lower-level employees possess more detailed knowledge of the issues concerning their subdivisions.³⁷ When it comes to communication between the two, concerns about information overload might "preclude[] charging lower level workers with concern for such low-frequency but potentially high-risk matters."³⁸ On the other side, information working its way upward could be distorted by intermediary managers influenced either by unconscious bias or conscious self-interest.³⁹

Together, the problems of diffuse information and responsibility and incomplete communication create what Vaughan calls "[s]tructural secrecy."⁴⁰ Structural secrecy is the idea that in an organization, "(a) information and knowledge will always be partial and incomplete, (b) the potential for things to go wrong increases when tasks or information cross internal boundaries, and (c) segregated knowledge minimizes the ability to detect and stave off activities that deviate from normative standards and expectations."⁴¹

To see how these structural deficiencies could apply in the human rights context, consider the paradigmatic case of environmental practices that threaten a local community's health or cause permanent damage to the residents' livelihood. Within the offending corporation, information about and responsibility for the environmental practices may be diffuse. Moreover, both upward and downward communication systems are vulnerable to important failures. Risk assessments and early warning signs considered by lower-level managers might be skewed or never make their way to the final decisionmakers. At the same time, goals and priorities established by high-level management

³⁵ Darley, *supra* note 26, at 17-18.

³⁶ *See id.* at 18.

³⁷ Bamberger, *supra* note 34, at 418.

³⁸ *Id.* at 419.

³⁹ Langevoort, *supra* note 20, at 120.

⁴⁰ Vaughan, *supra* note 18, at 277.

⁴¹ *Id.*

might not trickle down effectively to the teams that would actually need to implement them. Thus, environmental human rights abuses can take place without any actor within the responsible organization ever sitting down to calculate a decision with all the necessary information in front of her. Instead, the problem of structural secrecy can lead to an institutional decision, including one against the corporation's self-interest, that results in unintended human rights violations.

D. Evidence

To see how these irrational tendencies have operated in a real situation, consider the parallel issues leading up to the *Challenger* space shuttle launch. Like a corporation, the National Aeronautics and Space Administration (NASA) faced significant pressures to perform, making a rational choice explanation of the safety failures appear plausible. Vaughan explains this conventional historical account:

Underfunded by Congress, the Space Shuttle program depended on income from commercial satellite companies: the greater the number of flights per year, the greater the number of commercial payloads, the greater the income. Realizing the importance of schedule (the historically accepted explanation went), the managers who were immediately responsible for the decision responded to these pressures by disregarding the advice of their own engineers, knowingly violating rules about passing safety concerns up the hierarchy in the process.⁴²

That the launch was approved despite significant evidence of risk could mean the relevant actors made a self-interested calculation that the probable gains outweighed the probable losses — an analogous tradeoff to the one corporations face when measuring potential profits against human rights risks. But Vaughan's in-depth investigation of the decisionmaking process shows that the risks were not properly evaluated as a result of the irrational tendencies described in the preceding sections.

Just as a corporation's employees develop certain cultural understandings that influence their information processing, so too did NASA employees interpret the level of acceptable risk through their cultural lenses.⁴³ In particular, Vaughan notes how "the original technical culture of excellence" was affected by "production and cost concerns" and "attention to rules and procedures."⁴⁴ Despite concerns about data

⁴² Vaughan, *supra* note 6, at 36; *see also id.* at 40 ("Reduced funding had converted the R&D space agency into one that operated like a business, complete with production cycles and concerns about cost and efficiency.").

⁴³ Vaughan does not discuss individual cognitive biases separately, but one can readily imagine that they were operating in conjunction with the culturally induced distortions that she does emphasize.

⁴⁴ Vaughan, *supra* note 6, at 39.

from test missions, the engineers' attention to cost and scheduling prevented them from ordering additional tests.⁴⁵ At the same time, the engineers made sure to conform to all the relevant procedures, which provided psychological reassurance that their risk assessments were accurate.⁴⁶ While these errors were being made on the micro-level, a culture of groupthink prevented dissenters from speaking out: "Some people were silent who had information that might have altered the outcome. Some deferred to authority; others, concluding that they had not worked on the booster problems recently enough or were insufficiently informed for other reasons, kept their insights to themselves . . ." ⁴⁷

Structural secrecy also played a role. Early indications of problems, for example, were not passed up to the top NASA administrators.⁴⁸ These administrators also lacked the necessary expertise and context to evaluate the information that did make it to them.⁴⁹ Ironically, NASA had in place a decisionmaking process, Flight Readiness Review (FRR), intended to bring "all parts of the organization together for risk assessments prior to a launch" and to "uncover flaws in the analyses" done by isolated work groups.⁵⁰ Overwhelmed with information about the "60 million component parts," the FRR members could not meaningfully challenge the conclusions that were presented to them, and the risk assessment of the problematic component was "affirmed up the hierarchy."⁵¹

In addition to providing real-world evidence by analogy, the *Challenger* example illustrates the sort of case study that would help confirm the role played by irrational decisionmaking in corporate human rights violations. Interviews with the relevant actors, combined with documents from the original point of profit and risk assessment, could establish whether a corporation was complicit in a human rights violation against its self-interest. The same information could help determine what roles were played by individual cognitive biases, organizational culture, and deficient structures and processes. Moreover, broader surveys are necessary to determine the extent of the problem. One small study of noncompliance with environmental regulations, for example, confirmed that communications difficulties between employ-

⁴⁵ *Id.* at 41.

⁴⁶ *Id.*

⁴⁷ *Id.* at 45.

⁴⁸ Diane Vaughan, *Regulating Risk: Implications of the Challenger Accident*, in ORGANIZATIONS, UNCERTAINTIES, AND RISK 235, 240 (James F. Short, Jr. & Lee Clarke eds., 1992).

⁴⁹ *Id.*

⁵⁰ Vaughan, *supra* note 6, at 42.

⁵¹ *Id.* at 43.

ees were one root cause of noncompliance.⁵² A much more systematic study tailored to the causes of organizational irrationality would be a worthwhile next step.

III. EVALUATING THE EXISTING MECHANISMS FOR COMPLIANCE

Influenced either directly or indirectly by the rational choice model, evaluations of the existing efforts to promote corporate human rights compliance focus on enforcement mechanisms. Enhancing enforcement procedures, such as reporting obligations and sanctions, is no doubt an essential part of increasing the weight given to compliance in a corporation's self-interest calculation. But developing these procedures for optimal effectiveness requires attention to the features of organizational irrationality discussed in Part II. Moreover, an examination of organizational irrationality reveals that other steps may be just as important.

This Part will analyze the implications of organizational irrationality for soft law and civil litigation. A lack of empirical validation should not preclude consideration of at least some of the more modest reforms this Note will propose. Because many of the suggested interventions are less intrusive than what human rights advocates are currently seeking, they should be more palatable to the business community, and because most can be undertaken without interfering with efforts to strengthen deterrence through enforcement, the cost of experimenting with them is low.⁵³

A. *Soft Law*

1. *Overview.* — Soft law is generally understood to encompass nonbinding norms that govern behavior.⁵⁴ International soft law instruments can take a number of forms: resolutions and other pronouncements by international bodies, joint statements of intent issued by states, codes of conduct developed by an industry, guidelines drafted by expert groups, and more.⁵⁵ Even if not legally binding, soft

⁵² EPA & CHEM. MFRS. ASS'N, DOC. NO. EPA-305-R-99-001, EPA/CMA ROOT CAUSE ANALYSIS PILOT PROJECT 24 (1999), available at <http://www.epa.gov/compliance/resources/publications/assistance/sectors/rootcauseanalysis.pdf>.

⁵³ It is conceivable that some of the irrationality mechanisms could operate in the other direction — for example, overoptimism about the reputational gains that follow from human rights compliance efforts. The proposals here could presumably be tailored to avoid interfering with any such pro-human rights tendencies. A separate project might consider ways to harness those tendencies to achieve additional human rights gains.

⁵⁴ See JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 93 (2d ed. 2006).

⁵⁵ See *id.* at 94.

law is “routinely invoked . . . to challenge nonconforming behavior.”⁵⁶ The discussion here will focus on three categories of soft law that could be used to regulate corporate conduct in the context of human rights: standards set by intergovernmental organizations, principles developed through multistakeholder initiatives, and codes of conduct. The examples provided are far from exhaustive, but they illustrate the relevant challenges and opportunities.

(a) *Intergovernmental Organizations.* — The Organisation for Economic Co-operation and Development (OECD) provided an early attempt to regulate corporate human rights behavior, among other practices, when it adopted the Guidelines for Multinational Enterprises in 1976.⁵⁷ Amended in 2000, the OECD Guidelines provide “non-binding recommendations by governments to multinational enterprises operating in or from the 33 adhering countries.”⁵⁸ The Guidelines begin by enumerating fundamental principles. Enterprises are expected to “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”⁵⁹ Within the specific subject areas, the Guidelines provide both benchmarks⁶⁰ and detailed procedural principles.⁶¹ As often happens with soft law instruments, enforcement mechanisms have started to emerge based on the standards enunciated in the Guidelines. For example, complaints can now be brought against firms operating within the Guidelines’ jurisdiction for nonjudicial review by a National Contact Point.⁶²

The more recent U.N. Global Compact represents an effort to involve more companies by offering vaguer principles. The Global Compact is a voluntary initiative that focuses on “norm diffusion and the dissemination of practical know-how and tools”⁶³ without developing new law per se.⁶⁴ It includes just two principles under the human rights heading: “[1] Businesses should support and respect the protection of internationally proclaimed human rights; and [2] make sure

⁵⁶ *Id.* at 93.

⁵⁷ See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 819 (2007).

⁵⁸ ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2 (2001), available at [http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/\\$FILE/JT00115758.PDF](http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF).

⁵⁹ *Id.* at 11.

⁶⁰ See, e.g., *id.* at 18 (“Enterprises should . . . [o]bserve standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.”).

⁶¹ For example, the environmental recommendations include the “[a]doption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise.” *Id.* at 29.

⁶² Ruggie, *supra* note 57, at 834.

⁶³ *Id.* at 820.

⁶⁴ *Id.* at 819–20.

that they are not complicit in human rights abuses.”⁶⁵ But it also goes on to enumerate environmental principles and labor goals, such as the elimination of child labor and employment discrimination.⁶⁶

The Global Compact was designed to create a framework for “leadership, dialogue, learning, partnership projects, and network/out-reach.”⁶⁷ As with the OECD Guidelines, a complaint mechanism has recently been introduced.⁶⁸ The Global Compact Office (GCO) forwards registered complaints to a corporation accused of wrongdoing, and although the GCO takes no position on the merits, it reserves the right to remove the corporation from a public list of participants for failures to engage in a dialogue on the complaint.⁶⁹ This mechanism represents a first step in the direction of placing pressures on participants, but critics continue calling for, at the least, “a minimum social compliance threshold for participation.”⁷⁰

(b) *Multistakeholder Initiatives.* — Efforts in this category involve cooperation among corporations, states, and civil society organizations.⁷¹ They are often centered on a particular industry, facilitating the development of more detailed sets of principles. In that sense, these initiatives constitute an improvement on the approaches taken by intergovernmental organizations, which succeeded mainly in setting out more abstract ideals.

The Voluntary Principles on Security and Human Rights (the Principles) address the specific problems that corporations in the extractive sector have had with human rights violations by their security forces. The Principles first provide a series of factors that companies should consider in assessing risk, ranging from the human rights records of the prospective security forces to patterns of conflict within the local communities.⁷² Next, the Principles cover issues pertaining to companies’ relationships with public security forces. Emphasis is placed on communication, training, and transparency, as well as on reporting human rights violations and proactively monitoring their investigations.⁷³ For private security forces, the Principles require greater over-

⁶⁵ U.N. Global Compact, The Ten Principles, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Apr. 4, 2009).

⁶⁶ See *id.*

⁶⁷ Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT’L L. 1, 14 (2007).

⁶⁸ See GLOBAL COMPACT: NOTE ON INTEGRITY MEASURES 2–4, http://www.unglobalcompact.org/AboutTheGC/gc_integrity_mesures.pdf (last visited Apr. 4, 2009).

⁶⁹ See *id.* at 3–4.

⁷⁰ Oshionebo, *supra* note 67, at 38.

⁷¹ See Ruggie, *supra* note 57, at 835–37.

⁷² THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS 2–3, http://www.voluntaryprinciples.org/files/voluntary_principles.pdf (last visited Apr. 4, 2009).

⁷³ *Id.* at 3–5.

sight on the use of force. They include a proportionality requirement and draw a distinction between preventative and defensive force on the one hand and offensive force on the other.⁷⁴ The Principles even cover terms of the contract, suggesting that termination be permitted upon discovery of unlawful behavior⁷⁵ and that the security providers be “representative of the local population.”⁷⁶

The Voluntary Principles have been adopted by many of the major players in the extractive sector,⁷⁷ and many NGOs signed on to show their support.⁷⁸ In addition to the significant level of detail, the Principles are distinctive for their emphasis on providing how-to guidelines rather than taking a more aspirational approach.⁷⁹ Such guidelines enable participating companies to operationalize their commitments more readily.⁸⁰ Early evidence suggests that corporations are at least taking the Principles into account.⁸¹ Nevertheless, as with all voluntary initiatives, lack of enforcement remains the primary concern.

(c) *Codes of Conduct.* — Codes of conduct can be developed by industries, NGOs, and individual companies. The number of company codes has been estimated at around a thousand,⁸² and industry associations ranging from toy manufacturers⁸³ to chemical producers⁸⁴ have developed instruments as well. NGOs such as Amnesty International have developed suggested guidelines⁸⁵ that companies can either adopt wholesale or use as the starting point for their own codes.

As compared with other forms of soft law, codes of conduct may be especially attractive to companies because of their even greater flexibility. Conversely, compliance may be especially difficult to enforce by external monitors, raising the concern that corporations reap reputa-

⁷⁴ *Id.* at 6.

⁷⁵ *Id.* at 6–7.

⁷⁶ *Id.* at 7.

⁷⁷ See Voluntary Principles on Security and Human Rights, Participants + Companies, <http://www.voluntaryprinciples.org/participants/companies.php> (last visited Apr. 4, 2009).

⁷⁸ See Voluntary Principles on Security and Human Rights, Participants + Non-Governmental Organizations, <http://www.voluntaryprinciples.org/participants/ngo.php> (last visited Apr. 4, 2009).

⁷⁹ Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 438 (2001).

⁸⁰ See *id.* at 439.

⁸¹ See Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 419–20 (2005).

⁸² Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 219, 221 (Olivier De Schutter ed., 2006).

⁸³ Int'l Council of Toy Indus., Code of Business Practices, in BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 321.

⁸⁴ Int'l Council of Chem. Ass'ns, Statement on Responsible Care, in BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 324.

⁸⁵ Amnesty Int'l, Human Rights Guidelines for Companies, in BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 154.

tional benefits from the promulgation of their codes and are left with minimal incentives to comply.⁸⁶ In practice, codes of conduct developed by individual companies run the full gamut as far as specificity and accountability are concerned. Professor Joshua Newberg distinguishes between “values statement[s]” at one end of the spectrum and compliance-driven codes at the other, while recognizing that many codes are hybrids that incorporate elements of both.⁸⁷ Codes of conduct often contain voluntary reporting elements, which constitute one step in the direction of greater accountability.⁸⁸

2. *Analysis.* — When organizational irrationality is factored in, soft law takes on greater significance in the effort to reduce corporate human rights violations. Most would likely agree that attracting greater participation through flexibility is desirable, because participation forces corporations to think seriously about human rights and fosters dialogue among the various stakeholders. But those who stress the push toward greater enforcement and hard law status might overlook the important role that soft law can play in counteracting groupthink and cognitive biases. By bringing human rights concerns to the forefront, soft law should make corporate decisionmakers more attentive to competing considerations and thus more likely to make rights-protective choices. The push for compliance need not detract from this role played by soft law, but it can — if overly adversarial tactics disrupt the ongoing dialogue. For example, Professor Steven Ratner has noted the concern that NGOs can “fall prey to a visceral anti-[transnational enterprise] bias” that can obstruct cooperation.⁸⁹ Human rights advocates should, at the least, be aware of this tradeoff. It may not be worth pursuing enforcement at the cost of losing both cooperation and the irrationality-correcting functions of soft law.

In addition to its general debiasing effect, soft law could further the human rights cause through three particular strategies proposed below. Each is driven both by attention to organizational irrationality and a pragmatic awareness of the interests of the corporations’ side.

(a) *Operational Guidelines vs. Value Statements or Benchmarks.* — It is perhaps intuitive that how-to guidelines would enhance compliance better than abstract value statements would. But the discussion in Part II demonstrates why the need for the former is particularly acute. The kinds of vague principles contained in instruments such as the Global Compact need at some point to be translated into

⁸⁶ See Amiram Gill, *Corporate Governance As Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT’L L. 452, 462 (2008).

⁸⁷ Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 257 (2005) (internal quotation marks omitted).

⁸⁸ Gill, *supra* note 86, at 467–68.

⁸⁹ Ratner, *supra* note 4, at 533.

concrete instructions. If that translation takes place from within the organization, the irrational tendencies discussed earlier are liable to hinder effective action. Thus, human rights advocates should help establish how-to guidelines that are as specific as possible. The Voluntary Principles offer one of the best illustrations of this approach.

Some advocates would prefer to concentrate efforts on promoting accountability through benchmarks and minimum compliance standards.⁹⁰ Both approaches are worth pursuing; the major question is which to prioritize. Because corporations are more likely to resist benchmarks than operational guidelines, the human rights community might do well to make immediate inroads on the latter while continuing to negotiate the former.

(b) *Reporting/Monitoring vs. Impact Assessments.* — One of the most basic steps that a corporation can take toward better compliance is to agree to self-reporting. Commentators have pressed for this strategy as a way to strengthen codes of conduct.⁹¹ The obvious concern about self-reporting is that corporations can consciously skew their information. Fear of reputational harms and lawsuits might make such attempts quite rational, particularly if there is no obligation to report accurately. The less obvious concern is that there may also be unintentional distortion. Each of the four cognitive biases discussed in this Note makes individual employees vulnerable to misinterpretation of information. So too might structural secrecy interfere with the accurate assembling of that information.

Monitoring by an external party would constitute an improvement over self-reporting, but corporations are even less inclined to agree to it.⁹² Moreover, there is something of a dilemma in deciding how best to situate the monitoring party. On the one hand, if the monitoring group is too far removed, its effectiveness is limited by the accuracy of the information it gets. On the other hand, if the monitoring group becomes too closely involved with the people or entities being monitored, then it is liable to begin seeing information through the same biased lens.⁹³

One way to avoid this dilemma is to have an external monitor intervene earlier. The underlying strategy is the same one involved in shifting toward operational guidelines: to help an organization reason clearly before the various biases can cloud a final determination. In-

⁹⁰ See, e.g., Oshionebo, *supra* note 67, at 38.

⁹¹ See, e.g., Gill, *supra* note 86, at 467–68.

⁹² Alex Wawryk, *Regulating Transnational Corporations Through Corporate Codes of Conduct*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 53, 62 (Jedrzej George Frynas & Scott Pegg eds., 2003).

⁹³ See David B. Kahn & Gary S. Lawson, *Who's the Boss?: Controlling Auditor Incentives Through Random Selection*, 53 *EMORY L.J.* 391, 404–05 (2004).

stead of demanding greater reporting obligations, human rights advocates should ask corporations to commit to developing action plans and risk assessments before they begin new projects. The very act of developing such plans for an external audience might have a debiasing effect by forcing the company to step outside its groupthink tendencies and uncover any information hidden by structural secrecy. Moreover, human rights advocates can help to recognize and correct for any biased inferences drawn by members of the organization. Commentators have used similar justifications in support of environmental impact assessments,⁹⁴ and others have used the relative success of this approach in the environmental context to argue for the potential value of human rights impact assessments.⁹⁵

Finally, a practical advantage of emphasizing earlier intervention is that corporations may be more likely to cooperate. The cost of doing such assessments may be significant, but should not be prohibitive.⁹⁶ And whereas committing to reporting or monitoring makes corporations uneasy about prospective liability or reputational harms, releasing information and accepting feedback prior to the beginning of a project should seem much less risky. Of course, corporations may still be reluctant to subject their plans to scrutiny of any sort, and it is unclear how open they will be to implementing suggestions. Nevertheless, these are challenges that effective cooperation over time can help to overcome.

(c) *Counteracting Optimism.* — While the preceding subsections have considered ways to optimize the conditions for more rational decisionmaking, one can also imagine counteracting one set of biases by drawing on another set of cognitive tendencies. Soft law approaches to reducing corporate human rights violations might benefit from two more proactive interventions to offset the optimism bias.⁹⁷ The first involves the availability heuristic, which refers to the tendency people have to over- or underestimate probabilities based on examples that

⁹⁴ See, e.g., Neil Craik, *Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments*, 38 VICTORIA U. WELLINGTON L. REV. 381, 383 (2007).

⁹⁵ See Maassarani et al., *supra* note 13, at 149. The Danish Institute for Human Rights has taken the lead in developing tools of this sort. For a case study describing the experience of Shell International with the Danish Institute's Human Rights Compliance Assessment tools, see Esther Schouten, *Road-testing the Human Rights Compliance Assessment Tools*, in U.N. GLOBAL COMPACT & THE OFFICE OF THE U.N. HIGH COMM'R OF HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE II 64 (2007), available at http://www.unglobalcompact.org/docs/news_events/8.1/EHRBPII_Final.pdf.

⁹⁶ See Maassarani et al., *supra* note 13, at 167 (noting that both the "extra investment and preparation time" should seem reasonable in light of what already goes into major projects like a "\$1 billion pipeline").

⁹⁷ See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006).

stick out in their minds.⁹⁸ Bringing the realities of human rights violations to the attention of corporate decisionmakers, and thus making them more “available,” might be one way to overcome the optimism bias that might otherwise skew their reasoning. Human rights advocates should spend more time bringing these stories to life, through film, photography, and personal testimony,⁹⁹ and should find ways to bring this evidence directly into the consciousness of their business counterparts. Even as human rights advocates push for stronger monitoring and tougher penalties, they should not overlook the potential significance of less intrusive interventions. They might request, for example, that business leaders commit to basic employee training that includes a component that dramatically showcases past human rights failures.

Another way to counteract the optimism bias is the strategic use of “framing” effects, which describe how people respond differently depending on how information is presented.¹⁰⁰ One example is loss aversion, which is the idea that “people tend to weigh losses more heavily than gains in evaluating potential outcomes.”¹⁰¹ In light of that fact, advocates seeking to make the “business case” for human rights may want to emphasize potential harms rather than potential gains. This could mean helping to calculate the costs of litigation for sued corporations or performing the more difficult task of helping to translate reputational harms into concrete dollar figures. By sharpening the prospects for loss and putting them at the forefront of corporate decisionmakers’ attention, advocates could help those decisionmakers factor in human rights concerns at something closer to the objectively accurate level. Continuing to tout the reputational gains that come with good corporate citizenship might be valuable over the long term in inculcating norms, but capitalizing on loss aversion appears to be an underutilized strategy. This missed opportunity is all the more significant because it means that while human rights advocates seek stronger deterrence measures, they are failing to make the most of the potential for existing incentive structures to foster compliance through the mechanism of framing.¹⁰²

⁹⁸ *Id.* at 209–10.

⁹⁹ *Cf.* Andrew K. Woods, *The YouTube Defense: Human Rights Go Viral*, SLATE, Mar. 28, 2007, <http://www.slate.com/id/2162780> (explaining the impact that such media can have for the human rights cause more generally).

¹⁰⁰ Jolls & Sunstein, *supra* note 97, at 205–06.

¹⁰¹ *Id.* at 210; *see also* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979).

¹⁰² At first glance, this emphasis on loss may seem to contradict the earlier discussion of cooperative versus adversarial approaches. But it is possible for human rights advocates to spread this information in a spirit of cooperation, so long as both sides see improved compliance as the common goal.

B. Civil Litigation

1. *Overview.* — As countries ratify the Rome Statute of the International Criminal Court¹⁰³ and incorporate its provisions into domestic law, the number of available jurisdictions for charging transnational corporations with international crimes is on the rise.¹⁰⁴ In the United States, the Alien Tort Statute¹⁰⁵ (ATS) has provided a vehicle for international human rights claims. Since *Doe I v. Unocal Corp.*,¹⁰⁶ corporations have been vulnerable to civil suits for complicity in human rights violations. The Supreme Court in *Sosa v. Alvarez-Machain*¹⁰⁷ left this door open without actually deciding the question of whether private defendants can be sued under the ATS.¹⁰⁸

Neither business nor human rights advocates are completely satisfied with the ATS. Business groups, of course, oppose its very existence because it creates a risk of liability they otherwise would not face.¹⁰⁹ They argue that unpredictable liability will deter them from investing in foreign countries.¹¹⁰ Human rights groups, for their part, encounter a number of obstacles in their attempts to sue corporations under the statute. Courts have frequently dismissed such claims on act of state, comity, or political question grounds, thus never reaching the merits of the cases.¹¹¹

Moreover, both sides have reason to be concerned about two ambiguities that *Sosa* left unresolved. First, although *Sosa* provided guidance on the type of violation that would create a cause of action under the ATS,¹¹² the standard was open-ended enough that lower courts have not applied it in a predictable fashion.¹¹³ Second, *Sosa* did not

¹⁰³ July 17, 1998, 2187 U.N.T.S. 90.

¹⁰⁴ Ruggie, *supra* note 57, at 831.

¹⁰⁵ 28 U.S.C. § 1350 (2006).

¹⁰⁶ 395 F.3d 932 (9th Cir. 2002).

¹⁰⁷ 542 U.S. 692 (2004).

¹⁰⁸ The Court alluded ambiguously to this issue in a footnote, stating that “whether a norm is sufficiently definite to support a cause of action,” *id.* at 732, is related to “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual,” *id.* at 732 n.20.

¹⁰⁹ John E. Howard, Op-Ed., *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, <http://www.uschamber.com/press/opeds/0210howardlitigation.htm>.

¹¹⁰ *See id.*

¹¹¹ *See* Logan Michael Breed, Note, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT’L L. 1005, 1022–23 (2002).

¹¹² The Court said that it would “require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Sosa*, 542 U.S. at 725.

¹¹³ *Compare* *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (finding that a “claim for cruel, inhuman, degrading treatment or punishment” falling short

involve “aiding and abetting” liability and thus provided no relevant guidance. Lower courts have therefore continued to struggle with basic questions, such as whether international law or federal common law supplies the standard, and what level of involvement is required under each.¹¹⁴ Until these issues are clarified, corporations might be deterred from socially desirable investments for fear of being held liable for far-removed harms.¹¹⁵ At the same time, human rights advocates will have a difficult time planning an efficient allocation of their scarce resources in the face of inconsistent judicial rulings.¹¹⁶

2. *Analysis.* — From the human rights perspective, one general concern about litigation as a strategy is that it could undermine the cooperative relationship that the analysis in the previous section prioritized. Of course, it does not follow that litigation should be discarded as a component of the broader strategy. Indeed, the threat of such private litigation is an important deterrent that must remain available in the absence of, for example, a full-fledged international criminal law regime. But the human rights community should recognize that litigation is not only an incomplete tool,¹¹⁷ but also one that can undermine other efforts.

An analysis that incorporates organizational irrationality might also point toward a more surprising proposition — that narrowing the scope of the ATS may be in the interests of human rights advocates. In calculating the potential costs of human rights violations, corporations might not only misinterpret information about their likely complicity, but also underestimate the risk of enforcement against them. The self-serving bias, for example, may lead corporations to underestimate the likelihood of detection. Structural secrecy may prevent lawyers, who are in the best position to assess the litigation risk, from effectively preparing the organization to avoid hazards and from receiving warning signals from the frontlines.

of torture did not meet the *Sosa* standard), *with Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004) (holding, “consistent with *Sosa*,” that if “the specific conduct at issue . . . is universally condemned as cruel, inhuman, or degrading,” it does not matter whether the general prohibition on such conduct is sufficiently precise).

¹¹⁴ See Teddy Nemeroff, Note, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231, 232–33 (2008) (illustrating these layers of confusion through the disagreement of three judges in a single case, *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), the first post-*Sosa* appellate decision on the matter).

¹¹⁵ See Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 933–34 (1999).

¹¹⁶ See *id.* at 934.

¹¹⁷ See Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 272–73 (2004) (calling for a treaty approach).

Uncertainty in the law makes even a fully rational calculation imprecise, but it also seems likely to feed into and exacerbate the problems created by the self-serving bias¹¹⁸ and structural secrecy,¹¹⁹ potentially obstructing efforts within an organization to further the cause of compliance. Thus, if the ultimate goal is to prevent human rights abuses, then helping corporations better predict their risk of liability should be a positive step.¹²⁰ Instead of categorically rejecting calls to amend the ATS,¹²¹ or resting their hopes on the development of accommodating case law, human rights advocates should consider ways in which statutory reforms could further their purposes and should work with the business community to seek common ground.

This Note is not the place for a full-fledged proposal for reform of the ATS, but one particular goal must be emphasized. To fulfill the need for clarity, a new statute should specify standards for aiding and abetting liability and the particular violations that federal courts can adjudicate. Both of these issues will be extremely controversial, but settling them should be in the interests of both the human rights and business communities. Settlement enables better planning by both sides,¹²² first of all, but more relevant to the problem of irrationality, settlement in these two most uncertain areas can also help prevent the set of human rights violations that corporations would have unwittingly committed against their self-interest.

Because reforming the ATS, unlike the proposals outlined earlier, raises significant potential costs, more empirical assessment is required before any steps should be taken. It will be important to estimate what proportion of violations occurs because of uncertainty in the law, whether exacerbated by one of the mechanisms of irrationality or not. The gains from increased compliance and other potentially beneficial reforms¹²³ must then be weighed against any increase in violations be-

¹¹⁸ See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 46 (2000).

¹¹⁹ Cf. Joseph Sanders, *Firm Risk Management in the Face of Product Liability Rules*, in ORGANIZATIONS, UNCERTAINTIES, AND RISK, *supra* note 48, at 57, 79 (noting that "increasing rule uncertainty" leads to a bifurcation between the management of product design and the management of liability).

¹²⁰ A possible alternative view would be that uncertain liability will maximize precaution by forcing corporations to err on the safe side. This has some intuitive plausibility, but one should also recall that the mechanisms of organizational irrationality would cut against it.

¹²¹ See, e.g., Koh, *supra* note 117, at 270.

¹²² See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997).

¹²³ For example, an updated statute would provide a clearer authorization for U.S. courts to hear such suits and thus would weaken arguments for dismissal on political question grounds. Cf. Rachael E. Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 311 (1994) (arguing that the passage of the Torture Victim Protection Act indicates the political branches' understanding that "such cases are suitable for judicial decision").

cause of changes to the statute's deterrent effect. On balance, the costs might outweigh the benefits depending on the precise changes proposed, but that assessment cannot be made unless both sides engage and see what compromises can be reached.

The irrationality analysis itself points toward one possible compromise. To find aiding and abetting liability, courts have generally required corporations to have acted with knowledge or purpose.¹²⁴ Yet both standards may lead to only limited deterrence if cognitive bias and structural secrecy prevent the proper evaluation of risk. Thus, human rights advocates should urge a negligence theory of liability to incentivize corporations to take steps to counteract irrationality.¹²⁵ In return, corporations might demand the inclusion of a safe harbor provision that applies when they take certain steps, such as engaging in an impact assessment before beginning a project and following through on the assessment's recommendations. Such a compromise has the potential to be a win for both sides if it results both in a reduced number of human rights violations and in improved predictability for corporations.

CONCLUSION

The first goal of this Note is to identify concerns about organizational irrationality as an obstacle to improving corporate human rights compliance. The prevalence of these irrational tendencies may be presently unclear, but addressing them will only become increasingly important as other efforts to develop the rational and normative cases for compliance succeed. Although further empirical research into the extent of these problems will be necessary to guide the appropriate response, this Note also lays out some possible reforms to begin the conversation. At least some of the proposed interventions warrant immediate consideration because of their relatively low cost. But all of the suggestions are motivated by a common spirit of pragmatism that recognizes where second-best solutions are worth adopting and compromises are worth pursuing.

¹²⁴ Nemeroff, *supra* note 114, at 255.

¹²⁵ *Cf.* Langevoort, *supra* note 20, at 158 (making a similar argument for securities regulation).



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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
INCLUDING THE RIGHT TO DEVELOPMENT**

**Protect, Respect and Remedy: a Framework
for Business and Human Rights**

**Report of the Special Representative of the Secretary-General
on the issue of human rights and transnational corporations
and other business enterprises, John Ruggie**

Summary

Responding to the invitation by the Human Rights Council for the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to submit his views and recommendations for its consideration, this report presents a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors. The framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.

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Introduction

1. The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm. This report to the Human Rights Council presents a principles-based conceptual and policy framework intended to help achieve this aim.
2. Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply. Indeed, history teaches us that markets pose the greatest risks - to society and business itself - when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well.
3. The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.
4. The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises was appointed in July 2005. To meet the demanding requirements of the mandate he has, since then, convened 14 multi-stakeholder consultations on five continents; conducted more than two dozen research projects, some with the assistance of global law firms and other legal experts, non-governmental organizations (NGOs), international institutions, and committed individuals; produced more than 1,000 pages of documents; received some 20 submissions; and reported twice to the Commission on Human Rights and the Human Rights Council.¹ Previous reports have responded to the mandate provisions asking the Special Representative to identify, clarify and research key legal and policy dimensions of the business and human rights agenda.² The present report, together with its

¹ The mandate is contained in Commission on Human Rights resolution 2005/69. All documentation produced by and for the mandate is posted on the Business and Human Rights Resource Centre's website: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>. The Special Representative thanks all those who contributed to the mandate.

² E/CN.4/2006/97; A/HRC/4/35 and addenda 1-4; A/HRC/4/74.

companion report and addenda,³ responds to the mandate's invitation for him to submit views and recommendations for the Council's consideration. The mandate's extensive, inclusive and transparent work programme has enabled the Special Representative to reflect on the challenges, hear and learn from diverse perspectives, and develop ideas about how best to proceed.

5. The business and human rights debate currently lacks an authoritative focal point. Claims and counter-claims proliferate, initiatives abound, and yet no effort reaches significant scale. Amid this confusing mix, laggards - States as well as companies - continue to fly below the radar.

6. Some stakeholders believe that the solution lies in a limited list of human rights for which companies would have responsibility, while extending to companies, where they have influence, essentially the same range of responsibilities as States. For reasons this report spells out, the Special Representative has not adopted this formula. Briefly, business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance. At the same time, as economic actors, companies have unique responsibilities. If those responsibilities are entangled with State obligations, it makes it difficult if not impossible to tell who is responsible for what in practice. Hence, this report pursues the more promising path of addressing the specific responsibilities of companies in relation to all rights they may impact.

7. There is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors - States, businesses, and civil society - must learn to do many things differently. But those things must cohere and become cumulative, which makes it critically important to get the foundation right.

8. Every stakeholder group, despite their other differences, has expressed the urgent need for a common conceptual and policy framework, a foundation on which thinking and action can build. Drawing on the mandate's work in its first two years, the Special Representative introduced the elements of a framework in multi-stakeholder consultations during the autumn of 2007.⁴

9. The framework rests on differentiated but complementary responsibilities. It comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. Each principle is an essential component of the framework: the State duty to protect because it lies at the very core of the international human rights regime;⁵

³ A/HRC/8/5/Add.1 and 2 and A/HRC/8/16.

⁴ Each of these consultations was co-convened with a non-governmental organization (NGO).

⁵ The duty to protect is well established in international law and must not be confused with the concept of the "responsibility to protect" in the humanitarian intervention debate.

the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.

I. PROTECT, RESPECT AND REMEDY

10. The framing of policy challenges can have profound consequences for assigning responsibilities to relevant actors and determining whether the combination is capable of meeting the overall policy objectives. The business and human rights agenda remains hampered because it has not yet been framed in a way that fully reflects the complexities and dynamics of globalization and provides governments and other social actors with effective guidance.

A. The challenge

11. How should we frame today's challenges in order to capture their essential attributes? As noted at the outset, our focus should be on ways to reduce or compensate for the governance gaps created by globalization, because they permit corporate-related human rights harm to occur even where none may be intended.

12. Take the case of transnational corporations. Their legal rights have been expanded significantly over the past generation. This has encouraged investment and trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights. The more than 2,500 bilateral investment treaties currently in effect are a case in point. While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding international arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards - even when the legislation applies uniformly to all businesses, foreign and domestic. A European mining company operating in South Africa recently challenged that country's black economic empowerment laws on these grounds.⁶

13. At the same time, the legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization. A parent company and its subsidiaries continue to be construed as distinct legal entities. Therefore, the parent company is generally not liable for wrongs committed by a subsidiary, even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent. Furthermore, despite the transformative changes in the global economic landscape

⁶ Piero Foresti, *Laura De Carli and others v. Republic of South Africa* (International Centre for Settlement of Investment Disputes, case No. ARB (AF)/07/1).

generated by offshore sourcing, purchasing goods and services even from sole suppliers remains an unrelated party transaction. Factors such as these make it exceedingly difficult to hold the extended enterprise accountable for human rights harm.

14. Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters.

15. This dynamic is hardly limited to transnational corporations. To attract investments and promote exports, governments may exempt national firms from certain legal and regulatory requirements or fail to adopt such standards in the first place.

16. And what is the result? In his 2006 report, the Special Representative surveyed allegations of the worst cases of corporate-related human rights harm. They occurred, predictably, where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high. A significant fraction of the allegations involved companies being complicit in the acts of governments or armed factions.⁷ A recent study conducted for the mandate by the Office of the United Nations High Commissioner for Human Rights (OHCHR) confirms these findings but also shows that adverse business impacts on human rights are not limited to these contexts.⁸

B. The framework

17. Insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by States or firms, may be too constrained by the competitive dynamics just described. Therefore, more coherent and concerted approaches are required. The framework of “protect, respect, and remedy” can assist all social actors - governments, companies, and civil society - to reduce the adverse human rights consequences of these misalignments.⁹

⁷ E/CN.4/2006/97

⁸ See Addendum 2 to this report.

⁹ Multi-stakeholder initiatives like the Kimberley Process reflect elements of all three principles; they were discussed at length in last year’s report (A/HRC/4/35, paras. 52-61).

18. Take first the State duty to protect. It has both legal and policy dimensions. As documented in the Special Representative's 2007 report, international law provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction.¹⁰ To help States interpret how this duty applies under the core United Nations human rights conventions, the treaty monitoring bodies generally recommend that States take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress.¹¹ States have discretion to decide what measures to take, but the treaty bodies indicate that both regulation and adjudication of corporate activities vis-à-vis human rights are appropriate. They also suggest that the duty applies to the activities of all types of businesses - national and transnational, large and small - and that it applies to all rights private parties are capable of impairing. Regional human rights systems have reached similar conclusions.

19. Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists,¹² and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States.¹³ Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.¹⁴

20. The 2007 report also described the expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts.¹⁵ As discussed in the next section, in some jurisdictions innovations in regulation and adjudication are moving toward greater recognition of the complex organizational forms characteristic of modern business enterprises.

¹⁰ A/HRC/4/35 and A/HRC/4/35/Add.1. Some States hold that this duty is limited to protecting persons who are both within their territory and jurisdiction.

¹¹ A/HRC/4/35/Add.1.

¹² Recognized bases include where the actor or victim is a national, where the acts have substantial adverse effects on the State, or where specific international crimes are involved. See A/HRC/4/35/Add.2.

¹³ The entire human rights regime may be seen to challenge the classical view of non-intervention, but the debate here hinges on what is considered coercive.

¹⁴ For instance, the Committee on the Elimination of Racial Discrimination recently encouraged a State party to "take appropriate legislative or administrative measures" to prevent adverse impacts on the rights of indigenous peoples in other countries from the activities of corporations registered in the State party (CERD/C/CAN/CO/18, para. 17).

¹⁵ A/HRC/4/35, paras. 19-32.

21. Further refinements of the legal understanding of the State duty to protect by authoritative bodies at national and international levels are highly desirable. But even within existing legal principles, the policy dimensions of the duty to protect require increased attention and more imaginative approaches from States.

22. It is often stressed that governments are the appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. However, the Special Representative's work raises questions about whether governments have got the balance right. His consultations and research, including a questionnaire survey sent to all Member States, indicate that many governments take a narrow approach to managing the business and human rights agenda.¹⁶ It is often segregated within its own conceptual and (typically weak) institutional box - kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance. This inadequate domestic policy coherence is replicated internationally. Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business. Chapter II below elaborates on these issues.

23. The corporate responsibility to respect human rights is the second principle. It is recognized in such soft law instruments as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,¹⁷ and the OECD Guidelines for Multinational Enterprises.¹⁸ It is invoked by the largest global business organizations in their submission to the mandate, which states that companies "are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent".¹⁹ It is one of the commitments companies undertake in joining the Global Compact.²⁰ And the Special Representative's surveys document the fact that companies worldwide increasingly claim they respect human rights.²¹

¹⁶ A/HRC/4/35/Add.3.

¹⁷ ILO Official Bulletin, Series A, No. 3 (2000).

¹⁸ See Organisation for Economic Co-operation and Development, DAFFE/IME/WPG(2000)15/FINAL.

¹⁹ International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development (OECD), "Business and Human Rights: The Role of Government in Weak Governance Zones", December 2006, paragraph 15, <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

²⁰ See <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html>.

²¹ A/HRC/4/35/Add.3, A/HRC/4/35/Add.4 and "Human Rights Policies of Chinese Companies: Results from a Survey", available at <http://www.business-humanrights.org/Documents/Ruggie-China-survey-Sep-2007.pdf>.

24. To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm. Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts. There are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations.

25. Yet how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? Most do not. What is required is due diligence - a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.²² The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.

26. Access to remedy is the third principle. Even where institutions operate optimally, disputes over the human rights impact of companies are likely to occur. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped - from the company level up through national and international levels. Chapter IV below identifies criteria of effectiveness for grievance mechanisms and suggests ways to strengthen the current system.

II. THE STATE DUTY TO PROTECT

27. The general nature of the duty to protect is well understood by human rights experts within governments and beyond. What seems less well internalized is the diverse array of policy domains through which States may fulfil this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad. This should be viewed as an urgent policy priority for governments - necessitated by the escalating exposure of people and communities to corporate-related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own.

28. The following discussion is not intended to insist on specific legislative or other policy actions, but to illustrate important issues and innovative approaches the Special Representative believes deserve serious consideration. Adjudication is addressed in chapter IV below.

²² A traditional definition of due diligence is “the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation”. *Black’s Law Dictionary*, 8th edition (2006).

A. Corporate culture

29. Governments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business. This would reinforce steps companies themselves are asked to take to demonstrate their respect for rights, as described in chapter III below. Two approaches are illustrated here.

30. First, governments can support and strengthen market pressures on companies to respect rights. Sustainability reporting can enable stakeholders to compare rights-related performance. Several States, subnational authorities, and stock exchanges are calling for such disclosure.²³ Sweden requires independently assured sustainability reports using Global Reporting Initiative guidelines for its State-owned enterprises, and China recently issued an advisory opinion on this subject.²⁴ Some jurisdictions have gone further by redefining fiduciary duties. The recently revised United Kingdom Companies Act requires directors to “have regard” to such matters as “the impact of the company’s operations on the community and the environment”,²⁵ and regulators are increasingly rejecting company attempts to prevent shareholder proposals regarding human rights issues being considered at annual general meetings.²⁶

31. Second, some States are beginning to use “corporate culture” in deciding corporate criminal accountability.²⁷ They examine a company’s policies, rules and practices to determine criminal liability and punishment, rather than basing accountability on the individual acts of

²³ Among other examples, the Johannesburg Securities Exchange mandates sustainability reporting, as does France’s law on new economic regulations.

²⁴ “Guidelines for external reporting by Swedish State-owned companies”, adopted 29 November 2007, available at <http://www.sweden.gov.se/sb/d/8194/a/93506>; and “Instructing opinions about central State-owned enterprises fulfilling social responsibility”, issued by China’s State-owned Asset Supervision and Administration Commission of the State Council, 4 January 2008.

²⁵ Section 172 (1) (d) of the United Kingdom Companies Act (2006), which came into effect 1 October 2007.

²⁶ “Trends in the use of corporate law and shareholder activism to increase corporate responsibility and accountability for human rights” prepared for the Special Representative by the law firm Fried Frank, available at <http://www.business-humanrights.org/Documents/Fried-Frank-Memo-Dec-2007.pdf>.

²⁷ “Corporate culture as a basis for the criminal liability of corporations” prepared for the Special Representative by the law firm Allens Arthur Robinson, available at <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

employees or officers. These principles may be invoked at the liability stage, or during sentencing and in exercising prosecutorial discretion.²⁸ Both incentivize companies to have appropriate compliance systems.

32. In principle, inducing a rights-respecting corporate culture should be easier to achieve in State-owned enterprises (SOEs). Senior management in SOEs is typically appointed by and reports to State entities. Indeed, the State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or are acting on behalf, or under the orders, of the State. Beyond any legal obligations, human rights harm caused by SOEs reflects directly on the State's reputation, providing it with an incentive in the national interest to exercise greater oversight. Much the same is true of sovereign wealth funds and the human rights impacts of their investments.

B. Policy alignment

33. The adverse effects of domestic policy incoherence were repeatedly raised at a recent consultation held by the Special Representative: "vertical" incoherence, where governments take on human rights commitments without regard to implementation; and "horizontal" incoherence, where departments - such as trade, investment promotion, development, foreign affairs - work at cross purposes with the State's human rights obligations and the agencies charged with implementing them.²⁹ Consider two instances of this latter pattern: the first from host States, the second from home States.

34. To attract foreign investment, host States offer protection through bilateral investment treaties and host government agreements. They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to States' duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.

35. This imbalance creates potential difficulties for all types of countries. Agreements between host governments and companies sometimes include promises to "freeze" the existing regulatory regime for the project's duration, which can be a half-century for major infrastructure and extractive industries projects. During the investment's lifetime, even social and environmental regulatory changes that are applied equally to domestic companies can be challenged by foreign investors claiming exemption or compensation.

36. The imbalance is particularly problematic for developing countries. A study conducted jointly for this mandate and the International Finance Corporation shows that contracts signed

²⁸ For examples of the former, see section 12.3 of Australia's Criminal Code Act 1995 (Cth) and article 102 of the Swiss Penal Code. For an example of the latter, see chapter 8 of the United States Federal Sentencing Guidelines Manual: (2006) §8C2.5(b)(1).

²⁹ See Addendum 1 to this report.

with non-OECD countries constrain the host State's regulatory powers significantly more than those signed with OECD countries - and that country risk ratings alone do not seem to account for the variance.³⁰ Yet it is precisely in developing countries that regulatory development may be most needed.

37. When investment cases go to international arbitration they are generally treated as commercial disputes in which public interest considerations, including human rights, play little if any role. Additionally, arbitration processes are often conducted in strict confidentiality so that the public in the country facing a claim may not even know of its existence. Where human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality.

38. States, companies, the institutions supporting investments, and those designing arbitration procedures should work towards developing better means to balance investor interests and the needs of host States to discharge their human rights obligations.³¹

39. Now consider an example from the home State side. It concerns export credit agencies (ECAs), which finance or guarantee exports and investments in regions and sectors that may be too risky for the private sector alone. ECAs may be State agencies or privatized, but all are mandated by the State and perform a public function. Despite this State nexus, however, relatively few ECAs explicitly consider human rights at any stage of their involvement; indeed, in informal discussions, a number indicate they might require specific authority from their government overseers to do so.

40. On policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight - and possibly indicate where State support should not proceed or continue.

41. Closer alignment between a State's ECA and its official development agency is also desirable. A development agency may view the arrival of an ECA-supported private investment in a particular region of a country as reason to focus its own efforts elsewhere. But if the

³⁰ See "Stabilization clauses and human rights", available at <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>.

³¹ Similar concerns have been raised regarding international and regional trade agreements, specifically about the State's ability to ensure access to essential services and protect the right to health. The Special Representative has not had the opportunity to conduct independent research on these trade-related issues.

investment has a large physical and social footprint, the chances are that it will generate pressures that local authorities may need help in managing - and which the home country development agency might be able to provide.

42. This is but a small sample of issues where more effective policy alignment by States is required to support the business and human rights agenda.

C. The international level

43. Effective guidance and support at the international level would help States achieve greater policy coherence. The human rights treaty bodies can play an important role in making recommendations to States on implementing their obligations to protect rights vis-à-vis corporate activities.³² Special procedures mandate holders can also highlight relevant issues.³³ OHCHR can contribute to capacity-building in States that may lack the necessary tools by providing technical advice.

44. States are encouraged to share information about challenges and best practices, thus promoting more consistent approaches and perhaps increasing their expectations of each other for protecting rights against corporate abuse. Peer learning would be facilitated by States including information about business in their reports for the universal periodic review.

45. Where States lack the technical or financial resources to effectively regulate companies and monitor their compliance, assistance from other States with the relevant knowledge and experience offers an important means to strengthen the enforcement of human rights standards. Such partnerships could be particularly fruitful between States that have extensive trade and investment links, and between the home and host States of the same transnationals.

46. Finally, the OECD Guidelines are currently the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights. Most recently updated in 2000, their current human rights provisions not only lack specificity, but in key respects have fallen behind the voluntary standards of many companies and business organizations. A revision of the Guidelines addressing these concerns would be timely.

D. Conflict zones

47. It is well established that some of the most egregious human rights abuses, including those related to corporations, occur in conflict zones. The human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown,

³² In June 2007, the Special Representative met with treaty body representatives to discuss their emerging guidance.

³³ In June 2007, the Special Representative met with other human rights mandate holders to share experiences.

and absence of the rule of law. Specific policy innovations are required to prevent corporate abuse, yet it seems that many States lag behind international institutions and responsible businesses in grappling with these difficult issues.³⁴

48. State policies and practices - where they exist at all - are limited, fragmented and mostly unilateral. The use of Security Council sanctions targeting certain companies deemed to have contributed to conflicts in the Democratic Republic of the Congo, Sierra Leone and Liberia demonstrated a restraining effect. A recent report by the Secretary-General recommends that this enforcement tool be continued and improved.³⁵ But there is a need for more proactive policies to prevent harmful corporate involvement in conflict situations. As the Secretary-General notes, States need to do more to “promote conflict-sensitive practices in their business sectors”.³⁶

49. Home States could identify indicators to trigger alerts with respect to companies in conflict zones. They could then provide or facilitate access to information and advice - whether from home or their overseas embassies - to help businesses address the heightened human rights risks and ensure they act appropriately when engaging with local actors. There may be a point at which the home State would withdraw its support altogether. None of this detracts from host State duties to protect against all corporate abuse within their jurisdictions, including conflict zones.

E. Summing up

50. The human rights regime rests upon the bedrock role of States. That is why the duty to protect is a core principle of the business and human rights framework. But meeting business and human rights challenges also requires the active participation of business directly. We now turn to the second principle.

III. THE CORPORATE RESPONSIBILITY TO RESPECT

51. When it comes to the role companies themselves must play, the main focus in the debate has been on identifying a limited set of rights for which they may bear responsibility. For example, the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights generated intense discussions about whether its list of rights was too long or too short, and why some rights were included and others not. At the same

³⁴ To explore these issues, the Special Representative held a consultation in collaboration with Global Witness; see Addendum 1 to this report.

³⁵ S/2008/18, particularly paragraphs 16-18. In some instances, the lists identifying individuals and companies for sanctions has been criticized on due process grounds.

³⁶ *Ibid*, para. 20.

time, the norms would have extended to companies essentially the entire range of duties that States have, separated only by the undefined concepts of “primary” versus “secondary” obligations and “corporate sphere of influence”. This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.

52. The table below shows why any attempt to limit internationally recognized rights is inherently problematic. Drawn from more than 300 reports of alleged corporate-related human rights abuses, it makes a critical point: there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner. Therefore, companies should consider all such rights. It may be useful for operational guidance purposes to map which rights companies have tended to affect most often in particular sectors or situations.³⁷ It is also helpful for companies to understand how human rights relate to their management functions - for example, human resources, security of assets and personnel, supply chains, and community engagement.³⁸ Both means of developing guidance should be pursued, but neither limits the rights companies should take into account.

Business impact on human rights

Labour rights

Freedom of association	Right to equal pay for equal work
Right to organize and participate in collective bargaining	Right to equality at work
Right to non-discrimination	Right to just and favourable remuneration
Abolition of slavery and forced labour	Right to a safe work environment
Abolition of child labour	Right to rest and leisure
Right to work	Right to family life

³⁷ For example, the International Council on Mining and Metals conducted a study of 38 cases of allegations of human rights or related abuses involving mining companies in order to uncover patterns of human rights impacts. Second submission to the Special Representative, October 2006, available at <http://www.icmm.com/newsdetail.php?rcd=119>.

³⁸ The companies in the Business Leaders Initiative on Human Rights (BLIHR) are developing this approach. See <http://www.blihr.org>.

Non-labour rights

Right to life, liberty and security of the person	Right of peaceful assembly	Right to an adequate standard of living (including food, clothing, and housing)
Freedom from torture or cruel, inhuman or degrading treatment	Right to marry and form a family	Right to physical and mental health; access to medical services
Equal recognition and protection under the law	Freedom of thought, conscience and religion	Right to education
Right to a fair trial	Right to hold opinions, freedom of information and expression	Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests
Right to self-determination	Right to political life	Right to social security
Freedom of movement	Right to privacy	

Source: This table is based on a study of 320 cases (from all regions and sectors) of alleged corporate-related human rights abuse reported on the Business and Human Rights Resource Centre website from February 2005 to December 2007. Each case was coded for what right(s) the alleged abuse impacted, referencing the rights in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and ILO core conventions. For the full study, including sources and methodology, see Addendum 2 to this report.

53. The more difficult question of what precise responsibilities companies have in relation to rights has received far less attention. While corporations may be considered “organs of society”, they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States. Accordingly, the Special Representative has focused on identifying the distinctive responsibilities of companies in relation to human rights.

A. Respecting rights

54. In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts. Whereas governments define the scope

of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate.³⁹

55. The corporate responsibility to respect exists independently of States' duties. Therefore, there is no need for the slippery distinction between "primary" State and "secondary" corporate obligations - which in any event would invite endless strategic gaming on the ground about who is responsible for what. Furthermore, because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. Finally, "doing no harm" is not merely a passive responsibility for firms but may entail positive steps - for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.

B. Due diligence

56. To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts. Comparable processes are typically already embedded in companies because in many countries they are legally required to have information and control systems in place to assess and manage financial and related risks.⁴⁰

57. If companies are to carry out due diligence, what is its scope? The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly. Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.

58. For the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies.

³⁹ There are situations where national laws and international standards conflict. Further guidance for companies needs to be developed, but companies serious about seeking to resolve the dilemma are finding ways to honour the spirit of international standards.

⁴⁰ "There are due diligence processes that a corporation must undertake to meet its general legal obligations that either accommodate or are at least amenable to consideration of human rights laws or standards". Allens Arthur Robinson, "Corporate duty and human rights under Australian law", prepared for the Special Representative, p. 1, available at <http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers>.

59. The Special Representative's research and consultations indicate that a basic human rights due diligence process should include the following.⁴¹

Policies

60. Companies need to adopt a human rights policy. Broad aspirational language may be used to describe respect for human rights, but more detailed guidance in specific functional areas is necessary to give those commitments meaning.

Impact assessments

61. Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context.⁴² While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.

Integration

62. The integration of human rights policies throughout a company may be the biggest challenge in fulfilling the corporate responsibility to respect. As is true for States, human rights considerations are often isolated within a company. That can lead to inconsistent or contradictory actions: product developers may not consider human rights implications; sales or procurement teams may not know the risks of entering into relationships with certain parties; and company lobbying may contradict commitments to human rights. Leadership from the top is essential to embed respect for human rights throughout a company, as is training to ensure consistency, as well as capacity to respond appropriately when unforeseen situations arise.⁴³

Tracking performance

63. Monitoring and auditing processes permit a company to track ongoing developments. The procedures may vary across sectors and even among company departments, but regular updates of human rights impact and performance are crucial. Tracking generates information

⁴¹ The principles are the same for all companies, although specific procedures may differ in small and medium-sized enterprises.

⁴² The Special Representative submitted a separate report on this subject in 2007 (A/HRC/4/74).

⁴³ BLIHR, OHCHR, and the Global Compact, *A Guide for Integrating Human Rights into Business Management*, available at www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf.

needed to create appropriate incentives and disincentives for employees and ensure continuous improvement. Confidential means to report non-compliance, such as hotlines, can also provide useful feedback.

64. As companies adopt and refine due diligence practices, industry and multi-stakeholder initiatives can promote sharing of information, improvement of tools, and standardization of metrics. The Global Compact is well-positioned to play such a role, enjoying a United Nations platform and reaching widely into the corporate community, including in developing countries.

C. Sphere of influence

65. The Special Representative's mandate calls on him to research and clarify the concepts of corporate "sphere of influence" and "complicity". His detailed analysis is presented in a separate report.⁴⁴ Here the concepts are addressed specifically in relation to the corporate responsibility to respect human rights.

66. Sphere of influence was introduced into corporate social responsibility discourse by the Global Compact. It was intended as a spatial metaphor: the "sphere" was expressed in concentric circles with company operations at the core, moving outward to suppliers, the community, and beyond, with the assumption that the "influence" - and thus presumably the responsibility - of the company declines from one circle to the next. The draft norms later proposed the concept as a basis for attributing legal obligations to companies, using it as though it were analogous to the jurisdiction of States.

67. Sphere of influence remains a useful metaphor for companies in thinking about their human rights impacts beyond the workplace and in identifying opportunities to support human rights, which is what the Global Compact seeks to achieve.⁴⁵ But a more rigorous approach is required to define the parameters of the responsibility to respect and its due diligence component.

68. To begin with, sphere of influence conflates two very different meanings of influence: one is impact, where the company's activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing harm. The first falls squarely within the responsibility to respect; the second may only do so in particular circumstances.

69. Anchoring corporate responsibility in the second meaning of influence requires assuming, in moral philosophy terms, that "can implies ought". But companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because

⁴⁴ A/HRC/8/16.

⁴⁵ See <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have companies act whenever they have influence, particularly over governments. Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another.

70. Moreover, influence can only be defined in relation to someone or something. Consequently, it is itself subject to influence: a government can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights - again demonstrating why State duties and corporate responsibilities must be defined independently of one another.

71. Finally, the emphasis on proximity in the sphere of influence model can be misleading. Clearly, companies need to be concerned with their impact on workers and surrounding communities. But their activities can equally affect the rights of people far away from the source - as, for example, violations of privacy rights by Internet service providers can endanger dispersed end-users. Hence, it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company's web of activities and relationships.

72. In short, the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities.

D. Complicity

73. The corporate responsibility to respect human rights includes avoiding complicity. The concept has legal and non-legal pedigrees, and the implications of both are important for companies. Complicity refers to indirect involvement by companies in human rights abuses - where the actual harm is committed by another party, including governments and non-State actors. Due diligence can help a company avoid complicity.

74. The legal meaning of complicity has been spelled out most clearly in the area of aiding and abetting international crimes, i.e. knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime, as discussed in the 2007 report of the Special Representative.⁴⁶ The number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses.

75. In non-legal contexts, corporate complicity has become an important benchmark for social actors, including public and private investors, the Global Compact, campaigning organizations, and companies themselves. Claims of complicity can impose reputational costs and even lead to

⁴⁶ A/HRC/4/35, paras. 22-32.

divestment, without legal liability being established.⁴⁷ In this context, allegations of complicity have included indirect violations of the broad spectrum of human rights - political, civil, economic, social, and cultural.

76. Owing to the relatively limited case history, especially in relation to companies rather than individuals, and given the substantial variations in definitions of complicity within and between the legal and non-legal spheres, it is not possible to specify definitive tests for what constitutes complicity in any given context. But companies should bear in mind the considerations set out below.

77. Mere presence in a country, paying taxes, or silence in the face of abuses is unlikely to amount to the practical assistance required for legal liability. However, acts of omission in narrow contexts have led to legal liability of individuals when the omission legitimized or encouraged the abuse.⁴⁸ Moreover, under international criminal law standards, practical assistance or encouragement need neither cause the actual abuse, nor be related temporally or physically to the abuse.

78. Similarly, deriving a benefit from a human rights abuse is not likely on its own to bring legal liability. Nevertheless, benefiting from abuses may carry negative implications for companies in the public perception.

79. Legal interpretations of “having knowledge” vary. When applied to companies, it might require that there be actual knowledge, or that the company “should have known”, that its actions or omissions would contribute to a human rights abuse. Knowledge may be inferred from both direct and circumstantial facts. The “should have known” standard is what a company could reasonably be expected to know under the circumstances.

80. In international criminal law, complicity does not require knowledge of the specific abuse or a desire for it to have occurred, as long as there was knowledge of the contribution. Therefore, it may not matter that the company was merely carrying out normal business activities if those activities contributed to the abuse and the company was aware or should have been aware of its contribution. The fact that a company was following orders, fulfilling contractual obligations, or even complying with national law will not, alone, guarantee it legal protection.

81. In short, the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing the due diligence processes described above - which, as noted, apply not only to their own activities but also to the relationships connected with them.

⁴⁷ The Norwegian Government pension fund excludes and has divested from companies, including Wal-Mart, for complicity in human rights violations. Council on Ethics for the Government Pension Fund, annual reports 2006 and 2007, available at http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/annual-reports.html?id=458699.

⁴⁸ For example, International Criminal Tribunal for the former Yugoslavia, Trial Chamber judgement *Kvočka et al* (IT-98-30/1-T), 2 November 2001, paras. 257-261.

IV. ACCESS TO REMEDIES

82. Effective grievance mechanisms play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect. State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses. Equally, the corporate responsibility to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available. Providing access to remedy does not presume that all allegations represent real abuses or bona fide complaints.

83. Expectations for States to take concrete steps to adjudicate corporate-related human rights harm are expanding. Treaty bodies increasingly recommend that States investigate and punish human rights abuse by corporations and provide access to redress for such abuse when it affects persons within their jurisdiction.⁴⁹ Redress could include compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies. As discussed earlier, regulators are also using new tools to hold corporations accountable under both civil and criminal law, focused on failures in organizational culture.

84. Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Yet they are also important in societies with well-functioning rule of law institutions, where they may provide a more immediate, accessible, affordable, and adaptable point of initial recourse.

85. State-based, non-judicial mechanisms include agencies with oversight of particular standards (for example, health and safety); publicly funded mediation services, such as those handling labour rights disputes in the United Kingdom and South Africa; national human rights institutions; or mechanisms such as the OECD's National Contact Points.

86. Non-State mechanisms may be linked to industry-based or multi-industry organizations; to multi-stakeholder initiatives ensuring member compliance with standards; to project financiers requiring certain standards of clients; or to particular companies or projects. Non-State mechanisms must not undermine the strengthening of State institutions, particularly judicial mechanisms, but can offer additional opportunities for recourse and redress.

87. Yet this patchwork of mechanisms remains incomplete and flawed. It must be improved in its parts and as a whole.

⁴⁹ For instance, the Committee on the Rights of the Child increasingly recommends that States parties comply with article 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which requires them to take measures, where appropriate and, subject to national law, to establish criminal, civil or administrative liability of legal persons for treaty offences. See A/HRC/4/35/Add.1, para. 64.

A. Judicial mechanisms

88. Judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse. Victims face particular challenges when seeking personal compensation or reparation as opposed to more general sanction of the corporation through a fine or administrative remedies. They may lack a basis in domestic law on which to found a claim. Even if they can bring a case, political, economic or legal considerations may hamper enforcement.

89. Some complainants have sought remedy outside the State where the harm occurred, particularly through home State courts, but have faced extensive obstacles. Costs may be prohibitive, especially without legal aid; non-citizens may lack legal standing; and claims may be barred by statutes of limitations. Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary. In common law countries, the court may dismiss the case based on *forum non conveniens* grounds - essentially, that there is a more appropriate forum for it. Even the most independent judiciaries may be influenced by governments arguing for dismissal based on various "matters of State". These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.

90. The law is slowly evolving in response to some of these obstacles. In some jurisdictions, plaintiffs have brought cases against parent companies claiming that they should be held responsible for their own actions and omissions in relation to harm involving their foreign subsidiaries.⁵⁰ Elsewhere it is getting somewhat more difficult for defendant companies to have cases alleging harm abroad dismissed on the basis that there is a more appropriate forum.⁵¹ And foreign plaintiffs are using the United States Alien Tort Claims Act to sue even non-United States companies for harm suffered abroad.⁵²

91. States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic human rights violations.

⁵⁰ For example, *Connelly v. RTZ Corporation plc and others* [1998] AC 854, and *Lubbe v. Cape plc* [2000] 4 All ER 268 (House of Lords, United Kingdom).

⁵¹ The European Court of Justice has confirmed that national courts in an EU member State may not dismiss actions against companies domiciled in that State on *forum non conveniens* grounds. *Owusu v. Jackson* [2005] ECR-I-1283. And in Australia, defendants must now prove that the forum is "clearly inappropriate". *Voth v. Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538 (H.C.A.).

⁵² More than 40 cases have been brought against companies under this statute since 1993, when the first was filed.

B. Non-judicial grievance mechanisms

92. Non-judicial mechanisms to address alleged breaches of human rights standards should meet certain principles to be credible and effective. Based on a year of multi-stakeholder and bilateral consultations related to the mandate,⁵³ the Special Representative believes that, at a minimum, such mechanisms must be:

- (a) **Legitimate:** a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;
- (b) **Accessible:** a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;
- (c) **Predictable:** a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;
- (d) **Equitable:** a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;
- (e) **Rights-compatible:** a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;
- (f) **Transparent:** a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

C. Company-level grievance mechanisms

93. Currently, the primary means through which grievances against companies play out are litigation and public campaigns. For a company to take a bet on winning lawsuits or successfully countering hostile campaigns is at best optimistic risk management. Companies should identify and address grievances early, before they escalate. An effective grievance mechanism is part of the corporate responsibility to respect.

⁵³ The process involved experts from all stakeholder groups and regions. These principles, based on more specific guidance developed for companies, apply across non-judicial mechanisms of different kinds. See http://www.business-humanrights.org/Links/Repository/308254/link_page_view.

94. A company can provide a grievance mechanism directly and be integrally involved in its administration. This could include the use of external resources - possibly shared with other companies - such as hotlines for raising complaints, advisory services for complainants, or expert mediators. Or it may involve a wholly external mechanism. Whatever the form, the company should ensure that the process abides by the principles outlined above.

95. Where a company is directly involved in administering a mechanism, problems may arise if it acts as both defendant and judge. Therefore, the mechanism should focus on direct or mediated dialogue. It should be designed and overseen jointly with representatives of the groups who may need to access it. Care should be taken to redress imbalances in information and expertise between parties, enabling effective dialogue and sustainable solutions. These mechanisms should not negatively impact opportunities for complainants to seek recourse through State-based mechanisms, including the courts.

D. State-based non-judicial mechanisms

96. According to the research carried out under the mandate, of the 85 recognized national human rights institutions (NHRIs) at least 40 are able to handle grievances related to the human rights performance of companies. Of these, 31 are accredited under the Paris Principles.⁵⁴ Some are limited to human rights abuses alleged against State-owned enterprises or private companies providing public services. Others can address grievances against any kind of company, but only with regard to specific kinds of human rights-related grievances, often discrimination. A third group - notably in Africa - admits grievances against all companies with regard to any human rights issue.⁵⁵

97. The actual and potential importance of these institutions cannot be overstated. Where NHRIs are able to address grievances involving companies, they can provide a means to hold business accountable. NHRIs are particularly well-positioned to provide processes - whether adjudicative or mediation-based - that are culturally appropriate, accessible, and expeditious. Even where they cannot themselves handle grievances, they can provide information and advice on other avenues of recourse to those seeking remedy. Through increased interchange of information, they could act as lynchpins within the wider system of grievance mechanisms, linking local, national and international levels across countries and regions. NHRIs that do not

⁵⁴ The Paris Principles relate to the status of national human rights institutions (NHRIs) and establish criteria for their composition, guarantees of independence and pluralism, competence, responsibilities and methods of operation. See <http://www.nhri.net/default.asp?PID=312&DID=0>.

⁵⁵ “Business and Human Rights: A Survey of NHRI Practices”, at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

currently publicize information about their business-related work should do so. The Special Representative welcomes plans on the part of the International Coordinating Committee of NHRIs, supported by OHCHR, to address the issue of how this work might be further strengthened.

98. The 40 States adhering to the OECD Guidelines for Multinational Enterprises must provide a National Contact Point (NCP) whose tasks include handling grievances. OECD provides procedural guidance, with individual NCPs having flexibility in the application of the Guidelines. The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. In sum, many NCP processes appear to come up short when measured against the minimum principles set out in paragraph 92 above.

99. Certain NCPs, recognizing such shortfalls, have sought innovative solutions. Several have involved multiple government departments and created multi-stakeholder advisory groups. Perhaps most interesting is the decision of the Dutch Government to reorganize its NCP such that a four-person multi-stakeholder group handles grievances independent of, though supported administratively by, the Government. Alternative suggestions have included placing NCPs under the legislative branch or within a NHRI. OECD and adhering States should consider these and other options for addressing current deficits, while preserving the important role of governments in raising awareness of the Guidelines and providing incentives for corporate compliance and learning.

E. Multi-stakeholder or industry initiatives and financiers

100. For multi-stakeholder or industry initiatives aiming to advance human rights standards in the practices of their corporate members, a grievance mechanism provides an important check on performance. The same is true for financial institutions seeking to ensure compliance with human rights standards in the conduct of the projects they support. In the absence of an effective grievance mechanism, the credibility of such initiatives and institutions may be questioned. The Voluntary Principles on Security and Human Rights recently faced this challenge, and the Special Representative knows of calls for other initiatives, including the Equator Principles, to develop a grievance process. Furthermore, while many of these mechanisms require their corporate members or clients to have their own grievance processes as a first port of call, few set clear process standards for them. This risks encouraging tokenistic rather than effective processes at the operational level.

101. As the number of initiatives aimed at promoting standards increases, collaborative models for their grievance mechanisms will likely become more important. These could facilitate access for complainants by providing a single avenue for recourse to multiple organizations; marshal

the collective leverage of organizations and their members to achieve solutions; and reduce the resource implications for the individual entities involved. The organizations concerned must remain responsible for ensuring that any such mechanism meets the minimum principles described above.

F. Gaps in access

102. The foregoing describes a patchwork of grievance mechanisms at different levels of the international system, with different constituencies and processes. Yet considerable numbers of individuals whose human rights are impacted by corporations, lack access to any functioning mechanism that could provide remedy. This is due in part to a lack of awareness as to where these mechanisms are located, how they function, and what supporting resources exist. NHRIs, NGOs, academic institutions, governments and other actors could address this gap through improved information flows.

103. Yet this is not solely about a lack of information. It also reflects intended and unintended limitations in the competence and coverage of existing mechanisms. Consequently, some actors have proposed the creation of a global ombudsman function that could receive and handle complaints. Such a mechanism would need to provide ready access without becoming a first port of call; offer effective processes without undermining the development of national mechanisms; provide timely responses while likely being located far from participants; and furnish appropriate solutions while dealing with different sectors, cultures and political contexts. It would need to show some early successes if faith in its capacity were not quickly to be undermined. To perform these tasks any such function would need to be well-resourced. Careful consideration should go into whether these criteria actually can and would be met before moving in this direction.

V. CONCLUSION

104. **The current debate on the business and human rights agenda originated in the 1990s, as liberalization, technology, and innovations in corporate structure combined to expand prior limits on where and how businesses could operate globally. Many countries, including in the developing world, have been able to take advantage of this new economic landscape to increase prosperity and reduce poverty. But as has happened throughout history, rapid market expansion has also created governance gaps in numerous policy domains: gaps between the scope of economic activities and actors, and the capacity of political institutions to manage their adverse consequences. The area of business and human rights is one such domain.**

105. **In fact, progress has been made in the past decade, at least in some industries and by growing numbers of firms. The Special Representative's 2007 report detailed novel multi-stakeholder initiatives, public-private hybrids combining mandatory with voluntary measures, and industry and company self-regulation. All have their strengths and shortcomings, but few would have been conceivable a mere decade ago. Likewise, there is an expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts. Governments have adopted a variety of measures, albeit gingerly to date, to promote a corporate culture respectful of human rights. Fragments of international institutional provisions exist with similar aims.**

106. Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects. That is what needs fixing. And that is what the framework of “protect, respect and remedy” is intended to help achieve.

107. The United Nations is not a centralized command-and-control system that can impose its will on the world - indeed it has no “will” apart from that with which Member States endow it. But it can and must lead intellectually and by setting expectations and aspirations. The Human Rights Council can make a singular contribution to closing the governance gaps in business and human rights by supporting this framework, inviting its further elaboration, and fostering its uptake by all relevant social actors.



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**PROMOTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL,
ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING
THE RIGHT TO DEVELOPMENT**

**Business and human rights: Towards operationalizing the
“protect, respect and remedy” framework**

**Report of the Special Representative of the Secretary-General
on the issue of human rights and transnational corporations
and other business enterprises***

Summary

This report recapitulates the key features of the “protect, respect and remedy” framework and outlines the strategic directions of the Special Representative’s work streams to date in operationalizing the framework.

* This report has been submitted late in order to include the most up-to-date information.

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I. INTRODUCTION

1. At its June 2008 session, the Human Rights Council was unanimous in welcoming the “protect, respect and remedy” policy framework proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.¹ This marked the first time the Council or its predecessor had taken a substantive policy position on business and human rights. By its resolution 8/7, the Council also extended the Special Representative’s mandate for another three years, tasking him with “operationalizing” the framework - providing “practical recommendations” and “concrete guidance” to States, businesses and other social actors on its implementation.

2. The framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.² The three pillars are complementary in that each supports the others.

3. The new mandate is intended to translate the framework into practical guiding principles. Even prior to further operationalization, it has enjoyed considerable uptake. For example, the announcement of Canada’s export credit agency’s new “Statement on Human Rights” referenced the framework and said the agency would monitor the Special Representative’s work to “guide its approach to assessing human rights”.³ The United Kingdom’s National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises found against a company for failing to exercise adequate human rights “due diligence” - using the term as defined in the Special Representative’s report to the Council in 2008 (A/HRC/8/5) - and drew the company’s attention to that report in recommending how to implement an effective corporate responsibility policy.⁴ An Australian parliamentary motion took note of the framework and called on the Government to “encourage Australian companies to respect the rights of members of the communities in

¹ A/HRC/8/5.

