TOWARDS A LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

Olivier De Schutter

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Institute for Interdisciplinary Research in Legal sciences (JUR-I)
Centre for Philosophy of Law (CPDR)

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The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), a research centre located in the Institute for Interdisciplinary research in legal science (JUR-I) of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

ABSTRACT

This paper examines key options for the negotiation of a new "internationally legally binding instrument on Transnational Corporations (TNCs) and Other Business Enterprises with respect to human rights", in accordance with the terms of resolution 26/9 of the UN Human Rights Council adopted in June 2014. It first recalls the historical background of the debate (Part II). It then reviews four options for the negotiation of such an instrument (Part III). The first option is for the new instrument to define in greater detail the content of the States' duty to protect human rights by regulating transnational corporations. A new instrument could usefully clarify certain implications of this obligation of States concerning extraterritorial obligations, the parent-subsidiary and business (contractual) relationship and the right of victims to have access to justice. The second option is for the new legally binding instrument to take the form of a Framework Convention on Business and Human Rights, imposing on States to adopt national action plans or strategies on business and human rights, and to report on the progress made in this regard.

These first two first options essentially aim to strengthen the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011, by transforming the recommendations they contain into binding legal obligations. In contrast, the third and fourth options appear more ambitious. Yet, they too build on existing precedents in international law. The third option would be to directly address corporate behaviour, beyond what is already achieved in this regard through the Special Procedures of the Human Rights Council (including the Working Group on Business and Human Rights). This could be done by providing that States bound under the new instrument accept that the corporations operating under their jurisdiction can be attributed human rights wrongs where the domestic remedies available to victims have proven insufficient to remedy such harms. It could also be achieved by providing that corporations under the jurisdiction of the State concerned can be prosecuted for serious human rights violations or violations of humanitarian law amounting to international crimes, where national jurisdictions have failed to address such international crimes.

Finally, the fourth option is that of a new instrument on business and human rights that would provide for legal mutual assistance between States. One major source of impunity for transnational corporations which commit human rights violations is that the States concerned generally do not lend themselves such assistance, for instance in order to take evidence, to perform searches and seizures, to freeze or to recover assets following a judgment favorable to the victims. An instrument focused on legal mutual assistance would aim to fill this gap. Such an instrument would have a strong added value. It would also seem to have the support of a wide range of States, from the different regional groups. It would present the advantage of being easy to defend on the ground that the transnational nature of the activity of corporations poses specific challenges that this instrument would seek to address.

These four options are not necessarily mutually exclusive. Any internationally legally binding instrument in the area of business and human rights could contain elements of each. Part IV of the paper concludes by illustrating which combination of these various items could achieve the best balance between the need to improve the protection of victims, and the need to move towards proposals that are politically achievable.

Towards a Legally Binding Instrument on Business and Human Rights

Olivier De Schutter[*]

I. Introduction

On 26 June 2014, the Human Rights Council adopted a resolution calling for the establishment of an Intergovernmental Working Group (IGWG) "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[1] The resolution was tabled by Ecuador and South Africa, and it was co-sponsored by Bolivia, Cuba and Venezuela. Though strongly supported by an impressive coalition of civil society organizations who formed a "Treaty Alliance" in support of a binding treaty[2] and although it gained support from a plurality within the Human Rights Council, the proposal was highly divisive: within the 47-members large Human Rights Council, it was supported by 20 Member States[3] and opposed by 14 States, including the United States and the Member States of the European Union[4]; 13 Member States of the HRC abstained.[5] The EU announced they would not take part in the work of the IGWG. The vote shed light on strong inter-regional differences: whereas nine Members of the African Group within the Council voted in favour of the resolution (with three other African States abstaining), the Latin American Group was split: apart from the sponsors, all its Members, including Argentina and Brazil, abstained.

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

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[*] Professor at the University of Louvain (UCL) and at Sciences Po (Paris); former United Nations Special Rapporteur on the right to food (2008-2014); and Member of the Committee on Economic, Social and Cultural Rights. The positions taken in this article reflect the personal opinions of the author and should not be construed as representing the views of the Committee. A compact version of this study was published in the first issue of the *Business and Human Rights Journal* (Cambridge Univ. Press, 2015).

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

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

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

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

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

[6] UN doc. A/HRC/26/L.1/Rev.1.

[7] Id., par. 3.

[8] Id., par. 8.

This paper assesses the prospects of a new, legally binding instrument on business and human rights.[9] It argues that the gap between the States supporting the proposal by Ecuador and South Africa and the other States — including all industrialized countries members of the OECD club — is less wide than the voting patterns seem to suggest. The suspicion towards the Ecuador-South Africa proposal is in fact largely a matter of perception, to be explained by the connotation attached to the initiative. Many see this proposal as an attempt to reopen a battle fought during the 1970s, when the regulation of transnational corporations was a major component of the attempts to establish a "New International Economic Order", or as a resurrection of the proposal made in 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights for the adoption of a set of Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises.[10] These attempts are briefly discussed below, in Part II of this paper. They failed due both to the resistance of the business community and of capital-exporting countries, and to a certain naïveté in transposing to corporations norms designed to be addressed to States. By re-examining the reasons why these proposals failed, we can hope to improve our understanding as to what may now, perhaps, have a better chance of succeeding.

Following this historical section (Part II), this paper examines four options for the negotiation of a new "internationally legally binding instrument on Transnational Corporations (TNCs) and Other Business Enterprises with respect to human rights", in accordance with the terms of resolution 26/9 of the UN Human Rights Council (Part III). The first option is for the new instrument to define in greater detail the content of the States' duty to protect human rights by regulating transtionational corporations. The duty of States to protect human rights from the impacts of corporate conduct is well established under international human rights law, and it extends to a duty to regulate all corporate entities over which the State may exercise jurisdiction in accordance with international law. However, such a duty is still imprecise in certain respects. A new instrument could usefully clarify certain implications of this obligation of States concerning extraterritorial obligations, the parent-subsidiary and business (contractual) relationship and the right of victims to have access to justice. This first option, thus, would essentially consist in a restatement of existing international human rights law, though including a dimension of "progressive development".[11]

The second option is for the new legally binding instrument to take the form of a Framework Convention on Business and Human Rights. Such a framework instrument would impose on States to adopt national action plans or strategies on business and human rights, and to report on the progress made in this regard. This would be attractive to States insofar as it would appear as a mere consolidation of the *acquis* of the Guiding Principles on Business and Human Rights endorsed in 2011. For this very reason however, the added value of this approach as compared to the already existing mechanisms is rather minimal.

The third option would be to directly address corporate behaviour, beyond what is already achieved in this regard through the Special Procedures of the Human Rights Council (including the Working Group on Business and Human Rights[12]). This could be done by providing that States bound under the new instrument accept that the corporations operating under their jurisdiction can be attributed human rights wrongs where the domestic remedies available to victims have proven insufficient to remedy such harms (scenario 1, inspired by the proposal for a World Court for Human Rights). It could also be achieved by providing that corporations under the jurisdiction of the State concerned can be prosecuted for serious

[9] It builds on previous contributions of this author, including 'Sovereignty-plus in the Era of Interdependence : Towards an International Convention on Combating Human Rights Violations by Transnational Corporations', in: P. Bekker, R. Dolzer and M. Waibel (eds), *Making Transnational Law work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge: Cambridge University Press, 2010) 245-284; and 'La responsabilité des Etats dans le contrôle des sociétés transnationales : vers une Convention internationale sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales', in: Isabelle Daugareilh (ed.), *La responsabilité sociale des entreprises* (Bruxelles: Bruylant, 2011) 707-777.
[10] The Sub-Commission on Human Rights (as it was colloquially known) was a body of 26 independent experts advising the UN Commission on Human Rights, the intergovernmental body to which the Human Rights Council succeeded in 2007.
[11] On the distinction between "progressive development" and "codification", see below, note 67.
[12] The Working Group on the issue of transnational corporations and other business enterprises and human rights, a body composed of five independent experts appointed by the Human Rights Council, was established by resolution 17/4 adopted by the UN Human Rights Council in June 2011. Its mandate was extended in June 2014 by resolution 26/22 for another three years, for the period 2014-2017.

human rights violations or violations of humanitarian law amounting to international crimes, where national jurisdictions have failed to address such international crimes (scenario 2, inspired by the precedent set by international criminal jurisdictions). Both of these options can be defended, but they pose serious conceptual problems linked to the scope of the definition of "serious" human rights violations (unless they are limited to violations of international humanitarian law); to the role of the notion of "complicity" in this context; and more generally, to the definition of the respective responsibilities of corporate actors and States in situations where the conduct of the corporation that causes the violation was made possible by the failure of the State to adequately prevent such conduct, a failure that may indicate a violation of the State's duty to protect. In addition, considering the significant reluctance of States to move towards the establish of new mechanisms of the kind envisaged under these scenarios, this option does not appear the most realistic politically.

Finally, the fourth option is that of a new instrument on business and human rights that would provide for legal mutual assistance between States. One major source of impunity for transnational corporations which commit human rights violations is that the States concerned generally do not lend themselves such assistance, for instance in order to take evidence, to perform searches and seizures, to freeze or to recover assets following a judgment favorable to the victims. An instrument focused on legal mutual assistance would aim to fill this gap. Such an instrument would have a strong added value. It would also seem to have the support of a wide range of States, from the different regional groups. It would present the advantage of being easy to defend on the ground that the transnational nature of the activity of corporations poses specific challenges, that this instrument would seek to address.

By contrasting the options in this form, this paper seeks to help to guide the discussion on the framework to be established, without being trapped into the models inherited from the past. These four options are not necessarily mutually exclusive, however. Any internationally legally binding instrument in the area of business and human rights could contain elements of each. Part IV of this paper offers a brief conclusion illustrating which combination of these various items could achieve the best balance between the need to improve the protection of victims, and the need to move towards proposals that are politically achievable.

II. The Debate on Human Rights Duties of Transnational Corporations: A Brief History

1. Regulating Transnational Corporations as part of the New International Economic Order Agenda

The debate on the question of the human rights responsibilities of companies is hardly new. The insistence on an improved control of the activities of transnational corporations accompanied the vindication of a 'New International Economic Order' in the early 1970s, which the recently decolonized States pushed forward during that period.[13] A draft Code of Conduct on Transnational Corporations[14] was even prepared until 1992 within the UN Commission on Transnational Corporations, established as a follow-up to a report prepared by a group of experts upon the request of the Economic and Social Council.[15] The UN Draft Code of Conduct provided, *inter alia*, that "Transnational Corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational

[13] See the resolutions adopted by the General Assembly of the United Nations on 1 May 1974, calling for a New International Economic Order (UN doc. A/Res/3202 (*Programme of Action on the Establishment of a New International Economic Order*), and A/Res/3201 (S-VI) (*Declaration on the Establishment of a New International Economic Order*)). These resolutions were adopted by consensus. They were followed upon, in particular, by GA Res. 3281(XXIX) of 15 January 1975, UN GAOR Supp. (No. 31), UN Doc. A/9631 (1975), The *Charter of Economic Rights and Duties of States* (reproduced in 14 ILM (1975) 251-265), adopted by 120 votes in favor, 6 votes against, and 10 abstentions.

[14] UN doc. E/1990/94, 12 June 1990.

