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Business and Human Rights: Towards Greater Responsibility of Business Enterprises and Access to Remedies in a Legally Binding Treaty?

Tesi di Dottorato di: Marta Conconi

Matricola: 4212004

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Coordinatore: Ch.mo Prof. Paolo Colombo

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Overview

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List of abbreviations

ATS	Alien Tort Statute
CESCR	Committee on Economic Social and Cultural Rights
CJEU	Court of Justice of the European Union
CSR	Corporate Social Responsibility
ECOSOC	United Nations Economic and Social Council
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
ILO	International Labour Organisation
NIEO	New International Economic Order
OECD	Organisation for Economic Cooperation and Development
OEIWG	Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights
PCIJ	Permanent Court of International Justice
SCLS	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCHR	United Nations Commission on Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNCTC	Research Centre on Transnational Corporations
UNGA	United Nations General Assembly
UN HRC	United Nations Human Rights Committee

Introduction

'*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*'
(John Ruggie, 2008)

Over a long time, the issue of business and human rights has been on the agenda of the international community. While some cases of business-related human rights abuses attracted the attention of the international community and the civil society, the negative impact of such abuses on the enjoyment of human rights was generally soften by greater attention paid to the positive advantages determined by the activities of multinational corporations. Business enterprises, and especially transnational corporations, are extremely important actors on the global stage: their activities may potentially create enormous benefits and growth, however, they can, at the same time, cause lasting harms. There are several cases involving business companies implicated in creating, facilitating or tolerating situations resulting in human rights violations or environmental damages. These cases prove that, while the capacity to affect the enjoyment of human, labour and environmental rights seems to increase with greater social and economic power of multinational companies in the global economy, at the same time, it appears to be difficult to fully regulate their activities in a way that they conform to international human, labour, and environmental rights standards.

Generally, the international community seems to have adopted a slow approach to respond to the rapidly growing challenges in the field of business and human rights. It has to be noted that while some business companies successfully implemented corporate responsibility strategies and sought to dialogue with governments, the business and human rights scenario has largely counted on voluntary initiatives to hold corporations liable for human rights violations.

As a matter of facts, initial attempts aimed at establishing binding instruments, such as an early effort in the 1970s and the 2003 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, failed.

A first significant breakthrough was reached in 2011 with the unanimous adoption of the UN Guiding Principles on Business and Human Rights (hereafter UN Guiding Principles) by the UN Human Rights Council. The UN Guiding Principles have soon become an authoritative point of reference at the international level, nevertheless they remain a non-binding instrument. Indeed, although the UN Guiding Principles generated 'an unprecedented consensus around a coherent, normative framework, and [represent an] authoritative policy guidance for companies and governments'[1], several stakeholders continued to claim the necessity for a binding treaty on business and human rights. Even John Ruggie, the author of the UN Guiding Principles, stated that the 'endorsement [of the Guiding Principles] would not end all business and human rights challenges'.[2]

It was especially the perceived failure of "soft" regulatory initiatives to hold corporations responsible for human rights violations that led to continuous and increasing demands for a legally binding international instrument in the area of business and human rights.

Against this scenario, two significant Resolutions were adopted by the UN Human Rights Council at its twenty-sixth session in June 2014: Resolution 26/9 and Resolution 26/22. The former led to the establishment of an open-ended intergovernmental working group (OEIWG) with the mandate of 'elaborat[ing] an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'[3]. The latter Resolution extended the mandate of the already existing UN Working Group on Business and Human Rights, so to explore the benefits and

[1] Business and Human Rights Resource Centre, 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons. Notes of the Workshop and Public Debate' (14 May 2014) Notre Dame Law School, Business and Human Rights Resource Centre Online Publication, <http://businesshumanrights.org/sites/default/files/media/documents/note_event_does_the_world_need_a_treaty_on_business_and_human_rights__21-5-14.pdf>, accessed 1 July 2015.

[2] John Ruggie, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and Proposed Treaty on Business and Human Rights' (23 January 2015) SSRN Online Publication, 1.

[3] UN HRC, Res 26/9 (26 June 2014) UN Doc A/HRC/26/L.22/Rev.1.

limitations of a legally binding instrument, especially in relation to the issue of improving access to remedy for victims of business-related human rights violations.[4]

Resolution 26/9 and the consequent elaboration of a legally binding instrument on business and human rights is considered as the long-awaited possibility to close the gaps, which still today remain open in the business and human rights field. The prospective treaty was described as a necessary instrument '*to provide legal solutions to cure serious lacunae and ambiguities in the current framework of international law which have a serious negative impact upon the rights of individuals affected by corporate activities*'[5], as well as to deal with some of the most acute challenges and needs in the area of business and human rights, namely the deficits in ensuring the responsibility of companies for human rights violations and granting access to effective remedies for victims of business-related human rights abuses.

Business enterprises have been involved in a variety of human rights violations, ranging from the direct participation of business managers in human rights violations, cases of complicity through the supply of information or the provision of financial assistance to the perpetrators of human rights or through joint ventures with them. In addition, besides those situations where (host) States are directly involved in the perpetration of human rights violations, (host) States[6] may, for example, lack a functioning rule of law or a transparent and independent justice systems through which provide victims with access to justice and remedies. Moreover, due to the transnational character of some business companies and, sometimes, their great economic power, it might be difficult to hold such business companies accountable in case they perpetrate human rights abuses and, as a result, provide victims of such violations with access to justice. This situation is further complicated by the existence of a regulatory gap: business entities are not considered to possess international legal personality and, at the same time, no hard law treaty directly imposes obligations upon them. This scenario results in a situation where victims of business-related human rights violations are not able to obtain remedies for the violations suffered in their

[4] UN HRC, Res 26/22 (27 June 2014) UN Doc A/HRC/26/L.1, Paragraphs 7, 8, 10.

[5] David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (30 November 2014) SSRN Online Publication, 3.

[6] To the purpose of this study, "home State" is defined as the country where the parent company has its domicile or its centre of operations. On the contrary, the term "host State" is used to indicate the country where the business entity operates or invests, other than the home State.

States (namely the so-called host States). Furthermore, victims may also try to address courts in the home State of business enterprises but, similarly, they may have to face barriers and obstacles to access remedy and, as result, they will be denied justice.

To complete the scenario, it should be noted that the available legal avenues to hold business companies responsible for the perpetration of human rights violations are limited. Indeed, to date, no comprehensive international legally binding treaty on Business and Human Rights exists. Moreover, as recognized by the Office of the High Commissioner for Human Rights, '[*a]t present, accountability and remedy in [case of human rights violations perpetrated by business companies are] often elusive. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions. Human rights impacts caused by business activities give rise to causes of action in many jurisdictions, yet private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of adequate, effective and prompt reparation for harm suffered*'.[7]

At the domestic level, for example, victims of business-related human rights abuses are increasingly seeking remedies especially in the domestic legal systems of the parent company, for violations perpetrated by the respective subsidiaries. Criminal prosecution is not always a feasible option and, even when a criminal action is pursued, generally, it is limited to prosecution of business companies' officials, managers or representatives, rather than the prosecution of the business company itself.

Over the past decade, victims of business-related human rights violations have increasingly relied on the US Alien Tort Statute (ATS), bringing their cases before courts in the United States. The Alien Tort Statute made it possible for claimants coming from third States to file tort claims over violations of international human rights law by the US as well as foreign companies in US federal courts. Hence, the ATS has generally been viewed as the mechanism with the most promising potential for holding business companies responsible for human rights violations in developing countries. However, the US Supreme Court's decisions in the *Kiobel* Case, regarding the extraterritorial reach of the ATS, and in the *Daimler Case*, concerning the limits of personal jurisdiction in US courts, seem to have restricted the reach

[7] UN HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse. Report of the United Nations High Commissioner for Human Rights' (10 May 2016) A/HRC/32/19, Paragraph 2.

of the ATS and the possibility to bring claims (under the ATS) when the relevant conduct took place outside the United States, thus making US courts less attractive for such claims.

Probably as a consequence, victims of business-related human rights violations have increasingly started relying on civil litigations in domestic legal systems, as an alternative avenue to obtain remedies. Indeed, civil litigations are theoretically possible in almost all countries. As a result, most claims against business enterprises use the framework provided by private law in domestic jurisdictions and the respective rules under private international law – which may serve as a significant tool to provide access to justice. Nevertheless, claimants still encounter several barriers, which prevent them from accessing the courts and obtaining redress. The limits at the domestic level were already underlined by John Ruggie, who recognized that '*[n]ational jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting (gross) human rights abuses, potentially amounting to international crimes. Such abuses occur most frequently in situations where the human rights regime cannot be expected to function as intended, such as armed conflict. Greater legal clarity is needed for victims and business enterprises alike.*'[8]

Such clarity can be provided by the prospective legally binding treaty, which may aim, among others, at closing some of the so-called "governance gaps" remained unsettled after the endorsement of the UN Guiding Principles, and mainly 'the most acute challenges and needs in the area of business and human rights relate to the deficits both in ensuring the accountability of companies and in access to effective remedies for victims of abuse'.[9]

As acknowledged by John Ruggie, "governance gaps" between the activities of economic actors and the capacity of States to deal with their effects have determined 'the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or

[8] UN HRC, 'Recommendations on follow-up to the mandate', note presented to the UN Human Rights Council (11 February 2011) Business and Human Right Resource Centre Online Publication, 2, <https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>, accessed 6 January 2016.

[9] International Commission of Jurists, 'Needs and Options for a New International Instrument In the Field of Business and Human Rights' (June 2014) International Commission of Jurists Online Report, 15, <http://icj.wpengine.netdnacdn.com/wpcontent/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf>, accessed 7 May 2016.

reparation'.[10] Likewise, several scholars, civil society organizations and Governments have recognized the significant accountability deficit in the area of business and human rights: '[w]hile business operations […] expand across frontiers and allegations of abuse continue to emerge, there are very few evident examples of businesses being held to account.'[11]

Despite the sharply divided vote obtained by Resolution 26/9, the Human Rights Council – and precisely the Open-ended Intergovernmental Working Group – started the process of looking for new methods to create more binding legal standards in the context of Business and Human Rights.

Research question and outline

The present study starts from the significant breakthrough represented by the adoption of Resolution 26/9 and the drafting process of a legally binding treaty on business and human rights. As mentioned, if finally adopted, the prospective treaty may help to overcome some gaps remained open in the international and national legislations for the purpose of holding business companies responsible for human rights violations, while granting victims of business-related human rights abuses access to remedies.

As a matter of facts, by virtue of the recognition that the current legal framework does not provide for adequate regulation to prevent or redress the negative impacts of the activities of business enterprises on the enjoyment of human rights, the initiative aimed at creating a legally binding treaty in international human rights law may provide for a fundamental contribution to the attempt of closing those gaps which still remained unsettled after the endorsement of the UN Guiding Principles in 2011.

In line with this premise, and starting also from the consideration that the judicial systems often fail to hold business companies to account and to ensure effective remedy for victims of business-related human rights abuses – although they were aimed, *inter alia*, at

[10] UN HRC, Res 8/5 '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' (7 April 2008) UN Doc A/HRC/8/5.

[11] International Commission of Jurists (ICJ), 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014) ICJ Online Publication, 4.

enhancing accountability and remedy for human rights abuses by economic actors[12] – the research has the purpose of exploring the modalities and measures that could be incorporated in the prospective legally binding treaty in order to improve accountability of business companies and close the gaps in the access to remedy with regard to victims of business-related human rights violations.

Accordingly, the first chapter includes an overview of the early efforts aimed at the establishment of binding norms for business companies and underlines some of the issues which already emerged the 1970s and, later, in 2003 through the elaboration of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*. Emphasis is given to the *UN Guiding Principles on Business and Human Rights* which, despite their non-binding nature, gained large consensus as they were intended as a tool for positive engagement and an instrument for a "paradigm shift" away from "naming and shaming" towards "knowing and showing".

The second chapter focuses on the turning point in the business and human rights scenario, represented by the adoption of Resolution 26/9 by the UN Human Rights Council, which led to the establishment the *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises* (OEIWG) and started the discussions concerning the elaboration of a legally binding treaty on business and human rights. The prospective treaty, if adopted, might represent a significant step forward in the business and human rights field. Accordingly, the second chapter expounds on the discussion held during the first two sessions of the OEIWG, subsequently outlining some of the outstanding issues.

Considering that currently no international treaty on business and human rights exists and that only States hold the duty to respect, protect and fulfil human rights under international human rights law, as a result, the current legal framework does not seem to provide for adequate regulation to prevent or redress the negative impact caused by the activities of corporations on the enjoyment of human rights. The existence of such a gap in the current legal system is considered as one of the causing factors of the permissive environment for the commission of violations of human rights by business companies and the resulting

[12] UN Office of the High Commissioner for Human Rights, 'Accountability and Remedy Project' at the online webpage:<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx> accessed 25 January 2017.

impunity of such abuses, in certain cases. Starting from these considerations, the third chapter seeks to expound the reasons which prevent business enterprises from being considered as subjects under international law and, as a result, being held responsible for human rights violations under the prospective legally binding treaty. To this aim, the chapter further examines the issue related to whether or not business enterprises possess international legal personality and accordingly could be potentially considered as duty-bearers under the prospective treaty.

Furthermore, while '[a]ddressing the legal responsibility of the potential perpetrators of human rights abuses is also closely linked to the realization of the victims' effective remedy and reparation', '[e]nsuring accountability can constitute a component of reparation, as well as provide for the condition by which remedies may be achieved'[13]. The issue of providing greater access to remedy for victims of business-related human rights violations is addressed in the fourth chapter. The chapter seeks to answer the question regarding how and through which measures and modalities the prospective legally binding treaty can contribute in overcoming some of the obstacles and barriers currently encountered by victims of business-related human rights violations – which prevent them from having access to justice and obtaining redress for the violations suffered.

In line with the concepts already elaborated by John Ruggie in the UN Guiding Principles, the concept of "having greater access to remedy" is used in this study to refer to the possibility and the right of individuals to seek redress for violations of their rights. Accordingly, the fourth chapter focuses only on the so-called State-based judicial mechanisms through which States should provide access to effective remedy. The UN Guiding Principles enumerated also non-judicial mechanisms, which are however outside the scope of the present study, since effective judicial mechanisms, which refer to the possibility of victims to access civil or criminal courts, are at the core of ensuring access to remedy. Thus, the notion of access to justice is used to indicate access to effective and efficient judicial remedies, meaning mechanisms to establish responsibilities, punish those responsible and repair the damage suffered by the victims of human rights violations perpetrated by corporate actors.

[13] International Commission of Jurists (ICJ), 'Proposals for Elements of a legally binding instrument on Transnational Corporations and other Business Enterprises' (October 2016) ICJ Online Publication, 15.

For the purpose of clarifying fundamental concepts to be included in the prospective legally binding treaty, chapter four explores the right to remedy under international and regional human rights law instruments, pointing out the duty upon States to provide remedy. However, individuals seeking to use judicial mechanisms to obtain a remedy face a large number of challenges. While such challenges may vary from jurisdiction to jurisdiction, there are persistent issues common to several jurisdictions and exacerbated in cross-border cases.

Thus, the subsequent two sections of chapter four turn to the analysis of some obstacles which effectively prevent victims from having access to justice. Besides the impossibility, the unwillingness of States to ensure access to judicial remedies, or other causes more closely connected to political and economic factors, additional barriers of legal, procedural, practical and financial nature may undermine access to justice.

Chapter four addresses the main barriers in civil law, in particular rules of private international law, the *forum non conveniens* doctrine, as well as underlines the difficulties determined by the complex structure of business companies – particularly multinational corporations. This section obviously sets aside a number of other obstacles, such as those of more a practical and financial nature, which however is unlikely that the prospective legally binding treaty may solve.

Furthermore, chapter four deals with those obstacles in international and domestic criminal law, starting from the absence of jurisdiction over legal persons under the Statute of the International Criminal Court and other *ad hoc* Tribunals, and later briefly outlines the differences among national criminal systems.

It is important to point out, that the last two sections of the fourth chapter have both benefited from previous extensive and comparative research conducted on corporate liability for human rights violations, as well as overview of main barriers to access to remedy already provided by John Ruggie in the UN Guiding Principles and analysed during the first and second session of the OEIWG.[14] As a result, the analysis of domestic criminal and civil

[14] See among others: Doug Cassel, Anita Ramasastry, 'White paper: Options for a Treaty on Business and Human Rights' (2016) 6 Notre Dame Journal of International and Comparative Law; Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing, 2012); Jennifer Zerk, 'Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights' (2014) OHCHR Online Publication; Jennifer Zerk, *Multinationals and corporate social responsibility: limitations and opportunities in international law* (Cambridge University Press, 2006); Mark B. Taylor, Robert C. Thompson, Anita Ramasastry, 'Overcoming Obstacles to Justice. Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses (2010)

law systems in these two sections is limited, resulting in a broad legal comparison, functional to the study of the prospective legally binding treaty, with a focus on details only where relevant. The *rationale* behind this choice lies firstly in the extensive literature on comparative studies of domestic law systems – already existing – and secondly in the choice of keeping the focus of the present study on those elements which might be covered by and included in the prospective legally binding treaty with the aim of overcoming obstacles in accessing judicial remedies.

In addition, by virtue of the obvious lack of homogeneity and similarities among domestic jurisdictions of future States parties in the prospective treaty, for this treaty to be successful, it should aim at gathering broad consensus among a large number of States – including ideally the United States and European States, which actually voted against the adoption of Resolution 26/9, but remain the countries where the majority of business companies, especially transnational and multinational corporations, are incorporated. This is also the reason why the section regarding obstacles in civil law focuses mainly on the United States and on European countries.

Similar considerations underpin the analysis of barriers in criminal law, with a greater focus given to international criminal law, rather than domestic criminal law. This choice is indeed justified by the wide range of differences among domestic criminal jurisdictions and the consequent unlikelihood that the prospective treaty will supersede domestic criminal laws, for example through the establishment of a World Criminal Court dealing with business and human rights.

Fafo Report 2010:21; Anita Ramasastry, Robert C. Thompson, 'Commerce, Crime and Conflict. Legal remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries' (2006) Fafo Report 536; Frank Bold, European Coalition for Corporate Justice (ECCJ), European Center for Constitutional and Human Rights, Corporate Responsibility Coalition (CORE), Sherpa, 'Access to Justice. The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts' (December 2014) Online Publication; Human Rights in Business, 'Removal of Barriers to Access Justice in the European Union. Executive Summary' (September 2016) Human Rights in Business Online Publication; International Commission of Jurists (ICJ), 'Proposals for Elements of a legally binding instrument on Transnational Corporations and other Business Enterprises' (October 2016) ICJ Online Publication; International Commission of Jurists (ICJ), 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014) ICJ Online Publication; International Commission of Jurists (ICJ), 'Corporate Complicity & Legal Accountability. Civil remedies. Volume 3' (2008) ICJ Online Publication; International Commission of Jurists (ICJ), 'Corporate Complicity & Legal Accountability. Criminal Law and International Crimes. Volume 2' (2008) ICJ Online Publication; Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse. A comparative submission prepared for Professor John Ruggie UN Secretary-General's Special Representative on Business & Human Rights' (3 November 2008); Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (December 2013) ICAR Online Publication.

In conclusion, the availability and effectiveness of remedies to provide redress to those who suffered harms as a result of the acts or omissions of business enterprises is probably the area where there is the most urgent need for action, including – although not limited - through new international standards and a new international binding instrument.

Chapter 1: The path of Business and Human Rights

1. Introduction

Especially in the last decade, important developments have involved the business and human rights field, mainly with respect to the articulation the human rights accountability of business actors and the establishment of a regulatory framework in the field.

The approach adopted initially at the international level to respond to the rapidly growing challenges in the field of business and human rights has been however slow. Indeed, early attempts to regulate business enterprises, and in particular multinational corporations already emerged in the 1970s and aimed at bringing the need to establish binding norms for multinational corporations to the United Nations' attention. These initial efforts resulted in a first phase in the path of business and human rights characterized by the establishment of the United Nations Commission on Transnational Corporations and its mandate to draft a corporate code of conduct. This first attempt failed and it nevertheless led to the second phase of the United Nations' engagement with business actors, namely the elaboration of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (hereafter Norms)[1] which are investigated in the second part of this first chapter.

Finally, the failure but at the same time, the importance of the Norms opened a new stage which started with the appointment of John Ruggie as Special Representative on the issue of Business and Human Rights and led to a significant breakthrough with the adoption of the UN Guiding Principles on Business and Human Rights[2] in 2011. While it is outside the scope of the present study to review all John Ruggie's reports, the third part of the present chapter focuses consequently on the three Pillars constituting the "Protect, Respect and Remedy" Framework for Business and Human Right, defined as 'a common conceptual and policy

[1] UNCHR, Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

[2] UN HRC, Res 17/4 'Human Rights and transnational corporations and other business enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4.

framework, a foundation on which thinking and action can build'[3], which afterwards will be operationalized in the Guiding Principles.

2. The United Nations' engagement with business enterprises: early developments

An early attempt to regulate business enterprises through an international treaty emerged in the 1970s, when the international community tried to draw the attention of United Nations to the growing need to establish norms binding multinational corporations due to the negative impact caused by the activities performed corporations and, *inter alia* 'the unequal distribution of economic benefits and the [in]ability of indigenous business companies to grow and prosper'.[4] The international political and economic debate of those years was dominated by the request for a new international economic order and a more prominent regulatory role of the United Nations. This debate, corroborated by the events and scandals of the same period, led to an even stronger request, especially from developing countries, for a reform of the international economic order and a greater intervention of the United Nations for the purpose of controlling the activities of transnational and multinational corporations.[5] Especially these factors encouraged the United Nations to start

[3] UN HRC, Res 8/5 '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' (7 April 2008) UN Doc A/HRC/8/5.

[4] Karl P. Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations' (2015) 16 The Journal of World Investment and Trade, 12-14. See also: Robin F. Hansen, 'MNEs as Enterprises in International Law' in Noemi Gal-Or, Cedric Ryngaert, Math Noortmann (eds.) *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015, Brill-Nijhoff); Michael Addo (edited by), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999, Kluwer International); Fiammetta Borgia, *La responsabilità sociale delle imprese multinazionali* (2007, Editoriale Scientifica); Dominique Carreau, Patrick Juillard, *Droit international économique* (1998, Dalloz); Jonathan Clough, 'Not-so-innocents abroad: corporate criminal liability for human rights abuses' (2005) Australian Journal of Human Rights; Francesco Francioni, *Imprese Multinazionali, protezione diplomatica e responsabilità Internazionale* (1986, Giuffré); Nicola Jaegers, *Corporate human rights obligations: in search of accountability* (2002, Intersentia); Peter Muchlinski, *Multinational Enterprises and the Law* (1999, Blackwell); Umberto Musumeci, 'L'impatto sociale delle mutiazionali', in L. Sacconi, *Guida critica alla Responsabilità sociale d'impresa e al governo d'impresa* (2005, Bancaria Editrice) 561.

[5] Tagi Sagafi-nejad, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (2008, Indiana University Press); Menno T. Kamminga, Saman Zia Zarifi, *Liability of multinational corporations under International law* (2000, Kluwer Law International). See also: Sidney Dell, *The United Nations and International Business* (1990, Duke University Press); Theodore H Moran, 'The United Nations and Transnational Corporations: A review and a Perspective' (2009) 18 Transnational Corporations; Khalil Hamdani, Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (2015, Routledge); Surendra Patel, Pedro Rofffe and Abdulqawi Yusuf (ed.), *International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct* (2000, Kluwer International).

investigating the social and economic impact of transnational corporations on States – mainly on developing countries.

This newly emerged interest from the side of the United Nations reflected in two Resolutions: Resolution 3101 and Resolution 3202, adopted by the UN General Assembly, whereby a New International Economic Order (NIEO) was established. The so-called NIEO was a 'regulatory program with redistributive aims', promoted mainly by developing countries with the support of socialist States[6], and was '*based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which [should] correct inequalities and redress existing injustices, [made] it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations*'.[7]

Both Resolutions included an early reference to transnational corporations and the need to control and regulate their activities, '*in view of the continuing severe economic imbalance in the relations between developed and developing countries, and in the context of the constant and continuing aggravation of the imbalance of the economies of the developing countries and the consequent need for the mitigation of their current economic difficulties.*'[8]

In particular, Resolution 3101, the Declaration on the Establishment of a New International Economic Order, clarified that:

> '*The new international economic order should be founded on full respect for the following principles: […] Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries*'.[9]

Resolution 3202 concerning the Programme of Action on the Establishment of a New International Economic Order aimed, *inter alia*, at regulating and controlling activities of

[6] Sauvant (2015) 12-14.

[7] UNGA, 'Declaration on the Establishment of a New International Economic Order' (1 May 1974) A/RES/S-6/3201; UNGA, 'Programme of Action on the Establishment of a New International Economic Order' (1 May 1974) A/RES/S-6/3202.

[8] UNGA, Res S-6/3202, Introduction, Clause 1 and 2.

[9] UNGA, Res S-6/3201, Clause 4.g.

transnational corporations[10] and asked for the formulation, adoption and implementation of an international code of conduct for transnational corporations, with the objectives of:

> '*prevent[ing] interference in the internal affairs of the countries where [transnational corporations] operate […]; regulat[ing] their activities in host countries to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries and in this context facilitate, as necessary, the review; bring[ing] assistance, transfer of technology and management skills to developing countries on equitable and favourable terms; promot[ing] reinvestment of their profits in developing countries.*'[11]

Furthermore, already in 1972, the ECOSOC had started dealing with multinational corporations. Under ECOSOC Resolution 1721 (LIII), multinational corporations were defined as 'agents for transfer of technology and capital', whose potential positive impact was however counterweighted by their size and power which could have exceeded those of host country's economy.[12]

The same ECOSOC Resolution requested the UN Secretary-General to appoint a study group of eminent persons with the aim of 'study[ing] the role of multinational corporations and their impact on the process of development'.[13] Hence, in 1974, the ECOSOC established the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations (UNCTC) for the purpose of creating 'an effective machinery for dealing with the full range of issues relating the activities of transnational corporations'.[14]

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[10] UNGA, Res S-6/3202, Section V. Regulation and Control over the Activities of Transnational Corporations: 'All efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations: (a)To prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations; (b) To regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements; (c) To bring about assistance, transfer of technology and management skills to developing countries on equitable and favourable terms; (d) To regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned; (e) To promote reinvestment of their profits in developing countries.'

[11] Ibid.

[12] ECOSOC, 'Resolution 1721 (LIII) The impact of multinational corporations on the development process and on international relations' (28 July 1972) Records of the Fifty-Third Session (3-28 July 1972) E5209; Peter Muchlinski, *Multinational Enterprises and the Law* (1999, Blackwell Publishing) 593-597; David Bilchitz, Surya Deva, 'The human rights obligations of business: a critical framework for the future' in David Bilchitz, Surya Deva (edited by), *Human Rights Obligations of Business. Beyond the Corporate responsibility to Respect?* (2013, Cambridge University Press) 4-6.

[13] ECOSOC, Res 1721 (LIII), 3-4.

[14] ECOSOC, 'Resolution 1913 (LVII) The impact of transnational corporations on development process and on international relations' (5 December 1974) Records of the Fifty-Seventh Session, Resolutions Supplement 1A E5570/Add.1

While the UNCTC was tasked with monitoring the social and environmental impacts of companies, as well as recommending normative frameworks with respect to companies' activities[15], the Commission on Transnational Corporations was an advisory body of the ECOSOC, mandated to assist ECOSOC in addressing matters related to transnational corporations, conducting studies and research, and creating a Code of Conduct to regulate and police the behaviour of multinational corporations.[16] In turn, the Code of Conduct aimed at setting a multilateral framework to specify rights and responsibilities of transnational corporations and host country governments in their mutual relations.

It should be noted here that the negotiation and drafting process of the Code of Conduct represented only one of the efforts undertaken at the time. As a matter of facts, other specific agreements were successfully negotiated in the same period, such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[17], the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rule for Control of Restrictive Business Practices[18] and the Declaration on International Investment and Multinational Enterprises[19] agreed upon in the Organisation for Economic Cooperation and Development (OECD).

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[15] Scott Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' (2009) 31 Human Rights Quarterly, 302; ECOSOC, 'Resolution 1908 (LVII) The impact of transnational corporations on development process and on international relations (E/5579 (part II))' (2 August 1974) Records of the Fifty-Seventh Session, Resolutions Supplement 1A, E5570.

[16] ECOSOC, Res 1913 (LVII); Andreas Rasche, 'The United Nations and Transnational Corporations: How the UN Global Compact Has Changed the Debate' in Joanne T. Lawrence, Paul W. Beamish (eds.) *Globally Responsible Leadership. Managing According to the UN Global Compact* (Sage Publications, 2013) 34.

[17] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977). The ILO Tripartire Declaration was amended in 2000, 2006 and recently in March 2017 and provides for guidance to multinational enterprises on social policy and workplace practices. See also: Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2009) 6 Miskolc Journal of International Law.

[18] UNCTAD, 'The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' (5 December 1980) UN Doc TD/RBP/CONF/10/Rev.1 (1981). The Instrument was adopted by the UN General Assembly pursuant to Resolution 35/63 of 5th December 1980 and since then it has been reviewed through four conferences held under the aegis of the UNCTAD in 1985, 1990, 1995 and 2000.

[19] OECD, *Declaration on International Investment and Multinational Enterprises* (1976). The Declaration is a policy commitment by States member of the OECD and currently by other twelve non-OECD States for the purpose of providing an open and transparent environment for international investment, as well as supporting the positive contribution of multinational enterprises to economic and social progress. The Declaration was reviewed on several occasions, namely in 1979, 1984, 1991, 2001 and lastly in 2011. It is composed, *inter alia*, of the Guidelines for Multinational Enterprises which are a soft law instrument and are composed of a set of recommendations, principles and voluntary norms for multinational enterprises. See: Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: A critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 3 Hanse Law Review; Jernej Letnar Cernic, 'The 2011 Update of the OECD Guidelines for Multinational Enterprises' (2012) 16 American Society of International Law Insights; Joris Oldenziel, Joris,

In its initial two sessions, held in 1975 and 1976, the Commission on Transnational Corporations allocated the highest priority to the drafting of the Code of Conduct and, set up an Intergovernmental Working Group on Code of Conduct mandated to formulate and subsequently adopt the Code of Conduct by *consensus*.[20] In 1977, the proper negotiation process started and focused on a variety of issues, ranging from the respect for national sovereignty and observance of domestic laws, to taxation, competition, consumer protection, transfer of technology and disclosure of information. For the first time, a reference to human rights protection was linked to the activities performed by transnational corporations, particularly in a section of the Code of Conduct concerning the respect for human rights and fundamental freedoms. Furthermore, another section concerning the treatment of transnational corporation was of particular interest since it addressed the general treatment and compensation of transnational corporations by the countries where the same corporations were operating.[21]

The stall in the negotiations began with respect to matters related to the legal nature of Code of Conduct, namely its binding or voluntary character and the strength of its implementation mechanisms. Predictably, developing countries were in favour of binding guidelines for corporations, although they refused to abide by treatment standards binding also for host countries' governments. On the other hand, developed countries favoured opposite positions: stronger treatment standards upon host countries, weaker and not binding guidelines for business enterprises. In addition, implementation mechanisms represented another divisive element. While developing countries opted for weaker implementation mechanisms with respect to treatments standards, developed countries had the same view with respect to guidelines for corporations. Finally, also those provisions dealing with the scope of applications of the Code of Conduct were not agreed upon by developing and developed countries, which - respectively - preferred to limit the scope of

Joseph Wilde-Ramsing, '10 Years on: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct' (28 June 28 2010) SSRN Online Publication; John Ruggie, Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) HKS Working Paper No. 15-045; Jan Wouters, Anna-Luise Chané, 'Multinational Corporations in International Law' (2013) KU Leuven Working Paper No. 129; Larry Catá Backer, 'Corporate Constitutionalism: The Emergence of a Constitutional Order for Economic Enterprises' (10 April 2012) SSRN Online Publication; Scott Robinson, International Obligations, 'State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30 Utrecht Journal of International and European Law.

[20] Sauvant (2015) 19-20.

[21] Ibid., 41-42.

application only to private business enterprises or to extend it also to State-owned companies. It was clear that the struggle to reach a *consensus* on these issues was a reflection of different interests and objectives between developing countries – as the main host countries of business enterprises, seeking to safeguard their sovereignty and their possibility to independently deal with corporations in accordance with their national laws – and developed countries – as the main home countries of business enterprises, seeking stricter investment laws.[22]

The attempt to establish a code of conduct under the aegis of the UNCTC continued for more than a decade, however, not only the above-mentioned different positions, but also changes in the economic and political scenario during the 1980s and 1990s prevented an agreement on the Code of Conduct from being reached. Indeed, while developing countries were more willing to strengthen their right to regulate business companies, as well as outline the responsibilities of the same companies, developed countries were more interested in securing a level playing field for their business enterprises and transnational/multinational corporations conducting their business in less developed countries. In addition, following the oil crises in 1978 and 1979, the consequent debt crisis, the liberalization of trade and capital flows and the rise of the Neoliberalism, foreign direct investments (FDIs) became essential for developing countries to increase their economic and social progress. Thus, developing countries sought to attract FDIs, being persuaded that it was in their interests to move away from controlling and regulating multinational enterprises toward facilitating their operations in host economies.[23] Thus, 'political, economic, technological, and cultural changes […] altered the context and the tenor of the debate on [transnational corporations] away from confrontation toward collaboration'[24]. Resulting from these changes in interests and objectives, the negotiation process of the

[22] Ibid.

[23] Ibid.; Karl Paul Sauvant, Geraldine McAllister, Wolfgang A. Maschek, *Foreign direct investments from emerging markets: The challenges ahead* (Palgrave Macmillan, 2010); Victor Zitian Chen, Bersant Hobdari, Bersant, 'Book Review: Karl P. Sauvant and Geraldine Mcallister, with Wolfgang A. Maschek (eds.) Foreign Direct Investments from Emerging Markets: The Challenges Ahead' (2011) 30 European Management Journal.

[24] UN Intellectual History Project, 'The UN and Transnational Corporations' (July 2009) Briefing Note Number 17 Ralph Bunche Institute for International Studies, 2.

Code of Conduct was suspended and the activities of UNCTC were merged with those of the UN Conference on Trade and Development (UNCTAD).[25]

Nevertheless, the debate surrounding the responsibilities of business enterprises continued and, during the 1990s, expanded to include also concerns related to violations of human rights perpetrated by transnational and multinational corporations. More and more, human rights violations were occurring in an environment characterized by the liberalization of international trade rules, the increase in foreign direct investment in developing and emerging economies, and the growing power and influence of transnational corporations - especially in the extractive, apparel and footwear sectors.[26] Particularly mining, oil and gas companies and the practice of offshore production carried out by clothing and footwear companies began to attract the attention of a civil society increasingly concerned about poor working conditions along the value chains of '[large corporations conducting operations worldwide and] operat[ing] in the form of multinational corporate groups organized in "incredibly complex" multi-tiered corporate structures consisting of a dominant parent corporation, sub-holding companies, and scores or hundreds of subservient subsidiaries scattered around the world.'[27] As a result, a renewed interest in corporate regulation at the international level emerged, strengthened also by high-profile cases involving clothing or shoe manufacturers and the social and environmental impacts of business companies' activities. Among them, some of the most notorious examples were the 1984 Bhopal disaster in India, where a poisonous gas cloud leaked from a pesticide plant in Bhopal owned

[25] Sagafi-Nejad (2008) 89.

[26] David Kinley, Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 2 Human Rights Law Review, 457. See also: Michael Addo (edited by), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999, Kluwer Law International); Fiammetta Borgia, *La responsabilità sociale delle imprese multinazionali* (2007, Editoriale Scientifica); Sarah Joseph, *Corporations and Trasnational Human Rights Litigation* (2004, Oxford University Press); Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 Journal of Business Ethics 385; Peter Muchlinski, *Multinational Enterprises and the Law* (1999, Oxford University Press); G. Peroni, C. Migani, 'La responsabilità sociale dell'impresa multinazionale nell'attuale contesto internazionale' (2010) 2 Ianus.

[27] Pini Pavel Miretski, Sascha-Domink Bachmann, 'The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: a Requiem' (2012) 17 Deakin Law Review, 11-12; John Ruggie, 'Current Developments. Business and Human Rights: the Evolving International Agenda' (2007) Corporate Social responsibility Initiative, Working Paper No. 31, Kennedy School of Government, Harvard University,
<http://www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_38_ruggie.pdf> accessed 20 June 2016.

by an Indian subsidiary of US-based Union Carbide Corporation[28], or the case of the US oil company Unocal blamed for its involvement in human rights violations perpetrated by the Burmese military government during the construction of a local gas pipeline.[29] These were few examples, but the pattern which emerged, highlighted, on one side, the highly potential damaging impacts of some activities of business enterprises, and on the other, that States were not always able or willing to address human rights violations and provide victims of business-related abuses with access to remedies for the violations suffered.

3. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

As a response to the failure of the Code of Conduct for transnational corporations and the increased concerns over their impact, as well as impunities of human rights violations, a second attempt to elaborate a binding instrument for transnational corporations was undertaken by the UN Sub-Commission on the Promotion and Protection of Human Rights (hereafter UN Sub-Commission), a subsidiary body of the then UN Commission on Human Rights, with the mandate to study human rights violations, while exploring possible obstacles to human rights protection and developing new international standards.[30] In 1998, the UN Sub-Commission mandated a sessional Working Group 'to examine the effects of [the] activities of transnational corporations [on human rights], and make recommendations […], [while considering] the scope of States' obligations to regulate the same activities of transnational corporations'.[31]

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[28] Peter Muchilinski, 'The Bhopal case: controlling ultra hazardous industrial activities undertaken by foreign investor' (1987) 50 Modern Law Review, 546; Jamie Cassels, 'The uncertain promise of law: Lessons from Bhopal' (1991) 29 Osgoode Hall Law Journal. See, for a discussion of this disaster: William C. Bradford, 'Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profits and Human Rights' (2007) SSRN Online Publication; Surya Deva, 'Access to Justice: Human Rights Abuses Involving Corporations – India' (2011) International Commission of Jurists (ICJ) Publication; Surya Deva, 'Corporate Human Rights Accountability in India: What Have We Learned from Bhopal?' (July 2012) Commentaries – Corporate Legal Accountability Portal; Kent Greenfield, 'The Disaster at Bhopal: Lessons for Corporate Law?' (2008) 42 New England Law Review. See also the website of the Business and Human Rights Resource Centre.

[29] *Doe I v. Unocal Corp*. (395 F 3d 932) United States Court of Appeals for the Ninth District, 3 December 2010.

[30] Kinley, Chambers (2006) 456; Bilchitz, Deva (2013) 6-8; David Weissbrodt, Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 The American Journal of International Law, 903-904.

[31] UNCHR, Sub-Commission on the Promotion and Protection of Human Rights, Resolution 1998/8 'The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations' (20 August 1998) UN Doc E/CN.4/SUB.2/RES/1998/8.

It is worth noting that during the work of Working Group, in 1999 the then UN Secretary-General Kofi Annan announced the Global Compact, a voluntary instrument through which business actors could commit themselves to the respect of human rights, labour and environmental standards.[32] The Global Compact clearly represented an effort from the UN side to 're-engage with non-state actors and push for a public-private partnership to make globalisation more inclusive and equitable'.[33]

Against the backdrop of the criticism received by the Global Compact[34], in 2003, the Working Group presented the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (hereafter the Norms)[35].

The drafting and the surrounding discussion of the Norms were a long process, characterized by several renewals of the Working Group's mandate and numerous annual public hearings where representatives from unions, NGOs, business world, the academic community, and

[32] Weissbrodt, Kruger (2003) 903-04; Bilchitz, Deva (2013) 6.

[33] Bilchitz, Deva (2013) Ibid.

[34] On the critiques to the Global compact see Surya Deva, 'Global Compact: A Critique of UN's Public-Private Partnership for Promoting Corporate Citizenship' (2006) 34 Syracuse Journal of International Law and Commerce. Deva defines the Global Compact as 'one of the many private-public, localglobal, municipal-extraterritorial and voluntary-obligatory initiatives that aim to define as well as promote social responsibilities of corporations'. However, the Global Compact is criticized for lacking of enforcement and independent monitoring and for being potentially misused as a marketing tool. It is also interesting to note how Justine Nolan compares the Global Compact with other non-binding initiatives, such as the OECD Guidelines and the ILO Tripartite Declaration, which she described as 'revolutionary in the sense that they explicitly honed in on delineating the obligations of companies with respect to protecting human rights and in some form paved the way for the establishment of the Global Compact's ten principles. However, like the Compact they continue to be subject to severe limitations. Apart from the fact that they are non-binding, their implementation mechanisms are extremely weak and the duties outlined are broad, lack detail and provide little practical guidance for companies aiming to implement such rights. While the OECD Guidelines and the ILO Declaration encourage companies to promote and protect internationally recognized human rights, there are no effective, independent enforcement mechanisms to ensure they do so. Decisions cannot be enforced directly against a company and their power to compel behavioural changes remains subject to the political will and ability of national governments.' Justine Nolan, 'The United Nations Global Compact with business: Hindering or helping the protection of human rights?' (2005) 24 The University of Queensland Law Journal, 457. On the Global Compact see also: Andreas Rasche, 'A Necessary Supplement' – What the United Nations Global Compact Is and Is Not' (2009) 48 Business and Society; Andreas Rasche, Sandra Waddock, Malcolm McIntosh, 'The United Nations Global Compact: Retrospect and Prospect' (2013) 52 Business and Society.

[35] UNCHR, Res 2003/12 (26 August 2003). On the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* see: Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, as well as: Olivier De Schutter, *Transnational Corporations and Human Rights* (2006, Hart Publishing); Jacob Ragnwaldh and Paola Konopik, 'The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights', in R. Mullerat (edited by) *Corporate Social Responsibility: The Corporate Governance of the 21st Century, International Bar Association* (2005, Kluwer Law International).

other interested stakeholders were involved.[36] Despite the approval received by the UN Sub-Commission[37], the Norms were later rejected by the UN Commission on Human Rights, stating that the Norms had 'not been requested' and had 'no legal standing'.[38] Nevertheless, the relevance of the Norms relies on the fact that they may be considered as a first ambitious attempt, undertaken by a UN Human Rights Body, to specify the responsibilities of transnational corporations and other business enterprises and, as a result, hold them accountable in case of corporate-related human rights abuses.

The Norms are a 'succinct, but comprehensive restatement of the international legal principles applicable to businesses'[39]. Expanding beyond traditional human rights, as the right to equal opportunity and non-discriminatory treatment or labour rights, the Norms include also rights associated with consumer protection, as well as provisions related to environmental protection and corruption[40], which generally are covered under different areas of law. As part of the effort to draft the Norms as a codification of already existing principles of international law, rather than develop new legal principles, the Preamble refers to a non-exhaustive list of international treaties and conventions, which may be considered as the legal basis for establishing human rights obligations upon transnational corporations and other business enterprises.[41] As a result, on one hand, the Norms are based on

[36] Weissbrodt, Kruger (2003) 901-15; Kinley, Chambers (2006) 467-468. See also: Ramon Mullerat, 'The Still Vague and Imprecise Notion of Corporate Social Responsibility' (2004) International Business Lawyer; Penelope Simons, Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (2014, Routledge); Sarah Joseph, Corporations and Transnational Human Rights Litigation (2004, Hart Publishing); Lorenzo Sacconi (edited by) *Guida critica alla Responsabilità sociale d'impresa e al governo d'impresa* (2005, Bancaria Editrice).

[37] UNCHR, Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16 'Responsibilities of transnational corporations and other business enterprises with regard to human rights' (20 October 2003) UN Doc E/CN.4/Sub.2/RES/2003/16.

[38] UNCHR, Resolution 2004/116 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' (22 April 2004) UN Doc E/CN.4/DEC/2004/116.

[39] Weissbrodt, Kruger (2006) 901.

[40] UNCHR, Res 2003/12 (26 August 2003) Articles 7, 10, 14.

[41] In their Preamble, the Norms refers not only to the Universal Declaration of Human Rights, but also to other international treaties and instruments, including 'the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court;

international human rights instruments and restate several human rights, on the other, they create a *sui generis* system which would have bound transnational corporations and other business enterprises, in addition to States, with the precise objective of controlling and monitoring corporate activities.

The novelty of the Norms lied on their scope of application, as well as the enforcement mechanisms prescribed therein.

As a matter of facts, the Norms instated human rights obligations directly upon corporations along with their whole value chains and spheres of influence: States maintained the primary responsibility for human rights protection, but corporations were equally considered as duty bearers. As emphasized in the Norms' First Section about General Obligations, the Norms clearly ruled that States retained the primary and overarching responsibility for human rights protection, since they were deemed responsible for 'promot[ing], secur[ing] the fulfilment of, respect[ing], ensur[ing] respect of and protect[ing] human rights', as recognized in international treaties and in national laws. If the Norms had been adopted, this responsibility would have been further reinforced by the obligation upon States to 'ensure that transnational corporations and other business enterprises respected human rights'[42], and similar duties would have been extended to business enterprises, resulting in equal requirements to 'promote, secure the fulfilment of, respect, ensure respect of and protect' a wide range of human rights, as recognized in international and national law, within business

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the United Nations Convention against Transnational Organized Crime; the Convention on Biological Diversity; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Declaration on the Right to Development; the Rio Declaration on the Environment and Development; the Plan of Implementation of the World Summit on Sustainable Development; the United Nations Millennium Declaration; the Universal Declaration on the Human Genome and Human Rights; the International Code of Marketing of Breast-milk Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the "Health for All in the Twenty-First Century" policy of the World Health Organization; the Convention against Discrimination in Education of the United Nations Educational, Scientific, and Cultural Organization; conventions and recommendations of the International Labour Organization; the Convention and Protocol relating to the Status of Refugees; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development'; the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization; the Guidelines for Multinational Enterprises and the Committee on International Investment and Multinational Enterprises of the Organisation for Economic Cooperation and Development and the United Nations Global Compact. UNCHR, Res 2003/12, Preamble.

[42] UNCHR, Res 2003/12 (26 August 2003) Preamble and Article 1.

enterprises' respective spheres influence.[43] This means that the Norms would have covered activities taking place both in the corporations' home countries, and in countries where corporations were performing their activities and business, hence covering dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that may have entered into any agreement with the transnational corporations and other business enterprises.[44]

Moreover, the section of the Norms about General Obligations encompassed also a detailed list of responsibilities of transnational corporations and other business enterprises, including the duty of due diligence to ensure that business activities do not directly or indirectly contribute to human rights abuses; the duty to ensure that corporations do not benefit from such abuses; the duty to refrain from undermining efforts to promote human rights; the duty of a corporation to use its influence to promote human rights; the obligation to assess the human rights impact of the corporation; and the overall responsibility to avoid complicity in human rights abuses.[45] Thus, in contrast to other human rights instruments, which generally are structured either on the basis of sets of human rights (such as civil and political rights, economic, social and cultural rights) or on the basis of rights' holders (such as indigenous people, children, etc.), the Norms entailed a "duty-bearers" approach. Starting from the assumption that corporations and other business enterprises may violate human rights, the Norms identified corporations as duty bearers and the set of rights that corporations were required to respect and ensure. The Norms did not impose negative duties upon corporations, rather they included duties, requiring corporations to promote and ensure the respect for human rights.

Additionally, it is relevant to note that the Norms recognized as duty bearers not only multinational corporations, as previously under the Code of Conduct, but they extended their scope to cover also "other business enterprises" 'regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.'[46]

[43] Ibid., Article 1.
[44] Ibid., Article 15.
[45] UNCHR, Res 2003/12 (26 August 2003), Article 1 – General Obligations.
[46] Ibid., Article 21.

Consequently, the Norms expanded to the entirety of the corporation's value chain and sphere of influence. With this regard, it has to be noted that the notion of "value chain" was also criticized for not being clear enough, and being ambiguous with regard to the question of whether the entire supply chain of corporations may be included in their spheres of activity and influence.[47]

The Norms were expressed in mandatory terms, corroborated by enforcement and implementation mechanisms, which generally can be traced in relation to obligations binding States, as under International Human Rights treaties. On the contrary, the Norms extended such procedures to transnational corporations and other business enterprises, providing new implementation and enforcement mechanisms to assure that the obligations included in the Norms were met. As a result, under the Norms, transnational corporations and other business enterprises were firstly required to adopt, disseminate and implement internal rules of operation.[48] Secondly, corporations were required to periodically disclose to all stakeholders on their implementation, while incorporating the provisions of the Norms into their business dealings or, if necessary, cease doing business with non-compliant business partners. Finally, in addition to periodic evaluations and impact assessments conducted by corporations,[49] the Norms set another periodic monitoring and verification mechanism, which had to be transparent, inclusive and to take into account input from relevant involved stakeholders[50]. This mechanism could include the use of a new or an already existing monitoring mechanism to be controlled and led by the United Nations.[51] Thus, while States were required to 'establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws [were] implemented'[52], the Norms required corporations to adopt own internal rules, aimed at ensuring the protection set forth therein, and to cooperate in a

[47] Kinley and Chambers underlined that 'the notion of a state or corporation's 'sphere of influence', and the use of this notion to demarcate respective spheres of responsibility, although familiar to those in the corporate social responsibility movement, is not found in other human rights instruments. Its definition and application, especially its legal connotations, have been the subject of heated debate and some confusion'. As a result, the mandate received later by John Ruggie, the Special Representative on Business and Human Rights, *had inter alia* the purpose of researching and clarifying the implications for TNCs and other business enterprises of concepts such as complicity and sphere of influence. Kinley, Chambers (2006) 452.
[48] UNCHR, Res 2003/12 (26 August 2003), Article 15.
[49] Ibid., Article 16.
[50] Ibid.
[51] Ibid.
[52] Ibid., Article 7.

transparent manner with relevant stakeholders.[53] Interestingly, the terminology used to refer to States' requirements – "should" instead of "shall" – indicated that such requirements were not fully obligations or normative provisions.

Lastly, the monitoring and verification mechanism was reinforced by a "reparation provision", requiring corporations 'to provide prompt, effective and adequate reparations to those affected by a company's failure to comply with the Norms'.[54] As a consequence, the Norms did not aim only at preventing violations of human rights, rather their objective was also to provide reparation to harm. Thus, 'the Norms would [have been] misused if they had been employed by a government to justify failing to protect human rights fully or to provide appropriate remedies for human rights violations.'[55] The so-called "saving clause", stating that 'nothing in the Norms should be construed as diminishing states' obligations to protect and promote human rights or as limiting rules or laws that provide greater protection of human rights' is a further reiteration.[56]

To conclude, the Norms could have represented the first binding instrument to hold corporations responsible for any potential violations of human rights. Indeed, the Norms included a significant articulation of corporations' duties: by requiring the latter to 'adopt, disseminate and implement internal rules of operations', corporations would have been obliged to apply these standards, while being directly monitored by the United Nations.

However, predictably, the Norms did not receive a unanimously positive response and approval, rather they led to a divisive debate among interested stakeholders.

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[53] Ibid., Article 16.

[54] Ibid., Article 18.

[55] Weissbrodt, Kruger (2003) 912. From 1996 to 2003, David Weissbrodt served as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and he was appointed Chairperson of the Sub-Commission for two years, from 2001 to 2002. See also: Andreas Rasche, '"A necessary Supplement" - What the United Nations Global Compact is and is not' (2009) 48 Business and Society, 511. See *inter alia*: Surya Deva, 'Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 Syracuse Journal of International Law and Commerce; Joanne T. Lawrence, Paul W. Beamish, *Globally Responsible Leadership: Business According to the UN Global Compact* (Sage Publications, 2013); David M. Bigge, 'Bring on the Bluewash: A Social Constructivist Argument Against using Nike v. Kasky to Attack the UN Global Compact' (2004) 14 International Legal Perspectives, 6-21; Justine Nolan, 'The United Nations Global Compact with business: Hindering or helping the protection of human rights?' (2005) 24 The University of Queensland Law Journal, 445-466; Murphy, 'Taking multinational corporate codes of conduct to the next level' (2005) 43 Columbia Journal of Transnational Law, 388-433.

[56] UNCHR, Res 2003/12 (26 August 2003) Article 19.

On one side, the Norms were considered as 'the first non-voluntary initiative [in the field of business and human rights] at the international level'[57] to bind transnational corporations and other business enterprises, and it was underlined that they represented a shift in the paradigms dominating until that moment the corporate social responsibility discourse, which had caused ineffective regulation of corporate conduct and, as a result, had facilitated abuses of human rights.[58] In addition, the Norms were hailed with enthusiasm by other supporters, mainly from civil society organizations, because they could have represented the first mandatory set of standards binding all business enterprises, and 'a useful tool not only for companies to assess their own activities but also for governments and others interested [parties for] evaluating business practices'.[59] Other supporters argued that the Norms would remedy to the lack of accountability of business enterprises against violations of human rights, by '*fill[ing] an existing gap [as they pull] together into one single document the key international human rights laws, standards and best practices applying to all businesses. The Norms are more detailed than any existing document with regard to businesses' responsibility for human rights and not in contradiction but in conformity and but in conformity and complementary with existing international provisions*'.[60]

On the other side, the Norms received sharp critiques, mainly from business leaders. The Norms were criticized because they sought to expand the 'concept of corporate liability for human rights responsibilities beyond the [existing] model of self-regulation'[61] and beyond the existing standards applicable only to States -- thus shifting the obligations to protect human rights from governments to the private sector and, according to some critics,

[57] Weissbrodt, Kruger (2003) 901-903.

[58] Surya Deva considered the Norms as an 'imperfect step in the rights direction', highlighting the fact that the norms did not receive the attention of academia they deserved. He stated that the Norms 'undoubtedly represent an improvement in terms of both formulation and implementation of human rights standards over earlier such attempts at the international level, they still fall short of what is required for evolving an effective international regulatory regime of corporate human rights responsibility'. Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction' (2004) 10 ILSA Journal of International & Comparative Law, 494-497.

[59] Jerbi (2009) 299-320. See also: Julie Campagna, 'United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers' (2004) 37 John Marshall Law Review; Carolin F Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 4 German Law Journal, 1065; David Weissbrodt, 'Business and Human Rights' (2005) 74 University of Cincinnati Law Review.

[60] Jerbi (2009) 310.

[61] Kinley, Chambers (2006) 1.

allowing States to avoid their own international obligations.[62] Several States expressed their opposition by asserting that they would not depart from the traditional framework of international law, under which States were the central legal subjects. The Norms had determined a shift of responsibilities from States to business enterprises: rather than requiring only to States to implement duties and regulate business conducts through their legislations, the Norms bound directly transnational corporations and other business enterprises. Furthermore, it was argued that the Norms reflected duties that applied to States and that could not be automatically transposed to corporations.[63]

As already mentioned before, at the UN level, although the Sub-Commission had approved the text, the criticisms to the Norms were shared by the Commission on Human Rights, which at the 2004 annual session rejected their adoption, stating that although they had some 'useful elements and ideas', they had not been requested by the Commission itself and had no legal standing.[64] Regardless, the Norms represent a significant departure from the prevailing practice at that time, that of voluntary compliance trough soft law instruments. The Norms were designed to establish a non-voluntary, comprehensive framework, imposing direct obligations upon corporations and supplemented by an effective enforcement mechanism, which included the monitoring from the United Nations, as well.

4. The work of the Special Representative on Business and Human Rights

Since the failure of the Norms, the debate concerning the complex relation between business entities and human rights protection has nevertheless evolved and gained more

[62] Jerbi and Kinley and Nolan underlined that the Norms were criticized because, according to the opinions of those against them, they 'did not adequately take into account the positive contributions of business towards the enjoyment of human rights. Business representatives argued that, in some cases, the responsibilities under the Sub-Commission Norms went beyond stadards [at that time] applicable to States. Moreover, imposing legal responsibilities on business could result in shifting the obligations to protect human rights from governments to the private sector, allowing States to avoid their own international obligations.' Jerbi (2009) 304-305; David Kinley, Justine Nolan, Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 Companies and Securities Law Journal, 30.

[63] Other critiques were moved to the Norms. For example, the Norms were also criticized because they held transnational corporations and other business enterprises responsible for activities and violations performed and committed by other actors operating along the value chains. In addition, the International Chamber of Commerce and the International Organisation of Employers, argued that the Norms applied an excessive legalistic approach, whereas the US Council for International Business criticized the Norms for being too vague. Upendra Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 Human Rights Law Review, 14; Miretski, Bachmann (2012) 27-28.

[64] UNCHR, Res 2004/116 (22 April 2004).

and more prominence. Despite the rejection of the Norms by the Commission on Human Rights, in 2005 the same Commission requested the UN Secretary-General to appoint a Special Representative on Business and Human Rights (hereafter "Special Representative") mandated to 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.[65] Accordingly, in order to move beyond the stalemate and spell out the roles and responsibilities of States, companies and other relevant actors in the business and human rights sphere[66], Kofi Annan appointed Harvard Professor John Ruggie, who during the six years of his mandate elaborated two milestone documents: the *"Protect, Respect and Remedy" Framework for Business and Human Right* (hereafter the "Framework")[67] and the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (hereafter the "Guiding Principles").[68]

In accordance with the mandate of identifying and clarifying existing standards and practices, in the first two-year period of his tenure, John Ruggie developed 'an extensive programme of systematic research' aimed at 'mapping [the] patterns of alleged human rights abuses by business enterprises, [the] evolving standards of international human rights law and international criminal law, [the] emerging practices by States and companies, [the] commentaries of United Nations treaty bodies on State obligations concerning business-related human rights abuses, the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies.'[69]

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[65] UNCHR, Res 2005/69 'Human rights and transnational corporations and other business enterprises' (20 April 2005) UN Doc E/CN.4/RES/2005/69.

[66] Ibid.

[67] UN HRC, Res 8/5 (7 April 2008).

[68] UN HRC, Resolution 17/31 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31. On the UN Guiding Principles see among others: Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9 European Company Law; Penolope C. Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 Journal of Human Rights and the Environment; Jan Wouters, Anna-Luise Chané, 'Multinational Corporations in International Law', KU Leuven Working Paper No. 129; Jonathan Bonnitcha, 'The UN Guiding Principles on Business and Human Rights: The Implications for the Enterprises and their Lawyers' (2012) 1 Business and Human Rights Review; Astrid Sanders, 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' (2014) LSE Legal Studies Working Paper No. 18/2014; Stephanie Lagoutte, 'The State Duty to Protect Against Business-Related Human Rights Abuses. Unpacking Pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business' (2014) Matters of concern Human rights' Research papers Series No. 2014/1.

[69] Ibid., 4-5.

In particular, John Ruggie's first actions were designed to outline issues related to corporate violations of human rights, focusing mainly on:

> '*(a) identify[ing] and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;*
> *(b) [discussing] the role of States in effectively regulating and adjudicating […] transnational corporations and other business enterprises;*
> *(c) research[ing] and clarify[ing] the concepts such of "complicity" and "sphere of influence*";
> *(d) develop[ing] materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;*
> *(e) compil[ing] a compendium of best practices of States and transnational corporations and other business enterprises.*'[70]

In his first Interim Report[71] submitted in response to the UN Commission on Human Rights Resolution 2005/69[72], the Special Representative sought to frame the context of his mandate, while addressing the critiques raised against the Norms and taking distance from them.[73] John Ruggie acknowledged that the Norms had some 'useful elements', such as the 'summary of rights that [could] be affected by business, the collation of source documents from international human rights instruments and [other] voluntary initiatives', nevertheless he criticized the Norms for being 'engulfed by [their] own doctrinal excesses'.[74] In particular, the critiques concerned the legal authority of the Norms and the distribution of responsibilities between States and business enterprises for human rights protection, with a focus on the legal authority claimed by the Norms:

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[70] UNCHR, 'Promotion and Protection of Human Rights. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) UN Doc E/CN.4/2006/97, 3-4.
[71] Ibid.
[72] UNCHR, Res 2005/69 'Human rights and transnational corporations and other business enterprises' (20 April 2005) UN Doc E/CN.4/RES/2005/69.
[73] UNCHR, 'Promotion and Protection of Human Rights. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) UN Doc E/CN.4/2006/97, 14-15. Similarly, Wettstein criticized the Norms since they 'turned into a projection board for the controversy at the heart of the debate and made the deep rifts between supporters and proponents painfully visible'. He also stressed how, in contrast, when the mandate of John Ruggie expired 'a short eight years later in 2011, business and human rights had evolved into one of the most dynamic, relevant and perhaps even most influential debates concerning corporate responsibility'. In support of Jogn ruggies's mandate, also Jerbi stated: 'Ruggie has been largely responsible for moving what was a stalled and divisive debate to a new phase of dialogue and activity inside and outside the UN system.' See: Florian Wettstein, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment (2015) Journal of Human Rights 14/2, 162-182; Jerbi (2009) 301.
[74] Ibid., UNCHR, 'Promotion and Protection of Human Rights. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006).

> '*If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones. What the Norms have done, in fact, is to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law - hard, soft, or otherwise*.'[75]

States, and not business enterprises, were the only recipients of the binding obligations deriving from relevant binding instruments. With regard to customary international law, state practice and *opinion juris* had led to the conclusion that business enterprises could be held liable for committing or for being complicit in gross human rights violations '*amounting to international crimes, including genocide, slavery, human trafficking, forced labour, torture and some crimes against humanity. But most of this fluidity involve[d] quite narrow, albeit highly important, areas of international criminal law, with some indication of a possible future expansion in the extraterritorial application of home country jurisdiction over transnational corporations*.'[76] Nevertheless, the position as developed in the Norms that business enterprises could be held directly responsible and accountable for human rights violations could not be inferred by international law. This reasoning led to a second critique moved to the Norms by John Ruggie. The Norms imposed higher obligations upon business enterprises rather than upon States, either because not all States at that time had ratified the whole list of international instruments upon which the Norms were based, or because these international instruments had been ratified only conditionally by States.[77]

In 2008, in furtherance of his mandate, John Ruggie submitted the report *"Protect, Respect and Remedy" Framework for Business and Human Right* (hereafter the "Framework" or the "three-pillar Framework") which was unanimously adopted by the Human Rights Council under Resolution 8/5. Pursuant to UN HRC Resolution 8/7, the Human Rights Council also extended the Special Representative's tenure until 2011 demanding the operationalization

[75] Ibid.
[76] Ibid., 15-16.
[77] UN HRC, 'Interim Report of the Special Representative' (2006).

of the Framework, as well as concrete, practical recommendations for its implementation.[78] To achieve this task, in 2011, John Ruggie came to the elaboration of *Guiding Principles on Business and Human Rights*[79] for the purpose of '[...] *enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization*'.[80] On the basis of the three-pillar Framework, the Guiding Principles not only clarify the roles of involved actors but also identify concrete steps for Governments and companies to fulfill their respective duties and responsibilities, as well as steps to prevent human rights abuses in business activities and provide remedies when such abuses take place. The Guiding Principles provide a framework composed of the state duty to protect, the corporate responsibility to respect human rights and the need for the victims of corporate abuse to have access to remedies. On one hand, they clarify the existing obligations of States to protect human rights and, on the other, they affirm the existence of a corporate responsibility to respect human rights and the need for rights and obligations to be matched to appropriate and effective remedies when breached.

4.1 The first pillar of the "Protect, Respect and Remedy" framework for Business and Human Right: the state duty to protect

The first pillar of the Framework, reflected in the first section of the Guiding Principles, concerns the state duty to protect against human rights abuses committed by third parties, including business companies, through appropriate policies, regulation and adjudication.[81]
The pillar is built upon international human rights law obligations and accordingly, States have the positive obligation to protect every individual within their territory and/or jurisdiction from human rights abuses committed by third parties. Thus, States retain the primary duty in preventing and addressing corporate-related human rights abuses and, as a result, they are required to implement appropriate policies and regulations to attain this

[78] UN HRC, 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' (18 June 2008) UN Doc A/HRC/8/7.
[79] Ibid.
[80] UN HRC, Res 17/31 (21 March 2011) 6.
[81] Ibid., Guiding Principle 1: States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

duty.[82] This translates, under the first Guiding Principle, into 'taking appropriate steps to prevent, investigate, punish and redress such abuse[s]'.[83] The Framework and the Guiding Principles stress that States are *per se* not responsible for human rights violations committed by private actors, nevertheless they may result in breach of their international human rights law obligations if violations can be attributed to them, or if they fail 'to take appropriate steps to prevent, investigate, punish and redress private actors' abuses through effective policies and legislation'.[84] Although the interaction between States and business enterprises may manifest itself in several facets, States may lack adequate policies and regulatory arrangements aimed at effectively managing the complex business and human rights relations, resulting in policy incoherence and gaps. In particular, according to John Ruggie, States' practice has revealed substantial gaps, with States sometimes being unable to enforce laws, and thus causing severe consequences for victims of human rights violations, companies and States themselves.[85]

Consequently, States should specify their expectations to all business companies domiciled within their jurisdiction, so that in turn companies respect human rights in all their activities.[86] In this regard, as underlined by the Commentary to the second Guiding Principle, international human rights law does not require States to regulate extraterritorial activities of business enterprises domiciled in their territory and/or jurisdiction, however no existing

[82] The Commentary to the first UN Guiding Principle stresses that 'the State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.' UN HRC, Res 17/31 (21 March 2011) Guiding Principle and Commentary 1.