² The State duty to protect is well-established, with a firm basis in international human rights law, and is unrelated to the “responsibility to protect” principle in the humanitarian intervention debate.

³ “New statement sets out EDC’s principles for the consideration of Human Rights”, 30 April 2008: http://www.edc.ca/english/docs/news/2008/mediaroom_14502.htm.

⁴ Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., 28 August 2008, paras. 41, 64, 77: <http://www.berr.gov.uk/files/file47555.doc>.

which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas”.⁵ The Norwegian Government’s 2009 Corporate Social Responsibility White Paper discusses the framework extensively.⁶

4. Leading business entities have endorsed the framework. In a joint statement, the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD said that the framework provides “a clear, practical and objective way of approaching a very complex set of issues”.⁷ It was welcomed by the International Council of Mining and Metals and the Business Leaders Initiative on Human Rights.⁸ Forty socially responsible investment funds wrote to the Council, saying that the framework helped them by promoting greater disclosure of corporate human rights impacts, and appropriate steps to mitigate them.⁹ The oil company, ExxonMobil, in a public commemoration of the sixtieth anniversary of the Universal Declaration of Human Rights, cited the framework’s corporate responsibility to respect principle as a benchmark for its own employees.¹⁰

5. A joint civil society statement to the Council in May 2008 noted the framework’s value, and several signatories have invoked it in subsequent advocacy work.¹¹ Amnesty International said the framework “has the potential to make an important contribution to the protection of human rights”.¹² The Special Representative was pleased by the positive feedback from non-governmental organizations (NGOs) at a multi-stakeholder consultation in New Delhi in February 2009, and a NGO briefing in New York in March 2009. Finally, his work is featured prominently in academic writings and the media.

6. This report provides an update on steps the Special Representative has taken towards operationalizing the framework, and it addresses a number of issues related to it that have

⁵ Senate Official Hansard (No. 6 2008) 23 June 2008, pp. 3037-3038: <http://www.aph.gov.au/HANSARD/senate/dailys/ds230608.pdf>.

⁶ “Corporate Social Responsibility in a Global Economy”, Ministry for Foreign Affairs, Norway, 23 January 2009.

⁷ <http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>.

⁸ See <http://www.icmm.com/page/8331/icmm-welcomes-ruggie-report>; and <http://www.reports-and-materials.org/BLIHR-statement-Ruggie-report-2008.pdf>.

⁹ <http://www.reports-and-materials.org/SRI-letter-re-Ruggie-report-3-Jun-2008.pdf>.

¹⁰ This appeared on the *New York Times* op-ed page: http://www.exxonmobil.com/corporate/news_opeds_20081218_humanrights.aspx.

¹¹ A/HRC/8/NGO/5.

¹² <http://www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc>.

emerged from ongoing consultations. But before proceeding, brief reflections are in order concerning today's very difficult economic climate, and how it might affect business and human rights.

II. THE ECONOMIC CRISIS

7. From his first report to the Commission on Human Rights in 2006 onwards, the Special Representative has maintained that the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences, were unsustainable.¹³ "There is no magic in the marketplace", he began his 2007 report.¹⁴ Markets can be highly efficient means for allocating scarce resources, and powerful forces for promoting social objectives ranging from poverty alleviation to the rule of law. But for markets to work optimally they must have adequate institutional underpinnings and be embedded in the broader values of social community. All along he has stressed that these governance gaps "create the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation".¹⁵ He employed this framing to explain the state of business and human rights. We now know it holds for the world political economy as a whole.

8. Today, policymakers everywhere are focused on putting out the fires in the global financial system and containing their consequences for the real economy. According to an Asian Development Bank report, the worldwide loss of wealth this year may total US\$ 50 trillion, or one year's worth of GDP.¹⁶ A World Bank report projects global GDP in 2009 to decline for the first time since World War II, and the drop in world trade to be the steepest in 80 years.¹⁷ Even countries that were relatively insulated from the original financial sector meltdown, including the majority of developing countries, are hard hit by its effects: weak demand for their exports, collapsing commodity prices, lack of trade finance, severe credit squeezes, deep declines in foreign direct investment, and a sharp deceleration in workers' remittances. The ILO estimates that the number of persons officially unemployed could rise above 230 million in 2009, from 193 million last year.¹⁸

9. In major downturns, those who are already vulnerable - individuals and countries - are often the most severely affected. Global and national efforts are needed to limit the damage and

¹³ E/CN.4/2006/97, para. 18.

¹⁴ A/HRC/4/35, para. 1.

¹⁵ A/HRC/8/5, para. 3.

¹⁶ <http://www.adb.org/Media/Articles/2009/12818-global-financial-crisis/Major-Contagion-and-a-shocking-loss-of-wealth.pdf>.

¹⁷ <http://siteresources.worldbank.org/NEWS/Resources/swimmingagainstthetide-march2009.pdf>.

¹⁸ http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_103456.pdf.

restore economic momentum. Governments must avoid erecting protectionist barriers or lowering human rights standards for businesses; their short-run gains are illusory and they undermine longer term recovery. For companies, even downsizing and plant closings must be conducted responsibly, and restoring public trust and confidence in business is as much of an immediate challenge as reinventing viable business models.

10. However painful the near-term may be, going forward elements of the business and human rights agenda should become more closely aligned with the world's overall economic policy agenda than in recent decades. Governments once championing neo-liberal economic doctrines have been reminded starkly that they have duties no other social actor can fulfil, resulting in a recalibration of the balance between market and State. For other countries, the need to deepen their domestic markets will require greater attention to social investments and safety nets, thereby fostering their citizens' fuller realization of certain economic and social rights. Companies have had to acknowledge that business as usual is not good enough for anybody, including business itself, and that they must better integrate societal concerns into their long-term strategic goals. Society as a whole cries out for remedy where wrong has been done. The terms transparency and accountability resonate more widely than before. And calls for fairness are more insistent. Because the business and human rights agenda is tightly connected to these shifts, it both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth.

11. It is often mused that in every crisis there are opportunities. In operationalizing the "protect, respect and remedy" framework, the Special Representative aims to identify such opportunities in the business and human rights domain and demonstrate how they can be grasped and acted upon.

III. THE STATE DUTY TO PROTECT

12. The Council asked the Special Representative to provide views and recommendations on strengthening the fulfilment of the State duty to protect against corporate-related human rights abuse, including through international cooperation. This section summarizes this duty's content and elaborates upon several business-related policy areas highly relevant to States fulfilling their duty.¹⁹

13. The State duty to protect against third party abuse is grounded in international human rights law. The specific language employed in the main United Nations human rights treaties varies, but all include two sets of obligations. First, the treaties commit States parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction. Second, the treaties require States to "ensure" (or some functionally equivalent verb) the enjoyment or realization of those rights by rights holders.²⁰ In turn, ensuring that rights holders enjoy their

¹⁹ Access to remedy is discussed in section IV.

²⁰ For example, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child use "respect and ensure", with "respect" in the State context, meaning that the State must refrain from violating the rights. The Convention on the Rights of Persons with Disabilities requires States parties to "ensure and promote", and to take appropriate

rights requires protection by States against other social actors, including business, who impede or negate those rights. Guidance from international human rights bodies suggests that the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises.²¹

14. The State duty to protect is a standard of conduct, and not a standard of result. That is, States are not held responsible for corporate-related human rights abuse per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.²² Within these parameters, States have discretion as to how to fulfil their duty. The main human rights treaties generally contemplate legislative, administrative and judicial measures. The treaty bodies have recommended to States such measures as adopting anti-discrimination legislation governing employment practices; consulting with communities before approving mining and logging projects; monitoring and addressing the human rights impacts of such projects; and encouraging businesses to develop codes of conduct that include human rights.

15. The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction.²³

16. There are also strong policy reasons for home States to encourage their companies to respect rights abroad, especially if a State itself is involved in the business venture - whether as owner, investor, insurer, procurer, or simply promoter. Such encouragement gets home States out

measures to “eliminate” abuse by private “enterprises”. The International Convention on the Elimination of All Forms of Racial Discrimination requires that States parties “shall prohibit and bring to an end ... racial discrimination by any persons, group or organization”. The Convention on the Elimination of All Forms of Discrimination against Women requires States parties “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”. In the International Covenant on Economic, Social and Cultural Rights, States parties undertake “to take steps ... achieving progressively the full realization of rights”, while its rights-specific provisions, such as those dealing with labour, refer to States “ensuring” those rights.

²¹ See A/HRC/8/5/Add.1 for a summary of the Special Representative’s research on the United Nations human rights treaties and treaty body commentaries.

²² Corporate acts may be directly attributed to States in some circumstances, for example where a State exercises such close control that the company is its mere agent.

²³ E.g. CERD/C/USA/CO/6 (2008), para. 30; CESCR general comment 19 (2008), para. 54.

of the untenable position of being associated with possible overseas corporate abuse. And it can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own.

17. States have long been aware of the range of measures required of them in relation to abuse by State agents. Moreover, most States have adopted measures and established institutions in certain core areas of business and human rights, such as labour standards and workplace non-discrimination. But beyond that, the business and human rights domain exhibits considerable legal and policy incoherence, as discussed in the Special Representative's 2008 report.

18. There is "vertical" incoherence, where Governments sign on to human rights obligations but then fail to adopt policies, laws, and processes to implement them. Even more widespread is "horizontal" incoherence, where economic or business-focused departments and agencies that directly shape business practices - including trade, investment, export credit and insurance, corporate law, and securities regulation - conduct their work in isolation from and largely uninformed by their Government's human rights agencies and obligations.

19. Domestic policy incoherence is reproduced at the international level. This results in ambiguous and mixed messages to business from Governments and international organizations.

20. Recent legal and policy developments begin to address some of the challenges. In previous reports, the Special Representative noted four significant legal developments: the growing international harmonization of standards for international crimes that apply to corporations under domestic law, largely as a by-product of converging standards applicable to individuals; an emerging standard of corporate complicity in human rights abuses; the consideration by some States of "corporate culture" in deciding criminal responsibility or punishment; and an increase in civil cases brought against parent companies for their acts and omissions in relation to harm involving their foreign subsidiaries.²⁴

21. In the policy realm, a growing number of States are adopting corporate social responsibility (CSR) policies.²⁵ They vary in content and form, but generally encourage responsible business practices, including fostering business understanding of and respect for human rights. In some cases, access to official assistance, such as export credit or investment insurance, may be linked to companies having a CSR policy, participating in the United Nations Global Compact, or confirming their awareness of the OECD Guidelines.

22. The Special Representative considers it important for all stakeholders, including Governments, to learn more about these policy developments and how they may contribute to

²⁴ A/HRC/4/35, paras. 19-32; A/HRC/8/5, paras. 31 and 90; A/HRC/8/16.

²⁵ Many OECD countries have such policies. Elements can also be found in Brazil, China, Indonesia and elsewhere.

greater policy coherence in business and human rights. Therefore, he is surveying Member States. He is grateful to OHCHR for facilitating the survey, and urges all Governments to respond.

23. The Special Representative is also exploring several other policy domains closely related to the State duty to protect - corporate law, investment and trade agreements, and international cooperation, particularly with respect to conflict affected areas.

A. Corporate law

24. Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. Traditionally, the two have been viewed as distinct legal and policy spheres, populated by different communities of practice. That trend is beginning to change as Governments and courts introduce more public interest considerations into the equation. A few examples illustrate the trend.

25. Recently adopted Danish legislation requires larger companies to report on their CSR programme, or report that they lack one.²⁶ The recently revised Companies Act in the United Kingdom requires directors to “have regard” to such matters as “the impact of the company’s operations on the community and the environment” as part of their duties towards the company.²⁷ The United Kingdom Government recently confirmed that pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions, provided they act in the fund’s best interests.²⁸ The recent South African Companies Act allows the Government to prescribe social and ethics committees for certain companies.²⁹ A draft companies bill in India includes a provision requiring publicly listed companies above a certain size to have a board-level “stakeholder relations committee” to “consider and resolve the grievances of stakeholders”.³⁰

26. In the United States, Federal statutes require publicly listed companies to have robust programmes to assess, manage and report on material risks. None refers to human rights explicitly, but material risks clearly do encompass human rights issues: since the path-breaking *Doe v. Unocal* litigation in 1997, more than 50 cases have been brought against companies under the Alien Tort Statute alleging corporate involvement in human rights abuse abroad. Reputational damage and operational disruptions pose additional risks.

²⁶ Act amending the Danish Financial Statements Act, entered into force 1 January 2009.

²⁷ Section 172 (1) (d) of the UK Companies Act (2006), entered into force 1 October 2007.

²⁸ Statement by Lord McKenzie of Luton, Parliamentary Under-Secretary of State, Department of Work and Pensions, Parliamentary Hansard (26 November 2008).

²⁹ Section 72 (4), 2008 South African Companies Act.

³⁰ Section 158 (12-13), 2008 Indian Companies Bill.

27. To provide greater clarity about what is currently expected of companies under corporate law as it relates to human rights, the Special Representative is pleased that 19 leading law firms from around the world have volunteered to survey corporate law provisions in over 40 jurisdictions.³¹ The firms will document how the consideration of human rights by companies and their officers are addressed, explicitly or by implication, in laws and guidelines relating to incorporation, directors' duties, reporting, stakeholder engagement, and corporate governance generally. They will also report on how corporate regulators and courts apply these laws and guidelines, and whether legal or policy reform is being considered. The results will be published, and the Special Representative then will consult widely on what recommendations he might make to States.

B. Investment and trade agreements

28. Despite the current downturn, investment and trade will resume as engines of economic growth, and sustainable growth remains the necessary condition for economic and social development. The challenge in the short run is to avoid tit-for-tat escalation of protectionism - which deepened and lengthened the Great Depression, ultimately giving rise to some of the worst horrors of the twentieth century.

29. History has also witnessed successive waves of States arbitrarily expropriating foreign investments, and in prior eras, the "gunboat diplomacy" that was sometimes triggered in response. The modern investment regime is based on international investment treaties and contracts, often coupled with binding investor-State arbitration, all of which increased exponentially in the 1990s.

30. Nevertheless, recent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.³²

31. A Norwegian draft model agreement and commentary address such concerns about bilateral investment treaties. The commentary notes that these treaties pose potential risks to Norway's own highly developed system of regulations and protection, including environmental and social policies. It also stresses the vulnerability of developing countries to agreements "that tie up political freedom of action and the exercise of authority ...".³³ The draft model agreement

³¹ <http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf>.

³² *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB (AF)/07/1) has attracted international attention because it involves that country's black economic empowerment laws.

³³ "Comments on the Model for Future Investment Agreements (English Translation)", 19 December 2007 (copy on file with the Special Representative), p. 11.

strives to “ensure that the State’s right to make legitimate regulations of the actions of investors is not restricted by an investment agreement. However, the right to regulate must be balanced against the investors’ wish for predictability, legal safeguards, minimum requirements regarding the actions of the State and compensation in the event of expropriation”.³⁴

32. Investors often enhance the protection available under bilateral investment treaties with “stabilization” provisions in confidential contracts with host Governments called “host Government agreements”. The Special Representative, in collaboration with the International Finance Corporation, analysed stabilization provisions in nearly 90 recent host Government agreements.³⁵ Among the key findings are: none of the host Government agreements with OECD countries offered investors exemptions from new laws and, with minor exceptions, they tailored stabilization clauses to preserve public interest considerations; a majority of the host Government agreements with non-OECD countries did have provisions to insulate investors from compliance with new environmental and social laws or facilitated compensation for compliance; the most sweeping stabilization provisions were found in Sub-Saharan Africa, where 7 of the 11 host Government agreements specified exemptions from or compensation for the effect of all new laws for the duration of the project, irrespective of their relevance to protecting human rights or any other public interest.

33. This research was discussed with experts in London, Johannesburg, and Marrakesh. Seasoned project lawyers from major international law firms expressed surprise that some of their peers were still employing the more extreme stabilization provisions and that Governments were willing to sign them, while several developing country negotiators were unaware of alternatives.

34. When an investor brings a claim regarding a bilateral investment treaty or host Government agreement to binding international arbitration, depending on the rules incorporated into the agreements, little or nothing about the case may be made public. This is at variance with precepts of transparency and good governance. While confidential business information must be protected, under some rules not even the existence of a case against a country is known to its public, let alone its substance. This impedes more responsible contracting by companies and Governments, and contributes to inconsistent rulings by arbitrators, undermining the system’s predictability and legitimacy.

35. Accordingly, the Special Representative was pleased that the United Nations Commission on International Trade Law (UNCITRAL), one of the sources of arbitration rules, invited his views at its forty-first session in 2008. He is encouraged by the Commission’s conclusion that transparency is a desirable objective in investor-State arbitration and its decision to address this as a matter of priority.³⁶

³⁴ Ibid., p. 27.

³⁵ See “Stabilization Clauses and Human Rights”, http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_LessonsLearned.

³⁶ A/63/17.

36. As a next step, the Special Representative is exploring the feasibility of developing guidance on “responsible contracting” for host Government agreements in relation to human rights. As in the aforementioned Norwegian commentary concerning bilateral investment treaties, such guidance would have to satisfy two equally important objectives, safeguarding the host State’s ability to discharge its obligations, including those under international human rights law, and giving investors confidence that the host State will not act in a discriminatory or arbitrary manner or for non-bona fide purposes.

37. The Special Representative has not yet undertaken corresponding projects on trade. But he continues to consult experts extensively on whether and how the trade regime may constrain or facilitate the State duty to protect.³⁷

C. International cooperation

38. The Human Rights Council asked the Special Representative to provide recommendations regarding “international cooperation” in relation to the State duty to protect. As he understands the term in the business and human rights context, this involves States working together through awareness-raising, capacity-building and joint problem-solving. Several factors currently limit the achievement of these aims.

39. First, States are not using existing forums as effectively as they could to enhance peer learning with respect to the State duty to protect in the business context. These forums include the treaty bodies, the Human Rights Council’s Universal Periodic Review, National Contact Points under the OECD Guidelines, and regional human rights mechanisms. No serious intergovernmental dialogue on these issues is evident in international trade and financial institutions, with the exception of the IFC and OECD, in part reflecting the involvement of private sector actors.

40. The Special Representative continues his outreach efforts within and beyond the United Nations human rights mechanisms - to date, the treaty bodies and special procedures, regional human rights entities, national human rights commissions, the World Bank, UNCITRAL, OECD, the European Commission and Parliament, and national Governments. He welcomes additional opportunities.

41. Beyond dialogue and learning lies State capacity-building. But business and human rights is not high on the capacity-building agenda of most international and bilateral agencies. The ILO is a notable exception regarding labour rights, and some bilateral development agencies support CSR programmes in developing countries. OHCHR only within the past year has begun to consider including business and human rights in its capacity-building work at the country level, but this is not yet a priority.

³⁷ The Committee on Economic, Social and Cultural Rights, for example, has expressed concern about the potential adverse impact of trade agreements on Covenant obligations (C.12/CRI/CO/4/CRP.1, para. 42).

42. The adverse consequences of this scarcity of support are demonstrated in the earlier example of developing country investment negotiators signing contracts that adversely affect their States' duty to protect, at least in part because of capacity shortfalls that also extend to other policy domains.

43. Finally, international cooperation involves joint problem-solving by States. Nowhere is this more desperately needed than in conflict situations. The current international human rights regime cannot possibly be expected to function as intended where societies are torn apart by civil war or other major strife. It is therefore unsurprising that the most egregious corporate-related human rights abuses typically occur amidst conflict. The Special Representative has found that all stakeholders want greater guidance on how to prevent corporate-related abuse in conflict affected areas. Therefore, he is exploring the possibility of working with an informal group of home and host States to generate ideas about effective approaches and tools States could employ to help achieve that end.

D. Summing up

44. Governments are the most appropriate entities to make the difficult decisions required to reconcile different societal needs. Yet, as the Special Representative noted in his 2008 report, most Governments take a relatively narrow approach to managing the business and human rights agenda. Human rights concerns remain poorly integrated into other policy domains that directly shape business practices. Therefore, a major objective of the Special Representative's renewed mandate is to assist Governments in recognizing those connections and advancing the business and human rights agenda beyond its currently narrow confines.

IV. THE CORPORATE RESPONSIBILITY TO RESPECT

45. In paragraph 4 (b) of resolution 8/7, the Human Rights Council asked the Special Representative "to elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders". This section summarizes the responsibility to respect and addresses several issues requiring further elaboration.

46. Companies know they must comply with all applicable laws to obtain and sustain their legal licence to operate. However, over time companies have found that legal compliance alone may not ensure their social licence to operate, particularly where the law is weak. The social licence to operate is based in prevailing social norms that can be as important to the success of a business as legal norms. Of course, social norms may vary by region and industry. But one of them has acquired near-universal recognition by all stakeholders, namely the corporate responsibility to respect human rights, or, put simply, to not infringe on the rights of others.

47. By near-universal is meant two things. First, the corporate responsibility to respect is acknowledged by virtually every company and industry CSR initiative, endorsed by the world's largest business associations, affirmed in the Global Compact and its worldwide national networks, and enshrined in such soft law instruments as the ILO Tripartite Declaration and the OECD Guidelines. Second, violations of this social norm are routinely brought to public attention globally through mobilized local communities, networks of civil society, the media including blogs, complaints procedures such as the OECD NCPs, and if they involve alleged

violations of the law, then possibly through the courts. This transnational normative regime reaches not only Western multinationals, which have long experienced its effects, but also emerging economy companies operating abroad, and even large national firms.³⁸

48. As a well established and institutionalized social norm, the corporate responsibility to respect exists independently of State duties and variations in national law. There may be situations in which companies have additional responsibilities. But the responsibility to respect is the baseline norm for all companies in all situations.

49. Company claims that they respect human rights are all well and good. But the Special Representative has asked whether companies have systems in place enabling them to demonstrate the claim with any degree of confidence. He has found that relatively few do. What is required is an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts. The four core elements of human rights due diligence were outlined in his 2008 report: having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance.³⁹

50. What is the appropriate scope of a company's human rights due diligence process, the range of factors it needs to consider? Three are essential. The first is the country and local context in which the business activity takes place. This might include the country's human rights commitments and practices, the public sector's institutional capacity, ethnic tensions, migration patterns, the scarcity of critical resources like water, and so on. The second factor is what impacts the company's own activities may have within that context, in its capacity as producer, service provider, employer and neighbour, and understanding that its presence inevitably will change many pre-existing conditions. The third factor is whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-State actors, and State agents.

51. Companies do not control some of these factors, but that is no reason to ignore them. Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk.

52. Finally, companies need to know the substantive content of this due diligence process, or which rights it should encompass. The answer is simple - in principle, all internationally recognized human rights. The quest to determine a finite list of rights for companies to respect is

³⁸ A good indicator is the Business and Human Rights Resource Centre's website, which posts human rights allegations about business operations in more than 180 countries and gets 1.5 million hits per month. <http://www.business-humanrights.org/>.

³⁹ A/HRC/8/5, paras. 56-64.

a fool's errand because companies can affect the entire spectrum of rights, as documented in the Special Representative's mapping of nearly 400 public allegations against companies.⁴⁰ Therefore, the responsibility to respect must apply to all such rights, although in practice some may be more relevant than others in particular contexts.⁴¹

53. For the substantive content of due diligence, then, companies at a minimum should look to the International Bill of Human Rights - the Universal Declaration and the two Covenants - as well as the ILO Declaration on Fundamental Principles and Rights at Work. They should do so for two reasons. First, the principles these instruments embody are the most universally agreed upon by the international community. Second, they are the main benchmarks against which other social actors judge the human rights impacts of companies.

54. Companies might need to consider additional standards depending on the situation. For example, in conflict affected areas they should take into account international humanitarian law and policies; and in projects affecting indigenous peoples, standards specific to those communities will be relevant.

55. The Special Representative is planning consultations to further operationalize the corporate responsibility to respect human rights and related due diligence requirements. He will also continue to seek greater conceptual clarity on two sets of issues that have emerged in stakeholder discussions, addressed briefly below.

A. Responsibility to respect

56. A number of issues and dilemmas have been raised regarding the corporate responsibility to respect.

Demystifying human rights

57. One issue concerns the conceptual difficulties that even companies committed to internalizing human rights have faced in mastering this subject. Part of the problem is that international human rights instruments were written by States, for States. Their meaning for businesses has not always been understood clearly by human rights experts, let alone the engineers, security managers, and supply chain officers in companies who have to deal with the corporate responsibility to respect on the ground. But considerable advances have been made recently. In particular, an OHCHR publication, "Human Rights Translated", does what the title promises, by translating State-based text into language and examples that make sense in a

⁴⁰ See A/HRC/8/5/Add.2 and E/CN.4/2006/97, paras. 24-30.

⁴¹ Companies may support their baseline human rights responsibilities with collaborative initiatives focused on specific areas of rights particularly relevant to their business, such as the Voluntary Principles on Security and Human Rights and the Fair Labour Association.

business context.⁴² Similarly, the Business Leaders Initiative on Human Rights has developed a matrix mapping elements of the International Bill of Human Rights onto various business functions, making it more accessible to company staff.⁴³ The Special Representative will continue to engage developers and users of such tools, aiming to achieve further clarity and consistency while maintaining the integrity of the underlying human rights standards.

58. Confusion has also existed because the first generation of advocacy in business and human rights, culminating in the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,⁴⁴ so co-mingled the respective responsibilities of States and companies that it was difficult if not impossible to disentangle the two. Unsurprisingly, this approach was rejected by Governments and business alike. Here, too, there has been good progress: the “protect, respect and remedy” framework now provides a common platform of differentiated yet complementary responsibilities on the basis of which to move forward.

Positive acts

59. Some stakeholders have queried whether the responsibility to respect is a mere analogue to a “negative duty”. The answer should be clear from the foregoing: the responsibility to respect requires companies to undertake human rights due diligence to become aware of, prevent and address adverse human rights impacts. Moreover, for companies to know they are not infringing on others’ rights requires mechanisms at the operational level, to which affected individuals and communities can bring grievances concerning company-related impacts and which companies may need to establish where none exist. By definition, these are positive acts.

60. There will be variations in the details of due diligence and grievance mechanisms depending on specific situations, and the Special Representative will continue to explore them. But the underlying principles should be observed irrespective of situational factors.

Beyond respect?

61. In addition to legal compliance, the responsibility to respect human rights is the baseline responsibility of all companies in all situations. But some stakeholders maintain that more should be required of companies, while many companies claim already to be doing more.

62. Clearly, companies may undertake additional commitments voluntarily or as a matter of philanthropy. Moreover, some have developed new business opportunities by offering goods and services more closely aligned with basic needs, as in bottom-of-the-pyramid strategies and other

⁴² A joint project of the Castan Centre for Human Rights Law at Monash University, International Business Leaders Forum, OHCHR, and Global Compact Office; http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf.

⁴³ <http://blihr.org/>.

⁴⁴ E/CN.4/Sub.2/2003/12/Rev.2.

types of inclusive business models. These are worthy endeavours that may contribute to the enjoyment of human rights. But what it is desirable for companies to do should not be confused with what is required of them. Nor do such desirable activities offset a company's failure to do what is required, namely to respect human rights throughout its operations and relationships.

63. Operating conditions may impose additional requirements on companies, for example, the need to protect employees in conflict affected areas, or from violence in the workplace. But this is more appropriately considered a specific operationalization of the responsibility to respect, and not a separate responsibility altogether.

64. More than respect may be required when companies perform certain public functions. For example, the rights of prisoners do not diminish when prisons become privatized. Here, additional corporate responsibilities may arise as a result of the specific functions the company is performing. But it remains unclear what the full range of those responsibilities might be and how they relate to the State's ongoing obligation to ensure that the rights in question are not diminished.

65. Beyond such situations, the picture becomes even murkier. A number of additional factors have been proposed for attributing greater responsibilities to companies. They include power, influence, capacity, and the notion that companies are "organs of society". While such factors may impose certain moral obligations on any person or entity, including business, they are highly problematic bases for assigning responsibilities to companies beyond respecting all rights at all times, for reasons the Special Representative elaborated in previous reports.⁴⁵

International standards and national law

66. One of the toughest dilemmas companies face is where national law significantly contradicts and does not offer the same level of protection as international human rights standards. National authorities may demand compliance with the law, while other stakeholders may advocate adherence to international standards, as might the company itself, for reasons of principle or simple consistency of policy.

67. Where the country is under United Nations sanctions, or where the possibility exists of the company becoming complicit in international crimes committed by others, a company's own due diligence should generate warning signs or even flashing red lights. But the majority of cases do not fall into these categories, leaving companies caught in the middle unless they find ways to honour the spirit of international standards without violating national law.

68. Companies have grappled with this dilemma in relation to freedom of association. Some have encouraged workers to form their own representation within the company and facilitated elections of workers' representatives. Efforts have also been made to provide education on labour rights and train local management on how to respond constructively to worker grievances.

⁴⁵ See E/CN.4/2006/97, paras. 66-68, and A/HRC/8/5, paras. 65-72.

Companies have faced similar dilemmas in relation to gender equality, and most recently freedom of expression and the right to privacy in the Internet and telecommunications sectors, where the Global Network Initiative was recently formed to help guide companies.⁴⁶

69. In sum, while there is now considerably greater shared understanding of many issues regarding the corporate responsibility to respect than there was only a year or two ago, for others further clarification is required and will be pursued in consultations.

B. Due diligence

70. A number of issues regarding human rights due diligence have emerged in stakeholder discussions; four are addressed here.

Life cycle

71. Due diligence is commonly defined as “diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation”.⁴⁷ Some have viewed this in strictly transactional terms - what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.

Business role and size

72. The principles of human rights due diligence and its core elements should be internalized by all businesses, regardless of their nature or size. But the specific activities that companies must undertake to discharge this responsibility will vary in ways not yet fully understood.

73. For example, a bank’s human rights due diligence for a project loan will differ in some respects from that of the company operating the project. Nevertheless, banks do have human rights due diligence requirements in this context, and human rights risks related to the projects are also risks to the banks’ liability, returns and reputation. Beyond banks lies an even more complex array of other lenders, investors, and asset managers. Precisely how their respective due diligence differs requires further clarity.

74. Similarly, small- and medium-sized enterprises must consider their human rights impacts. But the scale and complexity of their due diligence can hardly mirror that of large transnational corporations.

75. Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. The challenge for buyers is to ensure they are not complicit in violations by their suppliers. How far

⁴⁶ <http://www.globalnetworkinitiative.org/>.

⁴⁷ *Black’s Law Dictionary*, 8th edition (2006).

down the supply chain a buyer's responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices. A growing number of global buyers are finding it necessary to engage in human rights capacity-building with suppliers in order to sustain the relationship.

76. The Special Representative will continue to explore how human rights due diligence might legitimately vary across businesses of different roles and sizes, as he provides a principled elaboration of human rights due diligence applicable to all businesses.

Free-standing?

77. Debate continues on how best to integrate human rights policies throughout a company. Some believe that human rights should be folded into existing due diligence processes, while others believe that human rights due diligence needs to be free-standing.

78. An advantage cited for free-standing procedures is that the relevant issues get the attention and professionalization they deserve. But a disadvantage may be that it is not connected to the rest of the company. In contrast, folding human rights due diligence into ongoing processes may put human rights on par with other key issues when managers evaluate potential projects, but the unique attributes of human rights may thereby get diminished.

79. A single model is unlikely to fit all situations. But two principles seem critical. First, companies must recognize that human rights are not merely another topic, but that it demands meaningful engagement with affected parties within and beyond the company. Second, oversight of compliance with a company's human rights policy must have its own direct line of access to corporate leadership. The Special Representative will draw on lessons from practical experience to inform further conceptual refinement of this issue.

Liability

80. Another question that has been raised, including by some corporate general counsel, is whether following these human rights due diligence requirements could increase the potential liability for firms by providing external parties with information they would not otherwise have had to use against the company.

81. This view seems to be more widespread in the United States than elsewhere, perhaps reflecting a more litigious tradition. But the case for it is not self-evident, even in the United States context. Under a variety of corporate governance regulations, companies are required to assess, manage and disclose material risks - as well as to evaluate the effectiveness of their systems for doing so - in order to avoid liability. As we have seen, involvement in human rights violations can be a material risk. Moreover, not knowing is itself a risk, and an unreliable defence. Beyond the legal sphere lie the value of reputation and the cost of operational disruptions. On sheer prudential grounds, therefore, a leading Wall Street law firm concluded

that the due diligence process elaborated by the Special Representative “encourages robust risk assessment that is ... highly advisable from a business perspective in today’s highly visible and transparent environment”.⁴⁸

82. There are two scenarios under which legal liability could flow from human rights due diligence, but the decisive factor in both is how the company responds to new information. In the first, the company gains knowledge of possible human rights violations it may commit or be involved in, does nothing to act on it, the violations occur, and word of the company’s prior knowledge gets out. In the second, the company publicly misrepresents what it finds in its due diligence and that fact becomes known. But the point of human rights due diligence is to learn about risks that the company would then take action to mitigate, and not to ignore or misrepresent the findings.

83. Some have claimed that the more information there is in the public domain about a company’s potential human rights impacts, the more fodder there might be for vexatious legal claims or public campaigns. But done properly, human rights due diligence should precisely create opportunities to mitigate risks and engage meaningfully with stakeholders so that disingenuous lawsuits will find little support beyond the individuals who file them. Moreover, recent experience shows that other social actors are quite capable of concluding and stating publicly that a company facing criticism has undertaken good faith efforts to avoid human rights harm, and that transparency in acknowledging inadvertent problems can work in its favour.⁴⁹

84. The mandate’s ongoing work, including the corporate law project, should shed further light on this question, and on what policy changes by States could ensure that companies are incentivized to undertake human rights due diligence.

C. Summing up

85. Discharging the responsibility to respect human rights requires due diligence whereby companies become aware of, prevent, and mitigate adverse human rights impacts of their activities and relationships. The responsibility to respect is not intended to carry the entire burden of the business and human rights agenda: it is bracketed by the State duty to protect on one side, and access to effective remedy on the other. We now turn to the latter.

⁴⁸ Memorandum from Weil, Gotshal and Manges LLP, <http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf>, p. 5.

⁴⁹ The reaction to news reports in 2007 about child labour in a GAP supplier factory illustrates this point. NGOs were nuanced in their response, and Mary Robinson, former High Commissioner for Human Rights, noted GAP’s transparency, swift response, and active participation in multi-stakeholder initiatives, and called the story “a two-day wonder”. *The Economist*, 19 January 2008.

V. ACCESS TO REMEDY

86. Access to effective remedy, the framework's third pillar, is an important component of both the State duty to protect and of the corporate responsibility to respect. This section is divided into four parts. The first seeks to clarify ambiguities concerning States' obligations in this area. The second addresses the relationship between judicial and non-judicial mechanisms. The third and fourth parts describe the Special Representative's current work and thinking on judicial and non-judicial mechanisms.

A. State obligations

87. As part of their duty to protect, States are required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction - in short, to provide access to remedy. Without such steps, the duty could be rendered weak or even meaningless. Remedy may be provided through judicial, administrative, legislative or other appropriate means. States may also be required to provide adequate reparation, including compensation, to victims.⁵⁰

88. This State obligation to provide access to remedy is distinct from the individual right to remedy recognized in a number of international and regional human rights conventions. While the State obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-State abuses. However, an individual right to remedy has been affirmed for the category of acts covered by the United Nations 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 (General Assembly resolution 60/147, annex), "irrespective of who may ultimately be the bearer of responsibility for the violation".⁵¹

89. Some international and regional human rights bodies have addressed what States are expected to do in providing access to remedy for corporate-related abuse. For example, they have emphasized establishing effective complaints mechanisms for employment-related grievances; minimizing the potential for extractive companies to impair the ability of communities affected by their operations, especially indigenous peoples, to access remedial mechanisms; and ensuring that effective remedial processes exist for abuses by private companies carrying out "State functions". However, guidance continues to vary as to: whether States are expected to punish corporate entities directly, apart from individuals acting on their behalf; when States are expected to provide individuals with civil causes of action regarding corporate-related abuse; and whether and to what extent States should hold corporations accountable for alleged rights abuses overseas.

90. These complex issues are further elaborated in the addendum to this report.

⁵⁰ Several core international and regional human rights treaties provide for these elements; where they do not, there has been some useful commentary from human rights bodies.

⁵¹ Principle 3 (c).

B. Interplay between judicial and non-judicial mechanisms

91. Judicial and non-judicial mechanisms sometimes are thought of as mutually exclusive, and in some circumstances, they may be. For instance, grievances that raise issues of criminal law in particular may necessitate judicial recourse. But typically the two mechanisms are more interactive, and may be complementary, reinforcing, sequential or preventive, as illustrated below:

- (a) Non-judicial mechanisms often can be engaged earlier and faster than judicial processes, as well as in situations where a dispute does not amount to a legal cause of action;
- (b) The prospect of litigation often incentivizes parties to reach a negotiated or mediated solution;
- (c) Mechanisms at the national or international levels may offer alternatives where local courts or mediated processes fail, or are inadequate or absent;
- (d) Mechanisms at the company level form an essential part of early warning and risk management to identify, mitigate and resolve grievances before they escalate and possibly entail extensive abuses and lawsuits.

92. Each type of mechanism has inherent advantages and disadvantages⁵². If effective remedies for business-related human rights abuses are to be improved, a range of options is required from which complainants can choose according to their needs and situations. Progress from the current patchwork to a more complete and deliberate system will require improvements in access to, and the effectiveness of, existing mechanisms; and new mechanisms where no effective ones are currently in prospect.

C. Judicial mechanisms

93. States often point to their criminal and civil law systems to demonstrate that they are meeting their international obligations to investigate, punish and redress abuse. However, significant barriers to accessing effective judicial remedy persist.⁵³ Most are well known, are not unique to business and human rights, and are the subject of ongoing capacity-building work by States in partnership with international institutions. The Special Representative's work focuses specifically on barriers that are particularly salient for victims of corporate-related human rights abuses.

⁵² See "Non-Judicial and Judicial Grievance Mechanisms for addressing disputes between business and society", prepared for the Special Representative's consultation on grievance mechanisms: www.business-humanrights.org/Documents/Non-judicial-and-judicial-mechanisms-Mar-2009.doc.

⁵³ See "Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses, available at <http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf>.

94. With regard to civil claims, a complainant may not be able to obtain an effective remedy from a company through a host State's national courts because of a range of legal and practical impediments. There may be no available course of action. The courts may lack the capacity to handle complex claims. Costs are frequently prohibitive: even filing a case may be too expensive for poor individuals and communities, and cost allocation provisions like the "loser pays" may preclude many more claimants from bringing a case. In the event of a favourable judgement enforcement may be difficult, especially if the company lacks sufficient assets.

95. Where the company is a subsidiary of an overseas parent, additional factors can compound these barriers. The parent company may use its own leverage with the host Government or mobilize the home Government and international financial institutions. The alternative of filing a suit in the parent company's home State for the subsidiary's actions, or for the parent's own acts or omissions, can raise jurisdictional questions about whether it is the appropriate forum, and may trigger policy objections by both home and host State Governments. Moreover, the standards expected of parent companies with regard to subsidiaries may be unclear or untested in national law. Such transnational claims also raise their own evidentiary, representational, and financial difficulties.

96. As regards criminal proceedings, even where a legal basis exists, if State authorities are unwilling or unable to dedicate the resources to pursue allegations, currently there may be little that victims can do.

97. Legal and practical access barriers are often accentuated for "at risk" or vulnerable groups, whether companies are national or transnational. Such groups may include women, children and indigenous peoples, as well as those marginalized for other reasons in their interactions with companies.⁵⁴ Governments have a critical role - and in some cases, a duty - to raise awareness of the risks facing these individuals and communities, and to ensure that their rights are adequately protected, including by providing access to remedy.

98. The Special Representative will continue research and consultations on barriers to judicial remedy, as well as possible options to address them.

D. Non-judicial mechanisms

99. In his 2008 report, the Special Representative presented a set of grievance mechanism principles. Six should underpin all non-judicial grievance mechanisms: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.⁵⁵ As a seventh principle specifically for company-level mechanisms, he stressed that they should operate through dialogue and mediation rather than the company itself acting as adjudicator. The remainder of this section looks at mechanisms at company, national and international levels.

⁵⁴ The Lowenstein International Human Rights Law Clinic at Yale University is conducting research for the Special Representative on the challenges confronting artisanal miners in engaging with large-scale mining companies and in accessing effective remedy.

⁵⁵ A/HRC/8/5, para. 92.

Company level

100. Effective grievance mechanisms are an important part of the corporate responsibility to respect. They complement monitoring or auditing for human rights compliance. They also provide an ongoing channel through which the company gains early warning of problems and disputes and can seek to avoid escalation; many of now emblematic cases of corporate-related human rights abuse started out as far lesser grievances. Moreover, by tracking complaints, companies can identify systemic problems and adapt practices to prevent future harm and disputes.

101. The scale and complexity of dedicated mechanisms will depend on the extent of the companies' likely impacts. They need not be cumbersome to be effective and they may be partially outsourced or shared with other operations or companies, provided the grievance mechanism principles are met. An increasing number of companies, business associations and business-related organizations are developing grievance mechanisms or related guidance. The Special Representative welcomes the decision by the ICC, IOE and BIAC to pilot these principles with companies in different sectors, and hopes this will generate broader lessons.⁵⁶

National level

102. National human rights institutions (NHRIs) and the NCPs of States adhering to the OECD Guidelines are potentially important avenues for remedy at the national level. In 2008, the Special Representative contributed to various meetings of national human rights institutions and addressed the annual meeting of NCPs.

103. While the mandates of some NHRIs may currently preclude them from work on business and human rights, for many it has been a question of choice, tradition or capacity. The Special Representative hopes that more NHRIs will reflect on ways they can address alleged human rights abuses involving business. He welcomes the decision of the International Coordinating Committee of NHRIs to establish a working group on business and human rights and looks forward to continued cooperation.

104. NCPs stress the need for operational flexibility that reflects national circumstances. But to ensure the credibility of the system as a whole, this ought to be delimited by minimum performance criteria in line with those set out by the Special Representative. Several NCPs, notably in the United Kingdom and Netherlands, have developed innovative governance structures, transparency measures and mediation capacity that merit attention. Moreover, Governments should consider ways to give more weight to NCP findings against companies. For example, since Governments are obliged to promote the OECD Guidelines under which NCPs operate, a negative finding logically might affect the company's access to government procurement and guarantees.

⁵⁶ <http://www.reports-and-materials.org/Joint-views-of-IOE-ICC-BIAC-to-Ruggie-Mar-2009.pdf>.

105. Other bodies can also play important roles in providing remedy at the national level. Some may be issue-specific, for example focused on non-discrimination or labour rights. Others may be sector-specific, such as for example, the banking and telecommunications industry ombudsman systems in Australia. The Special Representative continues to explore promising models.

International level

106. A number of voluntary industry codes, multi-stakeholder initiatives and investor-led standards have established grievance mechanisms, and the above principles now provide a basis for assessing whether they meet the minimum criteria. But many initiatives lack grievance procedures, and there is evidence that this erodes their perceived legitimacy. The logical implication is for them to adopt such mechanisms.

107. A major barrier to victims' accessing available mechanisms, from the company or industry to the national and international levels, is the sheer lack of information available about them. This information deficit also makes it difficult to improve such mechanisms and to learn from past disputes and to avoid their replication.

108. With these barriers in mind, the Special Representative has launched a global wiki: Business and Society Exploring Solutions-A Dispute Resolution Community.⁵⁷ BASESwiki (www.baseswiki.org) is an interactive online forum for sharing, accessing and discussing information about non-judicial mechanisms that address disputes between companies and their external stakeholders. It includes information about how and where mechanisms work, solutions they have achieved, experts who can help, and research and case studies. BASESwiki will be built over time by and for its users. It is currently available with English, French, Spanish, Chinese and Russian portals; Arabic is under development. The Special Representative urges all stakeholders - business, NGOs, Governments, mediators, lawyers, academics and others - to help develop this important resource and to assist in bringing its benefits to those without internet access.

109. Various stakeholders have pressed for a new international institution to improve access to non-judicial remedy. Proposals include a clearing house to direct those with disputes towards mechanisms that might offer remedy; a capacity-building entity to help disputing parties use those mechanisms effectively; an expert body to aggregate and analyse outcomes, enabling more systemic learning and dispute prevention; and a grievance mechanism for when local or national mechanisms fail or are inadequate.

110. The first three suggestions hold promise of practical, achievable benefits, if done appropriately. Developing global information and resource platforms such as BASESwiki is an essential precursor to any of these roles.

⁵⁷ In collaboration with the International Bar Association and with support from the Compliance Advisor/Ombudsman of the World Bank Group and JAMS Foundation.

111. The proposition of creating a single, mandatory, non-judicial but adjudicative mechanism at the international level inevitably poses greater difficulty. In handling complex disputes that involve diverse and economically unequal parties in remote locations, processes based solely on written submissions are unlikely to meet basic standards of fairness and rigor. The demands of appropriate investigations and/or hearings are likely to raise significant evidentiary, practical, financial and political challenges, while offering only limited prospects of remedies that are timely, enforceable and extend beyond a few complaints a year.

112. An alternative option would be to look to an existing body or network with international standing that could offer mediation of disputes involving human rights issues. If it had capacity to enable mediated processes in the locations where disputes arise, this could avoid many of the challenges noted above. At the same time, the mediation process would have to reflect the grievance mechanism principles set out by the Special Representative. Complainants might need advice and support to engage as equal participants in the process, and a funding model would be needed to avoid their facing prohibitive costs.

113. Arbitration by such entities might also be an option. In particular, companies operating in conflict affected areas should have a strong incentive to agree ex ante to use such mediation/arbitration bodies in the event of disputes with communities, and their investors and States should have a strong interest in seeing them do so. Arbitration would be subject to the same caveats as above, and should not preclude judicial recourse.

114. The Special Representative continues to explore options for institutional innovations where they hold promise of quantitative and qualitative improvements in access to effective remedy, with a view to future recommendations.

E. Summing up

115. Grievance mechanisms, judicial and non-judicial, form part of both the State duty to protect and the corporate responsibility to respect. They are essential to ensuring access to remedy for victims of corporate abuse. For States, they are also means of enforcing or incentivizing corporate compliance with relevant law and standards, and of deterring abuse. For companies, operational-level mechanisms have the added benefit of giving early warning of problems and helping mitigate or resolve them before abuses occur or disputes compound. But too many barriers exist to accessing judicial remedy, and too few non-judicial mechanisms meet the minimum principles of effectiveness. Further improvements, shared learning, and innovations are required.

VI. CONCLUSION

116. The Special Representative is honoured and humbled by the task the Human Rights Council has set for him of operationalizing the “protect, respect and remedy” framework so as to provide concrete guidance for all relevant actors.

117. In the face of what may be the worst worldwide economic downturn in a century, however, some may be inclined to ask: with so many unprecedented challenges, is this the appropriate time to be addressing business and human rights? This report answers with a resounding “yes”. It does so based on three grounds.

118. **First, human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social rights. Now more than ever, therefore, the business and human rights agenda matters. Any gains Governments believe can be had by lowering human rights standards for business are illusory, and no sustainable recovery can be built on so flimsy a foundation. Companies must weigh any corresponding temptations against the impact of declining public confidence in business, growing populism and an impending epochal shift in regulatory environments.**

119. **Second, it was noted earlier that the same types of governance gaps and failures that produced the current economic crisis also constitute what the Special Representative has called the permissive environment for corporate wrongdoing in relation to human rights. The necessary solutions for both similarly point in the same direction: Governments adopting policies that induce greater corporate responsibility, and companies adopting strategies reflecting the now inescapable fact that their own long-term prospects are tightly coupled with the well-being of society as a whole. Strengthening the international human rights regime against corporate-related abuse thereby contributes to, and gains from, the universally desired transition toward a more inclusive and sustainable world economy. Values are becoming a value proposition.**

120. **Third, the “protect, respect and remedy” framework identifies specific ways to achieve these objectives. For Governments, the key is to drive the business and human rights agenda more deeply into policy domains that directly shape business practices. For companies, the key is to become more fully aware of and responsive to their infringements on the rights of others. Access to effective remedy, judicial and non-judicial, is an essential component enabling individuals and communities to vindicate their rights - the very purpose of the human rights regime. More prosaically, it also serves as a signalling device, a feedback loop, alerting Governments, business and society as a whole when all is not well, while providing opportunities for early intervention and resolution before greater harm occurs.**

121. **In short, business and human rights is not an ephemeral issue to be considered at some future date. It is and must remain at the core of our common concerns today.**



Human Rights Council

Fourteenth session

Agenda item 3

**Promotion and protection of all human rights,
civil, political, economic, social and cultural rights,
including the right to development**

**Report of the Special Representative of the Secretary-
General on the issue of human rights and transnational
corporations and other business enterprises, John Ruggie**

**Business and Human Rights: Further steps toward the
operationalization of the “protect, respect and remedy” framework**

Summary

This is a progress report submitted in follow-up to A/HRC/8/5. Section I illustrates the Special Representative’s working methods in operationalizing and promoting the “protect, respect and remedy” framework. The following three sections summarize his current thinking on the three pillars and the synergies among them, pointing towards the guiding principles that will constitute the mandate’s final product.

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I. Introduction

1. In its resolution 8/7, adopted on 18 June 2008, the Human Rights Council was unanimous in welcoming the “protect, respect and remedy” policy framework (now widely referred to as “the United Nations framework”) that the Special Representative proposed for better managing business and human rights challenges. It rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.

2. From the outset, the Special Representative has maintained that the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences, were unsustainable. These governance gaps, he has observed, “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation”.¹ The framework is intended to help close those gaps. Its three pillars are distinct yet complementary. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.

3. The Council extended the Special Representative’s mandate until 2011, with two main tasks: “operationalizing” the framework, i.e., providing concrete guidance and recommendations to States, businesses and other actors on the practical meaning and implications of the three pillars and their interrelationships; and “promoting” the framework, coordinating with relevant international and regional organizations and other stakeholders.

II. Principled pragmatism

4. In his first report to the then Commission on Human Rights, the Special Representative described the approach he would take to the mandate as principled pragmatism: “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people”.²

5. In 2008, having systematically mapped patterns of corporate-related human rights abuse and existing standards and initiatives, and consulted widely across regions and sectors of society, he advised the Human Rights Council: “there is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – States, businesses, and civil society – must learn to do many things differently”.³ But, he added, those things must cohere and generate an interactive dynamic of cumulative progress – which the framework is designed to help achieve.

6. The same approach informs the current phase of operationalizing and promoting the framework: maximizing tangible results for affected individuals and communities by identifying and fostering standards and processes within and among relevant entities –

¹ A/HRC/8/5, para. 3.

² E/CN.4/2006/97, para. 81.

³ A/HRC/8/5, para. 7.

private and public, national and international – that will make them more effective in dealing with business and human rights.

7. As has been true throughout the mandate, the operationalization phase combines research, consultations and practical experimentation.⁴ For example, to benefit from diverse regional perspectives, since 2008 the Special Representative has held multi-stakeholder consultations in New Delhi, Buenos Aires and Moscow, including participants from nearby countries.⁵ Sweden, during its European Union Presidency, convened an European Union-wide consultation. The Office of the High Commissioner for Human Rights (OHCHR) organized a global consultation in Geneva, involving more than 300 participants.

8. To facilitate additional stakeholder input and engagement on the corporate responsibility to respect human rights, the Special Representative launched an online consultation in December 2009,⁶ which attracted visitors from 101 countries in its first three months.

9. To better understand the role that corporate law and securities regulation do and could play in ensuring corporate respect for human rights, the Special Representative worked with 19 leading law firms from around the world in mapping more than 40 jurisdictions, followed by an international expert workshop to extract patterns and lessons from the information gained.

10. To provide the mandate with information on obstacles to accessing judicial remedy, Amnesty International and two Norwegian research institutes, the Peacebuilding Centre and Fafo, organized a meeting of legal practitioners from diverse regions and legal traditions.

11. Five companies are testing the framework's principles for company-based grievance mechanisms: Carbones del Cerrejon with neighbouring indigenous communities in Colombia; Esquel Group, a garment manufacturer based in Hong Kong, China, in its Vietnamese facility; Sakhalin Energy Investment Corporation in Russia; the retailer Tesco in its South African fruit supply chain; and Hewlett-Packard with two of its suppliers in China.

12. Because the most egregious business-related human rights abuses occur in conflict-affected areas, the Special Representative has convened a small, informal but representative group of States to brainstorm innovative ideas about how host, home and neighbouring States might help prevent or mitigate such abuses. Participating countries include Belgium, Brazil, Canada, China, Colombia, Ghana, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom and the United States of America.

13. The Special Representative's efforts to promote the framework are equally wide-ranging and results-oriented. He is liaising with the Organisation for Economic Co-operation and Development (OECD) as it updates its Guidelines for Multinational Enterprises; the International Finance Corporation as it revises its Performance Standards; the Human Rights Working Group of the Global Compact in identifying best practices; and the European Commission, which is exploring ways of ensuring responsible behaviour overseas by European firms. He provided input for the human rights section of the social responsibility standard of the International Organization for Standardization (ISO 26000); successfully urged the United Nations Commission on International Trade Law to consider greater transparency in its investor-State arbitration proceedings when public interest considerations, including human rights, are involved; and he or a representative presented

⁴ All research and consultations reports are available from <http://www.business-humanrights.org/SpecialRepPortal/Home>.

⁵ Earlier regional consultations were held in Bangkok, Bogota and Johannesburg.

⁶ See <http://www.srsconsultation.org>.

the framework to, among other forums, the National Human Rights Institutions' Working Group on Business and Human Rights, the treaty bodies, the Permanent Forum on Indigenous Issues and the Inter-American Commission on Human Rights.

14. Several countries have referenced the framework in conducting their own policy assessments, including France, Norway, South Africa and the United Kingdom. Several global corporations are already aligning their due diligence processes with the framework. Civil society actors have employed the framework in their analytical and advocacy work. Other special procedures have drawn on the framework, notably the Special Rapporteur investigating a multinational company's large-scale toxic-waste dumping in Côte d'Ivoire. The German Ministry for Economic Cooperation and Development convened a Berlin workshop for stakeholders from around the world to share their experiences in using the framework.

15. The *Financial Times* reports that the Special Representative "has won unprecedented backing across the battle lines from both business and pressure groups for his proposals for tougher international standards for business and governments".⁷ He is immensely grateful to everyone who has supported and participated in the mandate's comprehensive and inclusive process, and the progress achieved to date. Principled pragmatism has helped turn a previously divisive debate into constructive dialogues and practical action paths.

III. The State duty to protect

16. Resolution 8/7 asks the Special Representative to provide views and recommendations "on ways to strengthen the fulfilment of the duty of the State to protect all human rights" from corporate-related abuses. This duty highlights that States have the primary role in preventing and addressing corporate-related human rights abuses. The Special Representative documented the duty's legal foundations, policy rationales and scope in his 2008 and 2009 reports.⁸

17. This section describes a portfolio of possible measures by States to promote corporate respect for human rights and prevent corporate-related human rights abuse. The duty's main remedial components are addressed in section IV.

18. Although States interact with business in numerous ways, many currently lack adequate policies and regulatory arrangements for effectively managing the complex business and human rights agenda. While some are moving in the right direction, overall State practices exhibit substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and States themselves. The most common gap is the failure to enforce existing laws, although for "at-risk" and vulnerable groups, there may be inadequate legal protection in the first place. The most prevalent cause of legal and policy incoherence is that departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government's own human rights obligations and agencies.

19. The Special Representative has identified five priority areas through which States should strive to achieve greater policy coherence and effectiveness as part of their duty to protect: (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with business; (c) fostering corporate

⁷ Hugh Williamson, "Time to redraw the battle lines," *Financial Times*, 30 December 2009.

⁸ A/HRC/11/13, paras. 13–16; and A/HRC/8/5, paras. 18–19.

cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritorial jurisdiction.

A. Safeguarding the ability to protect human rights

20. There is a saying that the first thing to do when you are stuck in a deep hole is to stop digging. Yet countries unwittingly get stuck in metaphorical holes that may constrain their ability to adopt legitimate policy reforms, including for human rights. The prime examples the Special Representative has studied in depth, because their effects can be so far-reaching, are bilateral investment treaties (BITs) and host government agreements (HGAs), the contracts between governments and foreign investors for specific projects.

21. A current BIT case illustrates the problem. European investors have sued South Africa under binding international arbitration, contending that certain provisions of the Black Economic Empowerment Act amount to expropriation, for which the investors claim compensation.⁹ A policy review examined why the Government had agreed to such BIT provisions in the first place. It explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs.”¹⁰ The same is often true for HGAs, which can remain in force a half-century.

22. There is a compelling need to protect foreign investors from unfair and arbitrary treatment by host governments. The more than 1,000 instances of nationalization in the 1970s led to a proliferation of BITs, which now number nearly 3,000. However, in successive BITs negotiations, capital importers that lacked significant market power felt increasingly pressured to compete with one another for investments by accepting ever-more expansive provisions, constraining their policy discretion to pursue legitimate public interest objectives.

23. Several States are currently conducting BIT policy reviews. The Special Representative encourages States to ensure that new model BITs combine robust investor protections with adequate allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner.

24. The same holds for HGAs, which include provisions (“stabilization clauses”) that can either insulate investors from new environmental and social laws or entitle them to seek compensation for compliance. Two themes emerged from several mandate consultations with HGA negotiators representing States and companies, and non-governmental organizations (NGOs). First, stabilization clauses, where they are used, should meet the twin objectives of ensuring investor protection and providing the required policy space for States to pursue bona fide human rights obligations. Second, there is an urgent need for all parties, including State and company negotiators and their legal and financial advisors, to consider the human rights implications of long-term investment projects at the contracting stage, thereby reducing subsequent problems. The Special Representative is exploring possible guidance for all parties on responsible contracting.

25. In conclusion, one important step for States in fulfilling their duty to protect against corporate-related human rights abuses is to avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy objectives.

⁹ See *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, (International Centre for Settlement of Investment Disputes Case No. ARB (AF)/07/1).

¹⁰ South Africa, Department of Trade and Industry, “Bilateral Investment Treaty Policy Framework Review”, June 2009, p. 5.

B. Doing business with business

26. States conduct many kinds of transactions with businesses: as owners, investors, insurers, procurers or simply promoters. This provides States – individually and collectively – with unique opportunities to help prevent adverse corporate-related human rights impacts. Indeed, the closer an entity is to the State, or the more it relies on statutory authority or taxpayer support, the stronger is the State’s policy rationale for ensuring that the entity promotes respect for human rights.

27. States should find it easiest to promote respect for rights by State-owned enterprises. Senior management typically is appointed by and reports to State agencies. Associated government departments have greater scope for scrutiny. Indeed, where companies are owned by and/or act as mere State agents, the State itself may be held legally responsible for such entities’ wrongful acts. Of course, State-owned enterprises, like other companies, are also subject to the corporate responsibility to respect human rights, discussed in section III.

28. Some States are moving towards promoting respect for human rights in such enterprises. In 2008, China issued guidance to its State-owned enterprises, recommending systems for corporate social responsibility (CSR) reporting and protecting labour rights.¹¹ Sweden requires such enterprises to have a human rights policy and engage on human rights issues with business partners, customers and suppliers. They must also report on these issues, tracking Global Reporting Initiative indicators, which include human rights.¹² Dutch State-owned enterprises are encouraged to do the same.¹³

29. Despite the State nexus, relatively few export credit agencies and official investment insurance or guarantee agencies explicitly consider the human rights impacts of the ventures they support, even where the risks are known to be high. This deficit of concern may be changing slowly. For example, recent United States legislation directs the Overseas Private Investment Corporation to issue “a comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors.”¹⁴

30. Some export and investment promotion agencies claim that considering human rights would put them and their clients at a competitive disadvantage. International cooperation can help level the playing field, but it must do so by raising the performance of laggards. At the regional level, a recent statement of the European Union Presidency, setting forth the United Nations framework’s relevance for European Union member States, encourages them to consider the human rights impacts of projects supported by export credit guarantees.¹⁵ The OECD “Common Approaches” could provide helpful guidance to its member States on human rights due diligence requirements.

31. Public procurement provides yet another vehicle. For example, the commitment of the Government of the Netherlands to achieving full sustainable procurement by 2010 will

¹¹ “Instructing opinions about central State-owned enterprises fulfilling social responsibility”, issued by the Chinese State-owned Asset Supervision and Administration Commission of the State Council, 4 January 2008.

¹² See, for example, <http://www.regeringen.se/content/1/c6/13/43/68/906181f3.pdf> and <http://www.sweden.gov.se/sb/d/2025/a/94125>.

¹³ See http://www.minfin.nl/Actueel/Kamerstukken/2009/04/Brief_publicke_belangen_en_staatsdeelneming_en.

¹⁴ 22 U.S.C., para. 2191b.

¹⁵ Available from http://www.se2009.eu/polopoly_fs/1.23024!menu/standard/file/Deklaration%20engelska.pdf.

be supplemented by criteria that include respect for international human rights standards.¹⁶ In the United States, all contractors doing significant business with the Federal Government must certify that they have compliance programmes rooted in ethical and legally compliant cultures, based on those required in the Federal Sentencing Guidelines.¹⁷

32. In short, the State's role as an economic actor is a key – but under-utilized – leverage point in promoting corporate human rights awareness and preventing abuses.

C. Fostering rights-respecting corporate cultures

33. The State duty to protect extends well beyond its role as economic actor. Most States have adopted measures and established institutions relevant to business and human rights, including labour standards, workplace non-discrimination, health and safety and consumer protection. However, States have been slow to address the more systemic challenge of fostering rights-respecting corporate cultures and practices. Four policy tools and their current usage are discussed here: CSR policies, reporting requirements, directors' duties and legal provisions specifically recognizing the concept of "corporate culture".

34. Numerous governments have adopted CSR guidelines or policies. To cite two recent examples, India has issued guidelines for companies to protect workers' rights, implement respect for human rights and avoid complicity in human rights abuses,¹⁸ while a CSR white paper by Norway guides companies on relevant international human rights standards, suggests resources for addressing human rights-related dilemmas and recommends that companies adopt the framework's due diligence process.¹⁹

35. Nevertheless, on the whole, relatively few national CSR policies or guidelines explicitly refer to international human rights standards. They may highlight general principles or initiatives that include human rights elements, notably the OECD Guidelines and the Global Compact, but without further indicating what companies should do operationally. Other policies are vaguer still, merely asking companies to consider social and environmental "concerns", without explaining what that may entail in practice. To merit the term "policy," even voluntary approaches by States should indicate expected outcomes, advise on appropriate methods and help disseminate best practices. The United Nations framework's "corporate responsibility to respect" pillar can provide guidance in this regard.

36. Encouraging or requiring companies to report on human rights policies and impacts is a second key policy tool. It enables shareholders and other stakeholders to better engage with businesses, assess risk and compare performance within and across industries. Moreover, it helps companies to integrate human rights as core business concerns, supporting their responsibility to respect human rights.

37. Governmental guidance or policies on CSR reporting, including on human rights, varies widely. Examples in State-owned enterprises from China, Netherlands and Sweden were already mentioned. In Denmark, all companies above a certain size must report whether they have CSR policies.²⁰ In Malaysia, annual reports of listed companies must

¹⁶ See, for reference,

http://www.agentschapnl.nl/sustainableprocurement/criteria_development/index.asp.

¹⁷ United States Federal Register, Vol. 73, No. 219, 12 November 2008.

¹⁸ Available from

http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

¹⁹ Available from <http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?id=565907>.

²⁰ Act amending the Danish Financial Statements Act, 2008.

include a description of their CSR activities (including those of their subsidiaries) or state that they have none.²¹ In South Africa, companies listed on the Johannesburg Stock Exchange must disclose compliance with a national corporate governance code that recommends integrated financial and non-financial reporting.²² In France, a new bill will extend standardized sustainability reporting requirements beyond listed to non-listed companies (small and medium-sized enterprises excepted). However, such steps are unusual and even among them, explicit human rights references remain rare; there is considerable variation in what and how companies should report and whether and how the provisions are enforced.

38. Worldwide, companies' financial reporting is their most tightly regulated and legally consequential reporting requirement. Companies generally must disclose all information that is "material" or "significant" to their operations and financial condition, with penalties for non-disclosure or misrepresentation. Regulators tend to regard information as "material" if there is a substantial likelihood that a "reasonable investor" would consider it important in making an investment decision. Such information uniformly includes financial risks, but regulators increasingly also recognize the "materiality" of certain short- and long-term non-financial risks to a company's performance. However, the Special Representative's corporate law project documents that none of the 40-plus jurisdictions studied specifically identify human rights-related risks as a factor in determining "materiality," therefore few companies report them.²³ This is despite the growing number of lawsuits against companies on human rights grounds, coupled with emerging evidence of significant costs triggered by human rights-based grievances (see section III). Regulators should clarify that human rights impacts may be "material" and indicate when they should be disclosed under current financial reporting requirements.

39. A third policy tool is the specification of directors' duties. Directors can set the right tone at the top and play vital oversight roles. The Special Representative's corporate law project examined to what extent directors' duties currently facilitate corporate respect for human rights. Two themes emerged. One is lack of clarity regarding not only what directors are required to do regarding human rights, but even what they are permitted to do. The other is the limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, directors get little, if any, guidance on how best to oversee their company's respect for human rights. Yet, in some instances, directors may already be at risk of legal non-compliance by not considering human rights impacts, as discussed in paragraphs 69–73.

40. Innovative practices with human rights implications are rare. The UK Companies Act requires directors, in promoting the company's success, to "have regard" for the company's "impact on the community and the environment".²⁴ The new company law of Indonesia requires natural resources companies to "put into practice environmental and social responsibility",²⁵ which may require directors' oversight. The new South African Companies Act will permit non-shareholders to demand that a company itself institute legal

²¹ Bursa Malaysia listing requirements (appendix 9c, part A (291)), Available from http://www.klse.com.my/website/bm/regulation/rules/listing_requirements/downloads/bm_mainchapter_9.pdf.

²² Section 8.63(a) of the Johannesburg Stock Exchange limited listings requirements.

²³ See <http://www.business-humanrights.org>.

²⁴ Section 172, para. 1 (d), Companies Act 2006.

²⁵ Article 74, para. 1, of Law No. 40 of 2007 concerning Limited Liability Companies.

proceedings to protect its interests, including for breach of directors' duties, provided a court decides that the action is necessary to protect the claimant's legal rights.²⁶

41. Corporate law provisions requiring directors, as part of their duty to the company, to consider the company's broader social impacts, including on human rights, would mark a significant step toward fostering rights-respecting corporate cultures, even if the benchmark remains the company's own success.

42. Under criminal law, a fourth tool is recognizing the "corporate culture" of companies as a factor at the prosecution or sentencing stage—where "culture" refers to the adequacy of a company's internal systems of oversight and control, coupled with prevailing company ethics. In Australia, a firm itself may be held liable when its systems and culture expressly or tacitly permit the commission of an offence by an employee or officer, including participation in an international crime.²⁷ An Italian criminal statute similarly provides that a corporation can be found liable if it lacks effective systems of control and supervision.²⁸ In the United States, the Federal Sentencing Guidelines require judicial consideration of whether a corporation has an "organizational culture that encourages ethical conduct and a commitment to compliance with the law" in assessing criminal penalties.²⁹ Such provisions incentivize companies to ensure they have a culture of legal compliance and ethical standards.

43. In conclusion, most Governments are still at an early stage of policy development in fostering rights-respecting corporate practices – ironically, the most under-utilized tools are those that most directly shape business behaviour. States should reconsider the misconception that companies invariably prefer, or benefit from, State inaction. Indeed, where companies are facing difficult, politically charged situations, they are particularly in need of and look for guidance from Governments on how to manage the risks such environments inevitably pose.

D. Conflict-affected areas

44. The worst corporate-related human rights abuses occur amid armed conflict over the control of territory, resources or a government itself – where the human rights regime cannot be expected to function as intended and illicit enterprises flourish. However, even reputable firms may become implicated in abuses, typically committed by others; for example, security forces protecting company installations and personnel. Businesses increasingly seek guidance from States. Yet, Governments – host, home and neighbouring alike – are reluctant and poorly equipped to provide such assistance.³⁰ Even the directly relevant Voluntary Principles on Security and Human Rights still lack a critical mass of participating States.

45. As noted, the Special Representative has convened a group of States in informal, scenario-based, off-the-record brainstorming sessions to generate innovative and practical approaches for preventing and mitigating corporate abuses in these difficult contexts. On the agenda are the potential roles of home-country embassies; closer cooperation among home-

²⁶ Section 165, Companies Act 2008, expected to come into force in 2010.

²⁷ Sections 12.3, para. 2 (c) and (d), Criminal Code Act 1995 (Cth).

²⁸ Legislative decree No. 231 of 8 June 2001.

²⁹ U.S.S.G, para. 8B2.1(a).

³⁰ There are exceptions: the British Government has issued a "Business and Human Rights Toolkit" for its overseas missions. Available from <http://www.fco.gov.uk/resources/en/pdf/3849543/bus-human-rights-tool.pdf>; see also OECD, "Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones". Available from <http://www.oecd.org/dataoecd/26/21/36885821.pdf>.

State development assistance agencies, foreign and trade ministries and export finance institutions, as well as between them and host government agencies; and the possibility of developing early warning indicators for government agencies and companies. The lessons that the Special Representative took away from the first meeting are the need to address issues early before situations on the ground deteriorate and to improve in-country coordination between trade promotion and human rights functions within the same embassy.

E. Extraterritorial jurisdiction

46. All States have the duty to protect against corporate-related human rights abuses within their territory and/or jurisdiction. In several policy domains, including anti-corruption, anti-trust, securities regulation, environmental protection and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction. However, this is typically not the case in business and human rights.

47. Legitimate issues are at stake and they are unlikely to be resolved fully anytime soon. However, the scale of the current impasse must and can be reduced. To take the most pressing case, what message do States wish to send victims of corporate-related abuse in conflict affected areas? Sorry? Work it out yourselves? Or that States will make greater efforts to ensure that companies based in, or conducting transactions through, their jurisdictions do not commit or contribute to such abuses, and to help remedy them when they do occur? Surely the latter is preferable.

48. In the heated debates about extraterritoriality regarding business and human rights, a critical distinction between two very different phenomena is usually obscured. One is jurisdiction exercised directly in relation to actors or activities overseas, such as criminal regimes governing child sex tourism, which rely on the nationality of the perpetrator no matter where the offence occurs. The other is domestic measures that have extraterritorial implications; for example, requiring corporate parents to report on the company's overall human rights policy and impacts, including those of its overseas subsidiaries. The latter phenomenon relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.

49. Thus, extraterritoriality is not a binary matter: it comprises a range of measures. Indeed, one can imagine a matrix, with two rows and three columns. Its rows would be domestic measures with extraterritorial implications; and direct extraterritorial jurisdiction over actors or activities abroad. Its columns would be public policies for companies (such as CSR and public procurement policies, export credit agency criteria, or consular support); regulation (through corporate law, for instance); and enforcement actions (adjudicating alleged breaches and enforcing judicial and executive decisions). Their combination yields six types of "extraterritorial" form, each in turn offering a range of options. Not all are equally likely to trigger objections under all circumstances.

50. The Special Representative will continue to consult on how to unpack the broad and highly politicized category of extraterritorial jurisdiction. Distinguishing what is truly problematic from measures that are entirely permissible under international law would be in the best interests of all concerned: the victims of corporate-related human rights abuse; host Governments that may lack the capacity for dealing with the problem; companies that may face operational disruptions or protracted and unpredictable law suits; and the home country itself, whose own reputation may be on the line.

F. Summing Up

51. The Special Representative is tasked with providing views and concrete recommendations on ways to strengthen States' fulfilment of their duty to protect against corporate-related human rights abuse. Part of the solution lies in preventative measures. If Governments safeguard their capacity to protect human rights, promote respect for rights when they do business with business, foster corporate cultures respectful of rights at home and abroad and work together to prevent and address the specific challenges posed by conflict-affected areas, they will take important steps in the right direction.

52. Greater policy coherence is also needed at the international level. States do not leave their human rights obligations behind when they enter multilateral institutions that deal with business-related issues. States should encourage those bodies to institute policies and practices that promote corporate respect for human rights. Additionally, capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect.

53. The elements of the State duty to protect discussed above can also assist other actors, including international and regional human rights bodies, civil society and indeed business itself, draw attention to gaps in the current system and identify ways of closing them.

IV. The corporate responsibility to respect

54. Resolution 8/7 tasks the Special Representative with elaborating further "the corporate responsibility to respect all human rights," and to provide concrete guidance on its operationalization to business and other stakeholders.

55. The term "responsibility" to respect, rather than "duty", is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility,³¹ and now affirmed by the Council itself.

56. Beyond meeting legal requirements, companies increasingly include human rights elements in CSR initiatives. This practice has grown rapidly over the past decade, stimulating learning and helping to raise the visibility of human rights as a corporate concern. However, as the Special Representative has shown, CSR initiatives often deal with human rights in ad hoc ways that vary considerably across companies; typically they are decoupled from companies' internal control and oversight systems; and many are weak on external accountability practices.³² Part of the problem has been that companies have lacked a strategic concept for addressing human rights systematically. The "corporate responsibility to respect" provides such a concept.

A. Foundations

57. The corporate responsibility to respect human rights means avoiding the infringement of the rights of others and addressing adverse impacts that may occur. This

³¹ The ubiquity of this norm is documented in A/HRC/11/13, paras. 46–48.

³² See A/HRC/4/35, paragraphs 66–81.

responsibility exists independently of States' human rights duties. It applies to all companies in all situations.

58. What is the scope of this responsibility? What acts or attributes does it encompass? Scope is defined by the actual and potential human rights impacts generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents. In addition, companies need to consider how particular country and local contexts might shape the human rights impact of their activities and relationships. Such attributes as companies' size, influence or profit margins may be relevant factors in determining the scope of their promotional CSR activities, but they do not define the scope of the corporate responsibility to respect human rights. Direct and indirect impacts do.