[15] Ecosoc Res. 1974/1721 of 24 May 1974 ; *The Impact of Multinational Corporations on the Development Process and on International Relations, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations*, UN doc. E/5500/Rev.1/Add 1 (1974).

Corporations shall conform to government policies designed to extend equality of opportunity and treatment".

The Draft Code failed to be adopted because of major disagreements between industrialized and developing countries, in particular, on the reference to international law and on the inclusion in the Code of standards of treatment for TNCs:[16] while the industrialized countries were in favor of a Code protecting TNCs from discriminatory treatment or other behavior of host States which would be in violation of certain minimum standards, the developing States primarily sought to ensure that TNCs would be better regulated, and in particular that they would be prohibited from interfering either with political independence of the investment-receiving States or with their nationally defined economic objectives. A compromise solution was found on these differing expectations in 1980, when in was agreed that the Draft Code would comprise two parts, one regulating the activities of TNCs, and the other relating to the treatment to be enjoyed by TNCs.[17] The conflicting views about what each of those parts should contain ultimately proved insuperable, however. The question of the nationalization of assets of foreign investors was particularly contentious.[18] Nationalization was seen by developing countries as a means through which they could assert their newly proclaimed sovereignty over national resources proclaimed both under the human rights covenants adopted in 1966 and under the resolutions adopted by the UN General Assembly as part of the New International Economic Order.[19] But industrialized countries and the G-77 — also called the "non-aligned" countries — could agree neither on the conditions under which such expropriation could be allowed to take place, nor on the remedies to be made available to the investors, nor on the levels of compensation to be granted.[20]

By the time when, in 1992, the work on the establishment of a Code of Conduct on Transnational Corporations was formally abandoned, the political momentum for such an advance had long been lost. Following his appointment by President Carter as the Chair of the United States Federal Reserve Board on 6 August 1979, Paul Volcker decided to combat inflation by sharply raising short-term interest rates from about 10 percent to 15 and later above 20 percent. The developing countries which, during the 1970s, has been encouraged to borrow heavily at interest rates they believed would remain at very low levels — massive liquidities were available to Western banks following the inflow of "petrodollars" from oil-producing countries —, were suddenly caught in the debt trap. Many of them were forced to renegotiate their debts, and to accept the adoption of strict conditionalities, in the form of structural adjustment programmes, as a condition for the receipt of further loans. The debt crisis, spectacularly illustrated by the announcement by Mexico, in the summer of 1982, that it would not be able to repay its debts, put developing countries on the defensive. Not even a decade after they had hoped to reshape international economic relations with a view to making them more equitable, they were forced backed into orthodoxy and even to a subservient position in the world economy.[21]

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[16] See the Report by the Secretary General, *The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/1996/12, 2 July 1996, para. 61-62. See also on this attempt S.K.B. Assante, 'United Nations: International Regulation of Transnational Corporations', 13 *J. World Trade Law* (1979), p. 55; W. Spröte, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations', 33 *German Yearbook of International Law* 331 (1990); P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000, pp. 97-117; N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Antwerpen-Oxford-New York: Intersentia, 2002) 119-124.

[17] P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD', at 100 (referring to Ecosoc Res. 1980/60 of 24 July 1980).

[18] A. Akinsanya, *The Expropriation of Multinational Property in the Third World* (New York: Praeger, 1980).

[19] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, entered into force on 3 January 1976, 999 UNTS 3 (6 ILM 360 (1967)), Art. 1(2) (referring to the right of peoples to "freely dispose of their natural wealth and resources"); International Covenant on Civil and Political Rights, New York, 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171 (6 ILM 368 (1967)), Art. 1(2) (same).

[20] A.A. Fatouros, "Towards an international agreement on foreign direct investment?", In: *OECD Documents, Towards Multilateral Investment Rules* (Paris: OECD, 1996), 48.

[21] This is of course a necessarily oversimplifying summary of a long and complex development. For a powerful description, see J.A. Frieden, *Global Capitalism. Its Fall and Rise in the Twentieth Century* (New York and London: W.W. Norton & Co., 2006), 372-378. It is in fact misleading to oppose the quest for a "new international economic order" to the imposition of

It is only following two decades of accelerated economic globalization that the fight against the impunity of transnational corporations for human rights abuses was given a new impetus. In the late 1990s, the calls from transnational civil society for a more humane globalization had become too loud to ignore. Civil society groups had strongly mobilized against the attempt within the OECD, launched in 1995, to adopt a Multilateral Agreement on Investment (MAI), one of the objectives of which was to strengthen and harmonize the protection of investors' rights across industrialized countries : their mobilization led the project to be finally dropped in late 1998.[22] Less than a year later, civil society again expressed its capacity to mobilize — and to effectively disrupt intergovernmental negotiations — at the WTO Ministerial Summit held in Seattle in November 1999. Against the background of these events, the *Economist* could ask whether we were heading towards a "Non-Governmental Order"[23]: clearly, if globalization was to make further progress, it would have to be made more responsive to these strong calls from global public opinion.

2. The United Nations Global Compact

The reaction came in two forms. A first initiative was announced by the United Nations Secretary-General K. Annan at the end of 1999. Using the tribune of the Davos World Economic Forum, the Secretary-General proposed to the world of business a Global Compact based on shared values in the areas of human rights, labour, and the environment ; anti-corruption was added to the list in 2004. The ten principles to which participants in the Global Compact pledge to adhere to are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. The two first principles relate to human rights, and they are captured in just one sentence : 'Businesses should support and respect the protection of internationally proclaimed human rights' (Principle 1) and they should 'make sure that they are not complicit in human rights abuses' (Principle 2).

The Global Compact process is voluntary. It is based on the idea that good practices should be rewarded by being publicized, and that they should be shared in order to promote a mutual learning among businesses[24]. The companies acceding to the Global Compact are expected to 'embrace, support and enact, within their sphere of influence', the ten (initially nine) principles on which it is based, and they are to report annually on the initiatives they had taken to make those principles part of their operations, in the form of "Communications on Progress". Initially, the Global Compact did not include any mechanism to verify compliance by the participating companies with the values that they pledged to uphold. NGOs were therefore quick at denouncing the risks of "blue-washing". The United Nations Joint

disciplines on developing countries in order to favor their inclusion in the international economic system: when, in 1963, Raúl Prebisch initially used the expression "new international economic order" at the first conference of the United Nations Conference on Trade and Development (UNCTAD I), he explicitly linked the establishment of such a "new order" to a strong "discipline of development" within the developing countries. "This policy", he wrote of the global strategy to restructure the world economic order, "makes it absolutely necessary for developing countries to undertake a series of internal transformations of their structures and attitudes where this has not already been done. It also requires them to adhere to the reasonable discipline of a development plan, to spur reciprocal trade by means of regional and sub-regional groupings aimed at economic integration, and to promote inter-regional measures for the expansion of trade" (cited by E.J. Dosman, *The Life and Times of Raúl Prebisch 1901-1986* (Montréal and Kingston, London, Ithaca: McGill-Queen's University Press, 2008), at 429).

[22] See, among many similar statements adopted by NGOs, *Over 600 International Organisations opposing the MAI 1998: Joint NGO statement*, drafted 27 October 1997, updated 11 February 1998. For a study of why the negotiations within the OECD on a MAI failed, see E. Neumayer, "Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations", *Wirtschaftspolitische Blätter*, vol. 46(6) (1999) 618-628.

[23] "The Non-Governmental Order: Will NGOs Democratise, or Merely Disrupt, Global Governance ?", *The Economist*, 11 Dec. 1999, 18-19.

[24] As stated initially on the website of the Global Compact (www.unglobalcompact.org, consulted on 15 Jan. 2004) : 'The Global Compact is a purely voluntary initiative. It does not police or enforce the behavior or actions of companies. Rather, it is designed to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships'. On this conception, see also John G. Ruggie, 'global_governance.net: The Global Compact as Learning Network', *Global Governance* 7(2001), 371-378. (John Ruggie was one of the main architects of the process.)

Inspection Unit itself, the independent external oversight body of the United Nations system,[25] concluded in 2010 that "the absence of adequate entry criteria and an effective monitoring system to measure actual implementation of the principles by participants has drawn some criticism and reputational risk for the Organization ... Ten years after its creation, despite the intense activity carried out by the [UN Global Compact] Office and the increasing resources received, results are mixed and risks unmitigated".[26] The scheme has been strengthened since[27] ; but its beginnings were weak indeed.

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

The second initiative come from the independent experts of the UN Sub-Commission for the Promotion and Protection of Human Rights. Following a wide consultation of all relevant stakeholders including in particular the business community, the Sub-Commission approved in Resolution 2003/16 of 14 August 2003, the set of 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises'.[28] The draft Norms were ostensibly presented as a restatement of the human rights obligations imposed on companies under international law. At the heart of the 'Norms' — this denomination was preferred, at the very last minute, the the vaguer expression of 'Principles' —, lies the idea of a division of labour between States and companies. "[E]ven though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights", the Preamble stipulated, "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights", and therefore "transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments".[29] Principle 1 of the draft Norms reflected their overall approach of the scope of the human rights obligations of companies:

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[25] The Joint Inspection Unit was established as a body of independent inspectors to perform inspections and evaluations "aimed at improving management and methods and at achieving greater co-ordination between organizations", as well as ensuring "that the activities undertaken by the organizations are carried out in the most economical manner and that the optimum use is made of resources available for carrying out these activities" (art. 5, par. 2 and 3, of the Statute of the Joint Inspection Unit, approved by General Assembly resolution 31/192 of 22 December 1976).

[26] *United Nations corporate partnerships: The role and functioning of the Global Compact*, prepared by Papa Louis Fall and Mohamed Mounir Zahran, Joint Inspection Unit (JIU) report 2010/9, Geneva, 2010, at iii (available at: https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf (last consulted on 15 July 2015)).

[27] Companies participating in the Global Compact who do not communicate progress for two successive years are expelled and the UN Global Compact, and their name is made public, which can involve significant reputational costs. Moreover, measures have adopted to ensure the integrity of the Global Compact. In brief, if the Global Compact Office receives an allegation of systematic or egregious abuse by a participating company and considers that the allegation is not frivolous, it will seek explanations from the company concerned and assist it in the adoption of measures that would ensure that its conduct is aligned with the principles of the Global Compact. If the company fails to cooperate, it can be considered as "non-communicating". Moreover, it can be de-listed from the participating companies if, "based on the review of the nature of the compliant (*sic*; read: complaint) submitted and the responses by the participating company, the continued listing of the participating company on the Global Compact website is considered to be detrimental to the reputation and integrity of the Global Compact"; the decision to "de-list" a company is indicates on the Global Compact website (United Nations Global Compact, *Note on Integrity Measures*, last updated 12 April 2010, available from the website of the Global Compact: https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.PDF (last consulted on 15 July 2015)). Whereas the Note emphasizes that the Global Compact is not equipped to monitor participating companies' performance, nor to have such intention, these measures are justified by the need to preserve the integrity of the Global Compact.

[28] UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, which the Preamble of the draft Norms states is 'a useful interpretation and elaboration of the standards contained in the Norms', UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). On the drafting process of these draft Norms and a comparison with previous attempts of a similar nature, see David Weissbrodt & Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *American Journal of International Law* 901 (2003) ; David Weissbrodt & Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors', in Ph. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 315-350.