[83] Ibid.

[84] Ibid.

[85] UN HRC, Res 8/5 (7 April 2008) 8-14. In his 2008 report to the Human Rights Council, the Special Representative suggested priority areas through which States could work to promote corporate respect for human rights and prevent corporate-related abuses, including the achievement of greater policy coherence and effectiveness across departments working with business, the safeguard of the State's own ability to protect rights when entering into economic agreements; the respect for human rights when States do business with business, whether as owners, investors, insurers, procurers or simply promoters, the promotion of corporate cultures respectful of human rights at home and abroad, innovative policies to guide companies operating in conflict-affected areas, and lastly addressing the cross-cutting issue of extraterritoriality.

[86] Under the second UN Guiding Principle: 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'. UN HRC, Res 17/31, Guiding Principle 2.

legal obligations prevent States from doing so, provided that there is a recognized jurisdictional basis. In addition, as far as the exercise of extraterritorial jurisdiction by a home State over the overseas activities of a transnational company is concerned, Guiding Principles 2 maintains a very careful but not clear approach, asserting that States only should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

Furthermore, the State duty to protect human rights requires also policy coherence (both horizontal and vertical) and 'extra vigilance in the regulation of business in conflict-affected areas or when there is a State-business nexus'.[87] Indeed, Guiding Principle 4 requires States to have in place additional measures and to take additional steps to grant human rights protection, especially in case of State-owned or State-controlled business enterprises or enterprises that receive support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies.[88] These further measures aim at requiring human rights due diligence along the whole value chain, and are justified by the fact that under international law, when a business enterprise is controlled by the State or when its acts can be attributed to the State, an abuse of human rights by the same business enterprise may entail a violation of the State's own international law obligations.

The Guiding Principles cover also the situation of business operations conducted in conflict-affected zones, where the risks of committing gross human rights violations are higher because local human rights regimes do not always function as intended, resulting in host States' lack of effective control and inability to safeguard the protection of human rights.[89]

[87] As underlined by Michael Addo, explaining the first Pillar of the Framework and the corresponding UN Guiding Principles, these latter underline 'the importance of the steps to be taken by States in terms of effective policies, legislation and regulations to prevent, investigate, punish and redress human rights abuses. [The State duty to protect] provides an opportunity for States to set out their expectations to all business enterprises domiciled within their jurisdiction to respect human rights in their operations. Other important operational indicators of the State's duty to protect human rights include the need for policy coherence (both horizontal and vertical) and the need for extra vigilance in the regulation of business in conflict-affected areas or when there is a State-business nexus.' Michael Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 Human Rights Law Review, 134-135.

[88] Specifically the Guiding Principle 4 reads as follows: 'States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.' UN HRC, Res 17/31, Guiding Principle 4.

[89] The Guiding Principle 7 deals with business enterprises which operate in conflict affected areas. Specifically it provides that '[b]ecause the risk of gross human rights abuses is heightened in conflict affected areas, States

For this reason, home States of business enterprises, '[...] *have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse*'. This role may require States to engage with the corporate actors involved and help them to assess and address the human rights-related risks of their activities and business relationships, deny public support or services to corporate actors that are involved in or refuse to address human rights violations, or ensure the effectiveness of existing policies, legislation, regulations and enforcement of those measures seeking to address the risk of business involvement in human rights abuses.

Interestingly, the Commentary to Guiding Principle seven points out that should the States' policies, legislation, regulations and enforcement not effectively address the risks of corporate violations of human rights, then States should address these gaps by 'exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives'[90], thus appearing open to the possibility of using domestic measures with extraterritorial implications.

4.2 The second pillar of the "Protect, Respect and Remedy" framework for Business and Human Right: corporate responsibility to respect

Under the second pillar, business enterprises have a responsibility to respect human rights as set forth in the Universal Declaration of Human Rights, the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, as well as the ILO Declaration on Fundamental Principles and Rights at Work.[91] As a result, business companies

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should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.' UN HRC, Res 17/31, Guiding Principle 7.

[90] Ibid., Guiding Principle and Commentary 7.

[91] In accordance with the Guiding Principles 11-12, '[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. [Moreover], The responsibility of business enterprises to respect

are not only required to comply with national laws, they are also responsible for respecting human rights.[92]

Both the Framework and the Guiding Principles undoubtedly recognize that business enterprises have an independent and different responsibility in comparison to States: this responsibility '[…] *exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights*.'[93] As such, business responsibilities cannot and should not simply mirror the duties of States. Accordingly, the Special Representative focused on identifying these distinctive responsibilities of companies in relation to human rights, which derive more from social expectations, rather than from national laws as established by States. As a result, business companies, in addition to complying with national laws, should take steps to 'become aware of, prevent and address adverse human rights impacts'. In other words, business enterprises are required to perform their activities in line with so-called "knowing and showing principle". This means that business companies should carry out human rights "due diligence"[94], which is composed of a three-pronged practice: avoiding infringing individuals' rights, addressing the adverse impacts of business activities, and communicating externally the outcome of such due diligence policies.[95] Thus, the corporate responsibility to respect human rights demands companies to maintain a responsible conduct in their own activities, through prevention, mitigation and, when necessary, remediation either to human rights

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human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.' UN HRC, Res 17/31, Guiding Principle and Commentary 11-12.

[92] UN HRC, Res 8/5 (7 April 2008) 16. On the corporate responsibility to protect see also: Surya Deva, '"Protect, Respect and Remedy": A Critique of the SRSG's Framework for Business and Human Rights', in K. Buhmann, L. Roseberry & M. Morsing Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives, (Palgrave Macmillan 2011), 108, 116–124; Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9 European Company Law; Denis G. Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20 Business Ethics Quarterly; Larry C. Backer, 'On the Evolution of the United Nations' Protect-Respect-Remedy Project: The State, the Corporation and Human Rights in a Global Governance Context' (2010) 9 Santa Clara Journal of International Law; Christiana Ochoa, 'The 2008 Ruggie Report: A Framework for Business and Human Rights' (2008) 12 ASIL Insights; Claire Methven O'Brien, Sumithra Dhanarajan, 'The Corporate Responsibility to Respect Human Rights: A Status Review' (2016) 29 Accounting, Auditing and Accountability Journal.

[93] UN HRC, Res 17/31, Guiding Principle and Commentary 11.

[94] UN HRC, Res 8/5 (7 April 2008) 17.

[95] UN HRC, Res 17/31, Guiding Principles 17-21.

abuses that business enterprises or their suppliers or vendors have caused or contributed to produce.

It is also important to note that when compared to the first pillar, the second pillar allocates only responsibilities, rather than duties to business enterprises. This is expressed through the choice of the language: "responsibility" of business enterprises to protect as opposed to the State "duty" to protect under the first pillar. Thus, the corporate responsibility to respect seems to be extra-legal or non-legal and, accordingly, Ruggie pointed out that the Framework and the Guiding Principles did not have the objective of creating new legal obligation – thus avoiding repeating the failure of the Norms.[96]

4.3 The third pillar of the "Protect, Respect and Remedy" framework for Business and Human Right: greater access to remedy

Under the third pillar, States are required to provide greater access to effective remedies for victims of business-related abuses. Hence, the third pillar indirectly recognizes the right of individuals to have greater access to judicial and non-judicial remedies.

As set forth under the first pillar, States have the duty to protect individuals within their territory and/or jurisdiction from human rights violations perpetrated by business enterprises and, to this aim, they should adopt judicial, administrative, legislative or other appropriate measures to ensure effective remedies when abuses take place.[97]

Under Guiding Principle 25, although remedies may take a wide range of forms, such as apologies, restitution, rehabilitation, compensation, punitive sanctions as well as prevention of harm, firstly States should firstly establish some mechanisms aimed at guaranteeing that any possible grievance is raised and that redress is sought.[98]

As a result, States should provide for access to both State-based judicial and State-based non-judicial grievance mechanisms. The first term of "judicial mechanisms" refers to States' judicial systems, which encompass criminal and civil courts. On the other hand, the concept

[96] Addo (2011) 135; Astrid Sanders, 'The Impact of the 'Ruggie Framework' and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' (2014) LSE Legal Studies Working Paper No.18/2014, 8-9.

[97] UN Guiding Principle 25: 'Access to remedy. Foundational Principle. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy'. UN HRC, Res 17/31, Guiding Principle and Commentary 25.

[98] Ibid.

of "state-based non-judicial mechanisms" include, *inter alia,* complaint offices, OECD's National Contacts Points and National Human Rights Institutions. Whilst the Guiding Principles recognize that non-judicial mechanisms may represent valuable alternatives to access remedies - especially in those countries where victims cannot approach domestic courts[99], access to criminal or civil courts is nevertheless considered to be 'at the core of ensuring access to remedy'.[100] Indeed, although non-judicial grievance mechanisms may represent a more propitious tool for some victims and have the fundamental role of completing and supplementing the functioning of judicial mechanisms, these latter may be considered as the spine of the whole system, without whom the system itself would fall apart.[101]

Under the third pillar, States should not only 'ensure the effectiveness of domestic judicial mechanisms', whose capability to address business-related human rights abuses is linked to their 'integrity, impartiality and ability to accord due process', rather they should seek to 'reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.[102] Among these barriers, the former Special Representative on Business and Human Rights already identified, on one side, corruption and the lack of economic and/or political independence among courts and, on the other side, structural characters of national systems, namely practical, procedural and legal features which hamper access to courts. Accordingly, under Guiding Principle 26, legal and practical barriers prevent legitimate cases from being brought before courts at domestic level. Among "practical" barriers, John Ruggie pinpointed the lack of resources, expertise and incentives for lawyers and prosecutors, as well as financial issues such as high costs of claims and the inability to resort to class actions or to other collective action procedures. Instead, among legal barriers, he listed the inability to access to courts both in host and home States of business companies in spite of the merits of the claim, and the modalities of attribution of legal responsibility among the corporate members in accordance with domestic criminal and civil laws.[103] In addition, legal barriers

[99] UN HRC, Res 8/5 (7 April 2008) 22.
[100] UN HRC, Res 17/31, Guiding Principle 25.
[101] Ibid., Guiding Principle 25; Nicola Jägers, speaking at the Conference 'Access to Justice in the EU for victims of Corporate Related Human Rights Abuses' (23 June 2015) Tilburg University.
[102] UN Guiding Principle 26: 'Operational Principles. State-based judicial mechanisms. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.' UN HRC, Res 17/31, Guiding Principle and Commentary 26.
[103] Ibid., Guiding Principle 26.

mostly concern the attribution of criminal or civil liability to business enterprises, determining a number of challenges to victims and States. In addition, the differences among domestic jurisdictions, from one State to another, result in inequalities and legal uncertainty that may amount to lack of remedies and impunity of those business entities which have perpetrated violations of human rights.

As far as practical or procedural barriers is concerned, they refer to a wide range of issues pertaining to legal representation, costs of litigation, the possibility of aggregating claims and the general functioning of the judiciary, as well. Barriers may arise when 'the costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms or other means'.[104] To this aim, collective actions or class action might be possible solutions to share the costs of litigations among claimants.

Finally, as noted by John Ruggie, 'the remedies provided by the grievance mechanisms […] may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred'.[105] Thus, grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. States have the duty to protect individuals within their territory and/or jurisdiction from human rights violations perpetrated by business enterprises and accordingly, States should take appropriate steps to ensure that when such abuses occur, those affected have access to effective remedy, through the adoption of judicial, administrative, legislative or other appropriate measures. Accordingly, while States should ensure that the people affected by business-related abuses can access remedies through court systems or other legitimate non-judicial process, corporations should establish or take part in grievance mechanisms.

5. The endorsement of the UN Guiding Principles on Business and Human Rights

In June 2011, the Human Rights Council adopted Resolution 17/4, acknowledging the end of the Special Representative's mandate and unanimously endorsing the Guiding Principles.[106]

[104] Ibid.
[105] UN HRC Res. 17/31, Guiding Principle and Commentary 25.
[106] UN HRC, Res 17/4 (6 July 2011).

Although the Guiding Principles are a soft law instrument, they have soon become an authoritative point of reference at the international level. For example, in 2011 the OECD updated the *Guidelines for Multinational Enterprises* introducing a new chapter specifically devoted to human rights on the basis of the Guiding Principles,[107] or the European Commission adopted the *Communication on a renewed European strategy for 2011-14 for Corporate Social Responsibility*,[108] where the UN Guiding Principles are listed among the core set of internationally recognised principles and guidelines on corporate social responsibility, and an entire section is dedicated to the implementation of the Guiding principles,[109] or the more recent *EU Directive on disclosure of non-financial and diversity information by certain large undertakings and groups* ,[110] which requires large business companies to disclose information include in the management report a non-financial statement containing relating to environmental, social and employee matters, respect for human rights, anti-corruption and bribery issues.[111]

[107] OECD, Guidelines for Multinational Enterprises, Chapter 4, Human Rights (2011). See also: OECD, 'Remarks at OECD Investment Committee Professor John G. Ruggie Special Representative of the UN Secretary-General for Business and Human Rights' (4 October 2010) OECD Online Publication; 'The Corporate Responsibility to Respect Human Rights in Supply Chains' (30 June 2010) 10th OECD Roundtable on Corporate Responsibility, Discussion Paper, OECD Online Publication; John Ruggie, 'Updating the Guidelines for Multinational Enterprises' (30 June 2010) 10th OECD Roundtable on Corporate Responsibility, Discussion Paper, OECD Online Publication.

[108] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. A renewed EU strategy 2011-14 for Corporate Social Responsibility' (25 October 2011) COM(2011) 681 final.

[109] 'Improving the coherence of EU policies relevant to business and human rights is a critical challenge. Better implementation of the UN Guiding Principles will contribute to EU objectives regarding specific human rights issues and core labour standards, including child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining'. In addition, through its Communication, the European Commission introduces a new definition of corporate social responsibility, intended 'the responsibility of enterprises for their impacts on society', which requires business enterprises to 'have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders […]'. The European Commission Communication seeks also to encourage business enterprises, mainly of large size, '[t]o identify, prevent and mitigate their possible adverse impacts […] and to carry out risk-based due diligence, including through their supply chains'. Finally, the Communication requires 'all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles', and interestingly invites EU Member States to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles'. Ibid., 3; 4.8.2.

[110] European Parliament and Council, 'Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups' (22 October 2014) L 330/1.

[111] The EU Directive 2014/95 requires certain large business companies to prepare non-financial statements which include information on environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters, for the purpose of increasing and allowing the consistency and comparability of non-financial information disclosed throughout the European Union. 'Such statements should include a description of the policies, outcomes and risks related to those matters and should be included in the

The Guiding Principles has been hailed for overcoming the stalemate that the debate about the complex relation between business enterprises and human rights reached after the halt determined by the rejection of the Norms. As underlined by John Ruggie, both the Framework and the Guiding Principles are characterized by the so-called "smart mix" of governance mechanisms: they 'are not just another layer of corporate governance but a synthesis of existing standards and mechanisms that integrate both voluntary […] and legally compelling standards'.[112] The Guiding Principles do not create a new binding international instrument, rather they build a comprehensive framework, starting from and further developing existing standards and practices for both States and business enterprises, as well as clarifying where these standards and practices would benefit from additional improvements. This is probably the reason why they were endorsed with enthusiasm by Governments, business and NGOs, obtaining broad *consensus.*

However, after their adoption, the Guiding Principles were not exempted from critiques, partially in line with John Ruggie's statement before the Human Rights Council in 2011, affirming that '[their] endorsement would not end all business and human rights challenges'.[113] Indeed, scholars, civil society organizations, NGOs criticized the Guiding Principles for being a missed opportunity in moving basic human rights steps in the direction of an effective human rights protection, since 'the Guiding Principles [did] not set a "global

management report of the undertaking concerned. The non-financial statement should also include information on the due diligence processes implemented by the [companies], also regarding […] its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.' Ibid., Articles 19a, 29a.

[112] Addo (2014) 136.

[113] In particular John Ruggie, while presenting the UN Guiding Principles before the Human Rights Council, stated that that their 'endorsement would not end all business and human rights challenges, but […] it would mark the end of the beginning, because for the first time there would be a commonly agreed-upon foundation on which to build.' Ruggie, 'Life in the Global Public Domain', 1.

standard", rather they endorsed the *status quo*'.[114] Critiques also pointed out that the Guiding Principles did not 'provide sufficient guidance to States and business enterprises [for the purpose of closing] the so-called governance gaps identified by [John Ruggie] as the root cause of the business and human rights predicament.'[115] For example, with regard to the third pillar, the Guiding Principles did not include the individual right to remedy for corporate-related human rights and place great emphasis on non-judicial mechanisms without addressing obstacles concerning judicial means.[116]

Furthermore, while Resolution 17/4 recognized the importance and the role of the Guiding Principles as a guidance to enhance standards and practices, under the same Resolution the Human Rights Council established a *Working Group on the issue of human rights and transnational corporations and other business enterprises* (hereafter "Working Group on Business and Human Rights" or "Working Group") consisting of five independent experts, with the mandate to promote the dissemination and implementation of the Guiding Principles, as well as support capacity building and provide advice upon request. Accordingly, the Working Group was 'expected to act as the guarantor of the integrity of the Guiding Principles and [was] tasked with identifying, exchanging and promoting good practices and

[114] Jena Martin for example argues that '[t]here is no doubt that Ruggie's work will influence the development of international human rights law', however the UN Guiding Principles failed to clarify the respective responsibilities of States and corporations, since instead of 'articulat[ing] what the responsibilities of corporations are for human rights issues, Ruggie has expressed only aspirational goals for what he wants to achieve'. Furthermore, '[n]either the Respect Framework nor the Guiding Principles do anything to remedy that governance gap—by continuing to put the primary, indeed the sole, legal duty on States, the Principles will not remedy those situations where States are either unable or unwilling to do more'. Likewise, Černič criticizes John Ruggie's work pointing out some limitations of his mandate. Among them, human rights are best protected in national legal orders and this is where any examination of obligations and responsibility for 'human rights should and must start. It appears, therefore, that any attempt to regulate corporations must focus primarily on the domestic level and only secondarily within the approaches of international law'. Jena Martin, 'The End of the Beginning? A Comprehensive Look at the U.N.'s Business and Human rights Agenda from a Bystander Perspective' (2012) 17 Fordham Journal of Corporate and Financial Law, 17, 70-72; Jernej Letnar Černič, 'Two Steps Forward, One Step Back: The 2010 Report by the UN Representative on Business and Human Rights' (2010) 11 German Law Journal, 1279-1280. See also: Larry Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All' (2015) 38 Fordham International Law Journal; 'UN Human Rights Council: Weak Stance on Business Standards. Global Rules Needed, Not Just Guidance' (16 June 2011) Online Publication, <www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>, accessed 25 June 2017.

[115] Amnesty International, CIDSE, ESC-Net, FIDH, Human Rights Watch, International Commission of Jurists, 'RAID (Rights and Accountability in Development), Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' (January 2011) Business and Human Rights Resource Centre Online Publication <https://business-humanrights.org/en/critiques-of-guiding-principles-by-amnesty-intl-human-rights-watch-fidh-others-debate-with-ruggie>, accessed 25 June 2017.

[116] Nicola Jägers, 'Column UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?' (2011) 29 Netherlands Quarterly of Human Rights, 162.

lessons learned'.[117] In line with the third pillar of the Framework, the Working Group was also required to study and make recommendations for the purpose of granting access to effective remedies for victims of corporate-related abuses.

[117] Addo (2014) 136-137.

Chapter 2: Towards a legally binding treaty on Business and Human Rights

1. Introduction

The UN Guiding Principles provide a framework on the state duty to protect, the corporate responsibility to respect human rights and the need for the victims of corporate abuses to have access to remedies. On one hand, they clarify the existing obligations of States to protect human rights and, on the other, they affirm the existence of a corporate responsibility to respect human rights and the need for rights and obligations to be matched to appropriate and effective remedies, when rights are breached.

Starting from the failure of the Norms, the difficulties encountered during their drafting process, as well as the opposition against the establishment of a mandatory regime with regards to business obligations, the Guiding Principles were unanimously endorsed by the UN Human Rights Council[1] and soon became an authoritative point of reference at the international level. However, they were not exempted from critiques. In particular, as a soft law instrument, they were deemed insufficient to address both the lack of accountability of transnational corporations worldwide and the absence of adequate legal remedies for victims.

Gradually, the discontent caused by the lack of concrete results achieved by the Guiding Principles increased and led to a proposal, presented to the Human Rights Council by Ecuador and South Africa, aimed at establishing an intergovernmental Working Group with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. What was initially a proposal, was then adopted by the Human Rights Council, at its 26th session in June 2014, under Resolution 26/9. The Resolution 26/9 established an open-ended intergovernmental working group (OEIWG) on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The

[1] Hereafter, "HRC" or "Human Rights Council".

Human Rights Council also decided that the first two sessions of the open-ended intergovernmental working group had to be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument, respectively in July 2015 and October 2016.

Additionally, during the same 26th session Human Rights Council session, the Council approved also Resolution 26/22 which, *inter alia*, extended the mandate of the UN Working Group on Business and Human Rights so to explore the benefits and limitation of a legally binding instrument.[2]

These initial debates and the developments preceding and following the adoption of Resolution 26/9 will be explored in the first section of the present chapter, while the second part will focus on the first two working sessions of the OEIWG which, in accordance with its mandate and despite the criticism surrounding Resolution 26/9, started investigating on the content, scope, nature and form of the prospective legally binding treaty during two working sessions. The two sessions held so far expounded several matters of consideration in the prospective treaties, including those issues that the Guiding Principles were not able to solve. Their understanding is indeed fundamental in the negotiation, as well as in the draft process of the prospective legally binding treaty, so that this latter may attempt to overcome the gaps left unsolved after the adoption of the UN Guiding Principles.

2. The turning point in the debate about Business and Human Rights: Human Rights Council Resolution 26/9

Despite the endorsement of the Guiding Principles and the work of the Working Group on Business and Human Rights, dissatisfaction about the concrete results achieved by the Guiding Principles increased and led to civil society mobilization. In September 2013 at the 24th session of the Human Rights Council, the Representative of Ecuador presented the proposal of a legally binding instrument on Business and Human Rights. Considering the Guiding Principles only as a first step, the Representative of Ecuador argued that soft law

[2] The Human Rights Council '[…] *Requests* the Working Group to launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument, and to prepare a report thereon and to submit it to the Human Rights Council at its thirty-second session', UN HRC, Res 26/22 (27 June 2014), Paragraph 8.

instruments could not sufficiently address 'the lack of accountability of transnational corporations worldwide and the absence of adequate legal remedies for victims'.[3] Hence, he claimed the necessity to elaborate a binding instrument with the objective of both 'clarify[ing] the obligations of transnational corporations [vis-a-vis human rights] and [establishing] effective remedies for victims in those cases where domestic jurisdiction [was] clearly unable to prosecute effectively those companies'.[4]

The proposal regarding the creation of a legally binding instrument on Business and Human Rights to be concluded within the UN system strengthened the debate around the lack of effectiveness of the Guiding Principles and gradually gained the *consensus* from a large number of States, as well as civil society organisations.[5] As a result, in June 2014, the proposal was adopted by the Human Rights Council under Resolution 26/9. The Resolution, drafted by Ecuador and South Africa and signed by Bolivia, Cuba and Venezuela, called for the establishment of an open-ended intergovernmental working group (OEIWG) mandated of 'elaborat[ing] an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[6] Resolution 26/9 only required the OEIWG to expound on the content, scope, nature and form of the prospective binding treaty during its first two sessions.

Additionally, during the same HRC session, the Council approved also Resolution 26/22, promoted and drafted by Norway, which instead extended the mandate of the existing UN

[3] In particular the representative of Ecuador pointed out that '[t]he increasing cases of human rights violations and abuses by some Transnational Corporations reminds us of the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises. The endorsement by the UN Human Rights Council in June 2011 of the *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework* was a first step, but without a legally binding instrument, it will remain only as such: a "first step" without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.' Republic of Ecuador, 'Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council' (September 2013) Business and Human Rights Resource Centre Online Publication, <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>, accessed 20 June 2016.

[4] 'An international legally binding instrument, concluded within the UN system, would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies.' Ibid.

[5] Among others, the "Treaty Alliance", a civil society movement, had the objective of promoting the draft of a multilateral treaty to bind States to a regime of human rights obligations for business enterprises and, through them, to bind business enterprises themselves.

[6] UN HRC Res 26/9 (26 June 2014).

Working Group on Business and Human Rights so to 'explore […] the benefits and limitation of a legally binding instrument'. Interestingly, the same Resolution also requested the Working Group and the UN High Commissioner for Human Rights to continue working on the issue of access to remedies.[7]

While Resolution 26/22 was adopted by *consensus* without a vote, Resolution 26/9 obtained twenty votes in favour, fourteen against and thirteen abstentions. Thus, apart from the sponsor-States, the majority was represented mainly by African and Latin America States with the addition of China, India and Russia. The African States, in particular, recognized the essential contribution provided by multinational corporations in the development of their countries, however, they stressed the imbalance of power between big corporations and small and, at the same time, less powerful countries, which had caused the marginalization and impoverishment of vulnerable groups within their societies.[8] Likewise, South Africa pointed out the positive role played by corporations, highlighting, however, the necessity to address human rights abuses perpetrated by corporations and criticizing the weak normative role of National Action Plans, elaborated pursuant to the UN Guiding Principles[9], which were not capable of fully regulating the activities of transnational corporations. For these reasons, a body of international standards providing equal protection and access to justice, which would also complement the National Action Plans, was necessary.[10] Furthermore, while

[7] UN HRC, Res 26/22 (27 June 2014).

[8] Jens Martens, Karolin Seitz, 'The Struggle for a UN Treaty. Towards global regulation on human rights and business' (August 2016) Online Publication, 22-23; Phil Bloomer, 'Negotiating and fighting for a binding treaty on business and human rights' (27 July 2015) The Guardian Online, <www.theguardian.com/global-development-professionals-network/2015/jul/27/negotiating-and-fighting-fora-binding-treaty-on-business-and-human-rights> accessed 31 July 2016.

[9] As indicated by the UN Working Group on Business and Human Rights, '[i]n the field of business and human rights, a [National Action Plan (NAP)] is defined as an evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs).' UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights (2014) Version 1.0 I December 2014, OHCHR Online Publication, <http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf> accessed 31 July 2016. See also the UN HRC Resolution 26/22, stressing the important role of National Action Plans, as a tool to promote the comprehensive and effective implementation of the Guiding Principles and encourage States to develop a national action plan itself or anothe similar framework.

[10] In line with the statements of the African Group statement delivered by Algeria on behalf of the African Group, South Africa shared the view of the representative of Ecuador and underlined that 'it is without doubt[s] that Transnational Corporations and Other Business Enterprises are the key drivers of globalization and owners of a big share of the global wealth, thus able to dominate over the global economy and exert their influence over global policymaking. The operational activities of these entities have enormous potential to uplift the socioeconomic situation of communities in which they operate and ensure maximum promotion, protection and fulfillment of human rights for all. [However], [c]urrently, there are no provisions in International Human Rights Law and International Humanitarian Law comprehensively addressing the

China and Russia initially supported Resolution 26/9, they later remarked the importance of both States' national sovereignty and regulations at national level, and advocated for improvements in the exchange of information and judicial collaboration between the home and host States of business companies.[11]

On the other hand, the United States and European Union member States voted against Resolution 26/9, which they considered 'counter-productive and polarizing'.[12] In particular, the United States argued, *inter alia,* that, while a one-size-fits-all instrument was not the right approach due to the challenges in regulating business companies, enough time had not been given to the implementation of the Guiding Principles, whose positive results would have been undermined by a binding treaty. As a matter of facts, the prospective legally binding treaty would have bound only States ratifying the treaty, thus it would have been in contrast with the more overarching nature of the Guiding Principles. The United States criticized also the scope of the prospective treaty. On one hand, they stressed that transnational corporations and other business enterprises were not subjects under international law and, as a result, practical questions would arise regarding how an international binding instrument would apply to corporations. On the other hand, Resolution 26/9 sought to regulate only certain types of business, thus creating an unequal regulatory regime between countries.[13]

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responsibility and accountability of Transnational Corporations and Other Business Enterprises to respect, promote, protect and fulfill human rights.' OHCHR, 'Opening Statement delivered by South Africa. Open-ended Intergovernmental Working Group on the Elaboration of an International Legally Binding Instrument on Transnational Corporation and Other Business Enterprises with respect to Human Rights' (6 July 2015), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SOUTHAFRICAS_Opening_StatementbyAmbMinty_Panel1.pdf>, accessed 2 September 2017, 3-4.

[11] Martens, Seitz (2016) 22.

[12] Ruggie, 'Regulating Multinationals' (2015); European Union, Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights. EU Explanation of Vote (2014) available online, <www.globalpolicy.org/images/pdfs/GPFEurope/HRC_resolution_Explanation_of_vote_EU.pdf> accessed 31 July 2016.

[13] In addition, during the fourth UN Forum on Business and Human Rights held in November 2015, the US Delegation reiterated its arguments for not participating in the treaty process, arguing that 'in order to establish a truly "level-playing field" a new legal instrument would have to apply also to domestic companies; [anyway a] new global legal instrument [could have] not solve the basic problem that the success or failure of such an instrument depended ultimately on implementation at the national level'. Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, US Delegation to the UN HRC, 'Explanation of Vote. Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights' (26 June 2014), UN Doc A/HRC/26/L.22/Rev.1, <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>, accessed 20 June 2017.

Similar reasons were expressed by the European Union, stating that '*[i]f Resolution 26/9 [had been] adopted, it [would have divided] the [Human Rights] Council not only on the vote, but in the years to [follow]. If the Open-Ended Intergovernmental Working Group [had been] established, the EU and its Member States [would not have participated] (…).*'[14]

2.1. The debate surrounding the adoption of Resolution 26/9

Despite the adoption of Resolution 26/9, the debate among scholars, civil society and the business world initially continued to gravitate around the question concerning the interest in and the benefit of drafting a binding treaty on business and human rights - by virtue of the previously unanimously adopted Guiding Principles. Although there was overall agreement about the progress reached in the protection of human rights against corporate violations, some scholars, experts and civil society NGOs still considered a binding treaty as a fundamental step to improve the existing legislations and fill the open "governance gaps" between the power of corporations and the ability of States to address companies' wrongful acts.[15] Indeed, the group of "proponents" of a binding treaty (hereafter "the proponents") argued that little progress had been reached since the endorsement of the Guiding Principles. The Guiding Principles had determined 'an unprecedented *consensus* around a coherent, normative framework and an authoritative policy guidance for companies and governments'[16], nevertheless, their implementation had remained 'slow or uneven' and gaps in addressing widespread corporate human rights abuses and lack of effective prevention and remedy remained.[17] The proponents and supporters of a prospective treaty

[14] Ibid.

[15] Business and Human Rights Resource Centre, 'Does the World Need a Treaty' (14 May 2014) Online Publication, 1. See also: Larry C. Backer, 'Essay: Considering a Treaty on Corporations and Human RIghts: Mostly Failures But with a Glimmer of Success' (August 2015) SSRN Online Publication; Larry C. Backer, 'Pragmatism Without Principle?: How a Comprehensive Treaty on Business and Human Rights Ought to Be Framed, Why It Can't, and the Dangers of the Pragmatic Turn in Treaty Crafting' (February 2016) SSRN Online Publication; Surya Deva and David Bilchitz (ed.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

[16] Ibid.; see *inter alia* Written Contributions from civil society organizations on the occasion of the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (6-10 July 2015), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/WrittenContributions.aspx>, accessed 15 June 2017.

[17] Institute for Business and Human Rights (IHRB), 'Submission to the United Nations open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Concerning possible principles, scope and elements of an international legally binding instrument

claimed also that traditional international law, which addresses only States' conducts, had failed to clearly establish obligations upon business enterprises. As a consequence, corporations were allowed to take advantage of their mobility and different regulatory regimes in various countries so to maximize their profits, while remaining unpunished in case of violations of human rights. Therefore, by virtue of the increased influence of corporations and considering that under international law only States hold duties with regard to human rights protection, a binding treaty was a valuable instrument to increase corporations' accountability and, at the same time, cope with the lack of effective prevention and effective remedies for victims of business-related abuses.[18]

On the contrary, the group of those who opposed the elaboration of a new binding treaty (hereafter "the opponents") favoured the strengthening of existing instruments, such as the Guiding Principles, the two core conventions on human rights, or national laws.[19] The opponents also stressed that early attempts to create a binding treaty, namely the Norms, had already failed because, among other reasons, developing or poorly developed countries had rejected intrusive laws, which might have caused the loss of investments by corporations in their respective countries.[20] Resolution 26/9 had been promoted mainly by developing countries, thus this could indicate that a similar failure was likely to occur again. In addition, a binding treaty would have to overcome the opposition from corporate lobbies and gained a sufficient number of ratifications by a significant group of States. Finally, the

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on transnational corporations and other business enterprises with respect to human rights' (June 2015), <http://www.ihrb.org/pdf/submissions/2015-06-22-IHRB-submission-UNIGWG.pdf> accessed 15 June 2017.

[18] Ibid.; Chip Pitts, 'For a Treaty on Business & Human Rights', Presentation at University of Notre Dame Business and Human Rights Resource Centre's Event (14 May 2014), Business and Human Rights Resource Centre Online Publication, accessed 15 June 2017.

[19] Business and Human Rights Resource Centre, 'Does the World Need' (14 May 2014) 1.

[20] Ibid. See also the position of the International Organisation of Employers (IOE) supporting efforts to secure the enjoyment of human rights, but questioning the rationale and added value of a new treaty on business and human rights. IOE, 'IOE Comments on the Proposal for a Binding UN Treaty on Business and Human Rights. Proposal for a legally binding Treaty on Business and Human Rights' (9 May 2014) IOE Online Publication <http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-05-12__G-523_IOE_Comments_on_a_Binding_UN_Treaty_on_Business_and_Human_Rights__final_.pdf> accessed 31 July 2016; IOE, 'Draft Strategy on IOE Engagement in the "Ecuador Resolution" Intergovernmental Working Group on Business and Human Rights' (5 November 2014) IOE Online Publication <http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-11-05__Draft_IOE_Strategy_Engagement_with_Ecuador_Initiative_IWG__Final_.pdf> accessed 31 July 2016.

excessive length of negotiating such a binding instrument might have contributed to the creation of weak instrument.[21]

Strong critiques against a future legally binding treaty were also expressed by John Ruggie. Already in 2008, Ruggie had noted that the same Principles, 'lay out a strategic policy framework for better managing business and human rights challenges'[22]. Moreover, while this Framework aimed at providing a basis for greater policy coherence, however '*there is one thing the report does not do: recommend that states negotiate an overarching treaty imposing binding standards on companies under international law*'.[23] His opposition to the establishment of a treaty was however not continuous. He stated that:

> *'[t]reaties form the bedrock of the international human rights system. Specific elements of the business and human rights agenda may become candidates for successful international legal instruments. But it is my carefully considered view that negotiations on an overarching treaty now would be unlikely to get of the*

[21] John Ruggie, 'A UN Business and Human Rights Treaty? An issues brief' (28 January 2014) Harvard Kennedy School, <www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>, accessed 25 June 2016; Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business' (March 2014), Business and Human Rights Resource Centre Online Publication, <https://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf> accessed 25 June 2017.

[22] It is interesting to note that John Ruggie argued that that 'the category of business and human rights involves an enormous range of problem diversity, legal and institutional variations, as well as conflicting interests across and even within states. Therefore, a general business and human rights treaty would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places. The same opinion was also shared by Jane Martins. Ruggie also pointed out a prospective treaty might focus only on gross human rights violations. This suggestion was instead criticized by Surya Deva. In answering to Deva, Ruggie explained that Deva 'believed that the first takes too constricted a view of the role of international law. I (John Ruggie) well understand that international law has expressive functions in addition to its regulative role. But there is no shortage of expressive international human rights I did so because of the severity of the abuses involved; because the underlying prohibitions already enjoy widespread consensus among states yet there remains considerable confusion about how they should be implemented in practice when it comes to legal persons (think Alien Tort Statute post-Kiobel); and because the knock-on effects for other aspects of the business and human rights agenda would be considerable, as was true of the ATS.' John Ruggie, 'Treaty Road not Traveled' (May 2008) Ethical Corporations, 42-43; Ruggie, 'Life in the Public Domain' (23January 2015); Jena Martin, 'The End of the Beginning? A Comprehensive Look at the U.N.'s Business and Human rights Agenda from a Bystander Perspective' (2012) 17 Fordham Journal of Corporate and Financial Law; Surya Deva, David Bilchitz (edited by) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

[23] In addition, John Ruggie pointed out that the UN Guiding Principles Governments would never have endorsed if they were a hard law instrument: '[t]he GPs are a "soft law" instrument, which increasingly is how governments make initial moves into highly complex and conflicted issues. Even so, several generally human rights-friendly states needed considerable persuasion to accept certain foundational formulations in the GPs, not merely because they were protecting "their" corporations as might be assumed, but in defense of strongly held legal doctrines and to avoid setting precedents for other, unrelated, matters.' John Ruggie, 'Treaty Road not Traveled' (May 2008) Ethical Corporations, 42-43; Ruggie, 'Life in the Public Domain' (23 January 2015).

ground, and even if they did the outcome could well leave us worse off than we are today.'

Ruggie gave three main reasons to support his statement. Firstly, a treaty-making process can be slow, while the challenges of business and human rights are immediate and urgent. Secondly, a treaty might undermine effective shorter-term measures to raise the standards applicable to business companies with respect to human rights. And lastly, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.[24]

In reference instead to the mandate given to the OEIWG under Resolution 26/9, Ruggie noted that the same was broad and controversial. As a result, the boarder the scope and the more controversial the subjects, the longer the treaty negotiation process would have been. Thus, while '[...] *immediate solutions to the escalating challenge of corporate human rights abuses*' were necessary, the negotiation process and the treaty-making would probably have been extremely slow.[25] Secondly, the treaty-making process could have jeopardized the success and positive accomplishments achieved by the Guiding Principles. As part of the continuous evolution of the business and human rights debate, 'further legalization [was] an inevitable and necessary component of future developments', nevertheless the failure of the Norms and previously of the Code of Conduct during the 1970s had made clear that an overarching international legal framework through a single treaty governing all aspects of transnational corporations in relation to human rights was not achievable in practice, due to the several interweaving facets of the issues at stake, which could not be covered by one single treaty. Indeed, the fragmentation of international law and the conflicting interests among States made the creation of one single treaty unrealistic: '*the category of business and human rights is a case in point: it encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of human rights*', and the growing number of transnational corporations made the attempt even more challenging.[26] As a result, any attempt to draft a single binding treaty would have led to a

[24] Ibid.

[25] Ibid.

[26] Ruggie, 'Regulating Multinationals' (2015); John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (8 July 2014) Institute for Human Rights and Business online publication, <http://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre>, accessed 20 June 2017.

treaty at such an abstract level to be lacking of substance and 'of little practical use to real people in real places.'[27]

Thirdly, in John Ruggie's opinion, even though an agreement concerning the imposition of obligations upon business enterprises had been reached, other issues, such as the enforcement of such obligations, would have been hardly agreed upon.[28] In particular, the option regarding the establishment of a Treaty Body (to which companies would report on their human rights obligations and their performance) was deemed unrealistic by John Ruggie. According to him, the huge number of business actors, as well as the large spectrum of human rights that corporations may potentially violate, as well as the inability or unwillingness of host countries to enforce regulations vis-à-vis corporate actors and the reluctance of home countries to extraterritorially enforce same regulations could compromise the effectiveness of a legally binding treaty. Finally, in line with the notorious "principled pragmatism"[29] advocated by John Ruggie during his six-year mandate, he suggested narrowing the scope of a prospective binding treaty and focusing only on business-related gross human rights abuses, including those which may rise to the level of international crimes (genocide, extrajudicial killings, and slavery and forced labour) by virtue of the consideration that "the gross human rights violation" criterion was more likely to achieve political *consensus* among States.[30]

Finally, to complete the understanding of the debate, it is important to note that some scholars and experts endorsed an intermediate position, pointing out that the prospective treaty should have been complementary to the implementation of Guiding Principles and, at the same time, it should have been supplementary to the enforcement of those existing norms at national and international level.[31]

[27] Ibid.

[28] In particular, John Ruggie considered as unrealistic the possibility of establishing a Treaty Body to which companies would report on their human rights obligations and performance.

[29] ''Principled Pragmatism" refers to '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.' In John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Co, 2013), xlii-xliii.

[30] Ruggie, 'Life in the Global Public Domain' (23 January 2015) 5; Ruggie, 'Regulating Multinationals' (2015).

[31] Ibid.

3. The work of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (OEIWG)

The Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, established under HRC Resolution 26/9, is mandated to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[32] Accordingly, 'the first two sessions […] shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument' with the aim of 'prepar[ing] elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions'.[33]

3.1 The first session of the OEIWG

In Geneva from the 6th to the 10th July 2015, the OEIWG opened its first session and started the debate regarding the elaboration of a legally binding treaty on business and human rights.

The first session gathered participants from Governments, civil society and business organisations[34], however the participations from States was scarce and sometimes controversial[35]. On one hand, some States, such as Brazil and China, did not maintain a clear

[32] UN HRC, Resolution 26/9, Paragraph 1.

[33] Ibid., Paragraph 2-3.

[34] The extensive list of contribution and submissions provided for the first session of the OEIWG is available at the website of the OHCHR. In particular see: Written contribution by Scottish Human Rights Commission, UN Doc A/HRC/WG.16/1/NI/1; Joint contribution by International Federation for Human Rights Leagues, Tides Center Project, International Network for Economic, Social and Cultural Rights (ESCR-net), UN Doc A/HRC/WG.16/1/NGO/7; Written contribution by Friends of the Earth International, UN Doc A/HRC/WG.16/1/NGO/13; Written contribution by Law Society of England and Wales, UN Doc A/HRC/WG.16/1/NGO/6; Written contribution by International Corporate Accountability Roundtable.

[35] Doug Cassel, 'Treaty Process Gets Underway: Whoever Said It Would Be Easy?' (July 2015), Business and Human Rights Resource Centre, Debate Blog Series, < http://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy>, accessed 23 July 2017; John Ruggie, 'Get real or we'll get nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty' (July 2015), Business and Human Rights Resource Centre, Debate Blog Series, <http://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>, accessed 23 July 2017.

position; similarly, Russia changed its position and publicly expressed its opposition to the prospective treaty - despite an initial vote in favour of Resolution 26/9. On the other hand, the majority of corporations' home States did not take part in the debate: Canada, Australia and the United States were not present, whereas the European Union left the session during the second day. The European Union had previously announced the conditions for its participation in the debate. Among them, the EU had asked for a reaffirmation that the treaty process would be complementary to the implementation of the UN Guiding Principles, and the extension of the scope of the prospective treaty to all businesses, rather than only to transnational corporations.[36]

The first session encompassed different panels covering the principles that the prospective treaty should take into consideration: the implementation of the Guiding Principles, the coverage of the prospective treaty with respect to its objective and subjective scope, the obligations of States party to the treaty - including any extraterritorial obligations, the responsibilities of transnational corporations and other business enterprises to respect human rights, the legal liability of corporations for human rights abuses, and the design of national and international mechanisms for access to remedy for victims of human rights

[36] The European Union, through its submission to the OHCHR on the occasion of the first session of the OEIWG, underlined its support for a consensual track at the UN level, as well as for the Human Rights Council Resolution 26/22. Accordingly, the EU declared of being 'firmly committed to the implementation of the "UN Guiding Principles on Business and Human Rights', stressing how these latter 'constitute a policy framework/guidance and a compilation of existing international obligations. By means of organising and subsuming all existing state and corporate obligations in a single, comprehensive document, the UNGPs allow for the identification of loopholes and grey areas of the current national and international regulatory framework with regard to corporate conduct and human rights.' However, the EU expressed its concerns as related to the process of drafting a prospective treaty, since 'the focus on solely transnational corporations, as foreseen in the process set out by resolution 26/9 which divided the Human Rights Council, neglects the fact that many abuses are committed by enterprises at the domestic level, thus undermining a fundamental element of the UNGPs that cover all businesses, regardless of whether firms are transnational. Moreover, 'small and medium-sized enterprises (SMEs) are seemingly absent from this debate. In real terms, SMEs represent an overwhelming percentage of all domestic economies, regardless of whether they are developing, transitional or developed economies'. Ruggie, 'Get real or we'll get nothing' (July 2015); European Union, 'Inter-Governmental Working Group (IGWG) on the elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights. Submission of the European Union' (2015) OHCHR Publication,
<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>, accessed 31 July 2016.

abuses perpetrated by business entities, including through international judicial cooperation.[37]

To accommodate the request of the European Union, a panel reiterating the importance and complementarity of the Guiding Principles was added on the first day. Nevertheless, the question regarding which companies should be regulated under the prospective treaty made the European Union leave the session. In this regard, while participants generally shared the view that a legally binding instrument should integrate the UN Guiding Principles and, at the same time, address all human rights abuses, rather than only gross human rights violations[38], opinions were divided on the question as to whether the prospective treaty should cover only transnational corporations or more generally apply to all business enterprises.[39]

[37] UN HRC, 'Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument' (5 February 2016) UN Doc A/HRC/31/50.

[38] UN HRC, Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights - Report of the Chairperson-Rapporteur: Amb. María Fernanda Espinosa Garcés (10 July 2015), Paragraphs 57-60.
General *consensus* was reached with regard to the scope of human rights violations to be covered by the prospective binding treaty: experts, member states as well as non-governmental organisations expressed indeed the need to include a full catalogue of human rights within the scope of the binding treaty, instead of restricting the scope to gross and severe human rights violations.

[39] As stated before, the European Union expressed the opinion that the focus of treaty should have been expanded as to included also small and medium-sized enterprises, which represented an overwhelming percentage of all domestic economies, regardless of whether they are developing, transitional or developed economies. The same opinion was shared by some panellists speaking during the first session of the OEIWG and stressing that all businesses, including small and medium-sized enterprises, were required to protect human rights. Specifically, the panellists noted that multinational companies competed locally for business and faced the challenge of competition with the unorganized and informal markets. The panellists added that it was critically important to enable host States to cast their net more broadly and minimize the informal economy, that all companies must abide by the laws of the States where they operate ("host States") and that the most valuable work was to equip host States to meet their responsibilities to protect human rights. However, as far as the debate regarding the footnote of Resolution 26/9 is concerned, another panellist pointed out that it would have been almost impossible to cover and control all domestic enterprises in the fulfilment of human rights, owing to the huge number of such enterprises and because they would be subject to domestic systems. The same panellist underlined that the prospective treaty would have encountered issues in defining transnational corporations and argued that there were examples of international agreements that did not include specific definitions. Some approaches for defining of the term "transnational corporations" could be through jurisprudence, delegation to national legislation or an intermediate referral system. Finally, the panellist stated that there were a number of precedents in other areas of law that address the control of subsidiaries and indirect control, for example, tax law, commercial law and intellectual property law. Opposing positions were held by some States' and NGOs' representatives emphasizing the need to focus on transnational corporations only. European Union, 'Submission of the European Union' (2015) OHCHR Publication, Ibid; UN HRC, Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument (5 February 2016) UN Doc A/HRC/31/50, 16.

Indeed, a footnote in Resolution 26/9 points out that the concept of "other business enterprises" '*denotes all business enterprises that have a transnational character in their operational activities*, *and does not apply to local businesses registered in terms of relevant domestic law*'.[40] Although the exclusion of local businesses from the scope of the prospective treaty may lead to a situation of double standards with negative effects on competition – since some transnational corporations are registered under States' national laws, even though they cannot be described as a locally operating business[41], a large number of delegations stressed the need to concentrate on transnational corporations due to the fact that local businesses cannot move from a geographical area as, instead, transnational corporations can. Pakistan, in particular, argued that local companies can be regulated by national governments, without the need for intrusion into their domestic sovereignty by international regulation.[42] On the other hand, other delegations, stressed that both transnational corporations and other business enterprises should be subject to direct human rights obligations under the treaty. Despite the opinions (mainly from the panellists and the participating civil society organisations) in favour to a broader inclusion of all business enterprises within the scope of the prospective treaty, the majority of the countries, among them Pakistan, China, Venezuela and India, remained against such proposal, whereas South Africa, Uruguay and Ecuador kept a middle position and the European Union left the debate.

Furthermore, no general agreement was reached in reference to the questions of the legal liability of corporations and access to remedy for victims of business-related human rights violations.

The first question related to the establishment of direct obligations upon business enterprises and entailed the status of business companies, the issue of whether they possess international legal personality, as well as the duty of States to regulate the activities of corporations through domestic laws.

Some panellists and delegations argued the imposition of direct obligations upon corporations would prevent corporations from hiding behind the alleged shortcomings of

[40] UN HCR, Res 26/9; UN HRC, 'Report of the Open-ended intergovernmental working group' (10 July 2015) Paragraph 53.
[41] Martens, Seitz (2016) 24-25; Cassel (July 2015).
[42] Ibid.

States. Indeed, a national system of obligations to legislate international human rights norms at the nation-state level had not been able to prevent human rights abuses by transnational corporations, particularly in case of weak States which were not willing or unable of regulating corporations and holding them accountable for human rights violations.

Some panellists asserted that there was no conceptual or legal obstacle for an international treaty, concluded by States, to create obligations for business enterprises[43] since transnational corporations could already be considered as actors in international law. As a matter of facts, they asserted that some international agreements already include direct obligations upon corporations. Some examples are the International Convention on Civil Liability for Oil Pollution Damage[44]and the UN Convention on the Rights of the Sea[45]. The first holds ship owners (including companies) liable for oil pollution damage. It should be noted however, that Article 9 of the Convention provides for the obligation of each Contracting Party to 'ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation'.[46] The UN Convention on the Law of the Sea, instead, forbids not only States, but all natural and juridical persons, from appropriating the seabed and/or associated resources.[47] Additionally, it was also pointed out that business corporations and investors have long enjoyed the benefits of rights and protections established in bilateral investment treaties and other similar treaties concluded by States, and at the same time some human rights have been interpreted to apply also to legal persons, including business corporations. Accordingly, it would not be impossible for a treaty to create obligations and liabilities for companies, which States would be in charge of applying or enforcing.[48]

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[43] Chip Pitts, 'Oral Statement during the first session of the OEIWG' (7 July 2015), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Statements.aspx>, accessed 2 August 2017; UN HRC, 'Report on the first session' (5 February 2016) UN Doc A/HRC/31/50, 13-19.

[44] International Maritime Organisation, Convention on Civil Liability for Oil Pollution Damage, entered into force 19 June 1975; replaced by 1992 Protocol, entered into force 30 May 1996.

[45] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994.

[46] Convention on Civil Liability for Oil Pollution Damage, Article 9.

[47] United Nations Convention on the Law of the Sea, Article 137 and 153.

[48] Chip Pitts, 'Oral Statement during the first session of the OEIWG' (7 July 2015), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Statements.aspx>, accessed 2 August 2017; Carlos Lopez, 'International talks on a treaty on business & human rights: A good start to a bumpy road' (July 2015) Business and Human Rights Resource Centre, Debate Blog Series, <http://business-humanrights.org/en/international-talks-on-a-treaty-on-business-human-rights-a-good-start-to-a-bumpy-road>, accessed 31 July 2017; UN HRC, 'Report on the first session' (5 February 2016) UN Doc A/HRC/31/50, 13-19.

On the other hand, the intervention and consent of States are nonetheless required, since States would have to monitor the compliance of obligations and, eventually, enforce judgements – even under a regime of direct obligations for private companies. Opponents to the establishment of obligations upon States also argued that human rights obligations must not be confused with civil and criminal national laws which apply also to corporations, since under international and human rights law only States have international legal personality.[49]
In discussing the standards necessary to establish the legal liability of corporations and measures to grant greater access to remedies, some delegations underlined the importance of addressing the legal loopholes that corporations exploit in order to escape liability from harmful conduct, as well as ensuring victims' access to remedy. Generally, it was advocated that there was a 'need for an international legally binding instrument to complement existing national, regional and international efforts, and that such an instrument ensure the full scope of remedies and generate clear mechanisms for redress'.[50] In addition, while there was wide recognition that available legal remedies are elusive and thus more uniform standards are needed, the discussion didn't reach any concrete proposals apart from the shared assertion that the effectiveness of the prospective treaty would 'depend on its ability to complement existing national, regional and international efforts in the field of business and human rights'.[51]

In conclusion, the majority of participants to the first session agreed on the complementarity between the Guiding Principles and the prospective treaty, as well as on the subject matter of the latter, which should not be restricted to the most severe human rights violations, rather include all forms of human rights infringements. Nevertheless, other controversial issues - extensively discussed during the first session such as the existence and the implications of extraterritorial obligations of States[52] - remained outstanding, among them the questions of direct obligations upon States and mechanisms to access remedy.

[49] UN HRC, 'Report on the first session' (5 February 2016) 11-12; OHCHR, Written contribution by Law Society of England and Wales (2015), UN Doc A/HRC/WG.16/1/NGO/6; OHCHR, Written contribution by Franciscans International (2015) OHCHR Online Publication; OHCHR, Joint contribution by Social Service Agency, Global Policy Forum, Geneva Infant Feeding Association, CIDSE (2015) UN Doc A/HRC/WG.16/1/NGO/9.
[50] UN HRC, 'Report on the first session' (5 February 2016) 19-20.
[51] Ibid., 19-21.
[52] Especially the Treaty Alliance and its members have repeatedly referred to the extraterritorial obligations of states in their demands for the treaty. Various sides however expressed reservations concerning the concept and the corresponding legal competency of States outside their territories. Some countries, among them China and Russia, as well as business representative expressed their disagreement, stating that foreign countries

3.2 The second session of the OEIWG

The second session of the OEIWG continued the examination of the content, scope, nature and form of the prospective treaty and reached general agreement, among delegations and civil society organizations, on the necessity of a legally binding instrument to compensate the imbalance between the progressive recognition of rights and the economic and political guarantees extended to corporations, which undermine the enjoyment of the individuals' rights.[53] During the session, it was also remarked that the current international legal order entails gaps and imbalances with respect to the relationship between human rights and corporations, especially with reference to the possibility of victims of business-related human rights violations to access to justice and obtain effective remedy. Furthermore, it was stressed that such gaps may be exacerbated by the complex legal structure of corporations, which together with their great economic powers, can increase the uneven playing field with respect to the States' capability to regulate the operations of corporations, leading, as a result, to a lack of accountability upon corporations particularly in their cross-border activities.

As already stated during the previous session of the OEIWG, the debates of the second session reiterated that the duty of States to protect human rights should be complemented

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could attempt to interfere in what they see as their internal affairs, violating their national sovereignty. Martens, Seitz (August 2016) 20-21.

[53] OHCHR, 'Draft report on the second session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (October 2016) <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>, accessed 1 November 2016, 4-5; OHCHR, 'Written Contribution of the European Union. European Union contribution in view of the second session of the Intergovernmental Working Group on Transnational Corporations and Other Enterprises with respect to human rights' (29 August 2016) OHCHR Online Publication <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> accessed 1 November 2016; OHCHR, 'Written Contribution of the International Labour Organisation. ILO submission for the 2nd session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to human rights' (2016) OHCHR Online Publication <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> accessed 1 November 2016; OHCHR, 'Written Contribution by Cuba' (2016) OHCHR Online Publication <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> accessed 1 November 2016. The extensive list of contribution and submissions provided for the first session of the OEIWG is available at the website of the OHCHR:
<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>. In particular see: Written contributions by ESCR-Net; Joint contributions by FIAN International, Franciscans International, CCFD-Terre Solidaire, the Colombian Commission of Jurists, La Plataforma Internacional Contra la Impunidad and Society for International Development; Written contributions by Friends of the Earth International; Written contribution by the International Federation for Human Rights (FIDH); Written contribution by the International Corporate Accountability Roundtable (ICAR).

by a comprehensive and balanced manner of addressing the obligations and responsibilities of business companies with respect to human rights. This belief was shared by several States, underlining also that the prospective treaty would have to set out corporations' obligations *vis-a-vis* prevention, mitigation, and compensation for potential human rights violations perpetrated as a result of their business activities. Furthermore, it was argued that in line with the second pillar of the UN Guiding Principles, which already refers to the responsibility of business enterprises to respect human rights, a legally binding instrument could clarify the mechanisms and measures required to implement such responsibilities, particularly by moving beyond the voluntary nature of those principles.[54]

The debate explored also the possibility to impose direct obligations and responsibilities on private actors, like corporations, under international law. In particular, it was argued that although international law was traditionally conceived as governing the relation between States, there is no legal impediment in international law to the imposition of obligations and responsibilities on private non-State actors.[55] In line with this position, some participants to the second session underlined that the traditional distinction between "subjects" and "objects" of international law and the discussion about whether corporations can be subjects of international law are not determinative of this legal question and consequently States could impose direct obligations on private non-State actors under international law.[56]

Furthermore, extensive discussion focused also on the lessons learned and challenges to access to remedy, particularly reiterating the existence of barriers, of diverse nature, preventing victims from obtaining redress, and at the same time underlining that a binding

[54] Specifically, several delegations taking part in the second session of the OEIWG pointed out that business enterprises could support the economy and contribute to development while respecting human rights and to this aim constructive dialogue in the process towards an international legally binding instrument was essential. It was also underlined by some delegations that support to the Guiding Principles on Business and Human Rights was essential to implement them and promote national action plans. In particular, a wide number of delegations recognized that the Guiding Principles and the mandate of the working group were mutually reinforcing, both representing positive steps towards the protection of human rights. UN HRC, 'Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (4 January 2017) UN Doc A/HRC/34/47, 4-6.
[55] Ibid, 12-13.
[56] Ibid.

instrument would need to prevent violations and provide for mitigation of and remedy for negative impacts of corporations.[57]

A wide number of delegates underlined the relevance of following a victim-centred approach and generally agreement was reached on the necessity to remove barriers, at national and international level – in host and home countries, which prevent victims from having redress. Particularly, it was acknowledged that '[*e]ven if there are positive measures to protect victims from human rights violations by [corporations], either binding or soft law, at national level, there must also be measures, standards and mechanisms in a binding instrument at international level. [The UN Guiding Principles] and the international legally binding instrument should be mutually reinforcing processes, and all the improvements achieved in the field of business and human rights in the framework of the universal system must be taken into account for the elaboration of a legally binding instrument*'.[58]

Among the proposals to improve access to remedy in home countries, it was suggested that the prospective treaty may require States to abolish the corporate veil, while developing legal approaches to hold parent companies accountable for human rights abuses also when committed by their subsidiaries. Another panellist added instead that there was a need for a shift in the burden of proof. As a matter of facts, while due diligence may be 'a useful an analytical tool for managing risks relating to human rights, liability standards should include strict liability and precautionary principles and be secured, for example through the reversal of the burden of proof and rebuttable presumptions.'[59]

Finally, it was also stressed that the treaty should require States to provide for civil, criminal and administrative liability in case of violations of human rights by business, as well as it should include a provision for collective redress and access to legal aid in appropriate cases.[60] In conclusion, 'a binding treaty should codify and develop provisions for access to an

[57] A specific panel was organized on the topic of "Lessons learned and challenges to access to remedy (selected cases from different sectors and regions)", where it was stressed the importance of access to remedy, particularly for the most vulnerable and marginalized, while underlining barriers which prevent victims from having access to remedies. UN HRC, 'Report on the second session' (4 January 2017) 20-21.

[58] Ibid., 5-6.

[59] OHCHR, 'Draft report on the second session of the Open-ended intergovernmental working group' (October 2016) 20.

[60] OHCHR, 'Joint contribution by CIDSE, Brot für die Welt and IBFAN-GIFA' (October 2016) OHCHR Online website, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/WrittenContributions.aspx>, accessed 2 November 2016, 2-3.

effective remedy for wrongful conduct by both States and business enterprises, and it would help to redress the inequality between corporate rights and obligations'.[61]

4. Outstanding issues in the field of Business and Human Rights

Developments over the last years and the adoption of Resolution 26/9 by the Human Rights Council, combined with the increased visibility gained by violations of human rights perpetrated by corporations, have certainly led to significant progress in the field of business and human rights. Nevertheless, numerous questions remain unanswered and several areas necessitate additional clarification.[62]

As it clearly emerged from the first two sessions of the OEIWG, the most severe challenges seem to concern the deficits in ensuring accountability of business companies, and the inability of victims of business-related human rights violation to have access to effective remedies. The same position was stressed by the Human Rights Commissioner, speaking at the second session of the OEIWG, where he underlined not only the importance of preventing and redressing business-related human rights abuses, but also the necessity of ensuring greater accountability and access to remedy for victims.[63] It is worth noting that the recognition that the area of access to remedies and justice needs greater attention was already marked in the Human Rights Council Resolution 26/22, as well as in the work conducted by the Office of the High Commissioner for Human Rights, leading the *Accountability and Remedy* Project and resulting in the publication of final recommendations.[64]

Indeed, while on one side business enterprises have been involved in a variety of abuses - ranging from the direct involvement of business managers, to cases of complicity through

[61] OHCHR, 'Draft report on the second session of the Open-ended intergovernmental working group' (October 2016) 21.

[62] An overview of different positions and opinions held by academics and civil society representatives on the results following the first and second session of the OEIWG is available at the Business and Human Rights Resource Centre website: <https://www.business-humanrights.org/en/binding-treaty>.

[63] OHCHR, 'Report on the second session' (2017) A/HRC/34/47, 3.

[64] The Project which also received a mandate from the Human Rights Council pursuant to Resolution 26/22 aimed to deliver credible, workable guidance to States to enable more consistent implementation of the UN Guiding Principles on Business and Human Rights in the area of access to remedy. In May 2016, OHCHR published its final report to the Human Rights Council, containing guidance to States on how to strengthen aspects of domestic judicial systems to improve accountability and access to remedy for victims of business-related human rights abuses. UN HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse. Report of the United Nations High Commissioner for Human Rights' (10 May 2016) UN Doc A/HRC/32/19.

the supply of information or technologies, through the supply of financial assistance to human rights abusers or through joint ventures with them - on the other side, as already mentioned, victims of such violations often face considerable barriers when they seek redress for the violations suffered.[65] Beside those situations in which States are directly involved in the perpetration of abuses, host States may, for example, not possess a functioning rule of law or a transparent and independent justice systems through which they can provide victims with access to justice and remedies. Victims may also try to address courts in the home State of business' enterprises, but similarly, they may have to face barriers and obstacles to access remedy and, as result, they might be denied justice.[66]

Thus, States are not always able or willing to address these violations and provide victims of business-related abuses with access to remedies for the violations suffered, thus failing to fulfil their duty to protect individuals under their jurisdiction, as well to ensure individuals' right to remedy.

Furthermore, at the international level there is no comprehensive international instrument addressing corporate accountability, leaving the door open to a legal vacuum and potential violations perpetrated by business companies. The deficit in ensuring business companies' accountability is also ascribable to the lack of legal personality over business companies. To this aim, during the second session of the OEIWG, it was advocated for the imposition of direct human rights obligations on business enterprises, which will make it easier for victims to seek remedies against the corporations involved in human rights violations. As a result, victims would be able to trigger judicial remedies without the help of state agencies and, at the same time, direct human rights obligations upon corporations would enhance the leverage of victims in negotiating, out of court, settlements with corporations.[67] However, the answer to the very debated question about whether or not direct obligations can be imposed directly upon corporations through an international treaty remained unclear and it will be further analysed in the next chapter.

[65] UN HRC, 'Report on the second session' (4 January 2017) 20-21; Zerk (2014) 8; International Commission of Jurists, Report (2016) 9-11.
[66] Skinner, McCorquodale, De Schutter, Report (2013).
[67] OHCHR, Surya Deva Intervention during Panel III, Subtheme I (October 2016) OHCHR Online website, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/WrittenContributions.aspx> accessed 2 November 2016.

At the domestic level, the available legal avenues to hold business enterprises liable are limited. Civil litigation is theoretically possible in almost all countries, however some recent developments, including the notorious judgment of the US Supreme Court in the *Kiobel* case, seem to have restricted the reach of the Alien Tort Statute and the possibility to bring civil litigation (under the ATS) when the relevant conduct took place outside the United States.[68] On the other hand, it has to be noted that civil litigations brought before European courts are increasing. While it is true that in the majority of jurisdictions victims of corporate-related human rights abuses may sue business enterprises in civil courts, not for the human rights violation *per se*, but on the ground of wrongful behaviour doctrines, claimants still face a number of barriers to access courts and obtain redress. On the other hand, turning to criminal prosecution, this is often not a feasible option and, when criminal action is pursued, this is often limited to prosecution of individuals acting as officials or representatives within the corporations at stake, rather than of the company itself.