59. Because companies can affect virtually the entire spectrum of internationally recognized rights, the corporate responsibility to respect applies to all such rights.³³ In practice, some rights will be more relevant than others in particular industries and circumstances and will be the focus of heightened company attention. However, situations may change, so broader periodic assessments are necessary to ensure that no significant issue is overlooked.

60. When conducting such assessments, companies can find an authoritative list of rights at a minimum in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the ILO core conventions.³⁴ The principles that these instruments embody are the foundational elements of the international human rights regime. Yet, because they are State-based instruments, there has been some confusion over their relevance to companies. Why should companies be concerned with them if they don't impose legal obligations on companies directly? The confusion is easily resolved: companies can and do infringe on the enjoyment of the rights that these instruments recognize. Moreover, those rights are the baseline benchmarks by which other social actors judge companies' human rights practices. In short, companies should look to these instruments as authoritative lists of internationally recognized rights. Further guidance on how companies might impact such rights is provided in the OHCHR publication, *Human Rights Translated: A Business Reference Guide*.³⁵

61. Depending on circumstances, companies may need to consider additional standards: for instance, they should also take into account international humanitarian law in conflict-affected areas (which pose particular challenges)³⁶; and standards specific to "at-risk" or vulnerable groups (for example, indigenous peoples or children) in projects affecting them.³⁷

³³ The range of company impacts on rights is documented in A/HRC/8/5/Add.2.

³⁴ The ILO considers eight conventions to be "core" or "fundamental," and they form the basis of the Declaration on Fundamental Principles and Rights at Work. Available from <http://www.ilo.org/declaration/textdeclaration/lang--en/index.htm>.

³⁵ This report was produced jointly with the Global Compact, the International Business Leaders Forum and the Castan Centre for Human Rights Law at Monash University. Available from http://www.ohchr.org/Documents/Publications/Human%20Rights%20Translated_web.pdf.

³⁶ International Committee of the Red Cross, "Business and International Humanitarian Law". Available from <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/business-ihl-150806>.

³⁷ The Special Representative thanks the Ethical Globalization Initiative for convening a workshop on integrating gender issues into the framework; see, for information, <http://www.reports-and-materials.org/Gender-meeting-for-Ruggie-29-Jun-2009.pdf>.

62. A number of stakeholders have asked whether companies have core human rights responsibilities beyond respecting rights. Some have even advocated that businesses' ability to fulfil rights should translate into a responsibility to do so, particularly where Government capacity is limited.³⁸

63. Companies may undertake additional human rights commitments for philanthropic reasons, to protect and promote their brand, or to develop new business opportunities. Operational conditions may dictate additional responsibilities in specific circumstances, while contracts with public authorities for particular projects may require them. In other instances, such as natural disasters or public health emergencies, there may be compelling reasons for any social actor with capacity to contribute temporarily. Such contingent and time-bound actions by some companies in certain situations may be both reasonable and desirable.

64. However, the proposition that corporate human rights responsibilities as a general rule should be determined by companies' capacity, whether absolute or relative to States, is troubling. On that premise, a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions – lacking democratic legitimacy, diminishing the State's incentive to build sustainable capacity and undermining the company's own economic role and possibly its commercial viability. Indeed, the proposition invites undesirable strategic gaming in any kind of country context.

65. In contrast, the corporate responsibility to respect human rights exists independently of States' duties or capacity. It constitutes a universally applicable human rights responsibility for all companies, in all situations.

B. Legal compliance

66. As noted, the corporate responsibility to respect human rights is not a law-free zone because elements of it may be required under domestic law. Companies universally state that their social responsibilities begin with legal compliance. However, in the area of human rights they do not always treat legal compliance as an obligation about which they must be proactive. Moreover, there are situations where prudence suggests that companies should adopt a legal compliance approach even though precise legal standards may not yet be fully defined. Three such compliance-related scenarios are addressed here: weak governance zones, the possible "materiality" of human rights-related risks, and the risk of corporate complicity in international crimes.

67. First, many corporate-related human rights abuses violate existing domestic laws that are enforced poorly or not at all. Early in his mandate, the Special Representative asked the world's largest international business associations to address this problem. Their response was resolute: "All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."³⁹

³⁸ The Special Representative thanks the Institute for Human Rights and Business for convening a workshop on this subject.

³⁹ International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, "Business proposals for effective ways of addressing dilemma situations in weak governance zones", 2006. Available from <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

68. The challenge is more complex where national law conflicts with international standards and where legal compliance may undermine the corporate responsibility to respect. The classic case thereof was apartheid in South Africa. The Special Representative addressed this dilemma in his 2009 report.⁴⁰ He is seeking further views and experiences on possible ways of dealing with it through his online consultation.

69. The second scenario is more complex. There are situations in which companies harm human rights and, in doing so, they also may be non-compliant with existing securities and corporate governance regulations. What is the connection? If companies are not adequately assessing and aggregating stakeholder-related risks, they are unlikely to be disclosing and addressing them, as may be required. Stakeholder-related risks stem from community challenges and resistance to company operations, typically on environmental and human rights grounds. Current evidence comes largely from the extractive and infrastructure sectors, especially where companies operate in conflict-affected or otherwise difficult contexts. However, similar internal control and oversight gaps are likely to exist in other sectors as well.

70. Such risks to companies include delays in design, siting, granting of permits, construction, operation and expected revenues; problematic relations with local labour markets; higher costs for financing, insurance and security; reduced output; collateral impacts such as diverted staff time and reputational hits; and possible project cancellation, forcing a company to write off its entire investment and forgo the value of its lost reserves, revenues and profits, which can run into several billion dollars in the latter case.⁴¹

71. A study of 190 projects operated by the international oil majors indicates that the time for new projects to come on stream has nearly doubled in the past decade, causing significant cost inflation. Delays are attributed to projects' "technical and political complexity."⁴² An independent and confidential follow-up analysis of a subset of those projects indicates that non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. It further estimated that one company may have experienced a US \$6.5 billion "value erosion" over a two-year period from these sources, amounting to a double-digit fraction of its annual profits. These are big numbers.

72. What appears to be happening is that such costs are atomized within companies, spread across different internal functions and budgets and not aggregated into a single category that would trigger the attention of senior management and boards. However, when added up, some of these risks could well count as being "material" even according to the narrowest definitions and, if unaddressed, could require disclosure under existing law.

73. This is a lose-lose-lose situation: human rights are adversely impacted, serious corporate value erosion occurs and disclosure requirements and directors' duties may be breached. Clearly, better internal control systems and oversight are necessary.

74. The same is true for a third issue: managing the risk that companies may be implicated in human rights-related international crimes. This is particularly problematic in similar sectors and circumstances as the issues just discussed. Few reputable companies may ever directly commit acts that amount to international crimes. Yet, there is growing risk that

⁴⁰ A/HRC/11/13, paras. 66–68.

⁴¹ See World Resources Institute, "Development without Conflict: The Business Case for Community Consent", 2007. Available from http://pdf.wri.org/development_without_conflict_fpic.pdf.

⁴² Goldman Sachs Global Investment Research, "Top 190 projects to change the world", April 2008.

they will face allegations of complicity in such crimes committed by others connected to their business.⁴³

75. For example, the more than fifty cases brought since 1997 against United States-based and other companies under the Alien Tort Statute have included allegations of complicity in genocide, slavery, extrajudicial killings, torture, crimes against humanity, war crimes and other egregious human rights violations. Other jurisdictions, too, have allowed civil claims and there have been significant settlements in the United States and elsewhere. In the criminal sphere, the Special Representative has explained how the incorporation of the International Criminal Court Statute provisions into domestic law, in jurisdictions that provide for corporate criminal responsibility, broadens the potential scope of such provisions beyond individual corporate officers to the company itself.⁴⁴ Human rights groups have pressed for the use of such provisions and at least one investigation by State officials has occurred.

76. Prudence suggests that companies should treat this risk robustly. Yet despite the expanding web of potential corporate legal liability, even leading companies in the most directly affected sectors tend not to treat it as a legal compliance issue, perhaps finding it difficult to grasp that they could be held responsible for contributing to human rights abuses committed by third parties, such as State or other security forces, connected to their operations.

77. Finally, companies should reflect on the fact that the three scenarios just described have intersected in several well-known cases brought against companies: weak national legal systems, community-based operational disruptions and company requests for or acceptance of coercive measures by security forces leading to the commission of alleged crimes, which the company is then charged in courts of law with aiding and abetting.

78. As self-evident as the requirement of legal compliance may seem, in the human rights context improvements in companies' internal control and oversight systems are necessary.

C. Due diligence

79. The appropriate corporate response to managing the risks of infringing the rights of others is to exercise human rights due diligence. That very process helps companies address their responsibilities to individuals and communities that they impact and their responsibilities to shareholders, thereby protecting both values and value.

80. Human rights due diligence can be a game-changer for companies: from "naming and shaming" to "knowing and showing." Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence.

81. Companies routinely conduct due diligence to ensure that a contemplated transaction has no hidden risks. Starting in the 1990s, companies added internal controls for the ongoing management of risks to both the company and stakeholders who could be harmed by its conduct, for example, to prevent employment discrimination, environmental damage or criminal misconduct. Drawing on well-established practices and combining them with what

⁴³ The weight of international legal opinion suggests that the relevant standard is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. See A/HRC/8/16.

⁴⁴ See A/HRC/4/35, paras. 22–25.

is unique to human rights, the “protect, respect and remedy” framework lays out the basic parameters of human rights due diligence. Because the process is a means for companies to address their responsibility to respect human rights, it must go beyond simply identifying and managing material risks to the company itself to include the risks a company’s activities and associated relationships may pose to the rights of affected individuals and communities.

82. But one size does not fit all in a world of 80,000 transnational corporations, ten times as many subsidiaries and countless national firms, many of which are small and-medium-sized enterprises. The Special Representative’s aim is to provide companies with universally applicable guiding principles for meeting their responsibility to respect human rights, recognizing that the complexity of tools and processes companies employ, will necessarily vary with circumstances.

83. Considered in that spirit, human rights due diligence comprises four components: a statement of policy articulating the company’s commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance. Company-level grievance mechanisms perform two functions: under the tracking and reporting component of due diligence, they provide the company with feedback that helps identify risks and avoid escalation of disputes; they can also provide remedy, as discussed in section IV. Each of these components is essential. Without them, a company cannot know and show that it is meeting its responsibility to respect rights.

84. Merely having a set of components in place, however, is no guarantee that the system will work. Accordingly, the Special Representative is also developing guidance points for their implementation. One example is that companies must understand that the responsibility to respect human rights is not a one-time transactional activity, but is ongoing and dynamic. Another is for companies to accept that, because human rights concern affected individuals and communities, managing human rights risks needs to involve meaningful engagement and dialogue with them. A third is that, because a main purpose of human rights due diligence is enabling companies to demonstrate that they respect rights, a measure of transparency and accessibility to stakeholders will be required. The Special Representative’s online consultation is exploring how to elaborate these components and processes.

85. This discussion of due diligence concludes with two provisos. One might be described as “the dilemma of normalization.” Making human rights a standard part of enterprise risk management should reduce the incidence of corporate-related human rights harm. However, it could also give companies a false sense of security that they are respecting rights if they lose sight of what makes rights unique. Human rights risk management differs from commercial, technical and even political risk management in that it involves rights-holders. Therefore, it is an inherently dialogical process that involves engagement and communication, not simply calculating probabilities.

86. The second proviso concerns the limits on what companies should expect to gain from human rights due diligence in legal terms. Conducting due diligence enables companies to identify and prevent adverse human rights impacts. Doing so also should provide corporate boards with strong protection against mismanagement claims by shareholders. In Alien Tort Statute and similar suits, proof that the company took every reasonable step to avoid involvement in the alleged violation can only count in its favour. However, the Special Representative would not support proposals that conducting human

rights due diligence, by itself, should automatically and fully absolve a company from Alien Tort Statute or similar liability.⁴⁵

D. Summing up

87. Just as “the duty to protect” provides guidance to States on how to achieve greater policy coherence and effectiveness with regard to business and human rights, so “the corporate responsibility to respect” provides companies with a pathway for managing human rights risks effectively. It identifies critical lacunae in legal compliance issues and leads to a due diligence process whereby companies become aware of and address the human rights harm they cause. At the same time, it can inform efforts by other actors, including States and civil society, to facilitate and ensure that companies respect rights.

V. Access to remedy

88. In resolution 8/7, the Council underscored the need for “enhancing access to effective remedies available to those whose human rights are impacted by corporate activities” and asked the Special Representative to “explore options and make recommendations.”

89. He has focused on three types of grievance mechanisms that can provide avenues for remedy: company-level mechanisms and both non-judicial and judicial State-based mechanisms. He has also examined how these can be complemented by initiatives undertaken by industry bodies, multi-stakeholder groups, international organizations and regional human rights systems.

90. A grievance is understood here as a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, explicit or implicit promises, customary practice, or general notions of fairness that may differ from standard economic and bureaucratic rationales.

A. Company-level

91. Successful companies do not wait for employee or consumer complaints to be lodged with external complaints bodies or the courts. They have established means for dealing with a variety of grievances in order to retain customer loyalty, maintain employee morale and sustain their reputation as responsive and responsible enterprises. These do not preclude individuals from recourse to State-based mechanisms, nor should they undermine trade union representation and collective bargaining arrangements. They can be important complements. However, such mechanisms remain underdeveloped in the human rights domain.⁴⁶

92. As noted, grievance mechanisms perform two key functions regarding the corporate responsibility to respect. First, they serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those impacted. By analysing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Second, these mechanisms make it possible

⁴⁵ This has been proposed by Lucien J. Dhooge, “Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute”, *Emory International Law Review*, 22 (2008).

⁴⁶ All grievance mechanisms need to separate legitimate from vexatious claims; human rights are no different in this respect.

for grievances to be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating.

93. Such mechanisms may be provided directly by a company, through collaborative arrangements with other companies or organizations, or by facilitating recourse to a mutually accepted external expert or body.

94. The Special Representative has identified a set of principles that all non-judicial human rights-related grievance mechanisms should meet to ensure their credibility and effectiveness: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for company-level mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator.⁴⁷

95. There are numerous ways for company-level mechanisms to put these principles into practice. Appropriate approaches will depend in part on the sectoral, political and cultural context, as well as the scale of a company's operations and its potential impacts. Nevertheless, the integrity of the principles should be maintained. The pilot projects referred to in paragraph 11 are testing these principles and specific guidance points for their operationalization.

B. State-based non-judicial

96. Under their duty to protect, States must take appropriate steps within their territory and/or jurisdiction to ensure access to effective remedy through judicial, administrative, legislative or other appropriate means.⁴⁸ The importance of non-judicial, State-based mechanisms, alongside judicial mechanisms, is often overlooked, as regards both their complaints-handling role and other key functions they can perform, including promoting human rights, offering guidance, building capacity and providing support to companies and stakeholders.

97. National human rights institutions (NHRIs) are one promising vehicle for achieving these objectives. The Special Representative interacted with several this past year, including those of Denmark, India, Kenya and South Africa. He also met with the International Coordinating Committee, and welcomes the formation of the Working Group on Business and Human Rights. Many NHRIs are not mandated to address business-related grievances, however, or are permitted to do so only when business performs public functions or impacts certain rights. Governments should reconsider this limitation as one important step towards enhancing access to effective remedy.

98. The national contact points (NCPs), which address complaints under the OECD Guidelines, also have the potential of providing effective remedy. Thirty-one OECD member States and eleven other States adhere to the Guidelines. Several areas of improvement should be considered in updating the Guidelines to realize that potential.

99. NCPs consider roughly 40 percent of the complaints submitted to be without substantive merit or falling beyond the Guidelines' purview.⁴⁹ A major reason for the latter is the absence of an "investment nexus"—either because the multinational involved is a buyer from, not an equity holder in, the supplier; or it is a lending institution that enabled an operating company's foreign investment, but is not itself the investor. This approach reflects

⁴⁷ See A/HRC/8/5, para. 99.

⁴⁸ See A/HRC/11/13/Add.1.

⁴⁹ OECD, Review of NCP Performance: Key Findings, document DAF/INV/WP(2008)1/REV1.

the link between the Guidelines and the OECD Declaration on International Investment; however, it significantly limits NCPs' utility as a grievance mechanism for rapidly expanding segments of global value chains.

100. Another weakness is that no minimum performance standards exist for NCPs. Some have made major improvements, while others remain virtually invisible. Their varied caseloads only in part reflect the number of multinationals domiciled in those countries; they also result from marked differences in the receptivity and effectiveness of NCPs. In addition, there are no official consequences to an NCP finding against a company: it could reapply immediately for export or investment assistance from the same government. The Guidelines' update should address all of these defects.

101. NHRIs and NCPs are two important examples of how non-judicial remedy can contribute to the State duty to protect. Yet neither exists in all States, and they rarely if ever provide full coverage of business-related human rights complaints. Thus, the universe of State-based non-judicial grievance mechanisms remains both under-populated and under-resourced. These gaps contribute to the heavy reliance by aggrieved parties and their representatives on campaigns and lawsuits against companies.

102. States may address this deficit by extending the mandates of existing mechanisms or adding complementary ones, drawing on examples of complaints procedures in fair trading, advertising standards or consumer affairs. Whatever roads they choose, States should view the provision of remedy comprehensively so that judicial and non-judicial approaches begin to cohere as a system of remedial options for victims of corporate-related abuse.

C. Judicial mechanisms

103. The responsibility for establishing judicial mechanisms, ensuring their functionality and facilitating access to them rests with States. If access to judicial remedy for corporate-related human rights impacts is to be improved, it is essential that both States and companies act in a manner supportive of the independence and integrity of judicial systems. States that deliberately erect barriers to prevent cases from being brought against business or that obstruct or intimidate the peaceful and legitimate activities of human rights defenders may breach their duty to protect.⁵⁰ Companies that obstruct or corrupt judicial mechanisms act at variance with their responsibility to respect.

104. Even where such impediments are not at issue, victims of corporate-related human rights abuse may confront legal and practical challenges stemming from the complexity of modern corporate structures coupled with existing imbalances in the operation of judicial systems.

105. First, one legal challenge is the attribution of responsibility among members of a corporate group. Many corporate-related human rights violations also violate existing national civil or criminal law, but applying those provisions to corporate groups can prove extremely complex, even in purely domestic cases.

106. A range of legal arguments has been advanced in cases involving the responsibility of parent companies for harm caused by subsidiaries. Some rely on the parent company's alleged "negligence" with respect to its subsidiary (primary liability), focusing, for example, on whether the parent has established key systems or processes, like those dealing with hazardous activities. Other arguments invoke "complicity" (secondary liability) or the concept of "agency" (vicarious or third party liability), which are found in both common and

⁵⁰ See, for reference, General Assembly resolution 53/144.

civil law jurisdictions. The responsibility of partners in joint ventures and other contract-based relationships raises even more complex questions, though the theory of multi-agency liability has gained traction in some jurisdictions. In short, far greater clarity is needed regarding the responsibility of corporate parents and groups for the purposes of remedy.

107. Second, these challenges are compounded in cases involving the foreign operations of multinational corporations. A central issue here concerns the permissible grounds for courts to exercise extraterritorial jurisdiction. There is some consensus: for example, in criminal cases, nationality is an acceptable basis for exercising such jurisdiction over defendants, including companies; in civil cases, the defendant being “domiciled” (or “present”) in the forum serves that purpose. All national systems need to adopt a principled approach to the question of adjudicative extraterritorial jurisdiction, balancing the interests of claimant, defendant and States, especially in situations where there is a heightened risk of denial of remedy in the host country.

108. A third legal challenge is that investigating large companies for human rights abuses is typically well beyond State prosecutors’ usual work. It requires expertise, resources and political will. Where events in other countries are involved, such investigations also rely on international cooperation to be effective. Criminal provisions remain mere words on paper unless States act upon their obligations to investigate individual and corporate involvement in business and human rights-related crimes.

109. Turning to practical obstacles, three are particularly problematic: costs; bringing representative and aggregated claims; and disincentives to providing legal and related assistance to victims. Their coexistence can make it almost impossible for victims to access effective judicial remedy.

110. The question of costs is fundamental – costs of obtaining legal advice and of the case itself should the claimant prove unsuccessful. There is an appropriate role for costs as a deterrent to unmeritorious cases, but they should not prevent legitimate claimants from accessing the judicial system. The costs of simply accessing a qualified lawyer can be a barrier for at least some plaintiffs in most jurisdictions. Beyond the provision of legal aid, there are examples of innovation in litigation funding and fee rules – legal expenses insurance, for one – but they are not widely available.

111. A second practical barrier can result from limitations on “standing” (who can bring a suit) and on the ability to bring group claims for compensation. Many instances of corporate-related harm involve a large number of individual claims that are grounded on the same underlying set of facts, each of which would be too costly for a single claimant to pursue. Jurisdictions are increasingly considering how such claims can be most effectively aggregated, and the conditions under which representative proceedings will be allowed. Alternatives being explored include the European debate over models of “collective redress” in the consumer protection field; the evolving system of “opt-in” representative suits in civil cases in China; and the expansion of forms of “class actions” in such jurisdictions as Chile (for consumer claims), Indonesia (in cases of environmental harm) and South Africa (to protect constitutional rights). However, the scope of many of these developments in relation to business and human rights claims remains unclear.

112. A third practical barrier is the financial, social and political disincentives for lawyers to represent claimants in this area. As a result, there is a far larger (and better compensated) pool advising corporate defendants. In some jurisdictions, the terms of settlements exacerbate this situation by requiring that the claimants’ lawyers not act against the same company in future matters. Compounding this, where human rights defenders are obstructed or intimidated, victims may be without any legal or related support at all.

113. Governments often point to the mere existence of judicial systems as proof that they are fulfilling their duty to protect. But, as the above discussion demonstrates, much more is

required. The Special Representative will continue to examine options for addressing these legal and practical barriers, including through a multi-stakeholder consultation.

D. Complementarities

114. State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for corporate-related human rights abuse. Within such a system, company-level grievance mechanisms can provide early-stage recourse and possible resolution. State and company-level mechanisms can be supplemented or enhanced by a range of collaborative initiatives.

115. Industry-based and multi-stakeholder initiatives can enable companies to increase the reach and reduce the costs of grievance mechanisms. Global framework agreements may achieve the same for union federations and transnational companies. Regional or international mechanisms may strengthen common standards for States and companies across jurisdictions. Whatever the rationale, the fundamental purpose of such mechanisms is to provide remedy to victims. Companies and States collaborating to develop or oversee such mechanisms should do so in a manner consistent with the corporate responsibility to respect and the State duty to protect.

116. The challenges to accessing any of these mechanisms can be greatest for the “at-risk” and vulnerable groups arguably most in need. Whether through active discrimination or as the unintended consequences of the way remedial mechanisms are designed and operate, these groups often face additional cultural, social, physical, and financial impediments to accessing them. The custodians of any mechanism should give due attention to possible differential impacts on such groups at each stage of the grievance process: access, procedures and outcome.

E. Summing up

117. Reality falls far short of constituting a comprehensive and inclusive system of remedy for victims of corporate-related human rights abuse. Although progress has been made, all types of mechanisms – State-based non-judicial and judicial, company-based, as well as collaborative and international – remain underdeveloped.

118. Moreover, individuals and communities are often unaware of existing avenues for remedy or how to make meaningful choices between them. As mechanisms further proliferate, the challenge of access will increase unless there is adequate assistance to all parties in navigating their options. The Special Representative recently upgraded his online resource, BASESwiki, through which he will continue to support improved access to information, learning and expertise in pursuit of more effective non-judicial grievance mechanisms.⁵¹ It currently features over 200 mechanisms and 70 case stories.

119. He is also conducting a feasibility study of whether and how new international networked arrangements for mediation might enhance access to sustainable dispute resolution in business and human rights. The results will be included in his final report.

⁵¹ Available at www.baseswiki.org.

VI. Conclusion

120. Resolution 8/7 extended the Special Representative's mandate to 2011. The Council asked him to operationalize the "protect, respect and remedy" framework "with a view to providing more effective protection to individuals and communities against human rights abuses by, or involving, transnational corporations and other business enterprises".

121. In deciding how best to pursue this task, the Special Representative found wisdom in the words of Nobel laureate Amartya Sen: "what moves us," Sen writes, "is not the realization that the world falls short of being completely just – which few of us expect - but that there are clearly remediable injustices around us which we want to eliminate".⁵² This perspective, which resonates well with the Special Representative's own approach of "principled pragmatism", leads one to inquire how to improve actual lives, Sen continues, rather than to theoretical characterizations of "perfectly just societies" or institutions, which in any case remain illusory. Accordingly, this report has addressed how States and companies can become more responsive and effective in dealing with business and human rights challenges. Identifying such practical measures also provides a basis for assessing the performance of States and companies, by each other, and by other stakeholders.

122. The United Nations "protect, respect and remedy" framework lays the foundations of a system for better managing business and human rights. It comprises State duties and corporate responsibilities. It includes preventative and remedial measures. It involves all relevant actors: States, businesses, affected individuals and communities, civil society and international institutions.

123. Progress within any one pillar will trigger and reinforce progress in the others. States and business have independent obligations, thus neither needs to, nor should, wait for the other to move first. As States do a better job of fulfilling their duty to protect, that will facilitate and begin to ensure that all companies meet their responsibility to respect. As companies internalize the responsibility to respect, they will increasingly support State efforts to bring laggards along. As access to remedy improves, companies and States alike will learn how better to prevent corporate-related abuses in the first place. And so on.

124. In his 2011 report, the Special Representative will provide a set of guiding principles for the operationalization of the framework's distinct yet complementary and interactive elements and processes.

125. The final report also will present options and recommendations to the Council regarding possible successor initiatives to the mandate. The Special Representative will engage extensively with Member States and others in developing these ideas. Nevertheless, to sustain the momentum the mandate has achieved, he is flagging one recommendation now.

126. Beyond the area of labour standards, the Special Representative has become the de facto United Nations focal point for business and human rights. States, companies, United Nations organizations and other national and international entities regularly seek his advice regarding their own corporate-related human rights policies and practices. Resource constraints limit how much he and his small team have been able to do. However, even those limited efforts will come to a halt once his mandate ends unless an advisory and capacity-building function is anchored firmly within the United

⁵² *The Idea of Justice* (Harvard University Press, 2009), p. vii.

Nations. Logically, this should rest with OHCHR. But the Office would need to become equipped to provide the leadership and guidance that stakeholders require and expect. The Special Representative urges early consideration of this matter by the Council.

Text No. 9

Human Rights

Prof. Dr. Christine Kaufmann



OECD Guidelines for Multinational Enterprises



OECD Guidelines for Multinational Enterprises



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Declaration on International Investment and Multinational Enterprises

27 June 2000

ADHERING GOVERNMENTS¹

CONSIDERING:

- That international investment is of major importance to the world economy, and has considerably contributed to the development of their countries;
- That multinational enterprises play an important role in this investment process;
- That international co-operation can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimise and resolve difficulties which may arise from their operations;
- That the benefits of international co-operation are enhanced by addressing issues relating to international investment and multinational enterprises through a balanced framework of inter-related instruments;

DECLARE:

- | | | |
|--|-------|---|
| Guidelines for
Multinational
Enterprises | I. | That they jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines, set forth in Annex 1 hereto, ² having regard to the considerations and understandings that are set out in the Preface and are an integral part of them; |
| National Treatment | II.1. | That adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government (hereinafter referred to as “Foreign-Controlled Enterprises”) treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as “National Treatment”); |

	2.	That adhering governments will consider applying “National Treatment” in respect of countries other than adhering governments;
	3.	That adhering governments will endeavour to ensure that their territorial subdivisions apply “National Treatment”;
	4.	That this Declaration does not deal with the right of adhering governments to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises;
Conflicting Requirements	III.	That they will co-operate with a view to avoiding or minimising the imposition of conflicting requirements on multinational enterprises and that they will take into account the general considerations and practical approaches. ³
International Investment Incentives and Disincentives	IV.1	That they recognise the need to strengthen their co-operation in the field of international direct investment;
	2.	That they thus recognise the need to give due weight to the interests of adhering governments affected by specific laws, regulations and administrative practices in this field (hereinafter called “measures”) providing official incentives and disincentives to international direct investment;
	3.	That adhering governments will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;
Consultation Procedures	V.	That they are prepared to consult one another on the above matters in conformity with the relevant Decisions of the Council;
Review	VI.	That they will review the above matters periodically with a view to improving the effectiveness of international economic co-operation among adhering governments on issues relating to international investment and multinational enterprises.

Notes

1. As at 27 June 2000 adhering governments are those of all OECD Members, as well as Argentina, Brazil, Chile and the Slovak Republic. The European Community has been invited to associate itself with the section on National Treatment on matters falling within its competence.
2. The text of the *Guidelines for Multinational Enterprises* is reproduced in Part I of this Booklet.
3. The text of General considerations and Practical Approaches concerning Conflicting Requirements Imposed on Multinational Enterprises is available from the OECD Website www.oecd.org/daf/investment/guidelines/conflict.htm.

PART I

OECD Guidelines for Multinational Enterprises

Preface

1. The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The *Guidelines* aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The *Guidelines* are part of the *OECD Declaration on International Investment and Multinational Enterprises* the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.

2. International business has experienced far-reaching structural change and the *Guidelines* themselves have evolved to reflect these changes. With the rise of service and knowledge-intensive industries, service and technology enterprises have entered the international marketplace. Large enterprises still account for a major share of international investment, and there is a trend toward large-scale international mergers. At the same time, foreign investment by small- and medium-sized enterprises has also increased and these enterprises now play a significant role on the international scene. Multinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.

3. The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. In developing countries, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services.

4. The activities of multinational enterprises, through international trade and investment, have strengthened and deepened the ties that join OECD economies to each other and to the rest of the world. These activities bring substantial benefits to home and host countries. These benefits accrue when multinational enterprises supply the products and services that consumers

want to buy at competitive prices and when they provide fair returns to suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources. They facilitate the transfer of technology among the regions of the world and the development of technologies that reflect local conditions. Through both formal training and on-the-job learning enterprises also promote the development of human capital in host countries.

5. The nature, scope and speed of economic changes have presented new strategic challenges for enterprises and their stakeholders. Multinational enterprises have the opportunity to implement best practice policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives. The ability of multinational enterprises to promote sustainable development is greatly enhanced when trade and investment are conducted in a context of open, competitive and appropriately regulated markets.

6. Many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth. Today's competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises may be tempted to neglect appropriate standards and principles of conduct in an attempt to gain undue competitive advantage. Such practices by the few may call into question the reputation of the many and may give rise to public concerns.

7. Many enterprises have responded to these public concerns by developing internal programmes, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. Some of them have called upon consulting, auditing and certification services, contributing to the accumulation of expertise in these areas. These efforts have also promoted social dialogue on what constitutes good business conduct. The *Guidelines* clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises. Thus, the *Guidelines* both complement and reinforce private efforts to define and implement responsible business conduct.

8. Governments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted. The post-war period has seen the development of this framework, starting with the adoption in 1948 of the Universal Declaration of Human Rights. Recent instruments include the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and Agenda 21 and the Copenhagen Declaration for Social Development.

9. The OECD has also been contributing to the international policy framework. Recent developments include the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and of the OECD Principles of Corporate Governance, the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, and ongoing work on the OECD Guidelines on Transfer Pricing for Multinational Enterprises and Tax Administrations.

10. The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise. In working towards this goal, governments find themselves in partnership with the many businesses, trade unions and other non-governmental organisations that are working in their own ways toward the same end. Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non-discriminatory treatment of firms, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective. Governments adhering to the *Guidelines* are committed to continual improvement of both domestic and international policies with a view to improving the welfare and living standards of all people.

I. Concepts and Principles

1. The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable.
2. Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.
3. A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*.
4. The *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.
5. Governments wish to encourage the widest possible observance of the *Guidelines*. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the *Guidelines* nevertheless encourage them to observe the *Guidelines* recommendations to the fullest extent possible.
6. Governments adhering to the *Guidelines* should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.

7. Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries, the governments concerned will co-operate in good faith with a view to resolving problems that may arise.

8. Governments adhering to the *Guidelines* set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.

9. The use of appropriate international dispute settlement mechanisms, including arbitration, is encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.

10. Governments adhering to the *Guidelines* will promote them and encourage their use. They will establish National Contact Points that promote the *Guidelines* and act as a forum for discussion of all matters relating to the *Guidelines*. The adhering Governments will also participate in appropriate review and consultation procedures to address issues concerning interpretation of the *Guidelines* in a changing world.

II. General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies.
10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*.
11. Abstain from any improper involvement in local political activities.

III. Disclosure

1. Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.

2. Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.

3. Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.

4. Enterprises should also disclose material information on:

- a) The financial and operating results of the company.
- b) Company objectives.
- c) Major share ownership and voting rights.
- d) Members of the board and key executives, and their remuneration.
- e) Material foreseeable risk factors.
- f) Material issues regarding employees and other stakeholders.
- g) Governance structures and policies.

5. Enterprises are encouraged to communicate additional information that could include:

- a) Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which such statements apply and its performance in relation to these statements may be communicated.

- b) Information on systems for managing risks and complying with laws, and on statements or codes of business conduct.
- c) Information on relationships with employees and other stakeholders.

IV. Employment and Industrial Relations

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

1. a) Respect the right of their employees to be represented by trade unions and other *bona fide* representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions.
 - b) Contribute to the effective abolition of child labour.
 - c) Contribute to the elimination of all forms of forced or compulsory labour.
 - d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.
2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements.
 - b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment.
 - c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.
3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
4. a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.
 - b) Take adequate steps to ensure occupational health and safety in their operations.

5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.
6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.
7. In the context of *bona fide* negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.
8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

V. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:
 - a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
 - b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives; and
 - c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.
2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
 - a) provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and
 - b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.
3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

4. Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.
5. Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.
6. Continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as:
 - a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;
 - b) development and provision of products or services that have no undue environmental impacts; are safe in their intended use; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;
 - c) promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise; and
 - d) research on ways of improving the environmental performance of the enterprise over the longer term.
7. Provide adequate education and training to employees in environmental health and safety matters, including the handling of hazardous materials and the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies.
8. Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.

VI. Combating Bribery

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.
2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.
3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.
4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.
5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of “off the books” or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.
6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.

VII. Consumer Interests

When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide. In particular, they should:

1. Ensure that the goods or services they provide meet all agreed or legally required standards for consumer health and safety, including health warnings and product safety and information labels.
2. As appropriate to the goods or services, provide accurate and clear information regarding their content, safe use, maintenance, storage, and disposal sufficient to enable consumers to make informed decisions.
3. Provide transparent and effective procedures that address consumer complaints and contribute to fair and timely resolution of consumer disputes without undue cost or burden.
4. Not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair.
5. Respect consumer privacy and provide protection for personal data.
6. Co-operate fully and in a transparent manner with public authorities in the prevention or removal of serious threats to public health and safety deriving from the consumption or use of their products.

VIII. Science and Technology

Enterprises should:

1. Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity.
2. Adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights.
3. When appropriate, perform science and technology development work in host countries to address local market needs, as well as employ host country personnel in an S&T capacity and encourage their training, taking into account commercial needs.
4. When granting licenses for the use of intellectual property rights or when otherwise transferring technology, do so on reasonable terms and conditions and in a manner that contributes to the long term development prospects of the host country.
5. Where relevant to commercial objectives, develop ties with local universities, public research institutions, and participate in co-operative research projects with local industry or industry associations.

IX. Competition

Enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should:

1. Refrain from entering into or carrying out anti-competitive agreements among competitors:
 - a) to fix prices;
 - b) to make rigged bids (collusive tenders);
 - c) to establish output restrictions or quotas; or
 - d) to share or divide markets by allocating customers, suppliers, territories or lines of commerce.
2. Conduct all of their activities in a manner consistent with all applicable competition laws, taking into account the applicability of the competition laws of jurisdictions whose economies would be likely to be harmed by anti-competitive activity on their part.
3. Co-operate with the competition authorities of such jurisdictions by, among other things and subject to applicable law and appropriate safeguards, providing as prompt and complete responses as practicable to requests for information.
4. Promote employee awareness of the importance of compliance with all applicable competition laws and policies.

X. Taxation

It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

PART II

Implementation Procedures of the OECD Guidelines for Multinational Enterprises

Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises

June 2000

THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Declaration on International Investment and Multinational Enterprises (the “Declaration”), in which the Governments of adhering countries (“adhering countries”) jointly recommend to multinational enterprises operating in or from their territories the observance of Guidelines for Multinational Enterprises (the “Guidelines”);

Recognising that, since operations of multinational enterprises extend throughout the world, international co-operation on issues relating to the Declaration should extend to all countries;

Having regard to the Terms of Reference of the Investment Committee, in particular with respect to its responsibilities for the Declaration [C(84)171(Final), renewed in C/M(95)21];

Considering the Report on the First Review of the 1976 Declaration [C(79)102(Final)], the Report on the Second Review of the Declaration [C/MIN(84)5(Final)], the Report on the 1991 Review of the Declaration [DAFFE/IME(91)23], and the Report on the 2000 Review of the Guidelines [C(2000)96];

Having regard to the Second Revised Decision of the Council of June 1984 [C(84)90], amended June 1991 [C/MIN(91)7/ANN1];

Considering it desirable to enhance procedures by which consultations may take place on matters covered by these Guidelines and to promote the effectiveness of the Guidelines;

On the proposal of the Investment Committee:

DECIDES:

To repeal the Second Revised Decision of the Council of June 1984 [C(84)90], amended June 1991 [C/MIN(91)7/ANN1], and replace it with the following:

I. National Contact Points

1. Adhering countries shall set up National Contact Points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters covered by the Guidelines so that they can contribute to the solution of problems which may arise in this connection, taking due account of the attached procedural guidance. The business community, employee organisations, and other interested parties shall be informed of the availability of such facilities.
2. National Contact Points in different countries shall co-operate if such need arises, on any matter related to the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken.
3. National Contact Points shall meet annually to share experiences and report to the Investment Committee.

II. The Investment Committee

1. The Investment Committee (“the Committee”) shall periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their application.
2. The Committee shall periodically invite the Business and Industry Advisory Committee to the OECD (BIAC), and the Trade Union Advisory Committee to the OECD (TUAC) (the “advisory bodies”), as well as other non-governmental organisations to express their views on matters covered by the Guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held at their request.
3. The Committee may decide to hold exchanges of views on matters covered by the Guidelines with representatives of non-adhering countries.
4. The Committee shall be responsible for clarification of the Guidelines. Clarification will be provided as required. If it so wishes, an individual enterprise will be given the opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interests. The Committee shall not reach conclusions on the conduct of individual enterprises.
5. The Committee shall hold exchanges of views on the activities of National Contact Points with a view to enhancing the effectiveness of the Guidelines.
6. In fulfilling its responsibilities for the effective functioning of the Guidelines, the Committee shall take due account of the attached procedural guidance.

7. The Committee shall periodically report to the Council on matters covered by the Guidelines. In its reports, the Committee shall take account of reports by National Contact Points, the views expressed by the advisory bodies, and the views of other non-governmental organisations and non-adhering countries as appropriate.

III. Review of the Decision

This Decision shall be periodically reviewed. The Committee shall make proposals for this purpose.

Procedural Guidance

I. National Contact Points

The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.

A. Institutional arrangements

Consistent with the objective of functional equivalence, adhering countries have flexibility in organising their NCPs, seeking the active support of social partners, including the business community, employee organisations, and other interested parties, which includes non-governmental organisations.

Accordingly, the National Contact Point:

1. May be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organised as a co-operative body, including representatives of other government agencies. Representatives of the business community, employee organisations and other interested parties may also be included.
2. Will develop and maintain relations with representatives of the business community, employee organisations and other interested parties that are able to contribute to the effective functioning of the Guidelines.

B. Information and promotion

National Contact Points will:

1. Make the Guidelines known and available by appropriate means, including through on-line information, and in national languages. Prospective investors (inward and outward) should be informed about the Guidelines, as appropriate.
2. Raise awareness of the Guidelines, including through co-operation, as appropriate, with the business community, employee organisations, other non-governmental organisations, and the interested public.
3. Respond to enquiries about the Guidelines from:
 - a) Other National Contact Points;

- b) the business community, employee organisations, other non-governmental organisations and the public; and
- c) governments of non-adhering countries.

C. Implementation in specific instances

The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law. In providing this assistance, the NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
 - a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts.
 - b) Consult the National Contact Point in the other country or countries concerned.
 - c) Seek the guidance of the Investment Committee if it has doubt about the interpretation of the Guidelines in particular circumstances.
 - d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.
3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.
4.
 - a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.
 - b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.

5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

D. Reporting

1. Each National Contact Point will report annually to the Committee.
2. Reports should contain information on the nature and results of the activities of the National Contact Point, including implementation activities in specific instances.

II. Investment Committee

1. The Committee will discharge its responsibilities in an efficient and timely manner.
2. The Committee will consider requests from NCPs for assistance in carrying out their activities, including in the event of doubt about the interpretation of the Guidelines in particular circumstances.
3. The Committee will:
 - a) Consider the reports of NCPs.
 - b) Consider a substantiated submission by an adhering country or an advisory body on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances.
 - c) Consider issuing a clarification where an adhering country or an advisory body makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances.
 - d) Make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines.
4. The Committee may seek and consider advice from experts on any matters covered by the Guidelines. For this purpose, the Committee will decide on suitable procedures.

PART III

Commentaries

Note by the Secretariat: *These commentaries have been prepared by the Investment Committee to provide information on and explanation of the Guidelines text and of the Council Decision on Implementation of the Guidelines. They are not part of the Declaration on International Investment and Multinational Enterprises or of the Council Decision on the Guidelines for Multinational Enterprises.*

Commentary on the OECD Guidelines for Multinational Enterprises

Commentary on General Policies

1. The General Policies chapter of the *Guidelines* is the first to contain specific recommendations to enterprises. As such it is important for setting the tone and establishing common fundamental principles for the specific recommendations in subsequent chapters.
2. Obeying domestic law is the first obligation of business. The *Guidelines* are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. While the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.
3. Enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community as well as business interests, can enrich this process. It is also recognised that governments should be transparent in their dealings with enterprises, and consult with business on these same issues. Enterprises should be viewed as partners with government in the development and use of both voluntary and regulatory approaches (of which the *Guidelines* are one element) to policies affecting them.
4. There should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development, and the *Guidelines* are meant to foster complementarities in this regard. Indeed, links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development.¹ On a related issue, while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments'

international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.

5. The *Guidelines* also acknowledge and encourage the contribution that MNEs can make to local capacity building as a result of their activities in local communities. Similarly, the recommendation on human capital formation is an explicit and forward-looking recognition of the contribution to individual human development that MNEs can offer their employees, and encompasses not only hiring practices, but training and other employee development as well. Human capital formation also incorporates the notion of non-discrimination in hiring practices as well as promotion practices, life-long learning and other on-the-job training.

6. Governments recommend that, in general, enterprises avoid efforts to secure exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation and financial incentives among other issues, without infringing on an enterprise's right to seek changes in the statutory or regulatory framework. The words "or accepting" also draw attention to the role of the state in offering these exemptions. While this sort of provision has been traditionally directed at governments, it is also of direct relevance to MNEs. Importantly, however, there are instances where specific exemptions from laws or other policies can be consistent with these laws for legitimate public policy reasons. The environment and competition policy chapters are examples.

7. The paragraph devoted to the role of MNEs in corporate governance gives further impetus to the recently adopted OECD Principles of Corporate Governance. Although primary responsibility for improving the legal and institutional regulatory framework lies with governments, enterprises also have an interest in good governance.

8. An increasing network of non-governmental self-regulatory instruments and actions address aspects of corporate behaviour and the relationships between business and society. Enterprises recognise that their activities often have social and environmental implications. The institution of self-regulatory practices and management systems by enterprises sensitive to reaching these goals – thereby contributing to sustainable development – is an illustration of this. In turn, developing such practices can further constructive relationships between enterprises and the societies in which they operate.

9. Following from effective self-regulatory practices, as a matter of course, enterprises are expected to promote employee awareness of company policies. Safeguards to protect *bona fide* "whistle-blowing" activities are also recommended, including protection of employees who, in the absence of timely remedial action or in the face of reasonable risk of negative

employment action, report practices that contravene the law to the competent public authorities. While of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the *Guidelines*.

10. Encouraging, where practicable, compatible principles of corporate responsibility among business partners serves to combine a re-affirmation of the standards and principles embodied in the *Guidelines* with an acknowledgement of their importance to suppliers, contractors, subcontractors, licensees and other entities with which MNEs enjoy a working relationship. It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise *vis-à-vis* its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope for influencing business partners and the supply chain is greater in some instances than in others. Established or direct business relationships are the major object of this recommendation rather than all individual or *ad hoc* contracts or transactions that are based solely on open market operations or client relationships. In cases where direct influence of business partners is not possible, the objective could be met by means of dissemination of general policy statements of the enterprise or membership in business federations that encourage business partners to apply principles of corporate conduct compatible with the *Guidelines*.

11. Finally, it is important to note that self-regulation and other initiatives in a similar vein, including the *Guidelines*, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments. It is understood that MNEs should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed.

Commentary on Disclosure

12. The purpose of this chapter is to encourage improved understanding of the operations of multinational enterprises. Clear and complete information on enterprises is important to a variety of users ranging from shareholders and the financial community to other constituencies such as employees, local communities, special interest groups, governments and society at large. To improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their

operations and responsive to the public's increasingly sophisticated demands for information. The information highlighted in this chapter may be a supplement to disclosure required under the national laws of the countries in which the enterprise operates.

13. This chapter addresses disclosure in two areas. The first set of disclosure recommendations is identical to disclosure items outlined in the *OECD Principles of Corporate Governance*. The *Principles* call for timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company. Companies are also expected to disclose sufficient information on the remuneration of board members and key executives (either individually or in the aggregate) for investors to properly assess the costs and benefits of remuneration plans and the contribution of incentive schemes, such as stock option schemes, to performance. The *Principles* contain annotations that provide further guidance on the required disclosures and the recommendations in the *Guidelines* should be construed in relation to these annotations. They focus on publicly traded companies. To the extent that they are deemed applicable, they should also be a useful tool to improve corporate governance in non-traded enterprises; for example, privately held and state owned enterprises.

14. The *Guidelines* also encourage a second set of disclosure or communication practices in areas where reporting standards are still emerging such as, for example, social, environmental, and risk reporting. Many enterprises provide information on a broader set of topics than financial performance and consider disclosure of such information a method by which they can demonstrate a commitment to socially acceptable practices. In some cases, this second type of disclosure – or communication with the public and with other parties directly affected by the firms' activities – may pertain to entities that extend beyond those covered in the enterprises' financial accounts. For example, it may also cover information on the activities of subcontractors and suppliers or of joint venture partners.

15. Many enterprises have adopted measures designed to help them comply with the law and standards of business conduct, and to enhance the transparency of their operations. A growing number of firms have issued voluntary codes of corporate conduct, which are expressions of commitments to ethical values in such areas as environment, labour standards or consumer protection. Specialised management systems are being developed with the aim of helping them respect these commitments – these involve information systems, operating procedures and training requirements. Enterprises are co-operating with NGOs and intergovernmental organisations in developing reporting standards that enhance enterprises' ability to communicate how their activities influence sustainable development outcomes (e.g. the Global Reporting Initiative).

16. The OECD *Principles of Corporate Governance* support the development of high quality internationally recognised standards of accounting, financial and non-financial disclosure, and audit, which can serve to improve the comparability of information among countries. Financial audits conducted by independent auditors provide external and objective assurance on the way in which financial statements have been prepared and presented. The transparency and effectiveness of non-financial disclosure may be enhanced by independent verification. Techniques for independent verification of non-financial disclosure are emerging.

17. Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal. Information that is made available to users in home markets should also be available to all interested users. Enterprises may take special steps to make information available to communities that do not have access to printed media (*e.g.* poorer communities that are directly affected by the enterprise's activities).

18. Disclosure requirements are not expected to place unreasonable administrative or cost burdens on enterprises. Nor are enterprises expected to disclose information that may endanger their competitive position unless disclosure is necessary to fully inform the investment decision and to avoid misleading the investor.

Commentary on Employment and Industrial Relations

19. This chapter opens with a chapeau that includes a reference to “applicable” law and regulations, which is meant to acknowledge the fact that multinational enterprises, while operating within the jurisdiction of particular countries, may be subject to *national*, *sub-national*, as well as *supra-national* levels of regulation of employment and industrial relations matters. The terms “prevailing labour relations” and “employment practices” are sufficiently broad to permit a variety of interpretations in light of different national circumstances – for example, different bargaining options provided for employees under national laws and regulations.

20. The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work. The *Guidelines*, as a non-binding instrument, have a role to play in promoting observance of these standards and principles among multinational enterprises. The provisions of the *Guidelines* chapter echo relevant provisions of the 1998 Declaration, as well as the ILO's 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Tripartite Declaration sets out principles in the fields of employment, training, working conditions, and

industrial relations, while the OECD Guidelines cover all major aspects of corporate behaviour. The OECD Guidelines and the ILO Tripartite Declaration refer to the behaviour expected from enterprises and are intended to parallel and not conflict with each other. The ILO Tripartite Declaration can therefore be of use in understanding the *Guidelines* to the extent that it is of a greater degree of elaboration. However, the responsibilities for the follow-up procedures under the Tripartite Declaration and the *Guidelines* are institutionally separate.

21. The first paragraph of this chapter is designed to echo all four fundamental principles and rights at work which are contained in the ILO's 1998 Declaration, namely the freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour, and non-discrimination in employment and occupation. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognised as fundamental.

22. The chapter recommends that multinational enterprises contribute to the effective abolition of child labour in the sense of the ILO 1998 Declaration and ILO Convention 182 concerning the worst forms of child labour. Long-standing ILO instruments on child labour are Convention 138 and Recommendation 146 (both adopted in 1973) concerning minimum ages for employment. Through their labour management practices, their creation of high quality, well paid jobs and their contribution to economic growth, multinational enterprises can play a positive role in helping to address the root causes of poverty in general and of child labour in particular. It is important to acknowledge and encourage the role of multinational enterprises in contributing to the search for a lasting solution to the problem of child labour. In this regard, raising the standards of education of children living in host countries is especially noteworthy.

23. The chapter also recommends that enterprises contribute to the elimination of all forms of compulsory labour, another principle derived from the 1998 ILO Declaration. The reference to this core labour right is based on the ILO Conventions 29 of 1930 and 105 of 1957. C. 29 requests that governments "suppress the use of forced or compulsory labour in all its forms within the shortest possible period", while C. 105 requests of them to "suppress and not to make use of any form of forced or compulsory labour" for certain enumerated purposes (e.g. as a means of political coercion or labour discipline), and "to take effective measures to secure [its] immediate and complete abolition". At the same time, it is understood that the ILO is the competent body to deal with the difficult issue of prison labour, in particular when it comes to the hiring-out of prisoners to (or their placing at the disposal of) private individuals, companies or associations.

24. The principle of non-discrimination with respect to employment and occupation is considered to apply to such terms and conditions as hiring,

discharge, pay, promotion, training and retirement. The list of non-permissible grounds for discrimination which is taken from ILO Convention 111 of 1958 considers that any distinction, exclusion or preference on these grounds is in violation of the Convention. At the same time, the text makes clear that the terms do not constitute an exhaustive list. Consistent with the provisions in paragraph 1d), enterprises are expected to promote equal opportunities for women and men with special emphasis on equal criteria for selection, remuneration, and promotion, and equal application of those criteria, and prevent discrimination or dismissals on the grounds of marriage, pregnancy or parenthood.

25. The reference to consultative forms of employee participation in paragraph two of the *Guidelines* is taken from ILO Recommendation 94 of 1952 concerning Consultation and Co-operation between Employers and Workers at the Level of the Undertaking. It also conforms to a provision contained in the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Such consultative arrangements should not substitute for employees' right to bargain over terms and conditions of employment. A recommendation on consultative arrangements with respect to employment arrangements is also part of paragraph eight.

26. In paragraph three of this chapter, information provided by companies to their employees is expected to provide a "true and fair view" of performance. It relates to the following: the structure of the enterprise, its economic and financial situation and prospects, employment trends, and expected substantial changes in operations, taking into account legitimate requirements of business confidentiality. Considerations of business confidentiality may mean that information on certain points may not be provided, or may not be provided without safeguards.

27. In paragraph four, employment and industrial relations standards are understood to include compensation and working-time arrangements. The reference to occupational health and safety implies that MNEs are expected to follow prevailing regulatory standards and industry norms to minimise the risk of accidents and injury to health arising out of, linked with, or occurring in, the course of employment. This encourages enterprises to work to raise the level of performance with respect to occupational health and safety in all parts of their operation even where this may not be formally required by existing regulations in countries in which they operate. It also encourages enterprises to respect employees' ability to remove themselves from a work situation when there is reasonable justification to believe that it presents an imminent and serious risk to health or safety. Reflecting their importance and complementarities among related recommendations, health and safety concerns are echoed elsewhere in the *Guidelines*, most notably in chapters on Consumer Interests and the Environment.

28. The recommendation in paragraph five of the chapter encourages MNEs to recruit an adequate workforce share locally, including managerial personnel, and to provide training to them. Language in this paragraph on training and skill levels complements the text in paragraph four of the General Policies chapter on encouraging human capital formation. The reference to local personnel complements the text encouraging local capacity building in paragraph three of the General Policies chapter.

29. Paragraph six recommends that enterprises provide reasonable notice to the representatives of employees and relevant government authorities, of changes in their operations which would have major effects upon the livelihood of their employees, in particular the closure of an entity involving collective layoffs or dismissals. As stated therein, the purpose of this provision is to afford an opportunity for co-operation to mitigate the effects of such changes. This is an important principle that is widely reflected in the industrial relations laws and practices of adhering countries, although the approaches taken to ensuring an opportunity for meaningful co-operation are not identical in all adhering countries. The paragraph also notes that it would be appropriate if, in light of specific circumstances, management were able to give such notice prior to the final decision. Indeed, notice prior to the final decision is a feature of industrial relations laws and practices in a number of adhering countries. However, it is not the only means to ensure an opportunity for meaningful co-operation to mitigate the effects of such decisions, and the laws and practices of other adhering countries provide for other means such as defined periods during which consultations must be undertaken before decisions may be implemented.

Commentary on the Environment

30. The text of the Environment Chapter broadly reflects the *principles* and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflects *standards* contained in such instruments as the ISO Standard on Environmental Management Systems.

31. Sound environmental management is an important part of sustainable development, and is increasingly being seen as both a business responsibility and a business *opportunity*. Multinational enterprises have a role to play in both respects. Managers of these enterprises should therefore give appropriate attention to environmental issues within their business strategies. Improving environmental performance requires a commitment to a systematic approach and to continual improvement of the system. An environmental management

system provides the internal framework necessary to control an enterprise's environmental impacts and to integrate environmental considerations into business operations. Having such a system in place should help to assure stockholders, employees and the community that the enterprise is actively working to protect the environment from the impacts of its activities.

32. In addition to improving environmental performance, instituting an environmental management system can provide economic benefits to companies through reduced operating and insurance costs, improved energy and resource conservation, reduced compliance and liability charges, improved access to capital, improved customer satisfaction, and improved community and public relations.

33. In the context of these *Guidelines*, "sound environmental management" should be interpreted in its broadest sense, embodying activities aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long-term, and involving both pollution control and resource management elements.

34. In most enterprises, an internal control system is needed to manage the enterprise's activities. The environmental part of this system may include such elements as targets for improved performance and regular monitoring of progress towards these targets.

35. Information about the activities of enterprises and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest.

36. Normal business activity can involve the *ex ante* assessment of the potential environmental impacts associated with the enterprise's activities. Enterprises often carry out appropriate environmental impact assessments, even if they are not required by law. Environmental assessments made by the enterprise may contain a broad and forward-looking view of the potential impacts of an enterprise's activities, addressing relevant impacts and examining alternatives and mitigation measures to avoid or redress adverse impacts. The *Guidelines* also recognise that multinational enterprises have certain responsibilities in other parts of the product life cycle.

37. Several instruments already adopted by countries adhering to the *Guidelines*, including Principle 15 of the Rio Declaration on Environment and Development, enunciate a "precautionary approach". None of these instruments is explicitly addressed to enterprises, although enterprise contributions are implicit in all of them.

38. The basic premise of the *Guidelines* is that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities. However, the fact that the *Guidelines* are addressed to enterprises means that no existing instrument is completely adequate for expressing this recommendation. The *Guidelines* therefore draw upon, but do not completely mirror, any existing instrument.

39. The *Guidelines* are not intended to reinterpret any existing instruments or to create new commitments or precedents on the part of governments – they are intended only to recommend how the precautionary approach should be implemented at the level of enterprises. Given the early stage of this process, it is recognised that some flexibility is needed in its application, based on the specific context in which it is carried out. It is also recognised that governments determine the basic framework in this field, and have the responsibility to periodically consult with stakeholders on the most appropriate ways forward.

40. The *Guidelines* also encourage enterprises to work to raise the level of environmental performance in all parts of their operations, even where this may not be formally required by existing practice in the countries in which they operate.

41. For example, multinational enterprises often have access to technologies or operating procedures which could, if applied, help raise environmental performance overall. Multinational enterprises are frequently regarded as leaders in their respective fields, so the potential for a “demonstration effect” on other enterprises should not be overlooked. Ensuring that the environment of the countries in which multinational enterprises operate also benefits from available technologies is an important way of building support for international investment activities more generally.

42. Enterprises have an important role to play in the training and education of their employees with regard to environmental matters. They are encouraged to discharge this responsibility in as broad a manner as possible, especially in areas directly related to human health and safety.

Commentary on Combating Bribery

43. Bribery and corruption are not only damaging to democratic institutions and the governance of corporations, but they also impede efforts to reduce poverty. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare. Enterprises have an important role to play in combating these practices.

44. Progress in improving the policy framework and in heightening enterprises’ awareness of bribery as a management issue has been significant. The *OECD Convention of Combating Bribery of Foreign Public Officials (the Convention)*

has been signed by 34 countries and entered into force on 15 February 1999. The Convention, along with the 1997 revised *Recommendation on Combating Bribery in International Business Transactions* and the 1996 *Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*, are the core instruments through which members of the anti bribery group co-operate to stop the flow of bribes for the purpose of obtaining or retaining international business. The three instruments target the offering side of the bribery transaction. They aim to eliminate the “supply” of bribes to foreign public officials, with each country taking responsibility for the activities of its companies and what happens on its own territory.² A monitoring programme has been established to assure effective and consistent implementation and enforcement of the Convention.

45. To address the demand side of bribery, good governance practices are important elements to prevent companies from being asked to pay bribes. In addition, governments should assist companies confronted with solicitation of bribes.

46. Another important development has been the International Chamber of Commerce’s recent update of its *Report on Extortion and Bribery in Business Transactions*. The *Report* contains recommendations to governments and international organisations on combating extortion and bribery as well as a code of conduct for enterprises that focuses on these issues.

47. Transparency in both the public and private domains is a key concept in the fight against bribery and extortion. The business community, non-governmental organisations and governments and inter-governmental organisations have all co-operated to strengthen public support for anti-corruption measures and to enhance transparency and public awareness of the problems of corruption and bribery. The adoption of appropriate corporate governance practices is a complementary element in fostering a culture of ethics within the enterprise.

Commentary on Consumer Interests

48. A brief reference to “consumer interests” was first introduced into the *Guidelines* in 1984, to reflect increasingly international aspects of consumer policies and the impact that the expansion of international trade, product packaging, marketing and sales and product safety can have on those policies. Since that time, the development of electronic commerce and the increased globalisation of the marketplace have substantially increased the reach of MNEs and consumer access to their goods and services. In recognition of the increasing importance of consumer issues, a substantial percentage of enterprises, in their management systems and codes of conduct include references to consumer interests and protections.

49. In light of these changes, and with an eye to helping enhance consumer safety and health, a chapter on *consumer interests* has been added to the *Guidelines* as a result of the current Review. Language in this chapter draws on the work of the OECD Committee on Consumer Policy, as well as that embodied in various individual and international corporate codes (such as those of the ICC), the UN Guidelines on Consumer Policy, and the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.

50. A variety of consumer protection laws exist that govern business practices. The emerging framework is intended to both protect consumer interests and foster economic growth and places a growing emphasis on the use of self-regulatory mechanisms. As noted, many existing national and international corporate codes of conduct include a reference to some aspect of consumer protection and amplify the commitment of industry to help protect health and safety and build consumer confidence in the marketplace. Ensuring that these sorts of practices provide consumers with effective and transparent protection is essential to help build trust that encourages consumer participation and market growth.

51. The emphasis on alternative dispute resolution in paragraph 3 of the chapter is an attempt to focus on what may in many cases be a more practicable solution to complaints than legal action which can be expensive, difficult and time consuming for everyone involved. It is particularly important that complaints relating to the consumption or use of a particular product that results in serious risks or damages to public health should be resolved in a fair and timely manner without undue cost or burden to the consumer.

52. Regarding paragraph 5, enterprises could look to the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data as a helpful basis for protecting personal data.

Commentary on Science and Technology

53. In a knowledge-based and globalised economy where national borders matter less, even for small or domestically oriented enterprises, the ability to access and utilise technology and know-how is essential for improving firm performance. Such access is also important for the realisation of the economy-wide effects of technological progress, including productivity growth and job creation, within the context of sustainable development. Multinational enterprises are the main conduit of technology transfer across borders. They contribute to the national innovative capacity of their host countries by generating, diffusing, and even enabling the use of new technologies by domestic enterprises and institutions. The R&D activities of MNEs, when well connected to the national innovation system, can help

enhance the economic and social progress in their host countries. In turn, the development of a dynamic innovation system in the host country expands commercial opportunities for MNEs.

54. The chapter thus aims to promote, within the limits of economic feasibility, competitiveness concerns and other considerations, the diffusion by multinational enterprises of the fruits of research and development activities among the countries where they operate, contributing thereby to the innovative capacities of host countries. In this regard, fostering technology diffusion can include the commercialisation of products which imbed new technologies, licensing of process innovations, hiring and training of S&T personnel and development of R&D co-operative ventures. When selling or licensing technologies, not only should the terms and conditions negotiated be reasonable, but MNEs may want to consider the long-term developmental, environmental and other impacts of technologies for the home and host country. In their activities, multinational enterprises can establish and improve the innovative capacity of their international subsidiaries and subcontractors. In addition, MNEs can call attention to the importance of local scientific and technological infrastructure, both physical and institutional. In this regard, MNEs can usefully contribute to the formulation by host country governments of policy frameworks conducive to the development of dynamic innovation systems.

Commentary on Competition

55. These *Guidelines* are intended to emphasise the importance of competition laws and policies to the efficient operation of both domestic and international markets, to reaffirm the importance of compliance with those laws and policies by domestic and multinational enterprises, and to ensure that all enterprises are aware of developments concerning the number, scope, and severity of competition laws and in the extent of co-operation among competition authorities. The term “competition” law is used to refer to laws, including both “antitrust” and “antimonopoly” laws, that prohibit collective or unilateral action to: a) abuse market power or dominance; b) acquire market power or dominance by means other than efficient performance; or c) engage in anti-competitive agreements.

56. In general, competition laws and policies prohibit: a) hard core cartels; b) other agreements that are deemed to be anti-competitive; c) conduct that exploits or extends market dominance or market power; and d) anti-competitive mergers and acquisitions. Under the 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, C(98)35/Final, the anti-competitive agreements referred to in sub a) constitute hard core cartels, but the Recommendation incorporates differences in member countries’ laws, including differences in the laws’ exemptions or provisions allowing for an exception or

authorisation for activity that might otherwise be prohibited. These guidelines should not be interpreted as suggesting that enterprises should not avail themselves of such exemptions or provisions. The categories sub *b*) and *c*) are more general because the effects of other kinds of agreements and of unilateral conduct are more ambiguous, and there is less consensus on what should be considered anti-competitive.

57. The goal of competition policy is to contribute to overall social welfare and economic growth by creating and maintaining market conditions in which the nature, quality, and price of goods and services are determined by market forces except to the extent a jurisdiction considers necessary to achieve other goals. In addition to benefiting consumers and a jurisdiction's economy as a whole, such a competitive environment rewards enterprises that respond efficiently to consumer demand, and enterprises should provide information and advice when governments are considering laws and policies that might reduce their efficiency or otherwise affect the competitiveness of markets.

58. Enterprises should be aware that competition laws are being enacted in a rapidly increasing number of jurisdictions, and that it is increasingly common for those laws to prohibit anti-competitive activities that occur abroad if they have a harmful impact on domestic consumers. Moreover, the growth of cross-border trade and investment makes it more likely that anti-competitive conduct taking place in one jurisdiction will have harmful effects in other jurisdictions. As a result, anti-competitive unilateral or concerted conduct that is or may be legal where it occurs is increasingly likely to be illegal in another jurisdiction. Enterprises should therefore take into account both the law of the country in which they are operating and the laws of all countries in which the effects of their conduct are likely to be felt.

59. Finally, enterprises should understand that competition authorities are engaging in more and deeper co-operation in investigating and challenging anti-competitive activity. *See generally*: Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/Final; *Making International Markets More Efficient Through "Positive Comity" in Competition Law Enforcement*, Report of the OECD Committee on Competition Law and Policy, DAFNE/CLP(99)19. When the competition authorities of various jurisdictions are reviewing the same conduct, enterprises' facilitation of co-operation among the authorities promotes consistent and sound decision-making while also permitting cost savings for governments and enterprises.

Commentary on Taxation

60. Corporate citizenship in the area of taxation implies that enterprises should comply with the taxation laws and regulations in all countries in which they operate, co-operate with authorities and make certain kinds of information available to them. However, this commitment to provide information is not without limitation. In particular, the *Guidelines* make a link between the information that should be provided and its relevance to the enforcement of applicable tax laws. This recognises the need to balance the burden on business in complying with applicable tax laws and the need for tax authorities to have the complete, timely and accurate information to enable them to enforce their tax laws.

61. A member of an MNE group in one country may have extensive economic relationships with members of the same MNE group in other countries. Such relationships may affect the tax liability of each of the parties. Accordingly, tax authorities may need information from outside their jurisdiction in order to be able to evaluate those relationships and determine the tax liability of the member of the MNE group in their jurisdiction. Again, the information to be provided is limited to that which is relevant to the proposed evaluation of those economic relationships for the purpose of determining the correct tax liability of the member of the MNE group. MNEs should co-operate in providing that information.

62. Transfer pricing is another important issue for corporate citizenship and taxation. The dramatic increase in global trade and cross-border direct investment (and the important role played in such trade and investment by MNEs) has meant that transfer pricing tends now to be a significant determinant of the tax liabilities of members of an MNE group. It is recognised that determining whether transfer pricing respects the arm's length standard (or principle) is often difficult both for MNEs and for tax administrations.

63. The Committee on Fiscal Affairs (CFA) of the OECD undertakes ongoing work to develop recommendations for ensuring transfer pricing reflects the arm's length principle. Its work resulted in the publication in 1995 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines) which was the subject of the Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises (members of an MNE group would normally fall within the definition of Associated Enterprises).

64. The OECD Transfer Pricing Guidelines focus on the application of the arm's length principle to evaluate the transfer pricing of associated enterprises. The Transfer Pricing Guidelines aim to help tax administrations (of both OECD member countries and non-member countries) and MNEs by indicating mutually satisfactory solutions to transfer pricing cases, thereby minimising

conflict among tax administrations and between tax administrations and MNEs and avoiding costly litigation. MNEs are encouraged to follow the guidance in the OECD Transfer Pricing Guidelines, as amended and supplemented, in order to ensure that their transfer prices reflect the arm's length principle.

Notes

1. One of the most broadly accepted definitions of sustainable development is in the 1987 World Commission on Environment and Development (the Brundtland Commission): "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."
2. For the purposes of the Convention, a "bribe" is defined as an "... offer, promise, or giv(ing) 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 in the conduct of international business". The Commentaries to the Convention (paragraph 9) clarify that "(s)mall 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance..."

Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

1. The Council Decision represents the commitment of adhering countries to further the implementation of the recommendations contained in the text of the *Guidelines*. Procedural guidance for both NCPs and the Investment Committee is attached to the Council Decision.

2. The Council Decision sets out key adhering country responsibilities for the *Guidelines* with respect to NCPs, summarised as follows:

- Setting up NCPs (which will take due account of the procedural guidance attached to the Decision), and informing interested parties of the availability of *Guidelines*-related facilities.
- NCPs in different countries to co-operate with each other as necessary.
- NCPs to meet annually and report to the Committee.

3. The Council Decision also establishes CIME's responsibilities for the *Guidelines*, including:

- Organising exchanges of views on matters relating to the *Guidelines*.
- Issuing clarifications as necessary.
- Holding exchanges of views on the activities of NCPs.
- Reporting to the OECD Council on the *Guidelines*.

4. The Investment Committee is the OECD body responsible for overseeing the functioning of the *Guidelines*. This responsibility applies not only to the *Guidelines*, but to all elements of the Declaration (National Treatment Instrument, and the instruments on International Investment Incentives and Disincentives, and Conflicting Requirements). In the Declaration, Committee seeks to ensure that each element is respected and understood, and that they all complement and operate in harmony with each other.

5. Reflecting the increasing relevance of the *Guidelines* to countries outside the OECD, the Decision provides for consultations with non-adhering countries on matters covered by the *Guidelines*. This provision allows the Committee to arrange periodic meetings with groups of countries interested in *Guidelines* issues, or to arrange contacts with individual countries if the need arises. These

meetings and contacts could deal with experiences in the overall functioning of the *Guidelines* or with specific issues. Further guidance concerning the Committee and NCP interaction with non-adhering countries is provided in the Procedural Guidance attached to the Decision.

I. Procedural Guidance for NCPs

6. National Contact Points have an important role in enhancing the profile and effectiveness of the *Guidelines*. While it is enterprises that are responsible for observing the *Guidelines* in their day-to-day behaviour, governments can contribute to improving the effectiveness of the implementation procedures. To this end, they have agreed that better guidance for the conduct and activities of NCPs is warranted, including through annual meetings and Committee oversight.

7. Many of the functions in the Procedural Guidance of the Decision are not new, but reflect experience and recommendations developed over the years (e.g. the 1984 Review Report C/MIN(84)5(Final)). By making them explicit the expected functioning of the implementation mechanisms of the *Guidelines* is made more transparent. All functions are now outlined in four parts of the Procedural Guidance pertaining to NCPs: institutional arrangements, information and promotion, implementation in specific instances, and reporting.

8. These four parts are preceded by an introductory paragraph that sets out the basic purpose of NCPs, together with core criteria to promote the concept of “functional equivalence”. Since governments are accorded flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent, and accountable manner. These criteria will guide NCPs in carrying out their activities and will also assist the Committee in discussing the conduct of NCPs.

Core Criteria for Functional Equivalence in the Activities of NCPs

Visibility. In conformity with the Decision, adhering governments agree to nominate National Contact Points, and also to inform the business community, employee organisations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the *Guidelines*. Governments are expected to publish information about their contact points and to take an active role in promoting the *Guidelines*, which could include hosting seminars and meetings on the instrument. These events could be arranged in co-operation with business, labour, NGOs, and other interested parties, though not necessarily with all groups on each occasion.

Accessibility. Easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.

Transparency. Transparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public. Thus most of the activities of the NCP will be transparent. Nonetheless when the NCP offers its “good offices” in implementing the *Guidelines* in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the *Guidelines*.

Accountability. A more active role with respect to enhancing the profile of the *Guidelines* – and their potential to aid in the management of difficult issues between enterprises and the societies in which they operate – will also put the activities of NCPs in the public eye. Nationally, parliaments could have a role to play. Annual reports and annual meetings of NCPs will provide an opportunity to share experiences and encourage “best practices” with respect to NCPs. The Committee will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.

Institutional Arrangements

9. The composition of NCPs should be such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines*. Different forms of organisation (*e.g.* representatives from one Ministry, an interagency group, or one that contained representatives from non-governmental bodies) are possible. It may be helpful for the NCP to be headed by a senior official. NCP leadership should be such that it retains the confidence of social partners and fosters the public profile of the *Guidelines*. NCPs, whatever their composition, are expected to develop and maintain relations with representatives of the business community, employee organisations, and other interested parties.

Information and Promotion

10. The NCP functions associated with information and promotion are fundamentally important to enhancing the profile of the *Guidelines*. These functions also help to put an accent on “pro-active” responsibilities of NCPs.

11. NCPs are required to make the *Guidelines* better known and available by appropriate means, including in national languages. On-line information may be a cost-effective means of doing this, although it should be noted that universal access to this means of information delivery cannot be assured. English and French language versions will be available from the OECD, and website links to the OECD *Guidelines* website are encouraged. As appropriate, NCPs will also provide prospective investors, both inward and outward, with information about the *Guidelines*. A separate provision also stipulates that in their efforts to raise awareness of the *Guidelines*, NCPs will co-operate with a wide variety of organisations and individuals, including, as appropriate, the business community, employee organisations, other non-governmental organisations, and the interested public.

12. Another basic activity expected of NCPs is responding to legitimate enquiries. Three groups have been singled out for attention in this regard: i) other National Contact Points (reflecting a provision in the Decision); ii) the business community, employee organisations, other non-governmental organisations and the public; and iii) governments of non-adhering countries.

Implementation in Specific Instances

13. When issues arise relating to implementation of the *Guidelines* in specific instances, the NCP is expected to help resolve them. Generally, issues will be dealt with by the NCP in whose country the issue has arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. This section of the Procedural Guidance provides guidance to NCPs on how to handle such situations. The NCP may also take other steps to further the effective implementation of the *Guidelines*.

14. In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*. In this context, the NCP will take into account:

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- the relevance of applicable law and procedures;
- how similar issues have been, or are being, treated in other domestic or international proceedings;
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.

15. Following its initial assessment, the NCP is expected to respond to the party or parties having raised the issue. If the NCP decides that the issue does not merit further consideration, it will give reasons for its decision.

16. Where the issues raised merit further consideration, the NCP would discuss the issue further with parties involved and offer “good offices” in an effort to contribute informally to the resolution of issues. Where relevant, NCPs will follow the procedures set out in paragraph 2a) through 2d). This could include seeking the advice of relevant authorities, as well as representatives of the business community, labour organisations, other non-governmental organisations, and experts. Consultations with NCPs in other countries, or seeking guidance on issues related to the interpretation of the *Guidelines* may also help to resolve the issue.