[29] Preamble, 3d and 4th Recital.

> States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. *Within their respective spheres of activity and influence*, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups. (emphasis added).

The notion of 'sphere of influence' carried therefore much of the burden in delineating the scope of the companies' duties and the respective roles of government and business. The notion was not entirely new when put forward by the experts of the Sub-Commission on Human Rights: indeed, it was already relied on at the time by the Global Compact. It was, however, and it remains to this day, a relatively vague notion, and is best understood as a compromise between two ideas : on the one hand, companies are not to be equated to the States in which they operate, which are primarily responsible for the provision of public services such as health or education, and for the maintenance of law and order; on the other hand, the more companies are powerful, the more it will be justified to impose on them to exercise leverage on their business partners or on the host government to ensure that they, too, comply with the set of internationally recognized human rights. How then can the notion be made operational? Previous versions of the Global Compact website attempted to provide an explanation.[30] But the clarification was not particularly helpful. It stated that the concept, although 'not defined in detail by international human rights standards, ... will tend to include individuals to whom the company has a certain political, contractual, economic or geographic proximity. Every company, both large and small, has a sphere of influence, though obviously the larger and more strategically significant the company, the larger the company's sphere of influence is likely to be'.[31]

As to the Commentary to the draft Norms – adopted by the UN Sub-Commission on Human Rights along with the draft Norms themselves, and which provide an authoritative explanation of their content –, it stated :

> Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware. Transnational corporations and other business enterprises shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses.

But the question of how to define the "sphere of influence" of companies, and therefore the scope of their human rights duties, was only one of the many issues raised by the presentation of the draft Norms. Indeed, the diplomats of the Commission on Human Rights reacted with a mix of suspicion and hostility to the suggestion of the Sub-Commission. The document, they noted, has not been requested from the independent experts; hence, "as a draft proposal, [it] has no legal standing, and [...] the Sub-Commission should not perform any monitoring function in this regard".[32] As a way to politely dismiss the document without entirely removing the issue from the discussions, the Commission recommended that the Economic and Social Council request a further report from the Office of the High Commissioner for Human Rights. That study was prepared between May 2004 and early 2005. According to the terms of the UN Commission on Human Rights decision 2004/116, its purpose was to set out 'the scope and legal

[30] The current version of the website of the UN Global Compact (www.unglobalcompact.org, last visited on 15 July 2015) does not appear to refer to the notion of "sphere of influence" anymore, although the notion is still occasionally referred to in the Communications on Progress (CoPs) filed by the participating companies.
[31] www.unglobalcompact.org
[32] Commission on Human Rights, Res. 2004/116, *Responsibilities of transnational corporations and related business enterprises with regard to human rights*, adopted on 20 April 2004 at the 56th session of the Commission.

status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the [draft Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises] and, identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, (...) and to submit the report to the Commission at its sixty-first session [March-April 2005] in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation'.

The report prepared by the Office of the High Commissioner for Human Rights identified a number of arguments put forward either by employers or by States against the draft Norms.[33] In particular, stakeholders critical of the Norms asserted, these Norms would represent 'a major shift away from voluntary adherence by business to international human rights standards and the need for this shift has not been demonstrated'; indeed, they added, 'the binding approach adopted in the draft Norms could also be counter-productive, drawing away from voluntary efforts and focusing on the implementation of only bare minimum standards'.[34] Moreover, the imposition of legal responsibilities on business could 'shift the obligations to protect human rights from Governments to the private sector and provide a diversion for States to avoid their own responsibilities'. Finally, by seeking to impose on businesses to 'promote, secure the fulfilment of, respect, ensure respect of and protect human rights', they would be misstating international law, as 'only States have legal obligations under the international human rights law'.

These critiques challenged the very approach of the Sub-Commission on Human Rights in adopting the draft Norms, as reflected in Principle 1 of the Norms, referred to above. They were only partially well-founded, however. The argument according to which international human rights law only imposes obligations on States fails to recognize the precedents in international criminal law of international law imposing directly obligations on private individuals : thus, even if the draft Norms may be seen as innovating, they are not moving into entirely unchartered territory, and from the point of view at least of the principles of international law, there is nothing in their approach which may be denounced as unorthodox. There are two more important points to make in response, however. First, although the imposition of direct obligations on companies under international law was one possible outcome of the draft Norms, this was neither a necessary outcome, nor the only outcome which could be imagined. The document adopted by the Sub-Commission on Human Rights itself mentions that the Norms could encourage United Nations human rights treaty bodies to better monitor the obligations of the States parties to the treaties they apply, which – as part of their general obligation to protect human rights under their jurisdiction – already are legally obliged to control private actors whose behavior could lead to human rights violations.[35] Thus, rather than imposing direct obligations under international law on companies, the Norms could, if adopted, instead impose stricter obligations on States parties to international human rights instruments, by clarifying the extent of their obligation to protect : far from 'shift[ing] the obligations to protect human rights from Governments to the private sector and provid[ing] a diversion for States to avoid their own responsibilities', the Norms in fact could thus be seen as reinforcing the existing international obligations of States. Second – and this argument follows directly from the first –, where the critics of the draft Norms assert that these Norms misstate

[33] *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005, UN doc. E/CN.4/2005/91, esp. par. 20.

[34] This argument of the adversaries of the draft Norms is of course in contradiction with another argument put forward by some critics, which is that 'The draft Norms duplicate other initiatives and standards, particularly the OECD Guidelines for Multinational Enterprises [adopted on 21 June 1976 wihtin the Organization for Economic Cooperation and Development (OECD)] and the ILO Tripartite Declaration [Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Organisation at its 204th Session (November 1977), and revised at the 279th Session (November 2000)]' (para. 20, (i), of the *Report*). The stakeholders critical of the draft Norms obviously do not form a coherent group, nor do they have one single coherent set of arguments to present.

[35] Although Principle 16 of the Norms states, perhaps imprudently, that 'Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms', the corresponding Commentary refers (in (b)) to the mechanisms which, at United Nations level, already exist in order to monitor compliance by States with their human rights obligations, and which could seek inspiration from the Norms.

international law, as 'only States have legal obligations under the international human rights law', they entertain a confusion between the content of international law and its tools. Although traditionally international law addresses itself to the State, it is common for the State to be imposed an obligation to control private actors under its jurisdiction; in such a situation, although the law of international State responsibility constitutes the mechanism on which international law relies for its enforcement, the material object of the international norms is to impose obligations on private actors. Indeed, the direct application of international law before national jurisdictions illustrates how even rules of international law, in particular those contained in international treaties, may easily apply to private parties, provided they are sufficiently precise and may therefore be considered self-executing.

A second set of critiques addressed to the draft Norms adopted by the Sub-Commission on Human Rights was directed instead to the content of the human rights obligations they list. It is said, for instance, that the content of human rights the document is based on is inaccurate, as it refers to instruments whose statuses and levels of ratification vary widely. This argument is closely related to another argument according to which 'the legal responsibilities on business identified in the draft Norms go beyond the standards applying to States. In particular, the wording of the draft Norms imposes duties on business to meet standards under treaties that a State in which a company was operating might not have ratified'.[36]

This critique, however, is rather paradoxical, since it serves to highlight the usefulness of defining at the universal level a set of standards applicable to corporations, in a context where the human rights obligations of States may vary widely, and where there are even more strikingly varying levels of implementation. It is striking for instance that two other major instruments that aim at strengthening the human rights responsibilities of companies, the 1976 OECD Guidelines on Multinational Enterprises and the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[37] refer, in defining the content of the human rights obligations of companies, not to the local rules or practices in the host State, but to the international commitments of the host State (in the case of the OECD Guidelines[38]) or to the relevant international standards, whatever the precise set of international instruments ratified by that State (in the case of the Tripartite Declaration[39]). In other terms, these instruments seek to compensate for the fact that the human rights record of the States in which companies operate is a mixed one: It is precisely because the commitments of States under international human rights law are variable that there is a need to define a set of standards applicable to the business community, both in order to ensure that companies will not invoke the bad human rights record of the host government in order to escape their liability for complicity in certain abuses, and in order to prevent any temptation by a government to seek out potential foreign investors at the expense of human rights under their jurisdiction.

The 2005 report of the Office of the High Commissioner for Human Rights highlights a third set of critiques, related to the implementation measures which the Norms envisage. The Norms, it is said, may be unworkable : 'The vagueness of some of the provisions in the draft Norms would make it difficult for a tribunal to adjudicate any communication that came before it and the reporting requirements in the draft Norms are burdensome'. This vagueness also results from the fact that, in the concrete implementation of the general principles contained in the draft Norms, balancing decisions would be

[36] *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, cited above, par. 20.
[37] See above, note 34.
[38] By referring to the obligation of MNEs to'respect the human rights of those affected by their activities *consistent with the host government's international obligations and commitments*' ('General Policies', par. 2), the OECD Guidelines suggest that the foreign investor should comply with any international instruments ratified by the host country, even if local regulations or local practice are not themselves in conformity with those instruments.
[39] Par. 8 of the chapter on General Policies states that: "All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices *and respect relevant international standards*" (emphasis added). This has led to the following interpretation by the ILO, under the procedure for the interpretation of the Tripartite Declaration set out below : 'There is no reasonable basis for interpreting the Declaration to permit the exemption of any party from complying with substantive safeguards under either domestic laws or international standards. This would be inconsistent with the Declaration's ultimate goal, laid out in paragraph 5, of furthering social progress. (GB.272/MNE/1 confidential, para. 21)' (Belgian Case n°2 (1997-1998)).

required, which should more appropriately be made by Governments: 'Some human rights require Governments to decide on the most appropriate form of implementation, balancing often competing interests. The democratic State is in a more appropriate position to make such decisions than companies'. In fact, this critique addressed to the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights adopted in 2003 by the UN Sub-Commission on Human Rights merely demonstrate that, in the form in which they were presented then, these Norms may not have been sufficiently clear and detailed to impose directly legal obligations on the companies to which they are addressed. But this does not invalidate current attempts to clarify those obligations and set up monitoring mechanisms which would ensure that they are effectively complied with.

4. The Guiding Principles on Business and Human Rights

The "Norms" of the Sub-Commission on Human Rights were therefore highly divisive. But they did succeed at least in putting the question of transnational corporations and human rights squarely on the agenda of the United Nations human rights community. Indeed, it is following the initiative of the Sub-Commission that the Commission on Human Rights decided to request the appointment of a Special Representative of the UN Secretary-General to identify ways through which the accountability of transnational corporations for human rights violations may be improved[40]. Professor John G. Ruggie, a professor at the John F. Kennedy School of Government of Harvard University and hitherto closely involved with the process of the UN Global Compact, was appointed Special Representative of the UN Secretary General on 28 July 2005.