Furthermore, it is worth noting that the obvious lack of common standards in law and enforcement among different jurisdictions may lead to an uneven playing field for business enterprises, which operate in jurisdictions where there is a higher risk of liability in comparison with other jurisdictions where standards and their enforcement are weaker. As a matter of facts, due to the uncertainty of the level of liability in which business companies operate, some enterprises may be much easier led to try to capitalize on these differences to their own benefit and to the detriment of human rights. Thus, the same differences may

[68] In the United States, the Alien Tort Claim Act (ATS) could have represented a promising example of a way to hold business enterprises liable for human rights violations, however in April 2013 the ruling of the Supreme Court in the *Kiobel* case seems to have restricted the reach of the Alien Tort Claim Act and the possibility to bring claims (under the ATS), when the relevant conduct has taken place outside the United States. Indeed, although the Supreme Court left the possibility to apply the ATS when the claims touch and concern the territory of the United States with sufficient force, it is not clear when and/or under which conditions claims possess the 'sufficient force' required to reject the presumption against extraterritoriality. The *Kiobel* case will be discussed in deeper details in Chapter 4. On the case see among others: Ingrid B. Wuerth, 'The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.' (2013) American Journal of International Law; Anthony Bellia, Bradford Clark, 'Kiobel, Subject Matter Jurisdiction, and the Alien Tort Statute' (2012) Notre Dame Legal Studies Paper No. 12-52*;* Liesbeth Enneking, 'Multinational Corporations, Human Rights Violations and a 1789 US Statute - A Brief Exploration of the Case of Kiobel v. Shell' (2012) 3 Nederlands Internationaal Privaatrecht; Odette Murray, David Kinley, Chip Pitts, 'Exagerating Rumors of the Death of an Alien Tort: Corporations, Human Rights and the Peculiar Case of Kiobel' (2011) 12 Melbourne Journal of International Law; Roger Paul Alford, 'The Future of Human Rights Litigation after Kiobel' (2014) 89 Notre Dame Law Review; Michele M. Porcelluzzi, Matteo M. Winkler, 'C'era una volta *Kiobel*: I giudici americani tornano a pronunciarsi sull'extraterritorialità dell'*Alien Tort Statute*' (20015) Diritto del Commercio Internazionale; Matteo M. Winkler, 'What Remains of the Alien Tort Statute After Kiobel?' (2013) North Carolina Journal of International Law.

result in fostering an environment characterized by a “race to the bottom” among States, where the latter try to attract foreign investments through a more favourable business-friendly environment.

Therefore, due to all these issues and by virtue of the recognition that the current legal framework does not provide for adequate regulation to prevent or redress the negative impacts of the activities of corporations on the enjoyment of human rights, the initiative aimed at creating a binding agreement in international human rights law may provide for a fundamental contribution in the attempt to close those gaps which still remain unsettled after the endorsement of the UN Guiding Principles. The Guiding Principles, for example, do address, under their second pillar, the corporate responsibility to protect and they promote, under the third pillar, a greater access to remedy. Nevertheless, despite their broad endorsement, they remain a soft law instrument, which led several participants in the two sessions of the OEIWG to strongly advocate that the future international legally binding treaty would remove obstacles to justice, in both host and home States.

Chapter 3: Greater responsibility of business enterprises?

1. Introduction

As emerged during the first and second session of the OEIWG, the current legal framework does not provide for adequate regulations to prevent or redress the negative impacts of the activities of corporations on the enjoyment of human rights and, as it was remarked, the current legal order entails gaps and imbalances with respect to the relationship between human rights and corporations. Currently, there is no international human rights treaty imposing legally binding obligations to respect human rights upon corporations, rather only States hold the duty to respect, protect and fulfil human rights under international law. This gap is considered as one of the causing factors of a permissive environment where business enterprises violate human rights, but remain unpunished. In addition, it has to be noted that addressing the legal responsibility of the alleged perpetrators of human rights abuses is closely linked to victims' access to effective remedy and reparation, since '[e]nsuring accountability [of business enterprises] can constitute a component of reparation, as well as provide for the condition by which remedies may be achieved.'[1]

Under Resolution 26/9, the mandate of OEIWG is to elaborate an international legally binding treaty to regulate the activities of corporations in international human rights law and, accordingly, the first two sessions of the OEIWG were dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international legally binding instrument.[2] With reference to the scope of the prospective binding treaty, the OEIWG will have to face, among others, the controversial question regarding which entities should be considered as duty-bearers in the prospective binding treaty.[3] Particularly,

[1] International Commission of Jurists (ICJ), Report 2016, 15.

[2] UNHRC, Res 26/9, 2.

[3] It has to be noted that the debate surrounding the scope of the prospective legally binding treaty involves also a discussion relating to a footnote included in Resolution 26/9 and whether the scope of the treaty will be extended to cover all business enterprises or only transnational corporations as set forth in the footnote. The footnote refers indeed to "Other business enterprises" clarifying that the notion denotes 'all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.' The Resolution thus focused on regulating in 'international human rights law, the activities of transnational corporations and other business enterprises' and the footnote provides an explanation of the concept of "other business enterprises". The footnote has however

the question concerns whether only States Parties to the prospective treaty or also transnational corporations and other business enterprises will hold the obligations under the treaty. Thus, in order to establish the duty bearers of the obligations laid down in the future treaty, the OEIWG will have, firstly, to deal with and consequently take a position on the largely debated academic discussion concerning whether or not corporations are subjects of international law. Secondly, it will have to establish whether the prospective binding treaty will bind only States Parties or rather it will impose direct obligations upon corporations.

Traditionally, States are the primary subjects and duty-bearers of international legally binding instruments. International law, as well as international human rights law have generally had States as the only treaty parties and duty-bearers[4] and notably, under international human rights law, the duty to respect, protect and fulfil human rights is held by the State.[5] Accordingly, the first and second pillar of the UN Guiding Principles reiterate that, under international human rights law, only States are bound by the "duty to protect" individuals within the respective jurisdiction and/or territory from human rights violations committed by business entities[6], whereas business enterprises hold only a responsibility – not an obligation – to respect human rights within their respective spheres of activity.[7]

As a result, while the obligations of States are clear and well-routed in international and human rights law, the responsibility of business enterprises, as stated above, might be settled in two different ways in the prospective binding treaty: the treaty may clarify the obligations of State for violations committed by business enterprises or it may impose

created controversy and raised the question as to which business enterprises should be covered by the prospective treaty.

[4] On the isssue of subjects of international law see, among others: Antonio Cassese, *Diritto internazionale* (Il Mulino, 2013); Massimo S. Carbone, Riccardo Luzzatto, Alberto Santa Maria (ed.), *Istituzioni di Diritto Internazionale. Quarta Edizione* (Giappichelli, 2011); Bendetto Conforti, *Diritto internazionale* (Editoriale Scientifica, 2010); James Crawford, *Brownlie's Principles of Public International Law. Eighth Edition* (Oxford University Press, 2012); Jan Klabber, *International Law* (Paperback, 2013); Malcom N. Shaw, *International Law* (Cambridge University Press, 2014).

[5] Moeckli, Shah, Sivakumaran point out the difference between international law and human rights law. Accordingly, under traditional international law 'the manner in which an obligation is supposed to be discharged is not specified. States simply have to do what they commit themselves to do and considerable discretion is left to the means by which they do so. [as far as human rights law is concerned], typically States are supposed to respect and ensure rights to all individuals. […] this is a very broad obligation and in practice the UN human rights treaty bodies have adopted a tripartite typology of how human rights should be secured. According to that typology, States must respect, protect and fulfil human rights.' Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, *International Human Rights Law. Second Edition* (Oxford University Press, 2014) 101-105.

[6] UN HRC, Res 17/31.

[7] Ibid.

obligations directly upon business enterprises. Consequently, the question at stake turns into whether or not business enterprises are subjects under international law and possess international legal personality. However, as pointed out in the first Chapter, the historical developments show that attempts – such as the *Norms on the responsibilities of transnational corporation and other business enterprises with regard to human rights*[8] – aimed at imposing duties directly upon business enterprises, failed because, *inter alia*, they encountered resistance from the business world, as well as States. Furthermore, in line with this opposition, the UN Guiding Principles, later elaborated by John Ruggie, recognized that corporations generally have only a responsibility to respect human rights, rather than an obligation which instead rests only upon States.[9]

The present chapter firstly clarifies the classical conception of international legal personality under traditional international and human rights law, then it moves to the review of some scholars' assertions and arguments, regarding both the reasons why corporations should be considered as subjects under international law and the critiques to the classic state-centric approach in international and human rights law, based on the assumption that individuals hold rights and only states bear obligations. The chapter examines three different approaches, based on three sets of criteria to identify and define international legal personality, focusing on those features identified by the International Court of Justice Advisory Opinion in the *Reparation for Injuries suffered in the service* case.[10] Following the definition of "subject" under international law as provided in the *Reparation* Case, the fifth part of the present Chapter aims at answering the questions about whether or not corporations possess rights and duties, arguing in particular that corporations cannot be deemed as subjects under international law and, thus, as duty bearers in the prospective legally binding treaty.

[8] The Norms represented an ambitious possibility to specify the responsibilities of transnational corporations and other business enterprises and, as a result, hold them accountable in case of corporate-related human rights abuses. The Norms could have represented the first binding instrument to hold corporations liable for any potential violations of human rights, by requiring high levels of accountability to business enterprises, however they led to a divisive debate and were finally not approved by the Commission on Human Rights. Further information about the Norms is included in Chapter 1.

[9] The UN Guiding Principles specify that business enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. (UNHRC, Res 17/31, Principle 11) Thus, corporations should avoid doing harm, however they do not hold any obligations, rather only a *responsibility* to respect fundamental rights.

[10] Hereafter "*Reparation* case".

2. States as subjects under international and human rights law

Traditionally, international law and human rights law are state-centric. 'International law has been understood as a system set up by States to regulate the affairs between them'[11] and accordingly an international treaty creates rights and obligations between States. States are also the subjects of human rights treaties, which are indeed agreements between States, although the beneficiaries of such agreements are individuals within the territories of the States ratifying them.[12] As a result, the classical conception is that individuals are bearers of rights, while States are bearers of obligations, stemming from the individuals' entitlements. These obligations, under international human rights law, have a twofold character: a negative duty of refraining from harming the individuals' rights and a positive duty of taking measures to ensure the fulfillment of the individuals' rights.[13]

Thus, 'under the classical doctrine [of international law], only States [were] international legal persons [and] international law solely emanate[d] from States and exclusively applie[d] to (or [could bind) States, specifically those States which [had] consented to it.'[14] Similarly, the human rights regime has developed along state-centric lines. Human rights treaties were traditionally developed by States as sets of obligations for States and their monitoring mechanisms, providing for the accountability of States, are based on the traditional rules of State responsibility.[15]

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[11] David Bilchitz, 'Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law' (2016) *Indiana Journal of Global Legal Studies*, 23; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) Business and Human Rights Journal, 2. On the subjects of international law see, among others: Antonio Cassese, *Diritto internazionale* (Il Mulino, 2013); Massimo S. Carbone, Riccardo Luzzatto, Alberto Santa Maria (edited by), *Istituzioni di Diritto Internazionale. Quarta Edizione* (Giappichelli, 2011); Bendetto Conforti, *Diritto internazionale* (Editoriale Scientifica, 2010); James Crawford, *Brownlie's Principles of Public International Law. Eighth Edition* (Oxford University Press, 2012); Jan Klabber, *International Law* (Paperback, 2013); Malcom N. Shaw, *International Law* (Cambridge University Press, 2014).

[12] Bilchitz (2016) 2; Moeckly, Shah, Sivakumaran (2014) 98-99. On the special character of international human rights obligations see among others: Moeckly, Shah, Sivakumaran (2014) 96; Metthew Craven, 'Legal differences and concept of the human rights treaty in international law' (2000) European Journal of International Law, 489; E. W. Vierdag, 'Some remarks about special features of human rights' (1978) 9 Netherlands Yearbook of International Law.

[13] David Bilchitz, 'Briefing Paper for Consultation: Direct Corporate Obligations', Paper for the ESCR-Net & FIDH Joint Treaty Initiative, <https://www.escr-net.org/corporate-accountability/treaty-initiative/legal-materials>, accessed 5 September 2016; Moeckly, Shah, Sivakumaran (2014) 96 onwards.

[14] Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (2012, Oxford University Press) 224.

[15] Andrew Clapham, 'Non-State Actors', in Moeckly, Shah, Sivakumaran (2014) 532.

Furthermore, '*traditionally, subject of law or legal personality mean[t] being holder of rights and duties. Under international law, subjects of international law or international legal personality mean[t] possessing or being the addressee of rights and duties in accordance with the international law*' (emphasis added).[16] States are considered the traditional and main subjects under international law and, as a consequence, international norms impose duties upon States, while bestowing rights on them.

On the other hand, '*unlike in domestic law […] no principle or norm in international law provides clear indications concerning what is meant by international legal personality (or international subjectivity), what [other] entities are international legal persons (or subjects)* [and eventually] *on the basis of what criteria or requirements […]*' (emphasis added).[17]

It is this lack of clear-cut and well-defined definition that has led to an extensive debate among scholars regarding the content of international legal personality and the status of subject/object under international law. This debate has extended later to the question about whether or not non-states actors are subjects of international law[18] and, with reference to the topic of the present chapter, whether or not business enterprises possess international legal personality.[19] Thus, while on one hand it is nowadays recognized that States are no longer the exclusive subjects of international law, there is still wide debate about which entities and which actors – besides States – can be considered as subjects under international law.

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[16] Carlo Focarelli, *Diritto Internazionale I* (Cedam, 2012), 19.

[17] Carlo Focarelli, *International Law as Social Construct* (2012) 223.

[18] The notion "non-state actor" is used to refer to 'any entity that is not actually a State, often including armed groups, terrorists, civil society, religious groups and also corporations'. Andrew Clapham, '*Non-State Actors*' in Vincent Chetail (edited by), *Post-Conflict Peacebuilding. A Lexicon* (Oxford University Press, 2009), 200.

[19] See among others: Philip Alston, *Non-State Actors and Human Rights* (Oxford University Press, 2005); Denis G. Arnold, 'Corporations and Human Rights Obligations' (2016) Business and Human Rights Journal; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Andrew Clapham, 'Human Rights Obligations of Non-State Actors: Where Are We Now?' (August 2015) SSRN Online Publication; José E. Alvarez, 'Are Corporations "Subjects" of International Law?' (November 2010) Public Law and Legal theory Research Paper Series, Working Paper N. 10-77, New York University School of Law; Jean D'Aspremont, *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011); Jean D'Aspremont, 'Non-State Actors in International Law: Oscillating between Concepts and Dynamics' (2011) Amsterdam Law School Legal Studies Research paper N. 2011-06; Eric De Brabandere, 'Non-State Actors, State-Centrism and Human Rights Obligations' (2009) Leiden Journal of International Law; Eric De Brabandere, 'State-Centrism and Human Rights Obligations Challenging 'Stateless' Approaches towards Direct Corporate Responsibility' (2009) SSRN Online Publication; Janne E. Nijman, 'Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality' (2010) Amsterdam Centre for International Law Research Paper Series; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal responsibility' (2001) 111 Yale Law Journal.

As a matter of facts, in addition to States, the international legal personality has been nowadays recognized to other actors, in accordance with the International Court of Justice (ICJ) Advisory Opinion on the *Reparation* case.[20] In answering to the question whether the United Nations, as an International Organization, had the capacity to bring an international claim against the responsible *de jure* or *de facto* Government of the injuries suffered, the ICJ ruled that the United Nations had the capacity to bring international claims and it recognized that it was exercising and enjoying functions whose exercise and possession could only be explained on the basis of the possession of international personality. Thus, the ICJ ruled that the UN was an international legal person. This meant that the United Nations could be considered as a subject of international law and as capable of possessing international rights and duties, including the capacity to bring international claims.[21] To reinforce the understanding that States were not the only subjects under international law, the ICJ also pointed out 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'.[22] This further clarification has led to the recognition of international organizations as subjects of international law.[23]

Accordingly, it seems that the doctrine recognizes that States are no longer the exclusive subjects of international law[24], nevertheless the question, relevant for the present study, about whether or not transnational corporations may be listed among the subjects of international law remains open. Indeed, the legal doctrine does not provide a final answer to this question nor a general, uniform and shared definition of international personality. An answer to such a question would have been easier to find if clear agreement existed among scholars on what constitutes legal personality under international law; instead there are wide debates among scholars on the essential elements of legal personality, as well as on

[20] *Reparation for Injuries suffered in the service of the United Nations*, Advisory Opinion, International Court of Justice, 11 April 1949. Hereafter "*Reparation* case".
[21] *Reparation* case, 179.
[22] Ibid., 178.
[23] See among others: Jean D'Aspremont, 'Non-State Actors in International Law: Oscillating between Concepts and Dynamics' (2011) Amsterdam Center for International Law No. 2011-05; Chigozie Udeariry, 'To What Extent do International Organizations Possess International Legal Personality?' (2011) SSRN Online Publications; Fleur E. Johns, 'International Legal Personality' (2009) Sydney Law School Research Paper No. 09/113; Roberto Belloni, Manuela Moschella, Daniela Sicurelli (edited by) *Le organizzazioni internazionali. Struttura, funzioni*, *impatto* (Il Mulino, 2013); Claudio Zanghì, *Diritto della Organizzazioni Internazionali* (Giappichelli, 2013).
[24] Klabbers (2013) 67; Shaw (2014) 189; Crawford (2012) 115.

the main reasons that justify the need to consider transnational corporations as subjects of international law.

3. The debate around the international legal personality of business entities

The question concerning the possession of international legal personality by corporations, and more broadly non-state actors, continues to be the object of academic debates and, at the same time, to be characterized by little agreement.

It was argued that the changes in the international scenario should lead to the imposition of obligations directly upon non-state actors, making non-state actors - including corporations - directly accountable for human rights violations, alongside States.[25] In accordance with this position, the extremely powerful and potentially detrimental role of non-state actors in the international scenario and on the enjoyment of human rights should no longer be ignored.[26] Indeed, the role of transnational corporations has considerably changed, together with their size and their resulting increased power; however, these changes haven't been combined with modifications in the traditional approach to international law, which still considers States as the only subjects and duty bearers. As a result, the detrimental impact of transnational corporations' activities on human rights has remained unpunished, causing the lack of liability of corporations for business-related human rights violations.[27]

Within this scenario, scholars, academic researchers and civil society have highlighted a perceived inadequacy of domestic legislations to effectively regulate the activities of transnational corporations. In addition, the changing role of States, together with the alleged lack of accountability for human rights violations committed by transnational corporations (which is deemed to be a result of the traditional approach of international law) has been considered among the main reasons to explain the necessity of the extension of human rights obligations to corporations and, generally, to non-state actors.[28] Some scholars further

[25] Eric De Brabandere, 'Review Essay: Non-state Actors, State-centrism and Human Rights Obligations' (2009) Leiden Journal of International Law.
[26] Eric De Brabandere, 'Non-state actors and human rights: corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system', in Jean d'Aspremont (Edited by), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 268.
[27] Ibid; Bilchitz (2016).
[28] De Brabandere (2009) 191-192.

point out that the traditional understanding of the States' role with respect to the protection of human rights, has indeed been challenged by the growth and the increased power of private companies, which owe the capacity to produce a considerable and detrimental impact on the enjoyment of human rights.[29] Thus, many share the opinion that the current international scenario has changed and, in turn, a change in the current legal framework is needed.

The rise of non-state actors together with privatization and globalization were considered as the central causes of this evolution.[30] In particular, three trends have been identified in order to explain the need for a reassessment of the boundaries between the private and the public spheres - which in turn will result in more accountability upon non-state actors, including corporations.[31] The first trend is the emergence of fragmented centres of power – including transnational corporations – which extend the individual's perception of authority, repression and alienation beyond the system of the State. Furthermore, the conception of private sphere has changed and has been replaced by a more regulated sphere of private behaviour. This phenomenon, in turn, has cast doubt on other divisions of "private" and "public" including the notion of the business enterprises understood as a private enterprise with no social or public obligations. Lastly, as a result of the emergence of new institutional centres of power, multinational enterprises are able to go around the state machinery and to exercise direct influence on these institutions which, in turn, directly exercise power over the individual.[32]

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[29] David Bilchitz, Paper for the ESCR-Net and FIDH Joint Treaty Initiative.

[30] De Schutter (2006); Clapham (2006).

[31] Clapham (1993) 137-138; Peter Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) International Affairs, 39-40.

[32] Muchlinski (2001), Ibid; Clapham (1993) 137-138. Clapham, while underlining the need to an increased international focus on the role and obligations of non-state actors, deepened his analysis by distinguishing four further phenomena, which he considered essential for the understanding of the changing international legal framework: the globalisation of the world economy, the privatisation of public sectors, the fragmentation of States, and the feminisation of international human rights law. He also points out that, the globalisation did not cause *ipso facto* an increase of human rights violations, however the globalisation determined the weakening of those barriers which traditionally transnational corporations were forced to face, changing at the same time the role of the States and leading to impunity when corporations commit human rights violations abroad.[32] 'The impunity, from which transnational corporations may benefit in foreign countries, can either be traced back to local governments' unwillingness to protect human rights or to their inability to ensure that protection effectively'. To complete the picture, corporations have sometimes become more powerful – especially in terms of economic power – than States. States, in particular where corporations are willing to invest, may in turn both lack laws imposing the respect of the human rights and also violate or be complicit in the violation of the human rights of the individuals under their jurisdiction. As a result, scholars argue that the impunity from which transnational corporations have benefitted in case of business-related human rights abuses is strongly

Besides explanations concerning the reasons why corporations should be considered as subjects under international law or reasons why they already possess international legal personality, the classical state-centric approach in international and human rights law, based on the assumption that individuals hold rights and only states bear obligations, has also been questioned.[33] While some support the opinion that corporations are subjects of international law on the basis either of their participation in the international system or of the growing privatisation of international law – particularly in arbitration and investment law, some others state that corporations are subjects of international law unless States and international organisations express the contrary view in a legally binding form.[34] Finally, others leave the question open, arguing that there is no legal impediment in the claim of corporations' subjectivity.

Furthermore, a different definition (than the explanation provided by the ICJ) of international legal personality and the capacity of actors – not only States – to bear obligations under international and human rights law was also elaborated.[35] Accordingly, it was claimed that non-state actors already have international human rights obligations:

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linked to the lack of obligations upon corporation and to the fact that 'international law is classically addressed to [S]tates'. However, States have progressively lost their central role and should no longer be considered as the only central actors. Thus, from here it comes the necessity to impose direct obligations directly upon corporations and considered them as duty-bearers. Finally, also Eric De Brabandere rephrasing Andrew Clapham, in a similar way, the fragmentation sometimes 'poses serious questions in respect of implementation of human rights law, especially during armed conflict and when no government is available to exercise public authority; [and this phenomenon is strictly connected with] the disintegration of the internal structures of states, often labelled as "failed", "failing", "weak" or "collapsed" States'. Eric De Brabandere, 'State-Centrism and Human Rights Obligations Challenging 'Stateless' Approaches towards Direct Corporate Responsibility' (26-28 March 2009) International Law Association - Research seminar on non-state actors, Online Publication, 3-4.
See also: Oliver De Schutter (edited by), T*ransnational Corporations and Human Rights* (Hart Publishing, 2006); Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) Northwestern Journal of International Human Rights; Eric De Brabandere, 'Non-state actors and human rights: corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system', in Jean d'Aspremont (edited by), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 270; Susan Marks, 'State-Centrism, international law and the anxieties of influence' (2006) Leiden Journal of International Law, 340.

[33] For example, Philip Alston, Andrew Clapham and Oliver De Schutter share the assertion that the classical state-centric approach is no longer valid. Philip Alston, *Non-State Actors and Human Rights* (2005, Oxford University Press); Oliver De Schutter (2006); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

[34] Karsten Nowrot, 'Reconceptualising International Legal Personality of Influential Non-State Actors: towards a Rebuttable Presumption of Normative Responsibilities' in John Fleurs (edited by), *International Legal Personality* (Ashgate, 2010) 372. See also: Jean d'Aspremont (edited by), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011); Susan Marks (2006).

[35] Alston (2005); Clapham (1993); Clapham (2006); De Schutter (2006).

> '*[w]e have an international legal order that admits that States are not the only subjects of international law. It is obvious that non-state entities do not enjoy all the competences, privileges, and rights that States enjoy under international law, just as it is clear that States do not have all the rights that individuals have under international law. […] We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity*'.[36]

Thus, the focus should be on the capacity of an actor to bear human rights obligations, irrespective of its status of subject. Moreover, the fact that non-state actors, including corporations, are capable of violating human rights is the result of being capable of bearing the corresponding human rights obligations, and can be bound by international law to do so. In other words, any non-state actor that violates human rights law, by virtue of having committed that very violation, has, in turn, the capacity of bearing corresponding human rights obligations because it could also have refrained from violating those rights.[37]

An alternative understanding of the traditional subject/object dichotomy has been suggested also by Higgins who claims that international law is a decision-making process in which no subjects and objects exist, rather only a wide range of participants, while also affirming that the classical dichotomy is 'an intellectual prison' with no practical function.[38]

4. Definitions of international legal personality

The notion of international legal personality is not characterized by a uniform definition, rather different set of requirements have been considered as necessary to determine whether an actor possesses international legal personality.[39]

According to one first approach, the international legal personality can be defined when a set of attributes similar to those possessed by the States are present. According to this

[36] Clapham (2006) 68-69.

[37] Ibid. Similarly, De Schutter argues that international legal personality flows from the grant of rights and duties to entities and if obligations are directly imposed upon corporations, then their international legal personality would automatically follow. Also Reinisch acknowledges that in traditional international law the majority of non-state actors, with the exception of international organizations, are not subjects of international law. Nevertheless, he challenges the idea that human rights obligations bind States only, reaching the conclusion that 'a contemporary reading of human rights instruments shows that non-state actors are also addressees of human rights norms'. De Schutter (2006); Alston (2005) 70-72.

[38] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 49-50.

[39] Vincent Chetail, 'The legal personality of multinational corporations, state responsibility and due diligence: the way Forward' in D. Alland, V. Chetail, O. de Frouville & J.E. Viñuales (edited by) *Unity and Diversity of International Law. Essays in Honour of Prof. Pierre-Marie Dupuy* (Martinus Nijhoff Publishers, 2014) 107-110.

definition, an entity is a subject of international law if, and only if, the three following cumulative conditions are met:

- it has the capacity to conclude international agreements;
- it has the capacity to establish diplomatic relations; and
- it has the capacity to bring international claims.[40]

Some variations of this approach have also been suggested through an expansion of the definition and the criteria necessary to determine the international legal personality. Accordingly, in order to determine international legal personality, actors are required to:

- participate in international legal relations;
- possess autonomous will;
- possess own international rights and duties in relation to other international person.[41]

In opposition to the above conception, a second approach is based on a single feature, namely the capacity to be invested of rights and obligations by international law. Thus, in accordance with this conception, the capacities to conclude international agreements and to bring international claims are irrelevant. Accordingly, '[t]he quality of a subject of international law, [namely] the capacity of being a subject of rights created and recognized by international law, does not […] depend upon the capacity to claim or enforce such rights in the beneficiary's own name. Nor does it depend upon whether the persons or body concerned are a contracting party in relation to the instrument creating such rights. It is sufficient if such rights are created in their favour and are effectively vested in them.'

Some critiques have been moved to this conception, as blurring the traditional distinction between "objects" and "subjects" of international law since the capacity to bring claims would be a distinguishing characteristic of legal personality.

An intermediate position[42], which will be used as benchmark in the present study, relies on the definition provided by the International Court in the so-called *Reparation* Case.

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[40] See in particular: Christian Domincé, 'La personnalité juridique dans le système du droit des gens', in J. Makarczyk (edited by), *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski* (Kluwer, 1996) 147-171; Giovanni Distefano, 'Observations eparses sur les caracteres de la personnalite juridique internationale' (2007) Annuaire francais de droit international, 105-128.

[41] Chetail (2014) 108.

[42] Ian Brownlie, *Principles of Public International Law. Seventh Edition* (Oxford University Press, 2008) 57 onwards; Crawford (2012).

Specifically, the ICJ was asked by the UN General assembly whether:

> '*I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?*
>
> *II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?*'.[43]

Both questions related to the capacity of an International Organization to bring an international claim. Thus, the ICJ started by defining the capacity to bring such a claim and then moved to the analysis of whether the United Nations possessed a right to present an international claim. According to the ICJ, the competence to bring an international claim can be defined as 'for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims.' The ICJ clarified that such a capacity 'certainly belongs to the State' in the form of 'a claim between two political entities, equal in law, similar in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned'.[44]

The Court then recognized that the United Nations was intended to exercise and enjoyed and at the same time it was exercising and it was enjoying functions and rights and this could only be explained on the basis of the possession of the international personality and the capacity to operate on an international plane. Thus, the ICJ came to the conclusion that the United Nations was an international person, but it recognized that its international personality 'was not the same thing of saying that it was a State or that its legal personality and rights and duties [were the same as those of a State'. What the ICJ meant was that the United Nations had to be considered as a subject of international law and it was capable of possessing international rights and duties, while having the capacity to maintain its rights and duties by bringing international claims.

[43] *Reparation* case, 8-9.
[44] Ibid.

From the ICJ ruling, it is thus possible to extract two cumulative conditions necessary to determine whether or not an entity, in particular corporations, can be considered as subjects under international law:

- the capability of possessing international rights and duties; and
- the capability of maintaining rights by bringing international claims.

Accordingly, 'a subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims'.[45] Predictably, the definition provided by the ICJ has not been exempted by critiques: 'this definition, though conventional, is unfortunately circular since the *indicia* referred to depend on the existence of a legal person. All that can be said is that an entity of a type recognized by customary law as capable of possessing rights and duties and of bringing international claims, and having these capacities conferred upon it, is a legal person'.[46]

By virtue of the lack of *consensus* in the legal doctrine about the criteria to be followed to establish the subjectivity of an actor under international law, and considering that the ICJ had nevertheless provided a definition - though not unanimously shared by scholars - this same definition provided in the *Reparation* case will be followed in the present study as framework to determine the international legal personality of business enterprises, which accordingly will be tested against criteria set forth in the *Reparation* case.

5. Do business entities have international legal personality?

Following the criteria elaborated by the ICJ in the *Reparation* case, the question that arises is thus *(a)* whether transnational corporations are capable of possessing international rights *(b)* and duties; and *(c)* whether they have the capacity to maintain their rights by bringing international claims. However, it seems that that 'if the first condition [of possessing rights and duties] is not satisfied, the entity concerned may have legal personality [but] of a very restricted kind, dependent on the agreement or acquiescence of the recognized legal persons and opposable on the international plane only to those agreeing or acquiescent'[47]. Accordingly, only the first of the two criteria set forth in the *Reparation* case will be tested.

[45] Brownlie (2008) 57.
[46] Ibid.
[47] Ibid.

5.1 Do business entities possess rights under international human rights law?

With reference to the first question, namely whether or not corporations possess rights under International Human Rights Law, it can be asserted that they enjoy certain rights under regional instruments, as the European Convention of Human Rights (ECHR).[48]

Under Article 34 ECHR concerning the individual application, the European Court of Human Rights (ECtHR) may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the contracting Parties of the Convention or its Protocols. Accordingly, the category of persons which have the right to claim a violation of their rights before the ECtHR and can lodge an application with the Court is any person, non-governmental organisation or group of individuals, including a private individual or a legal entity such as a company or association. In addition, since an application can be lodged with the ECtHR if the claimant has personally and directly been the victim of a violation of the rights and the alleged violation has been committed by one of the States bound by the Convention, the ECtHR cannot deal with complaints against individuals or private companies. As a result, this may reinforce the assertion that corporations do not hold duties, in this case in accordance with the ECHR – as will be dealt with in more details in the following paragraph.

Through the Court's rulings, corporations have been acknowledged a number of rights under the ECHR, thus they have been recognized as victims due to the violations of some of the Convention's rights. Among the ECHR rights that have been considered applicable to corporations, several cases concern the violation of the right to a fair trial (Article 6), the right to no punishment without law (Article 7), the freedom of expression (Article 10), the right to an effective remedy (Article 13), the right to peaceful enjoyment of one's possessions as laid down in Article 1 of the first Protocol to the Convention (hereafter

[48] It has to be noted that, under international law, several bilateral and multilateral investment and trade agreements grant corporations 'both substantive rights (for example regulatory stability, compensation for property takings, and due process of law) and remedial rights to sue States before international arbitration panels'. Cassel, Ramasastry (2016) 45.

Protocol No. 1), which applies not only to every natural person but explicitly to every legal person.[49]

With reference to the right to a fair trial, the ECtHR ruled that companies enjoy the right to a fair and public hearing[50] by an independent and impartial tribunal[51], the access to a court[52], the equality of arms[53] and reasonable length of the proceedings.[54]

In the *Regent Company v Ukraine* case, the ECtHR found a violation of Article 6 together with the protection of property rights, as laid down Article 1 of Protocol No. 1. The applicant, a privately owned commercial company registered in the Seychelles, with an address in London, complained that an arbitration award, given by the International Commercial Arbitration Court in its favour, had not been enforced in Ukraine. Dismissing the Government's preliminary objection, the ECtHR clarified that Article 6 ECHR did not preclude the setting up of arbitration tribunals in order to settle disputes between private entities. On the merits, The ECtHR noted that one of the main reasons for the non-enforcement had been the insolvency of the company, State-owned and State-managed, against which the arbitration award was made. The ECtHR held also that, while certain delays could occur during the process of honouring State debts from the State budget, there could be no excuse for the continuous non-enforcement of the award. In addition, the continued non-enforcement of the judgment debt at issue also constituted a violation of Article 6(1) ECHR.

Media companies have also frequently invoked the ECHR on the basis of alleged violations of the right to freedom of expression and the ECtHR has recognized the violation of article 10 of private companies, in some cases related to sanctions received for defamation[55], the

[49] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 – Protection of property: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

[50] *Stran Greek Refineries and Stratis Andreadis v Greece* (App. no.13427/87) ECtHR 9 December 1994. In this case, the ECtHR held that there were a breach of Article 6.1 ECHR as regards the right to a fair trial (but not as regards the length of the proceeding).

[51] *Sovtransavto Holding v Ukraine* (App. no. 48553/99) ECtHR 25 July 2002.

[52] *Silvester's Horeca Service v Belgium* (App. no. 47650/99) ECtHR 4 March 2004.

[53] *Dombo Beheer B.V. v The Netherlands* (App. no. 14448/88) ECtHR 27 October 1993.

[54] *Unión Alimentaria Sanders SA v Spain* (App. no. 11681/85) ECtHR 7 July 1989.

[55] *Verlagsgruppe News GmbH v. Austria* (no. 1) *(App. no.76918/01)* and (no. 2) *(App. no.10520/02)* ECtHR 14 December 2006; *Axel Springer AG v. Germany* (App. no. 39954/08) ECtHR 7 February 2012.

protection of sources[56], the payment of layers contingency fees[57], and the provision of information to the public[58]. In the *Verlagsgruppe News GmbH v. Austria* Case, the Austrian courts prohibited the applicant company Verlagsgruppe News GmbH from publishing photograph of the managing director of a pistols company in connection with reports on pending tax evasion proceedings against him. The ECtHR ruled that the Austrian courts had restricted the applicant company's freedom of expression relying on reasons which could not be considered relevant or sufficient, rather contrary to the Convention requirements. In the *Financial Times Ltd and Others v. the United Kingdom* Case, the Court ruled on the protection of sources. The case concerned the complaint by four UK newspapers and a news agency that they had been ordered to disclose documents to "Interbrew", a Belgian brewing company, and that the information in those documents could lead to the identification of journalistic sources at the origin of a leak to the press about a takeover bid. The Court emphasised the possible negative effect on the media if journalists were seen to assist in the identification of anonymous sources. It also underlined the public interest in protecting journalistic sources and concluded that there had been a violation of Article 10. Similarly, in the *Sanoma Uitgevers B.V. v. the Netherlands* case the Grand Chamber found a breach of Article 10 since the interference with the applicant company's freedom of expression had not been prescribed by law.[59] Finally, in *Centro Europa 7 S.r.l. and Di Stefano v. Italy* case[60], the Grand Chamber found a violation of media pluralism by the Italian Government. The case concerned an Italian TV company's inability to broadcast, despite having a broadcasting licence, because no television frequencies were allocated to it. Violation of Article 10 (freedom of expression and information) and of Article 1 of Protocol No. 1 (protection of property). The Court found in particular that the laws in force at the time had lacked clarity and precision and had not enabled the TV company to foresee, with sufficient certainty, the

[56] *Financial Times LTD and Others v. The United Kingdom* (App. no. 821/03) ECHR 15 December 2009; *Sanoma Uitgevers B.V. v. Netherlands* (App. no. 38224/03) ECtHR 14 September 2010.
[57] *MGN Limited v. The United Kingdom* (App. no. 3940104) ECtHR 18 January 2011.
[58] *Case of Open Door and Dublin Well Woman v. Ireland* (App. no. 14234/88; 14235/88) ECtHR 29 October 1992.
[59] The case concerned photographs, to be used for an article on illegal car racing, which a Dutch magazine publishing company was compelled to hand over to police investigating another crime, despite the journalists' strong objections to being forced to divulge material capable of identifying confidential sources. The Grand Chamber found that the interference with the applicant company's freedom of expression had not been "prescribed by law", there having been no procedure with adequate legal safeguards available to the applicant company to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.
[60] *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (App. no. 38433/09) ECtHR 7 June 2012.

point at which it might be allocated frequencies enabling it to broadcast. The Court concluded that the Italian authorities had failed to put in place an appropriate legislative and administrative framework guaranteeing effective media pluralism.

It is interesting to note that the ECtHR also pronounced judgments on cases where companies were the alleged violators of the ECHR's rights.[61] In these cases, however, the Court ruled in favour or against States, which were eventually found responsible for the violations committed by the private companies. This is of particular relevance because it means that while private companies do possess some rights under the ECHR, they cannot be considered as possessing corresponding duties under the ECHR.

Besides the ECHR, the possession of rights by corporations is less clear-cut. The International Covenant on Civil and Political Rights under Article 2, concerning the scope of the Covenant, recognizes only individuals as rights-holders. Accordingly, '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]'. The same concept has been reiterated by the United Nations Human Rights Committee in paragraph N. 31, where the Committee stressed that 'the beneficiaries of the rights recognized by the Covenant are individuals'. However, the Human Rights Committee in the same General Comment has pointed out that, despite the lack of explicit wording, legal entities may enjoy certain rights under the Covenant, such as the freedom to manifest one's religion or belief (Article 18) and the freedom of association (Article 22)[62], which nevertheless remain a very small range of rights in comparison to the rights listed in the ICCPR. Against the recognition of rights to private companies, Article 1 of the First Optional Protocol to the ICCPR limits however the scope of the ICCPR application only to individuals, who can claim violations of their rights committed by State parties.[63] Similarly, the American Convention on Human

[61] See for example: *Taskin and Others v. Turkey* (App. no. 46117/99) ECHR 10 November 2004; *Fadeyeva v. Russia* (App. no. 55723/00) ECHR 9 June 2005; *Tatar v. Romania* (App. no. 67021/01) ECtHR 27 January 2009.

[62] UN Human Rights Committee, General Comment N. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, Paragraph 9.

[63] Specifically, under Article 1 of the First Optional Protocol to the ICCPR '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 from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. 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'.

Rights and the African Charter on Human and Peoples' Rights explicitly accord human rights protection only to human beings.[64]

5.2 Do business entities possess duties under international human rights law?

Under International Human Rights Law, States are the primary duty bearers, bound to respect and fulfil human rights and to ensure their protection against abuses by private actors. As analysed in the first Chapter, since the 1970s several attempts have tried to draft international treaties aimed at imposing duties directly upon corporations, thus holding them direct liable of business-related human rights violations. However, these attempts, failed probably due to lack of agreement between States, as well as interested stakeholders. The subsequent initiative, the UN Guiding Principles, set forth only a "responsibility" of business companies to respect human rights, rather than a "duty".[65]

At the international level, some articles of the Universal Declaration of Human Rights (UDHR) have been interpreted as imposing duties upon companies. For example, Article 29(1) states that: 'everyone has duties to the community in which alone the free and full development of his personality is possible' and Article 30 (as well as the respective articles 5 (1) of the two Covenants) affirms that 'nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms […]'. The terms "group or person" have been interpreted as including also private companies and, in general terms, both articles have been quoted as examples of human rights obligations upon non-state actors and thus corporations, as well. Similarly, the UDHR states that 'every organ of society shall strive by teaching and education to promote respect for these rights and freedoms', and the notion of "every organ of society" has been interpreted as being wide enough to include also private companies.[66] However, it is important to note that also John Ruggie underlines how the

[64] American Convention on Human Rights, Article 1: '1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms […] 2. For the purposes of this Convention, "person" means every human being.' Likewise, the African Charter on Human and Peoples' Rights bestows rights only to individuals. No mention is included to legal persons.
[65] UN Guiding Principles, Second Pillar: Corporate Responsibility to Respect Human Rights.
[66] Muchlinski (2001) 40-41.

above-mentioned notion is contained in the preamble of the UDHR, which has not hardened into customary international law.[67]

Moreover, with reference to other international human rights instruments, referring to the ICCPR, the Human Rights Committee has explicitly stated that the Covenant does not have direct horizontal effect[68]. At the same time, the Committee on Economic, Social and Cultural Rights also observed that private enterprises are not bound by the ICESCR.[69] With reference regional human rights instrument and specifically to the ECHR, as noted in the previous paragraph, Article 1 ECHR binds only the 'high contracting parties [to] secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. In addition, since an application can be lodged with the ECtHR if the claimant has personally and directly been the victim of a violation of the rights under the ECHR and the alleged violation has been committed by one of the States bound by the Convention, the ECtHR cannot deal with complaints against individuals or private companies. As a result, this may reinforce the assertion that corporations do not hold duties pursuant to the ECHR.

Some authors have also claimed that the wide range of voluntary instruments and codes of conduct, emerged at the international level, reinforces the assertion that corporations may be considered as duty-bearers under international law. Some examples of voluntary international instruments are the Global Compact[70], the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[71], and the OECD Guidelines

[67] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2007) UN Doc A/HRC/4/35, Paragraph 38.

[68] UN Human Rights Committee, General Comment N. 31, Paragraph 8.

[69] CESCR, General Comment N. 18, 'The Right to Work – Art. 6' (2006) UN Doc E/C.12/GC/18, Paragraph 52.

[70] On the United Nations Global Compact see among others: Dorothée Baumann-Pauly, Andreas Georg Scherer, 'MNEs and the UN Global Compact: An Empirical Analysis of the Organizational Implementation of Corporate Citizenship', SSRN Online Publication; Menno T. Kamminga, 'Company Responses to Human Rights Reports: An Empirical Analysis' (2016) 1 Business and Human Rights Journal; Surya Deva, 'Global Compact: A Critique of UN's Public-Private Partnership for Promoting Corporate Citizenship' (2006) 34 Syracuse Journal of International Law and Commerce; Andreas Rasche, 'A Necessary Supplement' – What the United Nations Global Compact Is and Is Not' (2009) 48 Business and Society; Andreas Rasche, Sandra Waddock, Malcolm McIntosh, 'The United Nations Global Compact: Retrospect and Prospect' (2013) 52 Business and Society.

[71] On the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, see among others: Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' (2009) 6 Miskolc Journal of International Law; Pierre Verge, Sophie Dufour, 'Multinational Enterprises and Labour Laws' (2002) 57 Relations Industrielles/Industrial Relations.

for Multinational Enterprises[72]. However, all of them are voluntary and soft law instruments, and with reference to Codes of Conduct, beyond their specific scope, 'it is dubious that they have succeeded in creating a customary norm that would acknowledge or even confer a proper international personality on corporations'.[73] Accordingly, the assertion that codes of conduct and other non-binding standards and norms may demonstrate the acceptance of the international legal personality of corporations is questionable, as it is also arguable that these instruments of soft law can be considered as evolving norms of customary international law, not only because they are obviously not binding, but also since they are intentionally meant to be not binding. 'Soft law can of course be guidelines for future changes in the law, but as it stands today, […] 'soft law' is not binding under international law', and as a result cannot be interpreted as an acceptance of corporate human rights obligations, 'even if these can be seen as evidence of 'desired behaviour' and even if the corporations voluntarily decide to adhere to them.'[74] Thus, it is true that soft law instruments may lead to future conventional or customary law regulations, however while we should not 'underestimate the role of soft law for regulating the conduct of such private actors, [..] codes of conduct have been—at least for the moment— unable to establish a customary law personality for corporations.'[75]

As a result, it may be asserted that corporations do not have human rights obligations, stemming directly from human rights instruments. Indeed, international instruments, adopted so far in the field of business and human rights, rather impose "soft law" obligations, presumably as a consequence of the absence of corporation's international legal personality and therefore the inadequacy of traditional legal instruments to regulate their activities.

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[72] On the OECD Guidelines for Multinational Enterprises see among others: Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 3 Hanse Law Review; Joris Oldenziel, Joseph Wilde-Ramsing, '10 Years on: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct' (2010) SSRN Online Publication; John Ruggie, Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) HKS Working Paper No. 15-04; Jernej Letnar Cernic, 'The 2011 Update of the OECD Guidelines for Multinational Enterprises' (2012) 16 American Society of International Law Insights; Scott Robinson, International Obligations, 'State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30 Utrecht Journal of International and European Law; Juan Carlos Ochoa Sanchez, 'The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation' (2015) 84 Nordic Journal of International Law.

[73] Chetail (2014) 107-108.

[74] De Brabandere in: D'Aspremont (2011) 278-279.

[75] Ibid.

Furthermore, there are instances of Conventions requiring national legal systems to establish, at the national level, the liability of legal persons. Some examples are the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[76] the UN Convention on the Suppression of the Financing of Terrorism[77], the United Nations Convention against Transnational Organized Crime[78], the United Nations Convention against Corruption[79] and at the level of the Council of Europe the Convention on Action Against Trafficking in Human Beings[80] and the Convention on the Protection of the Environment through Criminal Law (not yet entered into force)[81], among others.[82]

[76] Article 2. Responsibility of Legal Persons: 'Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.' OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999).

[77] Article 5: '1. Each State Party, in accordance with its domestic legal principles, shall take the *necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence* set forth in article 2. *Such liability may be criminal, civil or administrative*. 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences. 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.' (Emphasis added) UN Convention on the Suppression of the Financing of Terrorism (adopted 9 December 1999).

[78] Article 10. Liability of Legal Persons: '1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to *establish the liability of legal persons for participation in serious crimes* involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. 2. Subject to the legal principles of the State Party, the *liability of legal persons may be criminal, civil or administrative*. 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.' (Emphasis added) UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003).

[79] Article 26 of the UN Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) set forth the liability of legal persons, using the same language of Article 10 of the UN Convention against Transnational Organized Crime.

[80] Article 22. Corporate liability: '1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: a) a power of representation of the legal person; b) an authority to take decisions on behalf of the legal person; c an authority to exercise control within the legal person. 2 Apart from the cases already provided for in paragraph 1, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority 3 Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative. 4 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.' Convention on Action Against Trafficking in Human Beings (ETS. 197) (adopted 16 May 2005, entered into force 1 February 2008).

[81] Article 9. Corporate liability: '1-Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another

Nevertheless, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography's seems to be the only human rights treaty which clearly recognizes the liability of legal persons, which '[s]ubject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.'[83]

Notwithstanding these treaties' provisions, duties are still imposed on States which are required to take measures to ensure the respect, by legal persons, of their obligations under domestic law. As a result, obligations are still addressed to States, with the objective of criminalising certain conducts, as well as adopting national laws to give effect to commonly agreed standards as laid down in the treaty at stake. Although the conduct of corporations under these treaties is regulated by an international instrument, the international legal obligation under the treaty itself rests with the State, which needs to adopt national measures to regulate the activity of the corporations on the domestic legal level.[84]

representative. 2- Corporate liability under paragraph 1 of this Article shall not exclude criminal proceedings against a natural person.' Convention on the Protection of the Environment through Criminal Law (ETS No.172) (adopted 4 November 1998, not yet entered into force).

[82] Other examples within the Council of Europe include the Convention on Cybercrime (ETS No. 185), Criminal Law Convention on Corruption (ETS. No. 173); and the convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS. No. 201); Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS. No. 210).

[83] Article 3: '1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:(a) In the context of sale of children as defined in Article 2: (i) Offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; c. Engagement of the child in forced labour; (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in Article 2; (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.' '2. Subject to the provisions of the national law of a State Party, the same shall apply to an attempt to commit any of the said acts and to complicity or participation in any of the said acts.' '3. Each State Party shall make such offences punishable by appropriate penalties that take into account their grave nature.' '4. *Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative*.' Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography's (adopted 25 May 2000, entered into force 18 January 2002).

[84] Carlos Manuel Vázquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) Georgetown Public Law and Legal Theory Research Paper No. 12-078; International Commission of Jurists (ICJ) Report (2016) 17-21; De Brabandere (2011) 9-10.

Chapter 4: Access to judicial remedies

1. Introduction

Resolution 26/9 and the prospective legally binding treaty have been celebrated as the long-awaited opportunity to address corporate-related human rights abuses through a hard law instrument, and cope with the so-called "governance and accountability gaps" – including the lack of accountability of business enterprises and the lack of effective remedies to provide victims of business-related human rights abuses with redress – that the UN Guiding Principles were not able to successfully address.[1]

Thus, the prospective treaty represents a valuable opportunity to foster and clarify issues surrounding the question of access to justice and remedies, although, by virtue of non-state private actors' lack of legal personality, the option of imposing direct obligations over business companies – which would have certainly coped with the lack of accountability of business enterprises – does not seem to be a realistic option in the future legally binding treaty.

In this regard, civil society movements, among others, advocated for a binding treaty where States Parties would be required to 'provide for access to an effective remedy [and] access to justice for foreign victims that suffered harm [resulting] from acts or omissions of a business enterprise'[2]. The same position was also reinforced by one the sponsoring countries of Resolution 26/9, stressing that a binding instrument should address the absence of adequate legal remedies for victims and take into

[1] People's Forum on Human Rights and Business, 'Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises' (5-7 November 2013), Bangkok, <http://peoplesforum.escr-net.org/joint-statement-binding-international-instrument/>, accessed 1 July 2017; Business and Human Rights Resource Centre, 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons. Notes of the Workshop and Public Debate' (14 May 2014) Notre Dame Law School, Business and Human Rights Resource Centre Online Publication, <http://businesshumanrights.org/sites/default/files/media/documents/note_event_does_the_world_need_a_treaty_on_business_and_human_rights__21-5-14.pdf>, accessed 1 September 2017.

[2] This goal has been promoted by the Treaty Alliance, the civil society movement for the binding treaty. Treaty Alliance, 'Bangkok Joint Statement. Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises' (November 2013), <http://www.treatymovement.com/statement-2013>, accessed 1 July 2017.

consideration situations 'where domestic jurisdiction is clearly unable to prosecute effectively companies'.[3]

The concept and the need of greater access to remedy for victims of business-related human rights abuses were already addressed in the third Pillar of the UN Guiding Principles, as expounded in the first Chapter. The Guiding Principles set forth that '*as part of their duty to protect against business-related human rights abuse, States [are required to] take steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy*'.[4] They further distinguish between State-based judicial and non-judicial mechanisms through which States can provide access to remedies.[5] While the analysis of State-based non-judicial mechanism is outside the scope of the present study[6], this chapter focuses on access to State-based judicial mechanisms only, since effective judicial mechanisms – intended as the possibility for victims to access civil or criminal courts – are considered to be at the core of ensuring access to remedy. As a matter of facts, the notion of access to justice is used here to indicate 'access to effective and efficient judicial and non-judicial remedies to establish responsibilities, punish those responsible and repair the damage'[7], in this case suffered by victims of human rights violations perpetrated by corporate actors.

[3] Republic of Ecuador, 'Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council' (September 2013) Human Rights Council, Geneva, <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>, accessed 1 July 2017.

[4] UNHRC, Res 17/31, Principle and Commentary 25.

[5] Ibid.

[6] The present study focuses indeed only on state-based judicial mechanisms (using the terminology provided by the UN Guiding Principles) since judicial mechanisms are deemed more important and are considered as at the heart of the whole system.

[7] Maria Chiara Marullo, 'Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation' (2016) HURI-AGE - Consolider-Ingenio 2010, 5. On the notion of access to remedy see, in addition to the UN Guiding Principles: European Union Agency for Fundamental Rights and Council of Europe, (FRA), Council of Europe (CoE), European Court of Human Rights (ECtHR), *Handbook on European law related to access to justice* (2016) FRA Online Publication; Juan J. A. Rubio, Katarina Yiannibas (edited by) *Human Rights in Business. Removal of Barriers to Justice in the European Union* (Routledge, 2017); Antoni Solé et al., 'Human Rights in European Business. A Practical Handbook for Civil Society Organisations and Human Rights Defenders' (September 2016) Human Rights in Business Online Publication.

Thus, in accordance with this framework, the notion of access to remedy will be used to refer to the possibility and the right of individuals to seek redress for violations of their rights. In other words, this means obtaining a remedy for the violations suffered in the form of apology, restitution, rehabilitation, compensation, punitive sanction, and prevention of harm. On the other hand, the notion of access to justice is used to refer to what John Ruggie called judicial remedies, thus access to civil and criminal courts. '*Access to justice allows individuals to have protection against violations of their rights, as well as to remedy civil wrongs and defend themselves in criminal proceedings. The concept of access to justice implies that States are required to guarantee the right to access courts, or alternative dispute resolution bodies, and to obtain a remedy if it is established that the rights of the individuals at stake have been infringed*.'[8] The access to justice may, however, be hampered by the already mentioned legal, practical and procedural barriers.

The Guiding Principles also underline that States should not only ensure '*the effectiveness of domestic judicial mechanisms, but also consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*'.[9] The respective Commentary further pinpoints that '*States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that legitimate and peaceful activities of human rights defenders are not obstructed*'.[10]

As a matter of facts, a wide number of causes, legal and political, have been enumerated[11] to explain the failure to provide effective remedies and redress to

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[8] European Union Agency for Fundamental Rights and Council of Europe, Handbook (2016) 15-16.
[9] UN HRC, Res 17/31, Principle 26.
[10] Ibid., Principle and Commentary 26.
[11] Through the UN Guiding Principles, John Ruggie enumerated legal, as well as practical and procedural barriers which may prevent business-related human rights violations from being addressed. The barriers may include 'the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability; the

victims of business-related human rights violations. While these causes may vary from country to country, they may encompass, among others, the weakness of the rule of law, including the lack of independence of the judiciary, the difficulty or unwillingness of executive and or legislative officials to counter resist powerful corporate interests; the lack of knowledge or capacity of public officials to uphold the law according to international standards, corruption and political interference.[12] These issue have all contributed to a system of domestic law remedies that has been defined as "patchy, unpredictable, often ineffective and fragile".[13] In addition, as it was pointed out in the UN Guiding Principles, but also during the debates surrounding the theme of business and human rights and notably in the sessions of the OEIWG, when remedial mechanisms do exist, several other legal and practical obstacles can prevent access to justice in practice.

Thus, several legal, procedural, financial and practical obstacles often undermine the effectiveness of civil and criminal remedies as an avenue to hold companies legally liable for harms perpetrated during their operations, including when business activities

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impossibility of accessing home State courts regardless of the merits of the claim where claimants face a denial of justice in a host State; costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, "market-based" mechanisms (such as litigation insurance and legal fee structures); […] difficult[ies] in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area; inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures); lack [of] adequate resources, expertise of [prosecutors…]'. Moreover, Zerk mentions additional barriers and distinguishes between legal and procedural barriers, as well as practical and financial ones. Among the first group Zerk lists the 'complexity of corporate structures and the doctrine of separate corporate personality; jurisdictional rules and *forum non conveniens*; sovereign immunity and related doctrines; difficulties in attributing negligence and intent to a corporate entity; rules of standing; exercise of prosecutorial discretion to decline to act; gaps in legal coverage (i.e. lack of relevant criminal offences or causes of action); statutes of limitations; and choice of law rules'. In the category of practical and financial obstacles, Zerk recognizes the 'limited availability (or non-availability) of legal aid or other viable funding options; loser pays rules; lack of access to suitably qualified and experienced legal counsel; the non-availability of collective action arrangements; corruption and political interference; fear of reprisals, intimidation of witnesses; lack of resources within prosecution bodies; difficulties accessing the information necessary to prove a claim or complaint; insufficiency of damages and enforcement problems'. UN HRC, Res 17/31, Principle and Commentary 26; Zerk (2014) 60-64; Mark B. Taylor, Robert C. Thompson, Anita Ramasastry, 'Overcoming obstacles to Justice. Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (2010) Fafo Online Publication.

[12] UNHRC, Res 17/31, Principle and Commentary 26; Beth Stephens, 'Briefing paper for Consultation: Remedial Mechanisms. For the ESCR-Net & FIDH Joint Treaty Initiative Project' (December 2015), <https://www.escr-net.org/corporate-accountability/treaty-initiative/legal-materials>, accessed 1 July 2017; International Commission of Jurists (ICJ), Report 2016.

[13] Zerk (2014) 1-2.

are carried out abroad, in foreign countries rather than in the country where they are incorporated or they have their main seat, and the violation of human rights took place in host countries.

Particularly, a study commissioned by the Office of the High Commissioner for Human Rights listed the main barriers which prevent access to justice at domestic level.[14] Among legal and procedural barriers, the study enumerated the complexity of corporate structures and the doctrine of separate corporate personality; jurisdictional rules and the doctrine of *forum non conveniens*, choice of law rules that would deny effective remedy. The same also identified practical and financial barriers, including 'the limited availability (or non-availability) of legal aid or other viable funding options, lack of access to suitably qualified and experienced legal counsel, non-availability of collective action arrangements and difficulties accessing the information necessary to prove a claim or complaint'.[15]

The present study focuses only on legal and procedural barriers. Indeed, after the analysis of the State duty to provide effective remedies and the individual right to remedy under international and regional human rights law instruments, the following sections deal with barriers, and also available opportunities to overcome the same obstacles, both in civil and criminal law. As a matter of facts, although an international human rights treaty imposing obligations directly upon non-state corporate actors does not exist, international and regional human rights treaties set out general principles under which domestic jurisdictions should grant the right to a remedy and fair trial. However, the practice shows that victims of business-related human rights abuses may still encounter difficulties and obstacles in having access to justice.
Accordingly, the second and third part of the present Chapter will analyse some of the main limits of judicial remedies and the difficulties in having access to civil and criminal remedies, with a specific focus on those barriers which prevent victims from having redress for the violations suffered and on possible measures and solutions that the prospective legally binding treaty may incorporate for the purpose of overcoming the mentioned obstacles.

[14] Zerk (2014) 60-64.
[15] Ibid. See footnote above.

Finally, it is important to note that the question concerning the modalities to obtain access to remedies for victims of business-related human rights abuses and the issue relating to the ways and means to overcome barriers (which prevent access to judicial remedies in human rights cases against business enterprises) were investigated not only both during John Ruggie's mandate and expanded in several studies and discussion papers[16], but were also endorsed by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Notably, in February 2014, the OHCHR started a project aimed at '[contributing] to a fairer and more effective system of domestic law remedies [in order] to address corporate liability for gross human rights abuses'.[17] The same project was also referred to by the Human Rights Committee which under Resolution 26/22 requested the OHCHR to continue its 'work on domestic law remedies to address corporate involvement in gross human rights abuses' and, on the other hand, invited the Working Group on Business and Human Rights to 'explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument'.[18]

As mentioned before, during the first and second sessions of the OEIWG, panel discussions on the need for greater access to effective judicial and non-judicial remedies for victims of business-related human rights abuses were organized. In

[16] International Commission of Jurists (ICJ), 'Proposals for Elements of a legally binding instrument on Transnational Corporations and other Business Enterprises' (October 2016) ICJ Online Publication; International Commission of Jurists (ICJ), 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014) ICJ Online Publication; Constance de la Vega, 'International standards on Business and Human Rights: Is Drafting a New Treaty Worth it?' (2016) University of San Francisco Law Research Paper No. 2016-24; Cassel, Ramasastry (2016). See also related information available on the Business and Human Rights Resource Centre website, <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>, accessed 17 January 2016.

[17] Further Information is available on the OHCHR website, <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>.

[18] Specifically, in Resolution 26/22 the Human Rights Council requested 'the United Nations High Commissioner for Human Rights to continue the work on domestic law remedies to address corporate involvement in gross human rights abuses, and to organize consultations with experts, States and other relevant stakeholders and to present a progress report thereon […as well as it requested also] the Working Group to launch an inclusive and transparent, consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument, and to prepare a report thereon and to submit it to the Human Rights Council'. UN HRC, Res. 26/22, Paragraphs 7-8, 10, 14.

particular, during these sessions it was reiterated the need for the prospective binding treaty to complement existing national, regional and international efforts, and to 'ensure the full scope of remedies and generate clear mechanisms for redress'.[19] Indeed, by virtue of the gaps and imbalances in the current international legal order and by virtue of the wide range of domestic differences existing from one country to another, victims of business-related human rights abuses encounter difficulties in accessing justice and obtaining effective remedies. Thus, besides specific analysis regarding barriers to justice, it was generally agreed that more uniform standards are necessary since the currently available legal remedies remain elusive. Lastly, as already mentioned several times, there was shared agreement that the prospective binding treaty should cope with the lack and insufficiencies of national domestic systems and face the challenge regarding how to effectively grant access to remedy.

2. Access to justice and remedy under human rights law

2.1 International human rights law instruments

Resulting from the State duty to protect, which is rooted in international human rights law, States are required to take appropriate steps to prevent business-related violations of the rights of those individuals within their territory and/or jurisdiction, as well as to investigate, punish and redress such violations when they occur.[20] Thus, the State duty to protect extends to the provision of access to remedy and to 'recognized rights that private parties are capable of impairing and to all businesses.[21]

[19] UN HRC, 'Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument' (5 February 2016) A/HRC/31/50, 19.
[20] See Article 2 (3) of the ICCPR; Article 6 of the ICERD; Article 2(1) and 16(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 4 (1) (e) of the Convention on the Rights of Persons with Disabilities which explicitly requires States parties to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'.
[21] UN HRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Addendum. State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions' (15 May 2009) A/HRC/11/13/Add.1, 4.

Various international (and regional) human rights treaties explicitly provide for elements of remedy, and where they do not, commentaries from human rights commissions, courts and United Nations treaty bodies provide for some explanations.

As highlighted by John Ruggie,[22] the foundations of the State duty to protect and the provision of access to remedy are traceable in a definition provided by the former Permanent Court of International Justice in the *Chorzów Factory* case, which although was a claim between States, it is relevant because the Court affirmed that '*it is a principle of international law, and even a general conception of law that any breach of engagement [would involve] an obligation to make reparation*' in an adequate form, which means either in the form of restitution or in the form of payment of a corresponding amount of money.[23] Therefore, '[r]eparation […] is the indispensable complement of a failure to apply a convention'.[24] The former Permanent Court of International Justice further explained:

> '*The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*'[25]

The Court firstly defined the notion of "reparation", underlining that it aimed at re-establishing the situation affected by the breach and, secondly, it dealt with the compensatory aspects of reparation, namely restitution in kind, payment of a corresponding amount of money or damages for loss sustained as a result of the

[22] Ibid., 9-10.
[23] *Case Concerning The Factory at Chorzów (Claim for Indemnity)(Merits)* (Series A No. 17) PCIJ, 13 September 1928, 29.
[24] International Law Commission (ILA), Draft articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 31.
[25] *Case Concerning The Factory at Chorzów*, 47.

wrongful act. Thus, the Court adopted a remedial approach, whose traces are present in international human rights treaties.[26]

Under international human rights law instruments, States are subject to the positive obligation to fulfil human rights, which entails both the duty to adopt measures aimed at guaranteeing the enjoyment of rights, and the obligation to provide remedy to victims of human rights violations.[27] It is undeniable that States possess discretion with reference to the modalities to fulfil this duty, however this discretion seems to be balanced by some treaty provisions, which clearly require States to provide remedies when abuses occurred, and by treaty bodies which provide for 'useful guidance'.[28]

The *Universal Declaration of Human Rights* clearly establishes that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'[29] The Universal Declaration of Human Rights recognizes also that individuals are entitled 'in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of [their] rights and obligations and of any criminal charge against [them].'[30]

Furthermore, the *International Covenant on Civil and Political Rights* (ICCPR) expresses explicitly that each State Party is required to ensure that any person, whose rights recognized in the Covenant are violated, is entitled to have an effective remedy and to have his/her claim judged by judicial, administrative, legislative or any other

[26] As underlined by John Ruggie, 'the remedial principles governing international human rights law have been strongly influenced by the law of State responsibility and, as a general rule, follow its emphasis on compensatory justice - that is, putting the victim back in (or as close to) the position they would have been in but for the violation'. UN HRC, A/HRC/11/13/Add.1, 2.