17. As part of making available good offices, and where relevant to the issues at hand, NCPs will offer, or facilitate access to, consensual and non-adversarial procedures, such as conciliation or mediation, to assist in dealing with the issues at hand, such as conciliation or mediation. In common with accepted practices on conciliation and mediation procedures, these procedures would be used only upon agreement of the parties concerned.

18. If the parties involved fail to reach agreement on the issues raised, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the *Guidelines*. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for.

19. Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see para. 8 in “Core Criteria” section, above). However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. Thus, while para. C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent.

20. As noted in para. 2 of the “Concepts and Principles” chapter, enterprises are encouraged to observe the *Guidelines* wherever they operate, taking into account the particular circumstances of each host country.

- In the event *Guidelines*-related issues arise in a non-adhering country, NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the firm in the home country, and, as appropriate, government officials in the non-adhering country.
- Conflicts with host country laws, regulations, rules and policies may make effective implementation of the *Guidelines* in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.
- The parties involved will have to be advised of the limitations inherent in implementing the *Guidelines* in non-adhering countries.
- Issues relating to the *Guidelines* in non-adhering countries could also be discussed at NCP annual meetings with a view to building expertise in handling issues arising in non-adhering countries.

Reporting

21. Reporting would be an important responsibility of NCPs that would also help to build up a knowledge base and core competencies in furthering the effectiveness of the *Guidelines*. In reporting on implementation activities in specific instances, NCPs will comply with transparency and confidentiality considerations as set out in para. C-4.

Procedural Guidance for the Investment Committee

22. The Procedural Guidance to the Council Decision provides additional guidance to the Committee in carrying out its responsibilities, including:

- Discharging its responsibilities in an efficient and timely manner.
- Considering requests from NCPs for assistance.
- Holding exchanges of views on the activities of NCPs.
- Providing for the possibility of seeking advice from experts.

23. The non-binding nature of the *Guidelines* precludes the Committee from acting as a judicial or quasi-judicial body. Nor should the findings and statements made by the NCP (other than interpretations of the *Guidelines*) be

questioned by a referral to the Committee. The provision that the Committee shall not reach conclusions on the conduct of individual enterprises has been maintained in the Decision itself.

24. The Committee will consider requests from NCPs for assistance, including in the event of doubt about the interpretation of the *Guidelines* in particular circumstances. This paragraph reflects paragraph C-2c) of the Procedural Guidance to the Council Decision pertaining to NCPs, where NCPs are invited to seek the guidance of the Committee if they have doubt about the interpretation of the *Guidelines* in these circumstances.

25. When discussing NCP activities, it is not intended that the Committee conduct annual reviews of each individual NCP, although the Committee will make recommendations, as necessary, to improve their functioning, including with respect to the effective implementation of the *Guidelines*.

26. A substantiated submission by an adhering country or an advisory body that an NCP was not fulfilling its procedural responsibilities in the implementation of the *Guidelines* in specific instances will also be considered by the Committee. This complements provisions in the section of the Procedural Guidance pertaining to NCPs reporting on their activities.

27. Clarifications of the meaning of the *Guidelines* at the multilateral level would remain a key responsibility of the Committee to ensure that the meaning of the *Guidelines* would not vary from country to country. A substantiated submission by an adhering country or advisory body with respect to whether an NCP interpretation of the *Guidelines* is consistent with Committee interpretations will also be considered. This may not be needed very often, but would provide a vehicle to ensure consistent interpretation of the *Guidelines*.

28. Finally, the Committee may wish to call on experts to address and report on broader issues (e.g. child labour, human rights) or individual issues, or to improve the effectiveness of procedures. For this purpose, the Committee could call on OECD in-house expertise, international organisations, the advisory bodies, NGOs, academics and others. It is understood that this will not become a panel to settle individual issues.

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OECD Guidelines for Multinational Enterprises

The *OECD Guidelines for Multinational Enterprises* are the most comprehensive instrument in existence today for corporate responsibility multilaterally agreed by governments. Adhering governments - representing all regions of the world and accounting for 85 per cent of foreign direct investment – are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate. This booklet contains the text, implementation procedures and commentary adopted in June 2000, on the occasion of the most recent revision of the *Guidelines*.

Detailed information about adhering governments and actions taken to implement the *Guidelines* is available on the OECD website at www.oecd.org/daf/investment/guidelines

The full text of this book is available on line via these links:

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**TERMS OF REFERENCE
FOR AN UPDATE OF THE OECD GUIDELINES
FOR MULTINATIONAL ENTERPRISES**

4 May 2010

The 42 governments adhering to the Guidelines for Multinational Enterprises have agreed on the terms of reference for carrying out an update of the Guidelines. The update aims to ensure the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct. This document was approved by adhering governments on 30 April 2010.

I. Introduction

The forty-two adhering governments to the Guidelines for Multinational Enterprises have agreed on the terms of reference for carrying out an update of the Guidelines outlined in the present document.

While the intention is not to embark in a revision of the scale of the 2000 Review of the Guidelines, the purpose of the update will be to ensure their continued role as a leading international instrument for the promotion of responsible business conduct. Since the Review of the Guidelines in 2000, the landscape for international investment and multinational enterprises has continued to change rapidly. The world economy has witnessed new and more complex patterns of production and consumption. Non-OECD countries are attracting a larger share of world investment and multinational enterprises from non-adhering countries have grown in importance. At the same time, the financial and economic crisis and the loss of confidence in open markets, the need to address climate change, and reaffirmed international commitments to development goals have prompted renewed calls from governments, the private sector and social partners for high standards of responsible business conduct.

The terms of reference were developed by the Working Party of the OECD Investment Committee at its 24 March 2010 session where non-OECD adhering governments to the Declaration have full participant status. They were approved under the written procedure on 30 April 2010 by all adhering governments at the level of the Investment Committee in enlarged session.¹ The development of the terms of reference benefitted from an extensive consultation process with stakeholders² and non-adhering countries³ and contributions from relevant OECD bodies and inter-governmental organisations.⁴

The terms of reference cover substantive, procedural and institutional issues relating to the Guidelines. The work on the update is expected to start on the occasion of the June 2010 Annual Meeting of the National Contact Points (NCPs) with the broad aim of completing the update in 2011, if at all possible, by the time of the 2011 Annual NCP Meeting.

II. Substantive Issues

Technical updates

The update should ensure that citations of the instruments referred to in the Guidelines or the Commentaries are accurate and up-to-date. Special attention should be given to UN and other universally-agreed instruments. References to new OECD and other instruments should be added after verification of their direct relevance to the Guidelines. It is recalled that during the 2000 Review, adoption by adherent countries of the instruments cited was not a pre-condition for their inclusion as references in the Guidelines

¹ Non-OECD adherents to the Declaration are entitled to participate in enlarged sessions of the Investment Committee where decisions relating to the Declaration are being considered.

² Comprehensive consultations with BIAC, TUAC, OECD Watch and other stakeholders were organised on 7 October 2009 and 8 December 2009 back-to-back with the 2009 Global Forum on International Investment [www.oecd.org/investment/gfi-8]. In addition, the Working Party held consultations with BIAC, TUAC and OECD Watch on the occasion of its meeting on 24 March 2010.

³ Consultations with non-adhering countries took place on 9 December 2009.

⁴ In addition, under its agenda item concerning responsible investment in agriculture, the Freedom of Investment Roundtable held on 26 March 2010 [www.oecd.org/daf/investment/foi] discussed the relevance of considering this issue in the context of the update of the Guidelines.

or the Commentaries. This technical update should be carried out in close consultation with partner international organizations, OECD bodies and BIAC, TUAC and OECD Watch.

Supply chains

The update should clarify or develop as appropriate further guidance on the application of the Guidelines to supply chains taking into account the following considerations.

The discussion within the Investment Committee in 2003⁵ focused on the influence of multinational enterprises on the conduct of their business partners using the presence of an investment nexus as a definition of their sphere of influence for the purpose of the Guidelines. More recent discussions, including those by Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights (UNSRSG),⁶ have focused on the due diligence that companies are expected to perform in light of their own circumstances along their supply chains.⁷ This approach has recently been used by the UK NCP in two specific instances.⁸ A due diligence approach is used in the Environment Chapter of the Guidelines and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. Due diligence and consideration of influence are not necessarily incompatible and could be seen as complementary.

Issues of a similar nature have also been raised in the context of specific instances relating to lending and investing activities of multinational financial institutions. The financial crisis has regulatory and several other causes but it has also heightened the importance for financial institutions to carry out their fiduciary or other responsibilities with due diligence. The update should investigate how the instruments and tools that have emerged on responsible lending or investment by financial institutions – such as the *IFC Policy and Performance Environmental and Social Standards* (last revised in 2006), the *Equator Principles* (2003, 2006), and the *UN Principles of Responsible Investment* (2005) and the *OECD Guidelines for Pension Fund Governance* (2009) – could assist in clarifying the application of the Guidelines to multinational financial institutions, including by introducing specific provisions in the Guidelines for that purpose.

Human Rights

Chapter II (General Policies) of the Guidelines has a specific provision on human rights. The update should develop more elaborated guidance on the application of the Guidelines to human rights, including if deemed appropriate, in a separate chapter of the Guidelines, drawing, in particular, on the work of the UNSRSG.

⁵ 2003 Annual Report on the OECD Guidelines for Multinational Enterprises, pages 21-22.

⁶ "Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'", A/HRC/8/16 (15 May 2008). Due diligence is one of the recommended principles for operationalizing the second pillar of the SRSG "Protect, Respect and Remedy" Framework for Business and Human Rights, A/HRC/11/13 (22 April 2009).

⁷ Due diligence has been referred to as steps that an ordinarily reasonable and prudent person would take to become aware of and adequately manage existing or potential risks in order to mitigate their adverse impacts and avoid harm in a specific context (country, sector, impact and relationship with third parties). Sources: OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, (OECD, 2006) and Report of the UNSGSR "Protect, Respect and Remedy: a Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008).

⁸ *Survival International – Vedanta Resources* (www.oecd.org/dataoecd/49/16/43884129.pdf) and *Global Witness – Afrimex* (www.oecd.org/dataoecd/40/29/43750590.pdf).

Such additional guidance should be developed with the aim of helping multinational enterprises identify, prevent and remedy negative human rights impacts which may result from their operations. This guidance should cover situations of supposed conflicting requirements between internationally-recognized standards on human rights and host country policies, including situations where the host country has not ratified a specific human rights instrument. Such additional guidance would also take into account due diligence recommendations under development by the UNSRSG and the guidance provided on other human rights aspects by the OECD Risk Awareness Tool, such as management of security forces and relationship with local communities and indigenous people.

Aspects of human rights are covered in other provisions throughout the Guidelines, notably core labour rights under Chapter IV on Employment and Industrial Relations. These provisions need not be deleted in the event of an addition of a dedicated chapter on Human Rights.

General Policies on due diligence

Given the broad application of due diligence to business conduct beyond supply chains, human rights or the environment and its importance for such industries as financial services, the update could also explore the merits of making due diligence one of the general operational principles of Chapter II of the Guidelines (General Policies) taking into account leading businesses' experiences.

Disclosure

The update should ensure that the Disclosure chapter of the Guidelines incorporates relevant upgraded standards for disclosure that have emerged since the 2000 Revision of the Guidelines. These include the provisions of the 2004 *OECD Principles of Corporate Governance*. Other relevant reporting initiatives will be considered.⁹ Additional disclosure provisions may be called for, notably with respect to supply chains and greenhouse gas emissions, the placement of which may not be necessarily in the Disclosure Chapter but in the relevant provisions dealing with the underlying subject matters.

Labour and industrial relations

Chapter IV (Labour and Industrial Relations) and Chapter II (General Policies) of the Guidelines and the related Commentary may need to be revised to take into account developments in the ILO including the adoption of the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalisation, and other proposals from labour stakeholders.

Anti-corruption

Following the adoption of the 2009 *Recommendation for Further Combating Bribery of Foreign Officials in International Business Transactions* and ongoing work, the Working Group on Bribery (WGB) would support an expansion, or an elaboration, of Chapter VI (Combating Bribery) to the following issues: small facilitation payments; the use of agents or other intermediaries; bribe solicitation and extortion, reporting foreign bribery and whistleblower protection; and internal controls, ethics and compliance programmes or measures for preventing and detecting the bribery of foreign public officials. The update would consider possible revisions to this chapter and commentaries in this light in close co-operation with the WGB.

⁹ For example the G3 Guidelines of the Global Reporting Initiative (GRI).

Environment

With growing concerns over climate change and increased attention given to green growth, eco-innovation, bio-diversity and sustainability issues, the update should consider whether there is a need to clarify or provide additional guidance on the application of the Guidelines to these issues. This work should be conducted in close co-operation with the Environment Policy Committee and relevant international organisations.

Consumer interests

The update should consider whether Chapter VII on Consumer Interests needs to extend beyond health and safety to address other consumer concerns such as financial education, supply chain management and sustainability issues. This reflection should be conducted in close co-operation with the Committee on Financial Markets and the Committee on Consumer Policy.

Taxation

The update will examine whether the relevant chapter of the Guidelines should include provisions on the public disclosure of taxes, royalties and other payments made to host governments consistent with the guidance provided by such initiatives as the *Extractive Industry Transparency Initiative* and the *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* taking into account applicable laws. As suggested in the letter of the Chair of the Committee on Fiscal Affairs (CFA), it may also investigate, in co-operation with the CFA, the desirability of addressing issues relating to tax risk management such as tax compliance by banks and the relationship between corporate tax payers and tax authorities.

III. Procedural Provisions and Institutional Issues

Mindful that the NCP mechanism is the most unique feature of the Guidelines and that procedural provisions set the frame for the implementation of the Guidelines, the update should consider how the implementation procedures adopted in 2000 could be further improved to enhance awareness, visibility and a more widespread and effective use of the Guidelines, including in non-adhering countries. This consideration should take due account of the experience, challenges and lessons learned during the past nine years of implementation of the Guidelines, proposals made by business, trade unions and NGOs, and the recommendations formulated by the UNSRSG for non-judicial redress mechanisms, including on institutional issues and the functioning of the NCP mechanism.¹⁰

This section also addresses the relationship between the Guidelines and the OECD Declaration on International Investment and Multinational Enterprises and suggests a follow-up work programme on an update.

Functional equivalence and respect of individual circumstances

The update should discuss how the Procedural Guidance could be clarified or supplemented by more detailed provisions or commentaries to give greater guidance to the institutional structure and functioning of NCPs while maintaining the rights of adhering countries to adopt the NCP structure that best fits their individual circumstances. The issues that could be examined include the provision of more detailed guidance on the core criteria of visibility, accessibility, transparency and accountability. Potential conflict

¹⁰ "Protect, Respect, and Remedy: A Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008), paragraph 92 and paragraphs 96-99.

of interests, degree of inclusiveness of stakeholders, oversight of NCP performance and right of appeal on procedural grounds have also been identified as areas deserving special attention.

Information and promotion

The key to the contribution of the Guidelines is ensuring that they are sufficiently promoted and brought into actual use by companies and stakeholders. The proliferation of corporate responsibility instruments and initiatives has increased the need for the OECD, NCPs and stakeholders to work to raise the visibility of the Guidelines. Promotional activities are increasingly viewed by stakeholders as going beyond raising awareness or better communicating the unique features of the Guidelines. The update should discuss ways of strengthening the information and promotion provisions of the Procedural Guidance, including the provision of training and capacity-building.

Implementation in specific instances

With a view to enhancing the credibility and efficiency of the specific instance facility, the update should discuss the role and tasks of NCPs in considering specific instances. In particular, it could develop, in light of emerging practices, more detailed guidance on the various steps and timeframes for considering a specific instance, and clarify the standards of transparency and confidentiality to be applied in the review process, and third party involvement. It could also clarify the distinction between mediation and adjudication and discuss ways of strengthening the NCP's mediation function as well as the role of NCPs in monitoring the implementation of final statements' recommendations.

Parallel Proceedings

In view of the different approaches followed by NCPs in handling parallel proceedings, the update should develop further guidance on this issue in the Procedural Guidance or Commentary. For this purpose, the guidance issued in September 2009 by the UK NCP as well as other relevant experiences should be evaluated.

NCP co-operation

The increased complexity of multinational operations has led to a significant increase in the number of multi-jurisdiction specific instances, a trend which is most likely to continue in the future. Accordingly, the update should develop further guidance in the Procedural Guidance or Commentary on how NCPs should co-operatively handle such multi-jurisdictional cases. It could also clarify the role of a home NCP for liaising with the parent company of the enterprise that is party to a specific instance.

Peer learning and review

Peer review is a traditional and well tested working method at the OECD. A variant of peer review "peer learning" has been used in an informal and *ad hoc* way in NCP and Working Party meetings. A voluntary peer review has also been conducted in 2009 on the performance of the Dutch NCP. The update will provide the opportunity to discuss, on the basis of these experiences, the merit of adopting peer review provisions in the Procedural Guidance or Commentary, as well as OECD's future supporting role in this area.

Relationship between the OECD Declaration on International Investment and Multinational Enterprises and the Guidelines

The relationship between the Guidelines and the Declaration should be considered. In this context, the interest of adhering countries in non-adhering countries coming closer to the values, principles and standards of the instruments included in the Declaration, in particular the Guidelines, and eventually adhering to these instruments, and the pros and cons of allowing selective adherence to the Guidelines – or other individual instruments presently incorporated into the Declaration – should be discussed. It is recognized that any final decision on the question of selective adherence to individual instruments now encompassed in the Declaration requires consideration of questions beyond those related exclusively to the Guidelines. This fact will have implications for how a final decision would be made on any recommendation to alter or amend the Declaration in this respect.

Follow-up Work Programme

As in the past, the results of the envisaged update are more likely to be judged from their actual implementation than from any agreed textual changes or modified procedures. For this reason, calls have already been made, notably by business, to include in the update the elaboration of a proactive follow-up work programme on the implementation of the updated Guidelines. This work programme could include proposals for promoting and communicating good corporate practices, enhancing co-operation between public and private stakeholders, assisting small and medium-sized enterprises, including in supply chains, in making a greater use of the Guidelines as well as to further reach out to non-adherent countries. As this could also imply an expanded involvement of the adhering countries at Investment Committee and Working Party levels, consideration should also be given to ways of strengthening OECD capacities and resources in these areas. The update should discuss options for fostering capacity-building, training and fact-finding for NCPs as well as communication and co-operation among NCPs.

IV. Modalities

Consultations with stakeholders and non-adhering countries

Consultations with stakeholders and non-adhering countries, including at the initiative of individual adhering countries, will be an integral part of the update process. The consultation process should be transparent, participatory, inclusive and timely while allowing for solicitation of inputs from targeted expert partners. It should encourage constructive inputs from consultations partners and actively involve non-adhering governments. Consultation partners are expected to include:

- accredited stakeholders (BIAC, TUAC, OECD Watch) and other relevant stakeholders;
- interested non-adhering countries, with priority given to major emerging economies;
- international organizations responsible for the international instruments referred to in the Guidelines, including ILO, as well as other organizations that have an interest in the Guidelines and have worked with the Investment Committee, including the Office of the UNSRSG, the UN Global Compact, the International Finance Corporation, UNEP Finance Initiative and the International Organisation for Standardisation (ISO);
- relevant OECD committees; and
- outside experts and influential personalities on the Guidelines.

In addition, the Chair of the Working Party intends to hold bilateral consultations with non-adhering G20 governments, including China, India, Indonesia, Saudi Arabia and South Africa, in the course of the autumn or early next year.¹¹

Non-adhering governments which have expressed an interest in contributing to the update of the Guidelines will be invited to provide their views in appropriate ways, including invitation as an *ad hoc* observer to specific agenda items of the Working Party's meetings.

Written inputs by consultation partners will be shared with or made available to participating parties. Opportunities for public comment will be offered via Internet.

Organizational issues

Work on the update will be carried out by the governments of adhering countries to the Guidelines.

The Working Party of the OECD Investment Committee, in which non-OECD adhering countries have full participant status, will be responsible, with the support of the Secretariat, for the update process and the development of draft recommendations resulting from this process.

The Chair of the Working Party will be assisted by an advisory group of interested adhering governments, representatives of BIAC, TUAC and OECD Watch and experts, which he will convene as needed to help him prepare working sessions on the update in the Working Party and elaborate proposals on issues requiring special attention. The composition of the meetings of this advisory group could vary according to the contributions that adhering governments and stakeholders might be able to make on particular issues.

The final recommendations on the update will be approved by the governments of all adhering countries to the Guidelines at an enlarged session of the Investment Committee in which they will be invited to participate. Non-adhering countries having announced a considered intention to adhere to the updated Guidelines will also be invited to participate in concluding sessions or earlier in the process depending on their level of commitment.

The Investment Committee will afterwards transmit to the Council, on behalf of adhering countries, the results of the update and any proposed amendments to the June 2000 Decision of the Council on the OECD Guidelines for Multinational Enterprises that may be called for. Different ways exist to ensure that non-OECD adhering countries are associated on an equal footing with OECD adhering countries in the final decision on an update of the Guidelines.

¹¹ The Russian Federation is engaged in a process of accession to the Organisation and, for this purpose, adherence to OECD instruments, including the OECD Declaration on International Investment and Multinational Enterprises and its Guidelines for Multinational Enterprises. The general policy has been that the Russian Federation as an accession country should be invited to the same Investment Committee and Working Party meeting discussions that the other accession countries are permitted to attend in their capacity as adherents to the OECD Declaration.



*Mandate of the Special Representative of the Secretary-General
on Human Rights and Transnational Corporations and other Business Enterprises*

**THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN
RIGHTS IN SUPPLY CHAINS
10TH OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY
DISCUSSION PAPER
30 JUNE 2010**

1. The corporate responsibility to respect human rights means to avoid infringing on the rights of others and addressing adverse impacts that may occur. This responsibility applies across an enterprise's activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-state actors and state agents.¹
2. Suppliers have the same responsibility to respect human rights as any other business entity. However, this note focuses on enterprises that purchase goods and services from suppliers. It outlines a decision logic for them to manage adverse human rights impacts in their supply chains and meet their responsibility to respect human rights.
3. For the purposes of this note:
 - the term '**adverse impact**' refers to any human rights abuse (e.g., violation of labor standards, non-discrimination norms, threats to the physical security of persons) linked to the product or services being provided to the enterprise. It excludes human rights abuses occurring in a supply chain entity that are unrelated to those products or services.
 - the term '**relationship**' is used to indicate an on-going association with a supply chain entity.
4. The appropriate response by an enterprise to the risk of contributing to human rights abuse through its supply chain is for it to conduct due diligence on its supply chain relationships to identify risks of actual and potential adverse impacts, and to prevent or mitigate both risks and impacts where they arise.²

¹ This is independent of the State duty to protect against corporate-related human rights abuse by taking appropriate steps to prevent, investigate, punish and redress such abuse.

² For the SRSG's most recent discussion of the components of ongoing human rights due diligence, see UN document A/HRC/14/27 (9 April 2010), paragraphs 79-86; available at <http://198.170.85.29/Ruggie-report-2010.pdf>.

5. Where human rights abuses in the supply chain are identified, the enterprise should assess:

- (a) whether the enterprise is implicated in the abuse *solely* by the link to the goods or services it procures (e.g., without contribution from the enterprise, the product is produced by bonded or child labor; or where an enterprise's external security provider commits human rights violations in protecting company facilities);
- (b) whether the enterprise is *also* contributing to the abuse by its own actions and omissions (e.g., where the buyer demands significant last-minute changes in product specifications without adjusting price or delivery dates, leading to labor standard violations by a supplier in a low-margin business);

6. In the event that the enterprise is contributing to the abuse by its own actions or omissions, the responsibility to respect requires that the enterprise take appropriate steps to address those contributions.

7. The remainder of this paper discusses the action the enterprise should take in the event that it is not contributing by its own actions or omissions, but is implicated by its link to the abuse through the product or services it procures.

8. The most common approaches to date have largely been to rely on clauses in contracts, or to set thresholds on the level of trade below which an enterprise's responsibilities would end. But both these responses have limitations.

(a) Enterprises should indeed have in place measures, such as contract provisions, to require and/or incentivize supply chain entities to respect human rights. This can be a useful step towards preventing or mitigating adverse impacts in the supply chain. However, it is not sufficient to meet the enterprises' responsibilities, absent reasonable evidence that the supply chain entities are both willing and capable of meeting the requirements. Moreover, enforcing contractual requirements beyond the first tier of suppliers can pose additional challenges (see paragraph 17).

(b) The suggestion that numerical thresholds can be used to determine when an enterprise's indirect responsibility for human rights harm should require it to take action – such that a company sourcing less than 'x' % of its materials from a supplier or representing less than 'y' % of the enterprise's business need not do anything with regard to identified abuse by the supply chain entity – has two major pitfalls:

- (i) Such thresholds are necessarily arbitrary when applied across very different business sectors and sizes, and unlikely to be appropriate in all circumstances;
- (ii) Such thresholds risk encouraging enterprises to game the system and remain below the threshold that would require them to take responsibility.

9. In sum, reliance on contract clauses is insufficient, while reliance on thresholds is fundamentally problematic.

10. Where an enterprise is implicated in human rights abuses solely by the link to products or services it receives, it should take appropriate action to address any impacts identified. What action will be appropriate, in turn, depends on two key variables:

- (i) whether the enterprise considers the supply chain entity **crucial** to its business; and
- (ii) whether the enterprise has **leverage** over the supply chain entity.

11. The supply chain relationship could be deemed ‘crucial’ to an enterprise if it provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists.

12. Leverage is considered to exist where the enterprise has the ability to affect change in the wrongful practices of the supply chain entity. Leverage may reflect one or more of a number of factors, such as:

- (a) whether there is a degree of direct control between the enterprise and the supply chain entity;
- (b) the terms of contract between the enterprise and supply chain entity;
- (c) the proportion of business the enterprise represents for the supply chain entity;
- (d) the ability of the enterprise to incentivize the supply chain entity for improved human rights performance in terms of future business, reputational advantage, capacity-building assistance etc.;
- (e) the reputational benefits for the supply chain entity of working with the enterprise, and the reputational harm of that relationship being withdrawn;
- (f) the ability of the enterprise to engage other enterprises that work with the supply chain entity in incentivizing improved human rights performance;
- (g) the ability of the enterprise to engage local or central government in requiring improved human rights performance by the supply chain entity through implementation of regulations, monitoring, sanctions, etc.

13. Based on the definitions above, the enterprise should assess whether the relationship is crucial and whether it possesses leverage. The combination of these variables will yield different conclusions as to what action should be taken.

Situation A: Where the supply chain entity is crucial and the enterprise possesses leverage, the priority must be to use that leverage to mitigate the abuse. If concerted efforts at mitigation prove unsuccessful, the logical conclusion is that the leverage is in fact not what was imagined, and the consequences for decision-making would move to situation (b) below.

Situation B: Where the supply chain entity is crucial to the enterprise but it lacks leverage to mitigate the abuse, its priority should be to seek ways to increase its leverage to enable mitigation. This could take a number of forms, for example:

- (i) offering capacity-building support to the entity to help it address the problems;
- (ii) working collaboratively with other enterprises that have relationships with the entity to incentivise improvements;
- (iii) working with other enterprises on a broader regional or sectoral basis to incentivise improvements;
- (iv) working with local or central government to the same ends.

If these efforts prove unsuccessful, the enterprise will either need to take steps to end the relationship, or it will need to be able to demonstrate that it has done everything reasonably possible to mitigate the abuses, and it also needs to be prepared to face any consequences for its decision to maintain the relationship.

Situation C: Where the supply chain entity is not crucial to the enterprise but the enterprise does have leverage, the enterprise's involvement would require it first to try to use its leverage to mitigate the abuse. If that proves unsuccessful, it can reasonably be expected to take steps toward ending the relationship.

Situation D: Where a supply chain entity is abusing human rights and is neither crucial to the enterprise nor subject to its leverage, the logical conclusion would be for the enterprise to take steps to end the relationship in order to meet its own responsibility to respect human rights.

14. In complex or contentious situations, enterprises and supply chain entities would be well-advised to seek the insights, advice and even validation of key external stakeholders regarding their options and ultimate choice of action.

15. The decision logic described above can be illustrated in a simple four-cell matrix:

	Have Leverage	Lack Leverage
Crucial source/partner	<p>A.</p> <ul style="list-style-type: none"> ➤ Mitigate the abuse. ➤ If unsuccessful 	<p>B.</p> <ul style="list-style-type: none"> ➤ Seek to increase leverage. ➤ If successful, mitigate abuse. ➤ If unsuccessful, take steps to end the relationship; or be able to demonstrate efforts made to mitigate abuse, recognising possible consequences of remaining.
Non-crucial source/partner	<p>C.</p> <ul style="list-style-type: none"> ➤ Try to mitigate the abuse. ➤ If unsuccessful, take steps to end the relationship 	<p>D.</p> <ul style="list-style-type: none"> ➤ Take steps to end the relationship

16. The logic described in the decision matrix can be applied to *existing* supply chain relationships. As for the decision whether to enter into a *new* supply chain relationship with an entity where there is evidence of existing human rights abuses, an enterprise should first assess whether it is likely to be able to mitigate those abuses through its relationship:

- (a) If it assesses that it can, it may enter the relationship if it then pursues options for mitigating the abuses, as illustrated by situations A or B in the matrix;
- (b) If it assesses that it cannot mitigate abuses identified in that entity it should not enter the relationship.

17. An enterprise necessarily knows all of the entities in the first tier of its supply chain. If any of those entities is found to be responsible for human rights abuses, whether directly or indirectly (for instance, in the case of an agent or licensee), the enterprise can apply the logic illustrated by the decision matrix.

18. Beyond the first tier, it can become more difficult for an enterprise to know all the entities in its supply chain and whether any are abusing human rights. With regard to those additional tiers, not knowing about abuses is not a sufficient response *by itself* to allegations of either legal or non-legal complicity if the enterprise should reasonably have known about them through due diligence. Therefore, enterprises should:

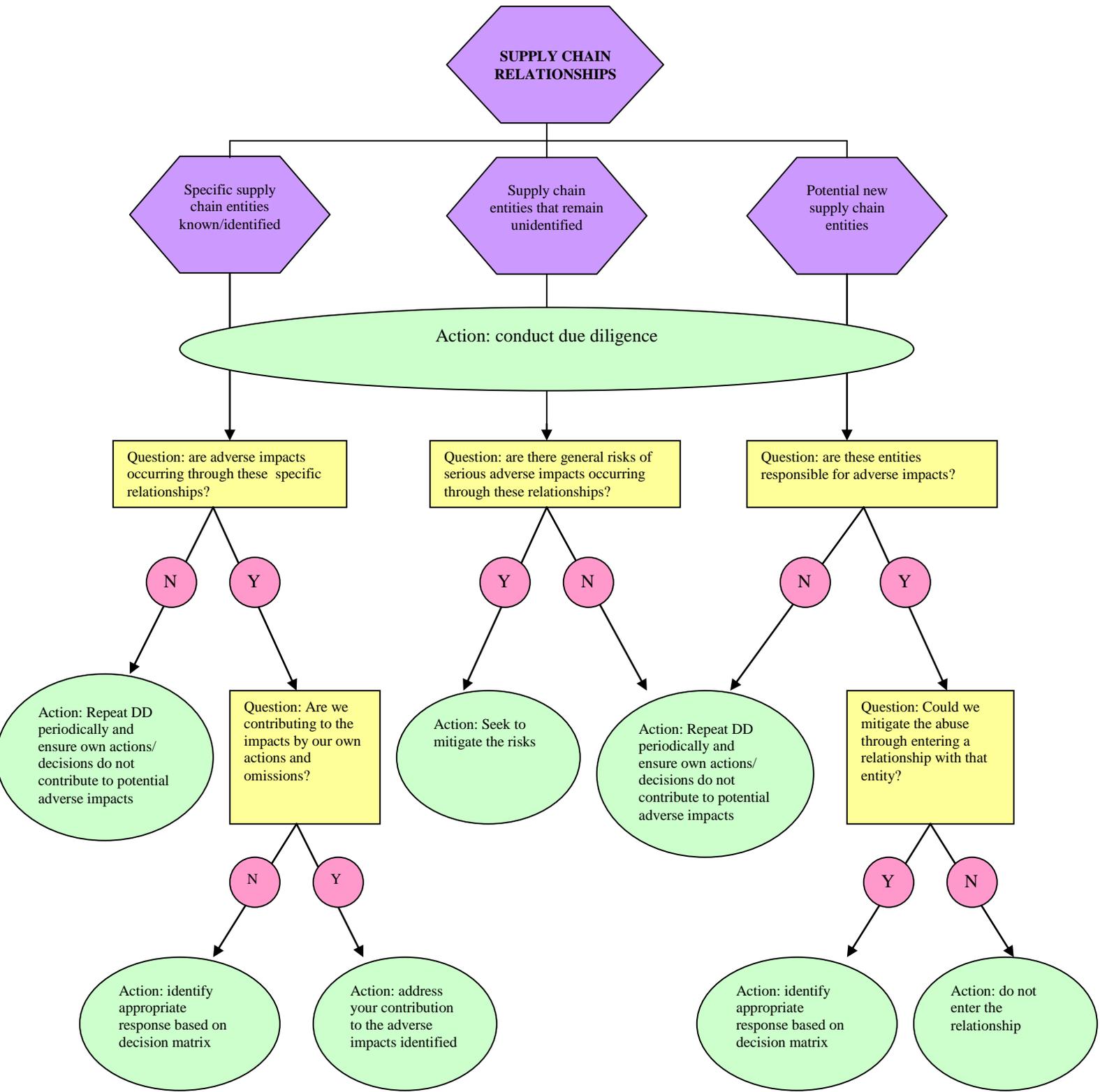
- (a) use due diligence to identify **general** areas of risk of serious human rights abuse in their supply chain relationships, drawing on appropriate government,

expert and/or stakeholder advice. General risks may be associated with a particular locale or region, or particular products or materials and their known sources;

(b) take action to mitigate any such risks, including by seeking to ensure that intermediary entities in the supply chain are themselves practicing due diligence and maintaining appropriate standards;

(c) wherever they identify *specific* supply chain entities that are abusing human rights, in line with the decision matrix above, take appropriate efforts to mitigate the abuse (directly or through intermediaries in the relationship chain); and if mitigation is impossible, either take steps to end the relationship (whether directly or via intermediaries) or be able to demonstrate efforts made to mitigate the abuse, recognising the possible consequences of maintaining the relationship.

19. The logic of this process for deciding on appropriate action in relation to an enterprise's direct and indirect adverse impacts is represented in the decision tree below:





10th OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY
Launching an update of the OECD Guidelines for Multinational Enterprises
30 June – 1 July 2010, OECD Conference Centre, Paris, France

**UPDATING THE GUIDELINES FOR MULTINATIONAL
ENTERPRISES DISCUSSION PAPER**

Professor John Ruggie

Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises

This discussion paper entitled “Updating the Guidelines for Multinational Enterprises ” is a contribution from the Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises for the 2010 OECD Corporate Responsibility Roundtable’s session on human rights, which will be held at the OECD Conference Centre on 30 June (afternoon).



UNITED NATIONS

*Mandate of the Special Representative of the Secretary-General
on Human Rights and Transnational Corporations and other Business Enterprises*

10TH OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY

UPDATING THE GUIDELINES FOR MULTINATIONAL ENTERPRISES DISCUSSION PAPER

Paris, June 30, 2010

1. The Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG) welcomes the decision of the 42 governments adhering to the OECD Guidelines for Multinational Enterprises to update the Guidelines, and the support for it expressed by all stakeholders groups.
2. This note identifies the main human rights elements the update should include if it is to meet its goal of ensuring “the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct.” It also addresses related procedural provisions. The note is based on the “Protect, Respect and Remedy” Framework proposed by the SRSG and welcomed unanimously by the UN Human Rights Council in June 2008.¹ Its structure broadly follows the agreed terms of reference for the Guidelines’ update.

A. SUBSTANTIVE ISSUES

I. THE ROLE OF STATES

3. The Guidelines recognize that socially and environmentally sustainable markets and enterprises require principles and standards for responsible business conduct. While the Guidelines are recommendations addressed by governments to multinational enterprises, they should also affirm the need for states to fulfil their international obligations.
4. The first pillar of the UN “Protect, Respect and Remedy” Framework addresses the state duty to protect against business-related human rights abuse through appropriate policies, regulation and adjudication. Chapter I of the updated Guidelines (Concepts and Principles)

¹ The Council also extended the SRSG’s mandate with the twin tasks of “operationalizing” and “promoting” the Framework. For the most recent report by the SRSG, see “Further steps toward the operationalization of the ‘Protect, Respect and Remedy’ Framework,” UN document A/HRC/14/27 (9 April 2010), available at <http://198.170.85.29/Ruggie-report-2010.pdf>.

similarly should stress that states must perform their required roles, individually and collectively, to ensure that the aims of the Guidelines are met.

II. HUMAN RIGHTS

5. Current language in the Guidelines reflects neither the needs of, nor best practices by, multinational enterprises when facing challenging human rights situations. Moreover, since the last Guidelines revision considerable progress has been achieved in clarifying the business and human rights agenda, as reflected in the UN “Protect, Respect and Remedy” Framework and the strong support it enjoys from governments, business associations and enterprises, trade unions and major NGOs. This combination of factors warrants a separate human rights chapter in the updated Guidelines, replacing current Guideline 2 under General Policies. It could be free-standing or combined with the chapter on Employment and Industrial Relations. The new chapter should reflect the elements of the “corporate responsibility to respect human rights” pillar of the UN Framework, as summarized below.

Foundation

6. The corporate responsibility to respect human rights means to avoid infringing on the rights of others and addressing adverse impacts that may occur. This responsibility exists independently of States’ human rights duties. It applies to all business enterprises in all situations. The new Guidelines chapter should affirm and reinforce this principle.

Scope

7. The scope of the corporate responsibility to respect rights is defined by the actual and potential human rights impacts generated through an enterprise’s own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-state actors and state agents.

8. The concept of “corporate sphere of influence” has sometimes been invoked as a basis for determining the scope of enterprises’ human rights responsibilities, rather than their human rights impact. This is problematic. Enterprises may have influence over a broad array of actors and situations, but only in exceptional circumstances should they be held responsible for human rights harms to which they are not linked in some way. Thus, while “corporate sphere of influence” may be a useful construct for enterprises to identify opportunities for contributing to the promotion of human rights, it is of limited utility as a basis for clarifying the scope of their responsibility to respect rights. Nor do promotional endeavors offset an enterprise’s failure to respect human rights across its business activities and relationships.

Content

9. Because business enterprises can impact virtually all internationally recognized rights, the corporate responsibility to respect encompasses the entire spectrum of such rights. In practice, some rights will be more relevant than others in particular industries and circumstances, and therefore will be the focus of heightened attention. But any *ex ante* delimitation of recognized rights that aspires to universal applicability inherently will provide misleading guidance to enterprises.

10. An authoritative enumeration of internationally recognized rights is provided by the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights); coupled with the eight ILO core conventions that form the basis of the Declaration on Fundamental Principles and Rights at Work. While business enterprises cannot violate these instruments as such, because they apply legally only to states, they can adversely impact the rights these instruments recognize. Moreover, those rights are the baseline benchmarks by which other social actors judge enterprises' human rights practices.

11. Depending on circumstances, enterprises may need to consider additional standards: for instance, they should take into account international humanitarian law in conflict-affected areas (which pose particular human rights challenges); and standards specific to "at-risk" or vulnerable groups (for example, indigenous peoples or children) in projects affecting them.

Due Diligence

12. The updated Guidelines should affirm that the appropriate response by business enterprises to managing the risks of infringing the rights of others is to exercise human rights due diligence. This can be a game-changer for enterprises: from "naming and shaming" to "knowing and showing." Naming and shaming is a response by external stakeholders to the failure of enterprises to respect human rights. Knowing and showing is the internalization of that respect by enterprises themselves through human rights due diligence.

13. Drawing on well-established enterprise risk management practices and combining them with what is unique to human rights, the UN Framework lays out the basic parameters of human rights due diligence. Because this process is a means for enterprises to address their responsibility to respect human rights, it must go beyond simply identifying and managing material risks to the enterprise itself, to include the risks its activities and associated relationships may pose to the rights of affected individuals and communities.

14. The complexity of due diligence processes and tools will vary with the size of the enterprise and certain other situational factors. But the same underlying principles should hold. Effective human rights due diligence should be an ongoing process, grounded in a policy commitment to respect human rights. It should include assessing the human rights impacts of the enterprise's activities and relationships; integrating these commitments and assessments into internal control, oversight and management systems; and tracking as well as reporting performance. Because a main purpose of human rights due diligence is enabling enterprises to demonstrate to themselves and to others that they respect rights, a measure of transparency and accessibility to stakeholders is required.

15. The terms of reference for the Guidelines' update indicate that it could also explore the merits of making due diligence one of the general operational principles of Chapter II (General Policies). This should be given serious consideration because it would allow enterprises to manage better all of their social and environmental risks. But if such a principle were to be adopted, the guidance should indicate clearly that human rights risk management differs from commercial, technical and even political risk management in that it involves rights-holders. Therefore, it is an inherently dialogical process that involves engagement and communication, not simply calculating probabilities.

Supply Chains

16. While all business entities, including suppliers, have the same responsibility to respect human rights, enterprises require more specific guidance on their responsibility for managing human rights challenges posed by their upstream suppliers. The SRSG has submitted a separate discussion paper to this Roundtable outlining a decision logic for enterprises, intended to contribute to the process developing such guidance.² It differentiates between spot-market transactions and ongoing relationships; is based on the nature of the ongoing relationship; and takes into account the size of the enterprise.

Operational-level Grievance Mechanisms

17. Even where an enterprise has the best internal control, oversight and management system in place, things can go wrong in complex situations and harms do occur. Some require legal recourse but many others can be satisfactorily addressed through effective non-judicial means. These include grievance mechanisms at the level of an enterprise's actual operations.

18. Operational-level grievance mechanisms perform two important functions in relation to the corporate responsibility to respect human rights. First, they make it possible for grievances to be remediated locally and directly, thereby preventing harm from being compounded and grievances from escalating. Second, they constitute an early warning system for enterprises, providing them with ongoing information about current or potential adverse human rights impacts from those impacted. By analyzing trends and patterns in complaints, enterprises can identify systemic problems and adapt their practices accordingly.

19. The Guidelines' update should encourage enterprises to develop or participate in operational-level grievance mechanisms. They could be provided directly by an enterprise, by collaborating with other entities, or by facilitating recourse to a mutually accepted external expert or body. Such mechanisms do not preclude individuals from recourse to state-based mechanisms, including the National Contact Points (NCPs) under the Guidelines, nor should they undermine trade union representation and collective bargaining agreements.

20. The particular arrangements that enterprises should adopt will depend in part on the sectoral, political and cultural context, as well as the scale of their operations and potential impacts. The UN Framework identifies a set of principles that all non-judicial human rights-related grievance mechanisms should meet to ensure their credibility and effectiveness: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for operational-level mechanisms involving enterprises is that they should function through dialogue and engagement rather than by the enterprise itself acting as adjudicator. These principles are summarized in Annex I of this discussion paper. Five companies in different regions and industry sectors are testing guidance points for the principles in collaboration with the SRSG.

Managing Legal Ambiguities and Dilemmas

21. Multinational enterprises operate in diverse legal and regulatory environments, as well as in governance contexts that differ in their ability—and sometimes willingness—to

² “The Corporate Responsibility to Respect Human Rights in Supply Chains,” available at <https://www.oecd.org/dataoecd/17/50/45535896.pdf>.

enforce existing laws and regulations. Conflicting requirements and variable capacity can create uncertainty and risks for enterprises in meeting their responsibility to respect human rights. Additional guidance through the Guidelines update would be helpful.

22. Weak governance zones are one case in point. Early in his mandate, the Special Representative asked the world's largest international business associations to address this particular challenge. The updated Guidelines should incorporate their response: "All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."³

23. The challenge is more complex where national law conflicts with international standards and where legal compliance may undermine the corporate responsibility to respect human rights. Enterprises should be encouraged in such circumstances to seek ways to respect the spirit of international standards while avoiding outright violation of the law. At the same time, they should ensure that their actions do not exacerbate abuses or the risks to those subject to the abuse.

24. Finally, since the Guidelines were last revised the web of potential corporate liability for complicity in egregious human rights abuses, such as international crimes, has expanded significantly in various national jurisdictions. But enterprises cannot know with certainty where claims might be brought against them. Nor can they know with certainty what precise standards and rules they may be held to because no two jurisdictions are identical in this respect. Rather than leaving this dilemma to chance—or to their CSR programs—enterprises should be advised to treat it as a complex legal compliance risk and act accordingly.

III. DISCLOSURE

25. The terms of reference for the Guidelines' update indicate that it should incorporate relevant disclosure standards. Transparency is an important element of the corporate responsibility to respect human rights, contributing to both accountability and institutional learning. Thus, the update provides an opportunity to highlight the importance of enterprises communicating on their significant human rights risk factors, as well as the measures taken to mitigate those risks. The form that this communication takes may vary with company size and other situational factors. It also should pay due regard to any potential risks it may pose to company staff and stakeholders, and to the legitimate requirements of commercial confidentiality.

B. PROCEDURAL PROVISIONS

I. FUNCTIONAL EQUIVALENCE

26. NCPs have the potential to serve as effective grievance mechanisms beyond the operational level. In order to realize this potential, the update should consider incorporating into the guidance for NCPs the principles for effectiveness and credibility outlined in the

³ International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, "Business proposals for effective ways of addressing dilemma situations in weak governance zones," available at <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

Annex to this paper: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.

27. Applied to the NCPs, these principles are sufficiently broad to provide room for the expression of different political cultures and institutional arrangements within adhering countries. Yet they could form the basis for a common understanding among NCPs of what is expected of them; among potential users of what they, in turn, can expect from an NCP process; and how government departments in which NCPs may be housed can manage the potential conflicts among the various roles they are expected to play.

28. The SRSG's has found that the enterprises and other stakeholders participating in his grievance mechanism pilot project derive considerable benefits from the individual and collective learning experience. In the Guidelines context, he believes that all parties similarly would benefit if NCP and Working Party meetings were to become more of a learning forum. Not only would this grow the common knowledge base, but it also would reduce the likelihood of different NCPs subjecting multinational enterprises to significantly different interpretations of common standards and approaches.

II. ADMISSIBILITY CRITERIA

29. The scope of the Guidelines for Multinational Enterprises is sometimes confused with the admissibility criteria for the consideration of "specific instances" by NCPs. The Guidelines provide principles and standards addressed to all multinational enterprises, whereas the admissibility criteria for "specific instances" concern the narrower question of what types of cases NCPs may agree to examine. The update should clarify this distinction even as it re-examines the admissibility criteria.

30. Currently, NCPs consider roughly 40 percent of the complaints submitted to them to be without substantive merit or falling beyond the Guidelines' purview. A major reason for the latter is the absence of an "investment nexus"—either because the multinational involved is a buyer from, not an equity holder in, the supplier; or it is a lending institution that enabled an operating enterprise's foreign investment, but is not itself the investor.

31. Many participants in the update process consider it important to retain the link between the Guidelines and the Declaration on International Investment and Multinational Enterprises. The SRSG takes no position on this complex issue. Nevertheless, he does urge that the updated Guidelines reflect widely used if not prevalent business models that barely existed when the Guidelines were last revised—as indicated by the fact, for example, that the most rapidly growing segment in world trade in recent years has resulted from intra-firm and related-party transactions.

32. Therefore, whatever is decided about the investment nexus, the update should identify realistic admissibility criteria for "specific instances." In the context of upstream supply chains, it is sometimes suggested that numerical thresholds can be used to determine admissibility—such that a company sourcing less than "x" % of its materials from a supplier or representing less than "y" % of the enterprise's business automatically would fall beyond the Guidelines' purview. This has two major pitfalls:

- (i) Such thresholds are necessarily arbitrary when applied across different business sectors and sizes, and are unlikely to be appropriate in all circumstances;

(ii) Such thresholds risk encouraging suppliers (and enterprises) to game the system by remaining below the threshold that would require enterprises to take responsibility.

33. Further in-depth discussion of these issues is needed. But the final formula should include two considerations. The first is the nature of the relationship between the enterprise and the business entity allegedly committing the harm, generally excluding spot-market transactions but closely examining ongoing relationships. The second is sourcing where it is widely known that serious human rights abuses are associated with a particular locale, product, service, or materials—and where, therefore, it is reasonable to expect an enterprise to take steps to mitigate such abuses to which it is linked in any form, or if it cannot do so then to avoid being linked to them.

34. The role of lenders may be more complex in light of the investment nexus constraint, although broadly similar principles should be applicable. In any event, the update process will need to address the fact that the Guidelines, which are intended as “a leading international instrument,” now lag well behind the standards of other international actors in this respect, including the International Finance Corporation; as well as private sector banks, such as those participating in the Equator Principles, which track the IFC standards.

III. IMPLEMENTATION OF SPECIFIC INSTANCES

35. There are few if any official consequences of an NCP finding against an enterprise. For example, in most cases the enterprise could apply immediately for export or investment assistance from the same government. To protect the integrity of the NCP system, the update should consider ways to give weight to NCP findings. The response need not necessarily be punitive. The home government could also work with the enterprise to improve its policies and practices. But where an enterprise fails to cooperate, the default presumption should be that a negative finding will be made public, and that it could affect the enterprise’s access to certain forms of public support and services for a specified period of time.

C. NEXT STEPS

36. At the request of the Human Rights Council, the SRSG is developing a set of guiding principles for the operationalization of the “Protect, Respect; Remedy” Framework, which will be presented to the Council in June 2011. He will continue to liaise closely with the OECD on common elements between the Framework and the Guidelines’ update.

ANNEX I:

PRINCIPLES FOR EFFECTIVE NON-JUDICIAL GRIEVANCE MECHANISMS

Through a survey of existing non-judicial grievance mechanisms and an extensive consultative process around the results, the SRSG identified the following principles for the effectiveness and credibility of non-judicial grievance mechanism. Five companies in different regions and industry sectors are collaborating with the SRSG in pilot projects to test guidance points for the principles:

- **Legitimate:** by having clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;
- **Accessible:** by being publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;
- **Predictable:** by providing a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;
- **Equitable:** by ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;
- **Rights-compatible:** by ensuring that its outcomes and remedies accord with internationally recognized human rights standards;
- **Transparent:** by providing sufficient transparency of process and outcome to meet the public interest concerns at stake.
- For company-level mechanisms specifically, a seventh principle is that they should operate through dialogue and engagement rather than the enterprise itself acting as adjudicator.

**10th OECD Roundtable on Corporate Responsibility:
“Launching an Update of the OECD Guidelines for Multinational Enterprises”
Paris, 30 June – 1 July 2010**

Possible implications for the substantive provisions of the Guidelines

Comments by John Morrison, Executive Director, Institute for Human Rights and Business

I would like to thank you for this opportunity to participate in the 10th OECD roundtable on corporate responsibility. This year’s meeting comes at an important time for the OECD Guidelines for Multinational Enterprises. And it takes place during a period of rapidly expanding activity in the arena of business and human rights. The gathering momentum is not least due to this being the final year of the mandate of Professor John Ruggie, the Special Representative of the UN Secretary-General for business and human rights.

Today, in addition to John Ruggie’s groundbreaking work, a number of processes are underway all of which seek to strengthen the place of human rights in the international architecture. For example, the International Finance Corporation’s revisions of its performance standards for international project finance, the Global Reporting Initiative’s efforts to update the human rights indicators within its reporting frameworks, the inclusion of human rights in the soon to be finalised ISO 26000 social responsibility standard. There are also ongoing efforts aimed at better alignment between human rights and the trade and investment policies of individual countries or regional bodies such as the European Union. The updating of the OECD Guidelines is an important piece, possibly one of the central pieces in this jigsaw, not least because its framework is today the closest in offering the world an extra-territorial complaints mechanism – albeit one with little or no binding effect.

Clearly, while recognizing the current zeitgeist for better alignment, we need also to consider what will work within the terms of the Guidelines themselves; what will be effective; and, in particular, how we can achieve better outcomes – not least for those communities and individuals whose rights have been

abused and who seek effective remedy. If this is our yardstick, then it is clear we have a lot of work ahead of us this year and beyond.

I have been asked to comment on the implications of the emerging understanding of the corporate responsibility to respect human rights for the substantive provisions of the OECD Guidelines, and in particular respond to some of the comments made by the Special Representative of the UN Secretary General – today represented by Gerald Pachoud.

I will reinforce some of the messages from his presentation but also explore a few issues further.

All rights are relevant

First, in relation to clarifying the content of the Guidelines, it is important that we all agree that we are talking about all internationally recognised human rights. As the Special Representative has stressed, because business enterprises can impact virtually all internationally recognized rights, the corporate responsibility to respect encompasses the entire spectrum of such rights. Clearly, some rights will be more relevant than others in particular industries and circumstances, and therefore should continue to be the focus of heightened attention. But any attempt to limit the scope is likely to provide misleading guidance to enterprises. Let's be explicit, we are talking about the Universal Declaration, the two International Covenants and the core UN and ILO conventions.

This is what governments, employer groups, trade unions and civil society have endorsed within the context of the United Nations and elsewhere, so it would be unfortunate if the issue of cultural relativism or arguments concerning state sovereignty were to be reopened here. I call on all present to stand by commitments made within the context of the United Nations, that all human rights are relevant to business even if specific governments have not ratified or brought into national law all related provisions.

Scope

Second, the focus on 'impact' as the main organising principle for determining corporate responsibility in the area of human rights, as opposed to the concept of 'sphere of influence', makes both intuitive as well as substantive sense. What matters fundamentally (in both a legal and moral sense) is the effect that business operations may have on the victims and potential victims of human rights abuses: all other

paradigms are ancillary to this. While ‘influence’ is one of the ways in which a business might understand its leverage on other actors, it should not be the primary way in which we define the responsibility of a corporation in the realm of human rights.

This clarity helps greatly when we go on to consider the scope of the OECD Guidelines. We would encourage the OECD and all states party to the Guidelines to think about ‘impact’ when considering the economic relationships to be included in any updated Guidelines. We would agree with those who suggest that the way some states have interpreted the ‘investment nexus’ is too restrictive and that the impact of business is not just in the form of investments but also in the full value chain – in particular the relationships and contracts it has with key suppliers – and I would argue, as key customers. This is not to deflect from the central focus on supply chains, but we mustn’t forget that product misuse has been an issue of major concern with regard to several significant instances of human rights abuses implicating corporations across a number of industries – albeit ones in which responsibility can be harder to apportion. This also calls for clearer understanding of complicity – a critical issue the SRSB has clarified, and for which now there is sufficient guidance available which should be embraced.

The critical issue is how the National Contact Points understand the scope of the Guidelines. When defining the limits of responsibility, the paradigm of ‘impact’ and the due diligence undertaken by companies are useful, in developing an understanding of, and plan for the associated risks. That way, the NCPs will not be limited by a singular consideration such as the investment nexus.

The Institute for Human Rights and Business can also report that this understanding is not at all alien to business. Last week, at the United Nations Global Compact Leaders Summit in New York, we launched a review of the human rights due diligence methodologies currently being developed by 24 major international companies – all of whom have accepted both the centrality of ‘impact’ and the feasibility of conducting human rights due diligence. They have also all recognised the potential relevance of every human right to their operations. In other words, we have moved beyond ‘pick and mix’ approaches.

Legal dilemmas

Third, on the issue of legal dilemmas – we would agree with much of what Gerald has said. Recognising the complexity of interplay between NCPs and the criminal and civil legal regimes of specific states, it is necessary to apply some universal process principles. We mustn’t see the potential clash between

national laws and international human rights standards as an issue only concerning some specific non-OECD member states. Indeed, it is an issue that occurs universally and therefore should be anticipated routinely. It is true that there is continuing gender inequality in many parts of the world, resulting in women's rights not being respected. Likewise, there are serious concerns over freedoms of expression, privacy and freedom of association in a number of countries, including rising global powers such as China. But even within the OECD there is need for a level playing field in human rights terms. In North America, for example, domestic labour laws continue to offer less protection than some ILO Core Conventions. Europe maintains restrictions on freedom of expression and its treatment of asylum seekers and migrant workers is far from exemplary.

This is not to point fingers, but to state that the legal dilemmas faced by business in human rights terms are not restricted to specific geographies. Depending on their core business, companies should anticipate some of these dilemmas when they do their own due diligence. Obviously, they are required to follow local law – but experiences of companies suggest that parallel means can be developed in many cases to get as close to the spirit of international standards as possible. Multi-stakeholder initiatives play a key role in helping to define what such parallel approaches might mean in practice. NCPs should expect companies to anticipate some of these legal dilemmas, not hide behind the excuse of obeying local laws blindly and to the exclusion of any corrective or mitigating actions.

NCPs should also have higher expectations of companies when they operate in so-called 'weak governance zones'. Here, baseline due diligence – by which we mean adopting a human rights policy; assessing the company's impacts on human rights; integrating human rights into management procedures; and tracking and reporting on performance - might not be enough. NCPs should expect companies to engage in 'enhanced' due diligence – extra steps to identify additional risks and potential impacts. There are perhaps four contexts in which this extra diligence might be expected: (i) situations of operating in armed conflict, including in crisis-prone regions on the brink of conflict, and during post-conflict reconstruction; (ii) acute environmental degradation or post-environmental disaster – such as Haiti; (iii) systemic poverty and associated vulnerability, and (iv) cases of rampant corruption.

Taking the first example, that of conflict, there are already a number of performance standards that NCPs can use when setting their expectations about how business should behave in conflict environments. These are drawn from international humanitarian law and international criminal law and are manifest in guidance such as the 'Red Flags', the Voluntary Principles on Security and Human Rights or the business

code of conduct relation to the 'Montreux Document' on Private Military Companies, and the OECD's own guidance for multinationals in weak governance zones.

In acute situations, such as conflict, business already has direct international legal responsibilities, which states need to enforce, primarily through legal mechanisms. A case involving an international crime, such as the use of forced labour, or forced displacement, should not have to be dealt with by an NCP, and other legal remedies have to be available. But grey areas arise when we think about incidents of alleged beneficial or silent complicity – possibly through the supply chain, which might not reach any threshold of criminal responsibility. The interplay between legal and non-legal approaches must be monitored by each NCP nationally, but the assumption must be that both approaches have a role to play – depending on the nature and severity of the abuse perpetrated. Decisions to freeze existing NCP investigations due to legal action should, if at all possible, be made by consent from all parties but it is ultimately a decision for each state to make, bearing in mind its own obligation to protect people from human rights abuses resulting from the actions of non-state actors, such as business.

Procedural issues and outcomes

My final set of comments relate to the way the OECD Guidelines are implemented and in particular the role of NCPs when disputes emerge. So let's start here with the desired end in mind. What are the outcomes we hope for over the next 10 years? Clearly, we want more effective mediation, and NCPs should indeed build on some of the good results achieved in this area. But aren't we also looking for more in cases where mediation is not enough or is impossible to achieve?

Cases such as those relating to Vedanta or Afrimex suggest that something more is needed, not just mediation, when the NCP makes statements about "responsibility". It is true that on their own such statements do not have legal effect, nor have such statements led to measurable changes in corporate behaviour in those two instances. But the fact that some NCPs are now willing to make such strong statements increases the chances of better outcomes in future.

Professor Ruggie is right to raise the question in his 2010 report as to what states themselves can do, if they make such such statements, and if legal proceedings are not appropriate or available. It is odd, to say the least, if the same, or other OECD governments, do not take such statements into consideration when granting export credit or providing investment assistance to the same companies. We hope to see

more Parliaments follow the lead of the Netherlands in resolving that governments withhold state assistance from companies found responsible by NCPs, but where no adequate remedy has yet been forthcoming.

If NCPs are going to have a role in both settling disputes, and more frequently, we hope, in making public statements of responsibility, then the associated guidance around what the necessary thresholds are, is an important issue. The rights-based principles issued by Professor Ruggie in 2008 in relation to access to effective remedies - legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency – are extremely relevant to the Guidelines and to NCPs whether in a mediation role or as a decision-maker.

Conclusion

In conclusion then, we believe that the ‘Protect, Respect, Remedy’ framework endorsed by the United Nations Human Rights Council provides an excellent basis for an update of the Guidelines. There is also a window of opportunity here for the OECD. None of us can be sure if this opportunity will arise again and the Institute for Human Rights and Business urges everyone in this room to be brave in their leadership and concrete in their actions. There will come a day, perhaps in the non too distant future, when the opportunity for a leveller playing field in relation to human rights and business might be closed again. At its heart, human rights is social sustainability – creating more just and sustainable communities which are good for people as well as being good for responsible business. Social sustainability requires us all to be more accountable to each other, and in this rubric – the OECD Guidelines play an important role.

Thank you for your attention. I look forward to our discussions.



10th OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY
Launching an update of the OECD Guidelines for Multinational Enterprises
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**“SUPPLY CHAINS AND THE OECD GUIDELINES FOR
MULTINATIONAL ENTERPRISES”**
**BSR DISCUSSION PAPER ON RESPONSIBLE SUPPLY CHAIN
MANAGEMENT**

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This paper on “Supply Chains and the OECD Guidelines for Multinational Enterprises” was commissioned from the corporate responsibility and consulting firm Business for Social Responsibility (BSR) as background information for the 2010 Corporate Responsibility Roundtable’s session on supply chains, which will be held at the OECD Conference Centre on 30 June (morning).

The views contained in the BSR paper do not necessarily represent those of the OECD or its member governments. For further information or clarification on any of the issues covered in this paper please contact: Cody Sisco, csisco@bsr.org.

OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY

“Supply Chains and the OECD Guidelines for Multinational Enterprises”

BSR Discussion Paper on Responsible Supply Chain Management

OECD Headquarters, Paris, 30 June 2010

BSR, a leader in corporate responsibility since 1992, works with its global network of more than 250 member companies to develop sustainable business strategies and solutions through consulting, research, and cross-sector collaboration. This paper was prepared by Cody Sisco, Blythe Chorn, Peder Michael Pruzan-Jorgensen, Jeremy Prepscius, and Veronica Booth at BSR. Please contact Cody Sisco at csisco@bsr.org.

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I. Introduction

1. BSR (Business for Social Responsibility) is pleased to submit this discussion paper on the application of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises to supply chains to the OECD in support of the Annual Meeting of the National Contact Points on 30 June 2010.

2. The purpose of this paper is to provide context and recommendations for discussion at the roundtable on corporate responsibility. This seminar will help clarify and develop appropriate guidance on the application of the OECD Guidelines for Multinational Enterprises (the Guidelines) to supply chain relationships in the context of the update that adhering governments have agreed to undertake in 2010-2011.

Definition of Supply Chain

There are multiple definitions of the term supply chain.

For the purposes of this paper, the term “supply chain” is used to refer to the network of organizations that cooperate to transform raw materials into finished goods and services for consumers.

Other definitions conceive of supply chains as flows of materials that are processed, transported, and otherwise transformed by a series of organizations into higher value products.

Supply chain and value chain are related but distinct concepts.

The value chain concept was first described and popularized by Michael Porter as a series of activities undertaken by a company that generate and add value to products. These activities include inbound logistics, operations, outbound logistics, marketing and sales, and services, and they are supported by activities including firm infrastructure, human resources management, technology development and procurement. A company's value chain is part of a larger value system that includes the value chains of upstream suppliers and downstream channels and customers.

(See Michael Porter, *Competitive Advantage: Creating and Sustaining Superior Performance*. New York: Free Press, 1980.)

II. Supply Chain Opportunities and Challenges and Multinational Enterprise Responses

3. The scale and pace of growth in global supply chains is unprecedented. Trade liberalization, decreased restrictions on capital movement, and technology advances which have sharply lowered transportation and communication costs have enabled geographically fragmented production processes, trade in services, and foreign direct investment by multinational enterprises (MNEs).¹

A. The Value of Supply Chain Relationships for MNEs

4. Supply chain relationships generally create significant value for MNEs. As growing competition in domestic and international markets forces MNEs to become more efficient and to lower costs, sourcing inputs from more efficient producers, either domestically or internationally, can be an opportunity to improve margins. This enhanced efficiency can stem from a number of sources, including lower labor costs, greater access to raw materials, and more advanced manufacturing and service provision processes, among others.

5. Another major motivation for building supply chains is the opportunity for entry into new markets. Demographic shifts and rapid growth in developing economies present tremendous growth opportunities for MNEs. Developing supply chain relationships in these economies allows MNEs to build a local presence in order to build brand awareness, gain market insights, and reduce costs associated with delivering final products and services to local customers.

6. MNEs also build supply chain relationships to gain access to strategic assets, which include skilled workers, technological expertise, and the presence of competitors and suppliers with valuable knowledge or experience. Access to these assets can improve product and service quality and support innovation. For example, access to foreign knowledge is a key element in shifting research and development (R&D) activities to the supply chain.²

B. Key Actors and Types of Supply Chain Relationships

7. To maximize these opportunities and to create efficiencies in manufacturing and service provision, MNEs have developed a variety of forms of supply chain relationships. In any one supply chain relationship, there are likely to be a number of unique actors:

- » *MNE*: The MNE is the large, global company that is the buyer of a product or service in the supply chain relationship. It may or may not be the ultimate retailer and so may face procurement and sustainability standards required by other MNEs.
- » *Supplier*: The supplier is the company, which could be a large, global enterprise or a small or medium-sized business based in one region or

¹ World Trade Organization, “World trade developments,” in *World Trade Statistics 2009*, (2009), www.wto.org/english/res_e/statistics_e/its2009_e/section1_e/its09_highlights1_e.pdf.

OECD, *Moving up the Value Chain: Staying Competitive in the Global Economy*, (2007), www.oecd.org/dataoecd/24/35/38558080.pdf.

² Wendy Tate, Lisa Ellram, Lydia Bals, and Evi Hartmann, “Offshore Outsourcing of Services: An Evolutionary Perspective,” *International Journal of Production Economics*, 120, (2009): 512-524. Peter Maskell, Torben Pedersen, Brent Petersen, and Jens Dick-Nielsen, “Learning Paths to Offshore Outsourcing - From Cost Reduction to Knowledge Seeking,” DRUID Working Paper 05-17, Danish Research Unit for Industrial Dynamics, Copenhagen Business School, (2007), www3.druid.dk/wp/20050017.pdf.

locale, which sells goods (including raw materials, semi-finished, component, and intermediary products) or provides services to a MNE. Suppliers that sell directly to a MNE are known as first-tier or direct suppliers.³ Suppliers that sell to other suppliers are known as sub-tier suppliers; they may be several times removed from the MNE but provide a good or service that is an element of the good or service that is ultimately sold to the MNE.

- » *Licensee*: Licensees purchase the rights to use MNEs' brands, usually to produce goods that bear MNEs' intellectual property or to provide services on behalf of MNEs. Licensees may perform the production or service provision in-house or further outsource to a supplier.
- » *Agent*: Agents identify and negotiate with suppliers and licensees on behalf of MNEs. Agents typically act fairly independently of MNEs, although each relationship is unique.
- » *Trader*: Traders typically make markets for goods and services by purchasing and reselling them, often across geographical boundaries. They typically are not involved in product development, manufacturing, or marketing to consumers.

8. There are also a number of different supply management models, each of which has varying levels of visibility and control over direct and sub-tier supply chain relationships. While supply management approaches vary widely between industries, MNEs, and even among product or service categories within one MNE, models can be generally grouped into four approaches:

- » *Transactional*: Generally the shortest of supply chain relationships, transactional supply management models are often characterized by a lack of contact between the MNE and supplier. Rather, products and services are sold through auctions, wholesalers, etc. This model is often used for commodities, one-time buys, and seasonal sourcing.
- » *External Management*: Although these supply chain relationships may be more durable than transactional relationships, an external management approach is similarly characterized by the lack of direct interaction between the MNE and supplier. Rather, the MNE provides general specifications and requirements and receives shipment, but a third party manages the entire procurement activity including selecting and managing suppliers. External management approaches are often typical of licensing relationships, where the agent acts as the third party.
- » *Supplier Selection*: The most common supply management model, supplier selection is typified by MNEs which directly approach suppliers, often through a request for quotation (RFQ), and select suppliers based on subsequent analysis and negotiations. Suppliers are often responsible for sourcing materials and services they require to deliver product to the MNE; the MNE typically does not interact with any sub-tier suppliers.
- » *Strategic Management*: Generally used with only the most durable, long-term supply chain relationships, a strategic management approach to supply management involves MNEs sourcing from and strategically managing direct, first-tier suppliers. Strategic management can involve making direct investments in suppliers to improve quality through providing training, assigning MNE staff to provide on-site support, and making joint

³ In some industries, the term "direct" supplier has a different and distinct meaning: a supplier of goods that are incorporated into the finished goods that are provided to consumers. This is distinct from "indirect" suppliers, which are technically first tier suppliers, but that provide goods which do not become part of products to consumers, for example, suppliers of office equipment, information technology services and catering would be considered "indirect" suppliers.

asset investments. MNEs using a strategic management approach often engage with sub-tier suppliers as well to improve production processes, lower costs, and ensure supply continuity.

9. Also, depending on a MNE's internal structure, supply management may be a centralized function or spread across many different product lines and business units. Interactions with suppliers therefore can take many forms, and any one supplier or other supply chain actor may have multiple points of contact within a MNE.

C. The Macroeconomic Impacts of Supply Chain Relationships

10. The emergence of global supply chains has had significant effects on national economies and has resulted in changes in comparative advantage and export specialization. Global supply chains also have significant impacts on employment, productivity, prices, wages, and terms of trade, and these impacts vary across regions and social groups.

11. **Developed economies.** In developed economies, globalization of supply chains may lead to short-term employment losses. While the number of jobs may be large in absolute terms, direct employment impacts are considered to be relatively small in comparison to overall turnover in the labor market due to technological development, changing consumer demands, etc.⁴ However, supply chain relationships can create greater opportunities for expansion and growth of domestic firms. Global supply chain relationships may allow firms to focus on their core activities and may enable them to expand employment in other areas.

12. Global supply chains also have positive impacts on productivity and may thus increase access to better, cheaper, and more varied goods and services. Supply chain relationships can also lead to increased inflows of foreign direct investment (FDI) to developed economies.

13. **Developing economies.** For developing economies, supply chain relationships can create numerous opportunities for growth. The expansion of global supply chains is clearly linked to the increasing integration of emerging countries into the global economy. Strong growth in manufacturing production has occurred in East Asia and in China, as well as in South Asia and the Middle East. Between 1996 and 2004, for example, Brazil, Russia, India, and China (known as the BRICs) together reported annual growth of 14.1% in manufactured exports, compared to 5.8% for the OECD as a whole. Exports of services are also increasing. Exports have grown more strongly than imports in the BRICs, resulting in an improvement of their trade surpluses.⁵

14. Also, trade data indicates that the BRICs have also become more active in higher-technology industries. Starting from a low base, their trade in high and medium-high-technology industries has risen faster than their trade in total manufacturing. In 2004 for example, average imports and exports in higher-technology industries, such as pharmaceuticals, scientific instruments, aircraft and spacecraft, motor vehicles, chemicals, and machinery and equipment, made

⁴ M.N. Baily and D. Farrel, *Exploding the Myth about Offshoring*, San Francisco: McKinsey Global Institute, 2004.

Sharon Brown and James Spletzer (2005), "Labour Market Dynamics Associated with the Movement of Work Overseas", (paper presented at OECD Workshop on the Globalisation of Production: Impacts on Employment, Productivity and Economic Growth, Paris, 15-16 November 2005).

⁵ OECD, *Moving up the Value Chain: Staying Competitive in the Global Economy*, (2007), www.oecd.org/dataoecd/24/35/38558080.pdf.

up almost 60% of the BRICs' total trade. This evolution will support larger inflows of FDI, increased innovation, and more sophisticated industrial structures.

15. **Small and medium-sized enterprises.** At the enterprise level, participation in global supply chains seems to bring stability to small and medium-sized enterprises (SMEs) in both developed and developing economies. Small firms that succeed in gaining access to a supply chain, and are able to retain their position in a supply chain despite competition, typically have more “staying power” than their peers.⁶

16. The development of global supply chains also offers SMEs new opportunities to expand their business across borders. The fragmentation of production also creates new entrepreneurial possibilities for SMEs that can move quickly and flexibly to fill emerging niches for the supply of novel products and services.⁷

17. Finally, through their supply chain relationships with MNEs, some SMEs have gained access to capital, experience, and expertise to enable them to develop into large MNEs themselves.⁸ The same trends enabling MNEs to develop supply chain relationships are also expanding SMEs' opportunities to realize efficiencies through supply chains. Similarly to MNEs, SMEs in developing economies are increasingly externalizing activities for production rationalization and resource optimization.⁹

D. Responsible Business Conduct Challenges in Supply Chain Relationships

18. Despite the clear opportunities, supply chain relationships can also create significant responsible business conduct challenges for MNEs. Beyond the business complexities of managing inventory, quality, etc., supply chain relationships introduce risks related to responsible business conduct as defined by the OECD Guidelines.

19. **Disclosure.** The complexity of supply chain relationships described above, and the challenges associated with visibility and traceability beyond the first tier of suppliers, creates challenges in knowledge of and disclosure of material information. In particular, MNEs sometimes struggle to identify and communicate foreseeable risk factors in their supply chain relationships.

20. Also, MNEs' disclosure of any impacts in their supply chains related to responsible business conduct issues are largely dependent on the accurate disclosure of impacts by suppliers and other actors in supply chain relationships. Historically, it has been challenging for MNEs to capture high-quality data on environmental impacts, labor conditions, and other responsible business conduct issues within the supply chain because often suppliers either do not track or do not want to disclose this information to MNEs.

21. **Employment and industrial relations.** Labor conditions in global supply chains, particularly those that extend into developing countries, often fail to meet international standards and national regulatory requirements and can lead to serious human rights abuses. These abuses may include denial of the freedom

⁶ OECD, (2007).

⁷ OECD, *SME and Entrepreneurship Outlook 2005*, Paris: OECD, 2005.

⁸ Dilek Ayut and Andrea Goldstein, “Developing Country Multinationals: South-South Investment Comes of Age,” In *Industrial Development for the 21st century: Sustainable Development Perspectives*, (New York: UN Department of Economic and Social Affairs, 2007), 85-116.