The results J. Ruggie managed to obtain following six years of reports and consultations are well known.[41] In June 2011, the Human Rights Council, the successor body to the Commission on Human Rights, adopted a set of Guiding Principles on Business and Human Rights. These Guiding Principles are now seen as the most authoritative statement of the human rights duties or responsibilities of States and corporations adopted at UN level.[42] They go beyond the plethora of voluntary initiatives, often sector-specific, that existed hitherto. They have been widely endorsed, by business organizations and in intergovermental settings — including, notably, by the Organization for Economic Cooperation and Development (OECD) when it revised its Guidelines on Multinational Enterprises in 2011[43] —. They have also been invoked, albeit at times grudgingly, by civil society. And they are now subject to a follow-up mechanism within the United Nations system, through the Working Group on business and human rights and an annual forum to be held on this issue.[44]

The Guiding Principles were highly successful at cementing a consensus across various stakeholders that, in the past, were deeply divided on the issue of how best to address corporate human rights violations: here at last was a set of principles that governments from different world regions, the private sector, unions and non-governmental organizations, could all agree would bring about significant improvements for the benefit of victims, and if implemented, would align economic incentives, community expectations, and legal requirements. However, despite this consensus — or perhaps as a

[40] UN Commission on Human Rights Res. 2005/69, 'Human rights and transnational corporations and other business enterprises', adopted on 20 April 2005 by a recorded vote of 49 votes to 3, with 1 abstention (chap. XVII, E/CN.4/2005/L.10/Add.17).

[41] For a highly informative and entertaining discussion of how the work of the Special Representative developed between 2005 and 2011, see John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013).

[42] Human Rights Council Res. 17/4 (16 June 2011).

[43] The new version of the OECD Guidelines on Multinational Enterprises, initially adopted in 1976 (see above, note 34) include a chapter IV on human rights, that is based on the 'Protect, Respect and Remedy' framework introduced by J. Ruggie in 2008 (see *Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises and human rights, John Ruggie*, UN doc. A/HRC/8/5 (7 April 2008)).

[44] The Working Group on the issue of human rights and transnational corporations and other business enterprises was established by Resolution 17/4 of the Human Rights Council, at the same time that the Council endorsed the proposed Guiding Principles on Business and Human Rights.

price of achieving it —, the Guiding Principles were also seen to present some infirmities.[45] Quite apart from the obvious limitations that result from the fact that the GPs are a non-binding instrument, with only a relatively weak monitoring performed by the Working Group on Business and Human Rights, two more substantive issues in particular are worth noting.

First, there is one area where the Guiding Principles set the bar clearly below the current state of international human rights law: that concerns the extraterritorial human rights obligations of States, including, in particular, the duty of States to control the corporations they are in a position to influence, wherever such corporations operate. The Guiding Principles do provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" (Principle 2). Though this includes operations abroad, the Commentary to the Guiding Principles qualifies this principle by stating:

> At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.
>
> There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support.

In contrast to this position, the United Nations treaty bodies have repeatedly expressed the view that States should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, that have their main seat or their main place of business under their jurisdiction. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should 'prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.[46] Specifically in regard to corporations, this committee has further stated that: 'States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant'.[47] Similar views have been expressed by other human rights treaty bodies. The Committee on the Elimination of Racial Discrimination considers that State parties should also protect human rights by preventing their own citizens and companies, or national entities from violating rights in other countries.[48] Under the International Covenant on Civil and Political Rights, the Human Rights Committee noted in 2012 in a concluding observation relating to Germany:

> The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.[49]

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[45] For a more systematic discussion than can be provided here, see Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business. Beyond the Corporate Responsibilty to Respect?* (Cambridge: Cambridge Univ. Press, 2013).

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

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

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

[49] CCPR/C/DEU/CO/6, para 16.

It is noteworthy that these statements, while they confirm the views of the human rights treaty bodies that these bodies had expressed in the past, were reiterated after the endorsement by the Guiding Principles on Business and Human Rights by the Human Rights Council. In defence of the Guiding Principles, it can perhaps be said that they are not a restatement of international law: they are a tool, meant to provide practical guidance both to States and to companies, in order to ensure that all the instruments at the disposal of both to improve compliance with human rights in the activities of business shall be used to that effect. Nevertheless, by adopting such a cautious approach to the extraterritorial obligations of States, the Guiding Principles in fact may have been encouraging States reluctant to accept such obligations to challenge the interpretation of human rights treaty bodies,[50] despite the support the position of these bodies received both from legal doctrine and civil society,[51] and from the International Court of Justice itself.[52]

The second area in which the Guiding Principles could be improved concerns the positive duties imposed on corporations. The concept of "sphere of influence", though it was borrowed at the time from the Global Compact, was heavily criticized when used by the UN Sub-Commission for the Promotion and Protection of Human Rights when it set out its proposal for 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises': the concept, it will be recalled, was denounced by a number of stakeholders, by employers' organisations in particular, as too vague to be operational, and as a potential source of legal uncertainty. Indeed, this is one reason why the Commission on Human Rights, when it adopted resolution 2005/69 requesting the appointment of a Special Representative of the Secretary-General on the issue of transnational corporations and human rights, included among his tasks to "research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence"".[53] Yet, once appointed, John Ruggie soon came to realize that it was not conceivable to impose on corporations

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

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

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

[53] UN Commission on Human Rights Res. 2005/69, 'Human rights and transnational corporations and other business enterprises', cited above.

responsibilities of a purely negative nature, requiring from them that they abstain from the adoption of measures that could adversely affect human rights: such an option would create an incentive for companies to adopt a "hands-off" approach to the situations they were influencing or could be influencing, and in particular, to remain at arms length from the entities — the subsidiaries, the business partners, the suppliers or the sub-contractors — that they could encourage to act in conformity with human rights.

The way out of the impasse was to set aside the notion of "sphere of influence", but in effect to ensure that the idea of "due diligence" would fulfil the same function. The Guiding Principles on Business and Human Rights stipulate that corporations should 'act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved'.[54] Principle 15 provides:

> In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
> ...
> (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.[55]

Although it is further explained under Principle 17 of the Guiding Principles, the due diligence obligation remains unspecified in certain important respects.[56] In particular, whereas the Guiding Principles state that corporates should, as part of the due diligence component of their responsibility to respect to respect human rights, "cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships",[57] it is unclear to which extent exactly companies who own a share in another company (whether as a controlling shareholder or not), or who sub-contract part of the production process to other businesses, should accept a responsibility for the human rights impacts of the activities of such entities.[58] "Human rights due diligence" is probably a more workable concept than "sphere of influence", in particular because the latter concept takes as given that a particular corporation has a given "sphere of influence" to which its responsibility extends, when "due diligence" is more explicitly normative and does not depend on a finding of fact about the reality of the influence the corporation concerned does have. Nevertheless, until such ambiguities are addressed, "due diligence" will remain relatively elusive, and may not escape the very vagueness that led its predecessor to be so harshly criticized.

* * *

It is against the background outlined above that the proposal to move towards a legally binding instrument on business and human rights should be assessed. The brief history sketched in the preceding section matters for two reasons. First, it allows us to understand better what has been achieved, and what are the stumbling blocks that could make further progress difficult. It is important to realize, in particular, that the Guiding Principles on Business and Human Rights, while highly successful in their ability to gather a consensus, were perceived by a number of States, and by significant segments of civil society, as only a first step towards a stronger (i.e., binding) approach. As aptly recalled by the

[54] A/HRC/17/31, para. 6.
[55] Ibid. Principles 17-21 elaborate further on the content of the due diligence requirement.
[56] This is one reason why civil society organizations commissioned experts to clarify the content of the obligation and to unpack its operational consequences: see *Human Rights Due Diligence: The Role of States* (authored by O. De Schutter, A. Ramasastry, M.B. Taylor and R.C. Thompson) (International Corporate Accountability Roundtable, European Coalition for Corporate Justice and Canadian Network on Corporate Accountability, December 2012).
[57] *Guiding Principles on Business and Human Rights*, Principle 17, (a).
[58] Nor do other instruments provide much guidance on this question. For instance, the OECD Guidelines on Multinational Enterprises, following their revision in 2011 to insert a human rights chapter (chapter IV) (see above, note 43), include in their definition of the responsibility of business enterprises to respect human rights, that they should "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts".

International Commission of Jurists, the resolutions adopted by the Human Rights Council when it initially approved the Framework Protect, Respect, Remedy in June 2008, and when it adopted the Guiding Principles in June 2011, both acknowledge in their respective Preambles that "efforts to bridge governance gaps at the national, regional and international levels are necessary"; Resolution 17/4, which endorses the Guiding Principles on Business and Human Rights, notes that these Principles were adopted without prejudice to "any future initiatives, such as a relevant, comprehensive international framework".[59]

Secondly, taking this long-term historical perspective allows us to replace the discussions on the regulation of transnational corporations under international human rights law in the broader North-South debate of which they were initially part: only by recalling this context can we understand that the proposal by Ecuador and South Africa for a new legally binding instrument in the area of business and human rights was seen by many as an attempt to revive dividing lines between industrialized countries and developing nations that were becoming less salient since the end of the Cold War. It is of course striking that the rhetorics opposing the interests of developing countries to that of industrialized countries (the former being interested in taming corporations dominated by interests from the latter), a legacy of the New International Economic Order era, corresponds less and less to the reality of investment flows: the most recent data available, concerning the years 2012-2013, indicate that developing and transition economies accounted for 39 per cent of total foreign direct investment (FDI) outflows, compared with only 12 per cent in the early 2000s. Though Africa remains significantly lagging behind, FDI outflows from developing countries as a whole represented 454 billion USD, almost a third of total FDI outflows[60]; and among the twenty top investors in the world in 2013, we find countries such as China (ranked third), the Republic of Korea or Singapore.[61] The old division of roles according to which industrial countries are "capital-exporting" and the developing and emerging countries "capital-importing" simply does not correspond to current geopolitical trends anymore.

III. Options for a Legally Binding Instrument on Business and Human Rights

The following sections review a range of options for a legally binding instrument on business and human rights. Four options are explored. The two first options — to clarify the scope of the States' duty to protect human rights and to oblige States to present national action plans on business and human rights, demonstrating their progress in improving accountability and in aligning economic and policy incentives with legal requirements — essentially aim to strengthen the Guiding Principles on Business and Human Rights, by transforming the recommendations they contain into binding legal obligations. The third and fourth options would aim, respectively, at establishing a new mechanism to monitor compliance of corporate actors with human rights obligations, or to provide for duties of mutual legal assistance in order to ensure adequate access to effective remedies for victims. Although these options are more ambitious, they too build on existing precedents in international law.

1. Strengthening the duty of the State to protect human rights

The duty of the State to protect human rights by regulating the behavior of private (non-State) actors is for the most part well understood, and it now belongs to the acquis of international human rights law.[62] Under the International Covenant on Civil and Political Rights, the Human Rights Committee takes the

[59] International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights* (Geneva, June 2014), at 5. Resolution 17/4 also states that adoption of the Guiding Principles do "not foreclose any other long-term development, including further enhancement of standards" (OP3), and requests the new Working Group on Business and Human Rights to: "continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas...." (OP6(e)).

[60] Africa contributed only 12 billion USD of this total, however (0.9 per cent of total FDI outflows); Asia and Latin America and the Carribean accounted for 326 billion USD and 115 billion USD respectively (23.1 and 8.1 per cent).

[61] These figures are from the *World Investment Report 2014. Investing in the SDGs: An Action Plan* (United Nations Conference on Trade and Development (UNCTAD), xiii-xv.