[27] Daniel Moeckly et al., *International Human Rights Law. Second edition* (Oxford University Press, 2014) 103. See also: Ilias Bantekas, Lutz Oette, *International Human Rights Law and Practice. Second Edition* (Cambridge University Press, 2016); Oliver de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2014); Brid Moriarty, Eva Massa (edited by) *Human Rights Law* (Oxford University Press, 2012); Philip Alston, Ryan Goodman, *International Human Rights* (Oxford University Press, 2012).

[28] UN HCR, 'State obligations to provide access to remedy for human rights abuses by third parties, including business' (15 May 2009) A/HRC/11/13/Add.1, 25.

[29] Universal Declaration of Human Rights, Article 8.

[30] Ibid., Article 10.

competent authorities.[31] Thus, the enjoyment of civil and political rights relies on States Parties, which, in addition to setting these mechanisms under domestic law, have to set up investigation by independent and impartial bodies in order to ascertain the alleged abuses. Thus, States are required not only to effectively protect the rights set forth in the ICCPR, but also, in accordance with Article 2(3) ICCPR, to ensure that individuals have access to effective remedies to vindicate the Covenant's rights.

The Human Rights Committee provides also some guidance regarding the concept of effectiveness of a remedy. Accordingly, the concept of "effective remedy" entails both procedural and substantive features and any failure by States may determine a breach of the ICCPR itself.[32] Firstly, the Human Rights Committee underlined the importance of prompt, thorough and effective investigations into allegations of abuses conducted by independent and impartial bodies. Secondly, reparation is the essential substantive component of remedy, since '[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy […] is not discharged.'[33] Reparation can include not only appropriate compensation, but also 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.'[34]

Furthermore, any failure to establish appropriate procedures to carry out investigations may constitute a separate breach of the ICCPR.[35] In addition, should an abuse be substantiated by an investigation, then the State should grant that the responsible parties are brought to justice. Also in this case, any failure to do so may constitute a breach of the ICCPR, in particular when the unlawful conducts are criminal violations under international law, such as torture and other cruel, inhuman or

[31] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR), Article 2(3): 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.'

[32] UN HRC, General Comment N. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

[33] Ibid., Paragraph 16.

[34] Ibid.

[35] Ibid, Paragraph 15.

degrading treatment or punishment.[36] In case of "particularly serious human rights abuses", the Human Rights Committee in the *Bautista de Arellana v. Colombia* case expressed also the view that 'purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2(3) of the [ICCPR], in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.'[37]

Moreover, with reference to the definition of reparation, the Human Rights Committee clarified that 'where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'[38] and the Committee considered that 'the Covenant generally entails appropriate compensation' although States are not bound by a duty to provide compensation.

Article 14 of the ICCPR recognizes also the right to a fair and public hearing by a competent, independent and impartial tribunal established if individuals face any criminal charges or if their rights and obligations are determined in a suit at law. Thus, every individual is entitled to equality before courts and tribunals, which applies regardless of the nature of the proceedings before such bodies. While paragraphs 2 to 5 of article 14 ICCPR contain procedural guarantees available to persons charged with a criminal offence, paragraph 6 refers to the substantive right to compensation in cases of miscarriage of justice in criminal cases. Reservations to specific clauses of article 14 may be acceptable, nevertheless the Human Rights Committee pointed out that a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.[39] In addition '*while article 14 is not included in the list of non-derogable [rights], States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual*

[36] Ibid, Paragraph 18.
[37] *Bautista v. Colombia* (Merits) (Communication No. 563/1993) UN HRC, 27 October 1995, Paragraph 8.2.
[38] UN HRC, General Comment N. 31, Paragraph 16.
[39] UN HRC, General comment N. 32. 'Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) CCPR/C/GC/32, Paragraphs 5-6.

situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.'[40]

Finally, under the *First Optional Protocol to the International Covenant on Civil and Political Rights*[41], States Parties recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to their jurisdiction and who claim to be victims of a violation of any of the rights set forth in the Covenant and committed by States Parties.[42] While States Parties are required not to hinder the access to the Human Rights Committee, complainants are required to have exhausted all domestic remedies.[43] This also means that a State party, where it considers that this condition has not been met, should specify the available and effective remedies that the author of the communication has failed to exhaust, as well as domestic remedies should be available to remedy any violations.[44]

Similarly to the ICCPR, the *Convention against Torture* provides that any individual 'who alleges [that] he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities'.[45] While every individual is entitled to prompt and impartial investigations, State parties must also ensure that victims of acts of torture obtain redress and have an enforceable right to fair and adequate compensation, including the means for full rehabilitation - as much as possible.[46] Likewise, *the Convention on the Rights of the Child* affirms that effective remedies must be available to redress violations, and that the right to an effective remedy is implicit in the Convention.[47]

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[40] Ibid.
[41] First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976).
[42] Ibid., Article 1.
[43] Ibid., Article 2.
[44] See also: UN HRC, General Comment N. 33, 'The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) CCPR/C/GC/33.
[45] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13.
[46] Ibid., Articles 12 and 14.
[47] UN HCR, A/HRC/11/13/Add.1, Paragraphs 47-48.

Also, the International *Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) requires States party to ensure effective remedies, stressing, in particular, the relevant role that national tribunals and other institutions may play to this aim.[48] The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) addresses both aspects of remedy. Firstly, it requires 'prompt and impartial investigations' and the respect of the individual 'right to complain and to have the case promptly and impartially examined by competent authorities'; secondly, it recognizes the victim's 'right to fair and adequate compensation'.[49]

Furthermore, although the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), does not enshrine first generation rights and thus does not include specific provisions concerning the obligations of States to provide access to remedy[50], it has provided useful guidance especially through the interpretation given by the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR stated that such obligations can be inferred from article 2(1), which requires States Party to achieve the progressive realization of the rights entailed in the Covenant.[51] In case of violation of article 2(2), which provides for the non-discriminatory exercise of the ICESCR rights, the CESCR pointed out that:

> '*National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. […] These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the*

[48] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (ICERD), Article 6.

[49] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) (CAT), Articles 12-13-14.

[50] International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR).

[51] ICESCR, Article 2(1): '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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' CESCR, General Comment N. 9, 'The domestic application of the Covenant' (3 December 1998) E/C.12/1198/24.

> *facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented*.'[52]

In addition, in the recently released General Comment N. 24, the CESCR addresses the obligations of States in the context of business activities, stating that:

> '*[i]n discharging their duty to protect, States Parties should both create appropriate regulatory and policy frameworks and enforce such frameworks. Therefore, effective monitoring, investigation and accountability mechanisms must be put in place to ensure accountability and access to remedies, preferably judicial remedies, for those whose Covenant rights have been violated in the context of business activities. States Parties should inform individuals and groups of their rights and the remedies accessible to them pertaining to the Covenant rights in the context of business activities […].*'[53]

In accordance with the opinion of the CESCR, remedies should be available, effective and expeditious for the purpose of fully achieving the rights under the Covenant. Thus, States should provide for appropriate means of redress to individuals or groups and ensure corporate accountability, especially through access to independent and impartial judicial bodies. As a result, 'victims seeking redress should have prompt access to an independent public authority, which must have the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done'.[54] Furthermore, the CESCR stressed that the right to adequate housing requires remedies, including but not limited to the right to legal appeals aimed at preventing planned evictions or demolitions, the right to obtain compensation following an illegal eviction, and the right to complain about illegal

[52] CESCR, General Comment N. 20 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) E/C.12/GC/20, Paragraph 40.
[53] CESCR, General Comment N. 24 'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (23 June 2017) E/C.12/GC/24, Paragraph 38.
[54] Ibid., Paragraphs 39-41.

actions by public or private landlords.[55] The CESCR also underlined the importance of providing remedial measures to indigenous peoples, particularly in the context of extractive and major infrastructure fields, including compensation and alternative land to displaced people.

Similarly to the Optional Protocol to the ICCPR, the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*[56] provides for a mechanism to enforce the obligations under the ICESCR through an individual complaints mechanism and the recognition of the competence of the CESCR to consider complaints from individuals or groups who claim their rights under the Covenant have been violated.[57] It is interesting to note that the admissibility criterion to the Optional Protocol requires exhaustion of domestic remedies, and by extension acknowledges that domestic remedies should be available to remedy violations and are preferable to adjudication on the international level.[58]

Finally, it is also important to highlight that the requirement to respect, ensure the respect for and implement international human rights law derives from customary international law, treaties and domestic law of each State. What also is relevant for the present analysis is that this requirement asks States to ensure that their respective domestic laws are consistent with, *inter alia*, the adoption of appropriate and effective legislative and administrative procedures and other appropriate measures to provide fair, effective and prompt access to justice, as well as the adoption of adequate, effective, prompt appropriate remedies, including reparation.

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[55] CESCR, General Comment N. 4, 'The Rights to Adequate Housing (Art. 11(1) of the Covenant)' (13 December 1991) UN Doc E/1992/23, Paragraph 17.

[56] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013).

[57] Ibid., Article 1.

[58] On the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights see: Beth A. Simmons, 'Should states ratify protocol? Process and consequences of the optional protocol of the ICESCR' (2009) 27 Nordic Journal of Human Rights; Geneva Academy of International Humanitarian Law and Human Rights, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (July 2013) 2 Academy in Brief, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20optional%20protocol%20In%20brief%202.pdf>, accessed 25 April 2017; Malcom Lanford, Bruce Porter, Rebecca Brown, Julieta Rossi (edited by), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press, 2016); Christian Courtis, 'Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) Inter-American Institute of Human Rights and International Commission of Jurists Online Publication.

2.2 Regional human rights law instruments

This section analyses access to justice and remedy under some regional human rights law instruments with a focus on the European level, specifically on the *European Convention on Human Rights*[59] (ECHR) and the *European Charter of Fundamental Rights*[60] (EU Charter). A brief reference is made to other non-European human rights instruments, namely the *American Convention on Human Rights*[61] and the *African Charter on Human and Peoples' Rights*[62].

2.2.1 The European framework

At the European level, the issue of access to justice is composed of two parts: the right to a fair trial and the right to an effective remedy, as set forth in Article 6 of the ECHR and Article 47 of the EU Charter, and Article 13 of the ECHR and the corresponding provision of Article 47 of the EU Charter, respectively.[63]

It is important to underline that the rights safeguarded by the ECHR and those under the EU Charter may overlap. Indeed, in accordance with Article 52(3) of the EU Charter, 'in so far [the EU Charter] contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]', and they will also be determined by case-law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[64] Additionally, the before-mentioned provision does not prevent Union

[59] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953). On the ECHR see, among others: William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015); David Harris, Michael O'Boyle, Edward Bates, Carla Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2014); Jacobs, White, Ovey, *The European Convention on Human Rights* (Oxford University Press, 2014).

[60] European Charter of Fundamental Rights (entered into force on 1 December 2009 with the entry into force of the Treaty of Lisbon).

[61] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).

[62] African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986).

[63] As noted above, these rights are also provided for in International Human Rights Law instruments, such as Articles 2 (3) and 14 of the ICCPR, or Articles 8 and 10 of the Universal Declaration of Human Rights.

[64] 'Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. In particular, this means that the legislator, in laying down

law from providing a more extensive protection[65], thus the level of protection granted by the EU Charter may never be lower than the protection guaranteed by the ECHR.

Analysing the right to an effective remedy, pursuant to Articles 13 ECHR and 47 EU Charter, this right allows individuals to seek redress for violations of their rights. Specifically, Article 13 ECHR deals with the right to an effective remedy 'before a national authority notwithstanding that the violation was committed by persons acting in an official capacity'.[66] Article 13 ECHR, when read in conjunction with Article 1 ECHR, imposes upon Contracting States the obligation to provide for remedies in their respective national legal order.[67] As far as its content is concerned, Article 13 ECHR requires Contracting States to establish 'at a national level, a remedy to enforce the substance of the Convention's rights and freedoms, in whatever form they may happen to be secured in the domestic legal order'.[68] As ruled in *Kaya v. Turkey*:

> '*Article 13 of the [ECHR] guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular, in the sense that its*

limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph […]'. Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) (14 December 2007) OJ 2007/C 303/02.

[65] EU Charter, Article 52(3).

[66] European Convention on Human Rights (entered into force 3 September 1953) (ECHR), Article 13.

[67] Jacobs, White, Ovey, *The European Convention on Human Rights. Sixth edition* (Oxford University Press, 2014) 131.

[68] 'The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to Article 3, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible'. *Lyanova and Aliyeva v. Russia* (Apps. No. 12713/02 and 28440/03) ECtHR, 2 October 2008, Paragraph 134.

exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State'.[69]

In addition, according to the ECtHR jurisprudence, the authority entitled to provide remedy may not necessary be judicial, 'but, if it is not, the powers and the guarantees which it affords are relevant in determining whether [or not] the remedy before it is effective'.[70] Thus, remedies may be both judicial and non-judicial, what is important is that they are available and effective both 'in practice [and] in law'. Moreover, while under Article 13 ECHR individuals can claim a remedy before a national authority for arguable claims that one or more of their rights set out in the ECHR have been violated[71], Article 35 ECHR requires individuals to exhaust domestic remedies in order for a claim to be admissible.

Turning to Article 47 of the EU Charter, 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal [in accordance with] the conditions [of the same] Article'. Thus, Article 47 EU Charter requires judicial protection of rights arising from EU law, whereas Article 13 ECHR provides a right to claim an effective remedy before a national authority for arguable claims of violations of rights set forth in the ECHR.

Interestingly, in *Sofiane Fahas v. Council of the European Union*[72] the CJEU ruled that 'the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union'. Consequently, the effective judicial protections, as required under Article 47 EU Charter and Articles 6 and 13 ECHR, are closely connected. However, the protection granted under Article 47 EU Charter seems to be more extensive by virtue of the reference which guarantees the right to an effective remedy "before a tribunal" and it applies to all rights and

[69] *Kaya v. Turkey* (App. No. 22729/93) ECtHR, 19 February 1998, Paragraph 106.
[70] *Silver and Others v. United Kingdom* (Apps. No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) ECtHR, 25 March 1983, Paragraph 113.
[71] *Klass and Others v. Germany* (App. No. 5029/71) ECtHR, 6 September 1978, Paragraph 64.
[72] *Sofiane Fahas v. Council of the European Union* (No. T-49/07) CJEU, 7 December 2010.

freedoms in the EU law, with no limitations to those rights recognized under the EU Charter.

In addition, both Article 13 ECHR and Article 47 EU Charter do not specify the form of remedy which should be provided to individuals, rather they only require that remedy is effective in practice and in law.[73] While, on one hand, in accordance with the ECtHR jurisprudence the effectiveness of a remedy does not depend on the certainty of a favourable outcome[74], on the other hand the ECtHR established some principles to determine the effectiveness of a remedy. Among them, in the *Vuckovic and Others v. Serbia* Case, the ECtHR ruled that a remedy should be accessible, capable of providing redress in respect of the applicant's complaints and offer reasonable prospects of success.[75] Under the European Union law, instead, the CJEU recognised, on the basis of the principles of effectiveness and equivalence, the obligation upon Member States to provide remedies that are sufficient to ensure the effective judicial protection of those rights in the fields covered by the European Union law itself. While the principle of effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under European Union law[76], the principle of equivalence requires that equally favourable conditions for claims arising from EU law and claims under domestic laws. Therefore, European Union's Member States are required to establish systems of legal remedies and procedures to ensure respect for the right to effective judicial protection guaranteed by EU law.[77]

In reference to the right to a fair trial, Article 6(1) ECHR grants every individual fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6 ECHR applies to criminal charges, disputes relating to civil rights and obligations recognised by domestic law.

[73] *M.S.S. v. Belgium and Greece* (App. No. 30696/09) ECtHR, 21 January 2011, Paragraph 288.
[74] *Costello-Roberts v. the United Kingdom* (App. No. 13134/87) ECtHR, 25 March 1993, Paragraph 40.
[75] *Vuckovic and Others v. Serbia* (App. No. 17153/11) ECtHR, 25 March 2014, Paragraphs 71-74.
[76] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* (No. C-33/76) CJEU, 16 December 1976.
[77] '[I]t is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'. *Unión de Pequeños Agricultores v. Council of the European Union* (No. C-50/00 P) CJEU, 25 July 2002, Paragraphs. 39-41.

This article is particularly important since it implies an obligation upon Contracting States to ensure that trials within their territories are accessible. In this regard, the ECtHR stated:

> '*Article 6 §1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 §1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing*'.[78]

This article may play a crucial role regarding the obstacles which victims of business-related human rights abuses may encounter to access courts. The barriers to access courts will be discussed extensively in next sections, however now it suffices to say that Article 6 ECHR may act as a minimum threshold especially when dealing with the duration and the costs of civil proceedings. For example, in *Airey v. Ireland*, the ECtHR ruled that Article 6 ECHR encompass an obligation, under certain circumstances, to enable the claimants in civil cases to acquire legal aid.[79] Furthermore, it also imposed duties on the Contracting States to ensure that their domestic rules on evidence did not, in practice, violate the equality of arms principle enshrined in Article 6 itself.[80] In addition, in *Steel and Morris v. United Kingdom*[81], the ECtHR ruled that the United Kingdom was responsible for ensuring the equality of arms between the parties to the dispute (the NGO campaigners and the private company) and, due to the disparities between the level of legal assistance of the parties, the refusal by the State to guarantee legal aid to the NGO campaigners determined an unfair restriction on their ability to present an effective defence.

[78] *Golder v. United Kingdom* (App. No. 4451/70) ECtHR, 21 February 1975.
[79] *Airey v. Ireland* (App. No. 6289/73) ECtHR, 9 October 1979, Paragraph 26. 'Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.'
[80] *Dombo Beheer v. The Netherlands* (App. No. 14448/88) ECtHR, 27 October 1993, Paragraph 33.
[81] *Steel and Morris v. United Kingdom* (App. No. 68416/01) ECtHR, 15 February 2005, Paragraphs 59-71.

Furthermore, in *Markovic*[82] the Grand Chamber ECtHR ruled that the State (Italy) is required by Article 1 ECHR to secure in those proceedings respect for the rights protected by Article 6.[83] The case concerned the attempt of applicants from Serbia and Montenegro to bring civil proceedings in Italy for human rights violations occurred during a NATO airstrike in Belgrade in 1999. The Italian courts declined jurisdiction because, under the Italian law, the claimants were not entitled to have reparation for civil damages which took place as a result of a violation of public international law. However, the ECtHR held that the claimants came under the Italian human rights jurisdiction and could, therefore, benefit from the obligation to ensure access to justice.[84] In particular:

> *'If the domestic law recognises a right to bring an action and if the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction ratione loci and ratione personae of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6. The Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a 'jurisdictional link' for the purpose of Article 1*.'[85]

Under Article 47 of the EU Charter, '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented'. The Explanations of the EU Charter clarifies that Article 47 coincides with the rights in Article 6 (1) of the ECHR, without the limitation of Article 6 on civil rights and obligations.[86] Therefore, Article 47 EU Charter grants, as a minimum, the protection offered by the Article of the ECHR for all rights and freedoms arising from

[82] *Markovic and Others v. Italy* (App. No. 1398/03) ECtHR (Grand Chamber) 14 December 2006.
[83] Ibid., Paragraphs 53-56.
[84] Ibid., Paragraphs 53, 54.
[85] Ibid.
[86] *Trade Agency Ltd v. Seramico Investments Ltd* (No. C-619/10) CJEU, 6 September 2012, Paragraph 52.

EU law.[87] In other words, this means that the jurisprudence of the ECtHR will be relevant in European Union law unless otherwise stated.[88]

Both Articles 6 ECHR and 47 EU Charter can be limited. On one hand, Article 6 may be limited by the imposition of reasonable time limits or the requirement to pay court fees – nevertheless any restriction cannot impair "the very essence of the right"[89]; on the other hand, Article 47 may be restricted by national procedures to ensure the efficient administration of justice.

In conclusion, in reference to access to remedy, Article 13 ECHR deals with the right to an effective remedy before a national authority and it requires Contracting States to establish at a national level, a remedy to enforce the substance of the Convention's rights and freedoms, in whatever form they may happen to be secured in the domestic legal order. Thus, especially when read in conjunction with article 1 ECHR, it imposes upon Contracting States the obligation to provide for remedies in their respective national legal order. On the other hand, under Article 47 of the Charter of Fundamental Rights, every individual whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. It is thus clear that Article 13 ECHR and Article 47 of the EU Charter have different scopes, since the former grants the right to claim effective remedies before a national authority for arguable claims of ECHR rights violations, whereas Article 47 provides a right to a remedy before a tribunal and applies to all rights and freedoms in EU law. This is not limited to rights under the Charter – thus granting more extensive

[87] *Europese Gemeenschap v. Otis NV and Others* (No. C-199/11) CJEU, 6 November 2012, Paragraph 47.

[88] European Union Agency for Fundamental Rights and Council of Europe (FRA), Council of Europe (CoE), European Court of Human Rights (ECtHR), Handbook (2016).

[89] 'The applicant did have access to the High Court and then to the Court of Appeal, only to be told that his actions were barred by operation of law. […] To this extent, he thus had access to the remedies that existed within the domestic system.' 'This of itself does not necessarily exhaust the requirements of Article 6 para. 1 (art. 6-1). It must still be established that the degree of access afforded under the national legislation was sufficient to secure the individual's "right to a court", having regard to the rule of law in a democratic society. […] Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals […] In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. […] Nonetheless, the limitations applied must 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'. *Ashingdane v. the United Kingdom* (App. No. 8225/78) ECtHR, 28 May 1985, Paragraph 57.

protection. It is also worth noting neither the ECHR nor the EU Charter defines the concept of "effective remedy" and do not provide for requirements related to the forms of remedies: a remedy must simply be effective in practice and in law.

Lastly, with reference to the right to a fair trial, Article 6(1) ECHR embodies the right to a court by granting every individual fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and applying to criminal charges, disputes relating to civil rights and obligations recognised by domestic law. Article 47 of the EU Charter establishes that the individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Article 47 47 coincides with the rights in Article 6 (1) of the ECHR, but without the limitation of Article 6 on civil rights and obligations.

Accordingly, the prospective legally binding treaty, while reaffirming the right of every individual to effective remedy and emphasising the States' obligations to ensure the provision of adequate, effective, prompt, and appropriate remedies, might also require States to ensure reparation for the victims of corporate-related human rights abuses, which in accordance with international law, should include restitution, compensation, rehabilitation, and satisfaction, and be subject to effective implementation and ensure a means to prevent future abuses since reparation includes guarantees of non-repetition.

2.2.2 Non-European frameworks

As far as the American Convention on Human Rights is concerned, a first reference to some elements related to the concept of access to remedy may be found in Article 1(1)[90], whose interpretation given by Inter-American Court of Human Rights in its first case, pointed out that the State duty to ensure the Convention's rights included also, when possible, the attempt to restore the right violated and the compensation for the

[90] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), Article 1(1). The Article states: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'.

damages.[91] Moreover, under the same Convention, the notion of remedy includes the right to judicial protection.[92] As a result, while every individual has 'the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights', States Parties are required to ensure that everyone has his/her claim heard by competent authorities, that he/she has access to effective judicial remedy and that competent authorities grant the enforcement of remedies. In addition, the Convention under Article 8 recognized a right to fair hearing 'with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law'.[93] Finally, if a court concluded that a violation took place, it shall rule that remediation for the consequences of the breach is granted to the victims and/or fair compensation is paid.[94]

Thus, under regional human rights treaties, not only a duty to provide and ensure access to remedy is recognized (in the case of ECHR it may be inferred from Article 13 in conjunction with Article 1 and in the case of the American Convention from Article 1), but these instruments explicitly establish the individual right to access to remedy, which may take the forms of right to judicial protection and compensation or the right to have complaints heard by competent authorities and to be granted relief. Similar principles are present also in the African Charter, whose Article 7 establishes the individual right to have claims heard by competent national organs.[95] Moreover, while clarifying the Charter, the African Commission on Human and Peoples' Rights has stressed that national remedies must be available, effective, as well as sufficient.[96]

In conclusion, international and regional human rights instruments set forth, on one side, a duty upon States to provide for access to effective remedies and, on the other, an individual right to effective remedy, generally by the competent national tribunals.

[91] *Velásquez Rodriguez v. Honduras* (Ser.C No.4) Inter-American Court of Human Rights, 29 July 1988, Paragraphs 166 and 177.
[92] American Convention on Human Rights, Article 25.
[93] Ibid, Article 8.
[94] Ibid, Article 63.
[95] African Charter on Human and Peoples Rights, Article 7.
[96] UN HCR, Report A/HRC/11/13/Add.1, 32.

With reference to the duty resting upon States, which results from the State duty to protect and is rooted in international Human rights law, States are required to take appropriate steps to prevent business-related human rights abuses of those individuals within their territory and/or jurisdiction, as well as to investigate, punish and redress such abuses when they occur. The State duty to protect extends to the provision of access to remedy. For example, under the ICCPR, States are required to ensure that any person, whose rights are violated, is entitled to have an effective remedy and to have his/her claim judged by judicial, administrative, legislative or any other competent authorities. Hence, under international human rights law instruments, States are subject to the positive obligation to fulfil human rights, which entails both the duty to adopt measures aimed at guaranteeing the enjoyment of rights, and the obligation to provide remedy to victims of human rights violations. Furthermore, although States possess discretion with reference to the modalities to fulfil this duty, the discretion owned by States seems to be balanced by some treaty provisions, which clearly require States to provide remedies when abuses occurred, and by treaty bodies which provide for 'useful guidance'. [97] In accordance with General Comment N. 31 of the UN Human Rights Committee, States human rights obligations 'will only be fully discharged if individuals are protected by State[s], not [only] against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights […]'. Thus, States may infringe their international human rights obligations if they fail 'to take appropriate measures or to exercise due diligence to prevent, punish or redress the harm caused by such acts by private persons or entities'.[98] Accordingly, the prospective legally binding treaty should have due regard to States human rights obligations to ensure effective remedies and it should emphasize that the States' human rights obligations will only be fully discharged if individuals are protected by States against acts committed by private persons or entities that would impair the enjoyment of the individuals' rights. This will be consistent with the interpretation of human rights treaties, in particular the ICCPR as provided by the UN Human Rights Committee in its

[97] UN HCR, 'State obligations to provide access to remedy for human rights abuses by third parties, including business' (15 May 2009) UN Doc A/HRC/11/13/Add.1, 25.
[98] UN HRC, General Comment N. 31, Paragraph 8.

General Comments. Furthermore, in accordance with international and regional human rights instruments, the prospective treaty should also specify the procedural and substantive components of effective remedies. From a substantial point of view, remedies should aim at the provision of reparation, including appropriate compensation, restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. Moreover, a remedy should be required to be prompt, thorough and it should entail effective investigations into allegations of abuses, which in turn, are required to be conducted by independent and impartial bodies. In other words, the victim should first have practical and meaningful access to a procedure, capable of ending and repairing the effects of the violation, and secondly, once the violation is established, the victim should receive a relief sufficient to repair the harm.

These requirements would be also consistent with the UN Guiding Principles and specifically Principle 25 which, besides underling the forms that remedies may take, points out that States are, first, required to set out mechanisms aimed at guaranteeing that any possible grievance is raised and that redress is sought.

Lastly, the prospective treaty may include provisions restating the individual rights to remedy and to fair trial. As a matter of facts, alongside the above-mentioned duty to provide remedy resting upon States, individuals are entitled to right to remedy and fair trial. For example, the UN Universal Declaration of Human Rights affirms that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'[99] and highlights that individuals are entitled 'in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of [their] rights and obligations and of any criminal charge against [them].'[100] Similarly, ICCPR Article 14 sets forth the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[99] Universal Declaration of Human Rights, Article 8.
[100] Ibid., Article 10.

3. Judicial remedies: opportunities and barriers in civil law

As pointed out in the UN Guiding Principles, the concept of judicial mechanisms to obtain judicial remedies refers a State's judicial system and thus to the possibility to access civil and criminal courts, underlining – as repeated several times – that States should reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy, and ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable.[101] However, a number of legal, procedural, financial and practical obstacles often undermine the effectiveness of civil remedies as an avenue to hold companies legally responsible for the harms committed during their operations, especially when the damage took place in host States, namely when companies operate in foreign countries.

Before further proceeding, some remarks related to the terminology used in the present chapter are necessary. Firstly, following the definition already elaborated by the International Commission of Jurists, the notion "law of civil remedies" or "civil law" is used here to indicate both the law of tort in common law systems, as well as the law of non-contractual obligations in civil law systems. Indeed, as pointed out by the International Commission of Jurists, the two systems of law govern and establish civil liability when an individual suffers harms caused by the behaviour of another actor, and the two individuals, the victim and the wrongdoer, do not have any contractual relation.[102] Secondly, in accordance with the definition elaborated by the International Law Association, a civil litigation for human rights violations may be described as a '*litigation founded on the law of civil remedies and instigated by victims of human rights abuses, their families or entities representing public interests, against private individuals or corporate entities in order to establish civil liability and obtain a private*

[101] UN HRC, Res. 17/31, Principle and Commentary 26.

[102] The majority of cases in the business and human rights field involves violations of human rights committed by corporations at the detriment individuals who are not in a contractual relationship with the company at stake. International Commission of Jurists (ICJ), 'Corporate Complicity & Legal Accountability. Civil remedies. Volume 3' (2008) ICJ Online Publication, 3.

law remedy, usually damages, and sometimes more importantly to the claimants themselves, formal, public, legal accountability of the defendant'.[103]

Most jurisdictions provide victims of human rights abuses or their families or 'entities representing public interests' with the possibility to start civil litigations against a natural person or a business enterprise for the purpose of obtaining compensation for a wrongful behaviour, which in turn may represent a way to acquire a legal remedy, under the condition that 'the behaviour complained of falls within the relevant domestic law tests for liability'.[104]

Thus, in every jurisdiction, civil law suits may represent a valuable way to have remedies for damages caused by an actor whose negligent or intentional conduct has caused harm to a victim. Despite the differences in the terminology across various jurisdictions, the definition of "wrongful behaviour" acquires a crucial importance. In both common law and civil law jurisdictions, the common grounds for liability are: intention or negligence (which together may be referred as fault), causation and harm/damage.[105]

In civil and common law countries, a damage has to be caused to an interest protected by law, in order to obtain remedies. Although the determination of what constitutes "an interest protected by law" may vary from case to case and from jurisdiction to jurisdiction, the 'law of civil remedies can be invoked to remedy harm to life, liberty, dignity, physical and mental integrity and property'.[106] This means that, although the alleged harm cannot be linked to a breach of international human rights law, it is nevertheless possible to take legal actions for one of the above-listed harms.[107]

In addition, in every jurisdiction, 'an actor can be held liable under the law of civil remedies if through negligent or intentional conduct the same actor caused harm to

[103] International Law Association (ILA), 'Report The Hague Conference. Private International Law Aspects of Civil Litigation for Human Rights Violations' (2010) ILA Online Publication.
[104] Ibid., 5; Zerk (2014) 43.
[105] International Commission of Jurists, Volume 3 (2008) 10; Tunc (edited by), *International Encyclopedia of Comparative Law. Volume XI. Torts, Part I* (1983) Chapter 1, 7-9. Hereafter cited as "International Encyclopedia".
[106] International Commission of Jurists, Volume 3 (2008) 10.
[107] Ibid.

someone else'.[108] Thus, in civil and common law systems, intent and negligence play a key role in the determination of the civil liability of the natural person or - as in the present analysis - of the legal person who committed harm. As far as "intent" is concerned, an actor is considered to have acted intentionally if the same actor deliberately started actions, knowing that his/her conducts would cause harm.[109] With regard to "negligence", in both civil and common law jurisdictions, the determination of whether or not a conduct was negligent depends, firstly, on the knowledge that a business entity had about the risk(s) that its conduct may cause or have caused harm and, secondly, it depends on whether or not the business entity put into place precautionary measures to prevent the risk(s).[110]

As a result, in civil law litigations, the claimant must prove that the damage - he/she suffered - was 'reasonably foreseeable to the defendant and, if so, whether the defendant had acted in a reasonable way given the risks'.[111] In civil and common law jurisdictions, 'findings of negligence relates to the questions of whether the damage suffered by the claimant was "reasonably foreseeable" to the defendant and, if so, whether the defendant had acted in a reasonable way given the risks In common law jurisdictions, these ideas find expression as duties and standards of care. To make out a successful claim for negligence, the claimant must show first, that there was a duty of care; second, that this duty of care was breached; third, that the breach of duty resulted in damage or loss to the claimant and, finally, the damage suffered was not too remote to justify compensation in the circumstances.'[112] Finally, as far as the last requirement is concerned, the actor not only must have acted with negligence or intentionally, but it has to be proved that he/she has contributed to the harm, in order to establish the actor's liability.[113]

In addition, although civil actions are a possibility in several States, several procedural obstacles may arise, especially in cross-border cases. Under private international law,

[108] Ibid.
[109] International Encyclopedia, Chapter 2, 31; International Commission of Jurists, Volume 3 (2008) 13; Zerk, (2014) 43.
[110] International Commission of Jurists, Volume 3 (2008) 14-26.
[111] Zerk, (2014) 44.
[112] Ibid.; International Encyclopedia, Chapter 2, 20.
[113] International Commission of Jurists, Volume 3 (2008) 21, 27.

in order to hear a case, the jurisdiction of that particular forum has firstly to be determined. Secondly, once the jurisdiction has been allocated, the Court has to establish the applicable law to the case at stake. Thirdly, other obstacles, ranging from the complex and tangled structure of the business company (which will make it difficult to assign liability, for example, to one of the business entities constituting a multinational corporations) to the separate legal personality of the subsidiary may also be encountered by the claimant. Finally, it is important to mention that although the Court may find in favour of the victims, this does not automatically lead to the enforcement of the judgment, rather there is the risk of the so-called limping relationships, namely 'situations in which decisions obtained in other countries cannot be enforced', particularly in host States.[114] These obstacles are particularly relevant when legal actions are commenced in courts located in a different State from the place where the alleged human rights abuse was committed or in a different State from the place where the damage or injury was suffered. Many reasons may explain why claimants '*favour an alternative jurisdiction over the one with the closest territorial connections to the claim, including concerns about lack of impartiality or the capacity of the local courts to hear the claim in a timely fashion. Alternative jurisdictions may also be more advantageous to claimants in terms of sources of funding, access to public interest lawyers and pro bono help, procedural advantages and the prospect of greater damages awards*.'[115]

3.1 Rules of private international law: the issue of jurisdiction

Jurisdiction here refers to the right and power to administer justice within a clearly defined territory.[116] This includes the powers of a State's court to hear cases

[114] Human Rights in European Business, 'A Practical Handbook for Civil Society Organisations and Human Rights Defenders' (September 2016) 40.
[115] Zerk (2014) 48.
[116] The notion of "juridisction" has various meanings. It may refer to a territory subject to the control of a particular court or to the power of a State to do something. While, in reference to States' exercise of jurisdiction, Oppenheim states that international law governing jurisdiction 'describes the limits of the legal competence of a State… to make, apply, and enforce rules of conduct upon persons. It concerns essentially the extent of each state's right to regulate conduct or the consequences of events', the notion of jurisdiction is also used to indicate the competence of (international) tribunals to hear a case. Thus, jurisdiction may be domestic as well as international. While domestic jurisdiction concerns the power of different governmental organs within a specific State, international jurisdiction refers to the division of powers between different States and other international entities. International jurisdiction

concerning persons, property or events and the powers of physical interference, such as the arrest of persons, the seizure of property or the determination of a fine. In international litigations containing a foreign element, such as a defendant domiciled abroad (for example the subsidiary of a parent company), or a claimant domiciled abroad (for example the victim of business-related human rights violations), or events (damage, for example the violation of human rights) that happened in a third country, international jurisdiction is intended as the possibility of the courts of a specific country to hear the case.[117]

Although every State has its own rules regarding jurisdiction, according to a general principle, private international law allocates jurisdiction to domestic courts, which in turn have jurisdiction over harms taking place within the territory of the *forum* State on the basis of a nexus to the forum State.[118] However, a claimant may decide to start a legal action in a forum with no territorial link to the claim, namely either in a court which is not the forum of the State where the alleged abuse was committed, or in a court located in a different country from the place where the damage or the injury were suffered.[119] This may be determined, *inter alia*, by the partiality or incompetence of local courts, or by a greater availability of funds in foreign systems. Therefore, courts generally do not exercise 'their adjudicatory jurisdiction for the sole reason that a claim was [brought before them] for a human rights violation, irrespective of any other connection' to the forum. Only in few States, among them the Netherlands and

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includes legislative, executive and judicial jurisdiction. This latter, which is the jurisdiction of courts and may be defined as 'the power of a court to give a binding decision on a legal controversy', is explored in this section. See Trevor C. Hartley, *International Commercial Litigation. Text, Cases and Materials on Private International Law. Second Edition* (Cambridge University Press, 2015) 3-17; International Bar Association, 'Report of the Task Force on Extraterritorial Jurisdiction' (2009) Online Publication, 6-8.

[117] On Private International Law see, among others: Trevor C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press, 2015); Geert Van Calster, *European Private International Law. Second Edition* (Bloomsbury, 2012); William H. Rattigan, *Private International Law* (General Books, 2012); Albert V. Dicey, John Morris, Lawrence A. Collins, *The Conflict of Laws*. *Fifteenth Edition* (Sweet & Maxwell, 2012); James Fawcett, Janeen Carruthers, Peter North, *Cheshire, North and Fawcett: Private International Law. Fourteenth Edition* (Oxford University Press, 2008); Giorgio Conetti, Sara Tonolo, Fabrizio Vismara, *Manuale di diritto internazionale privato* (Giappichelli, 2015); Franco Mosconi, Cristina Campiglio, *Diritto Internazionale Privato e Processuale. Volume I. Sesta Edizione* (Utet Giuridica, 2013).

[118] Human Rights in European Business, Handbook (2016) 48.

[119] Zerk (2014) 48-49, 68; Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) City University of Hong Kong Law Review, 10.

Japan, courts may - in exceptional circumstances - assume jurisdiction on the sole basis of the necessity and for the purpose of avoiding denial of justice, in accordance to the so-called *forum necessitatis* principle.[120]

Thus, while private international law plays an important role in determining whether and to what extent the courts seized have jurisdiction to adjudicate on them, the legal basis for a court to exercise jurisdiction varies from State to State, but it generally takes into account connecting factors between the defendant and the forum.

3.1.1 Jurisdictional rules in the United States

In the United States, a court cannot hear a dispute unless it possesses "personal" and "subject-matter" jurisdiction over the claim. Subject-matter jurisdiction is defined as 'the power of a court to entertain specified classes of case, [for example] any action between parties of differing citizenship'. On the other hand, personal jurisdiction refers to 'the power of a court to adjudicate a claim against the defendant's person and to render a judgement enforceable against the defendant and any of its assets'. Thus, when compared, subject-matter jurisdiction may be intended as '*a court's power to hear categories of claims, without necessarily considering the relationship of the parties to particular cases to the forum*.'[121]

In the United States, there are two distinct court systems: federal courts, which have federal jurisdiction, and state courts.[122]

As far as federal jurisdiction is concerned, to establish whether or not federal courts have subject matter jurisdiction, two main legal bases may be considered: federal

[120] ILA, Report (2010) 6.

[121] Gary B. Born, Peter B. Rutledge, *International Civil Litigation in United States Courts. Fifth Edition* (Wolters Kluwer, 2007) 1-217; Hartley (2015) 148-178; Enneking (2012) 133-134. See also: Paolo Bargiacchi, *Orientamenti della dottrina statunitense di diritto internazionale* (Giuffrè, 2011); Dicey, Morris, Collins, *The Conflict of Laws. Fifteenth Edition* (Sweet & Maxwell, 2012); Eric Engle, *The Alien Tort Statute: Extraterritorial Jurisdiction in US and International Law* (Lambert Academic Publishing, 2010)

[122] By virtue of the fact that the United States are a federal State, each state has its own court system and there is also a federal judicial system. As a result, at the single states level, there is a trial level, an intermediate appeal level and a state supreme court. On the other hand, at the federal level, there are federal judicial districts, composed of federal district courts. Federal judicial districts constitute various circuits, which have United States court of appeals and above them there us the Supreme Court of the United States. Hartley (2015) 148-149.

district jurisdiction and diversity jurisdiction.[123] In accordance with the former ground, the federal district courts have jurisdiction in all civil actions involving federal law. In accordance instead with the "diversity jurisdiction", they have jurisdiction '*in any civil action between citizens of different US states; citizen of a US state and citizens or subjects of a foreign State, citizens of different US states in which citizens or subjects of a foreign State are additional parties, and a foreign State as plaintiff and citizens of a US state or different states*'.[124]

As far as rules of international jurisdiction, generally State courts apply the "minimum contact" doctrine as ruled in the *International Shoe Co. v. State of Washington*[125], a landmark decision of the Supreme Court of the United States where the latter held that a party – in this case a corporation – can be subject to the jurisdiction of a state court if it has a minimum contacts with that state at stake:

> '*The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, […] and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.*
> *[…]*
> *Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. […]. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a*

[123] Federal question jurisdiction and diversity jurisdiction are not the only legal basis of federal court jurisdiction, but they may be considered as the most important. Hartley (2015) 150.

[124] There is also a rule that federal courts do not have subject-matter jurisdiction on diversity grounds unless there is complete diversity. This means that there is no diversity if any party on the one side is a citizen of the same state as any party on the other side. In addition, it may happen that federal and state courts have both jurisdiction. As a result, if the plaintiff chooses the state courts, the defendant may wish to have the case removed to the federal courts. This is normally possible if there is concurrent jurisdiction, but in diversity cases (or any case not involving federal question jurisdiction) removal is not permitted if any of the defendants is a citizen of the state where the action is brought. This means that, if an English plaintiff sues a Californian defendant in a state court in Texas, the defendant can have the case removed to a federal court, but if the plaintiff brings the action in a state court in California, removal will not be possible unless the case is based on federal law. Hartley (2015) 150-151.

[125] *International Shoe Co. v. State of Washington* (326 US 310: 66 S Ct; 90 L Ed 2d 95) United States Supreme Court, 3 December 1945.

defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.

[…] the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.'

As also explained in *World-Wide Volkswagen Corporation v. Woodson*[126], '*[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a non-resident defendant. […] a state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. […].*'[127] Mr Justice Byron White clarified also that '*the Due Process Clause does not contemplate*

[126] *World-Wide Volkswagen Corporation v. Woodson* (444US 286; 62 L Ed 2d 490; 100 S Ct 559) United States Supreme Court, 21 January 1980. The case was brought by Mr and Mrs Robinson in the state court of Oklahoma against to recover for personal injuries sustained in Oklahoma in an accident involving the car (an Audi) that they had bought in New York while they were New York residents and that was being driven through Oklahoma at the time of the accident. The defendants were the manufacturer (Audi NSU), the importer (Volkswagen of America), the regional distributor (World-Wide Volkswagen) and the retail dealer (Seaway). Both the regional distributor and the dealer challenged the jurisdiction of the Oklahoma court, arguing that they did not have any contact with Oklahoma or that any car that they had sold had never been driven there. 'The issue before [the court was] whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a non-resident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma'. While the Supreme Court of Oklahoma ruled that it had jurisdiction, found at the end that the defendants had no contacts, ties or relations with the State of Oklahoma.

[127] Ibid. The US Supreme Court further explained that '[t]he concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'

that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.'[128]

In addition, the *International Shoe Co. v. Washington* Case clarified that the "minimum contact" was the test for due process. The doctrine provides the outer limit for state-court jurisdiction: anything beyond that is unconstitutional. It has to be noted that while the "minimum contact" test was initially intended to impose limits on the jurisdiction that the states could confer on their courts, it later became a jurisdictional rule.[129] The "minimum contact" doctrine applies also to federal courts. However, if an action is brought in a state court, the minimum contact is required to be with the state at stake. If jurisdiction is based on state law, this is also the position of federal courts. However. Where no state jurisdictional rule covers the case, a federal court may obtain jurisdiction on the basis of a nationwide minimum contact test.[130]

Thus, in the United States, the personal jurisdiction of the court depends generally on the relationship between the corporations and the US state addressed and, in particular, either on the domicile of the corporation or on its presence within that specific State.[131]

While the domicile is considered to be the place of incorporation, "presence" may be defined as the principal place of business or the place where the foreign company has sufficient contacts with the State, for example on the basis of "doing business in that

[128] Ibid.
[129] Hartely (2015) 152-155.
[130] Ibid., 167-172.
[131] Zerk (2014) 48; International Law Association (ILA), 'Sofia Conference Report. Final Report. International Civil Litigation for Human Rights Violations' (2012) ILA Online Publication, 7-8. See also: Curtis A. Bradley, *International Law in the U.S. Legal System. Second Edition* (Oxford University Press, 2015); Enneking (2012).

State".[132] Indeed, a corporation is be considered to be "present" for the exercise of jurisdiction even when the same company is "doing business" in the sense of engaging in activities within a US state that are, as under the *International Shoe Co. Case,* "systematic and continuous", namely *"*neither irregular nor casual*".* These continuous corporate activities within a State are required to be 'so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities'*,* because those operations 'establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to traditional conception of fair play and substantial justice to permit the state [to exercise jurisdiction]'.[133]

Additionally, '*when it comes to personal jurisdiction, US rules tend to be fairly liberal in the sense that the presence of the defendant within the US is generally sufficient for US courts to exercise jurisdiction over that defendant. With respect to corporate defendants, the mere fact that a corporation is 'doing business' within the forum, meaning that it has substantial, ongoing business relations there, may provide US courts with personal jurisdiction over it.*'[134] In addition to what has already explained above, in the *Wiwa v. Royal Dutch Petroleum Co.* Case, the presence within the forum of an investor relations office was found by the Court as a sufficient grounds for the exercise of personal jurisdiction over two of the multinational corporations' foreign parent companies, Royal Dutch Petroleum Company and Shell Transport and Trading Company, which were incorporated in the Netherlands and the UK, respectively. '*In assessing whether jurisdiction lies against a foreign corporation, both this court and the New York courts have focused on a traditional set of indicia: for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests. […] The Investor Relations Office, whose activities are attributable to the defendants […] meets each of these tests. It constitutes a substantial*

[132] Ibid.
[133] Ibid.
[134] Liesbeth Enneking, *Foreign Direct Liability and Beyond. Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing, 2012) 141.

physical corporate presence in the State, permanently dedicated to promoting the defendants' interests.'[135] Thus, the presence New York investor relations office of two non-US companies, which were doing business in New York, was deemed sufficient by the Second District Court of Appeals to assert its personal jurisdiction by virtue of the fact that the investor relations office was considered to be "an agent" of the parent companies and because the office's expenses were completely paid by the parent companies, the office's time was dedicated to the companies' business, and approval from the parent companies was required for important decisions.[136]

3.1.2 Jurisdictional rules in the European Union

The Member States of the European Union are subjects to Regulation No 1215/2012 (Brussels I Regulation Recast)[137] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which, since 10 January 2015, has replaced the former Regulation No 44/2001 (Brussels I Regulation).[138] This latter, in

[135] *Wiwa et al. v. Royal Dutch Petroleum Company, and Shell Transport and Trading Company, PLC* (226 F.3d 88) United States Court of Appeals for the Second Circuit, 14 September 2000, 6. (Hereafter "*Wiwa et al. v. Royal Dutch Petroleum Company*" case). This claim was filed by Ken Wiwa (son of the Ogoni activist Ken Saro-Wiwa, who campaigned against environmental damages caused by oil extraction in the Ogoni region of Nigeria and for increased autonomy for the Ogoni ethnic group.) and other Nigerians who suffered human rights violations in Nigeria. In particular, they alleged that the defendants, Royal Dutch Petroleum Company (Royal Dutch) and Shell Transport and Trading Co, PLC (Shell Transport), had participated in the grave human rights abuses against themselves or their relatives in Nigeria. Royal Dutch, a Netherlands corporation, and Shell Transport, a United Kingdom company, together controlled the Royal Dutch/Shell Group, a multinational corporate conglomerate with a wholly owned subsidiary in Nigeria (Shell Nigeria). Shell Nigeria, in turn, engages in oil exploration and extraction in Nigeria, particularly in the Ogoni region. According to the claimants, the corporations were complicit in human rights abuses by – through the Nigerian subsidiary – providing transport to the Nigerian troops, allowing company premises to be used as staging areas for raids against local citizens and paying and providing food to the soldiers. In June 2009, the parties announced that they had agreed to a settlement in the case for $15.5 million. See also Aaron Xavier Fellmeth, 'Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?' (2014) 5 Yale Human Rights and Development Journal; Business and Human Rights Resource Centre website.

[136] *Wiwa et al. v. Royal Dutch Petroleum Company*, 88-95.

[137] Regulation (EU) No 1215/2012 of the European parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (2012), OJ L 351/1. Hereafter "Brussels I Regulation (Recast)". The Brussels I Regulation (Recast) applies throughout the territory of all EU Member States. For related cases against enterprises domiciled in Switzerland, Norway or Iceland in Member State courts, the Lugano Convention of 2007 applies.

[138] European Union Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001), OJ L 12/1. Hereafter "Brussels I Regulation". It is important to note that under Article 80 of the Brussels I Regulation (Recast),

turn, had revised the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters adopted on 27 September 1968.

Pursuant to Article 1 of the Brussels I Regulation (Recast), the Regulation applies to civil and commercial matters whatever the nature of the court and tribunal. As a result, defendants domiciled in a Member State of the European Union shall be sued in the courts of that Member State, whatever their nationality.[139] In business and human rights cases, this means that courts of the EU Member States generally have jurisdiction *ratione personae*, when the defendant company, whatever its nationality, is domiciled in any EU Member State.

On the other hand, defendants, who are not nationals of the EU Member State in which they are domiciled, are governed by the rules of jurisdiction applicable to nationals of that Member State.[140]

Under the Brussels I Regulation (Recast) Article 63, the domicile of a company is defined as the location where the same company has either its principal place of business, or its statutory seat or its central administration.[141] For example, in the *KiK* Case the claimants filed a compensation claim against the German company KiK at the Regional Court in Dortmund, Germany, for a fire started in 2012 at the Ali Enterprises textile factory in Karachi, Pakistan, where 260 people died and dozens were injured.[142] The claimants, the survivors and the victims' relatives, alleged that KiK was the main client of Ali Enterprises and they sued the German company pursuant to Article 4 of

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this latter applies from 10 January 2015, with the exception of Articles 75 and 76, which apply from 10 January 2014.

[139] Brussels I Regulation (Recast), Article 4(1).

[140] Ibid., Article 4(2).

[141] As far as natural persons are concerned, under Article 62 of the Brussels I Regulation (Recast), 'if a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State'.

[142] Business and Human Right Resource Centre, KiK lawsuit (re Pakistan), Online Publication, <https://business-humanrights.org/en/kik-lawsuit-re-pakistan>, accessed 17 October 2016; Carolijn Terwindt, ECCHR on Humboldt Law Clinic Grund-und Menschenrechte (20 October) Online Publication, <http://grundundmenschenrechtsblog.de/supply-chain-liability-the-lawsuit-by-karachi-claimants-against-retailer-kik-in-historic-perspective/>, accessed 17 October 2016; European Centre for Constitutional and Human Rights (ECCHR), 'Paying the price for clothing factory disasters in south Asia', ECCHR Online Publication, <https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html> accessed 17 October 2016; Philipp Wesche, Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK' (2016) 2 Human Rights Law Review.

Brussels I Regulation (Recast), thus on the basis that the domicile of the defendant was in Germany. In August 2016, the Dortmund Court accepted jurisdiction and granted legal aid to the Pakistani claimants to cover the legal fees.[143]

In case a defendant is not domiciled in a Member State, then the jurisdiction of the courts of each Member State shall be determined by the law of that Member State, subject to Articles 18(1) and Article 21(2), regarding rules related to consumers, employers, and Articles 24 and 25, dealing with exclusive jurisdiction and prorogation of jurisdiction.[144]

The general rule on the attribution of jurisdiction to the court where the defendant's domicile is located applies independently of the matter at issue in the lawsuit. However, '*in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in [the] Regulation should apply regardless of the defendant's domicile*.'[145]

Furthermore, the Brussels I Regulation (Recast) Article 7 entails special rules of jurisdiction, which are of relevance since they represent an alternative to rules connected to the domicile of the defendant. As a result, the claimant domiciled in a Member States may sue either in the courts of the defendant's domicile or, alternatively, in the courts of another Member State designated by the rule of special

[143] The Dortmund court will still have to decide the merits of the case. In addition, under the EU Rome II Regulation, the liability of Kik will be decided on the basis of the Pakistan law. See online article: Carolijn Terwindt, 'Supply chain liability: The lawsuit by Karachi claimants against retailer KiK in historic perspective' (20 October 2016) Humbolt Law Clinic Grundmenschrectenblog, <http://grundundmenschenrechtsblog.de/supply-chain-liability-the-lawsuit-by-karachi-claimants-against-retailer-kik-in-historic-perspective/>, accessed 10 July 2017.

[144] Brussels I Regulation (Recast), Article 6(1).

[145] Ibid, Recital 14 and Article 24. Specifically, under Article 24 of the Brussels I (Recast), 'a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated […]; (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat […]; (3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept; (4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered […]; (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.'

jurisdiction by virtue of the matter concerned, provided that the matter does not fall within Article 24 (exclusive jurisdiction) and that the parties have not agreed on any particular jurisdiction (Article 25).

Under Article 7(2), '[*a] person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur*'.[146] In the *Handelskwekerij G. J. Bier BV v Mines de Potasse d'Alsace SA.* Case[147], the Court of Justice of the European Union ruled that the place where the harmful event occurred is to be intended as the territory of the country where the event giving rise to the damage took place, as well as the territory of the country where the harmful result occurred and as a result the claimant had 'an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it.'[148] Specifically in this case, Mr Bier and the Reinwater Foundation claimed the company Mines de Potasse d'Alsace, whose headquarter was in France, had discharged pollutants into the Rhine, damaging the plantation of Mr Bier in the Netherlands. As a result, the event giving rise to the damage took place in France, while the harmful event resulted in the Netherlands.

[146] Brussels I Regulation (Recast), Article 7(2).

[147] *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* (C-21/76) CJEU, 30 November 1976.

[148] In particular, in the *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* Case, the Appeal Court of The Hague referred a question to the Court of Justice of the European Union on the interpretation of Article 5 (3) of the Brusssels Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters. The claimants, Mr Bier and the Reinwater Foundation, brought an action before the Court of first instance in Rotterdam against the company Mines de Potasse d'Alsace, alleging that the company discharged chlorides into the Rhine, as industrial waste. They considered that the excessive salinization of the Rhine is due principally to the massive discharges carried out by Mines de Potasse d'Alsace and they declare that it is for that reason that they have chosen to bring an action for the purposes of establishing the liability of that undertaking. While Mines de Potasse d'Alsace claimed that the Rotterdam Court did not have jurisdiction in the matter, the same opinion was confirmed by the Court ruling that it had no jurisdiction 'because the event that had caused the damage could only be the discharge of the residuary salts into the Rhine in France and therefore under the Convention of 1968 the case came under the jurisdiction of the French court for the area in which that discharge took place'. Mr Bier and Reinwater brought an appeal against that judgment before the Appeal Court of The Hague which subsequently asked to the Court of Justice of the European Union 'what [was] meant by, the place where the harmful event occurred in Article 5 (3) of the Convention. In particular, it asked the Court to say whether the meaning is the place where the damage occurred (the place where the damage took place or became apparent) or rather the place where the event having the damage as its sequel occurred (the place where the act was or was not performed).' *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, 1736-1737, 1746-1747.

However, in business and human rights-related cases, it might be difficult to identify both the place of the causal event that determined the damage, and the place where the damage was found. Especially when the alleged violation occurred in a third country, it becomes difficult to prove that the event, which caused the damage in a third country, is a decision of a negligent act taken or committed by a parent company domiciled in an EU Member State. Access to information may indeed be a barrier that victims encounter when they seek to prove that the damage was caused by a lack of due diligence by the parent company.

In addition, in a subsequent case, the CJEU imposed a limitation on the rules set forth in the *Bier v. Mines de Potasse d'Alsace* Case. In *Dumez v. Hessische Landesbank*[149], a German bank had allegedly caused harm to the German subsidiary of a French company. As a result, the subsidiary became bankrupt and the parent company suffered loss. The parent sued the bank in France and claimed that the French courts had jurisdiction under the current Article 7(2) Brussels I Regulation Recast (at that time Article 5(3) of the Brussels Convention of 27 September 1968). It argued that its loss was felt in France. The CJEU, however, stated that the rule laid down in *Bier v. Mines de Potasse d'Alsace* applied only to harm directly suffered as a result of the wrongful act. '*The expression "place where the harmful event occurred"* […] *may refer to the place where the damage occurred, but the latter concept can be understood only as indicating the place where the event giving rise to the damage, and causing tortious, delictual or quasi-delictual liability to be incurred, directly produced its harmful effects upon the person who is the victim of that event. Accordingly, […] a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act before the courts in the place in which he himself ascertained the damage to his assets.*'[150] Thus, the German subsidiary company had suffered a direct harm, whereas the parent company suffered an indirect harm. As a result, the French Court had no jurisdiction in the case.

[149] *Dumez v. Hessische Landesbank* (C-220/88) CJEU, 11 January 1990.
[150] Ibid., Paragraphs 15-22.

Furthermore, under Article 7(3) of the Brussels I Regulation (Recast), a person domiciled in a EU Member State may be sued in another EU Member State as regards to a civil claim for damage or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that the court has jurisdiction under its own law to entertain civil proceedings. Accordingly, when a human rights violation constitutes a crime, the Court hearing the criminal proceedings has jurisdiction to hear the civil proceedings as well, if the domestic law of the court allows to do so. Unlike jurisdiction in civil and commercial matters, criminal court jurisdiction is not regulated by EU Regulations, thus domestic rules of each EU Member State will apply.

In the *Amesys* Case[151], for example, the French Human Rights League (LDH) and the International Federation for Human Rights (FIDH) filed a complaint against the French company Amesys, alleging the complicity of this latter company and its executive managers in acts of torture committed by the Libyan regime, as a result of a commercial agreement for the provision of surveillance technology used by the Libyan regime to identify opponents of Gaddafi, whom the government then detained and tortured . As explained by the claimants':

> '*the application of the United Nations Convention against Torture 1984, and the principle of extraterritorial jurisdiction enshrined therein, gives French judges jurisdiction over crimes committed outside of France, regardless of the nationality of the perpetrator or the victim. In this instance, however, the fact that Amesys had its headquarters in France at the time that the alleged crimes were perpetrated, was enough to give the French courts' jurisdiction over acts of torture committed outside France where the main perpetrators were non-French nationals – namely, agents of the Libyan State, who used surveillance equipment supplied by Amesys, who was thus rendered accomplice to their crimes, to the detriment of Libyan victims.*'[152]

While the public prosecutor of the Paris Tribunal opposed to begin investigations into the case on the grounds that the alleged facts could not be classified as criminal acts,

[151] International Federation for Human Rights (FIDH), Ligue française pour la défense des droits de l'homme et du citoyen (LDH), The Amesys case Report, Online Publication, <https://www.fidh.org/IMG/pdf/report_amesys_case_eng.pdf> accessed 15 September 2016. Information available also in Business and Human Rights Resource Centre <https://business-humanrights.org/fr/proc%C3%A8s-amesys-libye> accessed 15 September 2016.

[152] FIDH, LDG, *The Amesys* Case, 5.

the investigating judge issued a different opinion supporting the start of an investigation to determine the liability of Amesys. In January 2013, the Paris Court of Appeal admitted the claim, referring the case to the judicial unit specialising in war crimes, crimes against humanity and genocide. In May 2013 five victims, who had been arrested and tortured in Libya, filed a claim for damages and, as result, the judge ordered an evaluation of the civil damages.[153]

Under the Brussels I Regulation (Recast), a person domiciled in a Member State may also be sued '*where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*'.[154] Thus, Article 8 gives Member States' courts international jurisdiction over cases against persons domiciled in a Member State by reason of related actions. Article 8(1) contains a specific provision for cases in which there is more than one defendant and the claimant can file its action against all the defendants in the same proceedings before a court of a Member State where one of the defendants has its domicile, provided that the claims are closely related with one another.

In this regard, the Court of Justice of the European Union, in the *Eva-Maria Painer v Standard VerlagsGmbH and Others* Case[155], has established two conditions for applying Article 8(1) (former Article 6(1) under Brussels I Regulation) in cases against private companies. Accordingly, the claim against the parent company must not be intended exclusively to bring the case of the foreign subsidiary into European jurisdiction and there must be a prior relationship between the defendants. In the *Painer* Case, the CJEU was asked, *inter alia*, whether Article 6(1) of the Brussels I Regulation had to be interpreted '*as meaning that its application and therefore joint legal proceedings are not precluded where actions brought against several defendants for copyright infringements identical in substance are based on differing national legal grounds the essential elements of which are nevertheless identical in substance – such as applies to all European States in proceedings for a prohibitory injunction, not based on fault, in*

[153] Ibid.
[154] Brussels I Regulation (Recast), Article 8.
[155] *Eva-Maria Painer v Standard VerlagsGmbH and Others* (C-145/10) CJEU, 1 December 2011.

claims for reasonable remuneration for copyright infringements and in claims in damages for unlawful exploitation'.[156] In this case, the claimant, Ms Painer, was a freelance photographer, in particular taking pictures of children in nurseries and day homes. During her work, she took several photographs of Natascha, a child who was abducted in 1998 and managed to escape in 2006. After Natascha's abduction, authorities launched a search appeal in which some of Ms Painer's pictures were used and published by some newspapers. Likewise, after Natascha's escape, newspapers (which were also the defendants in the main proceeding) published Ms Painer's photographs without, however, indicating the name of the photographer, or indicating a name other than Ms Painer's as the photographer. In particular, the defendants in the case were indeed five newspaper publishers, of which one was established in Austria, while the others were established in Germany. In addition, while the third and fourth defendants published their newspapers also in Austria, the second and fifth defendants published their newspapers only in Germany.[157]

The question asked to the CJEU by the referring Court was whether '*Article 6(1) of Regulation No 44/2001 must be interpreted as precluding its application if actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned.'*[158] In other words, the Austrian Court asked whether it had jurisdiction, under Article 6(1) of the Brussels I Regulation, for claims not only against the company domiciled in Austria, but also the second and fifth defendants, domiciled in Germany and publishing only there. '*Under Article 6(1) of the regulation, an applicant who sues a person in the courts for the place where he is domiciled ('the anchor claim') may also sue another person in that court. However, this is subject to the requirement that the anchor claim and the other claim are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*.'[159] The CJEU ruled that while an anchor claim existed 'in the form of the claim against the first defendant', the Court had to examine a second

[156] Ibid., Paragraph 43.1.
[157] Ibid., Paragraphs 1-43.
[158] Ibid., Paragraph 72.
[159] *Eva-Maria Painer v Standard VerlagsGmbH and Others (Opinion of Advocate General Trstenjak)* (C-145/10) 12 April 2011, Paragraph 50.

requirement, namely whether a close connection between the anchor claim and the other claims existed. To determine a close connection, two factors are to be taken into account: firstly, the claim should arise in the context of a single factual situation, secondly a sufficient legal connection should exist.[160]

In reference to the first factor, under the Opinion of Advocate General Trstenjak:

> '*[the] minimum requirement is not satisfied where the facts on which the applicant bases its anchor claim and the other claim are such that the conduct of the anchor defendant and of the other defendant concerns the same or similar legal interests of the applicant and is similar in nature, but occurs independently and without knowledge of one another. In such a case of unconcerted parallel conduct, it is not sufficiently predictable for the other defendant that he can also be sued, under Article 6(1) of the regulation, at a court in the place where the anchor defendant is domiciled.*'[161]

As far as the second requirement was concerned:

> '*[t]he theoretical starting point must be whether the two claims have such a close legal connection that the applicant could not be reasonably expected to seek to have the claims decided by two courts. It is clear from the wording of Article 6(1) of the regulation that this may be the case in particular where the legal connection between two claims is so close that inconsistencies between them would not be acceptable. Some account can also be taken in this connection of considerations of procedural economy, although strict regard must be had to the defendant's interest in the predictability of jurisdiction.*'[162]

The CJEU ruled that '*in assessing whether there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others. It is not an indispensable requirement for the application of Article 6(1) of Regulation No 44/2001. Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the*

[160] Ibid., Paragraphs 51-54.
[161] Ibid., Paragraph 92.
[162] Ibid., Paragraph 96.

defendants that they might be sued in the Member State where at least one of them is domiciled.'[163] In conclusion, the Court stated that Article 6(1) of Regulation No 44/2001 did not preclude actions against several defendants for substantially identical copyright infringements to be brought on different national legal grounds.[164]

Continuing with the analysis of the Article 8 of Brussels I Regulation (Recast), the relevance of this Article might have lied in the fact that the joining of defendants may help overcoming the barrier that especially foreign claimants face when they try to sue, in a European Court, a subsidiary company located outside the European Union, while the parent company is domiciled within the European union. Article 8 allows to join legal actions against a parent company, and indeed a defendant '*domiciled in a Member State [can be sued]: (1) where [it] is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*'.[165] However, all the defendants have to be domiciled in an EU Member State, otherwise the Court at stake cannot be attributed jurisdiction to hear the claim itself. Thus, it seems that if a subsidiary of a parent company is not domiciled in EU Member State, then Article 8.1 is not applicable.