⁹ OECD, (2007).

of association and collective bargaining, the use of child and forced labor, employee discrimination, excessive work hours, degrading treatment by employers, inadequate health and safety protections, improperly paid wages, and inhibited movement. The causes are numerous—pressures to keep prices low and to meet MNE expectations for short production and delivery schedules, as well as poor enforcement of local and national regulations and low understanding among suppliers and other actors of labor rights standards—and can all create challenges for MNEs in supporting good employment and industrial relations. Additionally, workers' often lack the means to improve their situations, either due to poverty and the lack of other opportunities, or due to their limited understanding of labor rights or limited access to grievance mechanisms or union representation.

22. Poor labor conditions create significant business challenges for MNEs. Low productivity and worker strikes can impact product and service prices and delivery. Negative non-governmental organization (NGO) campaigns and media coverage damage brands and reputations, threaten employee engagement and retention, and can lead to customer boycotts which directly impact profitability.

23. **Environment.** Environmental impacts in supply chains can be severe, particularly where environmental regulations are lax, price pressures are significant, and natural resources are (or are perceived to be) abundant. These impacts can include toxic waste, water pollution, and hazardous air emissions as well as high energy use and greenhouse gas emissions. The impacts may start at the very beginning of a product or service lifecycle, with the extraction of basic material inputs, but often continue through to the end-of-life when use and disposal also create waste.

24. For MNEs, the challenges associated with negative environmental impacts in supply chains are significant. The potential costs of supplier non-compliance with local and national regulations, including fines and operating interruptions, can create volatility in the price of goods and services and threaten business continuity. And NGO, government, and customer attention to environmental impacts lead to some of the same challenges with negative brand and reputational impacts as are created by poor labor conditions.

25. **Bribery and competition.** Significant bribery and competition risks can exist in supply chain relationships including procurement fraud between MNEs and suppliers who engage in corrupt practices involving governments and other supply chain actors.

26. The direct costs to MNEs of bribery and anti-competitive behavior are considerable, including diminished product quality, but are often dwarfed by indirect costs related to management time and resources spent dealing with issues such as legal liability and damage to a MNE's reputation.

27. **Consumer interests.** Supply chain relationships can also create significant challenges for MNEs in protecting consumer interests. Less direct oversight of product manufacturing and service provision means that MNEs have less ability to effectively influence product content, data protection, and accurate disclosures to consumers.

28. The risks for MNEs in protecting consumer interests are extensive given the potential costs, both directly and to a MNE's reputation, of a product recall or fine for non-compliance with consumer protection regulations.

Prevalence of Responsible Supply Chain Management Approaches

Because disclosure of MNEs practices related responsible supply chain management is based on an uneven landscape of legal requirements and voluntary standards, there are no comprehensive and authoritative statistics on the prevalence of responsible supply chain management practices. However, there are a few recent research results and survey findings that provide some indication of the extent to which MNEs are applying these approaches.

For example, using an ASSET4 database of environmental, social and governance data on 2,508 global corporations, the Harvard Law School benchmarked public labor and human rights policies relating to global supply chains. Their findings revealed that a significant minority of companies (28 percent) has broadly stated policies in this area, but far fewer have detailed standards or follow-up procedures. However, less than 6 percent of MNEs endorse specific labor standards such as the eight core conventions of the International Labor Organization. Only 6 percent say they monitor suppliers for policy or code compliance or set improvement targets; and only 7 percent describe enforcement procedures.

(See Aaron Bernstein and Christopher Greenwald, "Benchmarking Corporate Policies on Labor and Human Rights in Global Supply Chains," Capital Matters Occasional Paper Series No. 5, Pensions and Capital Stewardship Project, Labor and Worklife Program, Harvard Law School, (November, 2009), <http://www.law.harvard.edu/programs/lwp/pensions/publications/occpapers/occasionalpapers5.pdf>.)

29. **Science and technology.** While intellectual property (IP) and technology transfer offer important opportunities to advance supply chain relationships and support economic development, the widespread lack of stringent IP protection practices in global supply chains can create real risks for MNEs. IP infringement can lead to direct financial loss and stifle innovation.

E. Current MNE Approaches for Responsible Supply Chain Management

30. At present, there is no universal standard that defines responsible supply chain management for MNEs across all the responsible business conduct issues articulated in the Guidelines. As a result the scope and boundaries of MNE accountabilities for responsible business conduct issues in supply chains are not clearly defined. Instead, a baseline expectation has emerged, primarily driven by stakeholders including international organizations, governments, civil society, and labor groups, that MNEs should seek to uphold a number of legal and voluntary standards in their supply chain relationships including:

- » International covenants, declarations, and frameworks that define individuals' rights such as the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- » International frameworks and standards that define responsible business conduct such as the OECD Guidelines, the UN Global Compact, and the UN Protect, Respect, Remedy Framework
- » National and local regulations

31. To meet this expectation, MNEs, often in partnership with governments, NGOs, and other international institutions, have developed a number of different tools and approaches to assess and influence responsible business conduct in their supply chains.

32. Responsible supply chain management programs are generally based on four primary approaches—setting expectations, monitoring and audits, remediation and capability building, and partnership—each of which is implemented using a variety of tools.



33. **Setting expectations.** To set clear expectations with suppliers for responsible business conduct, MNEs use codes of supplier conduct which provide guidelines and direction to suppliers on how the MNE views responsible business conduct and what will be expected of suppliers in the course of the relationship. Codes of supplier conduct typically reference the three types of law and voluntary frameworks described above, and at present, this is the primary application of the OECD Guidelines to supply chain relationships.

34. The consequences for non-compliance with codes can vary significantly—from limited or no action taken by the MNE to requirements to participate in some

of the activities described below, such as monitoring or remediation, to consequences for the business relationship, such as suspension of new orders or contract cancellation.

35. **Monitoring and audits.** To assess suppliers' performance against responsible business conduct expectations, MNEs may ask suppliers to complete self-assessments or accept on-site audits. On-site audits may be performed at the facility level or at a supplier's headquarters (if the supplier has multiple facilities) and may be conducted by staff from the MNE or a third-party auditing firm. The scope, length, and frequency of audits vary considerably.

36. **Remediation and capability building.** MNEs use remediation and capability building to address specific areas of non-compliance discovered during the monitoring process and to promote continuous improvement of responsible business conduct.

37. Remediation can include a number of activities including working with suppliers to create a corrective action plan to achieve compliance, defining a roadmap for gradually increasing standards and expectations, and terminating supplier relationships when serious shortcomings on "zero-tolerance" issues are not remedied in spite of repeated notifications.

38. Capability building goes beyond fixing particular non-compliance issues to develop suppliers' overall ability to improve performance on specific responsible business conduct issues over time through an increased understanding of issues and access to resources. Capability building includes a variety of efforts, such as training for supplier personnel and establishment of supplier learning networks.

39. **Partnership.** To build more lasting responsible business conduct in the supply chain, some MNEs are trying to build supplier ownership of responsible business conduct expectations through partnership. Partnership approaches to responsible supply chain management employ many of the tools described, but rather than focusing solely on compliance with a code, partnership emphasizes the development of supplier management systems and creating shared incentives and value through responsible business conduct.

40. For example, some MNEs have begun incorporating evaluation of management systems into their audits and are providing training and consulting for suppliers on management system design. MNEs are also instituting improvement ladders which emphasize a continuous improvement approach to management systems development and provide increased incentives as responsible business conduct is demonstrated, such as recognition of improved performance, preferred supplier status, and reduced frequency of auditing.

41. Partnership approaches to responsible supply chain management are indicative of a significant mindset shift from a focus on basic risk management—value protection—to value creation for MNEs and suppliers. However, they are not yet widely applied by MNEs, even among those that have otherwise strong responsible supply chain management programs.

42. **Implementation.** As alluded to above, the approaches MNEs employ vary tremendously. Most MNEs, at least initially, build responsible supply chain management programs to manage the risks associated with responsible business conduct issues in their supply chains, including negative stakeholder attention and impacts on business continuity. Consequently, the approaches and tools employed, as well as the scope of their application through different tiers of

the supply chain, are a function of how MNEs perceive risks in their supply chain relationships rather than a normative decision.

43. To determine which responsible supply management approaches to apply with which suppliers, many MNEs begin by segmenting their supply base based on level of risk to their business. Some MNEs will also consider the level of risk to society and their opportunity to influence or impact suppliers' responsible business conduct based on the type of relationship with each supplier.

44. Most MNEs designing a new responsible supply chain management program focus on setting expectations, and to an extent, monitoring. Even advanced MNEs use these tools as the basis for understanding the extent of responsible business conduct issues in their supply chains, and to engage with their first-tier and sub-tier suppliers. Capability building and management systems tools are used more exclusively with suppliers that are considered more "strategic" by MNEs. These approaches are mainly the province of advanced MNEs who have a more sophisticated understanding of their supply chains, including where the biggest risks and opportunities are, and where investments will create long-term benefits for the buyer as well as the supplier and society.¹⁰



E. Challenges in Responsible Supply Chain Management

45. While the approaches described above are relatively common and well-established, there are still many complex and deeply rooted challenges that MNEs face in responsible supply chain management.

46. **Defining responsibility.** First and foremost is the challenge noted earlier in this section of defining the responsibility of MNEs for ensuring responsible business conduct in their supply chains. While guidelines such as the UN Protect, Respect, Remedy Framework have made great strides in beginning to clarify the roles of business and government in upholding international legal standards, these advancements have so far focused only on specific aspects of responsible business conduct such as human rights and build on discrete sources of international law and voluntary standards. While the UN Protect, Respect, Remedy Framework clearly applies to supply chain relationships, the implications for what this means in practice is still being defined. In addition, MNE responsibilities related to responsible business conduct issues beyond human rights are also unclear.

47. As a result, the responsible supply chain management efforts described above have been, for the most part, the result of on-going, informal, and ad hoc

¹⁰ Aaron Bernstein, and Christopher Greenwald, "Benchmarking Corporate Policies on Labor and Human Rights in Global Supply Chains," *Capital Matters Occasional Papers*, 5, (2009), www.law.harvard.edu/programs/lwp/pensions/publications/occpapers/occasionalpapers5.pdf.

UN Global Compact, "Supply Chain Sustainability: A Practical Guide for Continuous Improvement," *The United Nations Global Compact*, (2010).

interactions between MNEs and multiple stakeholders, often in reaction to negative events. At present, there is no overarching standard to help MNEs define and manage their responsibilities for all aspects of responsible business conduct—including human rights, labor rights, environmental protection, and good governance—in their supply chains. Thus, current approaches have been developed in the absence of a comprehensive standard, mainly in response to business risks, and based on evolving definitions of good practice.

48. Additionally, as understanding of the complexity of responsible supply chain management has grown over the last twenty years since some of the first responsible business conduct challenges in supply chains came to light, a number of systemic challenges have become evident including weak government enforcement of regulations, the lack of visibility in supply chains, the transactional nature of many supply chain relationships, the lack of bargaining power, poor MNE internal alignment, and weak or perverse incentives for suppliers, among others. While the partnership approach to responsible supply chain management has evolved partly in response to these challenges, there are still considerable barriers to MNE efforts to promote responsible business conduct in supply chains.

49. **Weak government enforcement of regulations.** Although national and local laws are one of the foundations of current responsible supply chain management efforts, they are often a shaky foundation. In many geographies, government policy is poorly enforced, either because governance structures are weak, resources are inadequate, corruption is endemic, or enforcement of responsible business conduct regulation is perceived to be disadvantageous to economic development. For MNEs, this creates complex challenges related to the boundaries between government and MNE responsibility for responsible business conduct and can put MNEs in the tenuous situation of acting as regulator or police officer.

50. **Lack of visibility.** As described above, many MNEs have little visibility into their supply chains because they have minimal direct interaction with the first tier of their supply chains and with sub-tiers. Even where MNEs take a more hands-on approach to managing their supply chain relationships, it is often challenging for MNEs to get a complete and accurate understanding of the sub-tiers of their supply chains. This lack of visibility makes it difficult for MNEs to identify responsible business conduct challenges and engage with supply chain actors to appropriately address them.

51. **Transactional nature of supply chains.** Similarly, many supply chain relationships are characterized by their transitory nature. In short-term relationships focused on a one-time delivery, possibly of a product that has already been manufactured, there is little opportunity for even well-resourced and highly committed MNEs to assess and address responsible business conduct issues with specific suppliers.

52. **Lack of bargaining power.** Even in longer-term supply chain relationships based on supplier selection or strategic management supply management models, MNEs struggle with a lack of bargaining power to require responsible business conduct in the supply chain. The threat of lost business generally is not a strong deterrent for irresponsible business conduct by suppliers who can often find another buyer with less stringent requirements. Also, MNEs are often hesitant to withdraw business based on irresponsible business conduct because there are significant costs associated with switching suppliers, and in the worst case, a supplier closure has significant negative repercussions for workers and local economies. MNEs may also be unable to offer positive incentives such as

preferred contracts or higher prices for responsible business conduct to suppliers.

53. **Poor MNE internal alignment.** There is often an unresolved tension within MNEs between commercial and responsible supply chain management objectives, particularly for purchasing and supply management staff. This tension can be further aggravated by product design that does not account for responsible business conduct issues, such as setting product specifications that require the use of highly toxic chemicals, and logistics complications that create significant time pressures and lead to worker overtime requirements or insufficient rest breaks. Until responsible business conduct issues in the supply chain become a priority for all functions within MNEs, responsible supply chain management efforts may be unintentionally circumscribed by supplier requirements from other parts of the business.

54. **Weak or perverse incentives for suppliers.** The lack of internal alignment can create competing incentives for suppliers as described above. This is exacerbated by many of the responsible supply chain management approaches currently employed by MNEs which focus on negative consequences for non-compliance rather than incentives for improved or consistent performance. In these situations, it is often easier for suppliers to fake compliance using double sets of books, forged certifications, etc. Competing incentives are also introduced by governments—for example, suppliers sometimes use double sets of books to demonstrate a smaller staff and therefore decrease their tax burden or other social contribution requirements.

III. Translating Multinational Enterprise Responses into Broader Operational Principles and Standards for Responsible Supply Chain Management Conduct

A. Opportunities for Defining Responsible Supply Chain Management

55. While the approaches to responsible supply chain management described above generally represent well-intentioned efforts by MNEs and other stakeholders to address emerging and evolving challenges in responsible business conduct in the supply chain, they are limited by the deficit in understanding of what defines MNE responsibility for responsible business conduct in supply chains.

56. MNEs should seek first and foremost to meet international, national, and local laws relevant to legal business conduct in the practices of their supply chains. To clearly define MNEs' responsibilities in responsible supply chain management though, an overarching framework is also needed to define MNEs responsibilities.

57. To effectively promote responsible business conduct throughout supply chains, and to help MNEs to understand how to direct their efforts in order to meet their responsibilities, such a framework needs to take into account the complexity of supply chain relationships, the evolving nature of responsible business conduct issues, and the complicated and overlapping web of international legal and voluntary standards and national and local laws. Therefore, it is limiting to strictly define MNE responsibilities in terms of a particular type of supply chain relationship or supplier tier. For example, some of the most serious responsible business conduct issues, such as forced labor in mines in conflict-affected areas, arise in the sub-tiers of MNEs' supply chains, and a definition of responsibility and responsible supply chain management that is limited to only to the first tier of suppliers would overlook these issues.¹¹

58. Rather, what is needed is a framework that describes how MNEs themselves should define and manage their responsibilities for responsible business conduct in the supply chain based on their unique supply chain relationships and the responsible business conduct issues that may arise in the context of those relationships. The framework should provide guidance on:

- » *Assessment*: how MNEs should identify and understand the full universe of potential responsible business conduct issues in their supply chains.
- » *Prioritization*: how MNEs should prioritize these issues to determine what issues, and therefore suppliers, to engage with.
- » *Management*: how MNEs should manage prioritized issues.

59. Additionally, such a framework should emphasize that, due the evolving and emerging nature of responsible business conduct issues in the supply chain, responsible supply chain management requires an ongoing, iterative approach to assessment, prioritization, and management of issues.

¹¹ The UN Protect, Respect, Remedy Framework pointed out similar challenges with trying to identify a limited set of rights for which they may bear responsibility and concluded that there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner. See John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Human Rights Council, (2008), www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

60. A framework for defining responsible supply chain management should also specify the two types of responsible business conduct issues that MNEs should assess, prioritize, and manage:

- » *Risks to society*: potential outcomes that would have a detrimental effect on human rights, labor rights, consumer interests, the environment, economic development and inclusion, and good governance as defined in international legal and voluntary standards.
- » *Risks to business*: potential outcomes that would have a detrimental effect on achieving business success including realizing business strategies, meeting financial targets, ensuring business continuity, containing costs, protecting reputation and brand equity, meeting customer and investor expectations, and other sources of business value.

61. As described in Part II, some leading MNEs are also making positive contributions to create value through responsible supply chain management. These MNEs use assessment of responsible business conduct issues in the supply chain to identify present, emerging, and potential risks as well as opportunities for value creation. They prioritize those issues that are important to stakeholders and that have an influence on business success, and engage with suppliers to realize opportunities. While it is important to recognize that responsible supply chain management can make a positive contribution to create value for society as well as for MNEs and suppliers, the assessment, prioritization, and management of opportunities for positive contribution is beyond the scope of MNE baseline responsibility for responsible supply chain management.

62. There are a number of different concepts that MNEs have used for defining and managing baseline responsible business conduct in the supply chain and which may prove useful for establishing a comprehensive framework:

- » *Investment nexus*: the practical ability of MNEs to influence the conduct of their business partners with whom they have an investment-like relationship.
- » *Sphere of influence*: the scope of power and influence that a MNE has over the decisions and activities of suppliers.
- » *Impact*: the positive or negative change resulting from MNEs' decisions and activities.
- » *Due diligence*: the process of evaluating (and managing) the risk involved in doing business with an entity prior to establishing and during a relationship.
- » *Materiality*: the assessment of the relative importance of an issue based on its impact on MNEs' business strategy as well as its impact on society.
- » *Continuous improvement*: the process of identifying and realizing opportunities for performance improvement.

63. Below, each of these concepts is explored in detail and analyzed for usefulness in assessing, prioritizing, and managing responsible business conduct opportunities and risks to business and society.

B. Investment Nexus

64. The concept of investment nexus has been the foundation for guidance developed by the OECD Committee on International Investment and

Multinational Enterprises (CIME) on how the Guidelines are intended to apply to supply chains.¹²

65. The investment nexus concept is broadly defined as the idea that MNEs' practical ability to influence the conduct of their business partners is based on the extent to which they have an investment-like relationship. Some National Contact Points have given a broad interpretation to the concept of investment nexus, and accepted cases on supply chains and contractual relationships, while others have given the investment nexus a much more narrow interpretation, and therefore excluded similar cases.

66. At present, the OECD is the only international institution that uses the concept of investment nexus. In the OECD CIME statement on the scope of the Guidelines issued in 2003, the concept is used to provide guidance to MNEs on the scope of the applicability of the Guidelines to supply chain relationships. No other international standard or guidance references the concept.

67. There is an obvious connection between the investment nexus concept and responsible supply chain management. In particular, the concept suggests that MNEs assess and prioritize the responsible business conduct issues that arise in their supply chains based on where they have strong, investment-like relationships.

68. However, the concept is weak in three key ways. First, it does not advise on how to determine if a supply chain relationship is investment-like. The CIME statement on the scope of the Guidelines recommends a "case by case approach...that takes into all factors relevant to the nature of the relationship and the degree of influence," which leaves the meaning of investment nexus and investment-like relationships subject to interpretation.¹³

69. Second, the concept does not provide any guidance on what responsible business conduct issues MNEs should assess, prioritize, and manage. Specifically, it does not distinguish between responsible business conduct risks to society or to business. Third, the investment nexus concept lacks recommendations for MNEs on managing responsible business conduct.

70. Consequently, the concept of investment nexus is too flexible and open to interpretation to be applied as a framework for responsible supply chain management.

C. Sphere of Influence

71. The concept of sphere of influence is currently the predominant paradigm for responsible supply chain management.

72. While it is difficult to establish the exact meaning of the sphere of influence concept, it is generally used to refer to the scope and extent of power and influence that a MNE has over the decisions and activities of other entities.

73. The concept of sphere of influence is quite prevalent in international principles and standards. For example, the concept of sphere of influence will be included in the final ISO26000 standard in some form, although there are ongoing discussions by the drafting group about how the standard can be aligned with the UN Protect, Respect, Remedy Framework. The ISO26000 drafting group

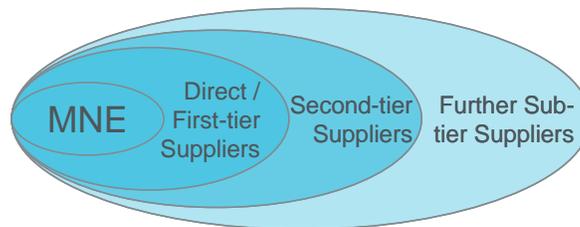
¹² OECD, "Statement by the Committee," *Scope of the Guidelines and the Investment Nexus*, (2003), www.oecd.org/document/3/0,3343,en_2649_34889_37356074_1_1_1_1.00.html.

¹³ Ibid.

discussed in May 2010 the following definition of sphere of influence: “range/extent of political, contractual, economic or other relationships through which an organization has the ability to affect the decisions or activities of individuals or organizations.”¹⁴ In addition, the drafting group recommends that the standard clarify that:

“An organization does not always have a responsibility to exercise influence purely because it has the ability to do so. For instance, it cannot be held responsible for the impacts of other organizations over which it may have some influence if the impact is not a result of its activities. However, there will be situations where an organization will have a responsibility to exercise influence. These situations will be determined by the extent to which the organization’s relationship is contributing to negative impacts.”¹⁵

74. Additionally, the UN Global Compact refers to sphere of influence to establish the scope of MNE responsibilities for application of the principles contained therein. In this context, sphere of influence was intended as a spatial metaphor: the “sphere” was expressed in concentric circles with MNE operations at the core, moving outward to suppliers, the community, and beyond, with the assumption that the “influence”—and thus presumably the responsibility—of the MNE declines from one circle to the next.¹⁶ The criteria for determine which suppliers fit into which circles was a loose paradigm based on the suppliers’ proximity to the MNE in terms of contractual relationship. However, the Global Compact’s practical guide on supply chain sustainability does not use the concept of sphere of influence.



75. While the link between the concept of sphere of influence and responsible supply chain management is clear, and can in practice be useful for identifying opportunities for positive contributions to responsible business conduct in the supply chain, there is a growing recognition that the concept is flawed both in theory and in practice.

76. First, despite its prevalence, there is still considerable lack of clarity as to the meaning of the concept. Its exact meaning in practice is highly specific to individual MNEs based on a holistic view of the business, its partnerships and relationships with other entities and governmental agencies, its legal structure and organization, as well as its physical property and operations.¹⁷ The vague use of the concept has left it overly flexible and malleable.

¹⁴ ISO, *Copenhagen Discussion Document: Copenhagen Key Topics (CKTs) – 4 May 2010*, (2010), <http://isotc.iso.org/livelink/livelink?func=ll&objId=9180193&objAction=Open>.

¹⁵ Ibid.

¹⁶ John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Human Rights Council, (2008), www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

¹⁷ Urs Gasser, post on “Corporate Social Responsibility: What is the Meaning of ‘Sphere of Influence’?” *Law and Information Blog*, entry posted October 25, 2006, <http://blogs.law.harvard.edu/ugasser/2006/10/25/corporate-social-responsibility-what-is-the-meaning-of-sphere-of-in/>.

77. Further, according to the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “sphere of influence conflates two very different meanings of influence: one is impact, where the MNE’s activities or relationships are causing human rights harm; the other is whatever leverage a MNE may have over actors that are causing harm. The first falls squarely within the responsibility to respect; the second may only do so in particular circumstances.”¹⁸ The representative goes on to explain that “anchoring corporate responsibility in the second meaning of influence requires assuming, in moral philosophy terms, that ‘can implies ought’. But MNEs cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have MNEs act whenever they have influence, particularly over governments.”¹⁹

78. As a foundation for responsible supply chain management, application of the concept of sphere of influence does not sufficiently distinguish between risks and MNEs’ capacity to exert influence. It could lead MNEs to miss considerable risks in sub-tiers of supply chains. For example, the most serious responsible business conduct issues in supply chains, e.g. child labor, forced labor, and serious violations of health and safety, often exist in sub-tiers of MNEs supply chains, precisely where influence is weak, but where significant risks may still exist. Consequently, MNE responsible supply chain management programs based on sphere of influence may not prioritize issues that are critical risks to society nor to the business itself.

79. Since the concept of sphere of influence does not provide useful guidance on assessing, prioritizing or managing responsible business conduct risks in the supply chain, and has been largely discredited in the international community, it is insufficient as a framework for responsible supply chain management.

D. Impact

80. The concept of impact is also increasingly referenced as a foundational concept for MNEs’ responsible supply chain management programs.

81. The draft ISO26000 standard defines impact as the “positive or negative change to society, economy or the environment, wholly or partially resulting from an organization’s past and present decisions and activities”.²⁰

82. Beyond the draft ISO26000 standard, impact is used in many other international standards including the UN Global Compact and the International Finance Corporation’s Policy on Social and Environmental Sustainability. In the current debate, impact is often used in place of the idea of influence—the UN Protect, Respect, Remedy Framework suggests that one meaning of influence is the concept of impact, where the MNE’s activities or relationships are causing harm. The UN Protect, Respect, Remedy Framework also uses the concept of impact to explain that the scope of corporate responsibility to respect human rights is defined by the actual and potential human rights impacts resulting from a MNE’s business activities and the relationships connected to those activities.²¹

¹⁸ Ruggie, (2008).

¹⁹ Ruggie, (2008).

²⁰ ISO, *Draft International Standard ISO/DIS26000: Guidance on Social Responsibility*, Geneva: ISO, (2009), http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/ISO_DIS_26000_Guidance_on_Social_Responsibility.pdf?no_deid=8385026&vernum=-2.

²¹ Ruggie, (2008).

83. The concept of impact has useful links to responsible supply chain management. As a framework, it is a helpful concept for MNEs to employ in evaluating opportunities for positive contributions to responsible business conduct in the supply chain. And unlike sphere of influence, it does not presuppose any geographic or spatial formula.

84. However, based on the current use of the term in international standards and principles, it is unclear if the term is limited to risks to society or if it also encompasses risks to business. While critical to assessing and understanding where MNEs might have a negative impact on society, the former interpretation would leave a gap in guidance on how MNEs should prioritize investments and engagement with suppliers to mitigate these risks based on their potential impact on the business.

85. In practice, the use of impact as a foundational framework for responsible supply chain management may result in MNEs prioritizing engagement on high societal risk issues and overlooking issues that are perceived as lower risk to society but that present serious business risk.

86. Impact is a useful framework for understanding how to prioritize engagement with responsible business conduct issues and suppliers. However, as an independent framework for responsible supply chain management, impact is not an adequate foundation for management.

E. Due Diligence

87. The concept of due diligence is often an implicit starting point for MNEs seeking to build responsible supply chain management programs.

88. Although definitions vary to some extent, the ISO26000 drafting group discussed in May 2010 the following definition of due diligence: a “comprehensive, proactive process to identify the actual and potential negative social, environmental and economic impacts of an organization’s decisions and activities, with the aim of avoiding and mitigating those impacts.”²² There are differing conceptions of due diligence as a management process versus an assessment approach that should be part of a larger, more robust management system.

89. Due diligence is currently referenced in a number of international standards and principles. In addition to ISO26000, the UN Global Compact references due diligence in its guidance on the responsibility of business to respect human rights.²³ Further, the OECD Pilot Project in the Mining and Minerals Sector is developing “draft due diligence guidance” as a framework for MNEs to manage risks related to the supply chains of minerals sourced from conflicted-affected and high-risk areas.²⁴ The UN Protect, Respect, Remedy Framework states that to discharge the responsibility to respect human rights requires due diligence and defines the core elements of human rights due diligence as:

1. Having a human rights policy;

²² ISO, *Copenhagen Discussion Document: Copenhagen Key Topics (CKTs) – 4 May 2010*, (2010), <http://isotc.iso.org/livelink/livelink?func=ll&objId=9180193&objAction=Open>.

²³ UN Global Compact, “The Ten Principles: Principle One,” *The United Nations Global Compact*, (2000), www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>.

²⁴ OECD, *Draft Due Diligence Guidance, Pilot Project in the Mining and Minerals Sector: Corporate Due Diligence for Responsible Supply Chain Management of Minerals from Conflict-Affected and High-Risk Areas*, (forthcoming).

2. Assessing human rights risks and impacts;
3. Integrating human rights throughout a company;
4. Having a mechanism to handle grievances; and
5. Tracking and reporting performance.²⁵

90. The concept of due diligence has obvious links to responsible supply chain management. As a conceptual framework, it is useful for helping MNEs assess the issues and consequently which suppliers to engage with on responsible business conduct. Further, the concept as defined by the UN Protect, Respect, Remedy Framework, which has gained considerable traction among MNEs, international organizations, and other stakeholders, also provides guidance on managing human rights issues. Because the UN Protect, Respect, Remedy Framework includes both a definition of responsibility, i.e. “do no harm,” as well as more operational guidance in the form of due diligence, it could be a key component of responsible supply chain management.

91. In view of the diversity of responsible business conduct issues covered by the Guidelines, however, the UN Protect, Respect, Remedy Framework concept of due diligence would require further elaboration with regard to providing guidance on other issues beyond human rights, such as the forthcoming guide on due diligence in minerals supply chains from the OECD.²⁶ Additionally, the concept could be further augmented with practical guidance on the balanced prioritization of risk mitigation efforts. That additional practical guidance should consider both risks to business and to society and should recognize that some environmental or social issues do not necessarily represent an equal risk to business and to society.

92. In practice, due diligence provides guidance to MNEs on the identification and management of risks to both society and business. Additional guidance on prioritization would help companies ensure a balanced mitigation of the broad range of risks related to responsible business conduct.

93. In sum, due diligence is a robust, near-comprehensive approach for assessing and managing responsible business conduct risks, and with some further adjustments, could be the core of an overarching framework for supply chain management.

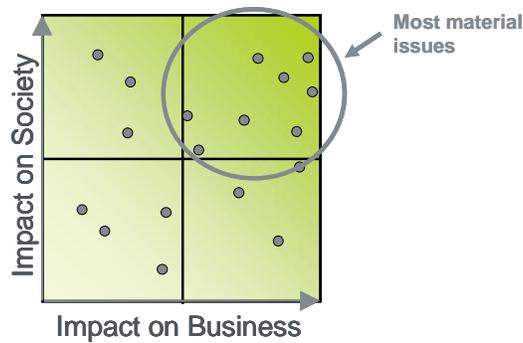
F. Materiality

94. The concept of materiality is a separate, additional interpretation of the concept of impact that considers both the effects of a responsible business conduct risk on society as well as on a MNE.

95. Materiality is generally defined as the assessment of the relative importance of an issue based on its impact on a MNE’s business strategy as well as its impact on society. Originally, the concept pertained to the reporting of business risk to regulators and investors, but has been expanded within the field of responsible business and corporate responsibility to encompass risks to business and society as well as opportunities for value creation. A responsible business materiality assessment begins by identifying all of the possible issues that could arise in the supply chain and then evaluating the potential impact of each issue on a MNE’s business success as well as its potential impact on society (using the issue’s importance to stakeholders as a proxy) to determine which issues are most material for the MNE and society.

²⁵ Ruggie, (2008).

²⁶ Ruggie, (2008).



96. The concept of materiality is not yet prevalent in international principles or standards but is increasingly used as a foundation by MNEs in responsible business reporting and strategy. For example, it is a key principle of the Global Reporting Initiative Sustainability Reporting Framework.

97. Although it is still a nascent concept in this field, materiality has clear links to responsible supply chain management. As a framework, it provides strong guidance to MNEs on the evaluation of risks to society and business as well as opportunities.

98. However, materiality does not offer a comprehensive management process for the issues that MNEs determine should be high priority. Accordingly, materiality is inadequate as a comprehensive framework for responsible supply chain management and is most useful for assessment and prioritization.

G. Continuous Improvement

99. Finally, the concept of continuous improvement, while less prevalent in international principles, is also increasingly cited as a basis for MNE responsible supply chain management programs. The UN Industrial Development Organization defines continuous improvement as “a process that identifies opportunities for performance improvement and facilitates their realization through the use of metrics, process development methodologies/approaches, project management principles, and reporting tools that support strategic and business plans”.²⁷

100. At present, continuous improvement is only included in a small number of international standards, although the UN Protect, Respect, Remedy Framework references the idea, and emphasizes an iterative approach to due diligence.²⁸ However, continuous improvement is a widely applied business concept embedded in the management systems approach and has been applied to supply chains to address quality concerns. Many MNEs have also begun to use the concept as a basis for aspects of their responsible supply chain management programs, particularly supplier capability building and management systems development.

101. The link between the concept of continuous improvement and responsible supply chain management is therefore apparent. The advantage of continuous improvement is that it provides guidance on applying an iterative approach to assessing, prioritizing, and managing responsible business conduct issues in the supply chain.

²⁷ UNIDO, *SPX Expert Corner: Supply Chain Management Glossary*, www.unido.org/index.php?id=o51310.

²⁸ Ruggie, (2008).

102. The concept is limited though because, like sphere of influence, continuous improvement may lead MNEs to focus more on the “can” than on the “ought”—on what they are more easily able to do rather than difficult issues for which they may have responsibility. It also does not offer any clarity on the types of issues—risks to society or risks to business—that should be identified and addressed.

103. In practice, a MNE responsible supply chain program based exclusively on the concept of continuous improvement might over-emphasize “quick wins” and fail to make investments in high-risk responsible business conduct issues and suppliers based on a perception of low likelihood of improvement. The continuous improvement framework applied on its own would also emphasize capability building and management systems development over (more widespread) monitoring, leaving MNEs potentially unaware of risks in unmonitored parts of their supply chains.

104. Although useful as a concept to guide implementation of a responsible supply chain management framework, continuous improvement does not provide clarity on the elements of assessment, prioritization, or management of risks to business and society. Therefore, the concept of continuous improvement is deficient as a comprehensive framework for responsible supply chain management.

H. Towards a Comprehensive Framework for Responsible Supply Chain Management

105. MNE responsible supply chain management should be based on a framework that promotes a strong understanding of where risks to the business and to society exist. Such a framework should also provide guidance on the elements of a robust management system which includes not only assessment of responsible business conduct issues in the supply chain but also processes for appropriately prioritizing and managing those issues.

106. Of the concepts reviewed, the concept of due diligence as defined by the UN Protect, Respect, Remedy Framework provides the strongest foundation for a comprehensive framework for assessing and managing responsible business conduct issues in the supply chain. Due diligence can usefully be augmented with concepts of materiality and continuous improvement that provide additional guidance on the prioritization of responsible supply chain issues, clearly specify the necessity of prioritization based on risks to business and to society, and applying a continuous improvement approach to responsible business conduct in the supply chain.

107. The three concepts illustrated below—due diligence, materiality, and continuous improvement—would together create a comprehensive framework.²⁹ As an overarching framework for responsible supply chain management, due diligence describes the steps MNEs must take to assess, prioritize, and manage responsible business conduct issues in the supply chain. Materiality offers



²⁹ See the OECD, Draft Due Diligence Guidance, Pilot Project in the Mining and Minerals Sector: Corporate Due Diligence for Responsible Supply Chain Management of Minerals from Conflict-Affected and High-Risk Areas, (forthcoming)

additional guidance specifically on the assessment and prioritization elements of due diligence to ensure that all potential impacts—risks to society as well as to business—are evaluated and prioritized. Continuous improvement provides guidance on implementation of the framework to ensure that MNEs assess, prioritize, and manage evolving and emerging risks.

IV. Developing Guidance on the Application of the OECD Guidelines to Supply Chain Relationships

A. Current Guidance on Responsible Supply Chain Management in the OECD Guidelines

108. At present, the OECD Guidelines for Multinational Enterprises offer limited guidance related to responsible supply chain management. References to suppliers are limited to the General Policies and associated Commentary, the Commentary on Disclosure, the Commentary on Environment, and the Guidance on Competition.

- » *General Policies*: MNEs are prompted to “encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines” in the General Policies. The Commentary on this General Policy focuses on why this encouragement is important to meeting the objectives of the Guidelines and on the limitations MNEs face in actually doing so. Very little is offered in terms of guidance on how to apply this Policy.
- » *Commentary on Disclosure*: Suppliers are also referenced in the Commentary on Disclosure, specifically in relation to social, environmental, and risk reporting.
- » *Commentary on Environment*: Additionally, the Commentary on Environment references the importance of engaging with suppliers (among other stakeholders) to build trust in MNEs and “understanding on environmental issues of mutual interest.”
- » *Guidance on Competition*: The Guidance on Competition encourages MNEs to “refrain from entering into or carrying out anti-competitive agreements among competitors ... to share or divide markets by allocating customers, suppliers, territories or lines of commerce.”

109. The Guidelines do not provide any definition of supplier or supply chain.

110. Additionally, the Guidelines currently make little use of the concepts described above:

- » *Investment nexus*: Investment nexus is currently not referenced at all.
- » *Sphere of influence*: The Commentary on the General Policies does refer to influence and scope of influence, which though not defined are presumed to be related to the concept of sphere of influence. The Commentary acknowledges the variation in the extent and the scope of influence that MNEs have, and also specifies that “Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships.” However, the Commentary does not provide any guidance on how MNEs can determine what influence they have with suppliers or on responsible business

conduct issues. It also does not offer any advice on how MNEs should use their influence in responsible supply chain management.

- » *Impact*: The concept of impact is referenced but not in regard to supply chain relationships.
- » *Due diligence*: Due diligence is currently not referenced at all.
- » *Materiality*: The concept of materiality is referenced but not in regard to supply chain relationships.
- » *Continuous Improvement*: The concept of continuous improvement is referenced but not in regard to supply chain relationships.

B. The Imperative for Revisions to the Guidelines on Responsible Supply Chain Management

111. There is clearly an opportunity for the OECD to significantly strengthen the guidance on responsible supply chain management provided by the Guidelines. There is also an obvious imperative to do so.

112. As discussed throughout this paper, there is no universal standard that defines the responsibilities of MNEs for the responsible business conduct issues in supply chains described above, with the exception of the UN Protect, Respect, Remedy Framework which defines responsibilities related to human rights. Not only does this create challenges for MNEs which seek direction for their well-intentioned efforts on responsible supply chain management, it also inhibits accountability for MNEs that have not proactively engaged with responsible business conduct issues in the supply chain. The OECD Guidelines are an appropriate instrument to use to clarify responsible supply chain management for four primary reasons: current relevance to MNEs and stakeholders, comprehensiveness, structure, and implementation mechanism.

113. **Current relevance.** First, as described in Part II, the Guidelines are currently used by MNEs and other stakeholders as a reference point for the baseline expectations of MNEs in responsible supply chain management. Rather than creating a new instrument for responsible business conduct in supply chains, it is more useful to integrate responsible supply chain management into existing instruments.

114. **Comprehensiveness.** The OECD Guidelines are the most comprehensive multilaterally-agreed corporate responsibility instrument currently in existence. The only other similarly comprehensive standard for responsible business conduct, the UN Global Compact, is designed for business rather than government adherence. Other international government standards are limited to specific issues in responsible business conduct.

115. **Structure.** The OECD Guidelines are also structured in a way that facilitates further guidance and clarification on responsible supply chain management, for example through Commentary. Unlike other international standards, which have little room for adjustment and no established regular method for revision, the structure of the Guidelines allow detailed guidance to be added through regular updates.

116. **Implementation mechanism.** Finally, the OECD Guidelines also have a unique implementation mechanism that can be leveraged to help further realization of any additional guidance on responsible supply chain management. Through their “specific instances” facility, National Contact Points (NCPs) offer support for resolving disputes between MNEs and stakeholders arising from

alleged non-observance of the Guidelines. Further considerations for the role of NCPs in relation to responsible supply chain management are examined below.

C. Opportunities to Provide Additional Clarity and Guidance on Responsible Supply Chain Management

117. To provide maximum guidance and clarity on how MNEs should apply the Guidelines in their supply chain relationships, the Guidelines should describe and encourage MNEs to implement a comprehensive framework that outlines how MNEs can assess, prioritize, and manage responsible business conduct issues in the supply chain. As described in Part 2, the three concepts of due diligence, materiality, and continuous improvement could be integrated to create a complete framework.

118. Based on the above analysis of the use of these concepts, it will be critical to clearly define each of these concepts in the Guidelines and to explain how they are intended to complement each other.

119. Additionally, any revision of the Guidelines should include an explanation of what is meant by suppliers and supply chain relationships. This could be included in the Concepts and Principles, where the definition of MNEs is currently addressed, or as part of any of the options described below.

120. There are a number of options to present this framework in the Guidelines:

- » *Option 1:* Revise the tenth General Policy and associated Commentary.
- » *Option 2:* Revise only the Commentary associated with the tenth General Policy.
- » *Option 3:* Revise the Commentary on Disclosure, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, and Science and Technology.
- » *Option 4:* Revise the Commentary on Disclosure, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, and Science and Technology in combination with Option 1 or 2.
- » *Option 5:* Add a special annex on the responsibilities of MNEs in applying the Guidelines to supply chain relationships.

121. Options should be considered based on their ability to provide complete guidance at a level of detail deemed appropriate by adhering governments. For example, edits to the text of the guidelines must be approved by the OECD Council, while the Commentaries are adopted at the level of the Investment Committee. Likely MNE perceptions of the level of importance of the guidance in relation to other elements of the Guidelines should also be considered. Each option is described in detail below.

122. **Option 1.** The most obvious option is to revise and expand on the tenth General Policy and Commentary that specifies that MNEs should encourage suppliers to apply principles of corporate conduct compatible with the Guidelines. This Policy could be considerably strengthened by recommending that MNEs apply the concept of due diligence to assess, prioritize, and manage material responsible business conduct impacts, as defined by the Guidelines, in their supply chain relationships.

123. The Commentary would need to be revised to explain the concept and each element of due diligence—assess, prioritize, and manage. The Commentary would also need to describe the concepts of materiality and

continuous improvement and how they should be applied by MNEs to implement the elements of due diligence.

124. The advantage of this option is that responsible supply chain management would be highlighted as a fundamental obligation of MNEs in meeting the OECD Guidelines. However, the links to specific Guidelines, such as Consumer Interests and Environment, might not be as clear.

125. **Option 2.** The Guidelines could be updated by revising only the Commentary related to the tenth General Policy without revising the Policy itself. The Commentary could be expanded as described above to present the framework of due diligence, materiality, and continuous improvement and describe responsibilities in responsible supply chain management.

126. This option, while somewhat clarifying and strengthening the Guidelines, would not send as strong of a message to MNEs about the necessity of responsible supply chain management as part of meeting the OECD Guidelines.

127. **Option 3.** Guidance on responsible supply chain management could be provided through the Commentary on Disclosure, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, and Science and Technology. This would necessitate a comprehensive explanation of the framework and descriptions of the concepts of due diligence, materiality, and continuous improvement throughout the Commentary of the Guidelines.

128. While the importance of responsible supply chain management would be emphasized by including it in so many places, the guidance would be somewhat difficult to access and may be perceived as a weak recommendation by MNEs. The guidance might also become repetitive, which would weaken the Guidelines overall by unnecessarily lengthening them.

129. **Option 4.** A revision of the tenth General Policy or the General Policies Commentary could be complemented by additional guidance through changes to the Commentary on Disclosure, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, and Science and Technology. Because the framework and concepts would be clearly explained in the tenth General Policy and Commentary, it would not be necessary to repeat that information. Rather, the expanded Commentaries could offer more detail on how MNEs should apply the framework specifically to the subject of each chapter.

130. This option would be helpful for providing more detailed guidance on responsible supply chain management and emphasizing its importance throughout the Guidelines. However, it would also disaggregate the guidance and potentially make it more difficult for MNEs to comprehensively identify responsibilities.

131. **Option 5.** Finally, the Guidelines could provide stronger and clearer guidance on responsible supply chain management by adding a special annex on the responsibilities of MNEs in applying the Guidelines to supply chain relationships.

132. Because this would be a new format for the Guidelines, the options for how this could be designed are numerous. In general, an annex could cover many of the topics described above—an overall framework for applying the Guidelines in supply chain relationships and an explanation of how the concepts of due diligence, materiality, and continuous improvement should be applied to

assessment, prioritization, and management of responsible business conduct for responsible supply chain management. An annex could also provide more detailed guidance on how MNEs can apply the framework to the specific topics covered by the Guidelines.

133. The advantage of this option, like the option of strengthening the tenth General Policy and the General Policies Commentary, is that all of the guidance would be captured in one place in the Guidelines and easily accessible. As described, a special annex would also be the most comprehensive of the options discussed. However, the lack of precedent for a special annex could create a challenge with regard to the perception by MNEs. On the one hand, a special annex could be perceived as emphasizing the importance of responsible supply chain management. However, by separating the guidance from the existing guidance and formatting it differently, responsible supply chain management could be interpreted as a topic not integral to the Guidelines. One alternative would be to create a “reference annex” that gathers together the Guidelines text and Commentary from various sections so that these are accessible in one place, though without any official status beyond being a collection of related text that has been approved by adhering governments.

D. Considerations for the Role of the National Contact Points

134. Finally, it is important to consider how revisions to the Guidelines to provide guidance on supply chain relationships might impact the role of the NCPs and whether any additional guidance is needed in Part II of the Guidelines. This implementation mechanism is unique among international responsible business conduct instruments and as such presents unique opportunities to further realization of the guidance provided on responsible supply chain management.

135. The terms of reference for the update of the Guidelines covers procedural provisions and institutional issues related to NCPs, including promotion of the Guidelines, implementation in specific instances, NCP co-operation, and peer learning. In practice, new guidance related to responsible business conduct in supply chains, if adopted by adhering governments, will also require careful consideration of how the NCP mechanism will be affected.

136. Currently, the Procedural Guidance and associated Commentary do not offer any guidance specifically related to MNEs’ application of the Guidelines in supply chain relations.

137. Specific instances of responsible business conduct issues in supply chains will be more difficult to resolve because supply chain relationships are complex and relationships can be unclear. Each specific instance will likely have particular complexities. For example, many suppliers in global MNE supply chains are based in non-adhering countries. The Commentary does however provide some direction on the role of NCPs in the event that Guidelines-related issues arise in a non-adhering country and this will be further expanded by the update process. However, it is important that each specific instance be carefully implemented with due caution and concern for all the parties involved, and in the spirit of shared learning and problem solving.

138. More specifically, NCPs will require information and guidance about responsible business conduct issues in supply chains, responsible supply chain management practices, and guidance in promoting this aspect of the Guidelines. They will also require guidance on implementing the specific instances facility—specifically on which instances to accept, procedures for further investigation, and guidance on mediation and adjudication, and how to pursue peer learning

opportunities. In addition, guidance related to third-party standing will be particularly important given that responsible business conduct issues in supply chains typically involve multiple parties who share responsibility in some way.

139. Given the options for revising the Guidelines described above, resolution of an issue either through mediation or adjudication could require confirmation that MNEs had implemented the responsible supply chain management framework to assess, prioritize, and manage responsible business conduct issues in the supply chain. Mediation and adjudication could center on demonstration of MNE efforts to implement the framework recommended in the Guidelines.

140. To offer further guidance, the Procedural Guidance and Commentary could be expanded to provide detail on which specific elements of the responsible supply chain management framework NCPs should take into account in making an initial assessment of whether the issue raised merits further examination and in crafting a statement and recommendations, if needed.

141. The Procedural Guidance and Commentary could also be revised to further clarify the need for full transparency. Because the issues associated with responsible business conduct in the supply chain continue to evolve, and the framework described above places the onus for defining and managing responsibilities on MNEs, there will be considerable learning opportunities that arise from issues brought to NCPs. Guidance on how to disseminate information on issues that have been raised would support MNE efforts to appropriately implement the responsible supply chain management framework.

V. Conclusion

142. At present, the Guidelines do not adequately reflect the challenges MNEs face in responsible supply chain management or provide appropriate guidance on MNE responsibilities to improve responsible business conduct in global supply chains.

143. The OECD has identified a critical opportunity to strengthen the OECD Multinational Guidelines on the application of the OECD Guidelines to supply chain relationships, which will not only improve the Guidelines themselves but advance the field of international standards and principles that MNEs rely on to improve responsible supply chain management.

144. Guidance should include clear definition of MNEs responsibilities related to responsible business conduct in supply chains and enable MNEs to assess, prioritize, and manage risks to society and risks to business.

145. This topic is rapidly evolving and will likely need more frequent updating and clarification in the future. The June 30th workshop is an important first step to ensuring the Guidelines reflect the latest thinking and practice in responsible supply chain management by MNEs.



Al-Adsani v. United Kingdom

European Court of Human Rights

Application No. 35763/97

European Human Rights Reports 34 (2002) 11, p. 273 et seq.

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(The President , Judge Wildhaber ; Judges Palm , Rozakis , Costa , Ferrari Bravo , Gaukur Jörundsson , Gaflisch , Loucaides , Cabral Barreto , Jungwiert , Bratza , Zupancic , Vajic , Pellonpää , Tsatsa-Nikolovska , Levits , Kovler)

21 November 2001

H1 The applicant, who has joint British and Kuwaiti citizenship, returned to Kuwait in 1991 to assist in the fight against the Iraqi invasion. During the course of the war, he obtained video evidence of a relative of the Emir of Kuwait ("the Sheikh") engaging in sexual activities. These videos subsequently entered general circulation, for which the Sheikh blamed the applicant.

H2 Following the expulsion of the Iraqi forces, the applicant alleged he was abducted and tortured by the Sheikh. When the applicant returned to Britain he required hospital treatment for burns covering 25 per cent of his body, as well as various psychological problems.

H3 The applicant initiated civil proceedings in England against the Sheikh and the Government of Kuwait in respect of injury to his physical and mental health caused by the torture as well as subsequent threats against his life made after his return to Britain. He obtained default judgment against the Sheikh but was prevented from pursuing his claim against the government of Kuwait due to domestic legislation conferring immunity on the State.

H4 The applicant alleges that this immunity violates Articles 3 and 6 of the Convention.

H5 Held, unanimously

(1) unanimously that there has been no violation of Article 3 of the Convention.

(2) by nine votes to eight that there has been no violation of Article 6(1) of the Convention.

Failure of the State to assist a citizen in achieving a remedy. (Article 3, taken together with Article 1 and Article 13).

1.

H6 (a) The applicant contended that, by granting immunity from civil suit to the Kuwaiti government, the United Kingdom had failed to secure his right not to be tortured, contrary to Article 3 of the Convention read in conjunction with Articles 1 and 13. [35]

H7 (b) The obligation undertaken by a Contracting State under Article 1 of the Convention is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction". Whilst Articles 1 and 3 together place a number of positive obligations on the High *274 Contracting Parties designed to prevent and provide redress for torture and other forms of ill-treatment, the obligation applies only in relation to ill-treatment allegedly committed within its jurisdiction. [37]-[38]

H8 (c) Article 3 has some limited extraterrito-



rial application, to the extent that the decision by a Contracting State to expel an individual might engage the responsibility of that State under the Convention. However, liability would be incurred by the expelling Contracting State by reason of its having taken action which had, as a direct consequence, the exposure of an individual to proscribed ill treatment. [39]

H9 (d) The alleged torture did not take place within the jurisdiction of the United Kingdom. Further, the United Kingdom authorities did not have any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities. It therefore follows that there has been no violation of Article 3 in the present case. [40]-[41]

State immunity as the denial of access to a court. (Article 6(1)).

2.

H10 (a) The applicant alleged that he was denied access to court in the determination of his claim against the Government of Kuwait and that this constitutes a violation of Article 6(1) of the Convention. [42]

H11 (b) Article 6(1) does not itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States. It extends only to disputes over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. The Convention enforcement bodies may not create, by way of interpretation of Article 6(1), a substantive civil right which has no legal basis in the State concerned. [46]-[47]

H12 (c) The proceedings which the applicant intended to pursue were for damages for personal injury. The Court does not accept the

Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right. The Court is satisfied that there existed a serious and genuine dispute over civil rights. Article 6(1) was therefore applicable to the proceedings in question. [48]-[49]

H13 (d) The procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court. Thus, Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court. [52]

H14 (e) The right of access to court is not absolute, but may be subject to limitations. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not ***275** pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. [53]

H15 (f) Sovereign immunity is a concept of international law, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote good relations between States



through the respect of another State's sovereignty. [54]

H16 (g) The Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties. Article 31(3)(c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity. [55]

H17 (h) It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity. [56]

H18 (i) Following the decision to uphold Kuwait's claim to immunity, the domestic courts were never required to examine evidence relating to the applicant's allegations, which have, therefore, never been proved. However, for the purposes of the present judgment, the Court accepts that the ill-treatment alleged by the applicant against Kuwait in his pleadings in the domestic courts can properly be categorised as torture within the meaning of Article 3 of the Convention. [58]

H19 (j) Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law. In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*.

H20 (k) On the basis of these authorities, the prohibition of torture has achieved the status of a peremptory norm in international law. However, the present case concerns not the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the *276 territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred relates to civil proceedings or to State immunity. [61]

H21 (l) It is not established that there is acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. [66]



H22 (m) The decision by the English courts to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to court. There has been no violation of Article 6(1) in this case. [67]

H23 Representation

Mr J. Foakes (Agent), Mr D. Lloyd-Jones Q.C. (Counsel), Mr D. Anderson Q.C. (Counsel), for the Government.

Mr J. McDonald Q.C. (Counsel), Mr O. Davies Q.C. (Counsel), Mr G. Bindman (Advisor), Ms J. Kemish (Advisor), for the Applicant.

H24 The following cases are referred to in the Court's judgment:

1. *A v. United Kingdom*: (1999) 27 E.H.R.R. 611 .
2. *Aksoy v. Turkey*: (1997) 23 E.H.R.R. 553 .
3. *Assenov v. Bulgaria*: (1999) 28 E.H.R.R. 652 .
4. *Fayed v. United Kingdom*: (1994) 18 E.H.R.R. 393 .
5. *Golder v. United Kingdom*: (1994) 18 E.H.R.R. 393 .
6. *Hornsby v. Greece*: (1997) 24 E.H.R.R. 250 .
7. *Loizidou v. Turkey*: (1997) 23 E.H.R.R. 51 .
8. *Osman v. United Kingdom*: (2000) 29 E.H.R.R. 245.
9. *Selmouni v. France*: (2000) 29 E.H.R.R. 403 .

10. *Soering v. United Kingdom*: (1989) 11 E.H.R.R. 439 .

11. *Waite and Kennedy v. Germany*: (2000) 30 E.H.R.R. 261 .

12. *Z and Others v. United Kingdom*: (2002) 34 E.H.R.R. 3 .

13. *Al-Adsani v. Government of Kuwait* 100 I.L.R. 465 .

14. *Argentine Republic v. Amerada Hess Shipping Corporation* 488 U.S. 428 (1989) .

15. *Controller and Auditor General v. Sir Ronald Davidson* [1996] 2 N.Z.L.R. 278 .

16. *Flatow v. Islamic Republic of Iran* 76 F.Supp. 2d 16, 18 (DDC 1999)).

17. *Princz v. Federal Republic of Germany* 26 F.3d 1166 (DC. Cir. 1994) at 1176-1185.

18. *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinichet Ugarte (No. 3)* [2000] A.C. 147 .

19. *Saudi Arabia v. Nelson* 100 I.L.R. 544 .

20. *Siderman de Blake v. Republic of Argentina* 965 F. 2d 699 (9th Cir. 1992).

The Facts

1. The circumstances of the case

A. The alleged ill-treatment

9 The applicant made the following allegations concerning the events *277 underlying the dispute he submitted to the courts of the United Kingdom. The Government stated that it was not in a position to comment on the accu-



racy of these claims.

10 The applicant, who is a trained pilot, went to Kuwait in 1991 to assist in its defence against Iraq. During the Gulf War he served as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sexual video tapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah ("the Sheikh"), who is related to the Emir of Kuwait and is said to have an influential position in Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh.

11 After the Iraqi armed forces were expelled from Kuwait, on or about 2 May 1991, the Sheikh and two others gained entry to the applicant's house, beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison. The applicant was falsely imprisoned there for several days during which he was repeatedly beaten by security guards. He was released on 5 May 1991, having been forced to sign a false confession.

12 On or about 7 May 1991 the Sheikh took the applicant at gunpoint in a government car to the palace of the Emir of Kuwait's brother. At first the applicant's head was repeatedly held underwater in a swimming pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol, as a result of which the applicant was seriously burnt.

13 Initially the applicant was treated in a Kuwaiti hospital, and on 17 May 1991 he returned to England where he spent six weeks in hospital being treated for burns covering 25 per cent of his total body surface area. He also suffered psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder, aggravated by the fact that, once in England, he received

threats warning him not to take action or give publicity to his plight.

B. The civil proceedings

14 On 29 August 1992 the applicant instituted civil proceedings in England for compensation against the Sheikh and the Government of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom on 17 May 1991. On 15 December 1992 he obtained a default judgment against the Sheikh.

15 The proceedings were re-issued after an amendment to include two named individuals as defendants. On 8 July 1993 a deputy High Court judge *ex parte* gave the applicant leave to serve the proceedings on the individual defendants. This decision was confirmed in chambers on 2 August 1993. He was not, however, granted leave to serve the writ on the Kuwaiti Government. *278

16 The applicant submitted a renewed application to the Court of Appeal, which was heard *ex parte* on 21 January 1994. Judgment was delivered the same day.

The court held, on the basis of the applicant's allegations, that there were three elements pointing towards governmental responsibility for the events in Kuwait: first, the applicant had been taken to a State prison; secondly, Government transport had been used on 2 and 7 May 1991; and, thirdly, in the prison he had been mistreated by public officials. It found that the applicant had established a good arguable case, based on principles of international law, that Kuwait should not be afforded immunity under [section 1\(1\)](#) of the State Immunity Act 1978 ("the 1978 Act") [FN1] in respect of acts of torture. In addition, there was medical evidence indicating that the applicant had suffered damage (post-traumatic



stress) while in the United Kingdom. It followed that the conditions in [order 11 rule 1\(f\)](#) of the Rules of the Supreme Court had been satisfied [FN2] and that leave should be granted to serve the writ on the Kuwait Government.

FN1 See para. 21 below.

FN2 See para. 20 below.

17 The latter, after receiving the writ, sought an order striking out the proceedings. The application was examined, *inter partes*, by the High Court on 15 March 1995. In a judgment delivered the same day the court held that it was for the applicant to show on the balance of probabilities that the Government of Kuwait were not entitled to immunity under the 1978 Act. It was prepared provisionally to accept that the Government was vicariously responsible for conduct that would qualify as torture under international law. However, international law could be used only to assist in interpreting lacunae or ambiguities in a statute, and when the terms of a statute were clear, the statute had to prevail over international law. The clear language of the 1978 Act bestowed immunity upon sovereign States for acts committed outside the jurisdiction and, by making express provision for exceptions, it excluded as a matter of construction implied exceptions. As a result, there was no room for an implied exception for acts of torture in section 1(1) of the 1978 Act. Moreover, the court was not satisfied on the balance of probabilities that the Kuwaiti Government were responsible for the threats made to the applicant after 17 May 1991. As a result, the exception provided for by [section 5](#) of the 1978 Act could not apply. It followed that the action against the Government should be struck out.

18 The applicant appealed and the Court of Appeal examined the case on 12 March 1996. The court held that the applicant had not established on the balance of probabilities that the Kuwaiti Government was responsible for

the threats made in the United Kingdom. The important question was, therefore, whether State immunity applied in respect of the alleged events in Kuwait. Lord Justice Stuart-Smith finding against the applicant, observed:

***279**

Jurisdiction of the English court in respect of foreign States is governed by the State Immunity Act 1978. [Section 1\(1\)](#) provides:

'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. ...'

... The only relevant exception is [section 5](#), which provides:

'A State is not immune as respects proceedings in respect of--

(a) death of personal injury ...

caused by an act or omission in the United Kingdom.'

It is plain that the events in Kuwait do not fall within the exception in section 5, and the express words of section 1 provide immunity to the First Defendant. Despite this, in what [counsel] for the Plaintiff acknowledges is a bold submission, he contends that that section must be read subject to the implication that the State is only granted immunity if it is acting within the Law of Nations. So that the section reads: 'A State acting within the Law of Nations is immune from jurisdiction except as provided ...'

... The argument is ... that international law against torture is so fundamental that it is a *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principles of sovereign immunity. No authority is cited for this proposition. ... At common law, a sovereign State could not be sued at all against its will in the courts of this country. The 1978 Act, by the exceptions therein set out, marks substantial inroads into this principle. It is inconceivable, it seems to me, that the draughtsman, who must have been well aware of the various interna-



tional agreements about torture, intended section 1 to be subject to an overriding qualification.

Moreover, authority in the United States at the highest level is completely contrary to [counsel for the applicant's] submission. [FN3] ... [Counsel] submits that we should not follow the highly persuasive judgments of the American courts. I cannot agree.

FN3 Lord Justice Stuart-Smith referred to the judgments of the United States courts, Argentine Republic v. Amerada Hess Shipping Corporation 488 U.S. 428 (1989) ; Siderman de Blake v. Republic of Argentina 965 F.2d 699 (9th Cir. 1992) , in both of which the court rejected the argument that there was an implied exception to the rule of State immunity where the State acted contrary to the Law of Nations.

... A moment's reflection is enough to show that the practical consequences of the Plaintiff's submission would be dire. The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination. ...

DPAG1The other two members of the Court of Appeal, Lord Justice Ward and Mr Justice Buckley, also rejected the applicant's claim. Lord Justice Ward commented that "there may

be no international forum (other than the forum of the *locus delicti* to whom a victim of torture *280 will be understandably reluctant to turn) where this terrible, if established, wrong can receive civil redress".

19 On 27 November 1996 the applicant was refused leave to appeal by the House of Lords. His attempts to obtain compensation from the Kuwaiti authorities via diplomatic channels have proved unsuccessful.

II. Relevant legal materials

A. Jurisdiction of English courts in civil matters

20 There is no rule under English law requiring a plaintiff to be resident in the United Kingdom or to be a British national before the English courts can assert jurisdiction over civil wrongs committed abroad. Under the rules in force at the time the applicant issued proceedings, the writ could be served outside the territorial jurisdiction with the leave of the court when the claim fell within one or more of the categories set out in [order 11, rule 1](#) of the Rules of the Supreme Court. For present purposes only rule 1(f) is relevant:

... service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ ...

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction ...

B. The State Immunity Act 1978

21 The State Immunity Act 1978 provides, so far as relevant:

1.

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act ...

5. A State is not immune as regards pro-



ceedings in respect of--

(a) death or personal injury; ...

caused by an act or omission in the United Kingdom ...

C. The Basle Convention

22 The above provision [FN4] was enacted to implement the 1972 European Convention on State Immunity ("the Basle Convention"), a Council of Europe instrument, which entered into force on 11 June 1976 after its ratification by three States. It has now been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed by one other State (Portugal). Article 11 of the Convention provides:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

FN4 s.5 of the 1978 Act.

Article 15 of the Basle Convention provides that a Contracting State ***281** shall be entitled to immunity if the proceedings do not fall within the stated exceptions.

D. State immunity in respect of civil proceedings for torture

23 In its Report on Jurisdictional Immunities of States and their Property (1999), the Working Group of the International Law Commission ("the ILC") found that over the preceding decade a number of civil claims had been brought in municipal courts, particularly in the United States and United Kingdom, against foreign Governments, arising out of acts of torture committed not in the territory of the forum

State but in the territory of the defendant and other States. The Working Group of the ILC found that national courts had in some cases shown sympathy for the argument that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded. [FN5]

FN5 The Working Group cited the following cases in this connection: (United Kingdom) *Al-Adsani v. Government of Kuwait* 100 I.L.R. 465 at 471; (New Zealand) *Controller and Auditor General v. Sir Ronald Davidson* [1996] 2 N.Z.L.R. 278, particularly at 290 (*per* Cooke P.); Dissenting Opinion of Justice Wald in (United States) *Princz v. Federal Republic of Germany* 26 F.3d 1166 (DC. Cir. 1994) at 1176-1185; *Siderman de Blake v. Republic of Argentina*, *loc cit.*; *Argentine Republic v. Amerada Hess Shipping Corporation*, *loc. cit.*; *Saudi Arabia v. Nelson* 100 I.L.R. 544.

24 The Working Group of the ILC did, however, note two recent developments which it considered gave support to the argument that a State could not plead immunity in respect of gross human rights violations. One of these was the House of Lords' judgment in *Ex parte Pinochet* (No. 3). [FN6] The other was the amendment by the United States of its Foreign Sovereign Immunities Act (FSIA) to include a new exception to immunity. This exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, applies in respect of a claim for damages for personal injury or death caused by an act of torture, extra-judicial killing, aircraft sabotage or hostage-taking, against a State designated by the Secretary of State as a sponsor of terrorism, where the claimant or victim was a national of the United States at the time the act occurred.

FN6 *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3) [2000] A.C. 147.



In its judgment in the case of *Flatow v. Islamic Republic of Iran and Others*, [FN7] the District Court for the District of Columbia confirmed that the property of a foreign State was immune from attachment or execution, unless the case fell within one of the statutory exceptions, for example that the property was used for commercial activity.

FN7 76 F. Sup. 2d 16, 18 (DDC 1999).

E. The prohibition of torture in Kuwait and under international law

25 The Kuwaiti Constitution provides in Article 31 that:

No person shall be put to torture. ***282**

26 Article 5 of the Universal Declaration of Human Rights 1948 states:

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

27 Article 7 of the International Covenant on Civil and Political Rights 1966 states as relevant:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

28 The United Nations 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides in Article 3 that:

No State may permit or tolerate torture and other cruel inhuman or degrading treatment or punishment.

29 In the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, adopted on 10 December 1984 ("the UN Convention"), torture is defined as:

For the purposes of this Convention, the

term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The UN Convention requires by Article 2 that each State Party is to take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and by Article 4 that all acts of torture be made offences under each State's criminal law.

30 In its judgment in *Prosecutor v. Furundzija*, [FN8] the International Criminal Tribunal for the Former Yugoslavia observed as follows:

144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency ... This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*. ... This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

FN8 10 December 1998, case No. I T-95-17/I-T, (1999) 38 ILM 317.

145. These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in



torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been ***283** granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders. ...

146. The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.

147. There exists today universal revulsion against torture This revulsion, as well as the importance States attach to the eradication of torture, has led to a cluster of treaty and customary rules on torture acquiring a particularly high status in the international, normative system ...

151. ... [T]he prohibition of torture imposes on States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community ... 153. ... [T]he other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force.

154. Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. ...

31 Similar statements were made in Prosecutor v. Delacic and Others [FN9] and Prosecutor v. Kunarac. [FN10]

FN9 16 November 1998, case No. IT-96-21-T, para. 454.

FN10 22 February 2001, case No. IT-96-23-T and IT-96-23/1, Para. 466.

F. Criminal jurisdiction of the United Kingdom over acts of torture

32 The United Kingdom ratified the UN Convention with effect from 8 December 1988.

33 [Section 134](#) of the Criminal Justice Act 1988, which entered into force on 29 September 1988, made torture, wherever committed, a criminal offence under United Kingdom law triable in the United Kingdom.

34 In its Ex parte Pinochet Ugarte (No. 3) judgment of 24 March 1999, [FN11] the House of Lords held that the former President of Chile, Senator Pinochet, could be extradited to Spain in respect of charges which concerned conduct that was criminal in the United Kingdom at the time when it was allegedly committed. The majority of the Law Lords considered that extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect. The majority considered that although under Part II of the State Immunity Act 1978 a former head of State enjoyed ***284** immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity, torture was an international crime and prohibited by *jus cogens* (peremptory norms of international law). The coming into force of the UN Convention against Torture [FN12] had created a universal criminal jurisdiction in all the Contracting States in respect of acts of torture by public officials, and the States Parties could not have intended that an immunity for ex-heads of



State for official acts of torture would survive their ratification of that Convention. The House of Lords [FN13] made clear that their findings as to immunity *ratione materiae* from criminal jurisdiction did not affect the immunity *ratione personae* of foreign sovereign States from civil jurisdiction in respect of acts of torture.

FN11 *loc. cit.*

FN12 See para. 29 above.

FN13 In particular, Lord Millet at p. 278.

JUDGMENT

I. Alleged violation of Article 3 of the Convention

35 The applicant contended that the United Kingdom had failed to secure his right not to be tortured, contrary to Article 3 of the Convention read in conjunction with Articles 1 and 13.

Article 3 provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 1 provides:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.

Article 13 provides:

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons in an official capacity.

He submitted that, correctly interpreted, the above provisions taken together required the British Government to assist one of its citizens

in obtaining an effective remedy for torture against another State. The grant of immunity from civil suit to the Kuwaiti Government had, however, frustrated this purpose.

36 The Government submitted that the complaint under Article 3 failed on three grounds. First, the torture was alleged to have taken place outside the United Kingdom's jurisdiction. Secondly, any positive obligation deriving from Articles 1 and 3 could extend only to the prevention of torture, not to the provision of compensation. Thirdly, the grant of immunity to Kuwait was not in any way incompatible with the obligations under the Convention.

37 The Court recalls that the engagement undertaken by a Contracting ***285** State under Article 1 of the Convention is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction". [FN14]

FN14 See, *Soering v. United Kingdom*: (1989) 11 E.H.R.R. 439, para. 86.

38 It is true that, taken together, Articles 1 and 3 place a number of positive obligations on the High Contracting Parties, designed to prevent and provide redress for torture and other forms of ill-treatment. Thus, in the *A v. United Kingdom* judgment [FN15] the Court held that, by virtue of these two provisions, States are required to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment. In the *Aksoy v. Turkey* judgment [FN16] it was established that Article 13 in conjunction with Article 3 impose an obligation on States to carry out a thorough and effective investigation of incidents of torture, and in *Assenov and Others v. Bulgaria*, [FN17] the Court held that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under



Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. However, in each case the State's obligation applies only in relation to ill-treatment allegedly committed within its jurisdiction.

FN15 A v. United Kingdom: (1999) 27 E.H.R.R. 611, para. 22.

FN16 Aksoy v. Turkey: (1997) 23 E.H.R.R. 553, para. 98.

FN17 Assenov v. Bulgaria: (1999) 28 E.H.R.R. 652, para. 102.

39 In the above-mentioned Soering case the Court recognised that Article 3 has some, limited, extraterritorial application, to the extent that the decision by a Contracting State to expel an individual might engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person concerned, if expelled, faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In the judgment it was emphasised, however, that in so far as any liability under the Convention might be incurred in such circumstances, it would be incurred by the expelling Contracting State by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment. [FN18]

FN18 *loc. cit.*, para. 91.

40 The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to

the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.

41 It follows that there has been no violation of Article 3 in the present case. ***286**

II. Alleged violation of Article 6(1) of the Convention

42 The applicant alleged that he was denied access to court in the determination of his claim against the Government of Kuwait and that this constituted a violation of Article 6(1) of the Convention, which provides in its first sentence:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

43 The Government submitted that Article 6(1) did not apply to the proceedings, but that, even if it did, any interference with the right of access to court was compatible with its provisions.

A. Applicability of Article 6(1) of the Convention

1. The submissions of the parties

44 The Government contended that Article 6(1) of the Convention had no applicability in the present case on a number of grounds. It pointed out that the applicant had not made any allegation in the domestic courts that the Government of Kuwait was responsible for the events of 7 May 1991, when he was severely burned, [FN19] and it submitted that it was not therefore open to him to complain before the European Court of a denial of access to court in respect of those alleged events. In addition, it claimed that Article 6 could not extend to matters outside the State's jurisdiction, and that as international law required an immunity in the



present case, the facts fell outside the jurisdiction of the national courts and, consequently, Article 6. Unlike the Osman case, [FN20] the present case concerned a clear, absolute and consistent exclusionary rule of English law. Applying the Osman test, the case fell outside the scope of Article 6.

FN19 Para. 12 above.

FN20 Osman v. United Kingdom: (2000) 29 E.H.R.R. 245, para. 138.

45 The applicant accepted that he had not alleged in the first instance *inter partes* hearing on 15 March 1995 [FN21] that the Government of Kuwait was responsible for the events of 7 May 1991. He underlined, however, that he had made clear in the Court of Appeal that he would seek to amend his statement of claim to add those events if the claim for immunity failed and he believed that he would have been allowed to make the amendment in those circumstances. As to the jurisdictional point, he observed that torture is a civil wrong in English law and that the United Kingdom asserts jurisdiction over civil wrongs committed abroad in certain circumstances. [FN22] The domestic courts accepted jurisdiction over his claims against the individual defendants. His claim against the Kuwaiti Government was not defeated because ***287** of its nature but because of the identity of the defendant. Thus, in the applicant's submission, Article 6(1) was applicable.

FN21 Para. 17 above.

FN22 Para. 20 above.

2. The Court's assessment

46 The Court recalls its constant case law to the effect that Article 6(1) does not itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States. It extends only to *contesta-*

tions (disputes) over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. [FN23]

FN23 Z and Others v. United Kingdom: (2002) 34 E.H.R.R. 3 , and the authorities cited therein.

47 Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6(1) may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) --namely that civil claims must be capable of being submitted to a judge for adjudication--if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons. [FN24]

FN24 See Fayed v. United Kingdom: (1994) 18 E.H.R.R. 393 , para. 65.

48 The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to English law. The Court does not accept the Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred *in limine* : if the defendant State waives immunity, the action will proceed to a hearing and judgment. The



grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.

49 The Court is accordingly satisfied that there existed a serious and genuine dispute over civil rights. It follows that Article 6(1) was applicable to the proceedings in question.

B. Compliance with Article 6(1)

1. The submissions of the parties

50 The Government contended that the restriction imposed on the applicant's right of access to court pursued a legitimate aim and was ***288** proportionate. The 1978 Act reflected the provisions of the Basle Convention, [FN25] which in turn gave expression to universally applicable principles of public international law and, as the Court of Appeal had found, there was no evidence of a change in customary international law in this respect. Article 6(1) of the Convention could not be interpreted so as to compel a Contracting State to deny immunity to and assert jurisdiction over a non-Contracting State. Such a conclusion would be contrary to international law and would impose irreconcilable obligations on the States that had ratified both the Convention and the Basle Convention.