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

view that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities".[63] This is also the position adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights.[64] Regional human rights courts or expert bodies under regional human rights instruments have routinely affirmed that the responsibility of the State may be engaged as a result of its failure to appropriately regulate the conduct of private persons.[65]

The principle is that States are expected to take all measures that could reasonably be taken, in accordance with international law, in order to prevent private actors from adopting conduct that may lead to human rights violations. The international responsibility of the State shall be engaged where such violations do occur which the State could have prevented without this imposing on the State an unreasonable burden. The duty to protect includes a duty to provide access to remedies where a violation did take place (i.e., the preventive measures failed or were insufficient). Thus, the duty to protect corresponds to the first and (in part) third pillar of the framework developed by the Guiding Principles on Business and Human Rights.[66] What would be the value of an instrument contributing to the progressive development[67] of international law, by clarifying the scope of the duty of the States to

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

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

[65] See under the European Convention on Human Rights, European Court of Human Rights (plenary), *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A, No. 44, para. 49, or European Court of Human Rights, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A, No. 91, para. 27 ; under the European Social Charter of the Council of Europe, European Committee of Social Rights, complaint n° 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 October 2005, para. 14 ('the state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator'); under the American Convention on Human Rights, see Inter-American Court of Human Rights, Case of *Velásquez-Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Series C No. 4, para. 172 ('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'); under the African Charter of Human and Peoples' Rights, see African Commission on Human and Peoples' Rights, application 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report of the ACHPR (1995-96); 4 IHRR 94 (1997) ('The Charter specifies in Article 1 that the states parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also ''undertake . . . measures to give effect to them''.' In other words, if a state neglects to ensure the rights in the African Charter, this may constitute a violation, even if the State or its agents are not the immediate cause of the violation'), or African Commission on Human and Peoples' Rights, application 55/96, *SERAC and CESR v Nigeria*, 15th Annual Activity Report of the ACHPR (2002), para. 46 ('the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms').

[66] See especially Principles 1-10 and 25-27, as well as Principle 31.

[67] The term "progressive development" should be preferred here to the term of "codification". Article 13, par. 1 of the UN Charter seems to distinguish between the "progressive development" of international law and its "codification", as it provides that the General Assembly "shall initiate studies and make recommendations for the purpose of: a. … encouraging the progressive development of international law and its codification". In order to implement this provision, General Assembly adopted resolution 94(I) ("Progressive development of international law and its codification") on 11 December 1946, establishing a Committee on the Progressive Development of International Law and its Codification. This Committee in turn recommended the creation of the International Law Commission (ILC), which was formally established by the General Assembly through resolution 174 (II) of 21 November 1947. The Statute of the International Law Commission (adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981) tasks the ILC with "the promotion of the progressive development of international law and its codification" (Art. 1 par. 1). Article 15 of the Statute of the ILC makes a distinction "for convenience" between progressive development as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in

protect human rights in situations where the harms have their source in the conduct of corporations? The following sections describe the gains that could result from such an attempt.

a) An extraterritorial duty to regulate corporations

We have seen that the weak formulation chosen in the Guiding Principles as regards the extraterritorial implications of the duty to protect may have introduced some confusion in this regard, and may even been seen as a step backwards. A legally binding instrument that would clarify the content of the State's duty to protect human rights could be explicit about the extraterritorial reach of this duty, in order to dispel such confusion.[68] This would essentially consist in imposing on the State concerned a duty to protect human rights by regulating the corporations over which the State may exercise influence, by any means compatible with international law.

The competence of the State to regulate the conduct of its nationals abroad is well established under international law, which refers in this regard to the principle of active personality.[69] The implication is that a State could be imposed a duty to protect as regards corporations that are registered under its laws, or that have their principal place of business under the State's jurisdiction, or that have located their central place of administration on the State's territory. In the absence of any particular mode of determination of the nationality under international law, there is of course a risk that the modes of determination of the nationality of the corporation will be manipulated in order to allow a State, relying on the principle of active personality, to extend its jurisdiction to extraterritorial situations – including acts adopted by companies incorporated abroad – which it might otherwise be prohibited under international law to reach.[70] However, the criteria listed above are generally accepted, denoting a sufficiently effective link between the State and the corporation to justify the exercise of State jurisdiction.

The main difficulty in this regard concerns the organisation of the multinational enterprise, which typically operates in different States by being organized in different legal entities, incorporated under the laws of different States, and linked by an investment nexus. Doubts have sometimes been expressed as to whether it should be considered allowable for States to seek to regulate the conduct of legal persons incorporated under the laws of another country, but which are managed, controlled, or owned, by natural or legal persons which have the nationality of the State concerned. Should States be allowed to treat as their 'nationals' legal persons incorporated under the laws of another country, but which are thus supervised by natural or legal persons of the State concerned ? The *Barcelona Traction* Case of the International Court of Justice did seem to exclude, at least in the context of diplomatic protection, basing nationality of the corporate entity on the nationality of its shareholders. In finding that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain, the Court recalled that, in municipal law, a distinction is made between the rights of the company and those of the shareholders, and that 'the concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights'.[71]

However, this ruling does not necessarily prohibit a State from treating a company incorporated in

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the practice of States" and codification as meaning "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

[68] Specifically, such an instrument could seek inspiration from Principles 24 and 25 of the Maastricht Principles (see above, note 51) which, though developed for the area of economic, social and cultural rights, and though not focused exclusively on transnational corporations, in fact could be extended to all human rights.

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

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

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

another State but controlled by a parent company incorporated in the State seeking to exercise extraterritorial jurisdiction, as having the nationality of that State for the purposes of exercising such jurisdiction. Already in its *Barcelona Traction* judgment of 5 February 1970, the International Court of Justice noted that the veil of the company may be lifted in order to prevent the misuse of the privileges of legal personality, both in municipal and in international law.[72] Therefore, where the separation of legal personalities is used as a device by the parent company to limit the scope of its legal liability, the lifting of the veil may be justified. In addition, the recent proliferation of bilateral investment treaties under which States seek to protect their nationals as investors in foreign countries even in cases where they have set up subsidiaries under the laws of the host country, has shed further doubt on the validity of the classical rule enunciated by the *Barcelona Traction* judgment, according to which a State may not claim a legal interest in the situation of foreign companies, even where its nationals are in control.[73] The 2012 Model U.S. Bilateral Investment Treaty for instance defines as an 'investor of a Party' protected under such a treaty 'a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party', the 'investment' meaning in turn 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[74] There is no doubt that, under these definitions, investments made by U.S. nationals in a State bound by a BIT concluded with the United States are protected under the treaty, even when (and, indeed, in particular when) their investment consists in a controlling participation in a company incorporated in the host country. Similarly, under the draft Multilateral Agreement on Investment negotiated within the framework of the OECD between 1995 and 1998,[75] the investments made in each Contracting Party by investors from another Contracting Party comprised '[e]very kind of asset owned or controlled, directly or indirectly, by an investor', including, *inter alia* 'an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation)' and 'shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom'.

The practice of determining the nationality of the corporation on the basis of the nationality of its shareholders, particularly of the nationality of a controlling parent company, while not usual, is not unknown. For instance, while the practice of the United States has generally been to determine the nationality of the corporation on the basis of the company's place of incorporation,[76] it is occasionally defined by reference to the nationality of its owners, managers, or other persons deemed to be in control of its affairs. This is the case, in particular, in the tax area[77] ; but there seems to be no reason why this could not also justify the exercise of foreign direct liability regulation in other domains. It is therefore not come as a surprise if the *Third Restatement on Foreign Relations Law* of the American Law Institute

[72] Id., at 38-39.

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

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

[75] See above, note 22.

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

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

does not exclude the regulation of foreign corporations, i.e., corporations organised under the laws of a foreign State, 'on the basis that they are owned or controlled by nationals of the regulating state'.[78]

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

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

b) Overcoming the problem of the corporate veil

This approach would also help overcome a second problem that the Guiding Principles on Business and Human Rights have not satisfactorily addressed: that is the problem of the corporate veil. As noted above, the Guiding Principles include a human rights due diligence requirement as part of the corporation's responsibility to respect human rights. However, the extent to which this requirement imposes on a corporation to ensure that other corporate entities with which it has an investment link comply with human rights, remains to a certain extent unspecified. Yet, in practice, in the absence of such a duty being imposed, victims of transnational corporate human rights abuses may face important hurdles. Within the multinational corporation as a group of companies, the parent (controlling) corporation on the one hand, its (controlled) subsidiary on the other, form two distinct legal entities, each with their own juridical personalities. In addition, according to the doctrine of limited liability, the shareholders in a corporation may not be held liable for the debts of that corporation beyond the level of their investment.[79] These doctrines combined make it difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent company, before the national jurisdictions of the home State of that company. In theory, three paths may be explored in order to overcome the problem of the separation of legal entities.

The first approach : piercing the corporate veil

The classical 'piercing the corporate veil' approach requires a close examination of the factual relationship between the parent and the subsidiary in order to identify whether the nature of that relationship is not more akin to the relationship between a principal (the parent) and an agent (the subsidiary), or whether, for other motives, there are reasons to suspect that the separation of corporate

[78] *Restatement (Third) of the Foreign Relations of the United States*, cited above note 69, § 414.
[79] *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ('Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception' (citations omitted)); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ('A corporation and its stockholders are generally to be treated as separate entities').

personalities does not correspond to economic reality. Thus, in exceptional circumstances, the United States courts will allow claimants to establish that the parent company exercises such a degree of control on the operations of the subsidiary that the latter cannot be said to have any will or existence of its own,[80] and that treating the two entities as separate (and thus allowing the parent to shield itself behind its subsidiary) would sanction fraud or lead to an inequitable result.[81] In such cases, the 'piercing of the corporate veil' will be admitted, on the basis that the subsidiary has been a mere instrument in the hands of the parent company[82] or that the parent and the subsidiary are 'alter egos'.[83]

Alternatively, it may be shown that the subsidiary was acting in a particular case as the agent of the parent company.[84] This will be allowed, again in rather exceptional circumstances, where the parent company controls the subsidiary and where both parties agree that the subsidiary is acting for the agent: in such a case, 'the acts of a subsidiary acting as an agent are, from the legal point of view, the acts of its parent corporation, and it is the parent that is liable'.[85] An example is the reasoning followed in the case of *Bowoto v. Chevron Texaco*, where Judge Illston concluded that CNL, the subsidiary of Chevron in Nigeria, which allegedly had acted in concert with the Nigerian military in order to violently suppress protests against Chevron's activities in the region, could be considered as the agent of Chevron, in view in particular of the volume, content and timing of communications between Chevron and CNL, notably on the day of a protest when 'an oil platform was taken over by local people'.[86] These and other indicia showed that Chevron 'exercised more than the usual degree of direction and control which a parent exercises over its subsidiary'.[87]

In order to establish either that the corporate form has been abused – by a parent artificially seeking to shield itself from liability by establishing a subsidiary which has in fact no existence of its own – or that the subsidiary has been acting in fact as the agent of the parent corporation, it will be required to bring forward a number of circumstances, which will serve to demonstrate that the separation of legal personalities is a mere legal fiction to which the economic reality does not correspond and which should not be admitted, as this might sanction fraud.[88] This approach thus may constitute a source of legal insecurity, since the criteria allowing the 'piercing of the veil' are many, without either the list of admissible criteria or their hierarchisation being authoritatively identified; and it imposes a heavy burden on complainants seeking to invoke the indirect liability of the parent corporation for the acts of its subsidiary, which results in a situation where, in fact, very few such attempts to 'pierce the veil' end up succeeding.[89]

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

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

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

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

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

[85] Ph. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', supra note 80, at 307.