Finally, if the defendant is not domiciled in an EU Member State, residual criteria may apply and the jurisdiction of the courts of each Member State shall be determined by the law of that Member State, subject to restrictions of the rules of exclusive jurisdiction, prorogation of jurisdiction and concerning jurisdiction over consumers, employers not domiciled in a Member States.[166] Thus, when EU Member States' courts cannot claim international jurisdiction under the Brussels I Regulation (Recast), they may be competent anyway under their country's own domestic law. This may be the case of a claim filed before a European forum against a non-EU domiciled company, for example against the subsidiary of a parent company located in an EU member State.

[163] *Eva-Maria Painer v Standard VerlagsGmbH and Others* (C-145/10), Paragraphs 81-83.
[164] Ibid., Paragraph 84.
[165] Brussels I Regulation (Recast), Article 8(1).
[166] Ibid., Article 6(1).

As a result, in some cases, the applicable domestic rules on jurisdiction will be similar to those set forth in the Brussels I Regulation, and in some others, instead, the domestic rules on civil jurisdiction may determine a denial of justice, or as in France, Belgium and the Netherlands, uphold the *forum necessitatis* jurisdiction, so to avoid cases of denial of justice and to guarantee effective judicial protection as outlined under Article 6 ECHR.

Indeed, under the domestic rules of some EU Member States, the courts of those States have international jurisdiction to hear cases which are only weakly related to their respective country (exorbitant jurisdiction). Accordingly, the legal basis to establish the court's jurisdiction is no longer the domicile of the defendants, rather the nationality of the parties, and the presence of the defendant or the location of assets of the defendant on the territory.[167]

3.1.3 The *Forum Non Conveniens* doctrine

In reference to questions related to the courts' competence, the doctrine of *forum non conveniens* may impact on the assertion of jurisdiction by the court at stake and, as a result, represent a further obstacle.[168] Accordingly, a court may exclude its jurisdiction and dismiss the case when it holds that it is not the appropriate forum to hear the dispute and, instead, a more "convenient" forum does exist. In other words, a national court may decide to refuse to exercise jurisdiction on the basis that a court in another

[167] Human Rights in European Business, Handbook (2016) 63-65. Under the criterion of the "nationality of the parties", the nationality of the claimant of defendant is a sufficient element to determine the forum jurisdiction. The presence of the defendant in the territory is then another criterion under which the defendant can be notified of any action against him and establish the jurisdiction of the court. Similarly, the location of the defendant's property is the basis to determine the jurisdiction that allows proceedings to be filed for any action with respect to the property in question.

[168] On the *forum non convenies doctrine* see, among other: Christopher A. Whytock, Cassandra Burke Robertson, 'Forum Non Conveniens and the Enforcement of Foreign Judgements' (2011) Columbia Law Review; Christopher A. Whytock, 'The Evolving forum Shopping System' (2011) Cornell Law Review; Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?' (2004) ILSA of International and Comparative Law; Joost Pauwelyn, Luiz eduardo Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) Cornell international Law Journal; Edwin Peel, 'Forum Shopping in the European Judicial Area – Introductory Report' (2006) Oxford legal studies Research Paper No. 39/2006; Donald Earl, 'Forum Conveniens: The Search for a Convenient Forum in Transnational Cases' (2012) Virginia Journal of International Law.

State, which has also jurisdiction, may be more a more appropriate forum for the trial of the action.[169]

In reference to business and human rights cases, when a forum in a home State dismisses a claim on the ground of the *forum non conveniens* doctrine, the same forum may expect the case to be filed instead in the host State – where the harm or the violation occurred.

However, the host State might, *inter alia*, be complicit in the harm, it might have a non-functioning and non-transparent judicial system, or it might simply offer lower levels of compensation in comparison to home States. For all these reasons the application of the *forum non conveniens* doctrine result being as an obstacle to obtaining justice for victims of business-related human rights violations.

Just to mention some examples, in the *Aguinda v. Texaco* Case, a Peruvian and Ecuadorian citizen filed and action against Texaco alleging that that the oil company caused damages to the environment, as well as personal injuries, by polluting forests and rivers in Peru and Ecuador.[170] In the determination of the competence of the court, the United States Courts of Appeals, Second Circuit explained that '*[f]irst, the court must consider whether an adequate alternative forum exists. If so, it must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake*.'[171] Accordingly, the requirement regarding an adequate alternative forum is satisfied '*when the defendant is amenable to process in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative*'.[172] The case was dismissed by the United States Second Circuit Court of Appeals on the basis of the *forum non*

[169] Geert van Calster, *European Private International Law. Second Edition* (Hart Publishing, 2016) 9-12.

[170] *Aguinda v. Texaco, Inc.* (303 F.3d 470) United States Courts of Appeals, Second Circuit, 16 August 2002, Paragraphs 1-8. In particular, In November 1993, Ecuadorian plaintiffs filed the first of two class action lawsuits against Texaco in the Southern District of New York on behalf of some 30,000 inhabitants of the Oriente region. In December 1994, residents of Peru living downstream from Ecuador's Oriente area brought a separate class action against Texaco in the Southern District of New York on behalf of at least 25,000 residents of Peru. Both complaints alleged that between 1964 and 1992 Texaco's oil operation activities polluted the rain forests and rivers in Ecuador and Peru. The complaints alleged that Texaco's activities in Ecuador were designed, controlled, conceived and directed through its operations in the United States.

[171] Ibid., Paragraph 5.

[172] Ibid.

conveniens doctrine, *inter alia*, because a more appropriate forum to hear the case were available.[173]

It is important to point out that while the doctrine of *forum non conveniens* is still an option especially in some common law States, for example Canada, Australia and the United States[174], it is no more applicable within the European Union, including the UK.[175]

With reference to the United States, federal courts can dismiss cases on the basis of *forum non conveniens* without first deciding on subject-matter or personal jurisdiction of the same courts.[176] The framework for the *forum non conveniens* doctrine is traceable in two rulings of the US Supreme Court, the *Gulf Oil Corp. v. Gilbert* Case[177] and the *Koster v. American Lumbermens Mutual Casualty Co* Case[178]. Accordingly, a Court generally should establish firstly whether there is an adequate alternative forum

[173] Ibid., Paragraph 38.

[174] In the United States, several cases have been dismissed on the basis of the *forum non conveniens* doctrine. For example, in the above mentioned *Wiwa et al. v. Royal Dutch Petroleum Company* case, the US Court of Appeal for the Second Circuit reversed the previous District Court decision, ruling that neither the Dutch court, nor the British court could have been appropriate fora to hear the case.

[175] ILA, Report (2010) 19.

[176] Further explanations on the application of the forum non convenience doctrine in the United States are provided in: David W. Feder, 'The Forum non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction' (2006) 74 Fordham Law Review; David Nersessian, 'International Human Rights Litigation: A Guide for Judges' (2016) Federal Judicial Center, available online; Christopher A. Whytock, Cassandra Burke Robertson, 'Forum Non Conveniens and the Enforcement of Foreign Judgements' (2011) Columbia Law Review; Christopher A. Whytock, 'The Evolving forum Shopping System' (2011) Cornell Law Review; Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction? ' (2004) ILSA of International and Comparative Law; Joost Pauwelyn, Luiz eduardo Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) Cornell international Law Journal; Edwin Peel, 'Forum Shopping in the European Judicial Area – Introductory Report' (2006) Oxford legal studies Research Paper No. 39/2006; Donald Earl, 'Forum Conveniens: The Search for a Convenient Forum in Transnational Cases' (2012) Virginia Journal of International Law.

[177] *Gulf Oil Corp. v. Gilbert* (330 U.S. 501) United States Supreme Court, 10 March 1947. See also: *Piper Aircraft Co. v. Reyno, Personal Representative of the Estates of Fehilly at al.* (454 U.S. 235) United States Supreme Court, 8 December 1981. The United States Supreme Court's opinion in the *Piper Aircraft v. Reyno* Case set forth the rules and reasoning regarding the doctrine of forum non conveniens when applied to foreign claimants and indeed the 'decision created a different standard of review for foreign and domestic plaintiffs'. Jennifer L. Rosato, 'Restoring Justice to the Doctrine of Forum Non Conveniens for Foreign Plaintiffs who sue U.S. Corporations in the Federal' (1986) 8 Journal of Comparative Business and Capital Market Law, 171-172.

[178] *Koster v. Am. Lumbermens Mut. Cas. Co.* (330 U.S. 518) United States Supreme Court, 10 March 1947. In this case, a Federal District Court in New York was justified in having dismissed a derivative suit brought in his home district on the ground of diversity of citizenship by a policyholder in an Illinois mutual insurance company by virtue of the application of the *forum non conveniens* doctrine. Furthermore, the Court clarified that 'in applying the doctrine of *forum non conveniens,* the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice'.

where the claimant can bring his/her suit if dismissed from the forum at stake and, secondly, whether the private and public interest factors justify the dismissal of the case.[179] As far as the first question is concerned, the determination of an alternative and adequate forum depends on whether there is a forum in which the defendant is amenable to process, and if the remedy available is not so inadequate or unsatisfactory as to be equated with no remedy at all. In other words, an adequate alternative forum will be found if it permits the filing of the suit and permits basic justice to be afforded to the plaintiff. Finally, the second consideration relates to the United States' public interest.[180]

On the other hand, the *forum non conveniens* doctrine is not applicable under EU law. As far as the United Kingdom is concerned, until 2005, the English courts were interpreting the Article 2 of the Brussels Convention[181] (the precursor of the Brussels I Regulation) as allowing the dismissal of a case against a UK-domiciled defendant when a more appropriate forum located in a non-EU state was deemed to exist. However, in accordance with the decision of the Court of Justice of the European Union in the *Owusu* Case[182], national courts of the EU (including those of the UK) did not have the power to halt proceedings on the grounds of *forum non conveniens* in cases brought against EU domiciled defendants, where the alternative venue was outside the EU. In particular, the CJEU highlighted that the '*respect for the principle of legal certainty,*

[179] Rosato (1986) 173.

[180] Rosato (1986) 173-174; Richard Meeran (2011) 13.

[181] Bussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 27 September 1968. Article 2: 'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.'

[182] *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others* (No. C-281/02) CJEU 1 March 2005. The case involved Mr Owusu, a British national domiciled in the United Kingdom, who was severely injured due to an accident occurred during a holiday in Jamaica. After the accident, Mr Owusu brought an action in the UK for breach of contract against Mr Jackson, also domiciled in the UK, by virtue of the fact that rented a holiday villa in Jamaica to Mr Owusu and this latter claimed that under the stipulated contract the beach of the villa should have been safe and free from hidden dangers. In addition, Mr Owusu brought an action in tort also against several Jamaican companies, operating in the same beach. The English Court of Appeal referred some questions to the CJEU for a preliminary, specifically asking whether it was 'inconsistent with the Brussels Convention [...] , where a claimant contend[ed] that jurisdiction [was] founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State [in this case Jamaica] (a) if the jurisdiction of no other Contracting State under the 1968 Convention [was] in issue; (b) if the proceedings [had] no connecting factors to any other Contracting State'. Paragraphs 1-22.

which is one of the objectives of the Brussels Convention would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine.' Moreover, '*[…] the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued*'. As a result, the Court stated that the '*[a]pplication of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.*'[183] In conclusion, the 2005 decision of the Court of Justice of the European Union made clear that the European Union national courts could not decline the jurisdiction on the basis that the forum of a non-Contracting State was a more appropriate court (namely on the basis of *forum non conveniens)* in claims against defendants domiciled within the European Union, 'where alternative venue was outside the EU'.[184]

3.1.4 The *Forum Necessitatis* doctrine

The *forum necessitatis* is a legal doctrine under which a court may assert jurisdiction, that usually the same Court does not have, on the ground that there is no other available forum where the claim may be brought or may be reasonably expected to be adjudicated.[185] In other words, under this doctrine, 'a court devoid of jurisdiction may

[183] Ibid., Paragraphs 38-41.

[184] '[…] the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.' *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others* (No. C-281/02) Paragraph 46; Richard Meeran (2011) 14.

[185] Chilenye Nwapi, 'A Necessary Look at Necessity Jurisdiction' (2014) UBC Law Review, 2; Chilenye Nwapi, 'Juridisction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 Utrecht Journal of International and European Law, 1-2. Blackburn, in particular, defines the *forum necessitatis* doctrine as a 'radically contrasting doctrine [to the *forum non conveniens* doctrine, which] is intended to prevent denial of access to justice'. He also suggests that the *forum necessitatis* doctrine has

nevertheless hear a dispute where it considers that there is no other court where the dispute may be heard or where the [claimant] may be expected to bring the same case.'[186]

As a result, under some circumstances, the exercise of such a rule would prevent issues related to the non-availability of (foreign) fora for claimants and thus it would avoid a denial of access to justice. The doctrine may thus be of relevance in the business and human rights context where the establishment of jurisdiction, as explored in sections above, is generally based on territorial requirements under which there should be some link between the forum country and the dispute. This connection or contact may depend on the subject matter of the litigation or on the parties – generally the defendant. While it is outside the scope of the present section and this study in general to extensively examine and compare in details the scope, nature and conditions of the application of the *forum necessitatis* in different jurisdiction, it is nevertheless important to highlight the potential of this legal doctrine especially in the context of business and human rights cases, where the doctrine could become a valuable tool to grant access to justice to victims of business-related human rights violations, mainly in case of extraterritorial human rights violations, and as a result avoid denial of justice.

A connection is deemed to exist between the *forum necessitatis* and Article 6 of the European Convention on Human Rights, which provides that '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

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its roots in the civil law countries. Daniel Blackburn, 'Removing Barriers to Justice. How a treaty on business and human rights could improve access to remedy for victims' (August 2017) Somo Online Publication, 18. On the origins and explanations regarding the *forum necessitatis*, see also:: Giulia Rossolillo, 'Forum Necessitatis e Flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione Europea' (2010) 2 Cuadernos de Derecho Transnacional; Giacomo Biagioni, 'Alcuni caratteri generali del forum necessitatis nello spazio giudiziario europeo' (2012) 4 Cuadernos de Derecho Transnacional; Maria Chiara Marullo, 'Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation' (2016) HURI-AGE, Consolider-Ingenio 2010; Geert van Calster, Charlotte Luks, 'Extraterritoriality and Private International Law' (2012) Recht in Beweging; Lucas Roorda, Cedric Ryngaert 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction' (2016) The Rabel Journal of Comparative and International Private Law; Stephanie Redfield, 'Searching for Justice: the Use of Forum Necessitatis' (2014) Georgetown Journal of International Law.

[186] Nwapi 'Juridisction by Necessity' (2014) 1; Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Asser Press, 2014) 121.

impartial tribunal established by law.'[187] This provision has been interpreted as allowing a right of access to justice or a right of access to court and, as a result, it has been considered as the basis for the *forum necessitatis*.[188]

At the level of the European Union, some Member States recognize the *forum necessitates* doctrine as a jurisdictional basis. A study commissioned by the European Union[189] in 2007 identified ten EU States where this legal doctrine is recognized either explicitly trough statutory provisions or through case law.[190]

For example, under article 3 of the Swiss *Loi fédérale sur le droit international privé* (Swiss Federal Code on Private International Law) '*lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procedure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes*'.[191] Thus, in case the Swiss Federal Code does not provide for jurisdiction in Switzerland and proceedings abroad are impossible or cannot reasonably be required to be brought, then Swiss judicial or administrative authorities – with which the facts of the case are sufficiently connected - will have jurisdiction. Likewise, the Belgian Code of International Private Law reads that '[…] *les juridictions belges sont exceptionnellement compétentes lorsque la cause présente des liens étroits avec la*

[187] Nwapi, 'A Necessary Look at Necessity Jurisdiction' (2014) 2-3; Nwapi 'Juridisction by Necessity' (2014) 29.

[188] Roorda, Ryngaert (2016) 809. In particular, Nwapi states that 'necessity jurisdiction is traced to Article 6(1) of the ECHR' and he highlights that 'the need to avoid a denial of justice is generally recognized in public international law. Article 6(1) of the European Convention on Human Rights has even elevated access to justice to the status of a human right'. Nwapi, 'A Necessary Look at Necessity Jurisdiction' (2014) 4 and Nwapi 'Juridisction by Necessity' (2014) 31. Furthermore, Nwapi explains that although 'the doctrine has been adopted in many countries, mostly civil-law countries, although it is not clear exactly when the first explicit adoption was made.' However, it seems that it was early adopted in the 1984 Inter-American Convention on jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, where its Article 2 reads as follows: 'The requirements for jurisdiction in the international sphere shall also be deemed to be satisfied if, in the opinion of the judicial or other adjudicatory authority of the State Party in which the judgment is to be given effect, the judicial or other adjudicatory authority that rendered the judgment assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other adjudicatory authority.'

[189] Arnaud Nuyts, 'Study on Residual Jurisdiction. Review of the Member States' Rules concerning the Residual Jurisdiction of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations. General Report – Third Version' (2007).

[190] Nuyts (2007) Paragraphs 83-86. Accordingly, the *forum necessitatis* is recognized as a valid as a ground of jurisdiction in Austria, Belgium, Estonia, the Netherlands, Portugal and Romania – on the basis of their Statutes, whereas in France, Germany, Poland and Luxembourg – on the basis of case law.

[191] *Loi fédérale sur le droit international privé* (18 December 1987) Article 3.

Belgique et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger que la demande soit formée à l'étranger'.[192] Provisions referring to the *forum necessitatis* may also be found for example in the Dutch[193], Austrian[194] and Portuguese Codes of Civil Procedure.[195] The Dutch Code of Civil Procedure, particularly, includes in Article 9 the basis for the exercise of *forum necessitatis* jurisdiction[196], and Dutch civil courts have accepted *forum necessitatis* jurisdiction in a case brought by Iraqi pilots residing in the Netherlands, concerning a

[192] *Code belge de droit international privé* (16 July 2004) Article 11. See also: Arnaud Nuyts, 'Comparative Study of Residual Jurisdiction in Civil and Commercial Disputes in the EU. National Report for Belgium' (2007) European Commission Online Publication, <http://ec.europa.eu/justice/civil/document/index_en.htm> accessed 10 July 2017, 14-15; Redfield (2014) 911-912.

[193] *Dutch Code of Civil Procedure*. Book 1 Litigation before the District Courts, The Courts of Appeal and the Supreme Court, Article 9.

[194] Austrian Courts can exercise jurisdiction on the basis that there is no other forum available abroad. The Court Jurisdiction Act provides that 'in case an Austrian jurisdiction is not given or cannot be identified, the Austrian Supreme Court has to determine the jurisdiction of an Austrian court inter alia if the plaintiff is an Austrian citizen or has the domicile, the respective residence or seat in the national territory and the pursuit of civil proceedings abroad is impossible or unacceptable. Among other things, impossibility is assumed if there is no other forum available abroad.' Julian Feichtinger, Karin Lehner, 'Comparative Study of Residual Jurisdiction in Civil and Commercial Disputes in the EU. National Report for Austria' (2007) European Commission Online Publication, <http://ec.europa.eu/justice/civil/document/index_en.htm> accessed 10 July 2017, 11-12.

[195] Rossolillo (2010) 405; Nuyts (2007) Paragraphs 83-86.

[196] Code of Civil Procedure, Book 1 Litigation before the District Courts, the Courts of Appeal and the Supreme Court. Title 1 General provisions. Section 1 Jurisdiction of Dutch courts. Article 9: 'Tacit choice of forum ('forum necessitatis'). When Articles 2 up to and including 8 indicate that Dutch courts have no jurisdiction, then they nevertheless have if: a. the case concerns a legal relationship that only affects the interests of the involved parties themselves and the defendant or a party with an interest in the legal proceedings has appeared in court, not exclusively or with the intention to dispute the jurisdiction of the Dutch court, unless there is no reasonable interest to conclude that the Dutch court has jurisdiction. b. a civil case outside the Netherlands appears to be impossible, or; c. the legal proceedings, which are to be initiated by a writ of summons, have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to a judgment of a foreign court.' Furthermore, the Dutch Report on residual Jurisdiction points out that the jurisdiction of Dutch Courts under article 9 (b) may be triggered by 'situations of factual impossibility (e.g. war, floods or other disasters) or legal impossibility (e.g. denial of access to tribunals because of race or religion). This article applies to writ of summons proceedings and petition proceedings alike. It is not required that there be any connection with the Netherlands as a prerequisite for the application of article 9(c) of the Dutch Civil Procedure Code. The Dutch lawmakers said that principle in article 6 of the ECHR, which grants everyone the right to access to a court, was the basis for article 9(b) and (c). If proceedings outside the Netherlands are impossible or unacceptable, the Dutch courts are able to exercise jurisdiction to provide relief. The position of the Dutch lawmakers is not that this clause was meant to function as an exorbitant ground of jurisdiction.' Marielle Koppenol-Laforce, Freerk Vermeulen, 'Comparative Study of Residual Jurisdiction in Civil and Commercial Disputes in the EU. National Report for Netherlands' (2007) European Commission Online Publication, <http://ec.europa.eu/justice/civil/document/index_en.htm> accessed 10 July 2017, 23; Redfield (2014) 912-914.

labour dispute with the Kuwait Airlines Corporation.[197] Although the labour contract established the competence of the Kuwaiti courts, the Dutch Court accepted jurisdiction because the pilots, as a former Iraqi nationals, could not expect a fair trial in Kuwait. In addition, in the *Palestinian Doctor* Case, the District Court of The Hague heard the claim of a Palestinian doctor for damages suffered from being unlawfully imprisoned in Libya because he had allegedly infected children with HIV/AIDS.[198] The *forum necessitatis* jurisdiction was justified having regard to the general political situation in Libya during that time, and irrespective of the fact that the claimant did not reside in the Netherlands. It is interesting to note that in Belgium and the Netherlands, where the *forum necessitatis* was introduced as a result of the abolition of exorbitant jurisdiction based on the domicile of the plaintiff in the forum.[199]

Finally, as another example, in the UK courts may consider the availability and suitability of other forums where the case may be heard, although the term 'necessity jurisdiction is not familiar' to the same courts.[200]

In addition, other jurisdictions have adopted the *forum necessitatis* as a legal basis – either through their Statutes or through case laws, including Uruguay, Argentina, Costa Rica, Iceland, Japan, South Africa, Turkey and Canada.[201]

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[197] *Abood/Kuwait Airways Corp.*, Amsterdam Sub-District Court (5 January 1996) Nederlands Internationaal Privaatrecht 145, 222 (Kuwait Airways case I) in Alex-Geert Castermans, Cees Van Dam, Liesbeth Enneking, Nicola Jagers, Menno Kamminga, 'Brief as Amici Curiae in Support of the Petitioners' (2013) Online Publication, 22.

[198] *El-Hojouj v. Unnamed Libyan Officials* (LJN: BV9748) The Hague District Court, 21 March 2012, in Liesbeth Enneking, 'Multinational Corporations, Human Rights Violations and a 1789 US Statute - A Brief Exploration of the Case of Kiobel v. Shell' (2012) 3 Nederlands Internationaal Privaatrecht, 397.

[199] Nuyts (2007) Paragraph 83. In the same study it was also noted that 'in the Netherlands, it was expressly felt that such abolition had the effect to restrict the right of access to the local court that needed to be "compensated" by the establishment of the forum necessitatis.'

[200] Chris Woodruff, Karen Reed, 'Comparative Study of Residual Jurisdiction in Civil and Commercial Disputes in the EU. National Report for England' (2007) European Commission Online Publication, <http://ec.europa.eu/justice/civil/document/index_en.htm> accessed 10 July 2017, 12.

[201] Nwapi, 'A Necessary Look at Necessity Jurisdiction' (2014) 15-17; Nwapi 'Juridisction by Necessity' (2014) 31-32; Redfield (2014) 914-915. In reference to Canada, the doctrine of forum necessitates has been invoked in some cases. Among them in the *Anvil Mining Ltd. v. Canadian Ass'n Against Impunity*, where the association Canadian Association Against Impunity (CAAI) filed a claim against the Anvil Mining company, alleging that this latter was complicit in the commission of war crimes and crimes against humanity, perpetrated in the Democratic Republic of Congo (DRC). In particular, CAAI alleged that Anvil provided logistical support to the DRC military during a 2004 massacre of civilians in a town located not far from Anvil's mine. On the other side, Anvil had registered as a corporation in 2004 in Canada's Northwest Territories and, at the time of the lawsuit's filing, was headquartered in Australia and had a small office in Quebec. The Canadian Court of Appeal rejected the complaint of CAAI due to lack of jurisdiction of the Court. The Court of Appeal ruled that, under the Civil Code of Quebec, to

Generally, two conditions seem to be necessary for the *forum necessitatis* to be applicable: firstly, there should be some obstacles which make it impossible to bring a case or make it unreasonable for the claimant to believe that his/her case will be successfully brought before another court, and secondly a connection between the case and the forum at stake.[202]

Accordingly, the first condition requires the presence of some obstacles preventing the claimant from having justice in another court. While in some States, claimant only need to demonstrate that it is 'unreasonable, unacceptable, or that there is an unreasonable difficulty to bring proceedings abroad, or that the plaintiff cannot be expected to do so, in other States the claimant is required to prove that either foreign courts have already heard the case and rejected for lack of jurisdiction it or that foreign courts do not have jurisdiction.'[203] In other words:

> '*[f]irstly, when there is a legal obstacle to accessing the foreign court, such as because (i) the foreign court lacks jurisdiction under the foreign law or has already dismissed the claim for lack of jurisdiction, (ii) there is no guarantee the parties would get a fair trial abroad, or (iii) the foreign judgment could not be enforced in the forum (but it has been noted that it would never be enough to show that the foreign court would declare the plaintiff's claim inadmissible or would dismiss it on the merits). Secondly, the plaintiff can also show that he is confronted with factual obstacles to enforcing effectively his rights abroad. Obstacles that are deemed to be relevant for that purpose include, depending on the Member States, the fact that the plaintiff faces major threats if putting foot on the foreign soil, the fact that the foreign country is affected by war, flooding or other*

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exercise jurisdiction it was required to be a real and substantial connection to Quebec—requiring presence in the jurisdiction and activity there—out of which the claim arises, but Anvil's activity in Quebec had no connection, directly or indirectly, to the complicity in committing war crimes or crimes against humanity during the operation of a mine. Furthermore, the Court of Appeal rejected the claim, based on the doctrine of the *forum necessitatis*, that CAAI could not obtain justice in the DRC or Australia. The Court ruled that considering that the only impediment was the difficulty in convincing an Australian lawyer there to take the case, this circumstance was not enough to bring the case before the Court in Quebec pursuant to the *forum necessitatis*. Indeed, the Quebec court could exercise jurisdiction only in exceptional circumstances, such as where there is an 'absolute impossibility at law or practical impossibility' in suing in the other forum. *Anvil Mining Ltd. v. Canadian Ass'n Against Impunity* (2012 QCCA 117 (CanLII) Quebec COUR D'APPEL, 27 January 2012, Paragraphs 96-103.

[202] Nuyts (2007) Paragraphs 83-86; Nwapi 'Juridisction by Necessity' (2014) 33-39; Roorda, Ryngaert (2016) 794. As it has been noted by Roorda and Ryngaert: '[w]hile these two traits are common to most forum of necessity provisions, their precise content and the thresholds that have to be met differ between states, with some still being a matter of internal debate.'

[203] Nuyts (2007) Paragraph 84.

disasters, or the fact that the cost of bringing proceedings abroad would be "out of proportion" with the financial interests involved in the case, provided that it be established that the plaintiff would be deprived, in practice, from his right of effective access to court if the proceedings had to be brought abroad.'[204]

The second condition, instead, requires a connection with the forum. While this second requirement is met when the claimant is domiciled or has his/her habitual residence in the State at stake, in several States there is lack of clarity on the required "connection", which is defined as 'adequate relation, sufficient connection, strong linking factor, or close contacts', or as in Austria the claimant must be an Austrian citizen or must have his/her domicile or residence in Austria. Instead, in the Netherlands for example this requirement is completely absent.[205]

In the analysis of the doctrine of the *forum necessitatis*, the Recast of the Brussels I Regulation is of relevance. As mentioned before, the current Brussels I Regulation is a Recast of the previous Regulation 44/2001. While the core principles have not changed significantly, the European Commission's initial Proposal for a new Regulation was more ambitious and could have led to important changes to the jurisdictional regime. The European Commission initially published a Green Paper, pointing out proposals of changes to the former Brussels I Regulation, as well as outstanding matters.[206] The Green Paper led to a European Commission proposal that fully harmonized private international law rules on jurisdiction of EU Member States, including those pertaining to defendants domiciled outside of the European Union. However, the Commission's Proposal was rejected during negotiations with the EU Member States and the European Parliament.

It is interesting to note that the Commission's Proposal dealt with the application of the Brussels I Regulation in case of litigations against defendants located in non-EU States. Indeed, since the regime under the Regulation extends only to defendants domiciled in an EU Member State, as a result even EU citizens may experience unequal

[204] Ibid.

[205] Ibid., Paragraph 85.

[206] Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM(2009) 0175 final) 21 April 2009.

access to justice depending on whether their claim is against an EU-based defendant or a defendant domiciled in a third State, over which the forum State courts may or may not have jurisdiction under national law. Similar situations may also occur in business and human rights cases, where a national court can have jurisdiction over a parent company incorporated on its territory, but not over a subsidiary incorporated in a third State where the harm also occurred.

In the attempt of proposing a remedy to this inequality, during the review of the Brussels I Regulation, the Commission initially suggested to extend the 'jurisdiction rules […] to disputes involving third country defendants, including regulating the situations where the same issue is pending before a court inside and outside the EU'.[207] In other words, it suggested extending jurisdiction rules to non-EU defendants, thus fully harmonizing the Member States' rules on jurisdiction in civil and commercial disputes. This would have brought the Brussels I Regulation in line with the Rome I and II Regulations on applicable law that claim universal application in their respective areas, in accordance with Articles 2 and 3 respectively.

The proposal of the European Commission included two additional grounds of jurisdiction: *forum necessitatis* (Article 26) and asset-based jurisdiction (Article 25). While the latter concerned jurisdiction in cases where the defendant owns property in the forum State, as long as the value of that property is not disproportionate to the claim, article 26 provided for jurisdiction where it was impossible or unreasonable for the claimant to bring a case in another State.

In particular, Article 26 stated that:

> '*Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular*:
> *(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or*
> *(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to*

[207] European Commission, Proposal for a Regulation of the European parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(2010) 748 final) 14 December 2010, 5.

ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised.'[208]

Accordingly, Member States' courts would be allowed to exercise jurisdiction if no other forum guaranteeing the right to a fair trial was available and the dispute had a sufficient connection with the Member State concerned.

Both grounds of jurisdiction would have facilitated civil law litigations in EU Member State courts for business-related human rights violations committed outside the European Union: the *forum necessitatis* jurisdiction since it aims at preventing a denial of justice; the asset-based jurisdiction because it facilitates litigation in States where a company does significant business without having its statutory seat or head office there.

The Commission's proposal was however not included in the final draft to the European Parliament. The European Parliament stated that the Commission had exceeded its mandate by proposing to extend the scope of the Regulation and, as a result, significantly changing its meaning and effect. The Parliament felt that a much wider range of consultations and debates should have taken place before taking that step. Moreover, it explained that '*the proposal [did] nothing to improve the position of non-EU defendants. According to the impact assessment, the negative economic impact on companies is difficult to quantify and there is little quantitative evidence that the existing divergences between the national laws [...] lead to distortions of competition and that the absence of access to EU courts entails significant losses for consumers and other weaker parties*. *A unilateral move by the EU would not necessarily improve the EU's bargaining position in future negotiations for a worldwide judgments convention*'.[209]

[208]Ibid., Article 26.

[209] Draft report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), (PE467.046v01-00), 28 June 2011, 8.

It is worth noting that two other EU Regulations includes provisions regarding the *forum necessitates*, namely the EU Maintenance Regulation[210] and the Succession Regulation.[211]

Both article 7 of the EU Maintenance Regulation and Article 11 of the EU Secession Regulation stipulate that '*[w]here no court of a Member State has jurisdiction […then] the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.*' In other words. They both set forth the jurisdiction of an EU Member States on an "exceptional basis", when the claim could not be brought or conducted in a third non-EU State, although the claim was more closely connected to this third States and as long as the claim had sufficient connection with the EU Member State.

As mentioned before, both Articles 25 and 26 were not included in the Recast of Brussels I Regulation. As a result, while they '*would have offered some possibility for recourse, [and] also displace national rules of residual jurisdiction that may provide better opportunities in business and human rights cases*'[212], non-uniformity remains among EU Member States, resulting in Member States with more favourable rules relating to the allocation of jurisdiction than others.

Remaining at the European level, but turning to the Council of Europe, it should be stressed that the *forum necessitatis* doctrine is deemed to be a component of the right to a fair trial as enshrined in Article 6(1) ECHR, which sets forth that '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

[210] Council Regulation No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation), 18 December 2008.

[211] Regulation No. 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation), 4 July 2012.

[212] Daniel Augenstein, Nicola Jägers, 'Access to Justice in the European Union for Corporate-related Human Rights Violations: Jurisdictional' in Juan J. A. Rubio, Katerina Yiannibas (edited by) *Human Rights in Business. Removal of Barriers to Justice in the European Union* (Routledge, 2017) 23.

independent and impartial tribunal established by law'.[213] The provision of this Article has indeed been interpreted as the basis for the acknowledgment of a right to have access to courts and by extension of the *forum necessitatis*[214], as also pointed out in the 2009 European Commission Proposal.[215]

It has to be noted that Article 6 of the ECHR does not directly provide for a right of foreign victims to bring civil proceedings in a European Member State against a business entity. However, when victims of corporate related human rights violations attempt to bring such claims, EU Member States' courts deciding on their jurisdiction under private international law should have due regard to their human rights obligations to ensure access to justice under Article 6 ECHR. This was confirmed by the ECtHR Grand Chamber judgment in *Markovic*, where the claimants from Serbia and Montenegro brought civil proceedings in Italy for human rights violations committed during a NATO airstrike in Belgrade in 1999.[216] The Italian courts declined jurisdiction because the claimants were not entitled under Italian law to seek reparation from the Italian Government for civil damages incurred as a result of a violation of public international law. On the other hand, the ECtHR unanimously held that the claimants came under the Italy's human rights jurisdiction and could therefore benefit from the State's obligation to ensure access to justice in accordance with Article 6 ECHR. In particular, the Grand Chamber ruled that:

> '*If the domestic law recognises a right to bring an action and if the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction ratione loci and ratione personae of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by*

[213] European Convention on Human Rights, Article 6(1).
[214] Chilenye Nwapp (2014).
[215] In addition, in *Delcourt v. Belgium* Case, the ECtHR ruled that 'in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.' *Delcourt v. Belgium* (App. No. 2689/65) ECtHR, 17 January 1970, 25.
[216] *Markovic and Others v. Italy* (App. No. 1398/03) ECtHR, 14 December 2006.

Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6. The Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a 'jurisdictional link' for the purpose of Article 1.'[217]

Moreover, while Article 6 ECHR does not oblige EU Member States to create any particular remedy, 'it can be relied upon by anyone who considers that an interference with the exercise of one of his[/her] (civil) rights is unlawful and complains that he[/she] has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1'.[218]

Thus, the ECHR imposes obligations on EU Member States to ensure access to justice and effective remedies in civil proceedings brought by victims of human rights violations committed by corporations within their human rights jurisdiction. Moreover, whenever third-country victims of corporate human rights violations attempt to bring civil proceedings in an EU Member State court, they come within that Member State's human rights jurisdiction with the consequence that the court has to interpret private international law in the light of the state's human rights obligations under Article 6 ECHR.

On the other hand, it is also important to note that the ECHR does not explicitly recognize the application of the forum necessitates in case of eventual denial of justice under Article 6. As a matter of facts, while in *Hans-Adam II v. Germany*[219] the Court ruled that states cannot simply 'refuse jurisdiction over claims that are incidentally connected to them if there is no alternative forum available'[220], in another Case, *Gauthier v. Belgium*[221] the Court avoided ruling on this specific issue.

In the former case, the ECtHR reaffirmed that meaning of Article 6(1), namely it has the purpose of '*secur[ing] to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the right to a court, of which the right of access, that is, the right to institute*

[217] Ibid., Paragraphs 53-54.
[218] Ibid., Paragraph 98.
[219] *Prince Hans-Adam II of Liechtenstein v. Germany* (App. No. 42527/98) ECtHR, 12 July 2001.
[220] Roorda, Ryngaert (2017) 809-810.
[221] *Gauthier v. Belgium* (App. n. 12603/86) ECtHR, 6 March 1989.

proceedings before courts in civil matters, constitutes one aspect only'.[222] While, '*[t]he right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations*'[223], '*where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the object and purpose of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. In determining whether granting an international organisation immunity from national jurisdiction is permissible under the Convention, a material factor is whether reasonable alternative means were available to protect effectively the rights under the Convention*.'[224]

In *Gauthier v. Belgium*, the ECHR would have had the possibility to settle the question about whether a claimant can contend that his right of access to a court under Article 6 (1) ECHR was violated in case there is an alternative forum available in a third country where, however, it is alleged that the case would not meet the standards of Article 6 ECHR. Nevertheless, the ECHR focused on the fact that the parties in the case had previously agreed upon a jurisdiction clause inserted into the claimant's contracts (under which any disputes arising from that specific employment contract would have been heard before the Court in Kinshasa) and thus it did not answer the question.[225]

Finally, the Council of Europe provided further guidance on access to justice in the context of business and human rights both in the Parliamentary Assembly and in the Committee of Ministers. The Parliamentary Assembly adopted Resolution 1757[226] and Recommendation 1936[227] on business and human rights, underlining '*the existing*

[222] *Prince Hans-Adam II of Liechtenstein v. Germany*, Paragraph 44.
[223] Ibid.
[224] Ibid., Paragraph 48.
[225] For deeper analysis of the *Gauthier v. Belgium* Case, see Roorda, Ryngaert (2017) 810 and Kiestra (2014) 100-103.
[226] Council of Europe Parliamentary Assembly, Resolution 1757 on Human rights and business, 6 October 2010.
[227] Council of Europe Parliamentary Assembly, Recommendation 1936 on Human rights and business, 6 October 2010.

imbalance in the scope of human rights protection between individual and businesses', and affirming that '*while a company may bring a case before the Court claiming a violation by a state authority of its rights protected under the [ECHR], an individual alleging a violation of his or her rights by a private company cannot effectively raise his or her claims before this jurisdiction*'.[228] Thess seems to echo the Guiding Principles and the requirement over States to provide victims of business-related abuses with effective remedies. Furthermore, the Parliamentary Assembly underlined also that '*many of the alleged human rights abuses by businesses occur in third countries, especially outside Europe, and that it is currently difficult to bring extraterritorial abuses by companies before national courts or the European Court of Human Rights (the Court)*.'[229] More interesting is the Recommendation on human rights and business[230] adopted by the Committee of Ministers which provides guidance to support Member States in preventing and remedying human rights violations perpetrated by business enterprises, while including measures applicable to the latter. While recalling to the Members States that they '*should ensure the effective implementation of their obligations under Articles 6 and 13 of the [ECHR] and other international and European human rights instruments, to grant to everyone access to a court in the determination of their civil rights, as well as to everyone whose rights have been violated under these instruments, an effective remedy before a national authority, including where such violation arises from business activity*', the Recommendation underlines the importance of the *forum necessitatis* which would allow 'domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against business enterprises [when these are not domiciled within their jurisdiction of the Members States, under the conditions that] no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the member State concerned'.[231] Accordingly, the Recommendation expressively

[228] Ibid.

[229] Council of Europe Parliamentary Assembly, Resolution 1757.

[230] Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, 2 March 2016.

[231] Ibid., 36. Interestingly, paragraph 35 also requires Members States to 'consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.'

recognized the *forum necessitatis* as a safeguard tool 'to avoid a denial of justice, for example in cases where victims of alleged human rights abuses involving business enterprises which occurred outside of Europe cannot reasonably be expected to receive a fair trial in the domestic courts of the country where such abuses allegedly occurred.'[232] Furthermore, in line with the Brussels I Regulation, as well as the CJEU judgment in *Owusu v. Jackson*, the Council of Europe Recommendation also invites Members States to dismiss the doctrine of *forum non conveniens* in cases of human rights-related civil proceedings against business enterprises domiciled within their jurisdiction.

In conclusion, the doctrine of *forum necessitatis* has the potential to address some of the jurisdictional difficulties which victims of business-related human right abuses may face especially when a home State's Court would consider that a more appropriate forum exists to hear the case. Indeed, the adoption of this doctrine would indeed would allow victims of business-related human rights violations to have a new jurisdictional possibility to assert the jurisdiction of courts especially in home countries of corporations. As a matter of fact, in those cases where it would be not feasible for the claimant to bring an action in a foreign country (typically in the so-called host States) where the dispute ought to be decided, or where for practical reasons the claimant cannot reasonably be expected to initiate the suit there, a court may assume jurisdiction on the basis of the *forum necessitatis* by virtue of the fact that failure to do so would lead to a denial of justice.

However, it has to be noted that while the *forum necessitatis* may contribute to avoid denial of justice, some arguments against its development have also been pointed out. Some examples are the claim that the implementation of the *forum necessitatis* will increase the domestic caseload and the burden of work on courts, or the so-called "forum shopping" phenomenon, namely the practice of choosing the forum 'not because it is the most appropriate forum but because the conflict of laws rules that it applies will prompt the application of the law that he or she prefers'.[233] However, in

[232] Explanatory Memorandum to Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, 2 March 2016.

[233] Stephanie Redfield highlights the claims raised against the application of the forum necessitatis. She firstly points out that that 'permitting *forum necessitatis* would overburden courts, although increase in

particular against this latter observation it may be argued that the *forum necessitatis* will be used only when 'the claimant is effectively barred from accessing a just court or where expecting him/her to bring a suit abroad would be entirely unreasonable'.[234] Additionally the advantages of avoiding denial of justice exceed the downsides of implementing the *forum necessitatis*.

3.2 Rules of private international law: the choice of applicable law

After having established that a court is competent to hear the case at stake, the forum will not automatically apply the law of its respective State. As for the determination of the competent court, private and procedural international rules are relevant for the choice of applicable law.[235] 'The applicable law governs the liability regime, and it is determined according to the rules for the resolution of conflicts of law.'[236] Conflict-of-law rules set what law of which forum is applicable when 'there are elements foreign to the jurisdiction and [when] the legal rules of different legislations could be applied'.[237]

As far as the European Union is concerned, the applicable law is determined in accordance with Regulation No 593/2008 on the law applicable to contractual

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caseload is inevitable, this increase could be substantially mitigated by the implementation of the strict guidelines advocated above to determine whether *forum necessitatis* is appropriate, placing a heavier burden on the plaintiff. [Secondly] that exercise of *forum necessitatis* might encourage [the so-called] forum shopping'. Thirdly, considering the United States, the use of *forum necessitatis* there could 'encourage foreign countries to entertain cases involving U.S. defendants who have no contacts whatever with the forum, is outdated'. The last claim underlined instead that 'favorable judgments would be impossible to enforce'. Stephanie Redfield, 'Searching for Justice: the Use of Forum Necessitatis' (2014) 45 Georgetown Journal of International Law, 925-927. See also Geert van Calster for the explanation of the forum shopping phenomenon. He defines the forum shopping as 'the technique whereby a litigant selects his forum to sue, on the basis of suitability.' The notion of forum shopping is used to denote a negative phenomenon when the forum is selected on the basis of those qualities of the forum which do not serve the rule of law, including the time the forum takes to decide a case or the technique of the so-called "torpedo". 'in combination with the impossibility of the other party to sue elsewhere, torpedo action literally torpedoes the possibility for the bona fide party to seek timely settlement of his action'. *European Private International Law. Second Edition* (Hart Publishing, 2016) 8-12.

[234] Ibid.

[235] See among others: Maria Hook, *The Choice of Law Contract* (Bloomsbury, 2016); Dean Symeon C. Symeonides, *Choice of Law* (Oxford Commentaries on American Law, 2016).

[236] Human Rights in European Business, Handbook (2016) 71.

[237] Ibid.

obligations (hereafter Rome I Regulation)[238] and Regulation No. 864/2007 on the law applicable to non-contractual obligations (hereafter Rome II Regulation).[239] With reference to cases in the field of business and human rights, the Rome II Regulation is the most relevant Regulation since, usually, the claimant (the victim of business-related human rights violations) has no previous contractual relationship with the business company, which has allegedly committed the violations, unless the claimed violations relate to the employees' rights and thus can be attributed to prior contractual relationships with the business company.

The Rome II Regulation defines the applicable law to non-contractual obligations in civil and commercial matters, when the event causing the damage took place after 11 January 2009 and it involves a situation where there is a conflict of laws. Under Rome II Regulation, European courts are required to apply to a non-contractual obligation arising out of a tort/delict the law of the country where the damage took place (*lex loci damni*), '*irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*'.[240] This means that, as a general rule, the applicable law is the law of the country where the damage took place, regardless of the law of the country where the event causing the damage occurred, or in what countries the indirect consequences may occur. In other words, the law of the country where the personal injury or property damage took place is the applicable law - for example the law of the host State where the subsidiary of a multinational corporation is located. However, in the determination of the law of the *loci damni*, it might be difficult to establish the place where the damage began especially if the damage later appeared in a different

[238] European Union Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008), OJ L 177/6.

[239] European Union Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (2007), OJ L 199/40.

[240] Rome II Regulation, Article 4. Under the Explanatory Memorandum to the proposal of the Commission regarding the Rome II Regulation, the rationale behind the choice for the *lex loci damni* is the concern for certainty in the law, as well as the consideration that 'the modern concept of the law of civil liability […] is no longer […] oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates'. In: *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"). Explanatory Memorandum* (COM(2003) 427 final) 22 July 2003, 12. Moreover, under Recital 16 of the Rome II Regulation, it is pointed out that the *lex loci damni* 'strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability'.

country. Particularly for such cases, the Rome II Regulation does not specify which the applicable law is when there is multiple damage which appears in the territory of different countries. For such cases, however, the court holding jurisdiction will have to apply the laws of each of the countries where the damage has appeared.

The Rome II Regulation harmonizes not only rules about the applicable law by courts, but also issues connected to the proceedings, namely time limitations, immunity and remedy.[241] Despite harmonization in these areas, "grey areas" still remain, particularly with regard to situations where the general rule can be replaced by the law of a country with a manifestly closer connection.[242] Indeed, if '*the person claimed to be liable and the person sustaining damage have both their habitual residence in the same country at the time when the damage occur[ed], then the laws of that country shall apply*'[243]. Thus, in such a situation, the law of the country of the joint habitual residence is applicable to the case. Moreover, under Article 4.3 of the Rome II Regulation, when '*the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, [then] the law of that other country shall apply*'.

In addition, the Rome II Regulation includes special provisions covering specific types of torts, which diverge from the general rule of *lex loci damni*. Articles 5-8 ecompass specific rules for specific unlawful acts, including damages caused by a product, unfair competition and acts restricting free competition, infringement of intellectual property right, as well as environmental damage.

This rule on environmental damages might be particularly significant in the context of business and human rights cases. Environmental damage is defined as any 'adverse

[241] It was underlined that the Rome II Regulation allows the full harmonization of 'conflict of laws principles applied by EU Member States in transnational proceedings. As a general rule, the applicable law will be the law of the State in which the damage occurred. Accordingly, courts should apply that law to determine not only liability, but also other issues arising in connection with the proceedings, such as time limitations, immunity and remedy.' In Frank Bold, European Coalition for Corporate Justice (ECCJ), European Center for Constitutional and Human Rights, Corporate Responsibility Coalition (CORE), Sherpa, 'Access to Justice. The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts' (December 2014), Online Publication,
<http://www.accessjustice.eu/downloads/eu_business.pdf>, accessed 15 September 2016.

[242] Rome II Regulation, Article 4.3; Zerk (2014) 50; Liesbeth Enneking 'Judicial remedies. The issue of applicable law' in Juan J. A. Rubio, Katerina Yiannibas (edited by) *Human Rights in Business. Removal of Barriers to Justice in the European Union* (Routledge, 2017).

[243] Ibid., Article 4.2.

change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.'[244] In case of a non-contractual obligation arising out of an environmental damage or damage sustained by persons or property as a result of such damage, pursuant to Article 7 of the Rome II Regulation, the applicable law is *the lex loci damni* in accordance with Article 4(1) of the Rome II Regulation, 'unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.'[245] Article 7 is based on the so-called "ubiquity theory", which allows the victim to choose between the law of the place where the causal event occurred and the law of the place where the damage happened. In other words, the victim can reject the law of the place where the damage occurred and choose the law of the country where the event causing the damage took place. This principle is of particular relevance considering that 'compared to the host countr[ies], [Member States of the European Union] often have higher environmental protection standards, curb certain kinds of corporate behaviour more closely and establish stricter rules of safety and conduct.'[246] Indeed, this rule on environmental damage was inspired by reasons of environmental protection, together with the concern that 'the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries'.[247] This specific rule might be relevant for business-related human rights cases where there has been an environmental damage and the event giving rise to the damage in the host country occurred in the home country of the corporate defendant, such as the cases when it can be alleged that parent company based in the home States, for example took decisions, or implemented policies which finally resulted in the environmental damage being caused in the host country, or failed to exercise supervision over the host country activities where it could and should

[244] Ibid., Recital 24.
[245] Ibid., Article 7.
[246] Human Rights in European Business, Handbook (2016) 74; Enneking in *Human Rights in Business* (2017) 52-54.
[247] *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"). Explanatory Memorandum* (COM(2003) 427 final) 22 July 2003, 19.

have done so. As a result, the victim would have the possibility to choose application of the tort law of the home country, which may inter alia grant higher level of damage, may have liberal rules on presumptions of law or on shifting the burden of proof, etc.[248]

Outside the European Union, in common law countries, such as Canada and Australia (with the obvious exception of the UK), instead of the *lex loci damni*, courts apply the *lex loci delicti*, namely they will establish the applicable law by considering the law of the place where the violation occurred.[249] Moreover, with regard to United States', although courts generally refer to the *loci delicti* rule, they still retain a margin of flexibility and discretion. Indeed, US courts may also consider the domestic law of the country which 'has the most significant relationship to the occurrence and the parties', or pursuant to the Alien Tort Statute courts may apply international law standards instead of domestic ones.[250]

In general, the choice of law is relevant because the protection of human rights under host States' laws may be less stringent compared with home States. Thus, while the choice of law may have little relevance where laws of home and host States are quite similar, it may be significant when the differences are remarkable, for example with regard to issues of limitation period or on the level of compensation that victims will receive.[251] An example is the Rome II Regulation which, by establishing the damages on the ground of the level of damages in the *loci damni*, may assess a lower level of damage than the amount that would have been granted by EU Member States' laws.

3.3 The Sofia Guidelines as a tool to overcome private international law obstacles

A valuable tool to overcome obstacles descending from private international law rules are the Sofia Guidelines, which have been elaborated by the International Law

[248] Enneking in *Human Rights in Business* (2017) 52-55.
[249] ILA, Report (2010) 24.
[250] International Commission of Jurists, Volume 3 (2008) 52.
[251] Frank Bold, European Coalition for Corporate Justice (ECCJ), European Center for Constitutional and Human Rights, Corporate Responsibility Coalition (CORE), Sherpa, 'Access to Justice. The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts' (December 2014); Meeran (2011) 15-17.

Association (ILA). The Sofia Guidelines 'propose […uniform] rules for the resolution of the private international law obstacles' in civil litigations for human rights violations which nationals courts have to face and which touch both claimants and defendants.[252] Therefore, despite their nature of mere recommendations, the Sofia Guidelines may be taken into account as a valuable reference model to be considered in the prospective binding treaty, and provisions similar to those listed in the Sofia Guidelines might be included in the treaty, as well.

In particular, the Sofia Guidelines extend their scope not only to claims against individuals but also to non-State actors and explicitly against corporations.[253] With reference to the jurisdiction of courts, the Guidelines – in line with the European Union Brussels I Regulation – establish the domicile of the defendant as ground to assert jurisdiction. They also provide for a uniform definition of domicile, which accordingly refers to the habitual residence of a natural person or, with regard to legal person, the domicile is either the central administration; or the place where the legal person has its statutory seat or is incorporated or under whose law it was formed; or the place of the legal person's business/other professional activity.[254]

Consequently, if the above-mentioned principles, as listed in the Sofia Guidelines, were incorporated into the prospective binding treaty, they might help overcoming the obstacles which prevent victims from accessing courts in the home States. Indeed, the criterion of the "domicile of defendant" as ground to establish a connection with the forum and to allocate jurisdiction to a forum, may avoid home States courts rejecting claims with no territorial link to the forum. As a result, through the implementation of these principles, victims who cannot sue business enterprises in their forum would avoid denial of justice.

Furthermore, the Sofia Guidelines – again, in line with the European legislation – recognise the non-applicability of the *forum non conveniens* doctrine. The only admitted exception is when 'alternative grounds of jurisdiction [are] available under the law of the forum seized', but under the conditions that the defendant accept the

[252] ILA, Report (2012) 2-5.
[253] Sofia Guidelines in ILA Report (2012) Article 1.1.
[254] Ibid., Article 2.

apparently "more convenient" jurisdiction and that the claimant has effective access to this alternative forum.[255]

Turning to the question of the choice of the applicable law, the Guidelines do not establish a special rule for the choice of law, instead the ILA affirmed that the *lex loci delicti* or the *lex loci damni* are 'reasonable alternatives […], while the unclear benefits of offering victims of human rights violations a choice of law do not outweigh certain difficulties for defendants […]'.[256] With this regard, a more interesting solution is offered by Article 7 of the Rome II Regulation. Accordingly, in case of environmental damage, 'the law applicable to a non-contractual obligation can be either the *lex loci damni* or 'the law of the country in which the event giving rise to the damage occurred' (*lex loci delicti*).[257]

Interestingly, the Sofia Guidelines acknowledge the *forum necessitatis* doctrine: in the eventuality of denial of justice, 'the courts of any State with a sufficient connection to the dispute shall have jurisdiction'.[258] Thus, a court may be required to exercise its jurisdiction on the basis that there is no other forum where the lawsuit can be started, and accordingly the court will have jurisdiction when no other forum is available to the claimant. The *rationale* behind this doctrine lies in the observation that in order to avoid a denial of justice, in exceptional circumstances, the traditional jurisdictional bases may be not applicable due to the 'insistence on the satisfaction of their requirements might preclude the possibility of the case being heard at all anywhere in the world because the dispute does not fit within any known jurisdictional framework'.[259]

3.4 The complex structure of the parent company

In order to determine the responsible subject of business-related human rights abuses, the business entity responsible for the alleged violation has firstly to be identified. In the context of business and human rights, the violation at stake is often committed by

[255] Ibid., Article 2.5 and 2.4
[256] ILA, Report (2012) 35.
[257] Rome II Regulation, Article 7.
[258] Ibid., Article 2.3.
[259] Chilenye Nwapp, 'A Necessary Look at Necessity Jurisdiction' (2014) UBC Law Review, 47, 211.

a subsidiary or a subcontractor or a partner otherwise of the parent company, with this latter located in a "home State" and the former usually located in a "host State".[260] The parent company is indeed the economic entity which generally leads and controls the business activities "abroad", as well as operates in "foreign countries" through subsidiaries or subcontractors. These latter, in turn, are usually the entities directly responsible for the human rights violations or the environmental damages. Thus, the home State is the place where the parent company has its headquarter or registered offices and where the decisions concerning the corporate group's activities are likely to be taken by the parent company itself. On the opposite, the subsidiary is subject to the principles of separate legal personality and limited liability.

As far as the principle of separate legal personality is concerned, this entails that 'a company is an artificial legal person separate from its shareholders, directors and executives'[261] and, as a result, usually the parent company is not considered to be legally liable for the acts and omissions of its subsidiaries.[262]

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[260] For a definition of "home" and "host" State, see the Introduction.

[261] Deva points out that the two principles (principles of separate legal personality and limited liability) 'were developed during a period when ordinarily only human beings could be shareholders in companies. This meant that unless authorised by a specific charter issued by the Queen/King, artificial legal entities like companies were neither allowed to hold shares in other companies nor could companies establish their own subsidiaries'. He also clarifies that '[the] corporate law principles have served a useful purpose in that they encouraged investment, innovation and the spirit of entrepreneurship. However, the twin principles also had a negative effect: over a period of time, parent companies started to rely on these principles as a 'shield' to deny, avoid or delay legal liability for human rights violations by their subsidiaries. Such a shield would be effective unless courts disregard the separate personality of a subsidiary company by lifting the corporate veil on certain limited grounds'. Surya Deva, 'Parent Company Liability. Briefing Paper for Consultation for the ESCR-NET & FIDH Joint Treaty Initiative Project' (December 2015), Online Publication, <https://www.escr-net.org/corporate-accountability/treaty-initiative/legal-materials>, accessed 20 September 2016, 1. See also: Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, and Edward Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach. Third Edition* (Oxford University Press, 2017); Henry Hansmann, Reinier Kraakman, 'What is Corporate Law?' (2004) Yale Law School, Center for Law, Economics and Public Policy Research Paper No. 300.

[262] On the principle of separate legal personality see also: Olivier De Schutter, 'State Responsibility to Control Transnational Corporations: Towards an International Convention on Combating Human Rights Abuses Committed by Transnational Corporations' (2014) SSRN Online Publication; Olivier De Schutter, 'Towards a Legally Binding Instrument on Business and Human Rights' (2015) SSRN Online Publication; Liton Chandra Biswas, 'Approach of the UK Court in Piercing Corporate Veil' (2011) SSRN Online Publication; Linn Anker-Sørensen, 'Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches' (2014) University of Oslo Faculty of Law Research Paper No. 2014-36; Evangelos Kyveris, '"Grouping Liability" and the Salomon Principle: "Judicial" or "Systemic" Abuse? ' (2015) SSRN Online Publication; Mehwish Baloch, 'Limited Liability in UK: The Landmark Decision of Salomon V. Salomon and its Implications on Limited Liability' (2013) SSRN Online Publication; Ugljesa

The principle of limited liability, instead, restricts the liability of a shareholder for the corporate conduct to the extent of its investment in the business company at stake.[263] As a result, the so-called "corporate veil" separates one legal entity from the other, even in cases when the two legal entities have a common owner, common shareholders, or a single operational policy in the areas where they conduct their activities.[264] As it will be explained below, these two principles may result in preventing the attribution of the subsidiaries' actions, including violations of human rights, to the parent company. In other words, the complex structure of the business enterprise, together with the principles of separate legal personality and limited liability, makes it increasingly problematical to distribute and attribute liability within the corporate group, and makes it difficult for victims of human rights violations perpetrated by subsidiaries to seek reparation by filing a claim against the parent company, before the national courts of the home State of that company.

Thus, firstly, the complex structure of some business corporations makes it difficult for claimants to sue a parent company and its subsidiary domiciled in a third country for the damages occurring in a host State. Specifically, it might be challenging to identify the business entity involved in the alleged violation, namely to pierce the corporate veil and, as a result, identify the entity against whom the claim has to be brought. Moreover, when a victim decides to file a claim before a foreign court (for example in the parent companies' home State), the claimant needs also to establish a connection 'not only between the [subsidiary] and its parent company, but also between the parent company and the violation'.[265] However, the complex structure of the business corporation, once again, may obstruct from collecting the evidence necessary to prove that the same company caused the damage, as well as to identify 'who knew what and

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Grusic, 'Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation' (2015) 74(1) Cambridge Law Journal.

[263] Deva (December 2015) 1; Hansmann, Kraakman (2004) 8-10.

[264] International Commission of Jurists (ICJ) Report (October 2016) 25; Enneking (2012) 129-130. See also: Cees van Dam, Filip Gregor, 'Corporate responsibility to respect human rights vis-à-vis legal duty of care' in Juan J. A. Rubio, Katerina Yiannibas (edited by) *Human Rights in Business. Removal of Barriers to Justice in the European Union* (Routledge, 2017); Lucas Bergkamp, Wan-Q Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts' (2001) 8/2 Maastricht Journal of European and Comparitive Law.

[265] Zerk (2014) 65.

when [within] the corporate organizational structure' – necessary in order establish negligence.[266]

Secondly, in accordance with the doctrine of separate legal personality, a parent company and its subsidiaries are considered as separate legal entities. This means that the legal personality of a parent company is different from the legal personality of each of its subsidiaries, even if the subsidiaries belong to and are controlled by the parent company.

In the landmark *Salomon v Salomon and Co Ltd* Case[267], for example, the House of Lords clearly draw a legal line between shareholders and companies, confirming that the legal person was separate and distinct. Nevertheless, this distinction must not be used in a fraudulent way since this would represent an abuse of separate legal personality.[268]

The parent company is indeed not automatically responsible for its subsidiaries' acts or omissions, 'even if the latter business is wholly owned and controlled by the first [entity]', namely the parent company.[269] As a consequence a violation committed by a subsidiary is not automatically attributable to the parent company and, as a matter of facts, the common principle among different jurisdictions is that the subsidiaries' actions will not be imputed to the parent company, and the latter in turn will not be held liable for the subsidiaries' conducts.

While there might be several reasons why a claimant would prefer to sue the parent company rather than its subsidiaries[270], in order to do so, the claimant has either to rely on one of the liability tests to be able to pierce the corporate veil, or he/she has to show the company responsibility 'on the basis that the parent company was negligent,

[266] Ibid., 44; Van Dam, Gregor (2017) 125-128; Enneking (2012) 129-130.

[267] *Salomon v Salomon and Co Ltd* [1897] AC 22, [1896] UKHL 1, 16 November 1896.

[268] Chrispas Nyombi and David Justin Bakibinga, 'Corporate Personality: The Unjust Foundation of English Company Law' (2014) Kluwer Labor Law Journal, 95-96. See also: Mehwish Baloch, 'Limited Liability in UK: The Landmark Decision of Salomon V. Salomon and its Implications on Limited Liability' (2013) SSRN Online Publication; Liton Chandra Biswas, 'Approach of the UK Court in Piercing Corporate Veil' (2011) SSRN Online Publication; Phillip Lipton, 'The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40 Monash University Law Review 452.

[269] Zerk (2014) 37; Skinner, McCorquodale, De Schutter, Report (2013) 78.

[270] For an extensive explanation: International Commission of Jurists, Volume 3 (2008) 43 onwards.

on the basis that it owed a separate duty of care to those affected by the activities of its subsidiaries and failed to discharge that duty'.

In reference to piercing the corporate veil, the veil can be pierced if it was used to hide fraud, tax evasion, or other illegal purposes, or if the court rules that a subsidiary is a sham or a puppet of the parent company in accordance with the extensive control exercised by the latter company over the subsidiary.[271] However, generally courts are reluctant to pierce the corporate veil or to establish the parent company liability for the acts of its subsidiaries on the basis of liability tests (which however are not evenly applied across different States). As mentioned before, in accordance with the doctrine of separate legal personality, in a large number of countries, a parent company and its subsidiaries are considered as separate legal entities and, as a result, the parent company is not automatically legally liable for its subsidiaries' wrong acts or omissions, even if the subsidiary 'is wholly owned and controlled by the [parent company]'.[272] This means that it is not possible to "pierce the corporate veil", 'unless [the] subsidiary is shown to be a mere façade or was created solely in order to defraud creditors'.[273] Alternatively, it can be demonstrated that the subsidiary was acting as an agent of the parent company, and as a result the activities of the subsidiary are considered as those of the parent company.[274] For example, in the *Bowoto v Chevreon Texaco* Case[275], in a 2004 ruling the subsidiary CNL of the parent company Chevron was considered as the agent of Chevron due to the volume, content and timing of the communications exchanged between Chevron and CNL.[276] In its analysis, the United States District Court

[271] Surya Deva, 'Parent Company Liability. Briefing Paper for Consultation for the ESCR-NET & FIDH Joint Treaty Initiative Project' (December 2015), Online Publication, 2; De Schutter (2010) 12-13.
[272] Zerk (2014) 37; Skinner, McCorquodale, De Schutter, Report (2013) 78.
[273] Cassel, Ramasastry (2016) 43.
[274] De Schutter (2014) 13.
[275] *Larry Bowoto et al. v Chevron Texaco Corp. et al.* (312 F. Supp. 2d 1229) United States District Court, N.D. California, 22 March 2004. The case was actually filed in 1999 by five Nigerian claimants who alleged that ChevronTexaco Corporation, the defendant, was involved in the commission of human rights abuses in Nigeria. In particular, the claimants asserted that Chevron Texaco Corporation was liable for its own acts and those of Chevron Nigeria Limited (CNL), a subsidiary of ChevronTexaco Corporation, which allegedly acted unlawfully and committed human rights abuses. After the 2004 ruling, in 2008, Chevron was however unanimously considered as non-liable for the allegations.
[276] The United States District Court for the Northern District of California ruled that: '[t]he evidence produced by plaintiffs reflects not that defendants made decisions during the attacks, but that there was an extraordinarily close relationship between the parents and the subsidiary prior to, during and after the attacks. For example, defendants and CNL had regular communications regarding security measures before and after the attacks. An analysis of the phone calls between defendants' personnel in

for the Northern District of California gave particular considerations to factors such as '*the degree and content of communications between CNL and defendants, particularly including the communications during the incidents at issue; the degree to which defendants set or participated in setting policy, particularly security policy, for CNL; the officers and directors which defendants and CNL had in common; […] and the extent to which CNL, if acting as defendants' agent, was acting within the scope of its authority during the events at issue*'.[277] Thus, the Court ruled that Chevron 'exercised more than the usual degree of direction and control which a parent exercises over its subsidiary'.[278]

However, the claimant may face a heavy burden in the attempt of piercing the corporate veil and demonstrating that the separation of legal personalities is legal fiction and that 'the corporate form has been abused – by a parent artificially seeking to shield itself from liability by establishing a subsidiary which has, in fact, no existence of its own – or that the subsidiary has been acting in fact as the agent of the parent corporation'.[279]

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the United States and CNL shows that the volume of calls was higher on May 27, 1998, the first day that the Parabe platform was occupied […] The day with the very highest call volume was […] another day on which an oil platform was taken over by local people.' In *Larry Bowoto et al. v Chevron Texaco Corp. et al.* (312 F. Supp. 2d 1229) United States District Court, N.D. California, 22 March 2004.