FN25 Para. 22 above.

There were other, traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim.

51 The applicant submitted that the restriction on his right of access to court did not serve a legitimate aim and was disproportionate. The House of Lords in *Ex parte Pinochet (No. 3)* [FN26] had accepted that the prohibition of torture had acquired the status of a *jus cogens* norm in international law and that torture had

become an international crime. In these circumstances there could be no rational basis for allowing sovereign immunity in a civil action when immunity would not be a defence in criminal proceedings arising from the same facts.

FN26 *loc. cit.*

Other than civil proceedings against the Kuwaiti Government, he complained that there was no effective means of redress available to him. He had attempted to make use of diplomatic channels but the United Kingdom Government refused to assist him, and although he had obtained judgment by default against the Sheikh, the judgment could not be executed because the Sheikh had no ascertainable recoverable assets in the United Kingdom.

2. The Court's assessment

52 In the *Golder* case the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court. [FN27]

FN27 See *Golder v. United Kingdom*: (1994) 18 E.H.R.R. 393, para. 65.

53 The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right ***289** of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to



the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. [FN28]

FN28 See *Waite and Kennedy v. Germany*: (2000) 30 E.H.R.R. 261, para. 59.

54 The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

55 The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31(3)(c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. [FN29] The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of

State immunity.

FN29 See, *mutatis mutandis*, *Loizidou v. Turkey*: (1997) 23 E.H.R.R. 513, para. 43.

56 It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

57 The Court notes that the 1978 Act, applied by the English courts so as to afford immunity to Kuwait, complies with the relevant provisions of the 1972 Basle Convention, which, while placing a number of ***290** limitations on the scope of State immunity as it was traditionally understood, preserves it in respect of civil proceedings for damages for personal injury unless the injury was caused in the territory of the forum State. [FN30] Except in so far as it affects claims for damages for torture, the applicant does not deny that the above provision reflects a generally accepted rule of international law. He asserts, however, that his claim related to torture, and contends that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.

FN30 Para. 22 above.

58 Following the decision to uphold Kuwait's claim to immunity, the domestic courts were never required to examine evidence relating to the applicant's allegations, which have, therefore, never been proved. However, for the purposes of the present judgment, the Court ac-



cepts that the ill-treatment alleged by the applicant against Kuwait in his pleadings in the domestic courts, namely, repeated beatings by prison guards over a period of several days with the aim of extracting a confession, [FN31] can properly be categorised as torture within the meaning of Article 3 of the Convention. [FN32]

FN31 Para. 11 above.

FN32 *cf.* Selmouni v. France: (2000) 29 E.H.R.R. 403 and also Aksoy v. Turkey, *loc. cit.*

59 Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances. [FN33] Of all the categories of ill-treatment prohibited by Article 3, "torture" has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering. [FN34]

FN33 See, for example, Aksoy v. Turkey, *loc. cit.*, and the cases cited therein.

FN34 *ibid.*, para. 63 and see also the cases referred to in paras 38-39 above.

60 Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's

criminal law. [FN35] In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*. For example, in its judgment of 10 December 1998 in the Furundzija case, [FN36] the ***291** International Criminal Tribunal for the Former Yugoslavia referred, *inter alia*, to the foregoing body of treaty rules and held that "[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules". Similar statements have been made in other cases before that Tribunal and in national courts, including the House of Lords in the case of *Ex parte Pinochet* (No. 3).

FN35 Paras 25-29 above.

FN36 Para. 30 above.

61 While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in the Furundzija and Pinochet decisions, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to [FN37] relates to civil proceeding or to state immunity.

FN37 Article 5 of the Universal Declaration of



Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the United Nations Convention against Torture.

62 It is true that in its Report on Jurisdictional Immunities of States and their Property [FN38] the Working Group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the Working Group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded.

FN38 Paras 23-24 above.

63 The ILC Working Group went on to note developments, since those decisions, in support of the argument that a State may not plead immunity in respect of human rights violations: first, the exception to immunity adopted by the United States in the amendment to the Foreign Sovereign Immunities Act ("FSIA") which had been applied by the United States courts in two cases; secondly, the Ex parte Pinochet (No. 3) ***292** judgment in which the House of Lords "emphasised the limits of immunity in respect of gross human rights violations by State officials". The Court does not, however, find that either of these developments provides it with a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of torture, let alone that it was not en-

joyed in 1996 at the time of the Court of Appeal's judgment in the present case.

64 As to the amendment to the FSIA, the very fact that the amendment was needed would seem to confirm that the general rule of international law remained that immunity attached even in respect of claims of acts of official torture. Moreover, the amendment is circumscribed in its scope: the offending State must be designated as a State sponsor of acts of terrorism, and the claimant must be a national of the United States. The effect of the FSIA is further limited in that after judgment has been obtained, the property of a foreign State is immune from attachment or execution unless one of the statutory exceptions applies. [FN39]

FN39 Para. 24 above.

65 As to the Ex parte Pinochet (No. 3) judgment, [FN40] the Court notes that the majority of the House of Lords held that, after the Torture Convention and even before, the international prohibition against official torture had the character of *jus cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention State from the criminal jurisdiction of another. But, as the Working Group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State, who was at the material time physically within the United Kingdom. As the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign States from the civil jurisdiction in respect of such acts. [FN41] In so holding, the House of Lords cited with approval the judgments of the Court of Appeal in the Al-Adsani case itself.

FN40 Para. 34 above.

FN41 See, in particular, the judgment of Lord Millet, mentioned in para. 34 above.



66 The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

67 In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity ***293** cannot be said to have amounted to an unjustified restriction on the applicant's access to court.

It follows that there has been no violation of Article 6(1) in this case.

For these reasons, THE COURT

1. *Holds* unanimously that there has been no violation of Article 3 of the Convention;
2. *Holds* by nine votes to eight that there has been no violation of Article 6(1) of the Convention.

Concurring Opinion of Judge Zupancic

O-11 [FN42] I concur with the majority's opinion in this case.

FN42 Paragraph numbers added by publisher.

Here, I simply offer another example illustrating the appropriateness of the majority's decision, namely a pertinent comparison deriving from a positive and recent source of public international law.

O-12 The United Nations Convention against

Torture (hereinafter CAT) provides as follows:

Article 9

States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 3 including the supply of all evidence at their disposal necessary for the proceedings.

States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

O-13 There is a striking difference in CAT between the strict and compulsory provisions concerning the enforcement of criminal law's (substantive and procedural) proscription of torture as a criminal offence and the above rather muted provision of paragraph 1 of Article 9.

Another remarkable clause of CAT is Article 5 which provides:

1. Each State Party shall take such measures as may be necessary to establish its [criminal] jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate. [FN43]

FN43 This is the criminal aspect of the situation in the present case. Clearly, CAT does not require the State Party (here the United Kingdom) to establish even criminal jurisdiction in such a case. It leaves it to its discretion. The compelling reasons for discretionary exclusion of criminal jurisdiction apply *a fortiori* to the issue of civil jurisdiction. Hence, the cited provision of Article 9(1) .



2. Each State Party shall likewise take such measures as may be necessary to establish its [criminal] jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article. *294

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

O-14 Evidently, the rationale for the apparent lack of severity of CAT concerning jurisdiction, criminal and civil, does not derive from the lofty principles that had most certainly guided the drafters of CAT, otherwise a superb legal instrument. On the contrary, this jurisdictional lack of severity--concerning the auxiliary extension of civil jurisdiction over acts of torture--runs contrary to the fundamental objectives of the Convention against Torture.

O-15 We may rest confident that the drafters of CAT did their utmost legally to eradicate the disgrace of torture, that is, to make it prosecutable and litigable ubiquitously and to the greatest possible extent. However, the drafters of CAT also felt constrained--not by theories of sovereign immunity, etc.--but by practical considerations. I feel constrained by exactly the same realistic considerations.

Ex factis jus oritur

O-16 The rationale elucidated by Judge Pellonpää in his separate opinion, with which I wholly concur, illustrates how true this is especially about international law.

O-17 Given the hindering effect of these "facts" which, incidentally, call for the continued significance of the long-established branch of law described as "private international law" or "conflict of laws"--nothing further needs to be said about the above mentioned realistic considerations.

Concurring Opinion of Judge Pellonpää Joined by Judge Bratza

O-II1 I fully agree with the majority's reasoning, as well as with the "realistic considerations" put forward by Judge Zupancic in his concurring opinion. I would like to add the following further considerations.

O-II2 There is much wisdom in the speech of Lord Justice Stuart-Smith who, on behalf of the Court of Appeal, called for a "moment's reflection" to consider the practical consequences which would have followed from the acceptance of the applicant's argument. Lord Justice Stuart-Smith continued [FN44] :

The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the *295 jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination.

FN44 Para. 18 of the present judgment.

...

O-II3 Similar consequences could have ensued in other jurisdictions. The somewhat paradoxical result, had the minority's view prevailed, could have been that precisely those States which so far have been most liberal in accepting refugees and asylum seekers, would have had imposed upon them the additional burden



of guaranteeing access to court for the determination of perhaps hundreds of refugees' civil claims for compensation for alleged torture. Even if the finding of a violation of Article 6 in this case had not had a "chilling effect" on the readiness of the Contracting States to accept refugees--a consequence which I would not totally exclude--the question of the effectiveness of the access in the circumstances outlined by Lord Justice Stuart-Smith would inevitably have arisen.

O-II4 It is established case law that mere access to court without the possibility of having judgments executed is not sufficient under Article 6. In the *Hornsby v. Greece* judgment, [FN45] the Court stated that "the right to institute proceedings before courts in civil matters" is only one aspect of the "right to court". [FN46] That right would, however:

... be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees afforded to litigants-- proceedings that are fair, public and expeditious--without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 ... [FN47]

FN45 *Hornsby v. Greece*: (1997) 24 E.H.R.R. 250.

FN46 Para. 40.

FN47 *ibid* .

O-II5 The acceptance of the applicant's argu-

ment concerning access to court would thus have required a possibility of having judgments--probably often default judgments--delivered in torture cases executed against respondent States. Thus in turn would raise the question whether the traditionally strong immunity property from execution would also have had to be regarded as incompatible with Article 6. It would seem that this indeed would have been the inevitable consequence of the acceptance of the minority's line. If immunity from jurisdiction were to be regarded as incompatible with Article 6 because of the *jus cogens* nature of the prohibition of torture, which prevails over all other international obligations not having that same hierarchical status, it presumably would also have to prevail over rules concerning immunity from execution. Consequently, the Contracting *296 States would have had to allow attachment and execution against public property of respondent States if the effectiveness of access to court could not otherwise be guaranteed.

O-II6 The acceptance of the applicant's argument indeed would have opened the door to much more far-reaching consequences than did the amendment to the U.S. Foreign Sovereign Immunities Act, which made it possible for U.S. nationals to raise damage claims based, *inter alia* , on torture against specifically designated States. [FN48] As appears from the plaintiff's futile efforts of execution in the case of *Flatow v. Islamic Republic of Iran* , [FN49] this narrowly limited statutory amendment did not affect the immunity of a foreign State's public property from attachment and execution, causing the District Court Judge Royce C. Lamberth to characterise the plaintiff's original judgment against Iran as an epitome of the phrase "Pyrrhic victory".

FN48 Para. 24 of the judgment.

FN49 *Flatow v. Islamic Republic of Iran* (999 F. Supp. 1 (D.D.C. 1998)).



O-II7 The Flatow case led to a further amendment of the Foreign Sovereign Immunities Act with the purpose of allowing U.S. victims of terrorism to attach and execute judgments against a foreign State's diplomatic or consular properties. The amendment, however, included a provision allowing the U.S. President to suspend its application. [FN50] On 21 October 1998 President Clinton exercised this power, reasoning as follows:

If this section [of the Act] were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to 'receive Ambassadors and other public Ministers'. Moreover, if applied to foreign diplomatic or consular property, section 177 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 177's attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 177 could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment. To the extent possible, I shall construe section 177 in a manner consistent with my constitutional authority and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the national security interest of the United States. [FN51]

FN50 The amendment is contained in paragraph 117 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105277 112 Stat. 2681

(1998).

FN51 Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriation Act, 1999 .

O-II8 A holding that immunity is incompatible with Article 6 of the Convention because of the *jus cogens* nature of the prohibition of *297 torture would have made it difficult to take into account any considerations of this kind. In other words, in order not to contradict itself the Court would have been forced to hold that the prohibition of torture must also prevail over immunity of a foreign State's public property, such as bank accounts intended for public purposes, real estate used for a foreign State's cultural institutes and other establishments abroad (including even, it would appear, embassy buildings), etc., since it has not been suggested that immunity of such public property from execution belongs to the corps of *jus cogens* . Although giving absolute priority to the prohibition of torture may at first sight seem very "progressive", a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of "Pyrrhic victory". International co-operation, including co-operation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations. Principles concerning State immunity belong to that regulatory framework, and I believe it is more conducive to orderly international co-operation to leave this framework intact than to follow another course.

O-II9 In my view this case leaves us with at least two important lessons. First, although consequences should not alone determine the interpretation of a given rule, one should never totally lose sight of the consequences of a particular interpretation one is about to adopt. Secondly, when having to touch upon central questions of general international law, this Court should be very cautious before taking



upon itself the role of a forerunner. [FN52] I started this opinion by quoting Lord Justice Stuart-Smith. I end it by quoting another eminent jurist, Sir Robert Jennings, who some years ago expressed concern about "the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented". [FN53] I believe that in this case the Court has avoided the kind of development of which Sir Robert warned.

FN52 That previous international practice does not support the conclusion that the *erga omnes* or *jus cogens* nature of the prohibition of torture has the consequence of obliging States to make their civil courts available for the victims of such violations is convincingly demonstrated by a study conducted by a group of distinguished international lawyers under the auspices of the British Branch of the International Law Association.

FN53 Sir Robert Jennings, "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers" in *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, ASIL BULLETIN: Educational Resources on International Law, Number 9, November 1995, 2 at p. 6.

Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic

We regret that we are unable to concur with the Court's majority in finding that, in the present case, there has not been a violation of Article 6 of the Convention in so far as the right of access to court is concerned. Unlike the majority, we consider that the applicant was ***298** unduly deprived of his right of access to United Kingdom courts to entertain the merits of his claim against the Kuwaiti Government although that claim was linked to serious allegations of torture. To us the main reasoning of the majority--that the standards applicable in

civil cases differ from those applying in criminal matters when a conflict arises between the peremptory norm of international law on the prohibition of torture and the rules on State immunity--raises fundamental questions, and we disagree for the following reasons:

O-III1 [FN54] The Court's majority unequivocally accept that the rule on the prohibition of torture had achieved at the material time, namely at the time when civil proceedings were instituted by the applicant before the United Kingdom courts, the status of a peremptory rule of international law (*jus cogens*). They refer to a number of authorities which demonstrate that the prohibition of torture has gradually crystallised as a *jus cogens* rule. To this conclusion we readily subscribe and in further support of this we refer to the Statutes of the ad hoc Tribunals for Former Yugoslavia and Rwanda, and to the Statute of the International Criminal Court, which also gives a definition of the crime. State practice corroborates this conclusion.

FN54 Paragraph prefixes added by publisher.

By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.

O-III2 The Court's majority do not seem, on the other hand, to deny that the rules on State



immunity; customary or conventional, do not belong to the category of *jus cogens*, and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status. It is common knowledge that, in many instances, States have, through their own initiative, waived their rights of immunity; that in many instances they have contracted out of them, or have renounced them. These instances clearly demonstrate that the rules on State immunity do not enjoy a higher status, since *jus cogens* rules, protecting as they do the *ordre public*, i.e. the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.

O-III3 The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke *299 hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.

O-III4 The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance. They contend that a distinction must be made between criminal proceedings, where apparently they accept that a *jus cogens* rule has the overriding force to deprive the rules of sovereign immunity from their legal effects, and civil proceedings, where, in the absence of authority, they consider that the same conclusion cannot be drawn. Their position is well summarised in paragraph 66 of the judgment, where they assert that they do not find it established that "there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State". Hence, "[t]he 1978 Act, which grants immunity to States in respect of personal injury claims not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity".

In our opinion, the distinction made by the majority and their conclusions are defective on two grounds:

First, the British courts, when dealing with the applicant's claim, never resorted to the distinction made by the majority. They never invoked any difference between criminal charges or civil claims, between criminal and civil proceedings, in so far as the legal force of the rules on State immunity or the applicability of the 1978 Act was concerned. The basic position of the Court of Appeal--the last court which dealt with the matter in its essence--is expressed by the observations of Lord Justice Stuart-Smith who simply denied that the prohibition of torture was a *jus cogens* rule. In reading the Lord Justice's observations, one even forms the impression that if the Court of Appeal had been convinced that the rule of prohibition of torture was a norm of *jus cogens*, they could grudgingly have admitted that the procedural bar of State immunity did not apply in the circum-



stances of the case.

Secondly, the distinction made by the majority between civil and ***300** criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant State as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him.

Under these circumstances we believe that the United Kingdom courts have erred in considering that they had no jurisdiction to entertain the applicant's claim because of the procedural bar of State immunity and the consequent application of the 1978 Act. Accordingly, the applicant was deprived of his right to have access to the British court to entertain his claim of damages for the alleged torture suffered by him in Kuwait, and article 6(1) , has, in our view, been violated.

Dissenting Opinion of Judge Ferrari Bravo

O-IV1 [FN55] What a pity! The Court, whose task in this case was to rule whether there had been a violation of Article 6(1), had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. To do so, it need only have upheld the thrust of the House of Lords' judgment in the Pinochet case, to the

effect that the prohibition of torture is now *jus cogens* , so that torture is a crime under international law. It follows that every State has a duty to contribute to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment.

FN55 Paragraph numbers added by publisher.

O-IV2 I say to "contribute" to punishment, and not, obviously, to punish, since it was clear that the acts of torture had not taken place in the United Kingdom but elsewhere, in a State over which the Court did not have jurisdiction.

O-IV3 But it is precisely one of those old formalist arguments which the Court endorsed when it said [FN56] that it was unable to discern any rules of international law requiring it not to apply the rule of immunity from civil suit where acts of torture were alleged. And the Court went further, notwithstanding its analysis of the cases mentioned in paragraphs 62 to 65, concluding sadly in paragraph 66 that the contrary rule was not yet accepted. *Quousque tandem!* ***301**

FN56 Para. 61.

O-IV4 There will be other such cases, but the Court has unfortunately missed a very good opportunity to deliver a courageous judgment.

Dissenting Opinion of Judge Loucaides

O-V1 I agree with the dissenting opinion of Judges Rozakis and Caflisch. Indeed, once it is accepted that the prohibition of torture is a *jus cogens* rule of international law prevailing over State immunity rules, no such immunity can be invoked in respect, of any judicial proceedings whose object is the attribution of legal responsibility to any person for any act of torture. I cannot see why there should be a distinction between criminal and civil proceedings in this respect, as contended by the majority. In view of the absolute nature of the prohibition of



torture it would be a travesty of law to allow exceptions in respect of civil liability by permitting the concept of state immunity to be relied on successfully against a claim for compensation by any victim of torture. The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever.

O-V2 However, I would prefer to adopt as my main reasoning for finding a violation of Article 6 in this case the same approach that I adopt in the cases of *McElhinney v. Ireland* and *Fogarty v. United Kingdom*, [FN57] which can be summed up as follows. Any form of blanket immunity, whether based on international or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6(1) of the Convention and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings.

FN57 Judgments of 21 November 2001, App. Nos 31253/96 and 37112/97 respectively.

O-V3 It is true that in the present case the absurd and unjust results of applying a blanket immunity without regard to any considerations connected with the specific proceedings are more evident because the immunity prevented accountability for a grave violation of an international peremptory norm, namely the prohibition of torture. However, this does not mean that the relevant immunities can only be found to be incompatible with Article 6(1) in a case

like the present one. In my opinion, they are incompatible with Article 6(1) in all those cases where their application is automatic without a balancing of the competing interests as explained above. ***302**

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**Progress at the Front: The Draft Optional
Protocol to the International Covenant on
Economic, Social and Cultural Rights**

By Claire Mahon

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Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Claire Mahon*

Abstract

The two-decade-long campaign for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) is nearing success. The drafting of the Optional Protocol has been completed, and the Human Rights Council approved the text on 18 June 2008. It is now hoped that the draft OP-ICESCR will finally be adopted by the General Assembly in late 2008, heralding the beginning of a new era in relation to access to international remedies for violations of economic, social and cultural rights (ESC rights). The draft OP-ICESCR establishes a new quasi-judicial function for the Committee on Economic, Social and Cultural Rights (the Committee), allowing it to receive communications from individuals and groups of individuals alleging violations of any of the ESC rights set forth in the ICESCR. It also establishes, *inter alia*, an inquiry procedure, provides for interim measures to be ordered and establishes a trust fund for the realisation of ESC rights. Some of the contents of its provisions and the procedures it establishes are unique in comparison with other treaty body complaints procedures, and others mirror closely existing provisions in similar protocols and conventions. This article overviews the draft OP-ICESCR,

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outlining its background and genesis, and detailing some of its most contentious provisions, including the scope of the OP-ICESCR, its *locus standi* and admissibility provisions, the criteria to be applied by the Committee in its review of the merits and particularly debated issues such as how to take into account the need for international cooperation and assistance. The article then proposes some preliminary assessments regarding the potential success and impact of this important new mechanism.

1. Introduction

The debate on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) has been labelled the new ‘front line’ in the long running war between civil and political rights and economic, social and cultural rights (ESC rights).¹ Finally, it appears that there is progress at the front as the drafting of the Optional Protocol has been completed, and the Human Rights Council approved the text on 18 June 2008.² Now all that remains is its adoption by the General Assembly,³ followed by a signing ceremony which is planned for March 2009 in Geneva.⁴ Presuming the text is adopted, a new mechanism will be added to our universal human rights system, allowing victims of violations of ESC rights to submit a communication to the Committee on Economic, Social and Cultural Rights (the Committee), and providing the Committee with the power to adjudicate these complaints and issue views and recommendations for remedy and redress. The High Commissioner for Human Rights has remarked that this progress is ‘a milestone in the history of the universal human rights system’, one which ‘will mark a high point of the gradual trend towards a greater recognition of the indivisibility and interrelatedness of all human rights.’⁵

The OP-ICESCR has been a long time coming, yet those who have not been closely following the lengthy campaign for universal justiciability of ESC rights may be surprised that the drafting process itself was relatively short. While some may trace the OP-ICESCR’s origins to the original decision to

1 de Schutter, ‘Le Protocol facultatif au pacte international relatif aux droits économiques, sociaux et culturels’, (2006) 1 *Revue Belge de Droit International* 8.

2 Human Rights Council Res. 8/2, 18 June 2008, A/HRC/8/L.2/Rev.1/Corr.1 Annex.

3 At the time of writing, the text of the OP-ICESCR had been transmitted to the Third Committee of the General Assembly where it is expected it will be considered in October 2008 and, following that, the plenary of the General Assembly for final adoption later in 2008.

4 *Supra* n. 2 at para. 2.

5 Statement by Ms Louise Arbour, High Commissioner for Human Rights to the Open-Ended Working Group on OP-ICESCR, Fifth session, 31 March 2008.

separate the two covenants in the 1950s,⁶ the real push for this mechanism began nearly two decades ago with an initiative taken by the Committee. But the Open-Ended Working Group on the OP-ICESCR was only granted a mandate to draft this instrument in 2006,⁷ and it began to consider a first draft in July 2007, finalising its text on 4 April 2008. The speed of this process is consistent with that for other recently adopted instruments, such as the Optional Protocol to the Convention on All Forms of Discrimination Against Women (OP-CEDAW),⁸ which was adopted after three years of drafting negotiations,⁹ and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD),¹⁰ which was concluded after several years of discussion about a monitoring mechanism but only two days of formal negotiations on the text of the OP-CRPD.¹¹ The recent negotiations on the OP-ICESCR were accompanied in their final stages by a sense of urgency—there has been a great desire to finalise this instrument in early 2008 so that its adoption could coincide with the 60th anniversary of the Universal Declaration of Human Rights 1948 (UDHR).¹² Indeed, this provides an opportune point in the history of human rights to end the long-standing controversy over the hierarchy between ESC rights and civil and political rights, and to reinforce the earlier Vienna Declaration commitments regarding the interdependence and indivisibility of all human rights.¹³

As the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)¹⁴ is one of only two of the core human rights treaties not

6 Ngoy Lumbu, *L'Instauration du mecanisme de communications individuelles devant le Comite des droits economiques, sociaux et culturels: une contribution à l'étude des voies et moyens additionnels pour une mise en oeuvre efficace du pacte international relatif à ces droits* (Unpublished PhD thesis, Université catholique de Louvain Faculté de Droit, 2007).

7 Human Rights Council Res. 1/3, Open-Ended Working Group on OP-ICESCR, 29 June 2006, at para. 2.

8 Adopted by General Assembly Res. 54/4 6 October 1999, A/RES/54/4, and opened for signature on 10 December 1999, entry into force 22 December 2000.

9 Sullivan, 'Commentary on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women' in Inter American Institute of Human Rights, *Optional Protocol: Convention on the Elimination of All Forms of Discrimination against Women* (San José: IAIHR, 2000) and International Women's Rights Action Watch Asia Pacific, *Our Rights Are Not Optional! Advocating for the implementation of the CEDAW Convention through its Optional Protocol: A Resource Guide* (Kuala Lumpur: IWRAP Asia Pacific, 2005).

10 Adopted by General Assembly Res. A/61/611, 13 December 2006, A/RES/61/106, and opened for signature on 30 March 2007, entry into force 3 May 2008.

11 Final report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/61/611, 6 December 2006. See further Kayess and French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', (2008) 8 *Human Rights Law Review* 1.

12 See, for example, Fifth report of the Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol, 6 May 2008, A/HRC/8/7 at para. 7 (Fifth Working Group Session Report).

13 Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

14 993 UNTS 3.

accompanied by an individual communications procedure,¹⁵ there were many examples to draw upon when it came to drafting a new Optional Protocol.¹⁶ The Chairperson of the OP-ICESCR had explained that, where possible, she intended to use agreed language from other similar texts,¹⁷ and available best practice from other UN human rights complaints mechanisms, in order to draft an instrument that was both consistent and progressive, thus reflecting the important advancements in human rights law and practice since the drafting of the first treaty body complaints mechanism, the First Optional Protocol¹⁸ to the International Covenant on Civil and Political Rights 1966 (OP1-ICCPR).¹⁹ It is not yet clear, however, how successful this has been, and whether the new OP-ICESCR will prove to be, as hoped for by the High Commissioner for Human Rights and many others, a mechanism that truly will improve access to remedies and relief for victims of violations of ESC rights.

While there is much to analyse in terms of the potential future impact of this new instrument and the legal implications of the various drafting decisions, this article is restricted in scope. Its purpose is to outline for readers some of the key aspects of the OP-ICESCR and some points of controversy that arose in the drafting process, and to make some limited preliminary comments regarding early assessments of this instrument. It does not seek to exhaustively address all aspects of the OP-ICESCR, the Working Group's deliberations, the arguments for and against an Optional Protocol or the history behind the campaign.²⁰ The necessary examination of the effectiveness and full analysis

15 The Committee on the Rights of the Child, which monitors implementation of the Convention on the Rights of the Child 1989, 1577 UTS 3 (CRC), is the other body that does not, yet, have a mandate to receive individual communications from alleged victims.

16 Other individual complaints procedures are established by the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR) through its first Optional Protocol (OP1-ICCPR); the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD—Article 14); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85 (CAT—Article 22); the Convention on the Elimination of all Forms of Discrimination against Women 1979, 1249 UNTS 13 (CEDAW) through its Optional Protocol; the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990, GA Res. 45/158, 18 December 1990, A/RES/45/158 (MWC—Article 76); and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD).

17 Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina de Albuquerque, 23 April 2007, A/HRC/6/WG.4/2, at 2.

18 999 UNTS 302.

19 999 UNTS 171.

20 See instead, *inter alia*, Alston, 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant' in Eide, Asbjørn and Elgesen (eds), *The Future of Human Rights Protection in a Changing World: Essays in Honour of Torkel Opsahl* (Oslo: Norwegian University Press, 1992) 79; Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become a Reality?', (1996) 2 *University of California Davis Journal of International Law and Policy* 1 at 111–36; Dennis and Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Right to Food, Water,

of the potential future impact of this new instrument, and the mechanism it has created, must be left for another day.

2. Background

The finalisation of the text of the OP-ICESCR is the result of over 18 years of work on the part of ESC rights advocates, including government representatives, the non-governmental community and international experts such as members of the Committee, the former Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) and various Special Rapporteurs. The campaign for an OP-ICESCR began in earnest in the early 1990s when the Committee and the Sub-Commission began to make recommendations to Member States and the Commission about the desirability of such a mechanism.²¹

In its sixth session in 1990, the Committee commenced discussions on the desirability of a draft Optional Protocol, and these discussions continued until its 15th session in 1996.²² At the Committee's request, then Committee member Philip Alston reported four times on the topic.²³ The Committee adopted an analytical paper for the 1993 World Conference on Human Rights, in which it expressed strong support for the development of an Optional Protocol which would extend its functions to include hearing individual

Housing and Health?', (2004) 98 *American Journal of International Law* 462; Porter, 'The Right to be Heard: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – What's at Stake', (2005) 11 *Human Rights Tribune* 3 at 40; de Schutter, 'Le Protocole Facultative au Pacte International Relatif aux Droits Économiques, Sociaux et Culturels', (2006) 1 *Revue Belge de Droit International* 1; Tomuschat, 'An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?' in Dicke *et al.* (eds), *Weltinnenrecht - Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot; Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel, 2005) 815; and Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights', (2003) 21 *Netherlands Quarterly of Human Rights* 423.

21 See further, Vandenhole, *supra* n. 20. The Sub-Commission on the Promotion and Protection of Human Rights became involved in the deliberations concerning the OP-ICESCR in 1992 when Mr Danilo Türk, the Special Rapporteur of the Sub-Commission on the realization of ESR rights, expressly recommended its elaboration: The Realization of Economic, Social and Cultural Rights, Final report submitted by Mr Danilo Türk, 3 July 1992, E/CN.4/Sub.2/1992/16, at para. 211. It continued to address the issue in its resolutions, for example, calling in 1996 for the elaboration of an OP-ICESCR (Res. 1996/13), in 2000 suggesting the establishment of an Open-ended Working Group (Res. 2000/9), and in 2001 and 2002 urging the Commission on Human Rights to mandate a working group to draft a text (Res. 2002/14 and 2003/19).

22 See E/1992/23—E/C.12/1991/4, at paras 360–6 and E/CN.4/1997/105, at para. 2.

23 E/C.12/1991/WP.2 of 25 October 1991; E/C.12/1992/WP.9 of 27 November 1992; E/C.12/1994/12 of 9 November 1994; and E/C.12/1996/CRP.2/Add.1.

complaints about violations of the ICESCR.²⁴ The Vienna Programme of Action took up this idea, and encouraged the Commission on Human Rights to cooperate with the Committee to continue examining the question of an Optional Protocol.²⁵ Subsequently, the Commission on Human Rights considered the matter for the first time in 1994, and, after taking note of the steps taken by the Committee, the Commission requested it to submit a report at the Commission's 51st session.²⁶ Accordingly, after an initial progress report,²⁷ the Committee continued its work,²⁸ and produced a draft Optional Protocol and a report analysing the issues to be examined by the Commission on Human Rights at its 53rd session in 1997.²⁹ The length of debate at the Committee level reflected the fact that not all members were in agreement about the need for an Optional Protocol, or about the content of any proposed protocol.³⁰

For three years, the Commission on Human Rights issued requests to States, intergovernmental organisations and non-governmental organisations (NGOs) to submit comments on the Committee's draft.³¹ Although only a disappointingly small number of States responded to these continued requests, the responses received were overwhelmingly in favour of an Optional Protocol: 11 of 14 States responded positively towards the proposal, as did numerous UN bodies and intergovernmental organisations, along with NGOs.³² These comments were compiled in annual reports to the Commission on Human Rights,³³ and in the final report the secretariat included suggested options for

24 Contribution of the Committee on Economic, Social and Cultural Rights to the World Conference on Human Rights, 26 March 1993, A/CONE.157/PC/62/Add.5, Annex I at para. 18 and Annex II.

25 Vienna Declaration and Program of Action, A/CONE.157/23, at para. 75.

26 Commission on Human Rights Res. 1994/20 on the question of the realization in all countries of the ESR rights contained in the Universal Declaration of Human Rights and in the ICESCR, and study of special problems which the developing countries face in their efforts to achieve these human rights, 1 March 1994, E/CN.4/RES/1994/20.

27 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretary-General, 5 February 1996, E/CN.4/1996/96. This progress report was welcomed by the Commission on Human Rights in Res. 1996/11, 11 April 1996, E/CN.4/RES/1996/11, at para. 5.

28 E/C.12/1996/SR. 44–49 and 54.

29 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretary-General, 18 December 1996, E/CN.4/1997/105.

30 See, in particular, the comments of Mr Grissa in the Committee's summary records, for example, 2 December 1997, E/C.12/1996/SR.42.

31 See E/CN.4/RES/1997/104, E/CN.4/RES/1998/33 and E/CN.4/RES/1999/25.

32 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights, 14 January 2000, E/CN.4/2000/49, at para. 32(c).

33 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the Secretary-General, 16 January 1998, E/CN.4/1998/84; Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the Secretary-General, 16 March 1998, E/CN.4/1998/84 Add.1; Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretariat, 7 January 1999, E/CN.4/1999/112; Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretariat, 4 March 1999, E/CN.4/1999/

how to progress the discussions.³⁴ After this, an independent expert was appointed in 2001 to examine the question of the draft Optional Protocol.³⁵ Professor Hatem Kotrane presented two reports to the Commission on Human Rights supporting the drafting of an Optional Protocol.³⁶ In his reports, he attempted to address questions such as: who would be entitled to utilise the proposed complaints procedure? Which organ would be competent to assess complaints under the proposed protocol? Which ICESCR rights should be included in a complaints procedure? Who should be the subject of complaints under the mechanism? And what remedial actions could be taken to remedy violations?³⁷ He recommended that the Commission on Human Rights establish a working group to consider an Optional Protocol.

While the Commission on Human Rights had resolved in 2002 to establish 'an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol,'³⁸ it was not until its 59th session in 2003 that the Commission requested the Open-Ended Working Group on the OP-ICESCR to meet.³⁹ The Working Group met for its first session from 23 February to 5 March 2004, under the direction of the Portuguese Chairperson, Catarina de Albuquerque. The Working Group's mandate provided initially for just one meeting, which was dominated by discussions regarding the general justiciability of ESC rights.⁴⁰ Deciding that the issues raised required further deliberation, the Commission on Human Rights extended the mandate of the Working Group in 2004 for a further two years.⁴¹

From 10 to 20 January 2005, the Working Group's second session debated how to progress the consideration of the proposed content of an optional protocol, deciding that in order to ensure greater focus in future sessions, it would

112 Add.1; and Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights, 14 January 2000, E/CN.4/2000/49.

34 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights, 14 January 2000, E/CN.4/2000/49, at para. 32.

35 Commission on Human Rights Res. 2001/30, 20 April 2001, E/CN.4/RES/2001/30.

36 First report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 12 February 2002, E/CN.4/2002/57; second report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 13 January 2003, E/CN.4/2003/53; Corrigendum to the second report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 3 April 2003, E/CN.4/2003/53/Corr.1; and second Corrigendum to the second report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 7 April 2003, E/CN.4/2003/53/Corr.2.

37 Ibid.

38 Commission on Human Rights Res. 2002/24, 22 April 2002, E/CN.4/RES/2002/24 at para. 9(f).

39 Commission on Human Rights Res. 2003/18, 22 April 2003, E/CN.4/RES/2003/18.

40 See the first report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an OP-ICESCR on its First session, 15 March 2004, E/CN.4/2004/44.

41 Commission on Human Rights Res. 2004/29, 16 April 2004, E/CN.4/RES/2004/29.

request the Chairperson to prepare a report containing elements for an Optional Protocol.⁴² This ‘Elements Paper’⁴³ allowed the third Working Group session (held from 6 to 16 February 2006) to discuss the main aspects of a communications procedure and other possible mechanisms such as an inquiry procedure and inter-State complaints.⁴⁴ Although several delegations continued to remind the Working Group that discussions on the contents of the Elements Paper did not constitute the start of negotiations on a text for an OP-ICESCR, it was clear that these provided a head-start to the drafting process.⁴⁵ The Elements Paper also explained the consequences of not pursuing an Optional Protocol, stating ‘the option of no optional protocol... suggests that... while civil and political rights are very explicitly spelled out, economic, social and cultural rights are essentially vague or aspirational’.⁴⁶ Guided by the discussions on the Elements Paper, the outcome of the third Working Group session was that many delegations expressed their readiness to begin drafting.⁴⁷

At its first session in 2006, the new Human Rights Council extended and amended the mandate of the Working Group, directing it to start negotiating the text of an Optional Protocol, and providing a two year timeframe.⁴⁸ The Human Rights Council further requested the Chairperson

to prepare, taking into account all views expressed during the sessions of the Working Group on, *inter alia*, the scope and application of an optional protocol, a first draft optional protocol, which includes draft provisions corresponding to the various main approaches outlined in her analytical paper, to be used as a basis for the forthcoming negotiations.⁴⁹

The fourth Working Group session, held from 16 to 27 July 2007, considered the Chairperson’s first draft Optional Protocol and her Explanatory Memorandum.⁵⁰ Her draft Optional Protocol included a number of possible

42 Second report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol, 10 February 2005, E/CN.4.2005/52 welcomed by Commission on Human Rights Res. E/CN.4/RES/2005/22, 15 April 2005, at para. 14.

43 Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical paper by the Chairperson Rapporteur, Catarina de Albuquerque, 30 November 2005, E/CN.4/2006/WG.23/2 (Elements Paper).

44 Third report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol, 14 March 2006, E/CN.4/2006/47 (Third Working Group Session Report).

45 Ibid.

46 Elements Paper, *supra* n. 43 at para. 60(d).

47 The GRULAC States expressed a desire to start drafting an OP-ICESCR, along with Azerbaijan, Belgium, Croatia, Finland, Italy, Iran, Portugal, Slovenia, Timor Leste and Turkey: Third Working Group Session Report, *supra* n. 44.

48 Human Rights Council Res. 1/3, 29 June 2006, at para. 2.

49 Ibid. at para. 2.

50 Fourth report of the Open-Ended Working Group on an Optional Protocol, 30 August 2006, A/HRC/6/8 (Fourth Working Group Session Report); Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina de Albuquerque, 23 April 2007, A/HRC/6/WG.4/2 (containing the Explanatory Memorandum) (Chair’s First Draft).

options in bracketed text, as ‘in some cases . . . it was not possible to account for all main views in one provision.’⁵¹ The fourth Working Group session was the first opportunity to discuss, Article by Article, the draft OP-ICESCR, and deepen the discussions regarding, *inter alia*, whether the text would establish both individual *and* collective complaint mechanisms, whether it would include an inquiry procedure, the criteria to be used by the Committee in examining communications, the admissibility criteria for communications, and how international assistance and cooperation would be addressed.⁵²

After the reading of the first draft Optional Protocol and the resulting discussions, the Chairperson prepared a first revised draft Optional Protocol, which included many of the proposals for amendments and new inclusions that had been made by delegates at the fourth Working Group session.⁵³ In order to better facilitate discussions and the need to seek instructions from capitals, the fifth session of the Working Group was divided into two separate week-long sessions. The first revised draft was considered during the first week, from 4 to 8 February 2008, where, despite a thorough review of the entire text, key points of controversy continued to prevent consensus forming on the main provisions. These unresolved drafting issues included standing, scope (i.e. the identity of the rights to be subject to the complaints procedure), criteria for review, reservations and international cooperation and assistance. After this first week of discussions on the revised text, the Chairperson prepared a second revised draft Optional Protocol,⁵⁴ which was used as the basis for the negotiations held during the second part of the fifth Working Group session, held from 31 March to 4 April 2008.⁵⁵ In addition, after a series of informal consultations with Working Group delegations in Geneva during 25–28 February 2008, the Chairperson prepared a short paper containing additional drafting proposals regarding some Articles of the draft OP-ICESCR.⁵⁶ These new suggestions addressed further issues of admissibility, interim measures, criteria for review by the Committee and new proposals for a trust fund to address the issue of international cooperation and assistance.

The final week of Working Group negotiations focused on addressing these main points of divergence. After numerous informal consultations, a compromise package proposal was discussed by the regional groups towards the end of the week, and finally agreement was reached. On the morning of 4 April

51 ‘Chair’s First Draft’, *ibid.* at para. 2.

52 Fourth Working Group Session Report, *supra* n. 50.

53 Revised Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina de Albuquerque, 24 December 2007, A/HRC/8/WG.4/2 (First Revised Draft).

54 Revised Draft OP-ICESCR, Letter from the Chairperson/Rapporteur, Catarina de Albuquerque, to the members of the Open-Ended Working Group on an OP-ICESCR, 28 February 2008, A/HRC/8/WG.4/3 (the second revised draft is contained in the annex to this letter) (Second Revised Draft).

55 Fifth Working Group Session Report, *supra* n. 12.

56 Drafting proposals for the OP-ICESCR by the Chairperson-Rapporteur of the Open-Ended Working Group, 25 March 2008.

2008, the Open-Ended Working Group decided, by consensus, to transmit the text of the Optional Protocol to the Human Rights Council for approval.⁵⁷ Despite the hard work to ensure an instrument that would attract broad support, participants at the final afternoon of the Working Group witnessed many delegations making statements to explain that their support for the transmission of the text to the Council was not (yet) to be considered as endorsement of the text itself.⁵⁸ Particular disagreements over the scope of the draft OP-ICESCR and the exclusion of Part I (the right to self-determination) from the complaints procedure were amongst the concerns some delegations had regarding the compromise text.

The draft OP-ICESCR was then forwarded to the Human Rights Council for consideration during its eighth session in June 2008, at which time controversy regarding the lack of reference to Part I of ICESCR (the right to self-determination) led some States to insist in informal consultations that amendments to the text would be required.⁵⁹ While others strenuously argued against opening up the text for further revisions outside of the Working Group format,⁶⁰ and some encouraged alternative wording in a pre-ambular paragraph as a solution, it became clear that to not incorporate the concerns of those troubled by the exclusion of Part I would spell disaster at that late stage. Portugal, along with the co-sponsors of the resolution, agreed to 'correct' the scope of the Protocol but insisted that no more amendments would be considered. The revised text did not explicitly include Part I within the scope of the OP-ICESCR, but reference to Parts I, II and III were replaced by more generic (and arguably very vague) wording, specifying that complaints could be brought before the Committee in relation to 'any of the economic, social and cultural rights set forth in the Covenant'.⁶¹

The revised text was finally approved without a vote by the members of the Human Rights Council on 18 June 2008,⁶² although, again, at least one State expressly reserved its position until such time as the final decision was ready to be taken by the General Assembly.⁶³ The draft has now been submitted to the Third Committee of the General Assembly, which will discuss the matter in October 2008. It is hoped the text will then be adopted by the plenary of the General Assembly, and it is expected that this will happen on or before 10

57 The final text of the OP-ICESCR is contained in Annex 1 to the Human Rights Council Res. A/HRC/8/2, 18 June 2008.

58 The United States, India, Denmark, the Netherlands, Japan, Canada, Poland, Norway, Sweden, New Zealand, German, Pakistan, the United Kingdom, China, Indonesia and Iran: Fifth Working Group Session Report, *supra* n. 12 at Part VI, paras 211–55.

59 In particular, this charge was led by Pakistan and Algeria, along with Palestine and Syria: International Service for Human Rights, 'Human Rights Council, 8th Session, Session Overview, 2–18 June 2008' in *Human Rights Monitor Series* (Geneva: ISHR, 2008) at 21.

60 Canada, the United Kingdom, Australia and Denmark, *ibid*.

61 Article 2, OP-ICESCR.

62 *Supra* n. 2.

63 The United Kingdom.

December, in celebration of Human Rights Day and in time for the 60th anniversary of the UDHR.

It is, however, by no means certain that the text will remain as agreed in the Working Group, nor that it will be adopted at the General Assembly. The scars from the process of adopting the Declaration on the Rights of Indigenous Peoples are still raw,⁶⁴ preventing many from being overly confident that the OP-ICESCR will obtain a mere rubber stamp in New York. Yet while the process is far from over, the long journey towards creating the possibility of access to a universal remedy for violations of ESC rights is nearing its end. Advocates hope that the variety of compromises included in the text, and the deals brokered to get to this point, will ensure that no delegations are sufficiently winners or losers, and thus no one has enough incentive to open the text up for further negotiation. This, however, remains to be seen.

Before addressing the key substantive points of the draft Optional Protocol, it is important to note the value of the various meetings and consultations conducted in parallel with the intergovernmental processes in Geneva. These events, often involving a range of international experts, NGO representatives and government delegates, helped progress the discussions in the Working Group sessions, providing fora in which decision makers could debate issues and discuss concerns in depth, thus contributing to the overall speed of the negotiation process in the formal sessions. For example, the informal process of drafting an Optional Protocol began in January 1995 when a group of experts met in Utrecht to review the Committee's early drafting attempts and produced an alternative protocol.⁶⁵ Following this, the International Commission of Jurists (ICJ), an NGO which had been one of those behind the campaign for an OP-ICESCR, convened meetings on a regular basis on the topic, starting with a joint consultation with the Office of the High Commissioner for Human Rights on the topic of the justiciability of ESC rights in 2001,⁶⁶ and followed by subsequent meetings in collaboration with

64 In November 2006, members of the Third Committee of the UN General Assembly rejected the strongly drafted Declaration on the Rights of Indigenous Peoples, although this instrument had previously been approved by the Human Rights Council on 29 June 2006. Those involved in blocking the adoption of the draft Declaration at the 60th Session of the General Assembly were Australia, Canada, New Zealand, the United States of America, Botswana and Namibia. The draft Declaration was finally adopted a year later, on 13 September 2007.

65 Coomans and van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights – SIM Special No. 18: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Utrecht: The Netherlands Institute of Human Rights, 1995). See further the comprehensive analysis of the Committee's draft and the Utrecht draft in: Arambulo, supra n. 20.

66 See, <http://www.unhchr.ch/html/menu2/escrworkshop.htm> [last accessed 27 September 2008]. See also, further expert seminars convened by the ICJ: Report of the Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, hosted by the International Commission of Jurists, 30 November 2001, available at: <http://www.icj.org/IMG/pdf/doc-55.pdf> [last accessed 27 September 2008]; Report of the Expert's

the Republic of Croatia in 2003,⁶⁷ and the Government of Portugal in 2003.⁶⁸ The French Ministry of Foreign Affairs coordinated a High Level Expert Seminar on the topic in September 2005,⁶⁹ and various consultations were convened in Latin America throughout the years of the Working Group sessions, as well as an African Regional Consultation in Cairo in early 2008. These were just some of many examples. The Chairperson also convened a series of expert consultations in Lisbon to discuss drafting questions.

Each of these meetings and consultations provided much needed further opportunities for governments, civil society and UN experts to discuss and debate the issues involved in drafting this new complaints mechanism. These events were complemented by discourse in the academic world, where consideration was also given to the merits of an Optional Protocol.⁷⁰ After such a busy two decades of meetings, discussions, reports and consultations, it was a vast relief to those involved to see that once the decision to commence drafting had been agreed upon, the process progressed relatively promptly.

3. Overview of the Draft Optional Protocol

The draft Optional Protocol to the ICESCR establishes a new quasi-judicial function for the Committee (preambular paragraph 6 and Article 1).⁷¹ It provides for a communications (complaints) procedure for ‘individuals and groups of individuals’ who claim to be victims of violations of any of the ESC rights contained in the ICESCR: it is therefore considered comprehensive in scope. Complaints can be brought against any State Party to the Optional Protocol, but can only be brought by or on behalf of victims who are ‘under the jurisdiction’ of a State Party (Article 2). Similarly to the OP-CEDAW,⁷²

Roundtable Concerning Issues Central to the Proposed OP-ICESCR, hosted by the International Commission of Jurists, 26 and 27 September 2002, available at: <http://www.icj.org/IMG/pdf/doc-61.pdf> [last accessed 27 September 2008].

67 Report of the International Conference on Economic, Social and Cultural Rights, hosted by the Republic of Croatia and the International Commission of Jurists, 3 February 2004, E/CN.4/2004/WG.23/CRP.2.

68 Report of the European Roundtable on Economic, Social and Cultural Rights, hosted by the Government of Portugal and the International Commission of Jurists, 4 January 2005, E/CN.4/2005/WG.23/CRP.3.

69 ‘Ministère français des Affaires étrangères’, *The Spirit of Nantes: Economic, Social and Cultural Rights for All Citizens*, (Paris: Charles Léopold Mayer Foundation, 2005).

70 See *supra* n. 20.

71 During the Working Group sessions and other meetings, consideration was given to whether the Committee on Economic, Social and Cultural Rights is indeed the appropriate body, especially given its legal status as an ECOSOC mandated body and not a true treaty body. References to these discussions can be found in all the reports of the Working Group sessions, and in Scheinin, ‘The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties’, (2006) 6 *Human Rights Law Review* 131.

72 Article 2, OP-CEDAW.

a complaint can be brought under the OP-ICESCR on behalf of an individual or group victim only with consent, unless the author can justify acting without this consent (Article 2). As is consistent with all such procedures, complaints can only be brought if domestic remedies have been exhausted (Article 3(1)), and if the same matter has not been or is not already being, examined by another procedure of international investigation or settlement (Article 3(2)(c)).

Like the OP-CEDAW,⁷³ express provision has been made in the OP-ICESCR for the possibility of interim measures 'to avoid possible irreparable damage to the victim or victims of the alleged violations' (Article 5).⁷⁴ When it comes to considering the merits of the case, the Committee will do this in closed meetings (Article 8(2)), in light of all the documentation brought before it (Article 8(1)) and in doing so it 'may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned' (Article 8(3)). Having examined a communication, the Committee shall transmit its non-legally binding 'views on the communication, together with its recommendations, if any, to the parties concerned' (Article 9(1)).

Besides the individual complaints procedure, the other key feature of the OP-ICESCR is an inquiry procedure, enabling the Committee to investigate if it receives 'reliable information indicating grave or systematic violations by a State Party of the rights set forth in Parts II and III of the Covenant' (Article 11 (2)). This inquiry procedure is applicable on an 'opt in' basis i.e. a State has to expressly declare that it recognises the competence of the Committee before the inquiry procedure can be invoked (Article 11 (1)). The OP-ICESCR also includes an inter-State complaints procedure, similar to other mechanisms (Article 10).⁷⁵

While many of these standard provisions mirror others in the texts establishing the existing complaints procedures, there are a number of aspects of this new mechanism that mark its divergence from the norm.

The major concession to the concern that the Covenant obligation in respect of ESC rights is formulated differently to that in treaties on many other rights, through the inclusion of the principle of progressive realisation and the

73 Article 5(1), OP-CEDAW.

74 The rules of procedure and practice of the Human Rights Committee, the Committee against Torture, and the Committee on the Elimination of Racial Discrimination, also all allow for interim measures.

75 The First Optional Protocol to the International Covenant on Civil and Political Rights (OP1-ICCPR), the ICERD, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT) and the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990, GA Res. 45/158, 18 December 1990, A/RES/45/158 (MWC) all include inter-State procedures.

reference to ‘available resources’ in Article 2(1) of the ICESCR,⁷⁶ was reflected in Article 8(4). This provision guides the Committee when examining communications to ‘consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant’ and in doing so, to ‘bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant’ (Article 8(4)).

The OP-ICESCR also differs from other UN complaints procedures by including a provision allowing the Committee some discretion as to whether to consider all of the claims brought before it. Article 4 states: ‘The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.’

Further, Article 14 of the OP-ICESCR establishes a trust fund, with the aim of ‘providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant’ (Article 14(3)). The intention behind the trust fund is to contribute ‘to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol’ (Article 14(3)).

For the first time, a formal follow-up procedure has been expressly included in the text of an optional protocol, building on the existing practice of the other treaty bodies.⁷⁷ Article 9 provides that within six months, States Parties shall submit written responses to the Committee detailing the action they have taken in response to the Committee’s views and recommendations. In addition, the OP-ICESCR includes a friendly settlement provision, borrowing from the practice of the Inter-American Commission on Human Rights,⁷⁸ and the European Court of Human Rights.⁷⁹

4. Contentious Aspects of the Draft Optional Protocol

Many contentious issues were discussed during the OP-ICESCR negotiations, but five aspects in particular caused the most debate and consternation. These were: whether the mechanism would allow governments to pick and choose the rights the Committee had the competence to adjudicate (the *à la carte* approach) or would instead comprehensively encompass all rights

76 Article 2(1), ICESCR reads: ‘Each state party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the (Covenant rights) . . .’

77 See further, Elements Paper, *supra* n. 43 at paras 20 and 1.

78 Article 48(1)(f), American Convention on Human Rights.

79 Article 38(1)(b), European Convention on Human Rights.

under the ICESCR; who would have standing to bring complaints under the protocol and whether NGO generated complaints or other collective complaints would be permissible; the admissibility criteria to be applied; and the criteria the Committee should apply when examining complaints; and how to include an appropriate reference to the fact that international cooperation and assistance is for many countries a necessary enabler for the full realisation of ESC rights. These topics were raised repeatedly throughout the five years of Working Group sessions, and were particularly addressed in the Chairperson's Elements Paper. During the reading of the first draft OP-ICESCR, it became clear that these would be the areas of most significant divergence in the positions of delegations, and thus the second week of the fourth Working Group session was dedicated to addressing some of these concerns in detail. The fifth session was able to progress by approving many provisions on other matters, but the discussions on these more contentious aspects showed that a package encompassing moderately acceptable compromises on all of them would be the only way to succeed in obtaining agreement on any one of them.

A. Scope

One of the main priorities for many human rights advocates has always been to ensure an OP-ICESCR would be comprehensive in scope, so that complaints could be brought to the Committee in relation to all of the rights in the ICESCR, as well as all levels of State obligations, including the duties to respect, protect and fulfil ESC rights.⁸⁰ The possibility that States could exclude some rights or levels of obligations through either opting in or out of rights which could be selected *à la carte* was formally left on the table until the very end of negotiations, although from early sessions of the Working Group it had been apparent that the majority of States were in favour of a comprehensive mechanism.⁸¹ Support from two of the main regional groups, the African Group and the Group of Latin American and Caribbean (GRULAC) States, helped guarantee the numbers for a comprehensive approach.

In her first draft, the Chairperson included both possibilities, also including in Article 2(1) a further bracketed option to restrict communications to

80 NGOs had insisted upon this as one of the 'minimum criteria' for an OP-ICESCR: see statements by, *inter alia*, the NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the NGO Coalition), the International Federation for Human Rights (FIDH), Amnesty International, the International Commission of Jurists (ICJ), the FoodFirst Information and Action Network (FIAN) and the International Network for Economic, Social and Cultural Rights (ESCR-Net), available at: www.opicescr-coalition.org. [last accessed 27 September 2008].

81 Belgium, Bolivia, Brazil, Burkina Faso, Chile, Ecuador, Egypt (on behalf of the African Group), Ethiopia, Finland, France, Guatemala, Italy, Liechtenstein, Mexico, Nigeria, Norway, Peru, Portugal, Senegal, Slovenia, South Africa, Spain, Sweden, Uruguay and Venezuela were amongst those States to express support for the comprehensive approach: Fourth Working Group Session Report, supra n. 50 at para. 33.

Parts II and III (but not Part I, which, as noted, covers the right to self-determination) of the ICESCR. The report of the fourth session of the Working Group summarises well the key concerns regarding an *à la carte* approach: it ‘would establish a hierarchy among human rights, disregard the interrelatedness of Covenant provisions, amend the substance of the Covenant, disregard the interest of the victims, and defy the purpose of the optional protocol to strengthen the implementation of all economic, social and cultural rights.’⁸² Indeed, the OP-ICESCR would have been unique among the UN human rights instruments if it had allowed for some rights to be singled out for justiciability but not others.

For the Russian Federation in particular, the primary concern in terms of the selection of rights to be covered by the Protocol was excluding claims on the basis of violations of the right to self-determination (as contained in Article 1 of the ICESCR). For some States in favour of an *à la carte* approach, the opportunity to exclude Part I of the ICESCR from consideration was an acceptable compromise,⁸³ and for some it appeared to be consistent with their understanding of a comprehensive approach,⁸⁴ as they did not necessarily consider self-determination to be an individually enforceable right under a completely comprehensive model anyway. The Working Group agreed on a ‘limited comprehensive’ scope, which provided that claims could be brought for violations of all rights contained in Parts II and III of ICESCR.

Although this compromise seemed acceptable at the Working Group, in the informal discussions at the Human Rights Council two months later, some States took particular exception to this aspect, refusing to accept the exclusion of Part I, and claiming that this would undermine the indivisibility of all human rights, and signal a step backwards in terms of universal protection.⁸⁵ In the end, the ‘limited comprehensive’ approach did not survive the back room negotiations. The text was amended to allow for complaints regarding violations of ‘any of the economic, social and cultural rights set forth in the Covenant’ (Article 2). The decision to amend the previously agreed language, ‘in the margins of [the] Human Rights Council’,⁸⁶ was highly contested, both

82 Fourth Working Group Session Report, *supra* n. 50 at para. 33.

83 The United Kingdom, Australia, Greece, India, Morocco, Russia and the United States: Fourth Working Group Session Report, *supra* n. 50 at para. 36.

84 Egypt, *ibid.* at para. 35.

85 The President of the Committee on Economic, Social and Cultural Rights, Philippe Texier, supported this view that the exclusion of Part I and reference solely to Parts II and III would breach the notion of indivisibility of all human rights: Letter from Philip Texier to Catarina de Albuquerque (in French only), 19 May 2008, available at: <http://www2.ohchr.org/english/issues/escr/docs/LetterCatarina190508.pdf> [last accessed 25 August 2008].

86 Statement by the representative of the United Kingdom to the Human Rights Council during the ‘explanation after the vote’ on Res. 8/2, 18 June 2008, available on the Human Rights Council extranet, at <http://portal.ohchr.org/portal/page/portal/HRCExtranet> [last accessed 27 September 2008].

in informal discussions and then in statements made to the plenary of the Council once the OP-ICESCR had been approved.⁸⁷ While the process of renegotiating a careful compromise beyond the Working Group was the key problem for many States at the Human Rights Council, a potentially more serious concern remains in terms of the future interpretation of the OP-ICESCR and the vague nature of the new wording. Some see the ability to bring complaints regarding 'any of the economic, social and cultural rights set forth in the Covenant' as a more comprehensive possibility than restrictions based on Parts II and III. Yet, some States made a point of clarifying that their interpretation of the amended provision, and the ICESCR, was that the right to self-determination by itself 'could not be invoked to trigger a complaint'.⁸⁸

In its original decision on this matter, the Working Group was influenced not just by political expediency in its desire to exclude Part I, but also by the affirmations by the representative of the Committee that it would adopt an approach consistent with the Human Rights Committee (HRC), which for some reinforced a belief that inclusion of Part I would be redundant. The HRC has long maintained that it has no competence to hear claims regarding stand-alone violations of this right.⁸⁹ However, the HRC has in fact sustained the relevance of the right to self-determination in relation to other rights, and thus ensured its continued applicability in the HRC's complaint procedure, and its ability to adjudicate cases involving violations of the right to self-determination in conjunction with violations of other rights.⁹⁰ The exclusion of the right of self-determination from the scope of the Committee's review when considering complaints under the individuals and groups of individuals communications procedure and the inquiry procedure therefore risked being major retrogression in the legal protection of human rights.

B. Standing

The effectiveness of any adjudicatory mechanism rests, in a large part, on its *locus standi* provisions. The Chairperson's first draft OP-ICESCR took a broad approach to this, providing standing for both 'individuals and groups of individuals' and collective complaints.⁹¹ The inclusion of both individuals and groups of individuals is not particularly new—the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)

87 International Service for Human Rights, *supra* n. 59.

88 The United Kingdom, Turkey, Canada, Australia and Switzerland, *ibid.*

89 See, for example, *Ominayak (Lubicon Lake Band) v Canada* (167/1984), CCPR/C/38/D/167/1984 (1990) at para. 32.1; *E.P. et al. v Colombia* (318/1988), CCPR/C/39/D/318/1988 (1990) at para. 8.2; and *A.B. et al. v Italy* (413/1990), CCPR/C/40/D/413/1990 (1991) at para. 3.2.

90 See, for example, *Diergaardt et al. v Namibia* (760/1997), CCPR/C/69/D/760/1996 (2000); 8 IHRR 46 (2001) at para. 10.3.

91 Collective complaints were provided for in Article 3 of the Chair's First Draft, *supra* n. 50.

and OP-CEDAW expressly provide standing for groups of individuals, as do the rules of procedure for the HRC.⁹² This was generally supported, as was the importance of the role national and international NGOs play in submitting communications on behalf of victims.⁹³ However, the final text does not grant standing to NGOs to file communications in their own right: they may do so only on behalf of individuals or groups of individuals claiming to be victims. An attempt to restrict NGO involvement to only those organisations with ECOSOC consultative status was defeated after concerns were raised by Belgium, Brazil, Ecuador, Ethiopia, Mexico and the NGO Coalition.⁹⁴

The option of collective complaints, provided for in Article 3 of the Chairperson's first draft OP-ICESCR, raised some consternation. For European States, this possibility was somewhat familiar, as under the European Social Charter, ESC rights complaints may be brought by registered NGOs or trade unions as collective complaints.⁹⁵ Yet the concept received lukewarm support at the Working Group.⁹⁶ Many States were against the idea.⁹⁷ Despite warnings from Portugal that some of the rights in the ICESCR are collective rights,⁹⁸ and thus potentially only enforceable under an OP-ICESCR that encompasses collective complaints, the proposed Article 3 on collective communications was deleted. It will be for the Committee to decide whether a trade union may be regarded as a 'group of individuals' with standing to bring claims concerning trade union rights under Article 8.

From the perspective of human rights law and practice, another interesting aspect of the negotiations regarding standing was the proposal to allow the Committee to grant *amicus* standing to NGOs and National Human Rights Institutions (NHRIs).⁹⁹ There was some discussion about how the usual language of *amicus curiae* would not be appropriate for a quasi-judicial body (a matter easily resolved by alternative wording), and how formalised such a possibility needed to be, including whether it was more appropriate for inclusion in the rules of procedure rather than the instrument itself. A small number of States were disinclined to include an express *amicus* possibility,

92 See further the analysis of this in the Elements Paper, *supra* n. 43 at para. 10.

93 Belgium, Mexico, Norway, Spain and the NGO Coalition: Fourth Working Group Session Report, *supra* n. 44 at paras 44 and 54.

94 Fourth Working Group Session Report, *supra* n. 44 at para. 54.

95 Optional Protocol to the European Social Charter 1995.

96 In the lead-up to the third session, the following States had expressed interest in collective communications: Ethiopia (on behalf of the African Group), the Netherlands, Canada, Finland, Mexico and Portugal. Later, it was also supported by the ICJ and FIDH: Fourth Working Group Session Report, *supra* n. 50 at para. 56.

97 Algeria, Australia, Belarus, Burkina Faso, China, Colombia, Ecuador, Egypt (on behalf of the African Group), Greece, India, Japan, Morocco, Nigeria, Norway, the Republic of Korea, Russia, Senegal, Tanzania, the United Kingdom, Ukraine, the United States and Venezuela.

98 Article 8(1)(b) and (c) of ICESCR.

99 Proposed as Article 1 *bis*. See further, Fifth Working Group Session Report, *supra* n. 12 at para. 42.

stating that third party participation rights were already provided for.¹⁰⁰ A lack of express precedent in other similar optional protocols was also cited as reason for its non-inclusion,¹⁰¹ although it appears the door is still open to address the matter either through the rules of procedure or Committee practice. If pursued, thought will need to be given to the separation of the consideration of admissibility and merits, in order to facilitate the participation of third parties not already involved in the case. Presumably, documentation from NGOs and NHRIs may be consulted by the Committee under Article 8(3).

C. Admissibility

Many delegations at the Working Group were in favour of relying upon previously accepted wording from other human rights instruments when it came to specifying aspects of admissibility criteria such as the exhaustion of domestic remedies, the exclusion of ill-founded and anonymous complaints, and the question of time limits on the lodging of claims. Nonetheless, there was debate for several years over how to precisely formulate the rule requiring exhaustion of domestic remedies. After early calls to insert an additional requirement to exhaust regional remedies were rejected,¹⁰² the negotiations centred around the second sentence in the former Article 4(1)—the requirement that available domestic remedies have to be exhausted ‘shall not be the rule where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief’. Burkina Faso, Canada, China, Ecuador, Egypt (on behalf of the African Group), Poland and the United States wanted the phrase ‘unlikely to bring effective relief’ deleted.¹⁰³ This bid was successful, despite the insistence by others that the wording was agreed language from the OP-CEDAW, OP-CRPD, CAT and the MWC.¹⁰⁴ At least one delegation reminded the Working Group that the exhaustion of domestic remedies requirement does not apply when no such remedies exist at the national level.¹⁰⁵

The discussion about admissibility was the opportunity for delegates to also raise traditional concerns that a complaints procedure would ‘open the floodgates’ to hundreds or thousands of complaints regarding violations of ESC rights. In the first and second sessions of the Working Group, there had seemed to be (an unfounded or at least unproven) correlation being made between the fact that there are many millions of people living in poverty and

100 See further, Fourth Working Group Session Report, *supra* n. 50 at para. 41.

101 *Ibid.*

102 Originally raised by Egypt, later taken up as a suggestion by the United Kingdom, and dropped before being included in any drafting: Fourth Working Group Session Report, *supra* n. 50 at para. 62.

103 Fourth Working Group Session Report, *supra* n. 50 at para. 59 and Fifth Working Group Session Report, *supra* n. 12 at para. 49.

104 Fifth Working Group Session Report, *supra* n. 12 at para. 49.

105 *Ibid.*

deprivation, and the possibility or likelihood that such circumstances would give rise to the lodging of an individual complaint. In the first week of the fifth session of the Working Group, Canada, New Zealand and the United Kingdom proposed addressing this potential overload through the inclusion of new wording referring to the Committee's discretion to consider a case on the basis of whether the victim was likely to suffer some 'significant disadvantage', or unless the communication raised a 'serious issue of general importance'.¹⁰⁶ Again, this proposal was attractive to some of the European governments, as it echoed familiar recent proposals to reform the procedures and thereby reduce the caseload of the European Court of Human Rights.¹⁰⁷ Yet there was significant opposition to pre-emptively including such a provision, as it 'would seem to imply that some violations could be considered insignificant, which [is] unacceptable'.¹⁰⁸ Other wording was suggested, including a need to show 'clear detriment', until it was decided to settle on 'clear disadvantage'. This phrase currently lacks legal content, and so it will be interesting to see how, if at all, it is interpreted by the Committee.

D. Criteria for Review

Article 8(4) of the draft OP-ICESCR reads:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

States such as the United States of America and Canada had long argued in the Working Group that the progressive nature of ESC rights and the 'available resources' limitation recognised in the Contracting Parties' basic obligations in Article 2(1) of the Covenant, made justiciability difficult, if not impossible, at the universal level. Additionally, other States, if not denying the possibility, had nonetheless raised serious concerns about how the Committee would approach cases involving questions on resource allocation and assessments of the sufficiency of steps taken by the Government to realise the rights.¹⁰⁹ At various formal and informal sessions, the Committee's representative at the Working Group, Professor Eibe Riedel, was questioned about what approach he foresaw the Committee adopting. Concerns about the Committee's potential over-involvement in policy setting prompted a desire to curtail this through

106 Fifth Working Group Session Report, *supra* n. 12 at para. 59.

107 See the admissibility requirement proposed by Article 12, Protocol 14 to the European Convention on Human Rights.

108 Fifth Working Group Session Report, *supra* n. 12 at para. 59.

109 In particular, Canada, the United Kingdom and Australia.

the inclusion of criteria in the text of the OP-ICESCR, which would guide the Committee as to the standard it was to apply when undertaking its consideration of the merits of the claim.

Thus, discussions began in the fourth Working Group session about an explicit requirement that the Committee grant to the State a margin of appreciation, and the inclusion of a 'reasonableness' standard, both contained in Article 8(4) of the Chairperson's initial draft.¹¹⁰ There were strong objections to such inclusions, in particular the margin of appreciation doctrine.¹¹¹ The reasonableness standard, influenced by the South African Constitutional Court's jurisprudence on ESC rights which relies strongly on this standard of review,¹¹² was cautiously supported by NGOs, with the proposal that it be coupled with 'effectiveness', while the Chair later suggested 'reasonableness and appropriateness' would be more useful.¹¹³ Some delegates, mainly those less familiar with the English common law legal system, were reluctant to use reasonableness as a standard for review,¹¹⁴ despite the proposals from the United Kingdom that an explanatory annex be included to define the concept.¹¹⁵ Some preferred a mandatory application of the margin of appreciation doctrine to alleviate their concerns, with Canada, Denmark, Greece, the Netherlands, New Zealand, Norway, Sweden, Turkey and the United Kingdom additionally requesting that qualifiers such as 'broad' or 'wide' be included in order to further entrench the State's discretionary powers.¹¹⁶ The proposal was criticised as an attempt to import an European principle into international law¹¹⁷—as although the margin of appreciation doctrine is relatively well established at the European Court of Human Rights,¹¹⁸ it has not been codified, least of all in an international instrument.

110 Supported by Belgium, Chile, Finland, Germany, Mexico, the Netherlands, Portugal, Slovenia and Spain at the Fourth Working Group Session and Australia, Austria, Germany, Greece, the Netherlands, New Zealand, Slovenia and Sweden at the Fifth session: Fourth Working Group Session Report, supra n. 50 at para. 94 and Fifth Working Group Session Report, supra n. 12 at para. 88.

111 The removal of the words 'margin of appreciation' was requested by Argentina, Bangladesh, Belgium, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation, Sri Lanka and the NGO Coalition for an OP-ICESCR: Fifth Working Group Session Report, supra n. 12 at paras 11, 91, 169 and 171.

112 See *The Government of the Republic of South Africa and others v Irene Grootboom and others* [2001] (1) SA 46 (CC).

113 Fifth Working Group Session Report, supra n. 12 at para. 168.

114 Azerbaijan, Denmark, Nigeria, Norway and Russia expressed their objection at the Fourth Working Group Session, and Ecuador, Egypt (on behalf of the African Group), Guatemala, India, Liechtenstein, Mexico, Peru, Sri Lanka and the NGO Coalition for an OP-ICESCR asked for its deletion at the Fifth Working Group: Fourth Working Group Session Report, supra n. 50 at para. 94; and Fifth Working Group Session Report, supra n. 12 at para. 88.

115 Fourth Working Group Session Report, supra n. 50 at para. 94 and Fifth Working Group Session Report, supra n. 12 at para. 88.

116 Fifth Working Group Session Report, supra n. 12 at para. 91.

117 Ibid. at para. 171.

118 Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002).

What resulted from these discussions in Article 8(4) was a moderate compromise: the inclusion of the criteria of ‘reasonableness’, but no mention of a need to apply a margin of appreciation. Although no explicit margin of appreciation is included, States are still granted discretion through the application of the second sentence of Article 8(4).

E. International Cooperation and Assistance

How to reflect the crucial role of ‘international assistance and cooperation’, as enshrined in Article 2(1) of ICESCR, was always going to be one of the most difficult aspects of the OP-ICESCR to draft. Many delegates, especially those from the African Group and GRULAC States, highlighted the potential for international cooperation to be a ‘tool to ensure a better implementation of economic, social and cultural rights in general, and of the Committee’s views and recommendations in particular.’¹¹⁹ The Chairperson, in her first draft, had drawn upon the example of the wording of Article 22 of the ICESCR and Article 45(3) of the Convention on the Rights of the Child, to include a provision (Article 13 in the Chair’s first draft) enabling the Committee to transmit its views and requests for technical cooperation directly to the relevant agencies ‘so that the agencies and programmes in question could identify tangible international measures to assist a State in need’.¹²⁰

The Chairperson had also incorporated a second provision, on the suggestion from Egypt (on behalf of the African Group), to establish a special voluntary fund which would support States facing serious resource constraints in their efforts to guarantee ESC rights and better enable them to implement the recommendations of the Committee. This provision (formerly Article 14) was based on the example of similar funds existing under the Optional Protocol to the Convention Against Torture (OP-CAT) and the Rome Statute of the International Criminal Court.¹²¹ It was, however, not supported by many Western States, including Australia, Belgium, Denmark, France, Liechtenstein, the Netherlands, New Zealand, Sweden, Switzerland, the United Kingdom and the United States. The language referring to the voluntary nature of the fund was dropped, amidst, on the one hand, arguments that any obligatory fund would be impossible to support, and, on the other, reminders that the inclusion of international cooperation and assistance in Article 2(1) of the ICESCR entailed corollary duties.¹²² Yet, without the express requirement that the fund be established by obligatory contributions, it is voluntary in nature.

119 Explanatory Memorandum, *supra* n. 50 at para. 35.

120 *Ibid.*

121 See, for example, Article 26, OP-CAT.

122 Fourth Working Group Session Report, *supra* n. 50 at paras 164 and 165.

In the fourth and fifth Working Group sessions, these two draft provisions (which were eventually merged into one, now Article 14) were much discussed, with debate over whether the Committee or the State should be specified as the party requesting the assistance, and how victims could be the beneficiaries of the trust fund either as direct recipients of funding to remedy their violation, or through receiving assistance to bring claims under the OP-ICESCR.¹²³ Criticism was levelled at a fund directed towards providing financial 'rewards' to human rights violators through creating a direct link between violations and access to funding.¹²⁴ As one of the pivotal aspects of the compromise package position, the final decision was made to include the provision establishing a trust fund; access to the fund by victims was excluded (Article 14(3)).