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

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

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

[89] Since the New Deal period, therefore, an alternative line of cases has emerged in the United States courts, which has led a number of these courts to set aside the classical tests for allowing the piercing of the corporate veil in order to ensure that the legislative policy will not be defeated by the choice of corporate forms. See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944) ('It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement'); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417

The European Court of Justice has taken a quite similar view in antitrust cases.[90] In the leading case of *Imperial Chemical Industries*,[91] the Court considered that where an undertaking established in a third country, in the exercise of its power to control its subsidiaries established within the Community, orders them to carry out a decision amounting to a practice prohibited under the competition rules of the EU (then the European Economic Community), the conduct of the subsidiaries must be imputed to the parent company. The separation of legal personalities should not shield the parent company from liability for the acts of its subsidiaries, 'in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'.[92] The parent company and the subsidiary will be considered to form one single 'economic unit' – allowing for the acts of the subsidiary to be imputed to the parent company – where two cumulative conditions are fulfilled: first, the parent has the power to influence decisively the behaviour of the subsidiary;[93] second, it has in fact used this power on the occasion of the adoption of the contested acts.[94] In such circumstances, 'the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition'.[95] In more recent cases, the Court of Justice of the European Union confirmed that, for the purposes of application of competition law, 'the conduct of a subsidiary may be imputed ... to the parent company particularly where, although having separate legal personality, that subsidiary does not autonomously determine its conduct on the market but essentially applies the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which unite those two legal entities'; it also established a presumption that the parent company exercises a decisive influence on the subsidiary where the parent company holds all or almost all of the capital in a subsidiary.[96]

The second approach : the presumption of control in the integrated enterprise

A second approach (though it could be seen as a variation on the first) is based on the idea that multinational corporations are groups of formally separate entities, but whose interconnectedness is such that it may be justified to establish a presumption according to which any act committed by one subsidiary of the group should be treated as if it were adopted by the parent. In this perspective, the transnational corporation is seen as 'a conglomeration of units of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, supervision and finance. Insofar as injuries result from negligence in respect of any of the parent company functions, then the parent should be liable'.[97]

U.S. 703, 713 (1974) ('the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy') ; *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) ('the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies'). However, the abandonment of the classical 'piercing the corporate veil' test has been piecemeal rather than systematic, and this has not contributed to legal certainty.

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

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

[92] Ibid, para. 133.

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

[94] Id., at para. 137-139.

[95] Id., at para. 140.

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

[97] R. Meeran, 'The Unveiling of Transnational Corporations', in M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague : Kluwer Law International, 1999), at 170.

This technique has been used in the United States not only in New Deal legislation and by courts and agencies seeking to ensure that legislation protecting employees would not be circumvented by the abuse of the corporate form, but also in order to define the conditions under which certain legislations protecting employees from discrimination could extend to the operations of subsidiaries of American undertakings operating overseas.[98] The 1990 American with Disabilities Act is an example. The Act prohibits discrimination against persons with disabilities, as committed by any employer, employment agency, labour organization, or joint labour-management committee. It provides for the extraterritorial scope of the prohibition, by establishing a presumption according to which 'If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer'.[99] However, in order to remain within the boundaries of extraterritorial jurisdiction as defined by the principle of active personality, this section does not apply with respect to 'the foreign operations of an employer that is a foreign person not controlled by an American employer'.[100] This is equivalent to imposing on all American employers covered by the Act an obligation to monitor the compliance of all the corporations they control in foreign countries with the prohibition of discrimination on grounds of disability. The Act also provides that

> the determination of whether an employer controls a corporation shall be based on—
> (i) the interrelation of operations;
> (ii) the common management;
> (iii) the centralized control of labor relations; and
> (iv) the common ownership or financial control,
> of the employer and the corporation.[101]

Similar provisions may be found, for instance, in Title VII of the Civil Rights Act of 1964.[102] Although the amendments made to the Civil Rights Act in 1991 seriously restricted the extraterritorial reach of this statute – following those amendments, only employees who are citizens of the United States are covered by the protection afforded under Title VII of the Civil Rights Act[103] –, American employers are presumed, under this statute, to engage in any discriminatory practice engaged in by a corporation whose place of incorporation is a foreign country, if they control such foreign corporation. The modalities of determining the existence of such control are identical to that provided for in the American with Disabilities Act.[104]

In the *Amoco Cadiz Oil Spill Case*, the District Court of Illinois adopted such an 'enterprise' approach, even in the absence of any legislative mandate, in order to conclude that the parent corporation should be held liable for environmental damage caused by an oil spill from a tanker off the coast of France: the close degree of control of the parent corporation over its subsidiaries allowed the court to overcome the separation of legal personalities.[105] It has also been proposed in legal doctrine to adopt a similar approach in the Alien Tort Claims Act, where, it has been argued, the fact that the subsidiary has allegedly violated the law of nations should be sufficient to allow for piercing the veil, and impose a liability on the parent (controlling) company unless it is proven by the latter that 'no reasonable effort would have discovered evidence from documents of any applicable government, non-governmental organizational documents

[98] Blumberg, Accountability supra note 80, at 313-315.
[99] Pub. L. 101–336, title I, § 102, July 26, 1990, 104 Stat. 331; amended by Pub. L. 102–166, title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077; codified as 42 U.S.C. § 12112 (c)(2)(A) (1994).
[100] 42 U.S.C. § 12112 (c)(2)(B) (1994).
[101] 42 U.S.C. § 12112 (c)(2)(C) (1994).
[102] Pub. L. 88-352 (Title VII), 42 U.S.C. § 2000e and ff., as amended by the Civil Rights Act of 1991 (Pub. L. 102-166).
[103] 42 U.S.C. § 2000e, (f), and § 2000e-1, (a).
[104] 42 U.S.C. § 2000e-1, (b) and (c).
[105] See *Amoco Cadiz Oil Spill*, 1984 A.M.C. 2123, 2 Lloyd's Rep 304 (N.D. Ill. 1984): 'As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, standard [the American parent corporation] is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalies AIC and Transport'.

and reports, employee information, or anecdotal information in the state that would have moved a reasonable person to inquire further'.[106]

Insofar as it is based on the presumption that the 'controlling' parent company may effectively influence the behaviour of the subsidiary – which justifies attributing to the parent company the acts of the subsidiary –, the 'integrated enterprise' approach is in line with the contemporary evolution of multinational firms. The ability of the multinational firm to move large volumes of goods swiftly and cost-effectively, as well as the standardization of products across the globe, has transformed the classical understanding of the relationship between the parent and the subsidiary. In many cases, the multinational appears as a coordinator of the activities of its subsidiaries, which function as a network of organisations working along functional lines rather than according to geographical specialization: 'In the past, parent companies typically made little effort to coordinate strategically the activities of their foreign subsidiaries. Foreign affiliates were treated as distant appendages – as 'stand-alone fiefdoms' that operated independently and merely paid a dividend to the home office. Today, (...) some multinationals are integrating their previously nationally focused and autonomous production and distribution operations in various countries along regional and global lines. Thus foreign subsidiaries that in the past produced and marketed products only in the country in which they were based, are now supplying regional or worldwide markets, including in many cases the parent company's home market'.[107] In this process, the new organizational structures 'give global corporate managers authority over country and regional managers'; incentive systems are devised to 'encourage cooperation among employees working for different affiliates'; and 'programs and practices designed to instill in diverse groups of employees scattered around the globe a common sense of purpose and common methods of operation'[108]: in sum, the head office reasserts its role, as the integration of the group is deepened.

The third approach : the direct liability of the parent corporation for failure to exercise due diligence

Finally, a third avenue consists in abandoning the idea of linking the behaviour of the subsidiaries to that of the parent altogether, and to focus instead on the direct liability of the parent company arising from the failure to exercise due diligence in controlling the acts of the subsidiaries it may exercise control upon. The liability of the parent corporation thus relates not only to the actions of parent firm, but also to its omissions. Indeed, a regime in which the liability of the parent company would be engaged for its actions alone (for the role it played in aiding and abetting the subsidiary to commit the alleged violation, in particular) could create a disincentive on parent companies to monitor the behaviour of their subsidiaries, because any amount of 'excessive' control might allow to conclude either that the subsidiary is merely acting as an agent of the parent, or that the implication of the parent in the operations is such that it should be held liable alongside the subsidiary.[109]

The case of *Connelly v. RTZ Corporation plc and Others* may serve as an illustration.[110] The claimant in that case was a former employee for Rossing Uranium Ltd. (R.U.L.), a Namibian subsidiary of the defendant corporation (RTZ Corporation plc, incorporated in the United Kingdom). He had been employed by R.U.L. in an uranium mine, following which it was discovered, three years after his return, that he was suffering from cancer of the larynx, apparently due to exposure to radioactive material in the mine. According to the description by the House of Lords, the claim was based on the allegation that

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

[107] L.A. Mabry, 'Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Nationality', cited above note 76, at 565.

[108] *Ibid*.

[109] S. Joseph, *Corporations and Transnational Human Rights Litigation*, supra note 86, at 134 (citing A.J.. Natale, 'Expansion of Parent Corporate Shareholder Liability through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary', *Univ. of Cincinnati L. Rev.*, 57 (1988) 717-750, at 736 ; and J. Cassels, 'Outlaws: Multinational Corporations and Catastrophic Law', *Cumberland L. Rev*., 31 (2000) 311-335, at 326).

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

'R.T.Z. had devised R.U.L.'s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy', and that 'an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine'. The argument was therefore not (as in classical piercing-the-veil analysis) that separation between the parent and the subsidiary should be treated as a mere fiction, a fraudulent means of limiting the liability of the parent corporation, without any correspondence in economic reality: it was that R.T.Z. corporation had itself contributed, by its acts, in causing the damage for which the victim sought compensation. Such an argument would have had no chance to succeed if, instead of being involved in defining the policy of its subsidiary on health and safety or environmental issues, R.T.Z. corporation had simply ignored any risks associated with the mining of uranium, and had acted merely as a shareholder, monitoring the financial performances of its subsidiary, but without seeking to be informed about, let alone participate in, the definition of its everyday policies in such areas.

In *Connelly*, the direct liability of the parent corporation was asserted on the basis of the *actions* it had taken in defining the policies of its subsidiary. By contrast, the *omissions* of the parent corporation were at stake in *Lubbe and 4 Others v. Cape plc*, which the House of Lords was presented with again only three years later.[111] Over 3,000 plaintiffs claimed damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos in South Africa, either upon working in mines owned by the defendant (until 1948) or by a fully-owned South African subsidiary of the defendant, or as a result of living in an area contaminated by the mining activities of the defendant or its subsidiaries. As noted by the leading opinion of Lord Bingham of Cornhill, 'the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, *failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group*. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss)'.[112]

Central to the *Cape plc* case was, therefore, the question 'whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company'.[113] It does not matter whether the parent company in fact was closely involved in setting up the procedures aiming at protecting the health and safety of the workers in the subsidiary: all that matters for the duty of care to be established, is that the relationship between the parent company and the subsidiary was such that the parent could have done more to ensure that such procedures provide adequate protection to the employees.