[277] Ibid.

[278] The Court ruled that '[t]he facts submitted by plaintiff, taken together, are such that a reasonable juror could find that [Chevron], exercised more than the usual degree of direction and control which a parent exercises over its subsidiary. The agency relationship alleged by plaintiffs is directly related to the plaintiffs' causes of action, in that plaintiffs allege that defendants were significantly involved in security matters and benefitted directly from CNL's oil production, which was made possible, or at least protected, by the military's wrongful use of force to quell unrest among Nigerians.' Ibid. It is also interesting to note that a similar opinion was held by the Court of Justice of the European Union in the *Imperial Chemical Industries* Case. In this antitrust-related Case, the CJEU ruled that although a subsidiary has separate legal personality from the parent company, this is 'not sufficient to exclude the possibility of imputing [the subsidiaries'] conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'. In addition, to attribute the acts of the subsidiary to the parent company, the subsidiary and the parent company has to be considered as one "economic unit". This will be the case when the parent company has decisive influence on the on the behaviour of the subsidiary and in case and the first company has used this influence in the acts at stake. In such circumstances, 'the formal separation between [the two] companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition'. *Imperial Chemical Industries Ltd. v Commission of the European Communities* (C-48/69) Court of Justice of the European Communities, 14 July 1972.

[279] De Schutter (2014) 13.

Thus, by virtue of the difficulties to pierce the corporate veil, it might be easier for the claimant to demonstrate the parent company liability on the ground of a duty of care, namely 'on the basis of [the companies'] involvement in the circumstances that led up to the relevant damage or injury'.[280] Thus, claimants can seek to prove the responsibility of the parent company 'on the basis that the parent company was negligent, on the basis that it owed a separate duty of care to those affected by the activities of its subsidiaries and failed to discharged that duty'.[281] As a result, the parent company will be held responsible for the breach of its own duty of care, rather than for its subsidiaries' wrongful behaviour.[282]

Some cases decided before UK Courts may serve as an illustration. In the *Connelly v. RTZ Corporation Plc and Others* Case[283], for example, the claimant, Mr Connelly, was a former employee of the Rossing Uranium Ltd. (R.U.L.) working for a uranium mine in Namibia. Mr Connelly, in particular, claiming that the company was responsible for his cancer of the larynx, apparently due to exposure to radioactive material in the mine. R.U.L. was a subsidiary of the defendant, the R.T.Z. Corporation Plc (R.T.Z.), an English company with its registered office in London.[284] The claim was based on the allegation that 'R.T.Z. had devised R.U.L.'s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy', and that 'an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine'.[285] Thus, the argument was that the parent company had contributed in causing the damage for which the victim sought compensation.[286]

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[280] Zerk (2014) 46.
[281] Ibid., 65; Van Dam, Gregor (2017), 125 onwards; Enneking (2012) 129 onwards; Cassel, Ramasastry (2016) 44.
[282] Cassel, Ramasastry (2016); Van Dam, Gregor (2017), 125 onwards; Enneking (2012) 129 onwards.
[283] *Connelly v. RTZ Corporation Plc and Others* [1997] UKHL 30, 24 July 1997.
[284] Ibid., Paragraphs 1,2.
[285] Ibid., Paragraph 3.
[286] It is important to note that the *Connelly* Case is relevant also in reference to the *forum non conveniens* principle. Indeed, initially, the parent company was able to persuade the English High Court that Namibia was a more appropriate forum to hear the case. However, afterwards, the argument focused on whether Mr Connelly's inability to obtain funding to bring a claim in Namibia, when in the UK such funding was available meant that the stay of proceedings should be refused, as otherwise justice would be denied. The case went to the Court of Appeal twice before reaching the House of Lords. The House of Lords held that Mr Connelly's inability to litigate in Namibia meant that the case should be

Furthermore, in the *Lubbe and 4 Others v. Cape plc* Case[287], the claimant alleged that the parent company was responsible for '*knowing that exposure to asbestos was gravely injurious to* [his] *health,* [but nevertheless] *failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed […]*'. The claimant alleged that Cape had '*breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)*.'[288] Thus, the question brought before the UK House of Lords was:

> '[w]*hether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?*'[289]

Thus, besides establishing whether the claimant suffered from personal injury, the House of Lords confronted itself with the questions about the level of control exercised by the defendant over the operations of the group, what Cape directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and, if so, whether this duty was broken.[290] As a result, in this case it was alleged and assumed by the House of Lords, that in principle it is possible to hold a

allowed to proceed in England. Thus, the House of Lords ruled that a claimant who would be denied justice in local courts, due to the inability to pay for lawyers and experts to pursue a case, but who was able to obtain such representation in the courts where he/she had instigated the claim, would be allowed to proceed, even though the local courts were otherwise the more appropriate venue. '[T]he availability of financial assistance in this country coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.' *Connelly v. RTZ Corporation Plc and Others* [1997], Paragraph 30; Meeran (2011) 28-31.

[287] *Lubbe and Others and Cape Plc. and Related Appeals* (2000) UKHL 41, 20 July 2000.

[288] Ibid., Paragraph 6.

[289] Ibid.

[290] Ibid., Paragraphs 20-21.

parent company liable for owing a duty of care in tort to claimants injured by a subsidiary company.[291]

Finally, another recent ruling pronounced by the UK Court of Appeal represent a further valuable example of a case where the allegations were against the parent company, rather than against the subsidiary, on the basis of the former's 'direct negligence for harm caused by its own wrongdoing instead of or in addition to its responsibility for the negligence of its subsidiaries'[292]. In the case *Chandler v. Cape Plc*[293], the Civil Division of the Court of Appeal in London ruled that Cape Plc (the parent company) was liable for the activities of its subsidiaries and for an employee's asbestosis.

The Court applied the so-called three-stage test of the *Caparo* Case[294] to determine whether a situation gives rise to a duty of care: '[t]he three ingredients are that the damage should be foreseeable, that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.'[295]

Therefore, the parent company was considered to be in breach of the duty of care and to have caused harm. Indeed, the Court of Appeal found that Cape Plc had '*superior knowledge about the nature and management of asbestos risks*' and as a consequence it was '*appropriate to find that Cape assumed a duty of care either to advise [the*

[291] The *Lubbe* Case actually represents a landmark decision for the rebuttal of the application of the *forum non convenies* doctrine since the House of Lords held that that a case of such magnitude required expert legal representation and experts on technical and medical issues, none of which could be funded in the courts of South Africa. Ibid., Paragraph 26.

[292] Meeran (2011) 5.

[293] *David Brian Chandler v. Cape Plc* (EWCA Civ 525) Court of Appeal of England and Wales,25 April 2012. In this case, the claimant, Mr Chandler, contracted asbestosis after being employed with the company Cape Building Products Ltd ("Cape Products"). Although the latter company was no longer in existence at the time of the ruling, the parent company, Cape, was so. In particular, the claimant alleged that Cape Plc owed him a duty of care, inter alia, because it employed a medical and a scientific officer responsible for overseeing health and safety across the group including at Cape Products.

[294] *Caparo Industries v Dickman* [1990] 2 AC 605] UKHL, 8 February 1990. On the *Caparo* case see also: Craig Purshouse, 'Arrested Development: Police Negligence and the Caparo "Test" for Duty of Care' (2016) 23 Torts Law Journal 1; James Goudkamp, 'Duties of Care and Corporate Groups' (2017) Law Quarterly Review.

[295] *David Brian Chandler v. Cape Plc* (2012) Paragraphs 31-32.

subsidiary] on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken'.[296] The Court continued stating that:

> '*in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection*'.[297]

In accordance with the *Chandler* Case, the issue of "piercing the corporate veil" may be circumvented if the parent company possesses a duty of care towards the employees of the subsidiaries. The Court of Appeal, indeed, highlighted that *'[a] subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees*.'[298]

Thus, the prospective binding treaty on Business and Human Rights may include such a principle or even a 'broader parental company duty of care in regard to human rights' by virtue of the duty of the parent company to exercise due diligence over its subsidiaries.[299] In France, for example, the *Proposition de Loi relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre* is of particular relevance regarding the introduction of mandatory human rights due diligence. The French Law was approved by the National Assembly in March 2015[300], later rejected by

[296] Ibid., Paragraph 78.
[297] Ibid., Paragraph 80.
[298] Ibid., Paragraphs 69-70.
[299] Cassell, Ramasastry (2016) 47-48.
[300] Assembleé Nationale, *Proposition de Loi relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre* (31 March 2015).

the Senate and later modified and adopted "*en deuxième lecture*" by the National Assembly and the Senate.[301]

The French Law requires any company that, at the end of two consecutive financial years, employs at least five thousand employees within the company itself, as well as its direct and indirect subsidiaries, and whose head office is located in France, to establish and implement an effective vigilance plan ("*plan de vigilance*"). Alternatively, the French Law applies to companies having at least ten thousand employees in their service and in their direct or indirect subsidiaries, whose head office is, also in this case, located on French territory or abroad.[302] The purpose of the *plan de vigilance* is to identify reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights, violations of fundamental freedoms, serious bodily injury, serious environmental damage, or health risks resulting directly or indirectly from the operations of the company and of the companies it controls, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.[303] Additionally, while the *plan de vigilance* is required to be publicly disclosed, failure to comply with the duties under Article 1 of the French Law will lead to compensation for the harm that due diligence would have permitted to avoid.[304] Thus, the French Law seems to be in line with the requirement in the Second Pillar of the UN Guiding Principles demanding companies to carry out human rights "due diligence", allowing companies to identify and assess their existing and potential adverse impacts, to prevent or mitigate these impacts, and to track and report on the outcomes of their actions in a transparent way.[305]

As mentioned before, the French Law may be considered as a promising legislation concerning the issue connected to "piercing the corporate veil" and a model that the prospective binding treaty may take into account. Indeed, the French Law - through the establishment of the duty of care to both subsidiaries and sub-contractors of

[301] *Loi n. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (28 March 2017).
[302] Ibid., Article 1.
[303] Ibid.
[304] Ibid., Article 2.
[305] UN HRC, Res 8/5 (7 April 2008) 17.

French companies - may allow to overcome the obstacles caused by the complex structure of business enterprises, which in turn makes it difficult for the claimant to attribute the acts of a subsidiary to the parent companies and thus to prove that the parent companies are liable. The French Law may thus represent a valuable model to be included in the prospective binding treaty.[306]

It is significant to note that, in line with the French developments, other attempts at the European level have been undertaken to include a corporate duty to prevent human rights violations by business companies, including subsidiaries and contractors, in civil law. Among them, the European Parliament and the Council adopted Directive 2014/95/EU[307], which requires large companies to disclose, through a non-financial statement, information necessary for an understanding of the companies' development, performance, position and impact of their activities, relating to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.[308] The purpose of the Directive is indeed to allow and help investors, consumers, policy makers and other stakeholders to evaluate the non-financial performance of such companies and encouraging these latter to develop a responsible approach to business.[309]

Furthermore, in 2016, the Committee of Ministers of the Council of Europe adopted a Recommendation on business and human rights[310], which provides more specific guidance to assist member States in preventing and remedying human rights violations by business enterprises and also insists on measures to induce business to respect

[306] Global Rights Compliance LLP, 'Legal Research for Treaty Proposal, prepared for Friends of Earth Europe. Final Version - Consolidated' (2015) 22.

[307] Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, 22 October 2014.

[308] Ibid., Article 19a.

[309] In addition, European Union institutions have also passed a new Regulation (Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas) which stops conflict minerals and metals from being exported to the EU, and mine workers from being abused. As stated under Article 1, the Regulation also aims at establishing a Union system for supply chain due diligence to reduce opportunities for armed groups and security forces to trade in conflicts minerals, while providing more transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas.

[310] Council of Europe Committee of Ministers, Recommendation of the Committee of Ministers to member States on human rights and business (CM/Rec(2016)3) 2 March 2016.

human rights. The Recommendation also encourages the Member States to promote and require:

> '*that business enterprises carry our human rights due diligence throughout their operations, provide information on their efforts on corporate responsibility to respect human rights, ensure that human rights abuses caused by business enterprises give rise to civil liability, and [finally] examine the possibility of creating civil causes of action against business enterprises that cause human rights abuses as a consequence of a failure to carry out adequate due diligence processes to prevent or mitigate risks to human rights*.'[311]

Finally, at the national European level, the 2015-adopted UK Modern Slavery Act requires businesses to be transparent in their supply chains through annual slavery and human trafficking statements, which should include information on their policies and due diligence processes in relation to slavery and human trafficking, as well as risk assessments as related.[312] Furthermore, another initiative, the Swiss Responsible Business Initiative, has been promoted a Swiss coalition of national civil society organizations and aimed at proposing a legal reform for the purpose of imposing a duty over companies to carry out due diligence and introducing their liability for human rights and environmental violations caused abroad by companies under their control.[313] The initiative and the connected legal text, if enacted, would have required Swiss-based companies to perform human rights due diligence, identify concrete and

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[311] Ibid., Recommendations 20-22.

[312] Modern Slavery Act 2015, Chapter 30, Article 54(1) and (5): 'A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation', which may include information related to '(a) the organisation's structure, its business and its supply chains; (b) its policies in relation to slavery and human trafficking; (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; (f) the training about slavery and human trafficking available to its staff'.

[313] Swiss Coalition for Corporate Justice, *Responsible Business Initiative. Factsheet*, available on the website of the Coalition <http://konzern-initiative.ch/wp-content/uploads/2017/01/KVI_Factsheet_5_E_V3_20161212.pdf>, accessed 1 August 2017; Amnesty International, Business and Human Rights Resource Centre, 'Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse' (4 September 2017) Business and Human Rights Resource Centre Online Publication, <https://business-humanrights.org/en/treaty-on-business-human-rights-could-improve-access-to-remedy-for-victims-says-new-report>, accessed 11 September 2017, 8.

potential impacts on the environment, as well as human rights, take appropriate measures to prevent or end the violations and, finally, account for their activities. these obligations would be applicable both to "controlled companies" and to other business relationships. Moreover, the Swiss-based companies would have been liable for damage caused by those companies they control unless they could prove that appropriate due diligence was performed.[314] However, in September 2017, the Swiss Federal Council has rejected the proposal.[315]

In conclusion, it is difficult for claimants/victims to prove the parent company's fault and its connection with the supplier or the sub-contractor which committed the abuse. As a matter of facts, in order to establish the company's liability, the claimant and his/her lawyers need satisfactory evidence to prove the Court the relationships between the company and the subsidiaries, and in particular to prove the company exercised sufficient control over its subsidiaries or partners as to influence their conducts. This illustrates the importance of victims gaining access to the relevant information, which is generally controlled or influenced by the company itself and safeguarded by national laws on disclosure of evidence which do not allow for this and different from common law and civil law systems.[316] Indeed, generally speaking, while common law systems of civil procedure comprise general rules on disclosure of evidence, civil law systems of civil procedure do not.[317]

In this regard, some scholars have already advanced a proposal which is based on the reversal of the burden of proof from the claimant-victim to the defendant, so that this latter has to prove that it did not exercise either control on the subsidiaries/partners

[314] Ibid.

[315] Specifically, the Swiss Federal Council stated that 'il est évident que les entreprises suisses doivent aussi assumer leurs responsabilités en matière de droits de l'homme et de protection de l'environnement aussi dans leurs activités à l'étranger […] mais considère que celle-ci va trop loin en particulier sur les questions touchant au droit de la responsabilité. Il préfère dès lors miser sur une démarche coordonnée au niveau international et sur les instruments existants, notamment sur les plans d'action récemment adoptés.' Swiss Federal Council, Press Release, 'Initiative populaire "Entreprises responsables": le Conseil fédéral reconnaît le bien-fondé de l'objectif mais choisit une autre voie' (15 September 2017), <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-68134.html> accessed 20 September 2017.

[316] Van Dam, Gregor (2017) 125-126.

[317] Ibid., 126.

or it did not hold a duty of care and did not breach such a duty.[318] However, considering that in some legal systems it could be difficult to for victims of corporate human rights abuses to establish that a company owed them a duty of care not only to prevent or mitigate subsidiaries or other business partners from committing human rights violations, the provisions included in the French Law, mentioned above, may constitute a valuable option in that they establish a duty for a company to conduct human rights due diligence.

3.5 Current trends in business-related human rights claims

As seen from some examples above, civil law suits for harms perpetrated by subsidiaries of parent companies in the course of their activities, especially in host States, are increasingly brought against the parent company of the multinational or transnational corporation before civil courts located in the companies' home States.[319]

Until now, the Alien Tort Statute (ATS), which will be further analysed below, has founded the main legal basis for transnational tort-based civil litigation, namely when a claimant from a host State seeks, in a home State's court, to address human rights violations resulting from actions of a business companies' in the host country. The relevance of the ATS lies exactly on the fact that it allows lower federal courts to exercise ATS jurisdiction over civil suits brought by foreign claimants, against foreign defendants, for foreign conduct allegedly violating human rights. In addition, it has to be noted that while the ATS has been used as valuable a mechanism to hold

[318] Global Rights Compliance LLP, 'Legal Research for Treaty Proposal, prepared for Friends of Earth Europe. Final Version - Consolidated' (2015) 22; 'Final Report. Side-Event: Legally Binding Instrument on Business and Human Rights: European perspectives' (19 March 2015), Business and Human Rights Resource Centre Online Publication, 7-8, <http://business-humanrights.org/en/legally-binding-instrument-on-business-human-rights-european-perspectives>, accessed 1 July 2017; Van Dam, Gregor (2017) 128-138.

[319] Such claims are usually referred to as foreign direct liability claims or transnational tort-based civil liability cases, due to their transnational character. In particular, the notion of transnational civil liability cases refers to civil tort/non-contractual obligations claims brought against parent companies of multinational corporations before domestic courts in home States by victims located instead in host States, who have suffered harms as a result of the detrimental impacts of the activities of the multinational corporations. Thus, these cases involve non-contractual liability claims against multinational corporations' parent companies, which however are not directly involved in the alleged violations, since the alleged violation took place in a different country than the home State of the parent corporation. Enneking (2012) 107-117.

corporations accountable for international human rights violations, victims of business-related human rights violations cannot obtain civil legal redress for the human rights violation *per se*. However, it seems that the 2013 ruling of the US Supreme Court in the *Kiobel v. Royal Dutch Petroleum Co.* has narrowed the opportunities for the use of the ATS against corporate actors, thus limiting the possibilities to hold corporations accountable for their involvement in human rights violations, perpetrated outside the United States, on the basis of the ATS itself.

On the other hand, and at the same time, some recent trends have shown an increase in the number of cases against business enterprises pursued on the basis of tort, in particular the law of "negligence" or "delict", for the purpose of providing compensation to the victims. It has been pointed out that:

> *'the past decade or so has seen a sharp increase in the number of 'foreign direct liability' claims, that is, claims brought in home state courts that target, not the subsidiary, but the parent company as the apparent 'orchestrator' of company-wide investment standards and policies. So far, a number of prominent home states have been affected – including the UK, the USA, Australia and Canada – and there is no reason to expect that it will stop there. A heady mix of factors – the high profile of CSR in these countries, the current level of media interest in cases of corporate wrongdoing, the availability of public interest lawyers willing to take on such cases, the financial and procedural advantages offered by many of these home state courts over foreign ('host state') alternatives (such as contingency fee representation or the possibility of class actions), the more than theoretical possibility of financial compensation, and generally better prospects for enforcement – makes further foreign direct liability litigation more than likely*'.[320]

Thus, despite the attraction of US courts, recent developments, especially the *Kiobel*[321] and *Daimler*[322] Cases, seem to have restricted the federal courts' jurisdiction over business-related violations under international law, and this is probably the reason why claimants are increasingly relying on US general private international law and thus

[320] Jennifer Zerk, *Multinationals and corporate social responsibility: limitations and opportunities in international law* (Cambridge University Press, 2006) 198-199.

[321] *Kiobel v Royal Dutch Petroleum Co.* (133 S.Ct. 1659) United States Supreme Court, 17 April 2013. See also previous cases: Kiobel v. Royal Dutch Petroleum Co. (456 F. Supp. 2d 457 (S.D.N.Y. 2006) United States District Court, 29 September 2006. *Esther Kiobel et al. v. Royal Dutch Petroleum Co, Shell Transport and Trading Company PLC, Shell Petroleum Development Company Of Nigeria Ltd* (621 F.3d 111 (2d Cir. 2010) United States Court of Appeals, Second Circuit, 17 September 2010.

[322] *Daimler AG v. Bauman* (No. 11-965, 571 US (2014) United States Supreme Court, 14 January 2014.

bringing their cases before US courts under domestic tort law, or alternatively relying on European courts.

3.5.1 The Alien Tort Statute

The Alien Tort Statute (ATS) is part of the Judiciary Act of 1789, which provides that federal courts have jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'[323] In other words, the ATS bestows federal subject-matter jurisdiction when a foreign person files a claim before a United States' court for a tort which violated the "law of nations", namely customary international law, or a treaty of the United States.

After a dormant period, the ATS was "rediscovered" by federal courts through the famous Case *Filártiga* v *Peña-Irala*[324], and progressively it has been considered as a mechanism to hold business enterprises accountable for human rights violations perpetrated especially outside the United States, in host States, where victims' chances of obtaining redress are jeopardized by poorly functioning legal systems, corruption, etc. Initial claims based on the ATS were initially against State actors who had allegedly violated international law, or against individual perpetrators of

[323] United States Code, Title 28, Part IV, Chapter 85, Paragraph 1350: '*The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*'. See also: Eric Engle, *The Alien Torts Statute: Extraterritorial Jurisdiction in U.S. and International Law* (Lambert Academic Publishing, 2010); Matthew J. Carey, 'How Concerned Should We Be? The Conundrum of Kiobel's Touch and Concern Test and Corporate Liability Under the Alien Tort Statute' (2016) Suffolk University Law Review; Donald Earl Childress III, 'The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation' (2012) Pepperdine University Legal Studies Research Paper No. 2011/9; Douglas M. Branson, 'Holding Multinational Corporations Accountable? Achilles Heels in Alien Tort Claims Act Litigation' (2010) Santa Clara Journal of International Law/ University of Pittsburgh Legal Studies Research Paper No. 2010-30; Anthony Bellia, Bradford Clark, 'The Alien Tort Statute and the Law of Nations' (2011) Notre Dame University Legal Studies Paper No. 10-12.

[324] *Filártiga v. Peña-Irala* (630 F.2d 876) United States Court of Appeals, Second Circuit, 30 June 1980.

international human rights violations or international crimes, such as the *Karadzic*[325] Cases.

In the *Filártiga* case, the ATS was invoked as a legal basis for a civil action brought before a US federal court by two Paraguayan, Joel Filártiga and her daughter Dolly living in the United States, against a former Inspector General of Police of Asuncion, Mr Peña. They alleged that Pena tortured and murdered Joelito Filártiga, Mr Filártiga's son, in retaliation for Mr Filártiga's political ideas and beliefs, in opposition to President Alfredo Stroessner's government.[326] The claimants based their argument in support of federal jurisdiction upon the Alien Tort Statute, on which the Court of Appeals ruled that:

> '*[s]ince [the] appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), [the Court] find[s] that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations*.'[327]

Thus, the Court concluded that torture was prohibited by the law of nations, even when perpetrated by officials and without distinction between treatment of aliens and citizens.[328] Furthermore, the Court also defined the meaning of "law of nations" clarifying that '*[t]he law of nations may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.[…] The Paquete*

[325] *Jane Doe I et al. v. Radovan Karadžić* (93 Civ. 878 (PKL)) United States District Court for the Southern District of New York, 4 October 2000. The complaint was actually filed, on the basis of the ATS, in 1993 by the Center For Constitutional Rights (CCR) on behalf of victims and survivors, who were seeking compensation for the harm suffered from the commission of genocide, war crimes, and crimes against humanity against Bosnian Muslims and Croats in the Trnopolje concentration camp. In 2000, in a default judgement, a jury reached a verdict of 4.5 billion dollars in compensatory and punitive damages.

[326] *Filártiga v. Peña-Irala*, 1-2. In particular, the claimants claimed that Joelito Filártiga was kidnapped and tortured to death by Mr Peña. Later that day, the police brought Dolly Filártiga to Mr Peña's home where she was confronted with the body of her brother, which evidenced marks of severe torture.

[327] Ibid., 5.

[328] Ibid., 11-12.

Habana [Case] […] reaffirmed that where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators […]'.[329]

The Filártiga family was thus awarded around 10 million dollars for the damages suffered, and the ATS consequently set the precedent for United States Courts to punish aliens for tortious acts which, committed outside the territory of the United States, were in violation of public international law (the law of nations) or any treaties to which the United States are party.

After the *Filártiga* case, the US courts progressively expanded their jurisdiction *ratione materiae* and *ratione personae*. Indeed, the initial ATS-based civil claims for violations of public international law perpetrated abroad mainly involved States or public officials, as defendants. In subsequent cases the ATS was instead applied to unlawful conducts held by private actors with no involvement of States.[330] These developments led to an expansion of the ATS's reach and to claims brought against corporate actors, including multinational corporations, for alleged violations of customary international law occurred abroad.[331]

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[329] Ibid., 5-6.

[330] The *Jane Doe I et al. v. Radovan Karadžić* Case (mentioned above) and the *Kadic v. Karadzić* Case are two examples. In both cases, Mrs Doe and Mr Kadic alleged that the defendant, Mr Karadžić, subjected them the genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. Mr Karadžić, as the ultimate commander of the Bosnian-Serb military forces, was responsible for these injuries that were inflicted by his forces. In particular, in the second Case, *Kadic v. Karadžić*, the Court of Appeals for the Second Circuit held that it had jurisdiction over Radovan Karadzic for a civil action based on human rights violations in the former Yugoslavia. Although initially rejected by the district court by virtue of lack of subject matter jurisdiction, since acts committed by non-state actors do not violate the law of nations, the Court of Appeals of the Second Circuit reversed the district court's opinion stating that non-state actors were capable of violating international law. Thus, the importance of this case is twofold: on one hand it specifically holds that an individual can be bound by the obligations of international law and, on the other, it allows a private individual to assert his/her rights under the ATS based on a violation of international law. *Kadic v. Karadžić* (70 F.3d 232, 64 USLW 2231) United States Court of Appeals, Second Circuit, 13 October 1995. See also: David P. Kunstle, 'Kadic v. Karadzic: do private individuals have enforceable rights and obligations under the Alien Tort Claims Act? ' (1996) 6 Duke Journal of Comparative and International Law.

[331] On the evolution of claims based on the Alien Tort Statute see, *inter alia*: Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria* Case' (2014) 10 Utrecht Law review; Liesbeth Enneking, 'Multinational Corporations, Human Rights Violations and a 1789 US Statute – A Brief Exploration of the Case of Kiobel v. Shell' (2012*)* 3 Nederlands Internationaal Privaatrecht 396; Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing, 2012); Curtis A. Bradley, Jack L. Goldsmith, David H. Moore, 'Sosa, Customary

Indeed, mainly from the 1990s, the ATS has been used as a basis for civil liability claims against corporate actors in relation to their alleged involvement in human rights violations perpetrated in host countries, and the famous *Bhopal* and *Unocal* Cases are some of the first examples.

The *Bhopal* Case originated from the 1984 Bhopal disaster, where thousands of Indian citizens, living in the proximity of the Bhopal chemical plant, operated by an Indian subsidiary of the US-based Union Carbide Corporation, died or were seriously injured due to the leak of a poisonous gas.[332] The incident led to several civil claims brought in India as well as in US courts, with the aim of holding the parent company liable for the harm suffered by the Indian victims. The claimants claimed in particular that the parent company had a large degree of control over the Indian subsidiary and that the parent company was at the same time negligent in the design and construction of the Indian plant and, later, in monitoring the safety of the subsidiary.[333] On the other hand, the Union Carbide Corporations argued that the incident had been caused by a sabotage, and as a result that the Indian government was equally negligent as it had allowed slums to be built in the vicinity of the plant. In 1986, the application of the *forum non conveniens* determined the dismissal of the case since the Court ruled that the case should be tried in the Indian legal system, rather than in the US[334]:

> '*The administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American taxpayers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the*

International Law, and the Continuing Relevance of Erie' (2007) 120 Harvard Law Review; Eugene Kontorovich, 'Implementing Sosa v. Alvarez-Machain: What Piracy Teaches About the Limits of the Alien Tort Statute' (2004) 80 Notre Dame Law Review; Ingrid B. Wuerth, 'The Alien Tort Statute and Federal Common Law: A New Approach (2010) 85 Notre Dame Law Review; Thomas H. Lee, 'The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations' (2014) 89 Notre Dame Law Review; William S. Dodge, 'After Sosa: The Future of Customary International Law in the United States' (2009) 17 Willamette Journal of International Law and Dispute Resolution; Beth Stephens, 'The Curious History of the Alien Tort Statute' (2014) 89 Notre Dame Law Review; Katherine Gallagher, 'Civil Litigation and Transnational Business: An Alien Tort Statute Primer' (2010) 8 Journal of International Criminal Justice.

[332] For the case history and further references, see Business & Human Rights Resource Centre website, <www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal>.

[333] Enneking (2012) 93-94.

[334] Ibid.

United States judiciary to the limits of its capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case. The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which affected its citizens on its own soil. Perhaps Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interests of citizens of the United States in the litigation'.[335]

In addition, referring to the assertion that the Indian Court would not have been the appropriate forum, the US Court ruled:

'*The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.*'[336]

In 1996, another landmark case, the *Unocal* case[337], was brought before the California District Court against the US-based Unocal Corporation, the French oil company Total, the Burmese military regime (the State Law and Order Restoration Council, SLORC) and the state-owned and controlled Myanmar Oil and Gas Enterprise (MOGE).[338] The claimants argued that the defendant companies had directly or indirectly committed violations of human rights of local farmers in Burma. Particularly, Unocal and Total were accused of using the Burmese military regime in the construction of a local gas

[335] *Union Carbide gas plant disaster at Bhopal, India in December 1984* (634 F. Supp. 842) U.S. District Court for the Southern District of New York, 10 June 1986.
[336] Ibid.
[337] *Doe v. Unocal* (395 F.3d 932) United States Court of Appeals, Ninth Circuit, 18 September 2002.
[338] See for the case history and further references Business and Human Rights Resource Centre Online Website.

pipeline, and mainly to provide for the security for the pipeline. On the other hand, the Burmese military regime was accused of forced labour, murder, rape and torture during the implementation of the gas pipeline project.[339] While the federal District Court dismissed the claims against the Myanmar Military and Myanmar Oil on the grounds that they were entitled to immunity, the Court also ruled that '*subject matter jurisdiction was available under the ATCA and that the Doe-Plaintiffs had pled sufficient facts to state a claim under the [ATS]*'.[340] In other words, the District Court ruled that corporate actors could be held liable for violations of international human rights norms in foreign countries under the ATS. However, later in 2000, the District Court dismissed the case '*because [the claimants] could not show that Unocal engaged in state action and that Unocal controlled the Myanmar Military. [In addition] [t]he District Court granted Unocal's motion for summary judgment on the [ATS] claims based on forced labor because [the claimants] could not show that Unocal actively participated in the forced labor*.'[341] As a result, this decision opened the door to further cases in which the ATS was used as a legal basis to establish the liability of US-based multinational corporations before US Federal Courts for wrongdoing or damage committed in the course of corporations' activities carried out in host countries.

Furthermore, interestingly the United States Court of Appeals for the Ninth Circuit[342] noted that '*[o]ne threshold question in any ATCA case is whether the alleged tort is a violation of the law of nations. We have recognized that torture, murder, and slavery are jus cogens violations and, thus, violations of the law of nations. Moreover, forced*

[339] In September of 1996, four villagers of Burma, the Federation of Trade Unions of Burma and the National Coalition Government of the Union of Burma brought an action against Unocal. (*Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.,* 176 F.R.D. 329, 334 (C.D.Cal.1997)("*Roe I*"). They claimed violations of the law of nations under the Alien Tort Claims Act and violations of state law. The Federation of Trade Unions and the National Coalition Government alleged similar injuries to their members and citizens. In October of 1996, fourteen other villagers from the same region brought another action against Unocal, Total, Myanmar Oil, the Myanmar Military, Unocal President Imle and Unocal CEO Beach (*Doe I v. Unocal Corp.,* 963 F.Supp. 880, 883 (C.D.Cal.1997) ("*Doe I*"). they claimant alleged that the defendant companies caused them to suffer death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property. Also in this case, liability was The *Doe*-Plaintiffs sought to represent a class of all residents of the Tenasserim region who have based on violations of the ATS and state law. In *Doe v. Unocal* (395 F.3d 932) United States Court of Appeals, Ninth Circuit, Paragraphs 33-34.

[340] Ibid., Paragraph 34.

[341] Ibid., Paragraph 35-37.

[342] The claimants appealed the dismissal of the international human rights claims under the ATS to the United States Court of Appeals, Ninth Circuit which ruled that it had jurisdiction.

labor is so widely condemned that it has achieved the status of a jus cogens violation.'[343] In conclusion, since all torts in the case were *jus cogens* violations, then they were also violations of the law of nations.

Under the Court's ruling, another threshold question in ATS's cases against a private party is:

> '*whether the alleged tort requires the private party to engage in state action for [ATS] liability to attach, and if so, whether the private party in fact engaged in state action. [It was ….] observed that while most crimes require state action for [ATS] liability to attach, there are a handful of crimes, including slave trading, to which the law of nations attributes individual liability, such that state action is not required. More recently, the Second Circuit adopted and extended this approach in Kadic.[344] The Second Circuit first noted that genocide and war crimes — like slave trading — do not require state action for ATCA liability to attach. […] The Second Circuit went on to state that although acts of rape, torture, and summary execution, like most crimes, are proscribed by international law only when committed by state officials or under color of law to the extent that they were committed in isolation, these crimes are actionable under the [ATS], without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes. […] Thus, under Kadic, even crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do not require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for ATCA liability to attach*.'[345]

The same applied to forced labour, considered '*a modern variant of slavery*' and thus it was possible to attribute individual liability.[346]

While an agreement in the *Unocal* Case was finally reached out of court in 2004, in the same year, the US Supreme Court interpreted issues of the ATS in the *Sosa* Case[347], providing some answers to the many questions that had arisen with respect to the scope and interpretation of the ATS. The case originated from the abduction of a Drug

[343] *Doe v. Unocal* (395 F.3d 932) United States Court of Appeals, Ninth Circuit, Paragraphs 37-38.
[344] The Court here is referring to *Kadic v. Karadžić* (70 F.3d 232, 64 USLW 2231) United States Court of Appeals, Second Circuit, 13 October 1995.
[345] *Doe v. Unocal* (395 F.3d 932) United States Court of Appeals, Ninth Circuit, Paragraph 43.
[346] Ibid., Paragrah 44.
[347] *Sosa v. Alvarez-Machain* (542 U.S. 692) United States Supreme Court, 29 June 2004.

Enforcement Administration (DEA) agent in Mexico, where the agent was tortured and then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that Mr Alvarez was involved in the torture. The Mexican Government later, including Mr Sosa, helped the DEA to abduct Mr Alvarez and bring him to the United States for trial. In the United States, the trial before the Supreme Court, found that the government could try a person who had been forcibly abducted, but that the abduction itself might violate international law and provide grounds for a civil suit. Mr Alvarez was then found not guilty for lack of evidence. Mr Alvarez later brought claims, *inter alia* under the ATS, against the United States and the Mexican nationals who had captured him.[348] The importance of this ruling lies in the fact that the Court seems to have limited the application of the ATS. Indeed, the Supreme Court ruled that:

> '*[…] it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond ….] violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development [… of the ATS ...] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended [the ATS] or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should 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*.'[349]

Thus, the Court established that the ATS gives federal courts limited authority to accept causes of action in accordance with international law, as well as under the condition that international law norms have a specificity analogous to paradigms in the 18th century, namely violation of safe conducts, infringement of the rights of ambassadors, and piracy. Moreover, the Court repeatedly stressed the need for

[348] Ibid., 1-4.
[349] Ibid., 27-28.

judicial caution in considering which claims could be brought under the ATS, due to foreign policy concerns, since '*the potential [foreign policy] implications […] of recognizing […] causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs*.'[350] However, the Court did not clarify which norms of customary international law would actually meet this threshold. As a matter of facts, lower courts had to determine which norms of customary international law provide a basis for civil claims under the ATS with the only indication that such a norm should be specific, universal and obligatory, but '*the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today*.'[351]

As already mentioned before, in April 2013 the ruling of the Supreme Court of the United States in the notorious *Kiobel v. Royal Dutch Petroleum Co.* Case (hereafter *Kiobel* Case)[352] led to a significant change in the possibilities offered, until that moment, by the ATS.[353] Indeed, the United States Supreme Court significantly limited

[350] Ibid., 28-35.
[351] Ibid., 35.
[352] *Esther Kiobel, Individually and on behalf of her late husband Kiobel, et al. v. Royal Dutch Petroleum Co. et al.* (569 US _ (2013) United States Supreme Court, 17 April 2013. (Hereafter *Kiobel* Case). As far as the history of the Case is concerned, see: *Esther Kiobel et al. v. Royal Dutch Petroleum Company at al.* (456 F.Supp.2d 457) United States District Court, S.D. New York, 29 September 2006*; Esther Kiobel, individually and on behalf of her late husband Dr. Barinem Kiobel et al. v. Royal Dutch Petroleum Co., Shell Transport and Trading Company PLC, Shell Petroleum Development Company Of Nigeria, Ltd.* (621 F.3d 111) United States Court of Appeals for the Second Circuit, 17 September 2010; *Esther Kiobel, individually and on behalf of her late husband Dr. Barinem Kiobel et al. v. Royal Dutch Petroleum Co., Shell Transport and Trading Company PLC, Shell Petroleum Development Company Of Nigeria, Ltd.* (642 F.3d 379) United States Court of Appeals for the Second Circuit, 14 February 2011.
[353] On the Kiobel ruling and its effects there is an extensive bibliography, among them see: Gwynne L. Skinner, 'Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World' (2014) 46 Columbia Human Rights Law Review; Matthew J. Carey, 'How Concerned Should We Be? The Conundrum of Kiobel's Touch and Concern Test and Corporate Liability Under the Alien Tort Statute' (2016) Suffolk University Law Review; Kenneth Anderson, 'Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional. Universalism in Retreat' (2013) American University, WCL Research Paper No. 2013-24; Ingrid B. Wuerth, 'The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co. ' (2013) 107 American Journal of International Law; Anthony Bellia, Bradford Clark, 'Kiobel, Subject Matter Jurisdiction, and the Alien Tort Statute (2012) Notre Dame Legal Studies Paper No. 12-52; Eugene Kontorovich, 'Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends' (2014) 89 Notre Dame Law Review; William S Dodge, Corporate Liability Under Customary International Law' (2012) 43 Georgetown Journal of International Law; Liesbeth Enneking, 'Multinational Corporations, Human Rights Violations and a 1789 US Statute - A Brief Exploration of the Case of Kiobel v. Shell' (2012) 3 Nederlands Internationaal Privaatrecht; Odette Murray, David Kinley, Chip Pitts, Chip, 'Exaggerated

the application of the ATS) by finding that the presumption against extraterritoriality applied to the case to claims brought for violations of customary international law occurring abroad, thus the ATS could not be used in the adjudication of cases where the conduct took place abroad and did not have sufficient connection to the United States jurisdiction.

The claimants were a group of Nigerians, living in the United States, who filed suit against Royal Dutch Petroleum Company and Shell Transport and Trading Company p.l.c., holding companies incorporated in the Netherlands and England, respectively, as well as against subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC), which was incorporated in Nigeria. The complainants claimed that the defendants aided and abetted the commission, by the Nigerian Government, of extrajudicial killings, crimes against humanity, torture, arbitrary arrest and detention, forced exile and property destruction. According to the claimants, the defendants helped the Nigerian Government by providing Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks.[354]

While initially the District Court of New York dismissed the claims for extrajudicial killings, violations of the rights to life, liberty, security, and association, forced exile and property destruction because they did not constitute violations of the law of the nations, the United States Court of Appeals for the Second Circuit dismissed the entire complaint by virtue of the fact the law of nations did not recognize corporate liability.[355] However, in 2012, the United States Supreme Court asked the parties to address a supplemental question, namely '*whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States*.'[356]

Rumours of the Death of an Alien Tort: Corporations, Human Rights and the Peculiar Case of Kiobel' (2011) 12 Melbourne Journal of International Law; Eric Engle, 'Corporate Criminal Liability & the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum' (2010) 34 Houston journal of International Law; Roger P. Alford, 'The Future of Human Rights Litigation after Kiobel' (2014) 89 Notre Dame Law Review; Sarah H. Cleveland, 'After Kiobel' (2014) 12 Journal of International Criminal Justice; Robert Cryer, 'Come Together?: Civil and Criminal Jurisdiction in *Kiobel* from an International Law Perspective' (2014) 12 Journal of International Criminal Justice.

[354] *Kiobel* Case, 1-3.

[355] Ibid., 3.

[356] Ibid.

Recalling the reasoning held in *Sosa*, the Supreme Court in *Kiobel* underlined that the question at stake was not whether the claimants had stated a proper claim under the ATS, but whether a claim could reach conduct occurring in the territory of a foreign sovereign.

Already before the *Kiobel* Case, the United States Supreme Court had ruled, in the *Morrison Case*[357], on the application of the presumption against extraterritoriality to the Securities Exchange Act. In particular, the Supreme Court clarified that:

> '[i]*t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States […] When a statute gives no clear indication of an extraterritorial application, it has none*.'[358]

This reasoning was mentioned in the *Kiobel* Case. In particular, the majority opinion held that the presumption against extraterritoriality applied to the ATS.

The Supreme Court firstly reaffirmed part of the reasoning in *Sosa*, stating that the ATS is a jurisdictional statute which creates no causes of action.[359] Thus it does not regulate conducts, rather it delegates to federal courts the power to recognize causes of action based on customary international law. Furthermore, the Court ruled that the presumption against extraterritoriality, as defined in *Morrison*, has the objective of determining whether an Act of the congress applies abroad, for the purpose of '*protect[ing] against unintended clashes between [the United States] laws and those of other nations which could result in international discord*.'[360] As a matter of facts, '*the danger of unwarranted judicial interference in the conduct of foreign policy*' is heightened in the ATS context since '*the question is not what Congress has done but what courts may do. These foreign policy concerns are not diminished by the fact that Sosa limited federal courts to recognizing causes of action only for alleged violations of international law norms that are specific, universal, and obligatory*'.[361]

Moreover, analysing the historical background against which the ATS was enacted, this does not corroborate the opinion '*that the Congress intended federal common law*

[357] *Morrison et al. v. national Australian Bank LTD et al.* (561 US 247) Supreme Court of the United States, 24 June 2010. Hereafter "*Morrison* Case".
[358] Ibid., 5-6.
[359] *Kiobel* Case, 3-4.
[360] Ibid., 4-5.
[361] Ibid.

under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.'[362] As already explained in Sosa, when the ATS was passed, three offenses against the law of nations were recognised: the violation of safe conducts, infringement of the rights of ambassadors, and piracy. While the first two does not have extraterritorial application[363], it is true that piracy may take place on high seas 'beyond the territorial jurisdiction of the United States or any other country'.[364] Nevertheless, '*applying U. S. law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign*'.[365]

The Court finally rules that although sometimes claims brought under the ATS 'touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. […Indeed] corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.'[366]

Thus, the majority opinion, shared by five members of the Supreme Court, ruled that the ATS does not apply extraterritorially unless the Congress clearly indicates that it does and the Congress did not give such an indication.[367] However, it has been noted that 'the majority did not necessarily rule out suits against American defendants for

[362] Ibid., 6-14.

[363] The Supreme Court further explained that '[p]rominent contemporary examples of the first two offenses—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.' Ibid., 6-11.

[364] Ibid. 11-12.

[365] The Supreme Court interestingly also reiterated that 'far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.' Ibid., 12-13.

[366] Ibid., 14.

[367] Ibid., 6-11.

human rights torts overseas', rather the five members were 'silent on whether claims against American citizens—subject to American jurisdiction under international law—would sufficiently touch and concern the United States to warrant jurisdiction under the ATS.'[368] Thus, while the original question about whether corporations can be sued under the ATS, similarly the question related to whether the ATS allocates jurisdiction to federal courts for claims against United States citizens or corporations for human rights violations – although committed abroad, remained unanswered. This position would also be in line with the concurring opinion of four other Justices, who however were not concurring in the reasoning. As a matter of facts, they shared the conclusion of the majority opinion, asserting however that the reason was to be traced in the fact that *Kiobel* was a suit by foreign claimants, against foreign defendants, for foreign torts, with no sufficient distinct American interest. Justice Breyer indeed stated that jurisdiction under the ATS could be found 'where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.'[369] Justice Breyer underlined that 'the ATS […] was enacted with foreign matters in mind. The statute's text refers explicitly to alien[s], treat[ies], and the law of nations. The statute's purpose was to address violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs […] And at least one of the three kinds of activities that we found to fall within the statute's scope, namely piracy, normally takes place abroad.'[370] Thus, in accordance with Justice Breyer's opinion, this would mean that the Congress contemplated potential extraterritorial application of the ATS. As a result, the ATS to allow jurisdiction to recognize causes of action for foreign violations of international law, but 'only where distinct American interests are at issue, in particular for the purpose of not becoming a safe harbor for foreign nationals who come here after committing human rights violations overseas', and when the

[368] Doug Cassel, 'Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open' (2014) 89 Notre Dame Law Review, 9-10.
[369] *Kiobel* Case, *Justice Breyer concurring in judgment*, 2.
[370] Ibid., *Justice Breyer concurring in judgment*, 3-4.

defendant is an American national.[371] Justice Breyer analysed previous Cases, in particular the *Filartiga* and *Marcos* Cases, as examples of ruling where although the defendants were not American citizens, the interests of the United States prevailed, namely the belief that 'international norms have long included a duty not to permit a nation to become a safe harbor for pirates'[372]:

> '*[i]n Filartiga, an alien plaintiff brought a lawsuit against an alien defendant for damages suffered through acts of torture that the defendant allegedly inflicted in a foreign nation, Paraguay. Neither plaintiff nor defendant was an American national and the actions underlying the lawsuit took place abroad. The defendant, however, had . . . resided in the United States for more than ninth months before being sued, having overstayed his visitor's visa. Jurisdiction was deemed proper because the defendant's alleged conduct violated a well-established international law norm, and the suit vindicated our Nation's interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct.*
> *[…]*
> *In Marcos, the plaintiffs were nationals of the Philippines, the defendant was a Philippine national, and the alleged wrongful act, death by torture, took place abroad. A month before being sued, the defendant, his family, […] and others loyal to [him] fled to Hawaii, where the ATS case was heard. As in Filartiga, the court found ATS jurisdiction*.'[373]

The majority ruled that the ATS did not have extraterritorial application, except when the foreign violations touch and concern the United States with sufficient force to displace the presumption against extraterritorial application, however under which circumstances a case touches and concerns the United Sates with sufficient force was left to be established by lower level courts. Indeed, besides underlining that the mere corporate presence in the United States of foreign corporations is not enough to meet the threshold, it was not clear what form or degree of connection to the United States was required.

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[371] Ibid., 7.
[372] Ibid., 8.
[373] Ibid., 8-9. As underlined by Cassel, '*Kiobel* was a suit by foreign plaintiffs, against foreign defendants, for foreign conduct. In that "foreign-cubed" case, the limited American jurisdictional interests at stake—mainly to afford redress for heinous international torts—were not enough to persuade the majority to overcome its presumption against extraterritorial application. Nor were they enough to convince the four Justices concurring in the result that there were sufficient "distinct American interests" to justify ATS jurisdiction in that case.' Cassel (2014) 2.

As a result, in rulings after *Kiobel*, lower courts have generally dismissed claims against foreign companies and acts perpetrated outside the US. Besides this lack of clarity, the *Kiobel* Case seems also to have importantly narrowed the use of the AT for such cases. The John *Doe I et al.* v. *Exxon Mobile Corporation at al.* Case[374] and the *Daimler* Case[375] are, respectively, two examples.

In July 2015 the District Court for the District of Colombia in the case *Doe I* v. *Exxon Mobile* decided that the plaintiffs succeeded in showing that the case sufficiently "touched and concerned" the United States. In this case, the claimants alleged that the companies Exxon Mobile Corporations and Exxon Mobile Oil Indonesia were liable for aiding and abetting human rights abuses committed by members of the Indonesian soldiers, while providing security for the company. In addition, Exxon was providing assistance to the Indonesian Government's soldiers, paying stipends, as well as providing housing, supplies and facilities – thus the Court stated that 'Exxon exercised substantial control over the activities of the soldiers, including approving and planning specific operations and deployment locations'.[376] The Court thus moved to consider whether the defendants could be held liable under the ATS, whether there was a violation of customary international law under the ATS, and finally where the presumption against extraterritoriality cold be overcome.

In reference to the last question, while noting that in accordance with the *Kiobel* Case the ATS 'is presumed not to regulate conduct occurring outside of the United States' and that the test to be applied is whether the claim touches and concerns the United States with sufficient force to displace the presumption, the District Court underlined that the only guidance provided in *Kiobel* was that the 'mere corporate presence of a defendant in the United States' does not satisfy the test.[377]

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[374] *John Doe I et al.* v. *Exxon Mobile Corporation at al.,* Memorandum Opinion (Civil No. 01'-1357 (RCL) United States District Court for the District of Columbia, 6 July 2015. (Hereafter *Doe v. Exxon Mobile* Case).

[375] *Daimler AG v. Bauman et al.* (644 F. 3d 909) US Supreme Court, 14 January 2014. (Hereafter *Daimler* Case). On the Case see also: Gwynne Skinner, Expanding General Personal Jurisdiction Over Transnational Corporations for Federal Causes of Action (2017) 121 Penn State Law Review; Verity Winship, 'Personal Jurisdiction and Corporate Groups: Daimlerchrysler AG v Bauman' (2013) 9 Journal of Private International Law.

[376] *Doe v. Exxon Mobile* Case, Memorandum Opinion, 1-2.

[377] Ibid., 9-10.

The District Court ruled that the location of the conduct at issue in the case was the primary inquiry:

> '*[t]he presumption against extraterritoriality is only displaced if the claims have a US focus and adequate relevant conduct occurs within the United States. "Relevant conduct" is the conduct alleged in support of those claims. The conduct will be "adequate" to displace the presumption if "enough" of it occurs in the United States. While this standard is fairly opaque, it appears to require that there be specific, substantial allegations of conduct occurring in the United States that supports an ATS clause o action. Although the US-based conduct need not allege a completed tort under the ATS, the domestic conduct must indicate a US focus to the claims and must be relevant to the claims, i.e. must support the claims.*'[378]

As a result, the presumption against extraterritoriality can be displaced when the claimant alleges substantial and specific domestic conduct relevant to a violation of the ATS. Furthermore, in accordance with the Eleventh Circuit in *Drummond Co*. Case[379] and the Fourth Circuit in *Al Shimari v. CACI*[380], the District Court for the District

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[378] Ibid., 12-16.

[379] *Jane Doe, et al. v. Drummond Company INC et al.* (782 F.3d 576) United States Court of Appeals for the Eleventh Circuit, 25 March 2015.

[380] *Al Shimari et al. v. CACI Premier Technology Inc., CACI International Inc. et al.* (Nos. 13–1937, 13–2162) United States Court of Appeals for the Fourth Circuit, 30 June 2014; *Al Shimari v. CACI Premier Technology, Inc.* (No. 15-1831) United States Court of Appeals for the Fourth Circuit, 21 October 2016. In the *Al Shimari* Case, in June 2014, the Fourth Circuit Court of Appeals overturned the lower court's dismissal and ruled that the case had sufficient connections with the United States for a United States court to hear the claims. Afterwards, in June 2015, the lower court granted CACI's motion to dismiss the case, affirming that CACI's actions at Abu Ghraib were controlled by the United States military and that assessing the plaintiffs' allegations would require the court to question actual, sensitive judgments made by the military. The court concluded that the case involved a political question that the judiciary did not have power to decide. In August 2015, the claimants appealed the decision, and in October 2016, the Fourth Circuit Court of Appeals reinstated the lawsuit. The latter court ruled that the "political question" doctrine did not prevent courts from hearing cases concerning illegal acts committed by government contractors, even if they were under control of the military. In particular, the court underlined that the US Supreme Court in *Kiobel* "broadly stated that the "claims" rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force", thus instructing lower courts to "apply a fact-based analysis" to determine whether ATS claims with a "close connection to United States territory" displace the presumption. Applying this fact-based analysis to the ATS claims, the Fourth Circuit found several factors relevant for the purpose of making such a determination, including the defendant's status as a US corporation, the US citizenship of the defendant's employees that allegedly committed acts of torture, and the US connections involved in the defendant corporation and its employees contracting with and obtaining security clearances from the U.S. government. *Moreover, the Court found* that the defendant had aided and abetted acts of torture through conduct that took place within the United States and that corporate managers located in the United States were aware of reports of misconduct and "implicitly, if not expressly, encouraged the acts. Balancing these elements, the Court unanimously ruled that the claimants' claims touched and

of Columbia ruled that a defendant's citizenship, the corporate status or other factors such as the implication of '*important national interests*'[381], are relevant elements in applying the touch and concern test, although not sufficient to displace the presumption against extraterritoriality, since the risk of international discord is reduced when the defendant is a citizen of the United States.[382]

Applying its reasoning to the case at stake, the Court firstly noted that no major national interest arose from the Case, as a result the relevant factors to evaluate were the relevant domestic conduct and the citizenship of the defendant. On one hand, the ATS-based claim against Exxon Mobil Oil Indonesia was dismissed firstly because the fact that the company was incorporated in the United States was deemed not sufficient for the claim against it to move forward and because, and secondly because although the claimants alleged that the board of directors of Exxon Indonesia was controlled from the United States, this element was insufficient to demonstrate that the relevant conduct took place in the United States.[383] On the other hand, the Court found that Exon Mobil's executives in the United States had knowledge (*mens rea*) of the essential elements of the crimes committed and the intent of the principal perpetrators and they should have known that the crimes would occur. Thus, the *mens rea* for aiding and abetting liability was established. The Court found also that the *actus reus* for aiding and abetting liability was supported allegations of U.S.-based decision-making by Exxon Mobil executives. These allegations, 'in combination with the fact [that Exxon Mobil place of incorporation and place of business is the United States] demonstrate[d] that the claims [of the claimants] sufficiently touch and

concerned the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS. Paragraphs 527-531.

[381] *Doe v. Exxon Mobile* Case, Memorandum Opinion, 15. It is interesting to note that the District Court pointed out that 'such national interests might be triggered by the fact that the United States Government is in some way culpable or, at least, integrally involved in the conduct giving rise to the claims at issue. This factor heightens the US interest in policing international law violations to a much greater degree than the mere US citizenship of the defendants. The direction of attacks against American citizens and property might be another relevant factor because it implicates our national interest in punishing and deterring such attacks.'

[382] Ibid., 12-16.

[383] Ibid., 2425.

concern the Unites States [so] to displace the presumption against extraterritoriality of the ATS.'[384]

Turning instead to the *Daimler* Case, it involved twenty-two residents of Argentina who sued the company DaimlerChrysler Aktiengesellschaft (Daimler), alleging that Mercedes-Benz Argentina (MB Argentina), an Argentinian subsidiary of Daimler, collaborated with the Argentinian State security forces to kidnap, detain, torture, and kill some MB Argentina workers, including the claimants.[385] The personal jurisdiction of the California Federal District Court, where the suit was filed, over Daimler was based on the contacts between Mercedes-Benz USA, LLC (MBUSA), a Daimler's subsidiary incorporated in Delaware with its principal place of business in New Jersey, and the distribution of MBUSA distributes vehicles to independent dealerships throughout the United States, including California. The US Supreme Court ruled that the case did not have enough ties with the *forum*, thus further reducing the possibility to bring such cases under the ATS. Particularly the Supreme Court pointed out that:

> '*[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. … [N]either Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. […] It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California*.'[386]

Resulting from these developments, claims will probably and increasingly be brought before other avenues. Indeed, while the option of suing individuals rather than the whole corporations remains valid, there is the possibility of bringing claims before either US State Courts on the basis of domestic legal principles or European Courts, where due to the absence of a Statute similar to the ATS, these claims are and will be

[384] Ibid., 27-28.
[385] *Daimler* Case, 1.
[386] Ibid., 20-21.

based on principles of civil law, rather than international law. By virtue of the fact that ATS-based claims against business enterprises are generally grounded on violations of international law amounting to international crimes and other egregious international human rights, it has been questioned whether non-ATS-based claims can represent a substitute for ATS-based claims, since these latter raise 'a very strong level of moral condemnation' that will be 'devaluated where this type of civil litigation is initiated on a different legal basis, such as general principles of domestic tort law.'[387] Nonetheless, a growing number of claims have also been brought before civil courts in European States, Australia and Canada.

3.5.2 Trends in the European Union

As mentioned above, mainly due to the consequences arising from the ruling of the US Supreme Court in Kiobel, business-related human rights cases have been increasingly brought before non-US Courts. Due to the lack of an ATS equivalent, these non-US claims have generally been pursued on the basis of principles of tort law and the tort of negligence. As a result, as already mentioned above, these claims do not revolve around violations of international human rights law per se.[388]

Among the most notorious examples, there are the recent cases against the Royal Dutch Shell and its Nigerian subsidiaries[389], where the Court of Appeal in The Hague ruled that it had jurisdiction to hear the case against both the parent company and its subsidiaries. The so-called *Royal Dutch Shell* Cases consist of several claims of damage against Royal Dutch Shell due to an oil spillage near three Nigeria villages, whose consequences were felt in fishponds and plantations. The injury to the environment resulted in a loss of income, property damage and injuries to health, amongst other

[387] Enneking (2012) 271; Joseph (2004) 76-77.

[388] Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria* Case' (2014) 10 Utrecht Law Review; Meeran (2011).

[389] *Fidelis Ayoro Oguru, Alali Efanga, Vereniging Milieudefensie v Royal Dutch Shell Plc and Shell petroleum Development Company of Nigeria Ltd* (No. C/09/330891 / HA ZA 09-0579); *Fidelis Ayoro Oguru, Alali Efanga, Vereniging Milieudefensie v Shell Petroleum N.V. and The "Shell" transport and Trading Company Limited* (No. C/09/365498 / HA ZA 10-1677) District Court of The Hague, 30 January 2013. Hereafter "Royal Dutch Shell cases (2013)"; Business and Human Rights Resource Centre, Shell lawsuit (re oil pollution in Nigeria), Online Publication, <https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria> accessed 17 September 2016.

serious consequences for farmers. The claimants argued, on one hand, that the Nigerian subsidiary did not exercise due care in order to avoid the oil spillage, or to mitigate the negative consequences and, on the other hand, that the parent company failed to exercise control over its Nigerian subsidiary. While the parent company defendant asserted that the Dutch Court did not have jurisdiction over the actions of the Nigerian subsidiary, the District Court in The Hague ruled instead that it did have jurisdiction in the case. In January 2013, the District Court in The Hague established that the oil spillages were caused by sabotage, rather than by faulty maintenance. As a result, the Court dismissed the majority of the claims against the Nigerian subsidiary SPDC, also by virtue of the fact that under the Nigerian law, in case of sabotage the oil pipeline company is not held liable for the harms resulting from any oil spills caused by the sabotage. Although all the claims against the parent company RDS were also dismissed because the District Court ruled that, under Nigerian law, 'there is no general duty of care to prevent other parties from suffering damage as a result of the practices of third parties'[390], the Dutch Court interestingly pointed out:

> '*under the following special circumstances, a plaintiff can successfully submit that the defendant had a duty of care to prevent a third party from inflicting damage on the plaintiff: (i) a special relationship was created between the plaintiff and the defendant because the defendant assumed a duty of care towards the plaintiff; (ii) there was a special relationship between the defendant and the third party based on which the defendant had to supervise the third party or had to exercise control over the third party; (iii) the defendant created a dangerous situation that could be abused by a third party and this way result in damage; (iv) the defendant knew that a third party had created a dangerous situation while that situation was under the influence of the defendant*.'[391]

> '*If one of these exceptional situations is involved, the requirements that proximity must exist between the plaintiff and the defendant and that it is fair, just and reasonable to impose a duty of care on the defendant to prevent a third party from inflicting damage on the plaintiff have been satisfied. The District Court assumes that under Nigerian law, as well, these exceptional situations constitute a reason to assume that a duty of care exists to prevent others from suffering damage as a result of the practices*

[390] Royal Dutch Shell Cases (2013) Paragraph 4.30.
[391] Ibid.

of third parties, to the extent that this damage of the plaintiff was foreseeable for the defendant.'[392]

The Court also considered the UK case *Chandler v Cape* in order to determine if a parent company can have a duty of care towards the employees of one of its subsidiary. In particular, some conditions should be met:

'(*i) The businesses of the parent company and of the subsidiary are essentially the same; (ii) the parent company has more knowledge or should have more knowledge of a relevant aspect of health and safety in the industry than the subsidiary; (iii) the parent company knew or should have realized that the working conditions at its subsidiary were unhealthy; (iv) the parent company knew or* should have foreseen that the subsidiary or its employees would rely on the fact that the parent company would use its superior knowledge to protect those employees.'[393]

The Dutch Court thus concluded that the circumstances under which the parent company was held liable in the *Chandler v. Cape* Case were not the same as those in the Case at stake and '*Chandler v Cape* [did] not create any precedent in the subject case'.[394] Accordingly, Shell did not have a duty of care towards the claimants.[395] Nevertheless, claims were granted against the subsidiary SPDC for two oil spillages from an abandoned wellhead. As a result, the subsidiary was requested to pay compensation to one of the farmers.[396]

In December 2015, however, the Dutch Court of Appeals reversed its dismissal and permitted the balance of the claims to go forward. In particular, with reference to the international jurisdiction of the Dutch Court over claims against the parent company, the Court ruled that:

'*Shell Petroleum is a company with its registered office in this country [the Netherlands], for which reason the Dutch court has jurisdiction (under art. 2(1) of the Brussels I Regulation) to hear a claim instigated against Shell Petroleum. With regard to RDS [one subsidiary of Shell Petrolum], not having its registered office in this country, the court has jurisdiction pursuant to art. 2(1) in conjunction with art. 60(1) Brussels I Regulation;*

[392] Ibid., Paragraph 4.31.
[393] Ibid., Paragraph 4.35.
[394] Ibid., Paragraph 4.39.
[395] Ibid.
[396] Ibid.; Liesbeth Enneking, 'Multinationals and Transparency in Foreign Direct Liability Cases The Prospects for Obtaining Evidence under the Dutch Civil Procedural Regime on the Production of Exhibits' (2013) 3 The Dovenschmidt Quarterly, 135-136

and with regard to Shell T&T [another subsidiary of Shell Petrolum], also not having its registered office in this country, the court has jurisdiction if not pursuant to art. 6(1), then pursuant to art. 24 Brussels I Regulation.'[397]

Similarly, a UK Court has recently established its jurisdiction in the *Dominic Liswaniso Lungowe & Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* case[398], where the claimants, almost 2000 Zambian citizens, claimed personal injury, damage to property, loss of income and loss of amenity and enjoyment of land for the alleged pollution and environmental damage caused by the Nchanga copper mine, owned and controlled by Konkola Copper Mines Plc (KCM). In turn, the Zambian KCM is a subsidiary of the UK based holding company Vedanta Resources Plc. The English judge rejected the defendants' argument that the case should be tried in a Zambian Court and affirmed the application of the Brussels I Regulation (Recast). In particular, although the judge had initially stated that England was not the appropriate forum to hear the case against the subsidiary KCM since a Zambian court would have been more appropriate, he then ruled that considering 'the existence of [other] ongoing proceedings between the claimants and Vedanta, England [was] the appropriate place to try the claims against KCM'.[399] Thus, without restricting the application of article 8 of Brussels I Regulation (Recast), the judge ruled that it was not necessary that all defendants were based on the territory of EU Member States. Interestingly, the judge also ruled on the question of access to justice in Zambia, affirming that some factors would deny justice in Zambia to the claimants. Indeed, not only Zambia is one of the poorest country in Africa, but also as a result of the claimants' poverty, 'the only way in which they could ordinarily bring these claims is by way of a CFA[400], [however] it is common ground that CFAs are not available in Zambia; indeed they are unlawful'. Finally, the judge asserted that there was no 'realistic prospect of legal aid for these claims' and '[…] in the absence of both CFAs and legal aid, the only remaining

[397] *Eric Barizaa Dooh, Vereniging Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* (Case No. *case c - 200.126.843*) and *v Shell petroleum N.V. and The "Shell" transport and Trading Company Limited* (Case No. *case d - 200.126.848*) Court of Appeal at The Hague, 18 December 2015, Paragraphs 3.1-3.6.