5. Other Key Aspects of the Draft Optional Protocol

Outlined above are some of the key controversial aspects of the OP-ICESCR, but these were no means the only areas of discussion and divergence of opinion. Numerous other aspects of the OP-ICESCR and the surrounding negotiations deserve consideration, although it is not possible to sufficiently explore these in this article. For example, one of the issues which arose for the first time in the reading of the first draft, and continued to be problematic until the last week of discussions, was the wording of the preamble, in particular whether or not the grounds of discrimination should be expressly stated. The Chair's initial proposal was to note, in preambular paragraph 2, that 'the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind'. At the fourth Working Group session Egypt (on behalf of the African Group) proposed that the final words in the Chair's draft sentence be replaced by the list of grounds of discrimination contained in Article 2 of the UDHR.¹²⁵ Others objected,¹²⁶ insisting that the wording in the Chair's draft better reflected the progressions in human rights that had occurred since 1948: the elephant in the room being discrimination on the grounds of sexual orientation and gender identity. Egypt won with its determination to see the UDHR grounds spelt out, although as this list is non-exhaustive it does not comprehensively exclude other forms

123 *Ibid.* at para. 168 and Fifth Working Group Session Report, *supra* n. 12 at paras 117, 184 and 191–4.

124 Fifth Working Group Session Report, *ibid.* at para. 114.

125 Fourth Working Group Session Report, *supra* n. 50 at para. 21.

126 Argentina, Mexico, Portugal, Spain, Switzerland and the United Kingdom: Fourth Working Group Session Report, *supra* n. 50 at para. 21. At the Fifth Working Group Session, Belgium, Canada, Chile, Costa Rica, Ecuador, Finland, France, Haiti, the Islamic Republic of Iran, Mexico, Poland and the NGO Group had added their voices in favour of the more general wording in the Chair's draft: Fifth Working Group Session Report, *supra* n. 12 at para. 17.

of discrimination from being considered. It was, however, a lost opportunity to reaffirm the language of the most recent human rights treaty, the Convention on the Rights of Persons with Disabilities (CRPD), which recognises an entitlement to rights ‘without distinction of any kind’.¹²⁷

Another interesting debate occurred around the question of whether to allow reservations, or specifically exclude this possibility, or leave the matter unspoken in the OP-ICESCR. While the last option was the one eventually agreed, long debates preceded this decision. On the one hand NGOs and others argued that a provision allowing for reservations would be akin to introducing an ‘à la carte approach’ via the back door, and many States strenuously opposed allowing reservations for a procedural instrument.¹²⁸ Yet some delegations, such as that of Denmark, considered that an express provision allowing for reservations would better enable global ratification.¹²⁹ Again, a compromise was made, and the opportunity to affirm the incompatibility of reservations with such an instrument, as had been done in the OP-CEDAW,¹³⁰ was lost. It will now be up to the Committee to take a view about the validity of a respondent State’s reservation so that it can apply the OP-ICESCR in a particular case, although, in accordance with the law of treaties, the final decision as to whether a reservation is consistent with the ‘object and purpose’ of the OP-ICESCR, and hence valid, will rest with the Contracting States.

Despite the somewhat traditional approaches taken to the preamble and the question of reservations, the OP-ICESCR does reflect some of the more progressive aspects of other universal human rights instruments. It provides for interim measures to be requested if a victim faces possible ‘irreparable damage’ (Article 5). The inclusion of this in the text of the Optional Protocol itself is consistent with OP-CEDAW’s similar provision, and is an improvement upon the way in which the HRC, the Committee against Torture and the Committee on the Elimination of Racial Discrimination must rely on their rules of procedure for the authority to order such measures. Such a measure had been staunchly supported by NGOs and States who considered that ‘[t]he function of interim measures to prevent irreparable harm was of such importance that the matter should not be deferred to the Committee’s rules of procedure.’¹³¹ A potentially retrogressive proposal from Norway that the voluntary nature of such requests be made clear in the wording of the

127 Preambular at para. 2, OP-CRPD.

128 Argentina, Belgium, Chile, Finland, Germany, Mexico, Portugal, South Africa and Venezuela: Fourth Working Group Session Report, supra n. 50 at para. 140.

129 Ibid. at para. 139.

130 Article 17, OP-CEDAW.

131 Supporters of the inclusion of an interim measures provision included Argentina, Belgium, Brazil, Chile, Ecuador, France, Finland, Liechtenstein, Mexico, Peru, Portugal, Spain, Uruguay, Venezuela, Poland, South Africa, Uruguay, Amnesty International, ESCR-Net, FIAN and the ICJ: Fourth Working Group Session Report, supra n. 50 at para. 67.

provision was rejected.¹³² A proposal to limit the use of interim measures to 'exceptional circumstances' was, however, agreed.¹³³

The OP-ICESCR also expressly provides for an inquiry procedure, expanding the Committee's functions even further. The inclusion of an inquiry procedure in the Chairperson's draft had prompted debate about the need for the Committee to have such a function given that the UN Special Procedures also have the possibility of investigating potential ESC rights violations. Thanks to the support of Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa, Sweden and the NGO Coalition, amongst others, the mechanism was retained, despite opposition from Australia, China, Egypt, India, Russia and the United States.¹³⁴ Those in favour noted the importance of a mechanism that could be used by individuals and groups facing difficulties in accessing the individual communication procedure or facing danger of reprisal.¹³⁵ The chief question then became whether the procedure should be 'opt-in' or 'opt-out'. A similar procedure established under the OP-CEDAW allows States to 'opt-out', and the Convention Against Torture provides the possibility for States to enter a reservation declaring they do not recognise the competence of the Committee in relation to the inquiry function (Article 20). Despite these precedents for 'opt-out' procedures, the OP-ICESCR adopts an 'opt-in' method, providing in Article 11(1) that '[a] State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee' to conduct an inquiry if it 'receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant' (Article 11(2)). Thus the mechanism, although included, will require positive support by States in order to be of any use.

Finally, it may surprise some readers to see that Article 10 contains an inter-State complaints procedure, mirroring the provisions in the OPI-ICCPR, ICERD, CAT and CMW,¹³⁶ all of which remain unused to date. There had been some discussion at the various Working Group sessions about the efficacy of

132 Fifth Working Group Session Report, *supra* n. 12 at para. 160. The HRC has taken the view that failure to comply with its interim measures are 'grave breaches' of a state's obligations under the OPI-ICCPR to permit the consideration of communications: *Piandiong v Philippines* (869/99), CCPR/C/70/D/869/1999 (2000); 8 IHRR 349 (2001).

133 This had been suggested by the Chairperson and supported by Argentina, Bangladesh, Brazil, Canada, Denmark, Egypt, France, Germany, Greece, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden, the United Kingdom and the United States, although it was considered redundant by Finland, Switzerland, Amnesty International, ICJ and the NGO Coalition: Fifth Working Group Session Report, *ibid.* at para. 158.

134 Fourth Working Group Session Report, *supra* n. 50 at para. 111.

135 *Ibid.*

136 Article 21, CAT and Article 76, MWC.

including a provision that had remained unused in similar instruments.¹³⁷ The Chairperson suggested that the Working Group

consider the extent to which an inter-State procedure might be a means by which a treaty body could provide its good offices in order to seek a friendly solution between States having made an appropriate declaration to accept such an instrument, [for example] in relation to concerns over international cooperation and assistance.¹³⁸

This approach reflects anecdotal reports that, although no claims have been progressed through the inter-State complaints procedures established by other instruments, their mere existence provided useful tools for international diplomacy. In the ensuing discussions at the Working Group, some States confirmed that such a procedure had proved to be useful in the regional human rights systems.¹³⁹

The inclusion of this provision is indeed a positive retention, as not only does it ensure that for the sake of any potential future unification of the treaty body communications procedures there is no significant gap when it comes to inter-State justiciability of human rights, but also it leaves open the door for possible developments in international jurisprudence in this regard. We are entering an era where inter-State dispute settlement mechanisms are increasingly being used to settle matters relating to human rights. For example, the International Court of Justice has decided its first contentious case on human rights issues, *DRC v Uganda*,¹⁴⁰ and issued its first Advisory Opinion commenting on human rights obligations specifically related to ESC rights and the ICESCR, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁴¹ It is also soon to hear the first request for the provisional measures in a case brought specifically on the grounds of alleged violations of a human rights treaty, in proceedings filed by Georgia against Russia.¹⁴² In short, these developments show us that the inter-State complaints procedures of the UN treaty bodies may not

137 For instance, in the Fourth Working Group Session, China, Ecuador, Ethiopia, Japan, Norway and the United Kingdom suggested it be deleted, some expressly on the basis that similar procedures had remained unused: Fourth Working Group Session Report, supra n. 50 at para. 109.

138 Elements Paper, supra n. 43 at para. 34.

139 Fourth Working Group Session Report, supra n. 50 at para. 109.

140 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of the International Court of Justice, 19 December 2005.

141 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the International Court of Justice, 9 July 2004.

142 See further, the press releases of the International Court of Justice, 'Georgia submits a Request for the indication of provisional measures', 14 August 2008, and 'Georgia institutes proceedings against Russia for violations of the Convention on the Elimination of All Forms of Racial Discrimination', 12 August 2008, available at: <http://www.icj-cij.org/docket/files/140/14661.pdf> and <http://www.icj-cij.org/docket/files/140/14659.pdf> respectively [last accessed 24 August 2008].

remain idle forever, and thus it is forward-thinking (if probably somewhat unintentionally on the part of most Working Group members) to include such a traditional provision in relation to ESC rights.

6. Preliminary Assessments of Potential Successes and Impacts

If the OP-ICESCR text is adopted by the General Assembly, hopefully later this year, it will enter into force three months after the tenth State has ratified or acceded to the instrument (Article 18). Given the speed with which the OP-CPRD entered into force, and the broad support for the OP-ICESCR expressed by many delegations, one can only hope that the OP-ICESCR's final steps towards implementation will also be fast and smooth. What will remain a longer term task for the human rights community is gathering an accurate picture as to whether the campaign for access to justice for victims of ESC rights violations has truly been enhanced through the adoption of this mechanism. It will take time, after the eventual adoption of the OP-ICESCR, to assess whether the mechanism really does 'ensure effective protection for victims of violations of economic, social and cultural rights', as the Chairperson and others hope it will.¹⁴³ Thus, it could be reasonably argued that any assessment of the potential impact of this mechanism is, at this stage, likely to be little more than premature hypothesising. Yet, it is nonetheless important to begin to establish a framework for some form of assessment, lest we continue along the road of proliferation of international mechanisms without giving due thought to their added value.

There are several ways in which such assessments could be structured. For example, we could take the number of States ratifying the OP-ICESCR as a guide to the success of the mechanism and what degree of impact it will have upon ratifying States, and more broadly. Many have taken this approach towards the Convention on the Protection of the Rights of Migrant Workers and their Families, claiming that as this instrument has a relatively small number of signatories, and those few that have ratified are representative of migrant exporting States, rather than receiving States, this instrument is one of the 'weakest' in the UN armoury. Yet migrant workers advocates claim it is one of the strongest, based on the tough wording of the Convention and the refusal of negotiators to weaken textual protections. They are less concerned about what the short-term number of ratifying parties means for the 'success' of the Convention, and more concerned about the longer term consequences of developing progressive international human rights law and establishing a body that can clearly adjudicate well articulated rights.

143 Fifth Working Group Session Report, *supra* n. 12 at para. 3.

On this basis, does the OP-ICESCR look set to be celebrated or ignored? It could be said that the last minute decision to make the Optional Protocol comprehensive in scope saved it from accusations of being an overly weak text, although some provisions could still have been stronger (see comments above regarding the role of NGOs as one example). It is difficult to say at this point how successful the ratification campaign will be: despite the widespread support from the GRULAC States and the African Group and assurances from many during the drafting processes that they are eager to ratify, will some States get cold feet and decide they are not ready to subject themselves to adjudication? Will some, perhaps rightly, claim that they do not have the domestic remedies in place to make entering into an Optional Protocol a desirable short-term policy option?

The back room critique by some diplomats from developed countries has been that this Optional Protocol risks being one which is only ratified by developing countries wishing to access the trust fund, who will claim lack of resources as mitigating circumstances in relation to all and any complaint raised against them. Developed States are reluctant to be the only ones held accountable under such a mechanism, which they see as carrying a risk of imposing higher standards upon rich countries. Hence, the push by countries like Australia and New Zealand to promote inclusion of wording referring to a 'wide margin of appreciation' for government decisions on resource allocations: they claimed this would make the Protocol more 'ratifiable' by their governments, and therefore a more 'effective' instrument overall. It will be interesting to see if the result of Article 8's government-friendly references to standards of reasonableness and State discretion in adopting 'a range of possible policy measures' heightens the willingness of States to sign on, or whether this admirable concern for the long-term efficiency of the mechanism was a smoke-screen for watering down the Committee's power to intervene.

While the level of acceptance may not provide a full indication as to the potential impact that this instrument may have, some minimum level of ratifications will be necessary to bring it into operation and ensure the Committee can begin receiving complaints. However, when it comes to particular aspects of the OP-ICESCR, the success of the instrument may be variable. For instance, in addition to ratification of the primary (optional) instrument, States are further requested to expressly give the Committee competence to conduct inquiries. The success of the inquiry procedure will therefore be dependant first on the forthcoming nature of this consent, and perhaps only subsequently will broader impacts become visible and relevant.

Taking a more comprehensive comparative analysis approach, one could assess the OP-ICESCR on the basis of how it compares with other human rights petitions mechanisms. Does it create more or less adjudicative space for victims? Does it add to the mechanisms that already exist, and fill gaps in the system, or is it purely duplicative of what is already out there? Do the

provisions of the OP-ICESCR reflect progression or retrogression in international human rights law and practice, or do they risk repeating exactly the same mistakes or raising the same problems that we see in other similar treaty body complaints procedures or regional adjudicatory mechanisms? Does the OP-ICESCR consolidate best-practice, or reject it? Although, not all aspects of the Optional Protocol stand up as examples of best-practice in the UN human rights system, as other complaints procedures are more progressive in some aspects, the OP-ICESCR does not fare too badly by comparison. For example, the express provision of interim measures is a positive development following on from the example of the OP-CEDAW, although the 'opt in' nature of the inquiry procedure is retrogressive when compared with the OP-CEDAW.

Another framework for analysis could be an assessment of whether or not the OP-ICESCR, in its final drafted form, has the capacity, on a textual basis, to fully realise the intended goals of the project. For instance, if one of the benefits promoted during the long-running campaign for an OP-ICESCR was that the Optional Protocol would provide a forum for victims to seek redress for violations of ESC rights, does the text of the OP-ICESCR adequately and appropriately facilitate this goal? Do the admissibility criteria and standing provisions sufficiently allow victims of violations to access the forum, or do they amount to barriers to justice? Do the criteria for review of a claim and the standard to be applied when reviewing the merits adequately allow the Committee to adjudicate violations, or is the margin of appreciation too skewed towards responding States? Is the OP-ICESCR as worded an instrument that will enable the Committee to fulfil the goals that proponents of an OP-ICESCR set out to achieve, such as creating a body of jurisprudence that will further enable interpretation and implementation of ESC rights globally? Will the OP-ICESCR actually contribute to progress the realisation of ESC rights? Likewise, is the text appropriately framed to address the concerns and critiques that had been levelled at the idea of an adjudicatory mechanism on ESC rights? For instance, does it adequately take into account the difficulty of fulfilling ESC rights for developing countries, or properly respect the parliamentary sovereignty of governments elected to make tough decisions about spending on social policies?

Some of these questions can already be answered, although all will require further elaboration and assessment as the mechanism begins operation. For example, in relation to the concern about the difficulty for developing countries, it appeared in the negotiations that even many of its proponents see the trust fund as little more than window dressing, and have accepted that due to its voluntary nature, it is quite likely it may never come into practical operation. On the question of the contribution the OP-ICESCR makes to the realisation of ESC rights, as referred to earlier, the former High Commissioner Ms Louise Arbour has articulated how the mere fact that such an instrument has been agreed and an adjudicatory mechanism now exists can be seen as a step towards ending the hierarchy of rights and setting us on track to enhance

global jurisprudence on ESC rights issues.¹⁴⁴ On a more technical level, the deliberate exclusion of *locus standi* for NGOs to directly bring claims (without the requirement they act ‘on behalf of’ victims) can be seen as a failure when it comes to creating a mechanism that has the best chance of being one that will provide access to justice. Most victims of ESC rights are those who would already struggle to access domestic remedies, if such remedies are available, let alone international remedies. To rule out the possibility for NGOs, who are usually the entities who bridge the gap between grass roots human rights violations and international redress mechanisms, to directly bring cases to the Committee means only those victims with the resources and awareness to file a petition, and the willingness to be named as complainants, will have the opportunity to access the complaints procedure.

Applying this functional analysis approach, the preliminary assessment is again mixed, and serves as little more than a reminder that the task of evaluating our newest human rights instrument requires more examination and more time to see how it will work once the finely drafted provisions are put into practice and interpreted.

7. Preliminary Conclusions

The anticipated adoption of this new instrument may not solve all of the problems that have plagued the international human rights community for decades when it comes to ESC rights. It is difficult to assess yet whether the OP-ICESCR will enhance the coherence of the human rights system in its treatment of rights, or whether the drafting decisions the Chairperson and the Working Group members have made along the way will ultimately hinder this process in various ways. For human rights advocates waiting and hoping for the final adoption of the text at the end of this year and its subsequent entry into force, the next step is not only to consider what impact this new mechanism can have, but also how best to maximise its potential through initial attempts at developing jurisprudence. The draft OP-ICESCR represents a significant move forward, but time will tell whether or not it will signal the real end of the war between civil and political rights and ESC rights.

144 Supra n. 5.



Human Rights Council

Resolution 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

The Human Rights Council,

Recalling Commission on Human Rights resolution 2005/69 of 20 April 2005 on the responsibilities of transnational corporations and related business enterprises with regard to human rights,

Bearing in mind paragraph 6 of General Assembly resolution 60/251 of 15 March 2006,

Recalling Council resolutions 5/1 on institution-building of the Human Rights Council and 5/2 on the code of conduct for special procedures mandate-holders of the Council of 18 June 2007, and stressing that the mandate-holder shall discharge his/her duties in accordance with those resolutions and the annexes thereto,

Stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State,

Emphasizing that transnational corporations and other business enterprises have a responsibility to respect human rights,

Recognizing that proper regulation, including through national legislation, of transnational corporations and other business enterprises, and their responsible operation

can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channeling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms,

Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary,

1. *Welcomes* the reports of the Special Representative and in particular the identification, through the process of consultations, studies and analysis, of a framework based on three overarching principles of the State duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises, the corporate responsibility to respect all human rights, and the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms;

2. *Recognizes* the need to operationalize this framework with a view to providing more effective protection to individuals and communities against human rights abuses by, or involving, transnational corporations and other business enterprises, and to contribute to the consolidation of existing relevant norms and standards and any future initiatives, such as a relevant, comprehensive international framework,

3. *Welcomes* the broad range of activities undertaken by the Special Representative in the fulfilment of his mandate, including in particular the comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions;

4. *Decides* to extend the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises for a period of three years, and requests the Special Representative:

(a) To provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation;

(b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;

(c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;

(d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;

(e) Identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact;

(f) To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council;

(g) To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings;

(h) To report annually to the Council and the General Assembly;

5. *Encourages* all Governments, relevant United Nations agencies, funds and programmes, treaty bodies, civil society actors, including non-governmental organizations, as well as the private sector to cooperate fully with the Special Representative in the fulfilment of his mandate, inter alia, through the submission of comments and suggestions on the issues related to his mandate;

6. *Requests* the Office of the United Nations High Commissioner for Human Rights to organize, within the framework of the Council, a two-day consultation bringing together the Special Representative of the Secretary-General, States, business representatives and all relevant stakeholders, including non-governmental organizations and representatives of victims of corporate abuse, in order to discuss ways and means to operationalize the framework, and to submit a report on the meeting to the Council, in accordance with its programme of work;

7. *Invites* international and regional organizations to seek the views of the Special Representative when formulating or developing relevant policies and instruments,

8. *Requests* the Secretary-General and the High Commissioner for Human Rights to provide all the necessary assistance to the Special Representative for the effective fulfilment of his mandate;

9. *Decides* to continue consideration of this question in conformity with the annual programme of work of the Council.

28th meeting
18 June 2008

[Adopted without a vote.]

SWITZERLAND'S HOME STATE DUTY TO PROTECT AGAINST CORPORATE ABUSE

Analysis of legislation and needed reforms in Switzerland to
strengthen corporate accountability regarding
human rights and environmental abuses

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Arbeitsgruppe Schweiz-Kolumbien

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EXECUTIVE SUMMARY

This study focuses on Switzerland's implementation of its duty to protect against corporate human rights and environmental abuse. The study's objectives are to review and assess the national Swiss legislation and policies and to outline the main areas that may need reform and to map the options available to ensure full compliance of Switzerland with its international obligations.

The Context

Switzerland is a state party to most of the universal and European international instruments on the protection of human rights, labour rights and the respect for the environment. Treaties concerning the protection of human rights and labour rights impose a wide range of obligations on States to respect and/or ensure respect for (depending on the formulation of each treaty), including to prevent, prohibit and bring an end to third party abuse of rights. In some cases, it will require holding those third parties legally responsible. Some provisions in certain treaties have been considered as imposing obligations of extraterritorial reach (i.e. Convention Against torture, CRC and Geneva Conventions).

The study takes into account Prof John Ruggie's framework based on three pillars: the primary duty of States to protect people against violations of their rights by third parties, including businesses; secondly, the responsibility of corporations to respect all human rights; thirdly, the need to enhance access to remedies (judicial and non judicial) by victims of rights violations by companies. It also takes into account developments and proposals made at the European level (such as those made by ECCJ) calling for clearer duties of corporations, access to justice and mandatory reporting.

Overall Swiss policy framework

Despite its intense engagement at the international level promoting a number of initiatives Switzerland does not have a unified overall policy on human rights, business and CSR. Independent government departments are in charge of human rights at home and abroad and of economic matters, and although close coordination is said to exist among them, this does not result in a unified policy involving a structure, principles and mechanisms.

Swiss Legal framework on CSR, human rights and environment

The Swiss Federal Constitution requires State organs to respect human rights and promote them in the context of its foreign policy. However, national legislation and policies have not developed that mandate to the fullest.

Legal duties of company directors- There are no specific rules in Swiss corporate law imposing an obligation on directors to consider the company's impacts on non-shareholders (including human rights impacts on the individuals and communities affected by the company's operations), within or outside Switzerland, except certain provisions of the Law on the Protection of the Environment -LPE. Practice in other countries generally links consideration of social and environmental impacts to the financial interests of the company. However, the law **permits** the directors to consider the company's impacts on non-shareholders, provided that this is not contrary to the company's interests.

Nor are there specific legal requirements on directors to ensure that subsidiaries, suppliers or other business partners take into account human rights considerations. The possibility that the parent company be held liable for such impacts (and, as the case may be, that the directors' liability be in turn triggered) is, in principle, limited, as they are different legal entities.

The Swiss Criminal Code establishes liability for individuals who commit crimes and this applies to company directors as individuals, including in relation to international crimes (crimes against humanity, war crimes and genocide). This covers direct perpetrators, accomplices and others. Criminal jurisdiction is based on a territorial principle, but in certain cases of international crimes and offences against children, it suffices that the perpetrator is in Swiss territory even if the offence was committed abroad to trigger Swiss jurisdiction.

Companies' liability- Environmental law imposes certain obligations on companies to take "appropriate measures" to prevent harm from occurring, a duty to inform the buyers and consumers about the characteristics and potential impact of the products (i.e. in case of biological organisms). Failure to observe these duties would trigger legal liability.

The Swiss legal system also establishes a novel system of criminal liability for corporations, yet untested (Article 102 of the Criminal Code): when the individual perpetrator of an offence cannot be identified because of the enterprise's lack of organisation; and, for certain specific crimes, the enterprise's parallel liability arises due to defective organisation (the enterprise has not taken all reasonable and necessary organisational measures to prevent the individual from committing the offence).

The principle is that a company and its subsidiary have separate legal personalities and are therefore considered as two different legal entities, one not being liable for the activity of the other. However, Swiss courts have developed some exceptions to this principle under specific and exceptional circumstances. In relation to the company **suppliers**: although they are two different legal entities, if the supplier has no decisional power of its own and the influence of another company is decisive, this other company may be held liable for the activities of the supplier.

Reporting on social and environmental issues

The existing reporting obligations focus mainly on financial reporting obligations. Companies are required to disclose risks that may have a major influence on the company, which may include impacts on non-shareholders, if, for instance, they pose a legal risk to the company.

The law requires listed companies (in the stock exchange) to inform on any price-sensitive facts that can trigger significant change in market prices. Price-sensitive facts could include events connected to the company's impact on non-shareholders such as **liability risks resulting from damages to the environment, violations of human rights or product liability** that imply an important change in the financial evaluation of the company.

In conclusion, companies may be required to disclose the impacts of their operations (including societal impacts) on non-shareholders mainly in cases where this might have a significant influence on their financial situation or on market prices, which limits the scope of

impacts to be reported on. They may also have to report these impacts in specific situations, where it is required in other laws, including labour and environmental laws.

As a rule companies are permitted to disclose the impacts of their operations (including societal impacts), as long as this reporting is not detrimental to the interests of the company. Many largest Swiss companies have codes of conduct and report on them.

Access to justice and grievance mechanisms

Access to an effective remedy is a human right. When affected communities face transnational companies, huge power and financial disparities become evident. Swiss law does not recognise the institution of “*class action*” whereby a group of persons who claim to be similarly affected by a company can bring a collective claim before the court for damages. Class actions usually facilitate legal action by a group with a single legal counsel reducing costs and also alleviating the burden of proof each individual would otherwise have, and possibly reducing the length of litigations. By contrast, Swiss law recognises to *civil associations and organizations the right to bring claims in defence of a collective interest* (not only of their members but also of those outside carrying out similar trade) provided that their statute enables them to defend the economic interest of their members.

Other obstacles to access justice include high legal costs (mainly of legal representation) and protection of witnesses and whistleblowers.

There are some grievance mechanisms that are being used, such as the OECD National Contact Points system. But the methods and outcomes of the Swiss NCP show that it is not yet an effective remedy for victims. At the same time, another potentially valuable mechanism, a national human rights commission, does not exist yet.

Policy instruments

Switzerland uses a series of policy instruments to advance human rights at home and abroad. They include a policy to defend Swiss enterprises economic interests abroad, which reportedly excludes cases of corruption or of companies without good human rights and labour record; public procurement that contemplates respect to ILO core labour conventions as conditions, and the export credit agency (SERV).

Common criticisms against these policies include the lack of coordination and coherence amongst them, selective use of standards, politicising, and lack of accountability.

Outlining options for reform

- Switzerland needs an overarching policy or plan to promote human rights and environmental business responsibilities, to catch up with the European trend. One way to achieve this is that the Federal Parliament requests the Federal executive to produce such a policy or paper in consultation with civil society, business and other stakeholders.
- Alternatively, the Federal Parliament can request the Federal executive to commission such policy paper to the Competence Centre on Human Rights that has been created as a pilot project. Failure of Parliament should not be a deterrent and the Federal executive

may be persuaded to directly commission such policy paper or plan from the Competence Centre.

- Company law may be reformed with the introduction of a specific duty of care of parent companies in respect to their subsidiaries and companies under their control. This duty may be added explicitly in amended Articles 716a and 717 CO that define directors' duties to the effect that directors' duties will include to exercise due diligence to ensure that subsidiaries and societies under its control do not commit serious human rights violations or cause serious damage to the environment.
- To enforce the duty of care in relation to subsidiaries, a suit at law may be brought against the parent domiciled in Switzerland.
- A general **duty of care** on the part of a company to ensure that human rights and the environment are respected **throughout its sphere of responsibility** (and not only as regards its subsidiaries or companies under its control) would be more effective if limited to the relationship of Swiss companies with suppliers, and, among suppliers, the most important ones over which the company has a significant leverage by virtue of being the main trading partner.
- Questions may be raised about a possible requirement of mandatory environmental and social reporting as part of the "financial reporting". Most of the largest Swiss companies already include some environmental and social reports in their annual reporting.
- Other European countries can serve as models. In Denmark, companies are required to report on: Their existing social responsibility policies, how the policies are implemented, and the achievements. France requires companies to report on: Information about the manner in which the company takes into account the social and environmental consequences of its activities, including social, employment, and local impacts of companies and subsidiaries (in France and abroad). These models, especially the Danish one, could be viable in Switzerland.
- The administration should use its procurement contracts and SERV in a more coherent and consistent way with its human rights goals. Companies aspiring to have government contracts should be able to show that they have an internal CSR policy that pays due regard to human rights and environmental issues, they report annually on its implementation and follow internationally recognised guidelines for reporting. A negative finding by the Swiss NCP should logically affect the company's access to government procurement and export risk insurance.
- Civil society may lobby the Government to use intensively the Competence centre on Human Rights, notably in relation to the preparation of a national policy or plan on CSR, and in-depth studies. After five years, Swiss civil society may wish to advocate more strongly in favour of a national human rights institution with powers of: Monitoring and reporting of human rights abuses in the corporate sector, facilitating law and administrative reform, building capacity of government institutions to better regulate business, and improving access to judicial and non-judicial dispute settlement.

- The unique character of the OECD Guidelines should be exploited. The Swiss Government and civil society should vigorously advocate a fair and transparent process and higher effectiveness of NCP processes and outcomes in the context of the “updating” process. Introduction of standards on human rights due diligence and corporate complicity into the Guidelines should be supported.
- Other European countries can also serve as models (i.e. Netherlands and the United Kingdom), although the novelty of their NCP innovations does not allow for conclusive assessment about their advantages.
- Procedural reform would facilitate access to justice with the introduction of class actions in civil responsibility cases. Just as trade unions counterweight the company’s power with the power of collective action, class actions offset the economic disadvantages in facing a company by pooling together resources and knowledge of a large group of victims.
- Consideration should also be paid to a possible reform of the legal aid system by expanding its coverage to cover eventual payment of legal costs (“the loser pay principle”). This area may need further study.

Introduction

This study on Switzerland's implementation of its duty to protect against corporate human rights and environmental abuse was prepared at the request of a group of Swiss NGOs working on Corporate Justice (hereafter called Coalition of Swiss NGOs).

The objective of the study, as set in the terms of reference, is "to clarify the existing legal framework and the needed reforms to improve Switzerland's duty to protect the human rights of the people in its territory or under its jurisdiction as a home state of transnational corporations and other enterprises. The study should focus on the theory and practice of corporate, criminal and civil law, and take a look at the political feasibility of amending existing or passing new laws." A second objective is to outline the main areas that need reform and to suggest the direction that such reform may take to ensure full compliance of Switzerland with its international obligations.

This study is justified given the ongoing international processes on corporate social responsibility, the economic and financial importance of Switzerland, and the country's prominent role in supporting or leading international initiatives in the field of business human rights responsibilities. Arguably, countries leading international initiatives should demonstrate good practice at the national level.

Switzerland hosts some of the leading companies operating in global markets in industries as diverse as pharmaceuticals and chemicals, machinery, infrastructure and utilities, food and beverages and financial services. In addition to these large groups with their strong presence in foreign markets, a multitude of small and medium-sized enterprises (SMEs) do business abroad (80 per cent of Swiss companies are SMEs).

In accordance with the terms of reference given to the ICJ by the Coalition of Swiss NGOs, the report takes into account the policy framework presented by Prof John Ruggie, Special Representative of the UN Secretary General, in his reports to the UN Human Rights Council (especially that of 2008¹), his project on Corporate Law Tools, and the debates at the European level and proposals formulated by the European Coalition on Corporate Justice (ECCJ) in that context. The issues addressed in the present report also correspond to those enumerated by the Coalition of Swiss NGOs in the terms of reference.

In general terms, the present study covers issues falling under the first pillar and partially the third pillar of Prof. Ruggie's framework: the State's duty to protect against third-party abuse of human rights and its duty to provide for the right to an effective remedy for those who claim their rights have been affected. Therefore, although it technically focuses on the Swiss state duty to protect, it does so in a way that also covers its duty to provide for an effective remedy.

In monitoring States' compliance with international obligations, UN treaty bodies generally look at national legislation and its implementation, as well as to a series of national policies

¹ "Protect, Respect and Remedy: a Framework for Business and Human Rights", Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Human Rights Council, 2008 A/HRC/8/5 (hereafter Ruggie Report 2008).

that foster or hinder the realisation of the rights enshrined in the treaties. In certain domains, policies or programmes are prescribed but States party maintain relatively substantial discretion in choosing their means to implement their obligations.

This study is organised as follows: the first section will briefly restate the international law framework applicable to Switzerland and defining its obligations. It will also set out the main elements of the current policy discussions within the United Nations. The second section will map out the main legislation in force, its potential and gaps to protect human rights in the context of corporate activity. The third section will review some policies implemented and traditionally used to advance human rights in the context of economic activity. The fourth section will discuss the available options for civil society to develop advocacy for reform.

1. THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK – THE SWISS POSITION AND ROLE

This section will briefly set out the international human rights and environmental obligations of Switzerland as well as the main developments at the multilateral level regarding States' duties to protect human rights against third-party interference. Legislation provides incentives to engage in human rights-compliant conduct and disincentives, in some cases involving criminal sanction, to non-compliant conduct. Areas of law that are generally considered include constitutional law, corporate law, criminal law, and the law of civil remedies.

1.1 Swiss International Human Rights and Environmental Obligations

Switzerland is a state party to most of the universal and European international instruments on the protection of human rights² and the respect for the environment (with the notable and important exception of the Aarhus Convention on access to information, public participation in decisions and access to justice in environmental matters)³. It is also party to the core ILO labour rights conventions and other ILO conventions and is a member of most UN Specialised Agencies, including the ILO, WHO and UNESCO, thereby assuming the obligations imposed by the Charters/Statutes of those organisations.

Treaties concerning the protection of human rights and labour rights impose a wide range of obligations on States to protect, respect and/or ensure respect for human rights (depending on the formulation of each treaty), including to prevent, prohibit and bring an end to third-party abuse of rights. In some cases, this requires states imposing civil or criminal liability on third parties.

² European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention against Torture (CAT); Convention on the Rights of the Child (CRC); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Elimination of All Forms of Racial Discrimination (CERD).

³ Among the environmental commitments of Switzerland include those contained in: the Convention on Biological Diversity and the Cartagena Protocol on Biosafety; efforts to ensure the entry into force of the UN Framework Convention on Climate Change and the Kyoto Protocol; and the Basel Convention regulating trade in hazardous wastes. They also include those in the framework of Bilateral Agreements II, approved by Parliament: 17 December 2004, date effective: 1 April 2006. The Aarhus Convention has been signed but not yet ratified. The Federal Government has recommended ratification.

There is an important debate about the scope of these obligations in relation to activities and actors located outside the national territory, such as transnational corporations.⁴

It is well established that the universal and regional human rights treaties themselves apply extraterritorially, although the scope of their extraterritorial reach and the circumstances under which state responsibility may be engaged for an extraterritorial breach of those treaties is not entirely settled and in any event may vary from treaty to treaty. At a bare minimum, the obligation to respect treaty convention rights extends to where the state has effective control over the territory or over persons situated in the territory of another state.⁵ Moreover, states have obligations to engage in international cooperation toward the realisation of rights of persons outside their territory. These obligations are expressed in a number of human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (articles 2(1), 11(2), 22 and 23), the Convention on the Rights of the Child (articles 4, 24(4) and 28(3)), the Convention on the Rights of Persons with Disabilities (article 32), the Convention against torture (article 9(1)), the Convention for the Protection of all Persons from Enforced Disappearance (article 15) and the Rome Statute for the International Criminal Court (articles 86 to 102).⁶ These conventional obligations serve to give effect, in part, to the agreement of states to engage in international cooperation under the UN Charter in order to achieve the purposes of the charter, including the realisation of human rights (article 1(3) and 56), as well as article 22 of the Universal Declaration on Human Rights.

Such international cooperation and assistance, whether conducted directly by the state or through private actors, must be undertaken in conformity with human rights. In addition, international humanitarian law requires States to ensure that private security and military companies observe humanitarian law and human rights law when taking part in armed conflicts, including abroad (see below, box on the Montreux Document).

Public international law also imposes general obligations on all States to respect the environment and persons in other jurisdictions. As expressed already in 1941 by an arbitral tribunal: “A State owes at all times a duty to protect other States against injurious acts by individuals within its jurisdiction”.⁷ The same principle was more clearly and explicitly articulated by the International Court of Justice in 1997:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond

⁴ Professor John Ruggie, UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises: “Operationalising the ‘respect, protect, remedy’ framework”, 22 April 2009, UN General Assembly, A/HRC/11/13, para. 15 (hereafter Ruggie Report 2009). *Also see* letter dated 9 July 2009 from Daniel Bethlehem QC to UN Special Representative Ruggie clarifying the United Kingdom Government’s view of the state duty to protect human rights, and letter in response, dated 14 July 2009. Available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Submissions/2009>. Mr Bethlehem’s letter argued that currently international law contains no general international obligation on States to regulate extraterritorial activities of their businesses.

⁵ See, for example, UN Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13 para.10

⁶ Article 2(1) ICESCR reads: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

⁷ Trail Smelter Arbitration (US V Canada) 1941, 3 UNRIAA, 1938, para. 144. Ian Brownlie considers this to be a principle of general international law. *Principles of Public International Law*, 5th Edition, Oxford University Press, 1998 p. 284.

national control is now part of the corpus of international law relating to the environment.”⁸

Obligations to respect the environment have an important bearing on the realisation of a number of human rights.

Switzerland is also member of the World Trade Organisation and is bound by the WTO Agreements (including GATT, GATS, TRIPS and the Agreement on Government Procurement). These treaties impose obligations to treat foreign products and services similarly to national products and services (including by protecting intellectual property rights according to certain international standards). WTO obligations have the effect of limiting the possibilities of requiring foreign products and services to comply with stricter social and environmental standards, and harmonising technical and other standards with the aim of eliminating barriers to trade. Thus, WTO obligations restrict to a great extent the policy options available to States to protect and promote human rights.

Switzerland has entered into a number of sectoral agreements with the European Union and its member States in a number of specific areas. Beginning with the Free Trade Agreement of 1972, a series of sectoral agreements has been concluded step by step, notably in bilateral negotiation Rounds I and II. As well as creating the conditions for mutual access to each other's markets, these agreements serve as the basis for close cooperation in various areas, including the environment. These agreements were signed in 1999 and 2004.

The Bilateral Agreements-I with the EU involve a further reciprocal opening of markets in seven specific areas: free movement of persons, technical barriers to trade, public procurement, agriculture, overland transport, civil aviation and research. The Bilateral Agreements-II cover additional economic interests and extend cooperation to the fields of internal security, asylum, statistics, the environment and culture.

1.2 Treatment of the question within the United Nations, the work of John Ruggie and the European debate

The attention of the international community has been drawn increasingly to corporate accountability over the past decade, spurred by the realisation of a growing corporate role in globalisation and numerous allegations of human rights and environmental abuse by some companies. This fact is reflected in the significant processes underway at the United Nations and at the European regional level.

1.2.1 The United Nations Human Rights Council

The former UN Sub-Commission on the Promotion and Protection of Human Rights was the first UN body to attempt to elaborate or at least clarify standards in relation to business and human rights, adopting in 2005 the UN Norms for Transnational Corporations and Other

⁸ “Legality of the Threat or Use of Nuclear Weapons (request by the United Nations General Assembly), Advisory Opinion”, ICJ Reports 1997, para. 29.

Business Enterprises.⁹ However, a number of States were uncomfortable with the outcome, and as a result the former UN Commission on Human Rights failed to take action to adopt the Norms. Instead, the Human Rights Commission (the predecessor body to the present Human Rights Council) in 2005 opted to tackle the question by appointing Professor John Ruggie as Special Representative of the Secretary General on Business and Human Rights (SRSG). The Commission mandated Professor Ruggie to study, clarify and issue recommendations. In 2008, after two interim reports, the SRSG presented to the UN Human Rights Council a report containing a policy framework of three pillars:

“the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.”¹⁰

In June 2008, the Council decided to extend Professor Ruggie’s mandate by three years and requested him to “operationalise” his policy framework. In particular, it requested that the SRSG prepare guidelines for companies on how to exercise their responsibility to respect human rights (notably, by exercising due diligence); and to provide views and recommendations about how States can better implement their duty to protect as well as how to enhance access to remedies.

1.2.2 The debate at the level of the European Union

Debates about CSR and the human rights responsibilities of business enterprises have also taken place within the European Union. The European Commission understands CSR as the “voluntary integration, by enterprises, of social and environmental concerns” in its operations and activities.¹¹ In 2007, the European Parliament passed a landmark resolution recognising the need to improve the accountability framework in which European business operates.¹² A process of multi-stakeholder dialogues organised by the European Commission helped to clarify positions but stalled due to a number of differences about participation and process. The 2009 multi-stakeholder forum saw the return of civil society to the dialogue. Business has coalesced around a platform called CSR Europe.

As part of its strategy to improve the regulation and accountability framework for European business, the ECCJ, a coalition of some 250 organisations at the European level, released a report¹³ in which it called for far-reaching reforms in European legislation, including:

- The establishment of strict liability of parent companies for abuses of their subsidiaries

⁹ Draft Norms on Human Rights for Transnational and Other Business Enterprises, UN Sub-Commission on the protection and promotion of human rights, 2003.

¹⁰ Ruggie Report 2008, cited above.

¹¹ This concept was developed in the Green Paper 2001, and later in the Communication of July 2002 relating to the “Social Responsibility of enterprises: a contribution to sustainable development”, and the Communication of March 2006, “Implementing the partnership for growth and employment: make Europe an excellence pole on CSR”.

¹² European Parliament, Committee on Employment and Social Affairs, Report on CSR: A New Partnership (2006/2133(INI))

¹³ “Fair Law: Legal Proposals to improve Corporate Accountability for Environmental and Human Rights Abuses”, European Coalition for Corporate Justice, 2008. See also the companion report, “With Power Comes Responsibility: Legislative Opportunities to Improve Corporate Accountability within the European Union,” ECCJ, 2008, available at www.corporatejustice.org

- Establishment of a duty of care to prevent abuses in the corporate sphere of responsibility
- Mandatory environmental and social reporting.

Through their proposals, ECCJ aims to establish a clearer link of responsibility between parent and subsidiary company.

The same issues of parent-subsidiary's responsibilities have been addressed by the ICJ report on Corporate Complicity and by Professor Ruggie's 2008 companion report on "complicity and sphere of influence".¹⁴ These reports address the issue from the angle not of direct parent responsibility but of responsibility of the parent company as accomplice.

At the European level, some matters fall within the mandate of the European institutions, while others remain under national jurisdiction of member States. Among the latter are legal and judicial matters. However, the Brussels I Regulation (EC 44/2001) defining the applicable laws in matters of jurisdiction and judicial cooperation within the European area has had a positive impact on harmonising rules of jurisdiction across member States. Under the Brussels I Regulation European courts should have jurisdiction on private law cases against companies domiciled within the EU. A review is underway and in this context proposals have been made to expand the jurisdiction of European courts to companies not domiciled within the EU but that have most of their business in Europe or are controlled by EU-domiciled shareholder/s.¹⁵ The outcome of this debate will have an impact on Switzerland since most Swiss companies have substantive business within the European zone. Any outcome will most likely have an impact on the equivalent legal framework provided by the Lugano Convention applicable to Switzerland.¹⁶

1.3 Switzerland's general policy on human rights, business and CSR

The main tenets of Switzerland's policy on human rights are explained in the 2007 message from Federal Council president Micheline Calmy-Rey to Parliament. In this message, Calmy-Rey stated Switzerland's support for dialogue with non-State actors and its involvement in peace and defense of human rights efforts.¹⁷ In this context, an important place is assigned to the development of a multilateral normative framework.

Switzerland has consequently supported politically and financially the process led by Prof. John Ruggie within the UN Human Rights Council and has joined the consensus in favour of the adoption of Ruggie's reports. In addition, Switzerland has been actively involved in several voluntary initiatives to foster human rights compliance by the business sector, including, for example, the Global Business Initiative on Human Rights, the Global Compact Platform for SMEs, and, since 2010, the Voluntary Principles on Security and Human Rights. Switzerland also provides funding for a number of projects in this area. It has also led the

¹⁴ Report of the UN Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, "Clarifying the Concepts of 'sphere of influence' and 'Complicity'", A/HRC/8/16 (15 May 2008); also "Corporate Complicity and Legal Accountability, Report of the Expert Legal Panel on Corporate Complicity in International Crimes", Vols. 1-3, Geneva, International Commission of Jurists, 2008.

¹⁵ See European Commission, Report and Green Paper on the operation of the Brussels I regulation, Brussels, 2009.

¹⁶ Convention concerning judicial jurisdiction and execution in civil and commercial matters concluded at Lugano on 16 September 1988 and entered into force in Switzerland on 1 January 1992.

¹⁷ « Message sur les mesures de promotion civile de la paix et de renforcement des droits de l'homme », 2007, FF- 4536.

creation of two important international initiatives in the area of transnational corporations and their responsibility under international humanitarian law: one in collaboration with the ICRC that has led to the adoption by a group of States of the Montreux Document, and another currently underway in collaboration with the Geneva Centre for the Democratic Control of Armed Forces (DCAF) to set a Code of Conduct for Private Military and Security Companies (PMSCs).

Two international initiatives by the Swiss Government

The Montreux Document

The website of the ICRC describes this initiative in the following terms:

“The Montreux Document reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law. The document also lists some 70 recommendations, derived from good State practice. These include verifying the track record of companies and examining the procedures they use to vet their staff. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur.” See www.icrc.org. This process had some 17 participating States, including a majority of Western States.

The Code of Conduct for Private Military and Security Companies

Under this new initiative, the Government of Switzerland has entrusted DCAF to lead a process toward drafting a Code of Conduct for PMSCs, including a monitoring/oversight and accountability system. The process involves a number of Governments covering both home and host Governments of PMSCs. The draft is currently available to the public for comments, but the section on the accountability mechanism is yet to be developed.

Despite this intense engagement at the international level, Switzerland does not have a unified, integrated and public policy on human rights, business and CSR.¹⁸

The Federal Department of Foreign Affairs- DFA (Political Affairs Division IV) formulates Switzerland’s peace and human rights policies and implements measures to strengthen human rights worldwide.¹⁹ Public officials state that DFA and SECO closely coordinate and consult each other in all matters relating to business and human rights and CSR. Civil society groups maintain that such close coordination does not exist in practice.

The Swiss Government’s policies for the promotion of human rights include policy dialogues with third countries and their businesses (for example, in China), and financial support for multi-stakeholder initiatives such as the Global Compact and the financial and political support of the mandate of the SRSG on human rights and business.²⁰ Outside the UN, Switzerland is also encouraging and supporting international frameworks such as those

¹⁸ Switzerland’s response to John Ruggie’s State CSR policy survey <http://www.reports-and-materials.org/Ruggie-survey-re-state-CSR-policies.pdf>; see also « Economie et droits humains: analyses et propositions pour soumettre les entreprises transnationales au regime des droits humains », Pain pour le Prochain et Action de Carême, Lausanne, octobre 2009, p. 8.

¹⁹ Measures to promote peace and human rights represent some 5% of official development assistance (ODA), OECD DAC Peer Review of Switzerland 2009, p. 26.

²⁰ See Foreign Policy Report 2009, Swiss Federal Council, 2009 p. 170.

within ILO, OECD and the Multilateral Development Banks.²¹ Switzerland understands its role as a broker, facilitator and donor for international initiatives.²² In this context, it assigns marginal importance to national legal reform and/or accountability. For instance, none of the currently funded projects is focused on the ways in which State regulatory activity is exercised or could be enhanced.

1.3.1 Policy Coherence

In response to a questionnaire formulated by the SRSG, Switzerland stated in 2009 that it does not have an overall national CSR strategy, but pointed to the Sustainable Development strategy adopted by the Federal Council for the period 2008-2011.²³ This strategy seeks to frame CSR as a sustainability issue and recommends that state intervention must be kept to a minimum.²⁴ Until the 2009 Foreign Economic Policy Report focussing on the subject of “sustainability in foreign economic policy”²⁵, the Sustainable Development strategy had limited impact on foreign economic policy issues.

In his 2009 report the SRSG identifies both “vertical” and “horizontal” incoherence as challenges to the fulfilment of the State duty to protect.²⁶ “Vertical” incoherence occurs when Governments sign on to human rights obligations but then fail to adopt policies, laws and processes to implement them. “Horizontal” incoherence refers to domestic policy incoherence, where economic or business-focused departments conduct their work in isolation from and largely uninformed by their Government’s human rights agencies and obligations.²⁷ Horizontal incoherence may be an impediment to discharge the State duty to protect when the task to address these issues is left to individual government departments and the human rights impact of business is generally subsumed within other departments (normally trade or industry).²⁸

In the UN context, Switzerland seems committed to overcoming those incoherencies.²⁹ These commitments should be observed in practice.

The OECD notes that what is described as “policy coherence for development” in many Swiss documents is just internal policy coherence in the delivery of programmes rather than

²¹ “Message du Conseil fédéral concernant la continuation de mesures de promotion civile de la paix et de renforcement des droits de l’homme », available at <http://www.admin.ch/ch/f/ff/2007/4495.pdf>, p. 4536.

²² « Réponse de la Suisse au questionnaire sur les politiques en matière de responsabilité sociale des entreprises et leur pertinence par rapport aux droits humains », Letter from the Swiss Government to John Ruggie, 2 July 2009.

²³ Swiss Federal Council, “Sustainable Development Strategy: Guidelines and Action Plan 2008–2011”. Available at <http://www.are.admin.ch/themen/nachhaltig/00262/00528/index.html?lang=en>

²⁴ *Ibid.*, p. 21.

²⁵ 2009 Foreign Economic Policy Report, available at <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=en&msg-id=31032>

²⁶ Ruggie Report 2009, para 18.

²⁷ *Ibid.*

²⁸ See UK Joint Committee on Human Rights, “Any of our business? Human rights and the UK private sector”, p.59.

²⁹ Statement by Ms. Muriel Berset on behalf of Switzerland, United Nations Press Release, « Le Conseil des droits de l’homme ouvre les travaux de sa onzième session », 2 juin 2009. Available at <http://www.unhchr.ch/hurricane/nsf/0/A43774A564DFB1EDC12575C9004D4BC0?opendocument>. Webcast available at: <http://www.un.org/webcast/unhrc/archive.asp?go=011>

coherence among policies.³⁰ Policy coherence for the OECD is a process based on three building blocks: political commitment, policy co-ordination and monitoring, and analysis and reporting systems.³¹

First, regarding political commitment and a specification of policy objectives, Switzerland lacks an overarching strategy on CSR or on business and human rights that could foster a coherent approach. The 2009 Foreign Policy Report mentions the issue of business and human rights only when reporting on Switzerland's support for the Human Rights Council's extension of the SRSG's mandate.³² The 2009 Foreign Economic Policy Report does briefly list Switzerland's engagement in various CSR initiatives, but the report does not discuss business and human rights beyond voluntary initiatives.³³

Recent national strategies and reports

In response to calls and initiatives from civil society groups, the Norwegian Council of States approved the White Paper on "Corporate Social Responsibility in a Global Economy" (2009), drafted by the Ministry of Foreign Affairs upon decision of the Government.³⁴ In the Netherlands, there is a "Government Vision on Corporate Social Responsibility 2008 - 2011"³⁵ and the UK published its "Government Corporate Responsibility Report 2009".³⁶ The UK Parliament has actively engaged in the debate, through the House of Lords and House of Commons Joint Committee on Human Rights, which conducted an inquiry and recently published its report entitled "Any of our business? Human Rights and the UK private sector".³⁷ All of these initiatives were preceded by sustained civil society campaigning. These reports and their recommendations are good examples of efforts to design a coherent national policy on CSR, including human rights and the environment.

Second, regarding policy co-ordination mechanisms, an interdepartmental core group on human rights policy has the task of coordinating human rights policy.³⁸ Information on the activities and agenda of this group, and whether and how CSR, human rights and environmental matters are addressed is scarce. DFA-PA IV states that it maintains permanent coordination and consultation with the SECO Development Directorate. In this context, the departments exchange projects and jointly review partners and projects twice a

³⁰ OECD DAC Peer Review of Switzerland, 2009, p. 37. The comments in the contexts of policy coherence for development seem no less pertinent to policy coherence for human rights promotion.

³¹ See Ibid, 2009, p. 35.

³² „Bericht des Bundesrates vom 2. September 2009 zur Aussenpolitik“, BBl 2009-3098, p. 170. Past editions of Reports on Peace and Human Rights in Swiss Foreign Policy (e.g. 2007, p. 18) briefly note the initiatives Switzerland undertakes in the area of business and human rights. The Human Rights Foreign Policy Report 2003-2007 includes a section on business and human rights, announcing that the activities of Switzerland in the area of business and human rights will be of increasing importance in the future (BBl 2004-0981, p. 6103-6104).

³³ „Bericht des Bundesrates 13. Januar 2010 zur Aussenwirtschaftspolitik 2009“, BBl 2010 xx, p. 36-37, 40.

³⁴ Available at http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf

³⁵ Available at http://mvoplatforn.nl/publications-en/Publication_2364

³⁶ Available at <http://www.berr.gov.uk/files/file50312.pdf>

³⁷ Available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf>

³⁸ Kerngruppe Internationale Menschenrechtspolitik [KIM], see „Bericht über die Menschenrechtsaussenpolitik der Schweiz (2003-2007) vom 31. Mai 2006“, BBl 2004-0981, p. 6116.

year. However, the terms of reference and outcomes of this coordination mechanism are not known to the public.

Policy coordination

Some governments have appointed ministers responsible for cross-department information sharing and coordination. Others, such as France and Sweden, have appointed ambassadors to foster greater integration of human rights principles and standards among government departments, including those addressing business and other trade and economic issues. In Kenya and South Africa, the National Human Rights Institutions (NHRIs) play this role.³⁹

Third, regarding monitoring, analysis and reporting systems, the Government submits reports to Parliament. Since 2009, the various reports have been consolidated into one comprehensive yearly report on foreign policy by the Department of Foreign Affairs. However, the Federal Department of Economic Affairs still issues reports on foreign economic policy separately and there are few cross-references to other reports. These reports generally only summarise activities and do not contain a systematic evaluation of the impact of human rights policies, in particular as they relate to CSR, human rights and environmental matters.

Upshot

Despite its overall commitment to pursue a CSR agenda at the international level, Switzerland lags behind other European countries in establishing practice for a coherent overall national policy on CSR matters.

2. SWISS LEGISLATION: INCENTIVES AND SANCTION

Legislation is one of the tools States often use to protect human rights. Switzerland's legal system is a complex, multilayered one involving Federal law, cantonal regulations and the local communal rules and decisions. This study focuses only on the federal level.

2.1 The Federal Constitution

Switzerland is a Federal State. The Federal and cantonal constitutions and laws contain provisions that have implications for the protection of rights and the environment.

Article 5 para. 4 of the 1999 Constitution states: "The Confederation and the cantons respect international law". According to Federal constitutional law, Switzerland adheres to the monist system. Therefore, the principles, rules and norms of public international law that bind Switzerland acquire internal validity without a need to incorporate such international law into domestic law or for the State legislature to make any implementation decision. However, because the principles and rules of several conventions are not self-executing (i.e. clear and precise enough to be put directly into practice), the authorities must pass acts to incorporate them into domestic law to make them applicable.

³⁹ See UK Joint Committee on Human Rights, "Any of our business?...", p.59

According to Swiss legal theory and case law, public international law takes precedence over cantonal (state) law. With regard to Federal law, the situation is more complex because Art. 190 of the Federal constitution declares both Federal laws and international law applicable but does not give directions for cases where there is a conflict between a federal law and international law.⁴⁰ The Federal Supreme Court clarified the situation with regard to human rights as enshrined in the European Convention on Human Rights (ECHR) in the sense that the ECHR will prevail over any provision in domestic Swiss law.⁴¹ In all cases, national law shall be interpreted in accordance with international law.

The Constitution provides that Swiss foreign policy aims at preserving the independence and prosperity of Switzerland and contributes to “the promotion of the protection of human rights, democracy, peaceful co-existence among peoples and the preservation of natural resources”. Article 35 declares:

1. *Fundamental rights must be upheld throughout the legal system.*
2. *Whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.*
3. *The authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons.”*

This provision may serve as a constitutional basis for bold action regulating and adjudicating companies’ activities, but so far its potential remains unrealised.

2.2 Corporate liability for human rights and environmental impacts in Swiss law

Under the heading of corporate liability, two issues will be analysed: first, directors’ duties and liability vis-à-vis shareholders and the community, and second, the company’s duties and liability proper.

2.2.1 Directors’ duties and liability

Directors’ duties are important because it is the board of directors or the top management that conducts ordinary company business, takes the most crucial decisions and responds and reports on behalf of the company. A key question in this regard is whether directors have a duty to take into account social and environmental impacts of the company in relation to its operations.

Article 754 of the Swiss *Code des Obligations* (code of contract law, hereafter “CO”) sets forth the general principle governing the liability of the directors toward the company, the shareholders and the company’s creditors. The directors’ duties, under Swiss corporate law, are owed to these three categories of stakeholders to varying degrees depending on the nature of the duty: the main general duties are owed to the company, while only specific duties are owed to shareholders or creditors. The directors’ main general duties toward the company are listed in article 716a CO. Directors have to give absolute priority to the interests of the company, and exercise their responsibilities with due diligence. A violation of this

⁴⁰ See the new report of the Federal Council on the relation between Public International Law and Swiss law, March 2010.

⁴¹ Propaganda Material PKK, Decision of the Swiss Federal Supreme Court 125, II, at 417

provision may lead to a liability claim against the directors. Directors shall give equal treatment to shareholders (art. 717 §2 CO and also art. 706 §2 CO). Violation of the equal treatment requirement constitutes a direct damage to a shareholder.

Although there are no legal duties of directors toward the community or third parties - except perhaps under environmental law - it could be argued that such duties are part of the social responsibility of the enterprise, which the directors are entrusted to implement. This social responsibility may have an impact on whether civil liability arises.

Although there are no specific duties to avoid legal risk and damages to the company's reputation, such duties can be accommodated by art. 754, which holds directors responsible for any damage they cause either by negligence or on purpose. In addition, they can also be seen as incorporated into a general duty to comply with the laws, if breaching the law leads to legal risk or reputational damage.

Thus, if a director fails to protect the company from a legal risk or reputational damage (for instance, by engaging negligently in environmental damage or human rights violations, exposing the company to negative public campaigning), this might be considered a breach of his duty of due care in the management of the company, for which he can be held liable.

There are no specific rules in Swiss corporate law imposing an obligation on directors to consider the company's impacts on non-shareholders (including human rights impacts on the individuals and communities affected by the company's operations), within or outside Switzerland. Certain provisions (see below, section 2.2.2) of the Law on the Protection of the Environment (LPE), may impose duties on the enterprise to evaluate and take measures regarding the risks that its activities entail for human beings and the environment. There is scarce evidence of other countries imposing such an obligation on company directors. For instance, section 172(d) of the UK Companies Act provides that a director, in promoting the success of the company, must "have regard (amongst other matters) to...the impact of the company's operations on the community and the environment". The weakness of this provision is that it subjects the consideration of social and environmental impacts to the "success of the company".

However, to the extent that directors in Switzerland should carry out their duties with diligence and safeguard the interests of the company, they might have to consider in certain circumstances the company's impacts on non-shareholders, including human rights impacts. For example, if by not duly considering impacts on non-shareholders, the directors cause the company to breach the law (labour law, environmental law), this may entail legal responsibility and damage the company, for which directors would be held liable.

Pursuant to article 754 CO, directors' liability applies in cases where directors have caused damages to the company, its shareholders or its creditors by a wilful or negligent breach of their duties.

Under the law the directors **are permitted** to consider the company's impacts on non-shareholders, provided that this is not contrary to the company's interests, nor to other interests they have to protect according to their mandate. It may even be considered in the

interest of the company to take these impacts into account with respect to the reputation and image of the company. This applies to impacts within or outside Switzerland.

Directors have broad discretion in determining what they deem to be in the company's interest and how they do so. They may therefore decide to consider the impacts on human rights of the company's activity, by applying the Swiss Code of Best Practice⁴² (hereafter "SCBP") or the OECD Guidelines for Multinational Enterprises (hereafter "OECD Guidelines"), or any other instrument even if it is not of a binding nature.

Regarding the impacts by subsidiaries, suppliers or other business partners, whether they occur within or outside Switzerland, there are no specific legal requirements on directors to ensure that such entities take into account human rights considerations in their operations. The possibility that the company could be held liable for such impacts (and, as the case may be, that the directors' liability could in turn be triggered) is, in principle, limited, as the company and its subsidiaries, suppliers and other business partners are different legal entities.

Criminal liability of directors or company officials

The Swiss Criminal Code establishes liability for individuals who commit crimes involving bodily and mental harm, killing, patrimonial damage, etc. Switzerland has also ratified the Rome Statute of the International Criminal Court and incorporated the definition of international crimes provided in the Statute into its national legislation. This legislation is highly relevant given that, in the past, corporate directors or other officials were held criminally liable before international criminal tribunals at Nuremberg and later on before the ad hoc tribunal for Rwanda.⁴³

Swiss criminal legislation provides for liability for perpetrators, accomplices and others that participated in gross human rights violations constituting international crimes in the form of crimes against humanity, war crimes and genocide. During the recent revision of the Criminal Code the question of providing a general forum for prosecuting international crimes in Switzerland was heavily debated. In light of developments in other European countries in relation to universal jurisdiction cases, the Parliament decided that only cases with a certain relationship or link to Switzerland should be brought before Swiss courts (the perpetrator or victim are Swiss nationals or the foreign perpetrator is in Swiss territory). As a result, Switzerland does not accept general universal jurisdiction in these cases but provides a forum under specific conditions: according to the principle of territoriality, article 3 of the Criminal Code acknowledges the jurisdiction of Swiss authorities when the offence has been committed in Swiss territory. If the offence has been committed abroad, it may nevertheless be prosecuted in Switzerland according to Article 7 which – in general terms – requires a link between the offence and Switzerland. With regard to human rights violations, Articles 5 and 182 acknowledge Swiss jurisdiction even if neither the perpetrator nor the victim is a Swiss national but the perpetrator is found in Switzerland.

⁴² "Swiss Code of Best Practice for Corporate Governance", Economiesuisse, 2008, www.economiesuisse.ch. This is a code of best practice adopted by a group of experts tasked by the Swiss Federation of Enterprises to provide a tool for corporate self-regulation.

⁴³ Examples can be found in ICJ, "Corporate Complicity & Legal Accountability", cited above.

The scope of Swiss jurisdiction to cover acts of foreign individuals in Swiss territory constituting incitement or complicity with offences that take place abroad has not been clear in the past. Swiss authorities have taken the view that such acts would not fall under the jurisdiction of Switzerland, but the OECD Working Group of Experts stated that Switzerland should have jurisdiction over any person (national or foreign) who knowingly incites or aids and abets the commission of a crime abroad. This consideration, which was made in the context of corruption-related crimes, can also be extended to cases involving crimes against humanity, war crimes and other international crimes. Thus, if a company director or employee within Switzerland aids and abets the commission of a crime by a Swiss or foreign company abroad, such individuals should be prosecuted within Switzerland.

The commission of international crimes abroad by a Swiss individual or company can be prosecuted in Switzerland according to the nationality principle that grants jurisdiction to the State of which the perpetrators are nationals.

Upshot

Swiss laws do not explicitly require company directors to take human rights and environmental impacts into account in company operations, but directors are permitted to do so;

Swiss law provides for civil and criminal liability for company directors as individuals, although the implementation of such a liability requires fulfilment of certain conditions and is limited to certain rights and crimes.

2.2.2 Corporations' legal duties and liability

Under Swiss law, corporations as such can incur civil and criminal liability for violations of labour law, environmental law, the commission of crimes and/or a civil tort. The liability of the company as such toward third parties or employees generally arises from conduct of the directors or company officials or agents that is attributable to the company.

Vicarious liability

Article 55 CO sets out the following general principle: the employer is responsible for damage caused by its workers or other assistants in carrying out their work if it does not prove that it took the measures and care necessary under the circumstances to prevent the damage from occurring or the damage was produced despite its due diligence. Damage caused by an employee in Switzerland or abroad equally gives rise to company liability.

Environmental liability for corporations

Regarding environmental impacts, Swiss environmental law lays down rules establishing prohibitions and rules relating to risk management.

The Law on the Protection of the Environment- LPE adopted in 1983,⁴⁴ is based on the principle of “cooperation,” whereby enterprises and economic actors are assigned a role in the implementation of the law. It was assumed that enterprises were in a better position to assess the risks relating to their activities and to adopt the necessary measures. The law sets the objectives but the choice of means is left to the economic actors. However, if those measures are insufficient and harm is produced, the damage should be repaired.

This philosophy of cooperation was extended in 1993 to integrate “economic organisations” (and not only individual enterprises) in the process of defining norms and objectives, while the implementation and choice of means is left only to the economic actors and their organisations. The same philosophy underpins the laws on energy and CO2 emissions. The public authority has a subsidiary role, intervening only when the measures taken by the economic actors are insufficient (art. 41 LPE).

Environmental law imposes certain obligations on companies. For instance, according to Article 10 LPE, an exploitation or installation that could cause harm to the population in the event of a catastrophe should take “appropriate measures” to prevent that harm from occurring. The authority verifies the adequacy of those measures. The mechanism is the same for article 16.3 LPE.

In other cases, the responsibility to establish control measures is left to the enterprise in the case of substances that represent a threat or harm to the environment (art. 26). The enterprise also has a duty to inform buyers and consumers about the characteristics and potential impact of the products (art. 27). The same obligation is imposed by Article 29 in the case of biological organisms that may threaten the environment and biodiversity.

In all these cases the law imposes obligations on economic actors. Since 1995, lack of compliance with most of these provisions triggers the application of article 59a LPE: responsibility of the owner of an enterprise or installation that represents a danger for the environment. This provision covers Article 10 as well as the case of those who own or use substances requiring prior authorisation or special rules. In the case of dangerous products covered under articles 26 and 29d LPE, responsibility is established under article 41 CO (see below for further discussion).

Finally, the law subjects three types of activity to stricter rules: waste elimination, utilisation of pathogen organisms and genetically modified organisms (GMOs). In these cases, prior authorisation is necessary and the level of control or responsibility left to the enterprise is marginal.

It is unclear to what extent these obligations extend to operations of Swiss companies abroad, especially with regard to subsidiaries or subcontractors. While the importation of products is subjected to Swiss laws and regulations, it is not clear whether the same is true for

⁴⁴ Loi fédérale du 7 octobre 1983 sur la protection de l’environnement, RS 814.01, available at http://www.admin.ch/ch/f/rs/c814_01.html

exportation or for production taking place abroad. WTO obligations may apply here to restrict Switzerland's ability to regulate processes of production abroad.

Enterprise's responsibility in "environmental management"

Art 43a LPE introduces a legal basis for the Federal Council's prescriptions on a "**voluntary system of evaluation and improvement**" of enterprise performance on environmental protection. In issuing prescriptions, the Council is to take into account international law and technical standards recognised internationally.

There are two internationally recognised systems: the European regulation known as Environmental Management and Assessment System (EMAS); and the private certification system ISO 14001. Their objective is to establish environmental management methods to improve the "environmental performance" of the enterprise. Rather than being result-oriented, they deal with processes that often take a long time to put in place and require constant evaluation.

Enterprises may have an interest in engaging in "environmental management", whether they espouse the idea of a "citizen enterprise" that accepts its social responsibilities or they want to avoid long-term social damage related to the degradation of the environment in which they operate. On the other hand, the enterprise may have an interest in avoiding risk or extra costs, or simply a motivation to obtain a label or certification that will give it a competitive advantage in the market. In economic terms, environmental management can be seen as a process of internalisation of social costs by the enterprise, encouraged by the authorities rather than imposed.

To undertake "environmental management" the enterprise should put in place an internal "environmental policy" as a framework to set general and specific objectives. As such, it is part of company management and entails a structure, organisation, evaluation and definition of responsibilities.

Criminal liability of corporations

The Swiss criminal code sets out certain prohibitions that are highly relevant for companies. Article 182 prohibits trafficking of human beings and attaches criminal liability to individuals and legal entities that violate that norm. Article 234 sets rules and prohibits the pollution of water sources and supply. Under Article 5, criminal offences against children abroad may be prosecuted in Switzerland.

In addition, the Swiss legal system contains novel provisions establishing liability for corporations. Article 102 of the Criminal Code institutes two systems of criminal liability for enterprises.⁴⁵

⁴⁵ Code pénal suisse du 21 décembre 1937, RS 311.0, available at http://www.admin.ch/ch/fr/rs/311_0/index.html.

Article 102:

Article 102, paragraph 1, provides for criminal liability for the enterprise when the individual perpetrator of an offence cannot be identified because of the enterprise's lack of organisation. This definition would apply to **all criminal offences**, including those committed abroad and those subject to universal jurisdiction, and those offences against human rights or the environment, when they exist. However, the enterprise's liability seems to be subsidiary and would not arise in the same time as liability for the individual. While most experts state that proof of both an "unidentified" offender and "lack of organisation" in the company may be difficult to furnish, proving intent or negligence of an unknown perpetrator may be much more difficult. This provision constitutes a strong incentive to all companies to put in place adequate policies and organisation defining clear responsibilities.

Article 102, paragraph 2, provides, for certain specific crimes (including domestic and foreign bribery, money laundering and terrorism-related offences and the "participation in a **collective undertaking**") for the enterprise's parallel liability due to defective organisation: that is, the enterprise has not taken all reasonable and necessary organisational measures to prevent the individual from committing the offence. This provision seems to penalise the company for participating in, rather than direct commission of, the crime. Such participation may generally be treated as an act of negligence. On the other hand, the application of paragraph 2 does not require the parallel sanctioning of a natural person. There must be an offence for which the enterprise is liable. It is not necessary for the natural person responsible to have been convicted or sanctioned.

The kind of acts that may be attributed to the enterprise or trigger its criminal liability under these two headings could be understood to include cases in which affiliates, subsidiaries or subcontractors commit a criminal offence for the company's benefit or with its knowing assistance and aid, or when the one who commits such an act is an outside (or foreign) intermediary used by the company. Swiss authorities believe that the perpetrator of the crime should be a *de jure* or *de facto* body, an employee occupying a senior managerial function or an employee with no particular powers. The phrase "in pursuit of its commercial activities in conformity with its objects" should be interpreted to apply to acts within the enterprise's sphere of activity with the exclusion of private acts of employees. However, all these interpretations have to be confirmed by case law. These provisions have not yet been applied in practice to human rights cases.

"1. A crime or misdemeanour committed within an enterprise in the pursuit of its commercial activities in conformity with its objects shall be imputed to the enterprise if it cannot be imputed to any specific individual because of the enterprise's lack of organisation. In such case, the enterprise shall be liable to a maximum fine of five million francs.

2. In the case of an offence under Articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies and 322septies, the enterprise shall be punished independently of the punishment of any individual if the enterprise can be said to have failed to take ["s'il doit lui être reproché"] all reasonable and necessary organisational measures to prevent such an offence.

3. The courts shall set the amount of the fine taking into consideration the seriousness of the offence, the lack of organisation, the damage caused and the economic capacity of the enterprise.

4. The following are deemed enterprises within the meaning of this article:

- a) private law legal persons;
- b) public law legal persons except for territorial corporations;
- c) companies;
- d) single-person enterprises. »

Civil liability of companies

Liability of social organs: the company's governance bodies could also have civil liability for tort/damage caused to third parties (individual or communities). The existence of "environmental management" systems within the enterprise may help the company's governance bodies to argue that they have taken all measures that would be expected from them under the circumstances to prevent the damage from occurring. This will alleviate the burden of proof, while it will be more difficult for shareholders and creditors to show that these bodies violated their duties.

Strict liability: strict or objective liability arises under article 59a LPE in association with the risks inherent to certain activities and products/substances deemed dangerous. Individuals suffering damage can claim compensation. This responsibility is based on risk as "a particular danger for the environment", that materialises and gives rise to the obligation for the company owner to repair the damage, including harm to health, human and animal life, plants and environment. The granting of prior authorisation to the product or activity does not take away this responsibility.

Responsibility for dangerous activities/business: equivalent responsibility arises under Article 59 LPE, but in this case it is administrative responsibility: it is the public authorities that will take action and sanction the wrongdoer.

This responsibility includes the development of dangerous activities or products: the production process or the products themselves have defects that were not evident or clear from applying the existing techniques and scientific knowledge at the time of entry into circulation of the product (art. 30.4 LGG). It is especially important to undertake a permanent evaluation of the risks in these cases.

Again, it has been suggested that a process of environmental management (assessment of "significant impacts on the environment" through an EMAS) may allow the identification of new or greater risks. It allows the timely identification of risks as the best protection against the materialisation of risk and ensuing responsibility.

In the case of activity or business that is not dangerous *a priori*, a process of environmental management (including its audits) will influence the determination of the existence of fault or due diligence.

The adoption of a system of environmental management does not imply an automatic release from liability nor a true presumption of due diligence as required of the company under the circumstances. However, it may permit a company to identify those responsible and possibly limit the damages.⁴⁶ It may also help to prove the infraction or the breach of due diligence duty when the officials' behaviour is contrary to the rules adopted by the enterprise.

The case GRICA vs IBM in Switzerland

⁴⁶ Petitpierre-Sauvain, Anne "La responsabilité environnementale de l'entreprise", en *Droit des sociétés: Mélanges en l'Honneur de Roland Ruedin*, edités par F. Bohnet et P. Wessner, Helbing & Lichtenhahn, Bâle, Genève, Munich, p. 141

In a relatively recent case, an association of descendants of Roma who were allegedly detained in Switzerland and extradited to the Nazi regime sued IBM in Switzerland for complicity in providing the technological means for Government agents to track down and detain gypsies during the Second World War.

While the state court of first instance in Geneva had admitted the case, the court of appeals as well as the Federal Supreme Court in 2006 dismissed the case on the grounds that legal action was time-barred by the statute of limitations, as the events in question occurred some 50 years earlier (ATF 132 III 661).

However, since the decision has been issued, article 101 of the Criminal Code has entered into force, which declares *inter alia* that genocide and crimes committed in violation of the Geneva Conventions are not subject to the statute of limitation. Current jurisprudence supports the view that future similar civil cases may not be time-barred.