This approach was confirmed the more recent case of *Chandler*, also concerning Cape plc.[114] The claimant, David Chandler, had been affected by abestosis, after having been exposed for a short period of time, in 1959-1962, to asbestos dust, when working for a subsidiary of Cape plc., the now dissolved Cape Buildings Products Ltd. (CBPL). The Court of Appeals approved the position of the High Court, which had applied the classic test according to which a duty of care is owed where the harm can be reasonably foreseeable due to the defendant's conduct, where the parties are in a relationship of proximity, and where it is fair, just and reasonable to impose liability.[115] Arden LJ, with whom the other judges of the Court of Appeals agreed, took the view that:

[111] On 14 December 1998, the House of Lords had already refused to allow leave to the defendants for filing a further appeal against an initial decision by the Court of Appeal. Following this, over 3,000 new plaintiffs emerged, fundamentally transforming the nature of the litigation presented before the United Kingdom courts.
[112] Emphasis added.
[113] As indicated by the opinion of Lord Bingham of Cornhill, this is the issue as reformulated during the first Court of Appeal hearing in the case.
[114] *Chandler v Cape plc*, [2012] EWCA (Civ) 525.
[115] The test was set out in this form by the House of Lords in *Caparo Industries plc v. Dickman*, [1990] UKHL 2. For the High Court's judgment in the Chandler case, see *Chandler v. Cape plc*, [2011] EWHC 951 (QB).

> 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, ... (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. *For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely*. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[116]

The same judgment states explicitly that the imposition of a duty of care is unrelated to the lifting of the corporate veil ("A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company"[117]). It is clear however that the two problems are closely interrelated: the imposition of a duty of care dispenses the victim from the burden of having to pierce the separation between the two legal entities.

Comparing the different approaches to the problem of the corporate veil

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

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

[116] *Chandler v Cape plc*, [2012] EWCA (Civ) 525, par. 80 (emphasis added).
[117] Id., par. 69.

The second consequence of this distinction is related to the question of State jurisdiction. The *ICI* case of the European Court of Justice presents us with a rather unfamiliar situation where the applicability of the law of the forum was extended to the acts of a parent company, incorporated in a foreign country, because of the acts committed by the subsidiaries of that company on the territory of the forum (more precisely in the *ICI* case, the behaviour of the subsidiaries produced effects on the common market of the European Economic Community).[118] In general however, the situation is exactly the reverse: the extraterritorial application of the law of the forum State is sought to be justified by the fact that the subsidiaries, though established in foreign States, in fact are controlled by the parent company, domiciled in the forum State. In this scenario, direct liability of the multinational corporation or the adoption of the 'integrated enterprise' approach[119] present over derivative liability the advantage that they can be based on the territoriality principle, combined with the criminal law doctrine of ubiquity where the extraterritorial legislation is of a criminal nature, or at least on the active personality principle. In addition, in litigation before the United States federal courts based on the Alien Tort Statute (provided, of course, the strong restrictions to the extraterritorial impacts of the ATS as expressed in *Kiobel* are overcome[120]), the adoption of the 'direct liability' or the 'integrated enterprise' approaches would facilitate overcoming the barrier represented by the *forum non conveniens* doctrine, since the connection to the forum will be stronger if the parent company is sued directly for its own actions, rather than for those of its subsidiaries.[121]

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

For both these reasons, the most advisable solution to avoid the parent corporation from shielding itself behind the subsidiary where it would have been able to control the subsidiary more effectively, would seem to consist in imposing directly on the parent corporation an obligation, defined by statute, to effectively monitor the behaviour of the subsidiaries which it 'controls'. The notion of control, for the purposes of the application of such a statutory obligation, should be defined on the basis of the stock ownership,[122] without there being a need to identify, on a case-to-case basis, whether the parent company has in fact been involved in the policies of the subsidiary or whether the latter has a 'mind of its own'.

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[118] A situation presenting certain similarities presented itself in the *Doe v. Unocal* case, in which the U.S. District Court for the Central District of California considered that it has no personal jurisdiction over Total, the French partner in the Yadana pipeline project in Burma of the Californian company Unocal (*Doe v. Unocal*, 27 F Supp 2d 1174 (CD Cal 1998), aff'd 248 F 3d 915 (2001)). The class action suit against Unocal and Total was based on the Alien Tort Statute, adopted as part of the First Judiciary Act 1789. The ATS provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' (28 U.S.C. §1350). Under the ATS, in order for the United States federal courts to be able to exercise 'personal jurisdiction', the defendant must have 'minimum contacts' with the forum, and this in principle requires 'systematic' and 'continuous' contacts with the forum (see *International Shoe v. Washington*, 326 U.S. 310 (1945); of *Hanson v. Deckel*, 357 U.S. 235 (1958), and their progeny). The U.S. District Court for the Central District of California took the view that it had no 'personal jurisdiction' over Total, since the Californian subsidiaries of Total were not its 'alter egos' in the classical 'piercing the veil' approach.

[119] Under the 'integrated enterprise' approach, the law of the forum State is extended to foreign corporations on the basis that they are part of one single economic group, coordinated by the parent corporation : indeed, as illustrated by the examples of the Civil Rights Act and the American Disabilities Act mentioned above (see text corresponding to notes 99-104), this approach has been adopted precisely in order to justify the extraterritorial reach of the concerned statutes.

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

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

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

Only where the parent company could demonstrate that it was unable to effectively avoid the contested behaviour of the subsidiary company from occurring, despite having exercised due diligence and despite its best efforts to seek information about such behaviour and to react accordingly, should its liability be excluded. Just like in the 'integrated enterprise' approach above, a presumption should therefore be established that the acts committed by the subsidiaries which it 'controls' may be attributed to the parent company as such, although such a presumption could conceivably be rebutted in certain instances where, despite the safeguards in place, the parent company failed to prevent certain tortious or otherwise illegal acts from being adopted.

The due diligence obligation: the parent-subsidiary and co-contractor relationship

The solution proposed above to the problem of the corporate veil is fully consistent with the emphasis placed by the Guiding Principles on Business and Human Rights on human rights due diligence as a component of the corporation's responsibility to respect human rights. It may be added that this solution can be relatively easily transposed to the other mode of transnationalization of a company's activities, which relies on the establishment of contractual relationships with suppliers, sub-contractors or franchisees, rather than on an investment nexus. Where a company sources supplies from other countries, or sub-contracts certain parts of a production process to contractors located abroad, it is even more difficult to measure the exact degree of influence one company (for instance, the buyer or the franchisor) exercises over another company (for instance, the supplier of the franchisee). Therefore, it is particularly advantageous to define the potential liability of the buyer (or of the company sub-contracting a part of the production process) in terms that are grounded in the duty of that entity to ensure that it seeks to identify the human rights impacts of its policies and that it prevents and mitigates impacts thus identified — a duty that is independent from the reality of the influence exercised on the other economic actors with whom that entity interacts. The human rights due diligence requirement has a *normative* function to fulfil, that does not depend on the *de facto* degree of control exercised by the corporation concerned on the other companies which it owns (in part or even in full) or with whom it entered into contractual relationships.

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

The question of access to remedies

If it were to seek to clarify the scope of the duty of States to protect human rights by regulating transnational corporations, the new legally binding instrument could also contribute to defining with greater precision the requirement to ensure that victims of transnational harms have access to effective remedies. The Guiding Principles on Business and Human Rights provide that

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. (Principle 25)

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

A duty for the home State of the transnational corporation to provide access to justice for victims of the activities of the said corporation wherever the harm occurred (and wherever the victims may be residing) is not a revolutionary idea. Instead, encouraged perhaps by the examples of the Alien Tort Statute in the United States[123] and by the equivalent instrument, the so-called "Brussels I" regulation,[124] in the European Union, it is a duty that is explicitly mentioned in the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.[125] A 2011 report of the Office of the High Commissioner for Human Rights also refers to such a duty in the context of environmental rights.[126]

Indeed, there is a growing concern that unless States do more to remove the obstacles victims of transnational human rights harms encounter when seeking to have access to effective remedies in the home State of the transnational corporation allegedly responsible for such harms, whatever remedies may be proclaimed in principle will remain a dead letter, impossible to exercise in practice. An indicator of this is that when work was launched on the revision of the Brussels I Regulation, the European Commission suggested that it might be useful to include such a *forum necessitatis* rule, "which would allow proceedings to be brought when there would otherwise be no access to justice".[127] The objective of such a clause[128] was to avoid negative conflicts of jurisdiction, potentially leading to a denial of justice. Following an initial consultation launched by its 2009 Green Paper, the European Commission proposed various revisions to the 'Brussels I' Regulation,[129] In particular, it suggested a new Article 26 in the Recast 'Brussels I' Regulation, worded as follows :

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[123] See above, note 118.

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

[125] See Principle 27 (Obligation to cooperate) and Principle 37 (General obligation to provide effective remedy). Principle 27 provides that: "All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected." As discussed further below, the duty to provide an effective remedy to victims, which in situations where transnational human rights are concerned is a duty both for the host State (under whose territorial jurisdiction the damage occurred) and a duty of the home State (under whose juridiction the transnational corporation is domiciled), can only be effectively discharged if the two States cooperate with one another. This explains the close link established, within the Maastricht Principles (see above, note 51), between the right to an effective remedy on the one hand, and the duty of States to cooperate on the other hand.

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

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

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

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

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

Though it was finally not retained,[130] such a "forum necessitatis" provision would have allowed the courts of an EU Member State to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned. This would have extended the jurisdiction of the national courts of the EU Member States to defendants which are not domiciled in the forum State, under a condition of subsidiarity (the national courts of one State should only have jurisdiction where no other court is competent), and provided there exist certain connections with the forum State.

Conclusion

The duty to protect of States is well established under international human rights law, and its contours have been gradually clarified by human rights courts and expert bodies, as well as by Special Procedures of the Human Rights Council. If combined with new, robust oversight mechanisms that would allow such an instrument to be more effective than the already existing human rights treaties, a restatement of this duty under a new legally binding instrument nevertheless could have added value. Such a restatement could further clarify the implications of the duty to protect in some areas. A new legally binding instrument clarifying the content of such a duty could clarify that such a duty extends beyond the national territory of the State concerned; that it includes a duty to impose a due diligence obligation on companies to control the entities which they own or with which they enter into contractual relationships, whether or not those entities are established under the jurisdiction of the State concerned; and that it requires that victims of transnational harms attributable to corporate conduct may have access to effective judicial remedies in the State concerned.

However, this clarification process is now taking place through other means, by the interpretation given to international human rights by courts and non-judicial bodies or experts — including, in particular, by the Committee on Economic, Social and Cultural Rights and the Working Group on transnational corporations and human rights. It is unlikely that a treaty would achieve more.