[398] *Dominic Liswaniso Lungowe & Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* (Case No. HT-2015-000292) Royal Court of Justice, 27 May 2016.

[399] Ibid, Paragraph 168.

[400] "CFA" is the acronym for Conditional Fee Agreement, which is an agreement between the lawyer and the respective client who decide to share the risks of the lawsuit and the client will pay part of all the lawyer's fee only in the event of success.

theoretical funding possibility that would allow these claimants to bring these claims in Zambia is for the lawyers to take on the claimants as their clients on the payment of a small up-front fee; to pay for all of the disbursements, including expert evidence, out of their own pockets; and then to recover their costs when the claims were successful.'[401] For these reasons, the judge ruled the above-mentioned factors 'amount to cogent evidence that, if these claimants pursued KCM in Zambia, they would not obtain justice'.[402]

In conclusion, on the basis of the current framework within the European Union civil law suits involving a translational character are generally brought against the involved parent company of a multinational or transnational corporation which is domiciled in one of the EU Member States. In case the corporate defendant is not domiciled in the European Union, then the feasibility of these cases relies on the application of domestic jurisdictional rules of the EU Members States where the claim at stake is brought. This also means that in such cases, their feasibility depends on the legal system and varies from one legal system to the other.

In addition, while the Alien Tort Statute considered as the "much-needed accountability mechanism" to remedy human rights violations perpetrated by business companies, especially in host countries[403], in general, the spread (also outside the United States) of civil law suits, and in particular of the so-called foreign direct liability cases, has been positively considered as a means to improve corporate accountability, since especially foreign direct liability cases can enable home countries to judicially 'monitor and where necessary influence their multinational corporations' behaviour abroad, [thus] allowing international and/or domestic norms on human rights, labour, health and safety and the environment to be enforced where this is problematic in the host countries involved.'[404] These cases have been considered as a potential a mechanism through which victims of business-related human rights abuses may obtain access to remedies, and interestingly, the European Parliament invited the European Commission to 'implement a mechanism by which victims, including third-country

[401] Ibid., Paragraphs 175-186.
[402] Ibid., Paragraph 177.
[403] Enneking (2012) 77–87, 277–278.
[404] Ibid., 48.

nationals, can seek redress against European companies in the national courts of the Member States' and monitor and take steps to further facilitate foreign direct liability cases brought before domestic courts in EU Member States.[405]

Moreover, when compared with claims brought under the ATS where the subject-matter of these claims is limited to the involvement of business companies in violations of customary international law, civil law suits alleging for examples harms caused by negligence arising from a breach of a duty of care (rather than, for example, torture or violation of the right to life) have the advantage that a wider range of claims that may be brought, environmental abuses, which under the ATS do not amount to violations of norms under customary international law. On the other hand, they have also cast doubt on their desirability, firstly because local courts, rather than foreign *fora*, may be considered as more appropriate avenues where these cases could be dealt; and secondly the involvement of home States' courts has been interpreted as a neo-imperialistic interference with the sovereignty and policies of developing states by developed states.[406] In addition, it has been highlighted that the "level of moral condemnation" arising from ATS-based claims is higher by virtue of the alleged violation of human rights.

[405] The European Parliament '[called] on the Commission to implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States', as well as '[called] on the Commission to organise and promote awareness campaigns and monitor the implementation of the application of foreign direct liability according to the Brussels Convention, and on the application of Directives 84/450/EEC on misleading advertising and 2005/29/EC on unfair commercial practices to adherence by companies to their voluntary CSR codes of conduct'. European Parliament, Resolution on Corporate Social Responsibility: A new partnership (2006/2133(INI)) (13 March 2007) P6_TA(2007)0062, Paragraphs 32,37.

[406] Enneking (2012) 48-onwards.

4. Judicial remedies: opportunities and barriers in international criminal law

As pointed out in the UN Guiding Principles, the concept of judicial mechanisms and particularly of judicial remedies refers to States' judicial systems and to the possibility for victims of business-related violations to have redress and access civil and criminal courts. As reiterated several times in the course of the present study, States should ensure that they do not erect barriers to prevent legitimate cases from being brought before courts.

However, at the international level, no international criminal tribunal has jurisdiction to try business companies, as legal entities, for crimes under international law. Indeed, so far, under the Statutes of International Criminal Law Tribunals only individual criminal liability has been established. For example, as far as the International Criminal Court (ICC) is concerned, although a proposal to add legal entities to its jurisdiction was discussed during the negotiations of the Rome Statute in 1998, the same proposal was later rejected and, as a result, the ICC currently has jurisdiction only over natural persons.

It is important to note that during the debates preceding the start of the work of the OEIWG, as well as during its first and second sessions, some scholars and advocates in the business and human rights field supported the hypothesis of establishing an international court or tribunal to try corporations for human rights violations.[407] The same proposal, while not new, stems from concerns regarding the existence of so-called "accountability gaps", which in turn are mainly determined by 'weak or dysfunctional national legal and judicial systems'.[408] Accordingly, it has been suggested extending the jurisdiction *ratione personae* of the ICC over legal persons or, alternatively, adding an additional Chamber to the ICC. Other proposals concerned either to the creation of a separate international criminal court for human rights[409] or

[407] Cassel, Ramasastry (2016) 32-33; International Commission of Jurists (ICJ), Report (October 2016); Luis Gallegos, Daniel Uribe, 'The Next Step against Corporate Impunity: A World Court on Business and Human Rights?' (2016) 57 Harvard International Law Journal Online Symposium, 7.
[408] Cassel, Ramasastry (2016) 32-33; International Commission of Jurists, Report (October 2016).
[409] For the proposal concerning the creation of a World Court of Human Rights see: Julia Kozma, Manfred Nowak, Martin Scheinin, 'A World Court of Human Rights. Consolidated Draft Statute and Commentary' (May 2010).

the creation of an International Arbitral Tribunal[410]. It is worth noting that the first proposal has its origins at the start of the United Nations when the idea of establishing a World Court of Human Rights was on the agenda of the UN Human Rights Commission in 1947.[411] The same gained new *momentum* in 2008 when the Swiss Foreign Minister declared it as one of projects constituting a new Swiss Agenda for Human Rights, which was launched in commemoration of the sixtieth anniversary of the Universal Declaration of Human Rights. A consolidated draft statute for a World Court for Human Rights was then proposed in 2010. Under this Statutes, regarding the jurisdiction *ratione personae* the Court will be able to receive complaints from natural persons, non-governmental organizations or group of individuals, victims of a violation of any human right found in an international human rights treaty binding on the State. Interestingly, the Court will have jurisdiction *ratione materiae* against any State Party, the United Nations or any of its specialised agencies, any inter-governmental organization or non-state actor, including business corporations, which will recognize the jurisdiction of the Court.[412]

<http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf> accessed 1 December 2016; Manfred Nowak, Julia Kozma, Swiss Initiative to commemorate the 60th Anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights. Research Project on a World Human Rights Court (June 2009) Online Publication <http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf> accessed 15 August 2017; International Commission of Jurists (ICJ), 'Towards a World Court of Human Rights. Supporting Paper to the 2011 Report of the Panel on Human Dignity' (December 2011) ICJ Online Publication. On position contrary to the proposal see: Philip Alston, 'Against a World Court for Human Rights' (2014) Ethics and International Affairs.

[410] On the proposal related to the creation of an International Arbitral Tribunal, Cassel and Ramasastry underline that one option relates to the establishment of an arbitration tribunal. They further explain that '[a]s opposed to lawsuits for damages before an international court, an arbitral proceeding might have the advantage of speedier and more streamlined procedures, and potential enforceability of its arbitral awards before the courts of nearly all nations under the New York Arbitration Convention. […] The arbitral tribunal might be created, and its use mandated or encouraged, by one or more of a variety of means, including voluntary agreements, incorporation into the Permanent Court of Arbitration, conditions in supply chain contracts or in bank loans, and regulatory requirements. If no international court is agreed to in a treaty, an arbitral tribunal, unlike individual complaint procedures before a treaty body, would have the advantage of being empowered to issue a legally binding award with potentially broad enforceability throughout the world. To the extent national justice systems remain beset by barriers to access and to fair adjudication, an arbitral tribunal might provide a workable alternative.' Cassel, Ramasastry (2016) 32-33; Claes Cronstedt, Robert C. Thompson, 'A Proposal for an International Arbitration Tribunal on Business and Human Rights' (2016) 57 Harvard International Law Journal Online Symposium.

[411] International Commission of Jurists (ICJ), 'Towards a World Court of Human Rights', ibid., 2-4.

[412] Kozma, Nowak, Scheinin, Consolidated Draft Statute and Commentary, ibid., Article 42.

Furthermore, also the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted by the African Union, although not yet entered into force, could have been a possible alternative model.[413] The Protocol would allow international criminal prosecution, not only of individuals – intended as natural persons – but also of corporations. Article 46 deals with corporate criminal responsibility and states that:

> *'1. […T]he Court shall have jurisdiction over legal persons, with the exception of States.*
> *2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.*
> *3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.*
> *4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.*
> *5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.*
> *6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.'*[414]

The Protocol gives the African Court jurisdiction over a wide range of crimes, including mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources. Thus, a broader range than the ICC and crimes which businesses might well commit.[415]

Nonetheless, conceptual as well as political oppositions remain to the possibility of extending international criminal responsibility to corporations. Businesses as legal entities have been viewed as fictitious beings, and as a result it might be unfeasible to determine the criminal intent or knowledge of a business entity. While some conceptual critiques concern the impossibility to put business companies in prison or the lack of impact of imposing fines on big and powerful companies, others focus on the political involvement of some governments which often seek to encourage

[413] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (27 June 2014).
[414] Ibid., Article 46C.
[415] Ibid., Article 28A.

company investment and commercial activity as an important element of domestic or regional economic growth. Therefore, they are often reluctant to include company entities among those subject to their criminal law.[416]

However, business representatives or officials, when intended as natural persons, may be prosecuted for committing crimes under international law. Notwithstanding the fact that the ICC and *ad hoc* Tribunals do not have jurisdiction over legal persons, and per extension over corporations, some legal basis of accomplice liability may offer the possibility to extend jurisdiction over corporations' officials, representatives and superiors[417] intended as natural persons. As a result, the first and second part of the present section concerning criminal law analyse the legal bases under international criminal law, which may allow to prosecute corporate officials when they are implicated with another actor in the commission of gross human rights abuses amounting to crimes under international law. Emphasis is given in particular to three legal bases, namely aiding and abetting, joint criminal enterprise and superior liability. Furthermore, the section expounds the type of involvements in gross violations of human rights which, amounting to crimes under international law, which may determine the liability of business officials, representatives and superior as accomplices. Thus, the focus is not the legal accountability of business officials when they are principal perpetrators of crimes under International Law, rather avenues of legal accountability when business officials are involved as accomplice in such crimes.

The *rationale* behind this choice lies in the fact that a wide range of business companies, such as private military or private security companies, increasingly operate in conflict zones or in countries with weak Governments – in general in areas where there are high risks of being implicated in the perpetration of criminal acts. Likewise, other types of business companies, such as infrastructure, retail and garment, natural resources extractive companies, may equally find themselves involved in unlawful conducts. Generally speaking, the expansion of supply chains worldwide, and especially but not only in conflicts areas, has increased the risks for business

[416] International Commission of Jurists, Report 2 (2008).

[417] The notion of "officials, representatives and superiors" is understood as referring to top business leaders or actors of a business enterprise. Thus, the notion includes managing directors of the company, individuals who facto run a business corporation.

companies to commit or end up being complicit with clients and/or suppliers in the perpetration of crimes under International Law.

Together with the exercise of jurisdiction from the ICC and *ad hoc* Tribunals, prosecutions at national level remain essential. However, while some national jurisdictions allow business entities to be prosecuted as criminal defendants, criminal prosecutions of business entities is in practice rare and few cases result in convictions against business companies. Furthermore, even in those States where criminal prosecutions of corporate entities for gross violations of human rights is a legal possibility, criminal law regimes vary from country to country and the same is applicable to the categories of crimes under which corporate entities may be held liable and the tests used to evaluate liability.

The presence of such differences between national jurisdictions may represent itself a barrier to access judicial criminal remedies, since it may increase legal uncertainty both for victims when they are seeking redress for the abuses suffered, as well as for business enterprises, which may find themselves applying different legal standards and rules depending on the country where they operate.

Although outside the scope of the present analysis, it is also worth mentioning that other obstacles remain to the use of both international and national criminal law, in particular with reference to those crimes which are committed extraterritorially, namely in other countries than the forum States. Especially in case of violations committed by subsidiaries of transnational or multinational corporations, it may happen that victims seek redress in the legal system of the home State of the (transnational or multinational) business company (namely the parent company) allegedly involved in the violations at stake. In this case, rules of attribution of jurisdiction may represent a significant obstacle.

Under international criminal law, while the extraterritorial assertion of legislative jurisdiction is generally not controversial, the assertion of adjudicative jurisdiction and especially of executive jurisdiction is more problematic since they violate the sovereignty of the involved territorial State. In this regard, although the notorious *Lotus* case allowed States to exercise jurisdiction unless there is a specific rule of

international law that prevents them from doing so[418], State practice seems to require 'a positive ground for the exercise of jurisdiction' instead of relying on the absence of a prohibition.[419] Accordingly, in order to assert extraterritorial jurisdiction, States are required to justify its use against some principles of jurisdiction – such as the active nationality principle[420], the passive personality principle[421] or the more controversial universality principle. This latter would allow States to exercise jurisdiction over crimes, 'without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State.'[422] While some scholars and academics reject the existence of the universal jurisdiction, others recognize that States can exert universal jurisdiction over war crime, crimes against humanity, genocide and torture – typically also included among gross human rights violations.[423] As already mentioned, the analysis of the universal jurisdiction is outside the scope of the present study, nevertheless such a jurisdiction should be taken into consideration during the negotiation process of the prospective legally binding treaty. In reference to the prospective treaty and gross violations of human rights, considering the gravity of such abuses, John Ruggie suggested indeed narrowing the scope of the prospective binding treaty and focusing only on business-related gross human rights abuses, including those which may rise to the level of international crimes (genocide, extrajudicial killings, and slavery and forced

[418] *Affaire du Lotus*, Publications de la Cour Permanente de Justice Internazionale, Serie A, N.10 (1927).
[419] Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to international Criminal Law and Procedure* (Cambridge University Press, 2014) 45.
[420] Generally speaking, the active nationality principle of jurisdiction allows States to legislate with reference to their nationals' conducts held abroad. See R. Cryer, H. Friman, D. Robinson, E. Wilmshurst (2014) 48.
[421] The passive personality principle is more controversial and it would allow States to exercise their jurisdiction in case of crimes perpetrated against their respective nationals when these latter were abroad. See Cryer, Friman, Robinson, Wilmshurst (2014) 49-50.
[422] Cryer, Friman, Robinson, Wilmshurst (2014) 50-51.
[423] Ibid. On the universal jurisdiction see among others: Florian Jeßberger, Julia Geneuss, 'Litigating Universal Jurisdiction - Introduction' (2015) 13 Journal of International Criminal Justice; W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 Michigan Journal of International Law; N. Roht-Arriaza, 'Universal Jurisdiction: Steps Forward, Steps Back' (2004) 17 Leiden Journal of International Law*;* Abi-Saab, 'The Proper Role of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice; G.P. Fletcher, 'Against Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice; Máximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' (2015) 13 Journal of International Criminal Justice.

labour).[424] This proposal, as already mentioned in previous chapters has been criticised and ultimately set aside during the first and second sessions of the OEIWG.

Finally, although issues and obstacles may arise in the application of international and national criminal law, the importance of criminal law lies on the fact that some gross human rights violations, in which business companies have resulted being involved, are addressed under criminal law. Although international criminal law has different historical origins from human rights law, both bodies of law share the protection against criminal acts which are crimes under International Law and at the same time are considered also as gross human rights abuses.[425] Indeed, gross human rights abuses may determine a breach of International Law and be considered as crimes under domestic law and, at the same time, they may be criminal offenses under international criminal law, also known as crimes under international law – which in turn imposes obligations on governments to prosecute and punish these crimes.

4.1 Legal persons under international criminal law

Under International Criminal Law, business companies, as legal entities, cannot be held criminally accountable since, so far, no the international criminal tribunals have had jurisdiction to try business companies for the commission of crimes under international law.[426] The International Criminal Court, for example, does not have

[424] Ruggie argued that, 'if treaty negotiations are to have any chance of success, they should focus on "carefully constructed precision tools" aimed at specific governance gaps'. Accordingly, he suggested focusing on 'corporate involvement in gross abuses', by virtue of 'the severity of the abuses involved; because the underlying prohibitions already enjoy widespread consensus among states yet there remains considerable confusion about how they should be implemented in practice when it comes to legal persons (think Alien Tort Statute post-Kiobel); and because the knock-on effects for other aspects of the business and human rights agenda would be considerable'. Ruggie, 'Life in the Global Public Domain' (23 January 2015) 5; Ruggie, 'Regulating Multinationals' (2015) 11-13.

[425] Despite being initially reluctant, the ICTY and the ICTR sometimes refer to human rights international instrument as well as case law. In the *Tadic* Judgement for example, the Trial Chamber ruled that 'interpretations of human rights standards made by other judicial bodies were considered, by the majority, to be of limited value due to the Tribunal's unique procedures'. Instead, in *Delalic*, the ICTY Trial Chamber ruled that decisions on provisions of the ICCPR and the ECHR were 'authoritative and applicable'. On the other hand, the ICC shall apply '[…] where appropriate, applicable treaties and the principles and rules of international law' and '[t]he application and interpretation of law […] must be consistent with internationally recognized human rights […].' (Rome Statute, Article 21(1)(b) and (3) in Cryer, Friman, Robinson, Wilmshurst (2014), 431-432.

[426] See among others: Antonio Cassese, Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Press, 2013); William A. Schabas (edited by) *The Cambridge Companion to International*

jurisdiction over business enterprises. In accordance with Article 25 of the Rome Statute, the ICC has jurisdiction *ratione personae* only over natural persons, who will be held liable in case of commission of a crime within the ICC jurisdiction.[427] Similarly, the personal jurisdiction of the *ad hoc* Tribunals, as the International Tribunal for Rwanda[428] or the International Criminal Tribunal for the Former Yugoslavia[429], does not extend to legal persons.

Nevertheless, it is worth noting that, during the negotiations of the ICC's Statute, discussion took place in relation to a proposal concerning the extension of the Court's jurisdiction to legal persons, especially on the basis of the assumptions that corporate criminal responsibility could have been viewed as a mechanism to assure compensation when the individual perpetrator would not have the resources to pay the reparations ordered by the Court, as well as on the basis that corporate liability would have been a deterrent against crimes potentially perpetrated by business companies.[430] The draft Statute, as it was discussed during the negotiation process at the Rome Conference in 1998, contained a provision granting the Court jurisdiction over legal persons. Its article 23 stated:

> '*23(5) The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.*
> *23(6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes*.'[431]

Criminal Law (Cambridge University Press, 2016); Antonio Cassese, Guido Acquaviva, Mary Fan, Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011); Gerhard Werle, Florian Jeßberger, *Principles of International Criminal Law. Third Edition* (Oxford University Press, 2014); Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 Journal of International Criminal Justice.

[427] Rome Statute, Article 25(1)(2).

[428] Statute of the International Tribunal for Rwanda, Article 5.

[429] UN International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 6.

[430] Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M.T. Kamminga and S. Zia-Zarifi (edited by), *Liability of Multinational Corporations Under International Law* (Kluwer Law International, 2000) 146.

[431] The footnote of Article 23(6) reads as follows: 'There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some

Furthermore, also the drafts of Articles 76 and 99 included provisions applicable to legal persons, specifically they established penalties applicable to legal persons (Article 76), while generally ruling that fines and forfeiture measures applied also to legal persons (article 99).[432] In particular, under Article 76, '[a] legal person shall incur one or more of the following penalties: fines; dissolution; prohibition, for such period as determined by the Court, or the exercise of activities of any kind; closure for such a period as determined by the Court, of the premises used in the commission of the crime; forfeiture of instrumentalities of crime and proceeds, property and assets obtained by criminal conduct; and appropriate forms of reparations.'[433]

The proposal, which was backed up by France and as evident rejected, applied only to private corporations and not to state and public companies, and related to the individual criminal responsibility of a principal member of a corporation at stake, who should have been in a prominent position and thus able to control and commit the crimes, acting on behalf of and with the explicit consent of the corporation in the course of its activities. As mentioned the French proposal was rejected, among other reasons also due to the prevailing will to focus only on individual criminal responsibility, in addition to the lack of 'a recognised standard of corporate responsibility across all states, [which would have made] the principle of complementarily unworkable'.[434] Nevertheless even though the French proposal was rejected in Rome, the proposal and the surrounding debate underlined the relevance of the question about the modalities to confront with corporate war crimes and the 'perceived difficulties of devising rules of attribution', and emphasized the fact that 'the concept of corporate crime is not as alien as is often supposed and is part of the

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delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.' Report of the Preparatory Committee on the Establishment of an International Criminal Court. Draft Statute for the International Criminal Court and Draft Final Act. Article 23(5)(6), 14 April 1998, A/CONF.183/2/Add.1.

[432] Draft Statute for the International Criminal Court and Draft Final Act, Articles 76 and 99; Clapham (2000) 144-145.

[433] Ibid.

[434] International Commission of Jurists, Report 2 (2008) 56.

new international legal order designed to combat corruption and other international crimes […].'[435]

Thus currently, the ICC has jurisdiction only over natural persons. The crimes within the jurisdiction of the Court are 'the most serious crimes of concern to the international community as a whole', namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[436] Furthermore, the ICC can exercise jurisdiction only if the accused is a national of a State Party or a State which has accepted the jurisdiction of the Court, and the crime has occurred on the territory of these States. Alternatively, the UN Security Council may refer a situation to the ICC Prosecutor, irrespective of the nationality of the accused or the location of the crime.[437]

4.2 Accomplice liability as avenue for business enterprises' liability under international criminal law

While it is unquestionable that the ICC does not have jurisdiction over legal persons, and per extension over business companies, its jurisdiction can nevertheless be extended over corporations' officials, intended as natural persons. Thus, corporations' officials may be held responsible for crimes, either as the principal and direct perpetrators, or as accomplices – in case they are involved with other actors in the perpetration of the crimes at stake.

With reference to this latter possibility, some scholars have indeed pointed out that business enterprises, generally, are not the material perpetrators of crimes, rather it is more likely that they assist political and/or military groups by providing goods, services or general support which, in the end, result in the commission of crimes under international law.[438] As a matter of facts, there has been cases of multinational

[435] Clapham (2000) 141.
[436] Rome Statute, Article 5.
[437] Ibid., Articles 12-17.
[438] Robert Dufresne, 'The Opacity of Oil: Oil Corporations, Internal Violence and International Law' (2004) 36 New York University Journal of International Law and Politics, 333. Furthermore, Zerk, in particular, outlines some scenarios through which she shows different ways in which business enterprises can become involved or implicated in gross human rights abuses in practice, including

corporations entering into joint ventures for the exploitation of natural resources with dubious governments or non-state armed groups, as well as providing them with money, weapons, transports - which were afterwards used to torture and kill civilians.[439] In other words, corporations resulted in assisting and facilitating the principal perpetrators in the commission of crimes by supplying them with the goods and services they needed; as a consequence, their contributions enabled the commission of offences or supported and exacerbated violations already ongoing.[440]
As a result, particularly the accomplice liability may offer a valuable avenue to hold corporate officials liable for international crimes, since '[l]abelling a perpetrator as an accomplice and not a principal in the commission of a crime under international law does not necessarily diminish their legal liability. The concept of accomplice liability is especially important in international criminal law because of the often large-scale and complex nature of the crimes and, consequently, the number of people who participate in them.'[441]

Under international criminal law, the person who directly or physically commits a crime is usually defined as the principal perpetrator[442]. In accordance with the Rome Statute, as well as the Statues of the *ad hoc* tribunals for Yugoslavia and Rwanda[443], a

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situations in which they are responsible for the acts of third parties, such as governments, the military, other security providers, paramilitaries, contractors and joint ventures. Zerk (2014) 15-23.

[439] Dufresne (2004) 333.

[440] International Commission of Jurists, Report 2 (2008) 5; Andrew Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups" (2008) 6 Journal of International Criminal Justice, 899; William A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 842 International Review of the Red Cross, 439-440.

[441] International Commission of Jurists, Report 2 (2008) 12.

[442] With reference to the notion of "perpetrator", under Article 3(a) of the Special Tribunal for Lebanon and under Article 7(1) of the ICTY, to which Article 6(1) of the ICTR conforms, the Tribunals have jurisdiction over any person who "committed" an international crime. Furthermore, the ICTY clarifies the subjects who can be exactly considered to have committed a crime, namely the physical perpetration of a crime by the offender, or the culpable omission of an act that was mandated by a rule of criminal law. (*Prosecutor v. Tadic´* (No. IT-94-1-A) Judgement Appeals Chamber, ICTY, 15 July 1999, Paragraph 188). On the other hand, in the *Seromba* Appeals Judgement, the Appeals Chamber retained a wider definition of "commission", ruling that in case of genocide the *actus reus* was not limited to the direct participation in the crime, rather 'other acts can constitute direct participation in the *actus reus* of the crime.' However, the Appeals Chamber did not provide further explanations a part from ruling that 'Mr Seromba's actions were as much an integral part of the genocide as were the killings which [they] enabled'. *The Prosecutor v. Athanase Seromba* (No. ICTR-2001-66-A) Judgement Appeals Chamber ICTR, 12 March 2008, Paragraph 161.

[443] See: ICTY Statute, Article 7(1); ICTR Statute, Article 6(1); Rome Statute, Article 25.

person can be responsible not only for committing[444], but also for planning[445], ordering[446], or instigating[447] a crime or for otherwise aiding and abetting a crime. In particular, under Article 25 of the Rome Statute, '*a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*

> *(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;*
> *(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;*
> *(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;*
> *(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*
>
> > *(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
> > *(ii) Be made in the knowledge of the intention of the group to commit the crime;*
>
> *(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;*

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[444] "Committing" refers to the physical participation of an accused in the actual acts, which constitute the material elements of a crime. Article 25(3)(a) ICC Statute. See also *The Prosecutor v. Georges Rutaganda* Judgement (No. ICTR-96-3) Trial Chamber I, ICTR 6 December 1999, Paragraph 40 stating that 'an accused incurs criminal responsibility for the commission of a crime, under Article 6(1), where he actually "commits" one of the crimes within the jurisdiction *rationae materiae* of the Tribunal'; and *Prosecutor v. Stanislav Galic* (No. IT-98-29-T) Judgement Trial Chamber I, ICTY 5 December 2003, Paragraph 168, ruling that the notion of "Committing" is applicable when 'an accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute. Thus, it 'covers first and foremost the physical perpetration of a crime by the offender himself.'

[445] The notion of "planning" is defined 'to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases, and the crime was actually committed within the framework of that design by others.' *Prosecutor v. Stanislav Galic* (No. IT-98-29-T) Paragraph 168; and *The Prosecutor v. Georges Rutaganda* (No. ICTR-96-3) Judgement Trial Chamber I, ICTR 6 December 1999, Paragraph 37.

[446] The concept of "ordering" means that 'a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to be given in any particular form.' *Prosecutor v. Stanislav Galic* (No. IT-98-29-T) Paragraph 168; and *The Prosecutor v. Georges Rutaganda* (No. ICTR-96-3) Paragraph 39.

[447]"Instigating" means 'prompting another to commit an offence, which is actually committed. It is sufficient to demonstrate that the instigation was a clear contributing factor to the conduct of other person(s). It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement.' *Prosecutor v. Stanislav Galic* (No. IT-98-29-T) Trial Chamber I, ICTY, 5 December 2003, Paragraph 168.

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.'[448]

Thus, the person who directly or physically commits a crime is generally considered as the principal perpetrator. On the other hand, the individuals who plan, order or instigate a crime can be classified either as main perpetrators or accomplices. Additionally, aiding and abetting an individual to commit a crime is generally described as a form of accomplice liability.

The notion of accomplice liability was already recognized under the Charter of the International Military Tribunal (also known as Nuremberg Charter) which included a mention to accomplice liability, stating that '[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [namely crimes against peace, war crimes and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.'[449] A similar provision was inserted also in the International Military Tribunal for the Far East Charter, also known Tokyo Charter.[450] In particular, during the Nuremberg trials, the first of the four counts of the prosecution charged all of the defendants with being leaders, organisers, instigators, or accomplices in the creation or execution of a common plan or conspiracy aimed at committing crimes against peace, war crimes and crimes against humanity. While for war crimes and crimes against peace, the defendants were accused of taking part in the common plan as leaders, organizers, instigators, and accomplices, the Tribunal did not clarify the legal basis necessary to establish each defendant's liability, namely it did

[448] Rome Statute, Article 25.

[449] Charter of International Military Tribunal, Section II. Jurisdiction and General Principles (8 August 1945) Article 6.

[450] 'The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace […]. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any or' the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan'. International Military Tribunal for the Far East Charter (19 January 1946) Section II. Jurisdiction and General Principles, Article 5.

not provide further details related to the precise role exercised by each defendant. The defendants – who had been also involved in industry and banking and had provided financial and industrial support to the Nazi regime – were also accused of making use of 'organizations of German business as instruments of economic mobilization for war' and both the 'Nazi conspirators', as well as 'the industrialists among them, embarked upon a huge re-armament program and set out to produce and develop huge quantities of materials of war and to create a powerful military potential.'[451] Moreover, in its final Judgement, the International Military Tribunal ruled that in the 'reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite willing to cooperate, and to play its part in the rearmament program.'[452]

The subsequent UN General Assembly Nuremberg Principles[453] and the International Law Commission's second version of the draft Code of Crimes against the Peace and Security of Mankind (ILC Draft Code)[454] established similar principles of accomplice liability. In particular, the ILC Draft Code specified that '*an individual shall be responsible for a crime […] if that individual:*

> *(a) Intentionally commits such a crime;*
> *(b) Orders the commission of such a crime which in fact occurs or is attempted;*
> *(c) Fails to prevent or repress the commission of such a crime […];*
> *(d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;*
> *(e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;*
> *(f) Directly and publicly incites another individual to commit such a crime which in fact occurs;*

[451] Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vol. 1, 35. See also: Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8 Journal of International Criminal Justice; Wolfgang Kaleck, Miriam Saage-Maa 'CorporateAccountability for Human RightsViolations Amounting to International Crimes. The Status Quo and its Challenges' (2010)8 Journal of International Criminal Justice.

[452] Ibid., 183.

[453] International Law Commission (ILC), Draft Code of Offences against the Peace and Security of Mankind, in Yearbook of the International Law Commission. Documents of the sixth session including the report of the Commission to the General Assembly. Volume II (1954) UN Doc A/CN.4/SER.A/1954/Add.l, 149 onwards.

[454] ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, in Yearbook of the International Law Commission. Part II. Volume II (1996).

(g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.'[455]

Accordingly, an individual may be held liable for participating in or contributing to a crime of genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes, and specifically any act, other than the commission (subparagraph a) or the attempt (subparagraph g) to commit a crime, may be considered as a form of accomplice liability[456], including ordering, failing to prevent or repress a crime as a superior, direct participation in planning or conspiring to commit a crime or directly and publicly inciting a crime.[457] As explained by the International Law Commission in the Commentary of the Draft Code, subparagraphs "b" and "c" address, respectively, the responsibility of the superior who orders the commission of such a crime and fails to prevent or repress the commission of such a crime by a subordinate. Thus, an individual, who is in a position of authority and uses his/her authority to oblige another individual to commit a crime, is responsible for the commission of the crime at stake. The superior may also be considered as more culpable than the subordinate/executor of the crime due to his/her position of authority with respect to the subordinate. Additionally, the responsibility of the superior incurs even when he/she fails to prevent the subordinate from committing a crime. Furthermore, the ILC Draft Code also set out that an individual is responsible for the crime, if he/she 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.'[458] In this case, the accomplice will be held responsible for his/her conduct, which contributed to the commission of the crime, although the criminal act was perpetrated by another individual.

Finally, subparagraph (e) addressed the responsibility of an individual who participates directly in planning or conspiring to commit a crime, for which he/she will be held liable even when the crime is actually committed by another individual; subparagraph (f) instead sets forth the individual responsibility of the person who directly and

[455] ILC Draft Code, Article 2(3).
[456] Ibid., Article 2(3)(b)-(f).
[457] Ibid.
[458] ILC Draft Code, Article 2(3)(d).

publicly incites another individual to commit a crime, thus contributing substantially in the commission of the crime at stake.

In addition to being embedded in the Rome Statute and in the instruments mentioned above, the concept of accomplice liability is included in the Statutes of *ad hoc* Tribunals, as the ICTY, ICTR, the SCSL, the Extraordinary Chambers for Cambodia, and the Special Tribunal for Lebanon.[459]

Furthermore, also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[460], the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[461] and the International Convention for the Protection of All Persons from Enforced Disappearance[462] require States parties to ensure that all acts - including commission, complicity and participation - resulting in the commission of a crime covered by the Convention at stake are considered as offences under criminal law and are addressed through appropriate measures.

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[459] ICTY Statute, Article 7(1); ICTR Statute, Article 6(1); SCSL Statute, Article 6(1); Law on the Establishment of the Extraordinary Chambers with inclusion of amendments as promulgated on 27 October 2004, Article 29; Statute of the Special Tribunal for Lebanon, Article 3.

[460] Article 4(1): 'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted 10 December 1984, entered into force 26 June 1987.

[461] Article 17(4): 'The Parties to the present Convention undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution. In particular, they undertake: (4) To take appropriate measures in order that the appropriate authorities be informed of the arrival of persons who appear, prima facie, to be the principals and accomplices in or victims of such traffic.' Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted 2 December 1949, entered into force 25 July 1951.

[462] Article 6(1): 'Each State Party shall take the necessary measures to hold criminally responsible at least: (*a*) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;(*b*) A superior who: (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution; (*c*) Subparagraph (*b*) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.' Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted 20 December 2006, entered into force 23 December 2010.

In conclusion, while it is clear that the concept of accomplice liability is rooted in international criminal law, different bases of liability may be applicable to corporations' officials. These bases, namely aiding and abetting, joint enterprise liability and superior responsibility, are discussed in further details in the sections below.

4.2.1 Accomplice liability for aiding and abetting

Accomplice liability for aiding and abetting takes place when an individual (the accomplice) knowingly assists the principal perpetrator, in the commission of a crime. As such it is often described as a form of assistance provided to the principal perpetrator, with knowledge. Generally, aiding and abetting is described as an accessorial or derivative form of criminal responsibility, thus the accomplice 'derives his liability from the primary party with whom he has associated himself'.[463] Accordingly, the accomplice must have knowledge that his/her action(s) would contribute to the commission of the crime, notwithstanding the fact that the assistance caused the crime. As a matter of facts, the relevant threshold is that the assistance had a substantial effect on the crime.

As already mentioned before, the ILC Draft Code encompasses this basis of liability, establishing that an individual is responsible for the crime, if he/she 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.'[464] The Commentary of the ILC Draft Code further expounds that "knowledge" is the essential mental element requisite, since the accomplice must knowingly provide assistance to the perpetrator of the crime. Furthermore, the assistance provided by the accomplice should "directly" and "substantially" contributes to the commission of the crime. Thus, the form of

[463] Vest explains the meaning of aiding and abetting, underlining that '[w]hile aiding means giving physical (or material) assistance to a crime such as providing the means for its commission, abetting is facilitating the crime by means of supporting the perpetrator psychologically or morally, i.e. encouraging him. The distinction between these two forms of assistance, until now, has not played any major role in the case law of the ad hoc tribunals. Commonly, aiding and abetting is classified as an accessorial or derivative form of criminal responsibility.' Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 Journal of International Criminal Justice, 856.
[464] ILC Draft Code, Article 2(3)(d).

participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.

The liability for aiding and abetting is recognized also under Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute, establishing that 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime […] shall be individually responsible for the crime.' In other words, the contribution of the aider and abettor can be provided at any stage, planning, preparation, or execution, of the criminal process.

In particular, the *Tadic´* Appeal Judgement[465] provides for a definition of aiding and abetting, namely '[t]he aider and abettor is always an accessory to a crime perpetrated by another person, the principal.' Furthermore, the same Judgement stipulates the requirements and threshold to establish the liability for aiding and abetting. Firstly, '[i]n the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan, […] indeed, the principal may not even know about the accomplice's contribution.' Secondly, '[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime […] and this support has a substantial effect upon the perpetration of the crime'. Thus, with reference to the *actus reus* of aiding and abetting requires both a direct and a substantial contribution. As explained in the *Tadic´* Appeal Judgement, the acts perpetrated by the aider and abettor, which assist the perpetration of the crime, must have a "substantial" effect on the commission of the crime at stake. The same threshold was already affirmed in the ILC Code, requiring accomplice to provide assistance which contributes "directly and substantially".[466] However, *'*this should not be taken as setting a high standard: the Yugoslav Tribunal has seen it more as meaning any assistance which is more than *de minimis*.'[467]

[465] *Prosecutor v. Tadic´* (No. IT-94-1-A) Judgement Appeals Chamber, ICTY, 15 July 1999.
[466] ILC Draft Code and Commentary, Article 2(3)(d).
[467] Cryer, Friman, Robinson, Wilmshurst (2014) 375.

Moreover, not only positive acts but also omissions or failure to act can amount to aiding and abetting, if there was legal obligation on the defendant to prevent the crime and the ability to intervene[468], and if the omission at stake had a decisive effect on the crime. In the *Tihomir Blaskić* case[469], the Appeals Chamber Judgement clarified that the *actus reus* of aiding and abetting can be carried out through an omission*,* as long as *'*this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*'. As a result, an omission may attract liability for aiding and abetting if, for example, an individual does nothing when he/she has instead the power to prevent, stop or mitigate the crime. Accordingly, and a failure to act can attract liability when the individual, who is a person with superior authority, is physically present during the commission of the crime.[470] Nonetheless, it is important to point out that the only presence at the scene of the crime is not conclusive of aiding and abetting, unless it is shown to have a significant legitimising or encouraging effect on the principal perpetrator.[471]

Additionally, as pointed out in the *Tihomir Blaškić* Judgement, the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[472]

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[468] 'To the same degree as it is the case with instigating, aiding and abetting can be fulfilled by express or implied conduct as well as constituted by acts or omissions, provided that in the latter case, under the given circumstances, the accused was obliged to prevent the crime from being brought about. This can in particular become relevant in situations where the aider or abettor is aware of a crime to be committed while being present. As, on the one hand, participating in a crime does not require presence at the time and place when and where it is performed, on the other hand, mere presence at the scene of the crime without preventing its occurrence does not per se constitute aiding and abetting.' *Prosecutor v. Naser Orić* (No. IT-03-68-T) Judgement Trial Chamber II, ICTY, 30 June 2006, Paragraph 283. In *Multinović et al.* the Trial Chamber pointed out that '[a]n accused may aid and abet not only by means of positive action, but also through omission'. In addition, aside from the approving spectator form of omission, responsibility for aiding and abetting could also arise where the accused was under a duty to prevent the commission of a crime or underlying offence and failed to do so, provided that his inaction had a substantial effect upon the commission of the crime or underlying offence and that the accused possessed the requisite state of mind'. *Prosecutor v. Multinović et al.* (No. IT-05-87-T) Judgement, Trial Chamber, ICTY, 29 February 2009, Paragraph 90.

[469] *Prosecutor v. Tihomir Blaškić* (No. IT-95-14-A) Judgement Appeals Chamber, ICTY, 29 July 2004.

[470] Ibid., Paragraph 47.

[471] *Prosecutor v. Milorad Krnojelac* (No. IT-97-25-T) Judgement Trial Chamber II, ICTY, 15 March 2002, Paragraph 89.

[472] *Prosecutor v. Tihomir Blaškić* (No. IT-95-14-A), Paragraph 48. This was also confirmed in *Blagojević and Jokić*, when the Court ruled that 'The actus reus need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated'. *Prosecutor v.*

In reference instead to the *mens rea*, '[…] the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal'.[473]

For example, in *Vasiljević* the Appeals Chamber, while explaining that the *actus reus* of aiding and abetting may incur when '[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime', ruled also that '[i]n the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal.'[474] Moreover, the Appeals Chamber in the *Tadic´* Judgement clarified that '[t]he mental element of a crime [against humanity] must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime [against humanity].'[475] The ICTY ruled also that it is not necessary that the aider and abettor know the precise crime that was intended and which in the event was committed. If the aider and abettor is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, then he/she is responsible for facilitating the commission of that crime, and is guilty as an aider and abettor.[476] Hence, the aider or abettor must know that his contribution facilitates the commission of the crime in question. That mental element does not require full or even certain knowledge but may be satisfied by 'awareness

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Blagojević and Jokić (No. IT-02-60-A) Judgement Appeals Chamber, ICTY, 9 May 2007, Paragraph 121. The same was reiterated by the ICTR Appeals Chamber, stating that 'an aider and abettor may participate before, during or after the crime has been perpetrated and at a certain distance from the scene of the crime.' *The Prosecutor v. André Ntagerura* (No. ICTR-99-46-A) Judgement Appeals Chamber, ICTR, 7 July 2006, Paragraph 372.

[473] Ibid., Paragraph 299.

[474] *The Prosecutor v. Vasiljevic´* (No. IT-98-32-A) Judgement Appeals Chamber, ICTY, 25 February 2004, Paragraph 102.

[475] *Prosecutor v. Tadic´* (No. IT-94-1-A), Paragraph 266. See also *Prosecutor v. Naser Orić* (No. IT-03-68-T), Paragraph 288.

[476] 'It is not necessary that the aider and abettor know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.' *Prosecutor v. Tihomir Blaškić* (No. IT-95-14-A), Paragraph 50.

that the principal will be using, is using, or has used the assistance for the purpose of engaging in criminal conduct'.[477]

The jurisprudence of the ICTY and the ICTR provides some examples of acts constituting aiding and abetting. Among them, for example, standing armed near the victims and prevent them from escaping may be considered aiding since the act has a substantial effect on the perpetration of the crime.[478] Other examples are the provision of 'weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population', and indicating the attackers the people to be killed.[479] Finally, in the Appeals Chamber Judgement in the *Radislav Krstić* case[480], the Chamber ruled that allowing resources for which a person is responsible to be used for committing a crime – in the case at stake genocide – was sufficient to establish that Mr Radislav Krstić was guilty for aiding and abetting genocide. Pursuant to Appeal Chamber's ruling:

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[477] Antonio Cassese, International Criminal Law (Oxford University Press, 2008) 215; Vest (2010) 858-859.

[478] 'The Appeals Chamber has already found that the Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber believes that the only reasonable inference available on the totality of evidence is that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant's actions had a 'substantial effect upon the perpetration of the crime'. *The Prosecutor v. Vasiljevic´* (No. IT-98-32-A) Judgement Appeals Chamber, ICTY, 25 February 2004, Paragraph 134.

[479] 'The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused only killed a limited number of persons is irrelevant to determining the accused's responsibility as an aider and abettor of the crime of extermination.' 'With respect to Elizaphan Ntakirutimana, the remaining findings are: […] he transported armed attackers who were chasing Tutsi survivors […]; […] he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers, who then chased these refugees singing, exterminate them; look for them everywhere; kill them; and get it over with, in all the forests […].' *The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana* (Nos. Nos. ICTR-96-10-A and ICTR-96-17-A) Judgement appeals chamber, ICTR, 13 December 2004, Paragraphs 530-532.

[480] *The Prosecutor v. Radislav Krstić* (No. IT-98-33-A) Judgement Appeals Chamber, ICTY, 19 April 2004.

> *'it was reasonable for the Trial Chamber to conclude that […] Radislav Krstić had knowledge of the genocidal intent of some of the Members of the VRS* [the Bosnian Serb Army] *Main Staff. Radislav Krstić was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan. Krstić knew that allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Krstić is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator*.'[481]

It is worth noting that all the above-mentioned examples refer to circumstances in which business companies' representatives may find themselves to be involved.

Turning instead to aiding and abetting under the Rome Statute, under article 25(3) this conduct arises when the accomplice *[f]or the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission*. Thus, the ICC Statute does not mention the requirement of the substantial contribution to the crime.[482]
Moreover, in reference to the mental element, the Rome Statute seems to demand a higher threshold than the "knowledge", since it requires that the accomplice conduct is committed "for the purpose of facilitating the commission" of the crime. Thus, aiding and abetting entails the purpose of facilitating the commission of a crime. This means that the aider and abettor has to share the intent of the principal perpetrator.
This might mean that it will be more difficult to prosecute individuals who, for example, 'sell arms or other war matériel [which might be then] used for [committing] international crimes', because even in the event that the arm sellers knew that the weapons would be used for the commission of international crimes, liability would not arise if the only objective of the dealer was making profit.[483]

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[481] Ibid., Paragraph 137.
[482] Vest (2010) 859; William Schabas, *An Introduction to the International Criminal Court. Third Edition* (Cambridge University Press, 2007) 213.
[483] Cryer, Friman, Robinson, Wilmshurst (2014) 377.
As far as aiding and abetting under Article 25(3)(c) of the Rome Statute is concerned, on one side it was stressed that 'while the objective requirements of aiding and abetting are lower than its counterpart in the jurisprudence of the ad hoc tribunals, this may be balanced by a higher subjective standard.' Vest,

4.2.2 Joint criminal enterprise or common purpose liability

The joint criminal enterprise liability, known also as "common purpose liability", is recognized under article 25(3)(d) of the Rome Statute, which sets forth that the criminal responsibility of the individual may incur if the individual '[…] contributes to the commission or attempted commission of […] a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime'.[484] In other words, an individual can be held criminally liable if he/she is a part of a group sharing a common purpose and he/she contributes to the commission of the crime, under certain conditions.

In reference to the *actus reus*, this form of liability contribution requires the commission or attempted commission of a crime by a group acting with a common purpose.

The ILC Draft Code does not include a specific reference to common purpose liability, however Article 2 (3)(e) covers the participation in planning and conspiring to a crime, establishing that the individual who directly participates in such acts will be responsible for the crime as long as the crime occurs. Similarly, the ICTY and SCLS Statute do not encompass specific provisions regarding joint criminal enterprise liability, nevertheless their jurisprudence helps clarifying the notion.

In the ICTY *Krajišnik* case[485], for example, Mr Krajišnik was accused of having committed, planned, instigated, ordered, or aided and abetted war crimes, genocide, complicity in genocide, crimes against humanity, namely persecution, extermination, murder, deportation, and forced transfer, as well as with failing to take necessary and reasonable measures to prevent such acts or to punish the perpetrators. While the

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however, while agreeing with this explanation, points out that this is still to be in practice. Vest (2010) 859-860; Antonio Cassese, Paola Gaeta, John Jones (edited by) *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (Oxford University Press, 2002) 801.

[484] Rome Statute, Article 25(d).

[485] *Prosecutor v. Momčilo Krajišnik* (No. IT-00-39-T) Judgement Trial Chamber I, ICTY, 27 September 2006.

ICTY Trial Chamber did not result in having enough evidence to establish the genocide intent,[486] it still ruled that Mr Krajišnik was part of a joint criminal enterprise, aimed at the ethnic re-composition of territories, through the forcible expulsion of Muslim and Croat populations[487] - initially pursued through the crimes of deportation and forced transfer and subsequently by means of other crimes as persecution, murder, and extermination.[488]

Furthermore, in the *Tadic* case the ICTY Appeals Chamber defined the notion of this basis of accomplice liability. Indeed, while providing for the interpretation of article 7(1) of the ICTY Statute, the Appeals Chamber ruled that the same article did not exclude the modes of participating in the commission of crimes typical of the joint criminal enterprise, which are situations where 'a person, who in execution of a common criminal purpose or a joint criminal enterprise, contributes to the commission of crimes by a group of persons [and thus] may be held criminally liable subject to certain conditions.'[489]

In addition, gathering evidence from customary law as observed in case law, the Appeals Chamber pinpointed three categories of joint criminal enterprise. Firstly, cases of 'co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)'[490] and indeed the *means rea* is the intent to perpetrate a certain crime.[491] Secondly, the so-called "concentration camp" cases, where the requisite *mens rea* includes 'knowledge of the nature of the system of ill-treatment and intent to further the common design of ill treatment.'[492] Thirdly, cases where crimes are committed by members of the Group who intended 'to take part in a joint criminal enterprise and further – individually and jointly – the criminal purposes of that

[486] Ibid., Paragraphs 867-869.
[487] Ibid, Paragraph 1076.
[488] Ibid., 1076, 1097.
[489] Ibid., Paragraph 878 and *Prosecutor v. Tadic´* (No. IT-94-1-A), Paragraphs 189-190.
[490] *Prosecutor v. Tadic´* (No. IT-94-1-A), Paragraph 220.
[491] Ibid., Paragraph 228.
[492] Ibid., Paragraphs 220, 228.

enterprise'. Additionally, the act is required to be a natural foreseeable consequence of the implementation of the joint criminal enterprise.[493]

All three categories have a common *actus reus*. Firstly, the presence of a plurality of persons. Secondly, there must exist a common plan, design or purpose (not necessarily previously arranged or formulated), which amounts to or involves the commission of a crime in accordance with the Statute. As a matter of facts, as pointed out in the *Krajišnik* Judgement, liability for joint criminal enterprise may amount even when preparatory plans or explicit agreements among the members of the enterprise are absent. It is not necessary for the members of the group to share a common objective, rather it suffices that in the implementation of common objective some members actually commit the crimes. Moreover, 'the existence of a joint criminal enterprise does not presume preparatory planning or explicit agreement among its participants' and indeed the lack of awareness, in one or more participants, about the existence of the joint criminal enterprise or its objective does not run counter to establishment of liability for the committed crimes.[494]

Finally, the third feature is the participation of the accused in the common design which entails the perpetration of one of the crimes under the Statute. This participation may take the form of commission of the crime as a principal perpetrator, as well as assistance in, or contribution to, the execution of the common plan or purpose.[495]

The ICTY jurisprudence also clarifies that the simple membership in a group does not suffice to ground liability on the basis of joint criminal enterprise[496], rather a form of

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[493] The Appeals Chamber highlighted also that 'everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.' Ibid., Paragraph 220.

[494] *Prosecutor v. Momčilo Krajišnik* (No. IT-00-39-T), Paragraph 883.

[495] Ibid.; *Prosecutor v. Tadic´* (No. IT-94-1-A), Paragraph 227.

[496] 'Individual criminal responsibility for participation in a [joint criminal enterprise] does not arise as a result of mere membership in a criminal enterprise. In order to incur criminal liability, the accused is required to take action in contribution of the implementation of the common plan. Participants in a [joint criminal enterprise] may contribute to the common plan in a variety of roles. Indeed, the term participation is defined broadly and may take the form of assistance in, or contribution to, the execution of the common plan. Participation includes both direct participation and indirect participation. An accused's involvement in the criminal act must form a link in the chain of causation'. *Prosecutor v. Radoslav Brdanin* (No. IT-99-36-T) Judgement Trial Chamber II, ICTY, 1 September 2004, Paragraph 263.

contribution in the execution of the plan is required.[497] Nevertheless, the contribution in a joint criminal enterprise can be direct or indirect[498] and it does not implicate any substantial result, as was required for aiding and abetting.[499] The only threshold is that the contribution in the joint criminal enterprise has to be "significant".[500]

The *Krajišnik* Judgement is again enlightening on the differences between joint criminal enterprise and the liability for aiding and abetting. As far as the *actus reus* is concerned, 'the aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime (murder, etc.), and this support has a substantial effect upon the perpetration of that crime. By contrast, in the case of action pursuant to a common criminal objective, it is sufficient for the participant to perform acts which in some way are directed to the furtherance of the common objective through the commission of crimes.'[501] On the other hand, liability for aiding and abetting requires that the *mens rea* is knowledge that the performed acts assist the principal perpetrator in the commission of a crime.

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[497] Ibid.

[498] Ibid.

[499] 'The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose'. *Prosecutor v. Miroslav Kvočka et al.* (No. IT-98-30/1-A) Judgement Appeals Chamber, ICTY, 28 February 2005, Paragraph 97.

[500] '[…] the Appeals Chamber observe[d] that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.' It is also interesting to note that the Appeals Chamber expounded also on the other requirements for conviction under the joint criminal enterprise liability. Accordingly: '[a] trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of [joint criminal enterprise], the foreseeable crime) did in fact take place. Where the principal perpetrator is not shown to belong to the [joint criminal enterprise], the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the [joint criminal enterprise] (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan.' *Prosecutor v. Radoslav Brdanin* (No. IT-99-36-A) Judgement Appeals Chamber, ICTY, 2 April 2007, Paragraph 430.

[501] *Prosecutor v. Momčilo Krajišnik* (No. IT-00-39-T), Paragraph 885.

The aider and abettor does not need to know of the existence of any common plan and he/she is responsible only for the crimes known – as long as the assistance he/she provides is substantial. On the contrary, in the joint criminal enterprise the requirement is the intent to reach a criminal objective and foresight by the accomplice is sufficient to establish liability for the committed crimes.[502]

Finally, under the Statute of the ICC, the subjects who may participate in a common criminal plan and, as a result, be held criminal responsible are distinct. Under Article 25(3)(a), a person shall be liable as a principal perpetrator if the individual commits a crime 'jointly with another or through another'. Instead, under Article 25(3)(d) a person shall be liable if he/she intentionally contributes to or attempts to contribute to the commission of a crime by a group of persons acting with a common purpose, with the aim of furthering the crime or the criminal purpose of the group or with knowledge of the intent of the group to commit the crime.

4.2.3 Superior responsibility

The third type of basis for liability analysed is the superior responsibility, which is generally understood as the criminal responsibility of a superior or commander for the offences committed by his/her subordinate(s). It is important to point out that not only military superior, but also civilian superiors in positions of authority can incur in criminal responsibility. Moreover, if liability is established, superiors are not charged with crimes committed by their subordinates, rather with the failure to prevent the respective subordinates from committing crimes, as well as to punish subordinates for the same crimes at stake.

The principle of superior liability is well-established in customary law[503], as well as it is set forth in the ILC Draft Code and in the Statutes of the *ad hoc* Tribunals, as the

[502] Despite the similarities between the two bases of liability, the ICTY pointed out that where people have participated in a joint criminal enterprise, to convict them 'only as an aider and abettor might understate the degree of their criminal responsibility', and thus 'aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator'. *Prosecutor v. Tadic´* (No. IT-94-1-A), Paragraphs 191-192.

[503] *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (Case No. IT-96-21-A) ICTY Appeals Chamber 20 February 2001, Paragraph 195.

ICTY,[504] the ICTR,[505] the SCSL[506] or the Extraordinary Chambers of Cambodia[507]. Article 28 of the Rome Statute also encompasses superior liability.

As far as the ILC Draft Statute is concerned, Article 2(3)(c) establishes the responsibility of a superior who 'fails to prevent or repress the commission of a crime' carried out by his/her subordinate(s).[508] Article 6 further clarifies the circumstances under which superior responsibility may incur. Accordingly, although a crime may be committed by a subordinate, the superior will be held criminal responsible if he/she 'knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if [the superior] did not take all necessary measures within [his/her] power [in order] to prevent or repress the crime.'[509] Thus, a superior may contribute directly or indirectly to the commission of a crime. As generally addressed under Article 2, the superior is directly responsible for the crime, when he/she directly orders the subordinate to perform the unlawful act or when he/she refrains refrain from performing an act which the subordinate has a duty to perform. The superior is instead indirectly responsible when, as addressed under Article 6, he fails to prevent of repress the criminal acts.[510] The Commentary to Article 6 makes clear that 'the duty of a superior to repress the unlawful conduct' encompasses any required 'disciplinary or penal action against an alleged offender.'[511]

The ICTY Statute and its jurisprudence further expound the notion of superior liability. Pursuant to Article 7(3) of the ICTY Statute, a superior is responsible for the crimes committed by a subordinate, if the superior knew or had reason to know that the

[504] 'The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.' ICTY Statute, Article 7(3).

[505] Article 6(3) of ICTR Statute includes the same provision of article 7(3) of the ICTY and article 6(3) of the SCSL Statute.

[506] Article 6(3) of SCSL Statute embeds the same provision of article 7(3) of the ICTY and article 6(3) of the ICTR Statute.

[507] Article 29, Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia (27 October 2004) NS/RKM/1004/006.

[508] 'An individual shall be responsible for a crime […] if that individual: (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6'. ILC Draft Code, Article 2(c).

[509] ILC Draft Code, Article 6.

[510] Ibid.

[511] Ibid., Article 26.

subordinate was about to commit such acts or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators of the same acts.

Accordingly, three elements are required in order to determine superior liability. Firstly, a superior-subordinate relationship between the superior and the subordinate who actually perpetrated the crime. Secondly the requisite mental element is that the superior "knew or had reason to know" that the crime was about to be, was being, or had been, committed. Thirdly, the superior failed to take the necessary and reasonable measures to prevent the crime, or to stop the crime, or punish the perpetrator.

The *Delalić* et al. Appeals Judgement, also known *Čelebići* case from the name of the city and the prison camp where the crimes took place, further clarifies the three requirements. In particular, the case involved Mr Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo who were charged with grave breaches of the Geneva Conventions and violations of the laws or customs of war for crimes including murder, torture, inhuman treatment and unlawful confinement.[512]

As far as the requirement of the superior-subordinate relationship is concerned, in *Čelebići* the Appeals Chamber ruled that, under article 7(3) of the ICTY Statute, a superior can be defined as the person 'who possesses the power or authority in either a *de jure* or *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.'[513] Accordingly, not only a *de jure* conferral of the superior's authority, but also a *de facto* authority may suffice. Indeed, 'in many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto.'[514] In this case, the threshold to be followed is the "effective exercise of power or control" that the superior exercises over the individuals committing the offence, so to prevent or punish the commission of the crime.[515] The Appeals Chamber

[512] On the Čelebići Case see also: Cristina Fernandez-Pacheco Estrada, 'The International Criminal Court and the Čelebići Test. Cumulative Convictions Based on the Same Set of Facts from a Comparative Perspective' (2017) Journal of International Criminal Justice.

[513] *The Prosecutor v. Zejnil Delalić et al.* (Case No. IT-96-21-A), Paragraph 192.

[514] Ibid., Paragraph 193.

[515] 'As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible

expressively ruled that 'the concept of effective control over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.'[516] The Appeals Chamber further clarifies that, although it is true that a court may presume that the possession of *de jure* power is an evidence of effective control, the possession of *de jure* power is not sufficient in the determination of the superior liability, if the threshold of the effective control is not established. The same requirement must be tested for the establishment of *de facto* superior responsibility and, as a result 'the absence of formal appointment is not fatal to a finding of criminal responsibility.'[517]

In the *Čelebići* Case, Mr Mucić was convicted under Article 7 for his superior authority as commander of the Čelebići camp for the crimes committed there. Mr Mucić claimed that the superior responsibility included only a *de jure* power and control. However, the Appeals Chamber rejected his argument, accepting that a position of *de facto* command could have been sufficient to establish the necessary superior-subordinate relationship, as long as the relevant degree of control over subordinates was proved. Indeed, the required threshold was effective control held by the superior over his subordinates, who were actually the perpetrators of the crimes. This however meant that the superior had the material ability to prevent or punish the commission of the crimes at stake.

With reference to the *mens rea* requisite, a superior either must have 'had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes', or 'he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain

for the commission of the crimes if he failed to exercise such abilities of control.' Ibid., Paragraphs 196-198.

[516] Ibid., Paragraph 256.

[517] Ibid., Paragraph 197.

whether such crimes were committed or were about to be committed by his subordinates.'[518]

This threshold was already confirmed by the International Law Commission in the Draft Code, elaborating that a superior must have known or had reason to know in the circumstances at the time that a subordinate was committing or was going to commit a crime. Accordingly, a superior may be in a situation where he/she has actual knowledge that his subordinate is committing or is about to commit a crime. On the other hand, the superior may only have some information, which however will allow him/her to determine that the subordinate(s) are committing or are about to commit a crime. In this latter case, the superior does not possess any 'actual knowledge of the unlawful conduct being planned or perpetrated by his subordinates, but he has sufficient relevant information of a general nature that would enable him to conclude that this is the case.'[519]

The same reasoning was endorsed by the jurisprudence of the ICTY in the *Čelebići* Case, where the Prosecution appealed against the Trial Chamber's interpretation of the requirement that a superior "knew or had reason to know" that a subordinate was about to commit crimes or had done so. However, the Appeals Chamber shared the conclusion reached by the Trial Chamber that the notion of "reason to know", as embedded into ICTY Statute Article 7(3), means that, if the superior had information of general nature which would have put him on notice of the offences at stake, then the superior be charged with knowledge of subordinates' offences.

Finally, with reference to the third requirement, it is necessary to establish that the superior failed to take the necessary and reasonable measures to prevent or stop the

[518] *The Prosecutor v. Zejnil Delalić et al.* (Case No. IT-96-21-A), Paragraphs 226, 239. Moreover, the Trial Chamber in the *Prosecutor v. Tihomir Blaškić* Case had a broader approach to the "had reason to know" threshold than the standard followed in *Čelebići* Case, and came to the conclusion that 'if a commander ha[d] exercised due diligence in the fulfilment of his duties yet lack[ed] knowledge that crimes [were] about to be or [had] been committed, such lack of knowledge [could not] be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance [could not] be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.' This standard was however abandoned and the *Čelebići* standard has become the accepted one in the ad hoc Tribunals for both military and civilian superiors. *Prosecutor v. Tihomir Blaškić* (No. IT-95-14-T) Judgement Trial Chamber, ICTY, 3 March 2000, Paragraph 332; Cryer, Friman, Robinson, Wilmshurst (2014).

[519] ILC Draft Code, 26.

crime, or to punish the perpetrator of the same. The type of measures to be taken depends on the power and control exercised by the superior and they may be evaluated in accordance with the context, as confirmed in the ILC Draft Statute ruling that the criminal responsibility of the superior only amounts if he had the "legal competence" and the "material possibility" to take measures to prevent or repress the criminal acts.[520]

Turning to the superior liability as set forth in the Rome Statute, Article 28 of the ICC is more detailed in comparison to Statues of *ad hoc* Tribunals.[521] Under the Statute of the ICC:

> '*(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*
>
> *(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
>
> *(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*
>
> *(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:*
>
> *(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;*
>
> *(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and*
>
> *(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to*

[520] Ibid.

[521] It is interesting to note that article 7(3) of the ICTY, article 6(3) of ICTR and article 6(3) of SCSL Statutes do not include any difference and that despite the SCSL Statute was adopted after the ICC Statute, the former seems to have rejected the concepts and differences as included in the Rome Statute.

submit the matter to the competent authorities for investigation and prosecution.'[522]

The ICC Statute encompasses civilian superior responsibility by referring to a military commander or a "person acting as a military commander" as a superior. This is consistent with the jurisprudence of the ad hoc tribunals, as well as the ILC Draft Statute expressively including within the notion of "superiors" not only military commanders but also civilians exercising similar role and control over the subordinates as the military commanders.[523]

With reference to the mental element, the Rome Statute's article expressively entails two requirements for military commanders and for civilian superiors. For military commanders, the *mens rea* requisite is not the "knew or had reason to know" criterion, as included in the Statues of ad hoc Tribunals, rather a "knew or should have known" standard. On the other hand, the threshold for civilian superiors is that they 'knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes'. Thus, the ICC Statute demands a higher mental requisite than the *mens rea* standard generally required for military superiors and civilian superiors under customary law.[524]

Turning instead to the third requirement of superior liability, under Article 28 of the ICC, the measures to be taken by the superior have the aim of both preventing and punishing the commission of the crime at stake, where possible, and they may even require the submission of the matter to competent authorities for investigation and prosecution.