Parent company liability for subsidiaries, business partners and suppliers under Swiss law

The following analyses two questions in relation to proposals made by the ECCJ: Is a parent company liable for its subsidiary under Swiss law and under which circumstances? Is a company liable for its suppliers or for its partners in a joint venture?

The principle is that a company and its subsidiary have separate legal personalities and are therefore considered to be two different legal entities, one not being liable for the activity of the other. However, Swiss courts have developed some exceptions to this principle under specific circumstances:

- (a) The first exception relates to cases where there is a financial and decision-making link between two legal entities such that treating them as distinct entities would lead to a result contrary to good faith or would contravene legitimate interests of third parties (e.g. creating or using a subsidiary in order to avoid some prohibition on competition or to avoid respecting a contract). In such cases, the legal separation between a parent company and its subsidiary can be disregarded with respect to the misuse under consideration⁴⁷.
- (b) The second exception is the development by the Swiss Supreme Court of a liability theory that rests not on the basic grounds of liability (contracts and torts), but on a violation of good faith ("the liability based on trust").⁴⁸ The scope of operation of this additional liability theory is extremely restrictive. It applies where, despite the absence of a contractual relationship, there is a special relation of trust between two persons by virtue of which one of them takes measures based on the behaviour of the other, which measures later prove to be detrimental to his interests (4C.71/2001). If the injured party makes arrangements based on trust, the party who generated that trust is liable for any damage to the extent that there is a proximate causal connection with the thwarted expectation. In short, the conditions under which this liability theory applies can be

⁴⁷ Decision of the Swiss Supreme Court of 9 December 2008, 4A_384/2008.

⁴⁸ Decision of Swiss Supreme Court of 12 June 2007, 4C.28/2007.

summarised as follows: (i) trust has been created; (ii) betrayal of that trust; (iii) disloyalty; (iv) the victim had precise expectations; (v) a special relation of trust between the parties; (vi) intent; (vii) damage to the victim; and (viii) proximate causation.⁴⁹ On this basis, the Swiss Supreme Court exceptionally held a parent company liable for the commitments of its subsidiary in a case where the subsidiary represented to third parties, through advertising documentation, that it had very close links with the parent company and therefore benefited from its support.⁵⁰ That said, most of the cases presented to the courts based on the abovementioned grounds have been rejected.

- (c) The third exception applies to cases where the subsidiary has no decisional power of its own, because the influence of the parent company is decisive. For this ground to be admitted, the board of the parent company must have behaved as if it were itself the board of the subsidiary (through links of a certain duration, acting freely as the board would do, having the competences and information the board would have in order to make decisions and so contributing to the decision-making of the subsidiary). A simple influence on the decisions of the subsidiary's board is not sufficient in this respect. In such a case, the parent company is qualified as a "*de facto* body" and may be held liable for the activities of the subsidiary it has influenced.⁵¹

There are no known cases of parent companies held liable for environmental and human rights impacts of their subsidiaries under Swiss law. However it cannot be excluded that, if the conditions for liability of a parent company as described above are met, such liability may be established in the future. Moreover, one could argue that, under the Swiss Private International Law Act (hereafter "LDIP"), action could be taken in Switzerland against a Swiss parent company of a foreign subsidiary if the activities of the foreign subsidiary are exercised in Switzerland or from Switzerland (articles 152 and 159, Federal Code on Private International Law).

Is a company liable for its suppliers or for its partners in a joint venture under Swiss law?

In relation to the company's **suppliers**, the principle is also that a company and its suppliers have separate legal personalities and are therefore considered to be two different legal entities, one not being liable for the activities of the other. However, if the supplier has no decisional power of its own and the influence of another company is decisive, this other company may be held liable for the activities of the supplier. For this ground to be admitted, the board of the dominant company must have acted as if it were itself the board of the supplier (see above regarding subsidiaries). A simple influence on the decisions of the supplier is not sufficient in this respect. The Swiss Supreme Court has also ruled that where there is a specific form of dependency between two persons, implying a control of one person over the other (but not necessarily through the control of all the capital of one over the other), the controlled entity could be considered a "straw man" under the direction of the controlling entity, where treating them as distinct entities would lead to a result contrary to good faith or contravene legitimate interests of third parties. In such cases, the legal separation between the

⁴⁹ Semaine Judiciaire 1997, p. 165.

⁵⁰ ATF 120 II 331 and also a recent case (2006) on money laundering in which the Swiss court took into account the fact that The Bahamas have more lenient standards than Switzerland: 2A.91/2005.

⁵¹ ATF 128 II 122.

two entities can be disregarded with respect to the misuse under review.⁵² That said, the court was referring to dependency in the context of friendship or family relationships. There are no known cases where a company has been held liable for the activity of a supplier in relation to human rights or environmental impacts.

Joint ventures: Under Swiss law, joint ventures are considered as partnerships regulated by articles 530 *et seq.* CO. They have no legal personality (which means that the assets of the partnership belong to the partners jointly, and that the partners are personally liable for obligations resulting from the activity of the partnership), even if some specific rules regarding decision-making or liability apply to the partnership. Articles 543 *et seq.* CO regulating the relationship between the partners and third parties cannot be contractually set aside. They are based mainly on rules of agency, with the main difference that there is a presumption in favour of third parties that, regarding the normal activity of the partnership, a managing partner is entitled to represent the partnership or all partners. The third party will need to prove that he had legitimate reasons to think that there was a partnership, and that he was dealing with a managing partner. In the case of a joint venture, such proof should normally be admitted. Therefore, a commitment undertaken by one partner acting on behalf of the partnership (or making a diligent third party believe he is) is binding for the other partners and a third party could take action against all the partners. However, whereas this form of liability applies for the regular business of the partnership, it does not apply to torts. Indeed, a partner could be held liable for the unlawful act of another partner only if he himself took part in it, willingly or by negligence.⁵³ This results from the fact that the partnership, even if regulated by specific rules, has no legal personality. Therefore, with respect to environmental or human rights impacts, the liability of a partner for another one could *a priori* be taken into consideration only if the other partner took part in some manner in the unlawful act or if he acted as if he were a “*de facto* body” of his partner (see above regarding the situation of suppliers).

Upshot

Swiss law provides for interesting but still untested avenues for pursuing criminal and civil liability of corporations.

Separate legal personality and the corporate veil could be an obstacle for holding Swiss transnationals to account for acts of their subsidiaries or suppliers. The exceptions provided by law are insufficient.

2.2.3 Obligation of Reporting on human rights and environmental impacts

Reporting on social and environmental impacts, especially those of operations abroad, has become a crucial demand from civil society to enhance transparency and accountability of corporations. It has also been argued that reporting will encourage companies to take into account more seriously their impacts on human rights and the environment. The following addresses whether companies are required or permitted under Swiss law to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as

⁵² Decision of the Federal Supreme Court, December 9, 2008, 4A_384/2008.

⁵³ ATF 90 II 501, JT 1965 I 369.

any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime.

Obligatory disclosure

General corporate rules regarding reporting are common to listed and private companies. However, there are more stringent rules regarding listed companies (those whose shares can be traded on a stock exchange).

General rules: Articles 662 *et seq.* CO govern the reporting obligations of the company's directors. Pursuant to these provisions, each year the directors must prepare annual financial statements, the annual report and the consolidated financial statements (if the latter are required by law).

The annual financial statements are mainly the profit and loss statement (or income statement), the balance sheet and an Annex with more detailed information (articles 663, 663a, 663b). The annual report discusses the course of business, as well as the economic and financial situation of the company (article 663d CO). Consolidated financial statements apply only to groups of companies.

The Swiss system focuses mainly on financial reporting obligations. However, as part of these obligations, a new provision entered into force in January 2008, which requires that indicators on **risk management** be disclosed with the Annex to the balance sheet. Thus directors must report risks that may have a major influence on the company, which may include impacts on non-shareholders, if, for instance, they pose a legal risk to the company. For financial institutions, the Basel II framework explicitly requires an assessment of legal risks, i.e. the risk of being taken to court. With regard to human rights, this has become an issue for banks doing business in the US in the context of employment discrimination. As of today, it is very difficult to assess the scope of this provision, as courts have not yet provided any guidance, but this could potentially lead to the disclosure of societal impacts and could be seen as a window of opportunity.

Aside from corporate law (and financial reporting obligations), other bodies of law may also have a bearing on the reporting of impacts on non-shareholders under specific circumstances. For example, with regard to labour law, article 335f-g CO requires the employer, prior to a mass dismissal, to consult first with the employees' representative body and then to notify the cantonal Labour Office in writing of such mass dismissal with all pertinent information. Another example is the obligation to conduct an environmental impact assessment prior to launching certain projects, as required by articles 10A and 10B of the Swiss federal Law on the Protection of the Environment (LPE).

Rules applying only to listed companies: in January 2008, new provisions were enacted (article 663b bis CO) in connection with indemnities, bonuses and other similar remuneration to directors or former directors. These provisions state that such indemnities must be disclosed in the Annex to the balance sheet, in addition to the indications mentioned above. Shareholders meeting certain thresholds ("important" shareholders) must also be disclosed (article 663c CO).

Listed companies are subject not only to the requirements of the CO but also to those arising from several other regulations. These regulations provide for a number of reporting obligations and subject listed companies to the oversight of competent authorities. They require, *inter alia*, the establishment of intermediary accounts (and not only annual accounts) that have to be compatible with the *International Financial Reporting Standards*; the obligation to declare the number of shares that exceed a certain threshold; and the obligation to comply with recognised international standards regarding information to be shared with investors in order to allow them a proper evaluation of securities and the quality of the issuer. The main rules are found in the Corporate Governance Directive of the SWX Swiss Exchange and in the listing rules. The Directive mainly follows international standards, but tends to be somewhat less stringent. Information must be provided on the structure of the group and the shareholders, the structure of the capital, directors, remuneration of directors, participation of shareholders, opting out and opting in clauses, revision body and information policies of the company.

Finally, pursuant to article 53 of the listing rules:

“1 The issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices.

2 The issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact.

3 Disclosure must be made so as to ensure the equal treatment of all market participants”

Examples of price-sensitive facts could include events connected to the company’s impact on non-shareholders such as **liability risks resulting from damage to the environment, violations of human rights or product liability** that imply an important change in the financial evaluation of the company. A recent example is the set of lawsuits against Eternit and its CEO Stephan Schmidheiny for not protecting its workers from exposure to asbestos.

In conclusion, companies may be required to disclose the impacts of their operations (including societal impacts) on non-shareholders mainly in cases where this might have a significant influence on their financial situation or on market prices, which limits the scope of impacts to be reported on. They may also have to report these impacts in specific situations, where it is required in other laws, including labour and environmental laws.

There is a trend in the EU to request companies to disclose their CSR guidelines or to state they use none. The obligation to report on social and environmental impacts has been introduced in France, the United Kingdom, Denmark and Sweden. Outside the EU, Norway requires non-financial reporting. The Norwegian Accounting Act requires companies to report on specific non-financial factors: working environment, gender equality, impact on the natural environment and actions taken to prevent or reduce such an impact.

Denmark requires the largest companies to state which standards they follow, how they implement them and what results have been achieved. Companies that do not have a CSR policy should say so. Norway was discussing similar legal requirements.

The UK Companies Act 2006 requires listed companies to report on environmental matters, employees and social community issues to the extent necessary to understand the performance and position of the company. Similarly, France requires listed companies to include in their annual report information about social and environmental impacts (Article L. 225-102-1 Code de Commerce). The law defines the kind of information that should be included. Any interested person may have recourse to the tribunals if the company's directors fail to fulfil this duty.

Voluntary disclosure

As a rule, companies are permitted to disclose the impacts of their operations (including societal impacts), as long as this reporting is not detrimental to the interests of the company, nor to the interests of other constituencies that directors have the mandate to protect.

Companies may, on a voluntary basis, follow the OECD Guidelines' recommendation, in article III, to disclose material issues regarding employees and stakeholders, as well as to provide information on business conduct including information on the social, ethical and environmental policies of the enterprise.

There are no specific legal provisions that extend the obligation of reporting impacts outside Switzerland or of subsidiaries or business partners. However, reporting obligations may extend to impacts outside Switzerland if such impacts are of a nature to affect the financial situation of the company, or if it affects the market price sufficiently to require reporting it. This also applies *mutatis mutandis* to the impacts of subsidiaries, suppliers and other business partners.

Annual financial statements (following articles 662 *et seq.* CO) must be prepared by the directors and need approval from the general meeting of shareholders. Some companies (including listed companies) must have their financial statements reviewed by auditors that are totally independent from the company.

If the company has outstanding bond issues or if its shares are listed on a stock exchange, Article 697h CO provides for the disclosure of the annual financial statement and consolidated financial statement in the Swiss Official Gazette of Commerce, or the company must send a copy of such statements to any person requesting it. Other companies have to disclose the annual financial statement and consolidated financial statements to creditors who can provide evidence of an interest worthy of being protected.

As part of the duties of the directors, failure to report may lead to a liability claim against them and/or against the auditors, if the conditions mentioned above are met. Under certain circumstances, a misrepresentation may lead to a criminal conviction against the directors for forgery.

The reports issued in compliance with the reporting obligations resulting from the listing rules are by definition public. Companies failing to respect these provisions may receive a warning or a fine of up to CHF 1 million, be suspended from trading, or even delisted. Furthermore, a liability action could be taken against the company.

Upshot

Swiss law does not require companies to report on social or environmental impacts, but it does not prohibit it either, provided the reporting does not damage the company's interests. The general trend in Europe is to require some form of mandatory social and environmental reporting from companies, but practice varies and is evolving.

2.3 Access to justice/remedy and grievance mechanisms

Several international human rights instruments ratified by Switzerland, in particular the International Covenant on Civil and Political Rights, article 2, guarantee the right to an effective remedy. Any person in Swiss territory or under its jurisdiction has the right to an effective remedy when his/her rights have been violated by State agents or by private actors whose activities are condoned and not remedied by the State. The essential characteristics of this right are its effectiveness, accessibility and promptness.

In the area of grievance mechanisms, Professor Ruggie has developed a set of criteria to assess those mechanisms in the context of the need to enhance access to justice for victims. Those principles include: accessibility, legitimacy, predictability, equitability, rights-compatibility and transparency.⁵⁴ Mechanisms such as the OECD National Contact Point or a National Human Rights Institution that receives complaints, investigates and issues recommendations may play an important role in providing relief to victims.

Switzerland's laws provide for a number of avenues for legal redress. However, the realisation of the right to an effective remedy in the context of corporate abuse (whether transnational or not) is hindered by a set of legal, procedural and social obstacles.

2.3.1 Legal standing

To hold company directors liable

The Swiss Supreme Court has made a distinction between direct and indirect damages. Such distinction determines who may take action as well as the relief sought. The criterion to distinguish between direct damages and indirect damages depends on the assets directly affected by the action attributed to the directors. Indeed, a shareholder or a creditor suffers direct damages when his assets are individually and specifically affected, independently of any damages to the company (e.g. a creditor who agreed on a loan to the company based on false indications of a director), while he suffers indirect damage when his prejudice is a result of the damage suffered by the company (e.g. diminution of the dividend because of damage affecting the company, or a claim of the creditor unpaid because of the company's lower credit-worthiness). Legal standing to sue the directors for damages is granted to the company as such represented by the board of directors or a special representative, the shareholders and the creditors if they have suffered direct damages. However, observers note that shareholders or creditors are unlikely to hold directors liable in relation to human rights and/or environmental impacts.

⁵⁴ Ruggie Report 2008, A/HRC/8/5 para 92.

As regards criminal liability, under Swiss law the prosecution of crime –including crime allegedly perpetrated by corporations– corresponds to public prosecution. The victim may have a limited role.

Swiss law on civil liability allows any person or legal entity to bring a claim against any other person domiciled in Switzerland for tort and to demand the payment of damages and compensation. In principle, this avenue would also be open to citizens of other countries if they have access to Swiss courts directly or through representation.

Class actions: Swiss law does not recognise the institution of “class action,” whereby a group of persons who claim to be similarly affected by a company can bring a collective claim before the court. Most European countries do not permit such class actions while most common law countries admit them in certain areas, including the United Kingdom and the United States, and most recently Italy for consumers’ rights. Other countries may have other institutions similar to class actions, and several Latin American countries of civil law tradition admit collective claims for constitutional remedies.

Class actions usually facilitate legal action by a group with a single legal counsel, reducing costs and also alleviating the burden of proof each individual would otherwise have, and possibly reducing the length of litigations. In its message about the new Swiss Code of Civil Procedure, the Federal Council rejected the introduction of class action in Swiss law citing, *inter alia*: difficulties in defining the group entitled to legal standing and in sharing the compensation amounts; the possibilities that other members of the group might take legal action outside the group; and its potential abusive use to sue for enormous amounts (akin to “blackmail” to force companies to settle).⁵⁵

By contrast, Swiss law recognises the right of *civil associations and organisations to bring claims in defence of a collective interest* (not only of their members but also of others who carry out similar trade) provided that their statute enables them to defend the economic interest of their members. According to Swiss Civil Code Article 28, the professional associations can only request declaratory relief and cessation but not reparation of damages for loss or injury. Despite its usefulness (for instance it was thanks to a labour union’s intervention that the administration refused authorisation to an enterprise to have women working on Sundays), the new Swiss Code of Civil Procedure –to enter into force in January 2011– has kept its scope limited, especially in connection to the relief that these associations may seek.

2.3.2 Obstacles to access to justice

Access to a legal remedy in Switzerland, although in theory open to a broad range of individuals and entities, is nevertheless marred by a series of obstacles. Among them are common obstacles such as the important financial resources needed to litigate in Switzerland (including the possible payment of legal costs of the opposing party if the case is lost); lack of knowledge about the mechanisms and avenues available; and availability of legal aid or legal representation. There are also important limits to capacity within the system to address issues

⁵⁵ FF 2006 6902

of a transnational and complex nature. Lack of clarity in the law of corporate criminal liability or limited options for piercing the corporate veil are also material obstacles for victims seeking to obtain justice. Also, apart from the above-mentioned limits to victims' legal standing, significant procedural obstacles may in practice prevent access to justice.

Costs of legal representation and legal aid

The costs of legal representation in Switzerland are generally high and are in practice the single most important obstacle for victims- especially those from poor countries- to gain access to the courts. The Federal Constitution, article 29.3, provides for the right to legal aid of everybody without sufficient resources, unless the claim appears to have no possibility of success. According to legal practitioners, legal aid generally works well. However, there are some difficulties in relation to the assessment of whether "possibilities of success" exist, which may be especially serious in the context of litigation against large corporations, where obtaining the necessary evidence against the company is difficult. In this context, such an assessment could be arbitrary.

Evidentiary problems

One of the most important problems victims face when confronting corporations in a legal context is providing the required evidence to prove the company's tort. This difficulty flows largely from the fact that most evidence, in the form of documents, records and archives is in the hands or control of the company. Witnesses, whistleblowers and the victims themselves may still be working for the company in a subordinate position, which makes them vulnerable to potential intimidation. The unequal position of the parties to the dispute in terms of financial resources is also seen clearly in their unequal ability to produce the necessary evidence. Requiring the complainants to provide *prima facie* evidence and then shifting the burden of proof to the defending company could be a solution (as is done for cases concerning gender discrimination).

During the proceedings, the judge can address the imbalance between the parties by ordering the party in control of a piece of evidence to disclose it (Article 186.2 Geneva Law of Civil Procedure) even if that party does not carry the burden of proof. However, the new Swiss Code of Civil Procedure will take a significant step backward in this regard by recognising a right to refuse to disclose the evidence when disclosing it would expose a party to criminal prosecution or civil liability (Article 163). While the refusal to disclose evidence that could bring criminal prosecution may be understandable by virtue of the guarantees against self-incrimination, allowing the party who controls the evidence to refuse to disclose it to protect itself against civil liability is clearly not in the interest of justice and diminishes the victim's ability to prove his claim. There may be strong policy grounds to change this rule and consider introducing stronger powers for the judge to order discovery of evidence.

Protection of witnesses and whistleblowers

The possibility that a company or financial institution employee who has witnessed irregularities would decide to reveal those irregularities to the authorities seems rather slim according to the report of the OECD Phase 2 review of Switzerland (2005). This report found

no cases of whistleblowers denouncing corrupt activities on the part of their firms. The main reasons for this are said to be labour laws that do not effectively protect employees from unfair dismissal (the indemnity for unfair dismissal is limited by law to six months' salary at most, often reduced in practice by the courts); the absence of any obligation for employers to reinstate employees who are victims of unfair dismissal; and the relatively small size of the country. Regarding the latter, a whistleblower, labelled as an informant, would very quickly be excluded from the labour market, as Swiss law has no specific provisions to protect employees' "right to warn", or to guarantee that they be reinstated if dismissed unfairly.

In practice, potential whistleblowers, as workers within the meaning of Swiss law, are subject to a number of restrictive legal obligations. Federal jurisprudence,⁵⁶ endorsed by legal commentary, establishes an employee's obligation of loyalty not only to abstain from any behaviour that may prejudice the employer's legitimate interests, but also to intervene actively, for example by informing the employer of irregularities and anomalies found within the firm. In this context, an employee's option to approach the firm's executive bodies seems, according to the OECD, to be limited in practice. The company's image and the trust of its customers and creditors are factors that may encourage senior managers not to bring a reported offence to the attention of the police.

There are also grounds for victims or witnesses to fear retaliation. Law enforcement agencies cannot guarantee that the names of witnesses will not be divulged during the procedure, except in situations in which knowledge of the witness's identity would constitute a threat to life or limb for the witness or a member of his family.

The OECD Working Group had recommended, in the phase 2 Report in 2005, that Switzerland examines measures to ensure effective protection of whistleblowers, especially employees in the private sector (Recommendation 3c). In March 2006, the Council of States accepted a revised version of Motion Gysin (03.3212) and mandated the Swiss Government to prepare a bill that addresses the protection of whistleblowers; the National Council followed suit in June 2007. The consultation procedure on the partial revision of the Swiss *Code des obligations* ended on 31 March 2009, with the Federal Council taking note of the report on 19 December 2009. The majority of stakeholders welcomed better protection for whistleblowers, but before taking a decision the Federal Council opened another consultation on the question of the existing and foreseen sanctions for unfair dismissal of whistleblowers.⁵⁷

2.3.3 Swiss National Contact Point

The OECD Guidelines for Multinational Enterprises provide the only multilateral framework that Governments are committed to promote. They set a number of recommendations and principles for multinational enterprises operating in or from OECD member countries or the 11 observer countries that have endorsed the Guidelines. The National Contact Points play a crucial role in promoting observance of the Guidelines, but international practice is uneven.

⁵⁶ ATF 127 III 310

⁵⁷ See http://www.ejpd.admin.ch/ejpd/fr/home/themen/wirtschaft/ref_gesetzgebung/ref_whistleblowing.html

The system of National Contact Points (NCP) established under the revised OECD Guidelines, as well as National Human Rights Commissions or Ombudspersons, are frequently presented as alternative non-judicial mechanisms to provide redress to victims of corporate abuse. The human rights system, in principle, does not limit the available remedies to those of judicial nature but also accepts those of administrative character subject to the requirement that the remedy offered be prompt and effective. As mentioned above, Professor Ruggie has suggested a number of principles that non-judicial remedies should comply with. However, it is not clear whether in his conceptual framework these non-judicial remedies correspond to what is mandated under international law.⁵⁸

The Swiss NCP is located within the International Investment and Multinational Enterprises Unit of the State Secretariat for Economic Affairs and is managed by Government officials. At the moment, the OECD Procedural Guidelines relating to the work of NCPs do not require any specific location of the NCP within the administration. It is still fairly common (some 17 NCPs) that the NCP is located in the same department as investment protection and promotion and/or staffed by employees from the respective ministry for economic affairs. But there is also a discernible trend to include stakeholders in NCP structures since 2000, when the NCP mechanism under the revised Guidelines was created. The number of NCPs with tri- or quadri-partite composition and/or involvement (business, governments, unions and sometimes other civil society groups) has increased to about 13 (including the Nordic countries: Norway, Sweden and Denmark), and advisory committees or permanent consultative bodies involving non-governmental partners have become frequent in countries with government-based NCP structures (such as in the UK). Recently, the Netherlands created a totally independent NCP served by a secretariat comprised of state officials for a trial period.

The Swiss Government regards international investment and CSR as closely related and sees no inconsistency in having the Swiss NCP and the task of protecting Swiss businesses investing abroad in the same governmental unit. Support to businesses operating internationally can and should be combined with fostering responsible corporate behaviour in an effective and flexible way.⁵⁹

The NCP approach to transparency and communication in concrete cases is described on the Swiss NCP website in very broad terms: "...with respect to the results of the procedure, the NCP needs to find a balance between transparency and confidentiality."⁶⁰ The outcome of the NCP's involvement in specific cases is made public on the website, in a very general and generic manner, in the annual report of the Swiss NCP, on the website of the OECD and in the OECD report of the "Annual Meeting of the National Contact Points".

In total, 11 specific instances have been filed with the Swiss NCP. Final statements, which are issued only once a case is closed, can be found online for only two cases. Other cases are

⁵⁸ Amnesty International has criticised the labeling of OECD NCPs or the Global Compact as "remedial mechanisms," where in practice they were not conceived of as such. See "Response by AI: Right to an Effective Remedy", CSR Conference convened by the EU President, Sweden, 10 November 2009.

⁵⁹ "Annual Report 2008/2009 on Activities of the Swiss National Contact Point" to the OECD Investment Committee, available at <http://www.seco.admin.ch/themen/00513/00527/02584/02586/index.html?lang=en>

⁶⁰ <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>.

known from external sources. The Swiss NCP Annual Report 2009 to the OECD reports on four instances: a labour conflict in a factory plant of the Swiss multinational enterprise Nestlé in Russia (2008); a labour conflict in a subsidiary of a Swiss multinational enterprise in Indonesia (2008); a labour conflict in a subsidiary of a Swiss multinational enterprise in Korea (this was filed with the Korean as well as the Swiss NCP); and a labour conflict in a subsidiary of a Swiss multinational enterprise in India (filed with the Swiss NCP in 2009).

The Swiss NCP was also involved in a specific instance initiated in 2007 by an Australian lawyer with the Australian NCP and by a Swiss NGO with the Swiss NCP concerning the coal mine “El Cerrejón,” partially owned by Anglo American, BHP Billiton and Xstrata and operating in Colombia. Since the Australian, Swiss and UK NCPs were involved, it was decided that the Australian NCP would lead the process. On 12 June 2009 the Australian NCP issued a statement formally closing the instance in view of the agreement reached between one plaintiff community and the company and the establishment by the company of an internal mechanism of social responsibility to continue dealing with the communities’ grievances. The Swiss NCP also issued a statement supporting the Australian statement and closing the instance. Both NCPs concluded that the mediation work had been successful. In its statement, the Australian NCP declined to assume an ongoing role in monitoring compliance with agreements and/or negotiations.

The latter case serves to illustrate the shortcomings of the OECD NCP model as a potentially effective remedy for victims. Civil society groups complain that compliance with the recommendations is weak, the procedure is non-transparent and unclear, and victims have a limited possibility of participating (especially if they are located in third countries). Further, in these groups’ view, SECO overemphasises mediation. Officials at SECO maintain that because of the constant coordination and consultation with other departments, the Swiss NCP in practice works as an interdepartmental structure. They also state that the levels of transparency are in keeping with what is required in the OECD Guidelines and NGOs generally publish their own positions. Finally, mediation is central to the NCP system.

Elsewhere concerns have been expressed about the independence and impartiality of bodies controlled by the Governments, the effectiveness of a system that relies largely on the good will of companies to engage in a mediation process and comply with commitments made in that context, and the inherent limitations on investigating or gathering evidence, especially from individuals and communities affected in third countries.⁶¹ Similar concerns arise in regard to the effectiveness of NCP statements favourable to the victims when the good will of the company is absent. Various cases in the UK and elsewhere showing lack of compliance by companies underscore the limits of the current NCP model.

Upshot

Currently, the Swiss NCP cannot be seen as a mechanism that provides an effective remedy, because it is not perceived to be independent and overemphasises mediation as the main tool.

⁶¹ See generally “Any of our business?...”, 2009, cited above.

2.3.4 A Swiss National Human Rights Institution?

The creation of a National Human Rights Commission or Ombudsman has been an advocacy demand of Swiss civil society for a number of years. In 2002, the Federal Council prepared a report on the feasibility of creating a federal commission on human rights. It considered two models: a federal commission and an independent specialised institute. In the end, it decided in July 2009 that establishing a National Human Rights Institution (NHRI) in Switzerland would be premature. Taking into account the current needs, the council decided instead to make available, as a preliminary step, 1'000'000 CHF per year to buy services from a Competence Centre for Human Rights that is or will be established at a Swiss university. Several universities have applied and the Federal Council will decide in spring 2010.

In the consultations on the NHRI, while business associations such as *economiesuisse* were against such a new institution, some multinational corporations (Novartis, ABB, Zurich Financial Services, Pfizer, Bechter, Hesta, Mondaine, UBS) have voiced the need for a National Human Rights Institution such as the Danish Institute on Human Rights, of which ABB and Novartis are regular clients.⁶² The global debates about business and human rights show that national bodies with the task of protecting and promoting human rights can also play an important role in the context of the human rights impacts of business. At the same time, the structure and functions of those institutions vary across countries and some countries lack such institutions altogether.

3. SOME EXISTING POLICY INSTRUMENTS AND THE STATE DUTY TO PROTECT

In its present state international human rights law does not prescribe specific policies for countries to implement their human rights obligations. It generally leaves States wide discretion to choose the most appropriate policies to discharge their human rights obligations, although some treaties such as CERD do require action in specific domains. However, there are strong policy reasons to adopt certain kinds of policies that are proven to be more conducive to the promotion of human rights than others or, in any event, to avoid policies that lead to the commission of violations.

With respect to human rights abroad, apart from the obligations under human rights law and those stemming from the Swiss Constitution, there may also be strong policy reasons for Switzerland to encourage or even ensure their companies respect rights abroad. One important reason is to avoid being associated with possible corporate abuse abroad or even being seen as accomplices. This holds true especially if the State itself is involved in the business venture, be it as owner, investor, insurer, procurer or simply promoter.⁶³

⁶² « Création d'une commission fédérale des droits de l'homme: possibilité, opportunité et alternative ». Rapport du Conseil fédéral, Berne, le 1er juillet 2009, Available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/human/humri.Par.0043.File.tmp/Rapport%201er%20juillet%202009%20Fr.pdf>

⁶³ Ruggie Report 2009, para. 16.

A review of all policy tools and programmes in place that have an impact on the promotion of human rights falls outside the terms of reference of this study. The following will focus only on those policy tools that are generally seen as having a bearing on the enjoyment of human rights abroad: export credit risk insurance, government procurement and investment and trade agreements.

3.1 Role of Swiss Embassies abroad and the promotion of bilateral dialogues

In response to the 2009 Ruggie questionnaire, Switzerland mentioned its sectoral policy of "défense des intérêts économiques des entreprises suisses à l'étranger". Critics pointed out that this policy (not publicly available) focuses on the protection of Swiss companies' interests. The response to the Ruggie questionnaire mentions that adherence to the OECD Guidelines and to the Global Compact is encouraged and that the protection of interests of Swiss companies also includes preventing reputational damage through respect for human rights. Government officials also stress that Swiss diplomatic missions do not extend protection in cases of corruption or to companies without a good record on human rights and labour standards: and limit that protection in practice to companies that are members of the Global Compact, have a good public reputation and do not have any pending instance before an OECD NCP.

Swiss diplomatic intervention in the cases in Colombia

In a long-running conflict between FENOCO, a Colombian railway company, and Sintraime, a metal workers union, the current Swiss Ambassador made efforts to de-escalate and resolve the conflict, speaking with company representatives and the President of the Central Unitaria de Trabajadores (CUT). A second case involves the alleged complicity of Nestlé Colombia in the torture and assassination of Colombian trade union leaders by paramilitary groups. The company is alleged to have benefited from the violations resulting from a trade union-free zone favourable to business. The Ambassador organised informal meetings between the CUT President and the head of Nestlé Colombia, for example, during a dinner at the ambassador's residence. The current ambassador appears more active than his predecessor and more willing to act when Swiss companies are involved in conflicts.

As the document is not publicly available, this sectoral policy cannot be analysed in full. Government officials stress that this document is internal administration guidance for staff, which is usually not public. It provides guidance to diplomats on cases and information that needs to be reported to Bern and therefore could play a useful role in conflict prevention. However, Swiss diplomats are reportedly reluctant to take an active role or mediate in this type of conflict, following on an instance in which the Ambassador in Brazil was criticised for his active involvement in a case concerning Syngenta.

By way of comparison, the UK has a publicly available business and human rights toolkit aimed at showing how UK overseas missions can promote good conduct by UK companies.⁶⁴ This toolkit provides guidance to staff on how to promote human rights by raising

⁶⁴ Available at: <http://www.fco.gov.uk/resources/en/pdf/3849543/bus-human-rights-tool.pdf>

awareness, lobbying and facilitating contact, and engaging with government, (UK-registered) business, civil society and multilateral organisations as well as how to react to complaints.

The Netherlands outlined a strengthened role for international CSR diplomacy in their Government vision on CSR 2008-2011. This includes the Netherlands' active and leading role in international bodies, taking CSR as an inherent part of promoting international enterprise and economic diplomacy, and ensuring CSR is implemented in all of the government's activities to promote trade and become a standard feature of all economic diplomatic missions of the Ministry of Economic Affairs.⁶⁵

Promotion and adequate training on human rights and business and on the contents of these tools for relevant staff would be essential to ensure the intended objectives are achieved.

3.2 Public Procurement

Public Procurement is one area in which Governments and other public authorities can use their purchasing power to reinforce business' responsibility to respect human rights.

In Switzerland, the federal law on public procurement⁶⁶ (BoeB) was revised in 1994 to conform to the WTO Agreement on Government Procurement binding on Switzerland since 1 January 1996. Article 8 BoeB provides that mandates are awarded only to bidders who respect local labour law, and, if the service is rendered in Switzerland, ensure equal pay for women and men.

In 2008, the Federal Council started a consultation process for the preliminary draft and the explanatory note for a full revision of the public procurement bill. The goal would be to modernise, clarify, insert flexibility and harmonise the law on public procurement. The report of the consultation, published on 18 November 2009, shows there is still a long way to go toward the envisaged comprehensive revision.⁶⁷ On the same date, the Federal Council passed an amendment of the Ordinance on Public Procurement to make important changes in a shorter time frame than the revision of the bill would take. Of particular importance for this study is the amendment of Article 7, which introduced adherence to the eight ILO core labour conventions as a minimum criterion for services rendered abroad.⁶⁸

While the inclusion of ILO core labour conventions is a step forward from simply requiring adherence to local law (which still appears in Article 8 of the Federal law on public procurement), more ambitious proposals were made in the consultation process.⁶⁹ In particular, one option would be to create the legal base to include more human rights and social policy-related issues as criteria for public procurement. The process seems to be stalled

⁶⁵ Available at http://mvoplatforn.nl/publications-en/Publication_2364, pp. 19-21.

⁶⁶ Loi fédérale du 16 décembre 1994 sur les marchés publics, RS 170.056.01, available at http://www.admin.ch/ch/f/rs/c172_056_1.html

⁶⁷ Available at <http://www.admin.ch/ch/f/gg/pc/documents/1606/Ergebnis.pdf>

⁶⁸ « Ordonnance du 11 décembre 1995 sur les marchés publics », RS 172.056.11, available at http://www.admin.ch/ch/f/rs/c172_056_11.html.

⁶⁹ http://www.sp-ps.ch/uploads/tx_userpressemitteilungen/081119_744_oeffentl-Beschaffungswesen_01.pdf

at the moment, but once the overall revision starts it could be an important avenue to operationalise the State duty to protect.⁷⁰

Importance of "Environmental management"

Requiring the establishment of an environmental management system may play a role in government procurement contracts with private companies. It can play the same role in public-private contracts to set environmental objectives or the provision of services. Often it will be a prior condition for the agreement.

The existence of an environmental management system may have an impact on the expectations of authorities to grant a licence (i.e. to use water) or authorisation based on the good faith declaration of the company. An exemption (i.e. ecological taxes) or licence obtained on the basis of the company's declaration that it has a functioning environmental management system that turns out not to be true or inexistent may be nullified or voided and may even trigger civil liability.

The question is whether an environmental management system should be made compulsory for government procurement.

3.3 Swiss Export Risk Insurance

The operating conditions of export risk insurance are laid down in the "Swiss Export Risk Insurance Act"⁷¹ (SERVG) of 16 December 2005 and the "Swiss Export Risk Insurance Ordinance"⁷² (SERV-V) of 24 October 2006. Art. 6 SERVG provides that it respects the principles of Swiss foreign affairs policy, which includes the promotion of human rights per Article 54 of the Swiss Federal Constitution. Art. 13 SERVG stipulates that insurance is excluded if the export would contravene Swiss or foreign law or Switzerland's obligations under public international law.

There are reasonable steps, both procedural and substantial, to ensure that export risk insurances conform to the regulations. These include Environmental Impact Assessments, fulfilment of the more stringent level of either local standards or World Bank Safeguard Policies, and adherence to IFC Performance Standards for project finance. SERV's conformity with the 2007 OECD Council Recommendations on Common Approaches on the Environment and Officially Supported Export Credit Projects is subject to periodic examination.⁷³ SERV also encourages adherence to the OECD Guidelines for multinational enterprises.⁷⁴

⁷⁰ The WTO Government Procurement Agreement and the Bilaterals I may pose some limits to criteria that can be included. See also Marc Steiner, *Die Berücksichtigung sozialer Aspekte im Rahmen der öffentlichen Beschaffung*, Vergaberechtliches Arbeitspapier erstellt im Auftrag der Interessengemeinschaft Ökologische Beschaffung Schweiz (2009), available at www.igoeb.ch.

⁷¹ http://www.serv-ch.com/fileadmin/serv-dateien/Ueber_uns/Rechtsgrundlagen/SERVG_f.pdf

⁷² http://www.serv-ch.com/fileadmin/serv-dateien/Ueber_uns/Rechtsgrundlagen/SERV-V_f.pdf

⁷³ Available at http://www.oecd.org/department/0,3355,en_2649_34181_1_1_1_1_1,00.html

⁷⁴ See <http://www.serv-ch.com/en/sustainability/guidelines-for-multinational-enterprises/>

Common criticisms against SERVG focus on the lack of systematic human rights impact assessments and the fact that recommendations flowing from all of the assessment and standard reviews are voluntary, thus failure to comply does not entail consequences.

Art. 34 SERVG states that in “particularly important”⁷⁵ export operations, the Federal Council can, on demand from the Federal Department of Economy, order SERV to insure the respective exports.

SERV’s environmental practitioner reportedly recommended not insuring the Ilisu Project, but the Federal Council decided otherwise. The Federal Council’s discretion arguably conforms to the weighing-and-balancing test of Art. 54 of the Constitution, whereby the promotion of respect for human rights is only one foreign policy goal among several and can be trumped by the need to safeguard other overriding values. In addition, under Article 101 of the Constitution, the Confederation shall safeguard abroad the interests of the Swiss economy. However, since compliance with human rights is one of the key features of the Swiss constitution there should be no room for deviating from human rights compliance.

The Ilisu and Yusufeli hydroelectric power plants

On 28 March 2007 the Federal Council, in consultation with the German and Austrian export credit agencies, instructed SERV to insure deliveries from Swiss companies to the hydroelectric power plant at Ilisu on the river Tigris in Turkey. This decision was conditional on assurances from Turkey that it would comply with numerous requirements based on World Bank standards in the fields of human rights, the protection of the environment, cultural assets and downstream impacts. In spite of occasional progress, repeated visits to the project site revealed shortcomings in compliance with the specified requirements. After a 180-day time limit expired without full compliance, the export credit agencies terminated the export risk insurance on 7 July 2009.⁷⁶

While the termination of the export risk insurance was commended as a victory for human rights, environmental and cultural concerns over economic interests, the Ilisu dam is not the only controversial project that warrants closer scrutiny.

In fact, only two months after Ilisu, the Federal Council instructed SERV to grant export risk insurance to the Yusufeli hydroelectric power plant – also in Turkey and a category A project, i.e. a project located in sensitive sectors or located in or near sensitive areas.⁷⁷ As in the Ilisu case, the Federal Council decided that the challenges highlighted in the Environmental Impact Assessment⁷⁸ and the Resettlement Action Plan⁷⁹ could be addressed by respective conditions and instructed SERV to insure the export risks.

⁷⁵ “Particulièrement importantes” is defined in Art. 28.2 SERV-V as “Les opérations d’exportation ayant des conséquences importantes sur le plan économique, social, écologique et sur le plan du développement ou d’autres aspects de politique extérieure sont réputées particulièrement importantes.”

⁷⁶ See 2009 Foreign Economic Policy Report, pp. 34-35.

⁷⁷ See http://www.serv-ch.com/fileadmin/serv-dateien/Ethik-Umwelt/Transparenzbericht_E.pdf

⁷⁸ Available at http://www.dsi.gov.tr/english/yusufeli_report.htm

⁷⁹ Available http://www.dsi.gov.tr/english/yusufeli_plan.htm

3.4 Trade and Investment

International trade and investment agreements have the effect of reducing the policy space available to countries to implement their duty to protect human rights. The possibility of conditioning trade advantages and concessions on respect for human rights and labour rights is severely restricted under WTO law, which offers relatively narrow windows of exceptions that must be interpreted on a case-by-case basis. Ruggie's conceptualisation of the impact of trade and investment on human rights focuses on whether trade and investment may "unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations".⁸⁰ Although the relationship trade/investment and human rights can also be seen from a positive angle - how governments can actively advance human rights through trade and investment agreements - at present conditions can be imposed only in unilateral schemes such as the Generalised System of Preferences or in bilateral agreements. The European Union regularly includes clauses of respect for human rights as essential elements of bilateral trade and cooperation agreements, but their enforcement is weak.

Regarding investment treaties, the SRSG singles out stabilisation clauses as an issue of particular interest.⁸¹ These clauses typically require compensation for any interference by the host State that increases the operating costs for the investment project. They may thus limit the application to the investment project of new laws aimed at protecting human rights. One survey paper produced for IFC and the SRSG on stabilisation clauses and human rights is publicly available.⁸²

Switzerland has concluded some 122 Agreements on the promotion and reciprocal protection of investments. An unspecified number is under negotiation or renegotiation. A preliminary survey of some of those investment treaties shows that the stabilisation clauses aim at preserving public interest considerations and do not insulate investors from compliance with new environmental and social laws. However, public policy goals or international human rights mechanisms are mentioned in a broad way and there are no suspension clauses in case of massive human rights violations.⁸³ More research should be undertaken in relation to Switzerland's investment and trade agreements. It appears that Switzerland could use its close ties with many countries to make bilateral investment treaties an instrument for advancing human rights protection.

International Good Practice

A Norwegian draft model agreement and commentary addresses concerns about bilateral investment treaties (BITs). The model was to serve as a guide for future negotiations and to review existing investment treaties for consistency. Later on, Norway decided to shelve the Model BIT as feedback from stakeholders was so

⁸⁰ Ruggie Report 2009, para. 30.

⁸¹ Ibid., para. 32-33.

⁸² A. Shemberg, "Stabilization Clauses and Human Rights: A Research Project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights", 11 March 2008. Available at <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>

⁸³ Beschluss des Bundesrates vom 9. April 2003 über die Politik der politischen Konditionalität.

⁸⁴ <http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>

polarised that “achieving a proper balance was too difficult”⁸⁴. There have also been earlier proposals such as the IISD Model International Agreement on Investment for Sustainable Development⁸⁵. No similar exercise is under way or planned in Switzerland, however in his closing remarks after presenting his 2009 report to the Human Rights Council, the SRSG announced that his team would be doing some work in this area.⁸⁶

There has been an enormous amount of research on the impact of trade law and WTO Agreements on human rights over a number of years.⁸⁷ Apart from the already quite well explored options to influence political and dispute settlement bodies within the WTO, civil society groups use the UN treaty bodies quite effectively to highlight the human rights impacts of States’ trade-related policies.⁸⁸ Also, both the UN Special Rapporteurs on the right to health and on the right to adequate food have used their missions to the WTO to call on States to conduct *ex-ante* human rights impact assessments of their trade policies. In addition, treaty bodies such as CESCR have provided guidance on this matter.⁸⁹

Interesting avenues for lobbying could arise in the context of the European Free Trade Association (EFTA). With the constitution in 2008 of a working group on trade and environment and one on labour standards, discussions on these issues were revived and the working groups are expected to deliver their initial reports soon.⁹⁰

4. OUTLINING THE OPTIONS

Proposals that aim at creating or strengthening a framework for corporate accountability will meet resistance in the prevailing political and economic environment. The political culture in Switzerland has traditionally separated human rights issues from economic ones. If progress

⁸⁵ http://www.fes-globalization.org/dog_publications/Appendix%20%20IISD%20Model.pdf

⁸⁶ Human Rights Council 11th session, 2 June 2009, 2nd Plenary Meeting, Closing Remarks and Answers, John Ruggie, webcast available at: <http://www.un.org/webcast/unhrc/archive.asp?go=011>

⁸⁷ See, for instance, OHCHR, “Human Rights and World Trade Agreements – Using General Exception Clauses to Protect Human Rights”, available at: <http://www.ohchr.org/Documents/Publications/WTOen.pdf>

⁸⁸ See, e.g., *Switzerland – Missing policy coherence: trade interests overriding right to health?* Available at: http://www.3dthree.org/pdf_3D/3D_CESCRSwitzerland_Nov2009.pdf. The concerns on TRIPS have been included in the list of issues Switzerland will have to respond to during the state reporting in November 2010, see <http://www2.ohchr.org/english/bodies/cescr/cescrwg43.htm>

⁸⁹ UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Mission to the World Trade Organisation*, UN Doc. E/CN.4/2004/49/Add. 1 (1 March 2004); UN Special Rapporteur on the right to adequate food, *Report of the Special Rapporteur on the right to food, Olivier De Schutter - Addendum - Mission to the World Trade Organisation*, UN Doc. A/HRC/10/5/Add.2 (25 June 2008).

⁹⁰ EFTA Ministers on 17 December 2009 “welcomed the significant progress reached in the ad-hoc EFTA Working Group on Trade and Environment and looked forward to the finalisation of a report in the first quarter of next year. They mandated the ad-hoc Working Group on Labour Standards in EFTA Free Trade Agreements to pursue its work”. See also, *Draft Discussion Paper on the relationship between trade and labour standards; and the consideration of new provisions in EFTA’s free trade agreements*, available at http://www.efta.int/~media/documents/advisory-bodies/consultative-committee/cc-news/efta_cc_discussion_paper_trade_and_labour.ashx; EFTA Parliamentary Committee Report, *Environmental policies and Labour standards in FTAs*, available at <http://www.efta.int/~media/documents/advisory-bodies/parliamentary-committee/reports-eea-joint-committee/report-labour-environment.ashx>

is to be achieved, political culture has to change and political will be built. A combination of public mobilisation, lobbying and debating with serious proposals and persuasion will be necessary. It could also be more effective to strategically reform existing institutions than to create new ones, which is usually more difficult and takes more time.

Bearing this in mind, a number of concrete steps would allow Switzerland more fully and effectively to discharge its duty to protect.

4.1 Creating a process to reach a national policy on CSR

Civil society may prepare proposals, lobby authorities and members of Parliament and campaign publicly for a national policy on CSR in which human rights and the environment feature prominently. Switzerland needs an overarching policy and plan to promote the human rights and environmental responsibilities of business. Other states, such as Norway, Denmark and the Netherlands have developed such policies and plans. The various state branches and departments (Parliament, the Federal Council, and the cantons) need to be involved in elaborating a national policy and plan, which should be presented to and debated in the Federal Parliament.

One option is for the Federal Parliament (National Council and/or States Council) to request the Federal executive to produce a policy or paper in consultation with civil society, business and other stakeholders.

Alternatively, the Federal Parliament could request the Federal executive to commission a policy paper from the Competence Centre on Human Rights, which has been created as a pilot project. Failure of Parliament to act should not be a deterrent, as the Federal executive may be persuaded to commission a policy paper or plan from the Competence Centre.

4.2 Enhancing companies' legal duties

4.2.1 Companies' duty of care for subsidiaries' impacts abroad

The adoption of an across the board regime of strict liability of parent companies for wrongdoings of their subsidiaries in the area of human rights and the environment is not feasible or desirable.⁹¹ If such a regime were to be established in Swiss law it would render unnecessary the introduction of a "duty of care" for the parent company in respect to subsidiary companies since the parent will always be regarded as liable whether or not it has duly exercised its duty of care. Currently no one proposes such a solution. However, strict liability for certain damages caused to the environment or by employees or company agents already exist in Swiss law and other national legislations. Strict or objective liability should be contemplated in certain cases to ensure that the company repairs the damage caused regardless of whether it behaved negligently or not. In that sense it remains a valid option for

⁹¹ A parliamentary motion was proposed in June 2007 to create a set of rules applicable to groups of companies in order to reinforce the liability of the parent company. However, the Swiss Federal Council considered that there was no need for such a new set of rules, as either specific rules or case law already existed in this respect and was sufficient. This motion was therefore discontinued.

attributing to parent companies the responsibility to repair certain cases of serious damage caused by their subsidiaries.

An alternative is the **introduction of a duty of care of parent companies with respect to their subsidiaries and companies under their control**. This duty could be added explicitly as an amendment to Articles 716a and 717 of CO that define directors' duties to the effect that these duties will include the exercise of due diligence to ensure that subsidiaries and societies under its control do not commit serious human rights abuses or cause serious damage to the environment. A definition of these standards may result from the parliamentary debate leading to the adoption of such legal amendment.

An important option is a more active use of the Swiss justice system (courts and tribunals) to develop progressive standards through jurisprudence, which would also clarify the scope of the **existing duty of care** in relation to subsidiaries and suppliers abroad. There is a growing practice in other countries of holding parent companies legally liable for damages caused by subsidiaries where the parent was involved in causing the damage.⁹² It should not be forgotten that courts and tribunals are part of the State, which is bound by international human rights law.

Questions to address include the following:

- (a) What threshold (number of shares) would need to be reached for a company to be considered to have control over another, which would in turn trigger liability for the acts of its subsidiary? Specifically, would a majority of shares be sufficient or would total economical identity be necessary? The Swiss CO article 663e provides a definition of a group of enterprises only for the purposes of drafting consolidated accounts.⁹³ The French Commercial Code provides the following definitions:

Subsidiary: "When a company owns at least one half of shares of another company, the latter is considered as subsidiary of the former in application of the present section" (Article L. 233-1, unofficial translation).

Control of a company by another: A company is considered as controlling another when: a) it possesses directly or indirectly a fraction of the capital entitling it to the majority vote in the company's general assembly, b) it has the majority vote as a result of an agreement with other shareholders, c) it determines in practice the decisions in the general assembly by virtue of its own votes, d) it is shareholder or associate of the company and has the power to appoint or revoke the majority of members in the directors' board or oversight board (Article L. 233-3).

It is interesting to note that shareholders have the right to demand information about the consolidated accounts, and thus about the subsidiaries under the control of the parent company.

⁹² In this respect, see ICJ Report on Corporate Complicity, Vol. 3 "Civil Remedies".

⁹³ Art. 663^e: « 1. La société qui, par la détention de la majorité des voix ou d'une autre manière, réunit avec elle sous une direction unique une ou plusieurs sociétés (groupe de sociétés) doit établir des comptes annuels consolidés (comptes de groupe). »

- (b) Would such a liability system have a general scope or rather be limited to human rights and environmental issues? A duty of care is a standard that in principle applies to all situations in which reasonable care should be taken to avoid harm by fault or negligence.
- (c) To what extent would Swiss private international law rules need to be modified to include liability of Swiss parent companies for foreign subsidiaries or for activities undertaken outside Switzerland? The Law on private international law may not need to be changed insofar as it recognises the jurisdiction of Swiss courts in claims against domiciled companies. To enforce the duty of care in relation to subsidiaries, a lawsuit may be brought against the parent domiciled in Switzerland or in the EFTA zone.

Relaxing the standards set forth by the case law of the Swiss Supreme Court with respect to the piercing of the corporate veil could also facilitate holding the parent accountable for the subsidiaries' acts, but this is a narrow avenue. If the corporate veil is lifted, the parent may be responsible for illicit acts by its subsidiary company through the principle of vicarious liability.

4.2.2 Companies' duty of care for suppliers and other business partners' impacts abroad

The ECCJ proposes the recognition of a general **duty of care** on the part of a company to ensure that human rights and the environment are respected **throughout its sphere of responsibility** (and not only as regards its subsidiaries or companies under its control). A company should be held liable if it cannot demonstrate that it has complied with this duty. The explicit introduction of this duty in Swiss law would need an amendment of the law establishing specific requirements of due diligence. Again, an option is to have recourse to the courts of justice filing lawsuits against companies for damages resulting from actions by their suppliers and in which the company recklessly or negligently contributed to causing the harm.

If an explicit provision is to be introduced in the law, it could operate in a manner comparable to the duties imposed on financial intermediaries to identify the beneficial owner and the origin of the funds deposited in a bank account. Unless these intermediaries can establish that they have taken every reasonable step in their power to do so, they may be held liable if such funds come from illegal activities. For such a system to operate it would need to address several difficult issues, including the following:

- (a) Which business partners of the company would be covered by this duty of care? Arguably, this additional responsibility should be limited to suppliers and, among them, the most important ones over which the company has significant leverage by virtue of being the main trading partner.
- (b) What would this duty comprise and, more specifically, which standards would govern the conduct of the company? Whereas in the case of subsidiaries or controlled companies the parent company has a clear involvement in directing the subsidiary, the power that the buying company wields in relation to the supplier is different, based more on a contractual relationship: it flows from its purchasing power. In this case, a different

standard of conduct may be expected. For instance, MIGROS Cooperative has long required its suppliers to certify that their goods are made in full respect of socially acceptable conditions of work (including safety, per European standards of the Business Social Compliance Initiative, BSCI) and a wage sufficient for a decent life. A duty of care in relation to suppliers could make this practice more widespread.

In cases where a company has little control over its business partners, this duty of care may be impracticable and therefore impose an excessive burden on the company, more similar to a strict liability system than to a duty of care. A practicable balance between the duty of care and the feasibility of controlling a business partner would have to be found. Moreover, although technically feasible, the imposition of an explicit and specific duty of care standard in relation to suppliers is politically difficult at present.

4.2.3 Mandatory environmental and social reporting

Mandatory environmental and social reporting provisions could be included within the “financial reporting” system. However, this solution would have the disadvantage of linking social and environmental reporting to the accounts or financial situation of the company, which may in turn limit their scope to reporting only on instances where social and environmental issues have a financially material impact on the company. On the other hand, there is a risk that a separate report on CSR and human rights impacts may become marginal for the company and be drafted by a separate CSR or public relations (PR) unit, thus diminishing the impact such an exercise may have within the company structure and culture. Therefore, some have recommended an “integrated reporting” model.

There are a number of possible models of reporting but what matters most are the reporting parameters adopted. The company should report not only on reputational and legal risks but also about risks of having a negative impact on the enjoyment of human rights within the community where it operates. Reputational and legal risks may have some impact in the financial results for the company and are arguably already covered (see analysis above), but many human rights risks may not have direct financial implications and still would need to be reported.

- (a) To whom would these reports be addressed and to whom would they be accessible? They would be public and accessible to all (possibly on the company website). A report of this kind is addressed not only to shareholders, business partners and creditors, although it may be in their interest as well.
- (b) Which companies would be subject to this reporting obligation? It would be difficult to impose a complex reporting obligation on small- and medium-sized companies. Depending on the kind of reporting, it would probably be limited to the largest, including listed and non-listed.
- (c) Would these reports be limited to the activities of the company or rather extend to the activities of the group of affiliated companies? Similar to the consolidated accounts (Art. 663e CO), in principle subsidiaries and other controlled companies would be included.

The specific contents of these reports would need to be clarified or “itemised”, for instance, through the use of standard forms.

It has been reported that most of the largest Swiss companies already include environmental and social reports in their annual reporting.⁹⁴ Most of these companies are among the driving forces of implementing the Global Compact (e.g., ABB, Swiss Re), however, the way they approach “materiality” (what risks should be reported on?) remains problematic. The Swiss investment foundation ETHOS has stated that many companies report on environmental and social matters, but that the standards they use are often not clear.

The UK Companies Act 2006 requires company directors, in the pursuit of their general duty, to have regard to the “impact of the company operations on the community and the environment”. The largest listed companies should include a business review in their annual directors’ report with information about “environmental matters, the company’s employees and social and community issues”. The directors should also include information about any “policies of the company in relation to those matters and the effectiveness of those policies”, but only to the extent that such information is necessary to understand the company’s business.

One recent model presented as good practice is the Danish’ “Social Responsibility for Large Business Law” of January 2009. This law requires large listed and public businesses (estimated to be 1,100 in Denmark) “to supplement their management’s review with a report on social responsibility”. Businesses are required to include information on their corporate responsibility policies and practices in their annual financial reports. Companies remain free to adopt such a policy or not, but if they have it they should report on it. The model used in Denmark has also been followed in Norway.

In the Danish model, companies are required to report on three aspects:

- Their existing social responsibility policies, including standards, guidelines or principles
- How the policies are implemented, including any systems and procedures in this respect
- Achievements and any related future implications for the business

One problem with these reporting models is that compliance and enforcement are left to market forces and public opinion. It would be important to create a right of action for any stakeholder to make a claim in relation to directors’ compliance with the reporting obligations.

It is interesting to consider the French model.⁹⁵ This model requires companies to include in their annual reports:

- Information about the manner in which the company takes into account the social and environmental consequences of its activities

⁹⁴ See generally “Codes de conduite: Meilleures pratiques des plus grandes sociétés cotées en Suisse”, ETHOS, Genève, Mars 2009.

⁹⁵ See a good description and analysis in « La responsabilité des entreprises en matière de droits de l’homme: II. Etat des lieux et perspectives d’action publique », Commission nationale consultative des droits de l’homme, La documentation Française, 2008.

- Social, employment and local impacts of companies and subsidiaries (in France and abroad)

Failure to report could give rise to legal emergency action by a stakeholder (shareholder, auditor or others) to require the board of directors to comply.

A very recent draft law in Spain (Law on Sustainable Economy) currently being discussed in the Parliament would allow for the Government to provide a set of criteria and indicators for companies to evaluate their CSR programmes. These criteria and indicators will comply with principles of transparency, good governance, commitment to the local economy and the environment, human rights and gender equality. Very interestingly, it would allow enterprises that comply minimally with those indicators to be certified as CSR-compliant by the State Council on CSR (see below).

Implementation of the French model is still weak and information on the Danish system is scarce. ETHOS argues that public opinion and reputational risks may be a more efficient means to ensure compliance.

In all these cases, reporting is limited to listed and/or the largest companies and the standards for reporting are still uneven. It would be important to establish, together with a mechanism to enforce compliance (perhaps through associations - shareholders would automatically have the right to enforce compliance anyway), a system of benchmarks and indicators for companies to follow in their reporting. Alternatively, companies may be given the freedom to pick one of the most reliable and complete reporting systems such as the Global Reporting Initiative and use it systematically. A possible Swiss Council on CSR should be able to provide those benchmarks and indicators and even certify compliant companies (as is proposed in Spain).

A 2009 motion in the Swiss Federal Parliament to establish a mandatory reporting system similar to the ones cited above was rejected by the Federal Council.⁹⁶ However, sustained public campaigning on this issue may bring a different result in the future.

4.3 Policies to promote and ensure respect for human rights and the environment by enterprises

4.3.1 Coordinating mechanisms: Councils, counsellors or ambassadors- or all of them at once?

France has appointed a special ambassador on CSR. For Switzerland, the appointment of such an ambassador is feasible and could help foster policy integration, international visibility and learning.⁹⁷ In Switzerland, there are geographical Special Ambassadors, such as for Sudan and for the Horn of Africa, and thematic Special Ambassadors, such as for human

⁹⁶ « Engagement environnemental et social des entreprises. Plus de transparence et de reconnaissance. » Motion 09.3520, déposé par Mme Adèle Thorens Goumaz le 9 Juin 2009.

⁹⁷ See, for the case of France, information at http://www.diplomatie.gouv.fr/actions-france_830/droits-homme_1048/droits-economiques-sociaux-culturels_4720/responsabilite-sociale-entreprises_17059.html

rights policy and for migration policy. The usefulness of this institution can be assessed against the expected outcomes and functions that may be assigned to it.

In 2009, Canada created the Office of the Extractive Sector CSR Counsellor⁹⁸ to review the CSR practices of Canadian extractive sector companies operating outside Canada, and to advise stakeholders on the implementation of endorsed CSR performance guidelines. The review process includes assessment, informal mediation, fact-finding, access to formal mediation and reporting. The Counsellor reports to the Minister of International Trade, which may table the report in Parliament. Reviews can be conducted only at the request of individuals, communities or groups that reasonably believe themselves to be adversely affected by activities of Canadian extractives. Civil society groups have noted the limited functions and powers of the Counsellor. The Counsellor was recently appointed and at this stage there is no substantive practice to be assessed.

Another recent and unique example is the Council on CSR in Spain, the first country to have created such a council. The State Council for CSR was created in 2008 but only recently became operational. It is a representative, quadripartite body of advisory and consultative character, with trade unions, the government, business associations and civil society (academics, NGOs) working on CSR. It has the following functions:⁹⁹

- Reporting and drafting of studies
- Submitting an annual report to the Government
- Functioning as the Observatory on CSR in Spain
- Promoting and fostering CSR initiatives
- Cooperating with similar bodies in other countries

These recent initiatives point to an identifiable international trend not only in producing national reports and strategies but also in establishing organs or bodies with monitoring and promotional functions, at the very least. States have been reluctant so far to give these bodies a meaningful remedial function.

4.3.2 Government procurement and Export Credit Insurance (SERV)

The Federal Government Procurement system should be reformed to include the core ILO Conventions. Although there is room for manoeuvre to work on other rights as criteria for granting contracts, there are also important limitations, many of them flowing from the rules set in the WTO Government Procurement Agreement.

One way to reform government procurement is to promote reporting obligations on human rights and environmental impacts. Thus, companies aspiring to have government contracts should be able to show that they have an internal CSR policy that pays due regard to human rights and environmental issues, they report annually on its implementation and they follow internationally recognised guidelines for reporting. This idea could be crafted in such a way as to avoid inconsistency with the WTO Government Procurement Agreement.

⁹⁸ “Building the Canadian Advantage: a CSR Strategy for the Canadian International Extractive Sector”, March 2009.

⁹⁹ Real Decreto 221/2008 creating and regulating the State Council for CSR, Boletín Oficial del Estado número 52, 29 febrero 2008.

For the Export Credit Insurance system, SERV, to be in synergy with other instruments of human rights promotion,¹⁰⁰ project approvals should be made contingent on appropriate due diligence systems for the protection of human rights and compliance with the OECD Guidelines for MNEs without exception. There should also be monitoring and sanction mechanisms. Since governments are obliged to promote the OECD Guidelines under which NCPs operate, a negative finding by the Swiss NCP should logically affect the company's access to government procurement and export risk insurance.¹⁰¹

4.3.3 Social labelling

Since 2002, the Belgian Government has put in place a potentially useful system of social labelling.¹⁰² This social label is granted by the State Secretary and can be used by companies to communicate to consumers that the product or service in question has been produced in full respect of the labour rights contained in the core ILO Conventions: minimum age for children to work and prohibition of the worst forms of child labour; prohibition of discrimination in employment and remuneration; prohibition of forced labour; and respect for freedom of association and collective bargaining. Enterprises can attach the label to the product or otherwise use it for marketing.

The Belgian social label addresses the whole chain of production - from extraction of natural resources to final transformation at factories, if applicable - and is granted following a request to the authorities and a process of certification/verification by external auditors or experts. The social label system also contemplates a mechanism of monitoring and complaints. The authorities can withdraw the label if the enterprise does not respect the minimum labour rights contained in the core ILO Conventions.

In Switzerland there have been some debates about labelling and certification. In 2007, a law was passed on taxing biofuels that on balance have a positive environmental impact and are produced under socially acceptable conditions.¹⁰³ These conditions are defined as the local laws at the production site that comply with core ILO Conventions. Suggestions to attach a certification and labelling system in this context were not taken up.

Drawing from the Belgian model, operational for several years with mixed results, Switzerland can build its own model and consider whether other rights beyond the core ILO conventions can be incorporated. The fact that the Belgian social label survived a challenge in the WTO makes it a safe and viable option.

4.4 Monitoring, grievance and enforcement institutions

4.4.1 A national human rights institution - to be revisited in 5 years

¹⁰⁰ As envisaged by the Human Rights Foreign Policy Report, p. 6115.

¹⁰¹ Ruggie Report 2009, p. 24.

¹⁰² http://www.social-label.be/social-label/FR/home/home_fr.htm

¹⁰³ www.admin.ch/ch/f/rs/641_61/index.html

As stated above, the Federal Council judged premature the establishment of a national human rights institution in Switzerland. The issue will be re-examined in five years. In the meantime, the administration may commission services from a Competence Centre in matters of:

- Research on and assessment of the scope of human rights standards for Swiss authorities
- Analysis and documentation of the human rights situation in Switzerland
- Exchange of expertise and providing a platform for dialogue by request
- Preparation of tools and contribution to training on human rights

It is suggested that civil society groups advocate for an intensive use of these services by the Government, notably in relation to the preparation of a national policy or plan on CSR, and in-depth studies on specific issues raised in the present study.

In five years, Swiss civil society may wish to advocate more strongly in favour of a national human rights institution with powers to advance State protection of human rights in the context of corporate activity. A mapping carried out as part of the round table of national human rights institutions, in Copenhagen in July of 2008, showed that activities of NHRIs in this area include:¹⁰⁴

- Monitoring and reporting of human rights abuses in the corporate sector
- Facilitating legal and administrative reform in policy areas relevant to the protection of human rights in the business sector
- Building capacity of government institutions to better regulate business
- Improving access to judicial and non-judicial dispute settlement

4.4.2 OECD Swiss National Contact Point

The limitations of the National Contact Point system support the conclusion that NCPs are not remedial mechanisms but simply promotional or mediation bodies that aim at achieving corporate compliance with human rights and social norms through persuasion and engagement. However, this does not rule out the potential for a reformed system to produce a remedial mechanism where victims can air their grievances, engaging directly with companies in host and home states. The system is unique and should be exploited, especially now that it is undergoing an “updating” process. There is room for a committed Government to promote reform in the good direction, in particular in ensuring a fair and transparent process and greater effectiveness of NCP processes and outcomes.

In this regard, there seems to be significant room for civil society engagement in the reform process of both the OECD NCP system and the Swiss NCP. Qualified lessons can be taken from two recent innovative models in the Netherlands and the United Kingdom. The UK NCP, originally based in a single Government department, was reformed following a large-scale consultation in 2007. The Department of International Development now works with the Department of Business, Enterprises and Regulatory Reform (BERR). A Steering Committee, comprised of representatives of NGOs, Parliament, trade unions and officials of eight other departments, oversees the work of this newly enlarged NCP.

¹⁰⁴ Report on the Roundtable of NHRI on the issue of Business and Human Rights, Copenhagen July 2008.

The Dutch model is even more innovative. The NCP consists of four independent individuals who are knowledgeable on CSR, plus advisors from four Government departments, all of them served by a secretariat located in the Ministry of Economic Affairs. While the UK model retains decision-making power in the Government, the Dutch system gives that power to independent experts.

The two models are relatively new and their record on implementation is thus limited so far, so a conclusive assessment of their advantages is not yet possible. Other governments and civil society should watch carefully and learn from these experiences. However, they show that innovative approaches are possible if a government has the political will. It is suggested that such political will should be mobilised in Switzerland through serious documentation on best practice, persuasion and public campaigning.

Two Swiss groups have already suggested advocacy points in this regard.¹⁰⁵

- Separation of the NCP from the Directorate of Investment Promotion within SECO, creating an interdepartmental structure and integrating the human rights section. According to Swiss public officials such separation has in fact been the practice, but advocacy could be directed at institutionalising this arrangement.
- Creation of a council with equal representation from civil society to ensure that all viewpoints are taken into account in resolving conflicts. To accomplish such a task, the proposed council would need to have not just advisory powers but also oversight, meaning that the NCP would report to that council. Alternatively, reporting could be made to Parliament in a more detailed way than usual.
- Increase of financial resources
- Setting of clearer and fairer procedural rules, establishing binding deadlines, transparency, clear recommendations and follow-up measures. The adoption of these changes will depend largely on the outcome of the update process in the OECD. While reasonable, the adoption of detailed and stricter rules may not be acceptable to the Swiss Government. A mid-way solution could be worked out that defines the steps, approximate duration of each step and the rights and duties of each party.

In addition, OECD Watch has recommended that the NCPs should engage in promotional and training activities, which should be complemented with other government initiatives. As the group states, “all stakeholders should promote the Guidelines”.¹⁰⁶

The Swiss Government should be encouraged to engage fully in updating the OECD Guidelines. The Government seems willing to discuss ways to better incorporate human rights into the Guidelines as a result of John Ruggie’s reports and recommendations. Similar discussions should focus on the need to more clearly extend the reach of the Guidelines to supply chains by incorporating concepts such as “complicity” and “spheres of influence”, and the clarification of the reach of the Guidelines with respect to countries that are not OECD members or observers. Finally, the involvement of local and affected communities is

¹⁰⁵ Pain pour le Prochain and Action de Carême: in « Economie et droits humains », cited above, p. 21

¹⁰⁶ “Model National Contact Point”, OECD Watch, 2007, p. 13. The series of specific recommendations contained in this publication, including the keeping of an updated website, should be considered by the administration.

another key issue that the Government should be asked to put on the table and advocate with vigour.

Implementation or enforcement remains a crucial issue for the OECD Guidelines system. This also holds true for the Dutch and UK NCPs despite their novelty. As a measure of coherence, Professor Ruggie suggests some form of linkage between the recommendations of NCPs in specific instances and the consideration and granting of public support or credit to investment projects abroad of the concerned companies. Given that Switzerland already seems to exclude companies with pending specific instances before NCPs from its diplomatic protection, it seems possible that at least some level of consultation and coordination between SERV, the Government departments procuring goods and services and the NCP should take place, with a view to achieving a coherent policy toward the concerned companies.

4.4.3 The judiciary and access to justice

Holding companies legally accountable is possible under Swiss law in a number of cases. The frontiers of such legal accountability can be expanded through creative litigation. Swiss courts, as part of the State machinery, are also bound to respect and protect human rights. The classic avenues for holding companies legally accountable are the use of civil remedies (*responsabilité civile extra-contractuelle*) and criminal sanctions. In both areas there are important obstacles that need to be overcome but also enormous potential to be developed.

It has been stated frequently that judicial mechanisms are lengthy, expensive, inaccessible and uncertain. However, up to now, judicial protection of human rights is the sole means that guarantees legitimacy, enforcement, respect of due process and fairness. The Swiss judicial system is fundamentally independent and well-trained but a few significant reforms may improve access to the system by those affected by corporate behaviour, especially abroad.

Legal standing

Perhaps the single most important reform would be the introduction of class actions in civil liability cases. Class actions present the usual problems of coordinating and organising large numbers of people but have the advantage of power in numbers. As in the case of trade unions, class actions offset the sheer economic power of the company by pooling together resources and knowledge of a large group of victims. The introduction of this reform will not meet with significant technical problems (given the widespread and growing acceptance of this mechanism in the world) but may meet political resistance.

A viable option could be the reform of the right of associations to file legal complaints. Currently professional and trade organisations can request only declaratory relief and cessation injunctions but not compensation for pecuniary damages (see analysis above). The recent Law on Genetic Engineering allows “competent public entities” (*collectivité publique compétente*) to file lawsuits and also request compensation for damages. This could be taken as a basis to request the extension of that right to sue for damages in other cases concerning serious human rights and environmental damage.

Costs

Costs of legal representation, court fees and eventual payment of the victorious party's legal costs by the losing party in a civil suit serve as important deterrents to bringing cases against companies in Switzerland. The practice of pro bono legal advice is also very limited and the scope of public legal aid to cover civil suits originating from violations abroad is still untested. The expansion of legal aid has to be tested by filing cases before the court. In the Netherlands there is currently a Parliamentary proposal to expand legal aid to foreign victims of corporate abuse. In Switzerland, it is still uncertain whether such a measure is necessary because the existing legal aid system has not been tested in this respect.

The principle that the losing party in a civil suit for damages pays the costs of the other party and even the court fees is widely accepted. In many cases, the plaintiff is required to deposit a guarantee as security for eventually having to pay costs. This is an additional deterrent to victims' legal action. In certain jurisdictions such as South Africa, there are exceptions to this principle when the suit was filed in good faith and/or is about a fundamental constitutional right. In Colombia, there is a constitutional remedy for poor litigants (*amparo de pobreza*) that can help with legal costs. In Switzerland, the "loser pays" principle has been affirmed and the few exceptions that existed were eliminated in 2007. For instance, the current Law on the Protection of the Environment (LPE), article 55e, provides that the organisation that loses the case will pay the costs. This needs to be changed to provide for some flexibility in the law so that the judge considers factors such as good faith, poverty of means and/or the public interest aspect of the suit in deciding whether to waive the payment of costs.

Burden of proof

In civil procedure the party that asserts an act or argument must provide the necessary proof of it. This has proven problematic in cases involving corporations and cases of transnational nature. Legal reform has been suggested in order to allow the shifting of the burden of proof to the defendant corporation. In Swiss law there is no entitlement for the plaintiff to request full disclosure from the company, as in common law jurisdictions. However, recent legislation is slowly adopting some exceptions. Examples of this include the law on genetic engineering and the law on equality between men and women.

Article 33 of the Law on Genetic Engineering provides that the judge can be satisfied by the "convincing likelihood" that the damage was caused by a given action if conclusive proof cannot be established with certitude or cannot reasonably be demanded from the plaintiff. The judge is also given the power to order expertise on the facts without the parties requesting this. Article 6 of the Law on Equality establishes a lighter burden on the plaintiff to prove only that the discrimination has likely occurred. On this basis a presumption is established and the burden of proof is shifted to the defendant corporation.

Drawing from examples in Swiss legislation, it may be possible to expand cases in which the burden of the proof is alleviated for the plaintiff to cases concerning other equally important human rights and when the victims are particularly vulnerable.

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