[522] Rome Statute, Article 28.

[523] ILC Draft Code, Article 26.

[524] The *mens rea* requisite for civilian superiors as set forth in the Rome Statute was criticized by the ICTR Appeals Court in the *Bagilishema* Judgement: '[t]he Trial Chamber must be satisfied that, pursuant to Article 6(3) of the Statute, the accused either "knew" or "had reason to know", whether such a state of knowledge is proved directly or circumstantially. The Appeals Chamber is of the opinion that the test for criminal negligence as advanced by the Trial Chamber cannot be the same as the "had reason to know" test in terms of Article 6(3) of the Statute. In the Appeals Chamber's view, the Trial Chamber should not have considered this third form of responsibility, and, in this sense, it committed an error of law.' *The Prosecutor v. Ignace Bagilishema* (No. ICTR-95-1A-A) Appeals Chamber ICTR, 3 July 2002, Paragraphs 26-37.

In the recent *Bemba* case[525], the ICC Trail Chamber pinpointed some essential elements regarding the measures that the superior is required to take in order to avoid incurring liability. In particular, Mr Bemba was found guilty under Article 28(a) of the ICC and held liable on the basis of superior liability as a military commander.as a matter of facts, the Trial Chamber ruled that Mr Bemba knew that the *Mouvement de libération du Congo* (MLC) soldiers, under his effective authority and control, were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging. Mr Bemba was also accused of having failed to properly exercise control over such crimes.[526] The Chamber affirmed that the defendant received consistent information of crimes committed by MLC soldiers in the Central African Republic, over which he had ultimate, effective authority and control. Indeed, notwithstanding the fact that he was not physically present, he required and regularly received reports and he took fundamental decision regarding the MLC troops.[527] Furthermore, the Trial Chamber underlined three different duties over commanders, as per Article 28(a)(ii). Accordingly, commanders have to prevent the commission of crimes; repress the commission of crimes; and submit the matter to the competent authorities for investigation and prosecution. Failure to comply with these duties may lead to criminal liability.[528]

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[525] *The Prosecutor v. Jean-Pierre Bemba Gombo* (No. ICC-01/05-01/08) Trial Chamber III, ICC 21 March 2016; *The Prosecutor v. Jean-Pierre Bemba Gombo* (No. ICC-01/05-01/08-3399) Trial Chamber III, ICC 21 June 2016.

[526] *The Prosecutor v. Jean-Pierre Bemba Gombo* (No. ICC-01/05-01/08-3399), Paragraph 61.

[527] Ibid., Paragraphs 61-62.

[528] Ibid., Paragraph 201. The Trial Chamber also provided detailed explanation of the three different duties of military superior. Accordingly, the concept of "preventing" means 'keep from happening', 'keep someone from doing something', or 'hinder or impede'. Thus, 'a commander violates his duty to prevent when he fails to take measures to stop crimes that are about to be committed or crimes that are being committed. The duty to prevent arises before the commission of the crimes, and it includes crimes in progress and crimes which involve on-going elements.' Furthermore, prevention may include a variety of measures, such as 'ensur[ing] that superior's forces are adequately trained in international humanitarian law; secur[ing] reports that military actions were carried out in accordance with international law; issu[ing] orders aiming at bringing the relevant practices into accord with the rules of war; [and] tak[ing] disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.' On the other hand, the notion of "repressing", which is not covered by *ad hoc* Tribunals' Statutes, may overlap with the concept of prevention and it includes the obligation to punish forces after the commission of crimes. In case the commander possesses disciplinary power, then he must exercise this power, however in the absence of such a power the commander has an obligation to submit the matter to the competent authorities. *The Prosecutor v. Jean-Pierre Bemba Gombo* (No. ICC-01/05-01/08), Paragraphs 202-209.

Finally, in accordance with the Trial Chamber Judgement in the *Bemba* Case, although Mr Bemba 'took some measures in reaction to public allegations of crimes by MLC soldiers', he repeatedly 'failed to take any measures in response to allegations of crimes reported internally within the MLC', and to submit the matter to competent authorities.[529] Indeed, he 'did not genuinely intend to take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty; rather his key intention was to counter public allegations and rehabilitate the public image of the MLC.'[530]

The *Musema* Case[531] is another example of establishment of superior liability. In particular the Trial Chamber of the ICTR held that the accused, Mr Musema, had exercised *de jure* authority and *de facto* control over the Gisovu Tea Factory's employees 'while they were on the factory's premises' and while they were engaged in their respective professional duties. the Trial Chamber convicted Musema, who had already incurred direct responsibility for personally committing crimes, for ordering and for aiding and abetting some of the crimes of his subordinates, also on the basis of superior responsibility, by having failed to take the necessary and reasonable measures to prevent said crimes and to punish his subordinates.[532]

4.3 Applying the bases of accomplice liability to officials of corporations

The above-explored bases of liability, namely aiding and abetting, common purpose liability or superior responsibility, may be applied to situations in which companies are involved in the commission of crimes under international law. Accordingly, in such circumstances, the business representatives or officials will be held criminally liable for their assistance or contribution or attempted contribution to the perpetration of the crimes at stake.[533] These circumstances may include, for example, the involvement of

[529] *The Prosecutor v. Jean-Pierre Bemba Gombo* (No. ICC-01/05-01/08-3399), Paragraph 63.
[530] Ibid.
[531] *The Prosecutor v. Alfred Musema* (No. ICTR-96-13-A) Trial Chamber I, ICTR 27 January 2000; *Alfred Musema v. Prosecutor* (No. ICTR-96-13-A) Appeals Chamber, ICTR 16 November 2001.
[532] *The Prosecutor v. Alfred Musema* (No. ICTR-96-13-A), 892, 898-900, 905-906, 914-915, 919-920, 924-925, 936, 950-95.
[533] Norman Farrell, 'Attributing Criminal Liability to Corporate Actors. Some Lessons from the International Tribunals' (2010) 8 Journal of International Criminal Justice, 873-875; Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal

business companies selling goods and services, such as weapons or military and/or intelligence services, in the perpetration of a criminal conduct thanks to the provision weapons or services otherwise.

For example, the increased activities of corporations in conflict zones have raised questions about their liability under domestic law and international law. As a matter of facts, business companies may be – at various levels – complicit or responsible in the commission of crimes. They can directly commit violations of international humanitarian law during conflicts, for examples by providing combatants and security providers. Business companies have also been associated with the commission of crimes through their business activities, for example by paying taxes or royalties to a government, the company may indirectly provide the government with funds which may assist in its commission of crimes. And at a middle level, companies can also enable, exacerbate or facilitate crimes by, among others, supplying governments or rebel groups known for committing international humanitarian law violations with equipment or arms, buying resources from such groups, building airstrips that are used for aerial attacks on civilian populations or broadcasting radio and television programmes that incite people to violence.[534]

The provision of goods resulting in assistance in the commission of a crime had already been discussed in the famous *Zyklon B* Case where German industrialists were prosecuted for aiding war crimes and sentenced for supplying poisonous gas to the SS. Mr Bruno Tesch, the owner of the Hamburg-based company Testa and his deputy, Karl Weinbacher, and chief gassing technician Joachim Drosihn were charged with having 'made themselves accessories before the fact' by distributing amounts of acid for both

Law' (2010) 8 Journal of International Criminal Justice, 910-911. Vest further clarifies that '[i]n theory, no business activity, regardless of how ordinary or 'neutral' it seems to be, can explicitly be left outside the scope of, e.g. accessorial liability to the commission of an international crime. Scenarios may cover providing raw materials, any kind of semi-finished products, end-products such as, e.g. weapons, goods and services including personal, technical and logistical assistance, information, cash, credit and banking facilities. Speaking of "providing" these may, however, be misleading as it points primarily to selling such goods or services. Buying, e.g. mineral resources like "blood diamonds" will also usually fuel and protract an armed conflict as well'. Vest (2010) 852-853.

[534] Farrell (2010) 973-874.

pest control purposes and murdering extermination camp prisoners.[535] The Military Court had to answer the question related to whether or not the accused 'knew of the purpose to which their gas was being put'. Accordingly, while the defendants denied they had knowledge about the use of the poisonous gas, the Military Court ruled instead that they must have had knowledge and accordingly the defendants were convicted of war crimes.[536] Furthermore, in the *Flick* Case the industrialists, Friedrich Flick and Otto Steinbrink were charged under count four with 'aiding and abetting criminal activities of the SS' for having provided 'extensive financial and other support' to the Circle of Friends of Himmler, which was composed of bankers, industrialists, government officials and SS officers and where money was donated to fund at the personal disposal of the Reichsführer SS.[537] Additionally, in the *Ministries* Case, the defendant Mr Karl Rasche, who was one of the board of directors of the Dresdner Bank, was charged for having financially supported the Circle of Friends of Himmler, as well as having allowed loans to 'various SS enterprises which employed large numbers of inmates of concentrations camps, and also to Reich enterprises and agencies engaged in the so-called resettlement program'.[538] The Military Tribunal found that Mr Rasche was liable for having provided financial support to enterprises, primarily created to exploit slave labour with knowledge of that purpose.[539]

Other more recent cases are illustrative of how the supply of goods and services or the provision of personnel may result in aiding and abetting the commission of crimes under International Law.

In the *Blagojević* case, Mr Blagojević was the commander of the Bratunac Brigade, part of the Army of the Republika Srpska (VRS) which in July 1995 attacked and gained control of Srebrenica, as well as detained and killed thousands of Bosnian Muslim men, while transporting the women, children, and elderly out of Srebrenica. He was

[535] *Trial of Bruno Tesch and two others*, Law Reports of Trials of War Criminals, Vol. I, 101 (Hereafter *Zyklon B* Case); Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 Journal of International Criminal Justice, 853-854.
[536] *Zyklon B Case*, 100; Cryer, Friman, Robinson, Wilmshurst (2014) 374.
[537] *U.S. v. Friedrich Flick et al,* Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (TWC), Vol. VI, 103 (Hereafter *Flick* Case); Vest (2010) 853.
[538] *U.S. v. Ernst von Weizsaecker et al*., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (TWC) 621 onwards (Hereafter *Ministries* case); Vest (2010) 853-854.
[539] Ibid.

charged, by the Appeals Chamber, with aiding and abetting murder, persecutions and other inhumane acts (including forcible transfer) as crimes against humanity.[540] The Appeals Chamber ruled that he provide personnel for the commission of the crimes at stake, by generally allowing 'the use of Bratunac Brigade resources to facilitate the commission of the crimes'. Moreover, the defendant had command and control over the Bratunac Brigade which gave "practical assistance" by guarding the detainees, helping to control access to them, allowing the murders to take place, etc.[541]
Furthermore, the *van Anraat*[542] and the *van Kouwenhoven*[543] Cases, although brought before a national court (the District Court and subsequently the Court of Appeal in The Hague) are significant examples of how business representatives may incur in liability for complicity.

Mr van Anraat, a Dutch businessman, was found guilty of complicity in the participation of violations of the laws and customs of war by supplying the Saddam Hussein's government with chemicals, which were later used to produce mustard gas, in turn used by the Iraqi Armed Forces in the war against Iran as well as during the "Anfal Campaign" against the Kurds in Northern Iraq. He was originally also charged with genocide, however he was acquitted of complicity in the commission of genocide of the Kurdish civilians because the Court of Appeal did not find 'actual knowledge of the genocidal intention of the perpetrators of the main offence' and ruled that Mr Van Anraat might not have known that the chemical substances would have been used in attacks directed against and aimed at the destruction of the Kurdish population.[544] However, he was convicted as accomplice in the war crimes of inhuman treatment and death, as well as for inflicting severe bodily harms of others through the use chemical weapons which were contrary to international law. Significantly, the Court of Appeal pointed out that Mr van Anraat was aware that the chemicals he was supply would be

[540] *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* (No. IT-02-60-A) Appeals Chamber, ICTY 9 May 2007.
[541] Ibid., Paragraph 130-134.
[542] *Public Prosecutor v. Frans van Anraat* (No. 22-000509-06) Court of Appeal of The Hague, 9 May 2007. (Hereafter Van Anraat Case).
[543] *Public Prosecutor v. Guus Kouwenhoven* (No. 220043306) Court of Appeal of The Hague, 10 March 2008. (Hereafter van Kouwenhoven Case).
[544] *Van Anraat* Case; Harmen van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case' (2006) 4 Journal of International Criminal Justice, 239-257.

used for the production of mustard gas, which in turn 'was going to be used by Iraq in the war that Iraq fought against and in Iran and against the allies, and/or those states which were considered as such in the sense that they were involved in an armed conflict with the Iraqi regime, and that this use of mustard gas has actually taken place'. Thus Mr van Anraat consciously made a substantial contribution to the continuing violation of the laws and customs of war committed by the Iraqi regime.[545] In the *van Kouwenhoven* Case instead, Mr van Kouwenhoven was accused of having been involved in both war crimes, committed by the Liberian government, rebels and militias, through the sale of arms to government under the President Charles Taylor in exchange for logging rights, and the breach of the embargo imposed on Liberia by the United Nations. While for the latter he was sentenced to eight years of prison by the District Court of The Hague, he was acquitted for the commission of war crime due to lack of evidence.[546]

Furthermore, the principle of superior responsibility is of relevance for the determination of corporate officials' or representatives' responsibility since this basis of liability applies not only to military personnel, but also to civilian. In the *Čelebići* Case, among others, the Appeals Chamber made indeed clear that the liability of civilian superiors is not controversial, rather 'civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective

[545] Ibid.

[546] Vest (2010) 855. In particular, Mr *van Kouwenhoven* was charged both with participation in war crimes, by complicity, incitement or promotion, committed between 2000 and 2002by the Liberian troops, and with the supply of arms to the Liberian government, in contradiction to Dutch regulations implementing UN Security Council Resolutions and EU regulations. Initially, the Dutch District Court acquitted Mr van Kouwenhoven of war crimes, but found him guilty of involvement in illegally supplying weapons and accordingly in June 2006 he was sentenced to 8 years. The prosecution appealed against Kouwenhoven's acquittal of war crimes. The defense repeated its argument that the prosecution's working methods had irreparably and seriously harmed Kouwenhoven's right to a fair trial. Both Mr Kouwenhoven and the prosecutor appealed against this verdict, in particular with the prosecution appealing against the acquittal of war crimes. Moreover, in March 2008, the Court of Appeal acquitted Kouwenhoven of all charges due to the lack of conviction that needs to be founded on reliable evidence. Later, however, in April 2010 the Supreme Court referred the case back to the Court of Appeals, stating that the Court of Appeal had insufficiently motivated its decision since it did not allow the prosecution to have witnesses testify anonymously. See: *Public Prosecutor v. Guus Kouwenhoven* (No. AX7098) District Court of The Hague, 7 June 2006; *Public Prosecutor v. Guus Kouwenhoven* (No. BA0852) Court of Appeals of The Hague, 19 March 2007; *Public Prosecutor v. Guus Kouwenhoven* (No. 220043306) Court of Appeal of The Hague, 10 March 2008; *Public Prosecutor v. Guus Kouwenhoven* (No. 08/01322) Supreme Court, 20 April 2010.

control.'[547] In the *Musema* Case, for example, the ICTR Trial Chamber Chamber found Mr Alfred Musema, the director of a tea factory during the genocide in Rwanda, guilty of genocide and crimes against humanity (including extermination, rape).[548] In particular, with reference to civilian superior liability, the Trial Chamber established that Mr Musema had de jure power and de facto control over Tea Factory employees and the resources of the Tea Factory. According to the Court:

> '*it has been established beyond reasonable doubt that Musema exercised de jure authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. […] Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. […] Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. […] by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes*.'

The Trial Chamber held also that Musema was criminally responsible for having ordered, as well having aided and abetted in the murder of members of the Tutsi ethnic group, and for the causing of serious bodily and mental harm to members of the said group.[549] Additionally, although some of the criminal offences had been committed by subordinates, Musema knew or had reason to know that the subordinate was about to commit such an unlawful act or had done so. Nevertheless, he failed to take the necessary and reasonable measures to prevent the commission of the crime by the subordinate or to punish him for the criminal conduct and instead he

[547] *The Prosecutor v. Zejnil Delalić et al.* (Case No. IT-96-21-A), Paragraph 196.
[548] *The Prosecutor v. Alfred Musema* (No. ICTR-96-13-A); *Alfred Musema v. Prosecutor* (No. ICTR-96-13-A). See also: Vest (2010) 870-871.
[549] *The Prosecutor v. Alfred Musema* (No. ICTR-96-13-A), Paragraph 891.

aided and abetted the commission of crimes both by his presence as well as by his personal participation.[550]

As a result, civilian superior responsibility may be especially relevant for those corporations which carried out their activities in countries with higher risks of human rights violations, such as conflict zones, or for those companies which are more exposed to involvements in human rights abuses, as for example companies operating private security functions or employing security/military personnel. In such cases, these companies should be particularly cautious and exercise due diligence, as well as oversight procedures aimed at taking all the necessary steps to avoid incurring in the superiors' liability.

Finally, in the decision held by the Special Tribunal for Lebanon in the New TVS.A.L. Case[551] the Appeals Panel ruled that it had jurisdiction to hear cases of obstruction of justice against legal persons, namely against business entities.

In July 2014, the Contempt Judge stated that the STL did not have jurisdiction over legal persons. However, he decided *proprio motu* to grant certification to the prosecution to appeal on 'whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60bis has the power to charge legal

[550] Ibid., Paragraphs 892-895.

[551] *Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV S.A.L. and Al Khayat* (STL-14-05/PT/AP/AR126.1), Appeals Panel, STL, 23 January 2015. The case originated from the broadcast on the television Al Jadeed TV of programmes mentioning the names asserted to be those of alleged confidential witnesses in the Tribunal's proceedings, as well as the later online publication of the same programmes on YouTube. The Al Jadeed TV was operated by the private company New TV S.A.L. Likewise, the newspaper *Al Akhbar*, operated by another private company – the Akhbar Beirut S.A.L., published similar information. This led to two separate cases, against New TV S.A.L. and its Deputy Head of News and Political Programmes Manager, Ms Karma Khayat, as well as against Akhbar Beirut S.A.L and its Editor-in-Chief Ibrahim Al-Amin, respectively. While initially the contempt judge dismissed the case against New TV S.A.L. and Karma Khayat because Rule 60 bis on Contempt and Obstruction of Justice of the Tribunal's Rules of Procedure and Evidence applied only to natural persons, the Appeals Panel found that there was prima facie evidence that the publication of information relating to the identity of alleged confidential witnesses entailed knowing and wilful interference with the administration of justice in breach of Rule 60 bis, under which states that the Tribunal may hold in contempt persons who knowingly and willfully interfere with its administration of justice. On the case, see also: Nadia Bernaz, 'Corporate Criminal Liability under International Law. The New TVS.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon' (2015) 13 Journal of International Criminal Justice.

persons with contempt'.[552] While appealing the Decision, the Prosecutor also tried to demonstrate that the 'tribunal [had] the power to charge legal persons with contempt' and that 'the contempt judge erred in ruling to the contrary'.[553] Specifically, the prosecutor argued that the Tribunal should be able to charge legal persons, because 'the raison d'etre of international tribunals is the fight against impunity, wherever it is found, including as to contempt'.[554] In addition, 'the contempt power exists in its broadest, fullest sense, without any substantive or jurisdictional limitation (except that the alleged criminal conduct must be linked in some way to the Tribunal's work or functions).'[555]

The Appeal Decision in *New TV S.A.L.* Case answered two questions: 'whether the Contempt Judge erred in considering that there is no ambiguity in the term "person" under Rule 60 bis, and whether the Contempt Judge erred in distinguishing between the Tribunal's material, temporal and territorial jurisdiction on the one hand, and its personal jurisdiction on the other with respect to contempt proceedings'.[556]

In reference to whether the Contempt Judge erred in considering that there is no ambiguity in the notion of "person" under Rule 60 bis, the Appeals Panel ruled that:

> '*The Contempt Judge considered that Rule 60 bis provides for criminal responsibility of natural persons who have knowingly and wilfully interfered with the Tribunal's administration of justice. He emphasized several times that this Rule is clear and unambiguous. In his view: [W]ith the word person in Rule 60 bis, the Plenary expressed a clear and precise concept, given that [a]ny person who clearly refers to person in its natural meaning, namely, a human being. He further mentioned: If we understand ambiguous as a concept, term or phrase with more than one meaning, then in my view the expression cannot be ambiguous, because - in the absence of any additional qualification- it only has one meaning, related to human beings. Similarly, he said: [T]he Rule is anchored to a concrete and well-defined concept (the term person), with clear contours. […] We find that if the word person can*

[552] *Decision on Motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment, in the Case New TV S.A.L., Karma Mohamed Tahsin Al Khayat (No. STL-14-05/PT/CJ) Contempt Judge*, STL, 24 July 2014, Paragraph 83.
[553] *Interlocutory Appeal against the Decision on Motion challenging jurisdiction, New TV S.A.L. and Al Khayat* (No. STL-14-05/PT/AP/AR126.1), Prosecution, STL, 31 July 2014, Paragraph 9.
[554] Ibid., Paragraph 10.
[555] Ibid., Paragraph 12.
[556] *Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV S.A.L. and Al Khayat* (STL-14-05/PT/AP/AR126.1), Appeals Panel, STL, 23 January 2015, Paragraph 91.

implicitly (rather than explicitly) refer to legal persons, it follows that the term person is subject to interpretation. A word that can potentially have more than one meaning in a legal context is ambiguous. […] We consider that the Contempt Judge erred in concluding that Rule 60 bis is not ambiguous insofar as it relates to the word person. Further, the Appeals Chamber recognised that society alters over time and interpretation of a law may evolve to keep pace, and as such a statute is presumed to be always speaking. The Appeals Panel fully concurs with the reasoning of the Appeals Chamber. This is of course subject to limitations, such as the nullum crimen sine lege principle, a matter to which we now turn.'[557]

For the Appeals Panel, the meaning of the term "person" in a legal context 'can include a natural human being or a legal entity'.[558] Moreover, the Appeals Panel took into account human rights standards. In this regard, the Appeals Panel relied on the current trend, within international human rights law, to address corporate human rights violations and noted the existence of an 'emerging shared understanding on the need to address corporate responsibility'.[559] Although contempt cannot be listed under human rights violations, the Appeals Panel considered that recent developments of the law required enhanced accountability of corporations, among others through the development of remedies for corporations' transgressions.[560]

Furthermore, the Appeals Panel also analysed state practice on corporate criminal liability. As a matter of facts, while the Contempt Judge had adopted a cautious approach underlining that he could not 'discern a consensus'[561] on this, the Appeals Panel ruled that, although there were differences and variations among different legal systems, in a majority of them corporations '[were] not immune from accountability merely because they [were] a legal and not a natural person'.[562] Finally, 'while international law has not evolved to the stage where the subjection of a corporate person to criminal liability has become imperative on States', the Appeals Panel retain an inherent power over contempt and therefore 'need not be constrained by this

[557] Ibid., Paragraphs 46-51.
[558] Ibid., Paragraph 36.
[559] Ibid., Paragraphs 45-46.
[560] *Decision on Motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment, New TV S.A.L. and Khayat* (STL-14-05/PT/CJ), Contempt Judge, 24 July 2014, Paragraph 75.
[561] Ibid.
[562] *Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV S.A.L. and Al Khayat* (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015, Paragraph 58.

fact'.[563] As a result, in reference to contempt, the Appeals Panel clarified that the absence of precedent before international tribunals did not mean that there was a bar to jurisdiction over legal persons for that offence, but it was simply an indication of the fact that the issue had never been adjudicated before.[564] In other words, that fact that the ICC does not possess jurisdiction over legal persons did not result in impeding such an exercise before other international courts.

Lastly, the Appeals Panel also considered the Lebanese law, which recognized corporate criminal liability, and allowed the Panel to state that 'it [was] foreseeable under Lebanese law that the owner of a journalistic publication or a television station could be either a natural or a legal person and could be criminally liable provided that actual complicity in the crime committed is proven'.[565]

In conclusion, although it is true that the Special Tribunal for Lebanon is an ad hoc Tribunal with limited jurisdiction – thus probably less 'less universal appeal' than the International Criminal Court, and although the decision has a limited scope since it is concerned with contempt rather than other core crimes under the Tribunal's jurisdiction, the Case is still relevant because it recognizes that companies may commit crimes which can be prosecuted at the international level. [566]

4.4 Criminal liability of business companies under domestic criminal law

In line with the analysis above and by virtue of the fact that the ICC and the *ad hoc* Tribunals have jurisdiction only over natural persons, domestic criminal regimes should be explored in order to evaluate the possibilities they may offer in terms of corporate criminal responsibility at the domestic level. However, several differences exist from country to country, starting from the lack of unanimous recognition of corporate criminal liability to the absence of uniform incorporation into national jurisdictions of the prohibitions of crimes under international law. As a result, some domestic jurisdictions only cover individual criminal responsibility, in accordance with the legal doctrine which does not recognize the possession of criminal intent to abstract legal

[563] Ibid. Paragraph 59.
[564] Ibid., Paragraph 41.
[565] Ibid., Paragraph 71.
[566] Bernaz (2015) 329-330.

entities.[567] In addition, differences among countries relate also to the categories of crimes under which corporate entities may be held liable, as well as the tests used to evaluate liability.

While the objective of the present section is not a deep comparative analysis of corporate criminal responsibility at domestic level – already expounded in other studies[568] – it is worth noting that while some countries do not recognize corporate criminal liability and do not allow the prosecution of business entities, some others do, but at different levels. Among jurisdictions recognizing corporate criminal responsibility, Australia, Canada, the Netherlands, the United States and United Kingdom, *inter alia*, allow corporate criminal responsibility for those offences that generally attract individual criminal liability (with the exception for those offences for which corporate criminal liability is not a logical or physical possibility, for example as incest or bigamy).[569] On the other hand, other countries, such as France, set out exceptions in the recognition of corporate criminal responsibility or, as Indonesia and Japan, allow this possibility only if specifically provided for in their penal codes or specific statutes.[570]

Generally speaking, in order to establish criminal liability, also at the national level, it is firstly necessary to determine that the criminal act was committed, and secondly that the accused had the requisite criminal *mens rea*.

The requisite mental element varies from jurisdiction to jurisdiction and may require criminal intent, or recklessness as to whether or not the prohibited outcome occurred, and in some cases a form of negligence.[571] In general terms thus, differences also involve 'the kinds of offences for which corporate entities can be liable, and tests used'

[567] Zerk (2014) 36; Farrell (2010) 874-876; Vest (2010) 851-855.

[568] Ibid., Zerk (2014); International Commission of Jurists, Report 2 (2008); Anita Ramasastry, Robert C. Thompson R., 'Commerce, Crime and Conflict. Legal remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries' (2006) Fafo Report, 536; Daniel Blackburn, 'Removing Barriers to Justice. How a treaty on business and human rights could improve access to remedy for victims' (August 2017) SOMO Online Publication, 46 onwards.

[569] Zerk (2014) 32; Blackburn (2017) 46-47.

As explained by Blackburn, the Netherlands and the UK are characterized by the oldest traditions of specific corporate criminal liability offences. Specifically, in 1976, the Section 51 of the Dutch Criminal Code established that both individuals and legal entities could commit any criminal offence; in the UK instead, prosecution of corporations under the general criminal law was theoretically possible hundreds of years ago, however the barrier of *mens rea* prevented the majority of prosecutions.

[570] Zerk (2014) 32-33; Blackburn (2017) 47-48.

[571] Ibid. Zerk (2014); Blackburn (2017) 48.

to prove liability, which in turn depends, for example, on the type of offence involved.[572]

As already mentioned, the tests used to evaluate corporate culpability and subsequently to determine whether the acts and omissions may attract criminal liability vary from jurisdiction to jurisdiction. It is worth underlining that, while accomplice liability by omission is possible under international criminal law, in some domestic jurisdictions the 'mere omissions (for example standing passively while a crime is taking place) is not sufficient.'[573] As a result, jurisdictions may avail themselves with an "identification method" through which the acts and intentions of business officials are identified with the corporate entity, as long as the acts and intents at stake 'are treated as having been those of the company itself'.[574] Instead, another method, the "aggregated approach", allows to overcome difficulties in identifying the precise individuals whose acts can be identified with the company.[575] Finally, other tests may be based on the "corporate culture" rather than on the intentions and action of the individuals and accordingly the "corporate culture approach" focuses on the quality of a company's management.[576]

Turning instead to the examination of the question of accomplice or accessory liability, this basis of liability is generally an available possibility in the majority of domestic criminal systems, where, as a result, business officials, managers and representatives may be personally held liable for participating in the commission of a crime and prosecuted for aiding and abetting crimes perpetrated by the business entities for which they were responsible or for being part of a joint criminal enterprise which committed an offence.

Most domestic criminal systems recognize accomplice liability as a form of accessory liability and thus include legal basis as aiding and abetting or other forms of participation considered by the ILC as forms of accomplice liability. Some examples are

[572] Ibid.

[573] Ibid., 38.

[574] Ibid. Zerk (214); Blackburn (2017) 48. In reference to the "identification" approach, Blackburn underlines that 'a problem for this approach is that the courts in several countries require that the person possessed of the *mens rea* for the offence must also be a 'controlling mind' within the company'.

[575] Ibid., 33-34

[576] Ibid., Fafo (Ramasastry/Thompson) Report (2006) 15-20.

instigation, conspiracy and ordering. In domestic criminal laws, these modes are however considered as 'separate and distinct offences or crimes or considered as forms of criminal liability for perpetration, rather than accomplice liability'.[577]

With reference to liability for aiding and abetting, the greater differences among national jurisdictions concern the requisite mental element. Indeed, while the *actus reus* requires a principal perpetrator and an accomplice who aids and abets, the threshold to establish the *mens rea* varies, once again, from country to country.

In some jurisdictions, the threshold is the "shared intent" doctrine, namely the accomplice must share the same intent as the principal perpetrator. However, this standard has been criticized for being a too high threshold for establishing the liability of business entities since the principal perpetrator and the accomplice (the business entity) will probably have two distinct intents: a business actor which aids and abet the commission of a crime is more likely to be motivated by profit whereas the perpetrator will be focused on the commission of the crime as his primary goal.[578] Accordingly, '[i]t is likely that the shared intent standard presents too high a threshold for corporate complicity because it requires that it be shown that actions were taken out of a common state of mind when in fact corporate complicity in criminal acts of others appears to be more often based on actions motivated by mutual or common interest.'[579]

The requisite mental element can also be "knowledge", namely the accomplice knew about the acts that the principal perpetrator intended to commit. This also clearly means that it is not required that the *mens rea* of the principal perpetrator is the same as the accomplice, which however has to have acted knowingly.[580] Under international law, "knowledge" is the threshold required to determine the *mens rea*; accordingly, the accomplice can be held criminally liable if he/she knew or had reason to know that their actions would result in the principal's commission of a crime.

Finally, a third standard is the so-called "*dolus Eventualis*" or foreseeability standard, which may be defined as the 'subjective foresight of the possibility of the unlawful circumstance existing or unlawful consequence resulting and nevertheless going ahead

[577] International Commission of Jurists, Report 2 (2008) 25.
[578] Ibid.; Fafo (Ramasastry/Thompson) Report (2006) 15-20.
[579] Fafo (Ramasastry/Thompson) Report (2006) 19-20.
[580] Ibid.

with the conduct'.[581] This means that the accomplice knew or should have known that the perpetrator intended to commit a crime, but accepted this risk.

When comparing "knowledge" and "foreseeability" standards, it seems that the former may create some limits in its application to business entities. As a matter of facts, it might be difficult for the prosecution to prove that the accused business entity had knowledge of a crime that the principal perpetrator committed. The lower threshold required instead by the "foreseeability" criterion seems instead of more easily application to corporate activities, since in this case the requisite would be only the awareness from the business enterprise's side that its suppliers, security agents or clients were implicated in crimes and that the provision of goods or services from the business company could facilitate or assist the commission of the unlawful act.

National legal systems also recognize legal basis as joint criminal enterprise or common purpose crimes and conspiracy. Accordingly, these crimes have their correspondents in international criminal law, as discussed above. Hence, under both national and international laws, business enterprises and their officials may incur in the risk of being held criminally liable when they are implicated in a joint criminal enterprise. While some jurisdictions, such as the United Kingdom, Canada, South Africa, Germany, Belgium and Japan, recognize as a crime the participation in a joint criminal venture to commit a crime or the legal basis of common purpose, other jurisdictions refer to the participants as co-perpetrators or as merely accomplices, others also do not make any distinction.[582]

In reference to conspiracy, this offence refers to an agreement between two parties aimed at the commission of a crime accompanied by the intent to perpetrate the same.[583] Among jurisdictions which punish conspiracy, the most common threshold to establish conspiracy is that a mere agreement to commit a crime is not sufficient, rather it is required an evident act by at least one conspirator in furtherance of the agreement. [584]

[581] International Commission of Jurists, Report 2 (2008) 25.
[582] Ibid.
[583] Ibid., 20.
[584] Ibid.

The national crimes of conspiracy and common purpose find their international criminal law counterparts in concepts of joint criminal enterprise discussed above. Accordingly, under both national and international laws, companies and their officials may be held criminally liable in circumstances where they pursue a common purpose or make an agreement with others to commit crimes. In conclusion, these principles would permit the acts of others with whom they are acting to be imputed to them, thereby potentially increasing their personal criminal liability.

Chapter 5: Conclusion

To date, no comprehensive international legally binding treaty on Business and Human Rights exists. After some initial efforts, firstly in the 1970s, to hold business enterprises liable for human rights violations under an international treaty and later in 1992 with the failure of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, in 2011, the UN Guiding Principles, elaborated by John Ruggie, were unanimously endorsed by the United Nations Human Rights Council. Nevertheless, due to their non-binding nature, the UN Guiding Principles do not impose binding obligations under international law neither to States nor to business enterprises. Moreover, while some of the Guiding Principles stem from accepted legal principles, others seem to be general and vaguely expressed to be able to provide for effective guidance. In addition, while standards concerning business enterprises' human rights responsibilities, including the performance of human rights due diligence, have been well-received, others, especially those relating to the exercise of extraterritorial jurisdiction and access to remedies, remain unclear. As a result, despite the large *consensus* gained by the UN Guiding Principles, the so-called "governance and accountability gaps" remain unsettled.

In line with this scenario, a significant breakthrough was reached at the 26th Human Rights Council session with the adoption of Resolution 26/9, which led to the establishment of an *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Thus, under the aegis of the Human Rights Council, the OEIWG started preliminary discussions to negotiate the draft of a legally binding treaty on Business and Human Rights. Pursuant to Resolution 26/9, so far two sessions have been held, aimed at conducting constructive deliberations on the content, scope, nature and form of the prospective international instrument.[1]

[1] The third and last session of the OEIWG is expected in October 2017.

While it is unquestionable that a wide range of issues, already discussed during the sessions of the OEIWG, necessitate further clarification throughout the elaboration of the prospective binding treaty, this latter may represent a valuable opportunity to close the so-called "governance and accountability gaps", particularly by focusing on the accountability of business enterprises and the provision of greater access to effective remedies for victims of human rights abuses perpetrated by business enterprises. As mentioned, while several questions – such as the definition of standards concerning the extraterritorial dimension of the State duty to protect, the implementation of international monitoring, supervision and cooperation mechanisms – would require clearer answers, '*the most acute challenges and needs in the area of business and human rights relate to the deficits both in ensuring the accountability of companies and in access to effective remedies for victims of abuse*.'[2] Accordingly, the present research has focused on these issues for the purpose of proposing elements and suggestions to be incorporated in the prospective binding treaty.

1. The responsibilities of States and business enterprises

Extensive debate was held during the first and second session of the OEIWG concerning the existence of legal obstacles to international law imposing obligations and responsibilities on non-State actors, notably business companies. The question was whether the prospective legally binding treaty could impose direct obligations on business enterprises, in addition to the obligations imposed on States themselves. It was claimed, indeed, that direct obligations on business enterprises would overcome the accountability gap, while making it easier for victims to seek remedy.

Traditionally, international and human rights law are state-centric and, especially human rights law has had States as the only duty-bearers. Thus, the primary responsibility to promote and protect human rights lies with the States.

Despite different arguments regarding the reasons why private non-state actors should be directly held accountable for human rights violations in international law and be considered as subjects under international law, in the legal doctrine a broadly shared definition of international legal personality, as well as clear criteria to define the subjectivity of an actor

[2] International Commission of Jurists (ICJ) Report (2014) 15.

under international law seem to be missing. In line with the definition of international legal personality provided by the ICJ in the notorious *Reparation* case, two cumulative conditions are necessary: the capability of possessing international rights and duties; and the capability of maintaining rights by bringing international claims.

Accordingly, while it may be stated that business companies seem to possess some rights – although a limited range, especially under the ECHR – it is, on the other hand, clear that business entities have no direct human rights obligations under international and human rights law. Indeed, the majority of legal instruments adopted so far in the regulation of corporate activities do not impose direct obligations on corporations, rather they have focused on soft law obligations – thus not binding – probably as a result of the absence of corporations' international legal personality and the inadequacy of traditional international legal instruments to regulate such corporate activities under international and human rights law. The OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the United Nations Global Compact and the UN Guiding Principles are all examples of instruments addressing the responsibility of business enterprises – despite being soft law instruments.

As a result, States first bear a duty to respect the human rights of the individuals under their territory/jurisdiction and, at the same time, States are bound by the obligations to ensure that private actors do not violate those rights.[3]

Although it is true that at the national level business enterprises have certain obligations and that the human rights obligations applicable to corporations at the domestic level can be considered as derived from the international human rights obligations of States, these international obligations remain principally obligations resting upon States. The human rights obligations of private non-state actors, essentially, are regulated by domestic civil or criminal legal systems. As mentioned before, while it is true that human rights obligations of

[3] This essential public/private divide of human rights has also been dealt with by the UN Human Rights Committee in its General Comment N. 31, in which the Committee explicitly emphasised that the primary human rights obligations remain with the State 'The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'. UN Human Rights Committee, General Comment N. 31, Paragraph 10.

corporations at the domestic level are backed by the international legal obligation of the State to ensure protection of the human rights of the individuals under the State's territory/jurisdiction, this fact does not alter the essentially domestic character of corporate human rights responsibilities. And even in cases where the illegal act, which violates human rights, is not imputable to the State, it is still the State which might be held internationally responsible for lack of due diligence.[4]

In conclusion, while it might be desirable that the prospective binding treaty imposes direct obligations on corporations, the international legal personality of corporations cannot be asserted. Moreover, by virtue of the controversy of such an issue, the same might compromise the negotiation process of the prospective legally binding treaty. As a result, the prospective treaty could, of course, re-state and emphasise the responsibilities resting on business enterprises – also in line with the UN Guiding principles – however, by virtue of the lack of international legal personality of private non-State actors, it is likely that the treaty would consider only States as duty-bearers and it would impose obligations only on them. Additionally, effective implementation of the responsibilities of business enterprises to respect human rights could only be achieved through national institutions. From this perspective, it is thus unnecessary to address the thorny question of whether or not corporations can be regarded as subjects of international law in the context of negotiations of the prospective treaty.

This would also be consistent with those proposals presented during the first and second sessions of the OEIWG suggesting that only States provide for legal liability for business enterprises for acts or omissions that infringe human rights, thus underlining the key role played by States in ensuring the compliance with domestic laws at the national level. Accordingly, the prospective treaty might clearly and vigorously re-state the State duty to respect, promote and protect human rights against violations or abuses within their territory

[4] As noted by the Inter-American Court of Human Rights, for instance, in the *Velasquez Rodriquez v. Honduras* case: '[…] in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'

and/or jurisdiction, including against violations perpetrated by business entities. In addition, the treaty might re-emphasise that to ensure that business companies respect human rights throughout their activities, States shall take all necessary and appropriate measures to prevent, investigate, punish and redress violations or abuses of human rights, including through legislative, administrative, adjudicative or judicial measures.

Finally, considering the critiques which have been already moved, *inter alia* by the United States, to the issue of the international legal personality of corporations and by virtue of the importance of the involvement of all States (including the United States and European Union Member States) to the success of the prospective legally binding treaty, an approach in favour of the establishment of business companies as subjects of the prospective treaty might result in undermining the negotiation process.

2. Greater access to judicial remedies

As previously mentioned, the establishment of a legally binding treaty under Resolution 26/9 has been applauded as the long-awaited possibility to address issues concerning the lack to access remedies for victims of business-related human rights violations. Accordingly, it was argued that the prospective treaty should seek to address the obstacles which prevent victims of such abuses from having access to justice and obtaining remedies. In other words, the prospective treaty provides an opportunity to drive meaningful change to enhance access to remedy for corporate-related human rights abuses. To do so, while on one side the prospective treaty could address the scarce availability and the doubtful effectiveness of remedies, on the other side, it may contribute to overcome the barriers which prevent access to justice through the incorporation into its text of solutions and measures to get over such obstacles.

Under the Universal Declaration of Human Rights “all are equal before the law and are entitled without any discrimination to equal protection of the law”; “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”, and “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. The concept of “access to effective remedy” is also defined under UN Guiding Principles,

underlining that it is part of the States' duty to protect individuals within their territory and/or jurisdiction from human rights violations perpetrated by business enterprises, which indeed requires States to adopt judicial, administrative, legislative or other appropriate measures aimed at ensuring effective remedies when human rights abuses take place. While remedies may embrace a wide range of forms, such as apologies, restitution, rehabilitation, compensation, punitive sanctions as well as prevention of harm, States should also establish mechanisms aimed at guaranteeing that any possible grievance is raised and that redress is sought, including access to state-based judicial mechanisms, namely to criminal and civil courts. In other words, "access to judicial remedies". Every individual, victim of a violation of his/her human rights, is entitled to have an effective remedy and have his/her claim heard by judicial, administrative, legislative or any other competent authorities. The enjoyment of this right relies on States which have, in turn, the obligation to provide remedy to victims of human rights violations.

As a matter of facts, international and regional human rights instruments set forth, on one side, a duty upon States to provide for access to effective remedies and, on the other side, an individual right to effective remedy, generally by the competent national tribunals.

It is well recognized that international human rights law treaties impose positive obligations on States to take appropriate steps to prevent business-related abuses of the rights of those individuals within their territory and/or jurisdiction and to investigate, punish and redress such abuses when they occur. Under international human rights law instruments, States are subject to the positive obligation to fulfil human rights, which entails both the duty to adopt measures aimed at guaranteeing the enjoyment of rights, and the obligation to provide for remedy to victims of human rights violations. Furthermore, although States possess discretion with reference to the modalities to fulfil this duty, this discretion seems to be balanced by some treaty provisions, which clearly require States to provide remedies when abuses occurred, and by treaty bodies which provide "useful guidance".

Accordingly, it is suggested that the prospective legally binding treaty has due regard to States' human rights obligations to ensure effective remedies. Moreover, it should also emphasize that the States' human rights obligations will only be fully discharged if individuals are protected by States against acts committed by private entities that would impair the enjoyment of the individuals' rights. This will be consistent with the interpretation

of human rights treaties, in particular, the ICCPR as provided by the UN Human Rights Committee in its General Comments.

Furthermore, in accordance with international and regional human rights instruments, the prospective treaty might also specify the procedural and substantive components of the concept of “effective remedies”.
The concept of “effective remedy” encompasses a procedural and substantive component. The former pinpoints the importance of prompt, thorough and effective investigations into allegations of abuses conducted by independent and impartial bodies, whereas the latter entails reparation, which in turn can include appropriate compensation, restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. Therefore, the prospective legally binding treaty might re-affirm that victims should firstly have practical and meaningful access to a procedure, capable of ending and repairing the effects of the violations they have suffered and secondly, once the violation is established, victims should be entitled to receive a relief sufficient to repair the harm suffered.

Furthermore, the treaty may include provisions restating the individual rights to a fair and public hearing by a competent, independent and impartial tribunal. As a matter of facts, as underlined in Chapter 4, alongside the above-mentioned duty to provide remedy resting upon States, individuals are entitled to the right to remedy and fair trial. This would be consistent not only with provisions under the Universal Declaration of Human Rights, or the ICCPR, but also with rights encompassed in regional human rights treaties, particularly the ECHR and the EU Charter of fundamental human rights – on which the present study has mainly focused. In European human rights law, Articles 6 and 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right to a fair trial and to an effective remedy, as interpreted by the European Court of Human Rights and the Court of Justice of the European Union, respectively.

Core elements of these rights include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery

of justice. In particular, the right to a fair trial may play an important role because it implies the obligation of States to ensure that trials are accessible within the respective territories.

Accordingly, the treaty, while reaffirming the right of every individual to effective remedy and emphasising the States' obligations to ensure the provision of adequate, effective, prompt, and appropriate remedies, might also require States to ensure reparation for the victims of corporate-related human rights abuses, which in accordance with international law, should include restitution, compensation, rehabilitation, and satisfaction, and be subject to effective implementation and ensure a means to prevent future abuses since reparation includes guarantees of non-repetition.

Despite these principles set forth in international and regional human rights treaties, in practice, a wide range of barriers prevent victims of business-related human rights abuses from obtaining remedies, including when they seek access to courts and to judicial remedies. A wide number of causes, legal and political, have been enumerated to explain the challenges in accessing and obtaining judicial remedies. In particular, this study has focused on some legal barriers, in civil and criminal law. These issues do demonstrate that more definite standards are necessary to fully safeguard and implement the right to remedy and fair trial with respect to business enterprises' activities, especially when they operate in foreign countries.

In reference to criminal law, at the outset, it has to be noted that some gross human rights violations, in which business companies have resulted being involved, are addressed under international and national criminal law. As a matter of facts, although international criminal law has different historical origins from human rights law, both bodies of law share principles related to the protection of individuals against criminal acts, which are crimes under international law and, at the same time, are also considered as gross human rights abuses. Indeed, gross human rights abuses may determine a breach of international law and be classified as crimes under domestic law and, at the same time, they may be criminal offenses under international criminal law, also known as crimes under international law – which in turn imposes obligations on governments to prosecute and punish such crimes.

In addition, at the international level, no international criminal tribunal has jurisdiction to try business companies, as legal entities, for crimes under international law. Indeed, so far,

under the Statutes of International Criminal Law Tribunals, including the International Criminal Court (ICC), only individual criminal liability has been established. Although, for example, proposals to extend the jurisdiction *ratione personae* of the ICC were advanced during the negotiation process in Rome in 1998, conceptual as well as political oppositions have – so far – impeded the extension of international criminal responsibility to corporations. As a result, to date, the ICC and other *ad hoc* Tribunals have jurisdiction *ratione personae* only over natural persons.

Nevertheless, business representatives or officials, when intended as natural persons rather than legal persons, may be prosecuted for the commission of crimes under international and national criminal law. Focusing mostly on international criminal law, the study has indeed analysed some legal basis of accomplice liability which may offer the possibility to extend jurisdiction over corporations' officials, representatives and superiors intended as natural persons. Thus, the relevance of accomplice liability as avenue of corporate liability lies in the fact that corporations are rarely the material perpetrators of crimes, rather it is more likely that they assist, among others, political and/or military groups in the supply of goods, services or in general in the provision of support which, in the end, result in the commission of crimes under international law. In other words, corporations have resulted in assisting and facilitating the principal perpetrators in the commission of crimes by providing them with supplies and assistance. As a consequence, these contributions enabled the commission of offences or supported and exacerbated violations already ongoing.

Therefore, the analysis has shown that some basis of liability - namely aiding and abetting, common purpose liability or superior responsibility - can be applied to situations in which companies are involved in the commission of crimes under international law. In these circumstances, the business representatives or officials will be held criminally liable because they aided and abetted, or they were part of a joint criminal enterprise, or on the ground of superior liability. These basis of liability, as the *van Anraat* Case has revealed, may be particularly significant, for example for those companies selling goods and services – such as weapons or military and/or intelligence services, which be used in the perpetration of a criminal conduct. Furthermore, the principle of superior responsibility is of particular relevance to the determination of corporate officials' or representatives' responsibility since this basis of liability applies not only to military personnel, but also to civilians. As a result,

civilian superior responsibility may be especially relevant when dealing with corporations which carry out their activities in countries with higher risks of human rights violations, such as conflict zones, or for companies more exposed to involvement in human rights abuses, as for example operating private security functions or employing security/military personnel.
As a result, in such cases, companies should be particularly cautious to put into place due diligence plans and oversight measures aimed at ensuring that superiors take all necessary and reasonable steps to prevent or punish acts committed by subordinates that could amount to crimes.

Furthermore, as already mentioned before, together with the exercise of jurisdiction from the ICC and *ad hoc* Tribunals, prosecutions at national level remain essential. However, while some national jurisdictions allow business entities to be prosecuted as criminal defendants, criminal prosecutions of business entities is in practice rare and few cases result in convictions against a business companies. Moreover, also the standards used to attribute legal liability to companies, as well as the threshold used to determine secondary liability greatly vary from jurisdiction to jurisdiction. The presence of such differences between national jurisdictions may represent itself a barrier to access judicial criminal remedies, since it may determine an increase in legal uncertainty for both victims and business companies, which may find themselves applying different legal standards and rules depending on the country where they operate.

Hence, on one hand, there is the need for greater clarity as to the modes of contribution leading to legal liability and the principles for attributing mental elements of offences to companies, on the other hand, the prospective treaty may re-affirm that secondary offences are treated with the same seriousness as primary offences and as conceptually distinct from the primary offence, and that liability is not contingent on the liability of the main perpetrator'.[5]

Turning instead to civil law, as mainly EU and US jurisprudence show, private law is being used to deal with claims concerning violations of human rights and it may be considered as a significant avenue for victims to obtain redress for harm perpetrated by business entities.

[5] UN HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance' (12 May 2016) UN Doc A/HRC/32/19/Add.1, 7-8.

Some premises are again necessary at the outset. Violations of international human rights obligations may lead to legal actions against a defendant only in some States. In this case, a breach of international law rather than a breach of tort law (in common law jurisdictions) or of the law of non-contractual obligations (in civil law systems) will be the basis to establish civil liability. A notorious example is the Alien Tort Statute (ATS) in the United States which provides that federal courts have jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of the nations or a treaty of the United States. In other words, the ATS bestows federal courts subject-matter jurisdiction when a foreign person files a claim before a United States' court for a tort which violated the "law of nations", namely customary international law, or a treaty of the United States.

Over the past decade, the Alien Tort Statute has generally been viewed as the mechanism with the most promising potential for holding business companies accountable for human rights violations in developing countries, and over the last two decades, victims of business-related human rights abuses have brought their cases mainly before courts in the United States, with most claimants relying on the Alien Tort Statute. However, as it was discussed, the 2013 US Supreme Court ruling in the *Kiobel* Case seems to have restricted the reach of the ATS and the possibility to bring claims (under the ATS), when the relevant conduct has taken place outside the United States.

Thus, increasingly, victims of business-related human rights violations have started relying on civil litigations in domestic as an alternative avenue to obtain remedies. It is also worth noting that the relevance of laws providing for civil remedies lies in the fact that although in some countries business enterprises can be held responsible for human rights violations under criminal law, other jurisdictions do not recognize corporate criminal responsibility. In addition, even among those States which do recognize this possibility, a large number of differences exist. On the other hand, in the majority of jurisdictions victims of corporate-related abuses may sue business enterprises in civil courts, not for the violation of human rights *per se*, but on the ground of "wrongful behaviour doctrines". Indeed, the majority of jurisdictions provides victims of human rights abuses or their families or "entities representing public interests" with the possibility to start civil litigations against a natural person or a business enterprise for the purpose of obtaining compensation for a wrongful behaviour, which in turn may represent a way to acquire a legal remedy, under the condition

that the behaviour complained of falls within the relevant domestic law tests for liability. Thus, in every jurisdiction, civil law suits may represent a valuable way to obtain remedies for damages caused by an actor whose negligent or intentional conduct has caused harms to a victim. Despite the differences in the terminology used across various jurisdictions, the common grounds for liability are: intention or negligence (which together may be referred as fault), causation and harm/damage. Additionally, since these cases involve claims for compensation and are invariably costly, they may serve to achieve critical elements of MNCs' accountability, namely, monetary redress for victims and deterrence against future human rights violations.

Nevertheless, civil law is not exempted from obstacles which obstruct victims from having access to justice, with challenges exacerbated in cross-border cases. While such barriers vary from jurisdiction to jurisdiction, there are persistent problems common to several jurisdictions, including private international law rules regarding the jurisdiction of the competent forum, the choice of the applicable law by the court and the application, in some countries, of the *forum non conveniens* doctrine. Furthermore, the structure of business enterprises and the legal separation between a parent company and its subsidiaries represent a further cross-cutting barrier.

With reference to private international law rules, from the analysis it has emerged that different rules exist with reference to criteria to determine the jurisdiction of courts. While under the European Union Brussels I Regulation, the defendants' domicile – namely the business entities' domicile – is the basis to establish the competence of the forum, in the United States, for example, the jurisdiction depends generally on the relationship between the corporations and the State where the court is located and, in particular, it depends either on the business entities' domicile or on their presence in the State. Moreover, although a forum has jurisdiction to hear a case, *the forum non conveniens* doctrine, applied especially in some common law countries except for the UK, may further prevent a court from hearing the case at stake, when a more convenient court is found.

After having established that a court is competent to hear the case, the forum will not automatically apply the law of its own State. As for the determination of the competent court, private and procedural international rules are involved in the choice of the applicable

law. Within the European Union, under the Rome II Regulation, European courts are required to apply to a non-contractual obligation arising out of a tort/delict the law of the *loci damni,* regardless of the law of the country where the event causing the damage took place, or the laws of the countries where the indirect consequences may occur. Outside the European Union, in common law countries, courts apply the *lex loci delicti*, namely the law of the place where the violation occurred.

The choice of law is particularly relevant because it may potentially lead to obstacles especially with reference to differences in the levels of protection of human rights from home States to host States where. In this latter case, the host States' laws may not only be less stringent in comparison to those of home States', but remarkable differences may emerge in the level of damage and the consequent compensation that victims will receive.

A valuable tool to overcome obstacles descending from private international law rules are the Sofia Guidelines, elaborated by the International Law Association for the purpose of suggesting uniform rules aimed at the resolution of the private international law obstacles' in civil litigations for human rights violations which national courts have to face and which touch both claimants and defendants. Therefore, despite their nature of mere recommendations, the Sofia Guidelines might be taken into account during the negotiation process of the prospective legally binding treaty as a valuable reference model, and provisions similar to those listed in the Sofia Guidelines might be referred to in the treaty.

With reference to the jurisdiction of courts, the Sofia Guidelines, in line with the European Union Brussels I Regulation, establish the domicile of the defendant as a ground to assert jurisdiction. They also provide for a uniform definition of domicile, which accordingly refers to the habitual residence of a natural person. With respect to legal persons, the domicile is defined as the place where the legal persons have their central administration, the place where they have their statutory seat or are incorporated or under whose law they were formed, or lastly the place of their business or other professional activities. This threshold of the "domicile of defendant" as a ground to establish a connection with the forum and allocate jurisdiction to the forum at stake, can play a significant role in avoiding home States courts rejecting claims with no territorial link to the forum. As a result, victims who cannot sue business enterprises in their forum would avoid denial of justice.

Interestingly, the Sofia Guidelines rejects the application of the *forum non conveniens* doctrine and recommend the adoption of the *forum necessitatis* doctrine, which might play an additional key role in avoiding denial of justice and ensuring victims access to remedy. As explained before, the *forum necessitatis* would allow courts to exercise jurisdiction, when no other forum guaranteeing the right to a fair trial is available and a sufficient connection between the State and the dispute exists – thus leaving open the possibility for a court to exercise its jurisdiction on the basis that there is no other forum where the lawsuit can be initiated. In other words, the court will have jurisdiction when no other forum is available to the claimant.

Furthermore, with reference to the question of the choice of the applicable law, the Sofia Guidelines do not establish a special rule in this regard, rather both the *lex loci delicti* and the *lex loci damni* are considered as a reasonable alternative. In this reference, a more interesting option is offered by Article 7 of the Rome II Regulation. Accordingly, the law applicable to a non-contractual obligation can be either the *lex loci damni* or the law of the country in which the event giving rise to the damage occurred (*lex loci delicti*). Article 7 is based on the so-called "ubiquity theory", which allows the victim to choose between the law of the place where the causal event occurred and the law of the place where the damage took place. In other words, the victim can reject the law of the place where the damage occurred and choose the law of the country where the event causing the damage occurred. This is of relevance considering that compared to the host countries, home countries (EU Member States) often have higher protection standards, curb certain kinds of corporate behaviour more closely and establish stricter rules of safety and conduct.

Therefore, the prospective treaty might contribute to overcome barriers to accountability and remedies by requiring States to implement measures that would reduce obstacles to accessing courts and obtaining meaningful judicial remedies.

In addition, it has to be noted that besides these obstacles, the lack of homogeneity and uniformity from one State to another is a further impediment. This consideration is particularly relevant since the differences among national jurisdictions in laws and enforcement may result in an uneven playing field for businesses. These differences and especially different level of liabilities for business entities potentially violating national laws

are likely to promote an environment for a "race to the bottom" among States willing to attract foreign investments and to create an environment more favourable to business companies in terms of laws. For this reason, the Sofia Guidelines may represent a useful model not only to go beyond private international law obstacles to civil litigations for corporate-related abuses, in particular, issues connected with the determination of the competent court and the applicable law, but also to implement a uniform and common set of rules.

As analysed in Chapter four, the complex structure of business enterprise and the principle of separate corporate personality make it increasingly problematical to distribute liability within the business enterprise itself. As a matter of facts, the complex structure of some business corporations could cause difficulties for claimants to identify the business entity involved in the alleged violation and, as a result, the entity against whom to bring a claim. Moreover, when a victim decides to file a claim before a foreign court (for example in the companies' home State) the claimant needs also to establish a link both between the subsidiary and its parent company, and also between the parent company and the violation. However, the complex structure of the business corporation may obstruct from collecting the necessary evidence to prove that the company caused the damage, and also who knew what and when within the corporate organizational structure – necessary for example to establish negligence. In addition, in accordance with the doctrine of separate legal personality a parent company and its subsidiaries are considered as separate legal entities. Thus, there is a "corporate veil" which separates the two legal entities and as a result, the parent company is not automatically responsible for its subsidiaries' acts or omissions, even if the latter business is wholly owned and controlled by the parent company. Accordingly, the existence of the "corporate veil" is considered as a further barrier preventing the allocation of responsibilities to the parent company or its subsidiaries and, per extension, also an obstacle for the victims of abuse to obtain remedies vis-à-vis the parent company. As a consequence, a violation committed by a subsidiary is not automatically attributable to the parent company since the common principle among different jurisdictions is that the subsidiaries' actions will not be imputed to the parent company, and the latter in turn will not be held liable for the subsidiaries' conducts.

In view of the difficulties to pierce the corporate veil, claimants may seek to prove the companies' responsibility on the basis that the parent company was negligent, on the basis that it owed a separate duty of care to those affected by the activities of its subsidiaries and failed to discharge that duty. As a result, the parent company is responsible for the breach of its own duty of care, rather than for its subsidiaries' wrongful behaviour.

This would be consistent with recent jurisprudential developments, as the ruling of the United Kingdom Court of Appeals in the *Chandler v Cape Plc Case*, and other legal developments at the domestic level. Among them, a promising legislation relating to the allocation of responsibilities within the corporate structure is the French *Proposition de Loi relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre* which introduces an obligation for certain business enterprises to adopt a 'due diligence plan' which should include reasonable measures to identify and prevent the risks, including that of human rights violations and environmental degradations, resulting from their business operations as well as those of their subsidiaries, sub-contractors and suppliers.
Under the French Bill, however, it will still be difficult to prove the parent company's fault and its connection with the supplier or the sub-contractor which committed the abuse. As a matter of facts, in order to establish the company's liability, the claimant and his/her lawyers need evidence to prove the relationships between the company and the subsidiaries and to support the claim. In this regard, some scholars have already promoted a proposal which is based on the reversal of the burden of proof from the claimant to the defendant. Secondly, establishing either a duty of care on parent companies or imposing compulsory due diligence plans may certainly contribute to overcome legal barriers in civil law proceedings and to ensure access to civil remedies.

However, while the inclusion of these measures in a prospective binding treaty is supported by some scholars and civil society organisations, the treaty will have firstly to clarify who the duty bearers will be, thus whether the treaty will impose obligations over States only, or also over business enterprises. In this regards, considering the failure of the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, a treaty imposing obligations only on States is likely to gain broader *consensus*, especially among States, and while 'the establishment of legal duties for business

actors may gain political traction, the establishment of such duties [will always] need State institutions to be implemented domestically through legislation and enforcement'.[6]

Finally, besides the above-mentioned barriers, other issues outside the scope of the present study – such as extraterritorial jurisdiction, the subjective scope of the treaty, enforcement mechanisms – should be necessarily discussed and clarified in the prospective legally binding treaty. It is also important to point out that while it is desirable that the treaty includes measures to try to cope with these gaps, final implementation of these measures and final details would be necessarily left to single States, and as a result it seems beneficial for the treaty not to be too specific, rather try to achieve a balance between requests coming especially the civil society and those provisions which may reach a broad *consensus* among States.

3. A model for the prospective legally binding treaty on Business and Human Rights

By virtue of the wide range of differences among States, it may be utopian to expect States to accept and adopt only one liability regime. For this reason, the prospective binding treaty may look at already existing treaties and well-established principles to be used as a model of reference. Indeed, the principles entailed in existing treaties have already been negotiated and agreed upon by States, thus it might be easier to build the prospective biding treaty upon such already accepted principles and, as a result, accommodate the diversity of domestic approaches.

In this regard, while on one hand the prospective treaty may reinforce the State duty to protect and require States to enforce such a duty - which also includes the duty to provide access to judicial remedies - the future treaty can also require States to deploy a wide range of measures – civil, criminal and administrative – to enhance victims' access to remedy. With this objective in mind, the United Nations Convention against Corruption (UNCAC) might represent a valuable model to be taken into account during the drafting of the prospective legally binding treaty on business and human rights.

Indeed, the UNCAC requires States to 'establish the liability of legal persons for participation in the offences established in accordance with [the] Convention' and it affirms also that, in

[6] International Commission of Jurists (ICJ) Report (2014).

accordance with the laws of the State party, 'the liability of legal persons may be criminal, civil or administrative'.[7]

Moreover, the UNCAC is an example of an international treaty that binds corporations with respect to their transnational conduct and the harms they cause. The UNCAC clearly involves the private sector and, specifically, it includes a chapter focused on private sector and its role in the fight and prevention of corruption and bribery. Specifically, the UNCAC requires State Parties to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities which may give rise to bribery

In addition, the Convention is particularly relevant since it requires States Party to provide victims with their individual right to have access to civil damages, accordingly '[*e]ach State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation*'.[8] The Convention highlights also that State Parties shall ensure that responsible legal persons are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary ones.[9]

Thus, the UNCAC may represent a model of reference for the drafting of a perspective binding treaty, since States will commit themselves to putting into practice and applying laws to establish criminal, civil or administrative liability when wrongful acts are committed and, in this way, this model might accommodate the different domestic approaches. The UNCAC sets up frameworks, whereby nations should create sanctions for corrupt acts, and institutions designed to prevent and prosecute such acts. Since national implementation is the critical element, States relied on the existence of State practice as a means of understanding what could be achieved through a treaty, and in what way it was possible to bind corporations through such a mechanism.

However, a single approach will not be enough, since the provision included in the UN Convention against Corruption do not provide for any solutions to overcome the above-identified obstacles that victims may have to face when trying to access courts. Thus, it is at

[7] United Nations Office on Drugs and Crimes, United Nations Convention against Corruption (UNCAC), entered into force 14 December 2005, Article 26.
[8] Ibid., Article 35.
[9] Ibid., Article 26(4).

this point that the prospective binding treaty might include in its text some provisions built on the Sofia Guidelines, some provisions establishing the *forum necessitatis* and some provisions allowing to pierce the corporate veil concerning the business entities duty of care, which all together offer some solutions to those obstacles identified.

In conclusion, the prospective legally binding treaty could require States Parties to ensure the effective implementation of their obligations under international and regional human right treaties and grant to everyone access to a court, as well as an effective remedy before a national authority, including where such violation arises from business activity. States Parties would also be required to apply legislative or other measures, including civil, criminal and administrative measures, to ensure that human rights abuses caused by business enterprises within their jurisdiction give rise to civil or criminal liability under their respective laws. While the doctrine of *forum non conveniens* should not be applied in these cases, States Parties should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against business enterprises even when they are not domiciled within their jurisdiction, if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the member State concerned.

Lastly, as noted among others by Ruggie, probably a smart mix of measures would be the best solution: not only judicial mechanisms but also non-judicial grievance measures and not civil law measures, but also criminal law ones: the prospective legally binding treaty should set up 'a mutually reinforcing regime that provides for a vibrant relationship between different adjudicative mechanisms and levels of remedy at both the domestic and international level'.[10]

[10] Global Rights Compliance LLP (2015) 16.

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