2. A Framework Instrument

The second option for a new legally binding instrument on business and human rights would take the form of a Framework Convention on Business and Human Rights. A framework convention is one which defines general obligations of result, while leaving a broad margin of appreciation to States as regards the means of implementation, as well as as regards the speed at which to adopt the measures required. For instance, the Framework Convention on Tobacco Control (FCTC),[131] which was adopted in 2003 when, for the first time, the World Health Organization (WHO) chose to resort to a legally binding international instrument, could attract ratifications at an impressive speed (it has now 180 States parties), in part because the key obligation is for each Party to "develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance

[130] The idea of the *forum necessitatis* was rejected in the course of the preparation of what became the Recast "Brussels I" Regulation, which entered into force on 1 January 2015: see above, note 124.
[131] WHO Framework Convention on Tobacco Control, opened for signature in Geneva on 21 May 2003, entered into force on 27 February 2005 (2302 UNTS 166).

with this Convention and the protocols to which it is a Party".[132] The FCTC lists a number of actions that States parties are required to take, covering a large number of fields, but it leaves it to the States themselves to define the content of such measures, although they are to "submit to the Conference of the Parties [to the FCTC], through the Secretariat, periodic reports on [the] implementation of [the FCTC], which should include [...] information on legislative, executive, administrative or other measures taken to implement the Convention".[133]

There are strong arguments in favor of such an approach being followed for the adoption of a legally binding instrument in the area of business and human rights. First, the UN Working Group on Business and Human Rights[134] strongly encourages all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights. The Working Group also developed guidance for the development of such action plans in December 2014, emphasizing in particular the importance of participation,[135] and the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) have proposed a toolkit for the establishment of such plans. To date, seven States have adopted such an action plan,[136] and 21 other States are in the process of finalizing one. The momentum around the adoption of such action plans may facilitate reaching a consensus on a new binding instrument making this obligatory, and establishing a systematic exchange of information between States parties around the content of such plans, thus increasing accountability.

A second argument in favor of such an approach is that the Guiding Principles on Business and Human Rights cut across a wide range of issues and policies. This is in particular because of the emphasis they place on *policy coherence*, i.e., on the need to ensure that companies face an incentives structure that encourages them to take into account their responsibility to respect human rights (and to act accordingly), rather than to circumvent such responsibility. This requirement of coherence, under the Guiding Principles, is intended to ensure both that States have in place all the necessary policies, laws and processes to implement their international human rights law obligations (vertical policy coherence), and that they support and equip "departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations" (horizontal policy coherence).[137] It may be easier to address the full range of sectors concerned for such a consistent approach towards imposing on companies that they respect human rights, by the adoption of a comprehensive action plan ensuring a coordination across different policy areas and levels of governance.

Finally, a framework instrument is a tool to accelerate collective learning, and the gradual convergence on certain practices that, at the level of implementation, have proven their effectiveness. This may be particularly appropriate, since certain key elements of the Guiding Principles on Business and Human Rights remain vague, and would require to be gradually clarified by comparing systematically how they are implemented in particular settings. This is true, in particular, as regards "due diligence" as a component of the corporation's responsibility to respect human rights; the requirement to provide access to "effective" remedies, particularly in transnational situations where the host States' courts fail to comply with requirements of independence or impartiality; or the need for States to maintain "adequate domestic policy space to meet their human rights obligations" when they conclude trade or investment treaties or host government agreements with investors.[138] However, to a certain extent, the need to

[132] WHO Framework Convention on Tobacco Control, art. 5.1.
[133] Id., art. 23, a).
[134] See above, note 12.
[135] See the relevant page of the website of the Working Group on the issue of human rights and transnational corporations and other business enterprises, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (last consulted on 15 July 2015).
[136] These are the United Kingdom, The Netherlands, Italy, Denmark, Spain, Finland and Lithuania.
[137] See the Commentary to Principle 8 of the Guiding Principles on Business and Human Rights.
[138] See Principle 9 of the Guiding Principles on Business and Human Rights; as regards the requirement that States do not make undertakings under trade or investment treaties that would create obstacles to their ability to regulate the conduct of corporations under their jurisdiction, see the *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements,*

ensure a consistent implementation of these notions, and to encourage States to share into collective learning in this regard, are already met by the establishment of the Working Group on Business and Human Rights, which has been tasked with the follow-up to the Guiding Principles.

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

Conclusion

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

3. An instrument imposing direct legal obligations on corporations

Though primarily focused on the strengthening of the States' duty to protect human rights, the impressive coalition of civil society organizations who rallied behind the proposal for a new legally binding instrument on business and human rights also refers to a third option for such an instrument.[139] This option would be to conceive of the new legally binding instrument directly addressing corporations. Such a demarche is of course reminiscent of the "Norms on the Human Rights Responsibilities of

Report of the Special Rapporteur on the right to food, Olivier De Schutter: Addendum, UN doc. A/HRC/19/59/Add.5 (19 December 2011); on contracts between host States and investors, see *Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

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

Transnational Corporations and Other Business Enterprises" proposed in 2003 by the independent experts of the UN Sub-Commission for the Promotion and Protection of Human Rights.[140] Indeed, while the draft Norms ostensibly presented themselves as a restatement of the human rights obligations imposed on companies under international law, they were in fact effectuating a silent revolution by being addressed directly to companies, rather than to States alone.

The "Norms" proposed in 2003 are not isolated in this regard, however. More recently, the draft Statute establishing a World Court of Human Rights — produced by a Panel of Eminent Persons appointed by the Swiss Government[141] — anticipated that business entities would be allowed to recognize the jurisdiction of such an international jurisdiction,[142] with the option of choosing, upon making such a declaration, which human rights treaties or specific provisions thereof would be subject to the jurisdiction of the Court.[143] In this draft Statute, the attempt to define the duties of business entities directly under international human rights law is pushed rather far: the role of the World Court of Human Rights, according to the drafters of the project, is to "determine whether an act or omission is attributable to a State or Entity [having made a declaration accepting the Court's jurisdiction, such as a business corporation] for the purposes of establishing whether it committed a human rights violation. In so doing, the Court shall be guided by the principles of the international law of State responsibility which it shall apply also in respect of Entities subject to its jurisdiction, as if the act or omission attributed to an Entity was attributable to a State".[144] The proposal envisages that, where an Entity such as a business corporate accepts the jurisdiction of the World Court for Human Rights, it "may in its declaration [accepting such jurisdiction] identify what internal remedies exist within its own structures".[145] According to the logic of the draft Statute, an applicant alleging to be a victim of a violation resulting from an act or an omission of a corporation having accepted the Court's jurisdiction should first rely on those internal remedies as well as on any domestic remedies available both in the host State and, wherever possible, in the home State of the transnational corporation, before filing the complaint with the World Court.

It is often argued that any mechanism imposing direct obligations on companies under international law is bound to fail due to the sheer number of the actors involved: the Special Representative of the Secretary-General on Business and Human Rights, for instance, noted that "we live in a world of [...] 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms",[146] and the implicit suggestion is that an accountability mechanism addressed to such a large number of actors would be immediately overwhelmed by the number of instances it would have to deal with. This argument is unconvincing. The sheer number of transnational corporations (however reliably that number is estimated) is not in fact an obstacle to the establishment by a new international instrument of a mechanism specifically dedicated to monitoring corporate behavior, no more than in a domestic setting, legal prohibitions are bound to remain a dead letter because they are addressed to a large range of individuals. Indeed, such mechanisms to hold transnational corporations accountable already exist, to a certain extent at least. The Working Group on Business and Human Rights may receive complaints from aggrieved individuals or communities, and send communications to States or business entities on that basis in the form of urgent appeals or letters of allegation. This is also a prerogative other Special Procedures of the Human Rights Council have been recognized and routinely use.

In fact, the reason why the approach followed by the advocates of the World Court on Human Rights is unsatisfactory is not because they cast the net too wide, but instead because they are too modest. They would make the jurisdiction of the Court conditional upon business entities having voluntarily joined the system. The establishment of any mechanism to improve the accountability of transnational

[140] See above, Part II, section 3.
[141] The draft Statute for a World Court of Human Rights was prepared by the Ludwig Boltzmann Institute of Human Rights (Manfred Nowak and Julia Kozma) and Martin Scheinin (professor at the European University Institute in Florence) at the end of 2010. See J. Kozma, M. Nowak and M. Scheinin, *A World Court of Human Rights — Consolidated Statute and Commentary* (Graz: Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte / COST, 2010).
[142] See Article 51, para. 1.
[143] Id., Article 51, para. 2.
[144] Id., Article 6, para. 1.
[145] Id., Article 9, para. 3. See also the *Commentary*, at 41.
[146] A/HRC/17/31, para. 15.

corporations that would depend on the corporation joining a supervisory system on its own motion almost per necessity would remain deeply unsatisfactory, however. First, it would put the companies showing the greatest goodwill at a disadvantage vis-à-vis their competitors. Secondly, it would in fact do little else than add another voluntary mechanism to the voluntary mechanisms that already exist, in which the scope of the obligation of the corporation depends on its acceptance of certain mechanisms freely entered into. Can another system be imagined? Two scenarios appear plausible and worth exploring. Both go beyond the protection already afforded by the human rights treaty bodies and the Special Procedures of the Human Rights Council. And in neither of these scenarios is the supervisory mechanism to be established made to depend on the willingness of the corporations concerned to be monitored, as in the draft Statute for a World Court for Human Rights.

The first and perhaps most plausible form a new legally binding instrument imposing direct human rights obligations on transnational corporations could take is that of a treaty, open to the signature and ratification of States, by which they would accept that all transnational corporations under their jurisdiction [147] are subjected to some form of control, more robust than the existing monitoring mechanisms recalled above. By ratifying this instrument, a State would express its consent to a new monitoring mechanism applying directly to the transnational corporations under its jurisdiction: where it is alleged that a human rights violation has been committed by such a corporation, that State would agree that the corporation itself would have to respond to such allegations before an international mechanism, unless the violation has been addressed either by the internal grievance mechanisms of the corporation concerned, or through legal remedies available within the State concerned.

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

The second and perhaps most plausible form a new legally binding instrument imposing direct human rights obligations on transnational corporations could take is that of a new mechanism, conceived per analogy with existing international criminal tribunals or the International Criminal Court, but established specifically to address serious human rights violations that are committed by corporations or in which corporations are complicit. This new mechanism should be of a judicial nature if it is to add value in comparison to the existing mechanisms referred to above. Under the present Statute of the International Criminal Court (ICC)[148] legal persons are not included in its jurisdiction.[149] However, national and international legislation increasingly contemplate the criminal liability of corporations; and as recalled by a number of authors who have returned to the British and American war crimes tribunal set up after the Second World War,[150] the involvement of corporations in the international crimes over which the ICC has jurisdiction can be generally imagined in the form of complicity.

For such scenarios to be viable, the instruments establishing them should address two issues that deserve

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

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

[149] See, for a detailed examination of the negotiations of the Statute of the International Criminal Court on this issue, Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons : Lessons from the Rome Conference on an International Criminal Court', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 139-195.

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

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

Yet, whereas violations of international humanitarian law are well circumscribed in particular as their definitions are provided in the Rome Statute of the International Criminal Court (with the exception of the crime of aggression), the notion of "serious violation of international human rights law" is much more elusive. This is curious, since references to the seriousness of a violation are not unusal in human rights law. For instance, the African Charter on Human and Peoples' Rights provides that: 'When it appears after deliberations of the [African Commission on Human and Peoples' Rights] that one or more communications apparently relate to special cases which reveal the existence of a *series of serious or massive violations of human and peoples' rights*, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.'[151] Various human rights treaties define the scope of the powers of the expert bodies they establish by referring to the existence of "grave or systematic violations".[152] Despite these references, the notion remains largely undefined. The former "1503 Procedure" before the United Nations Commission on Human Rights (now replaced by the Complaints Procedure before the Human Rights Council) examined situations that "appear to reveal a consistent pattern of gross and reliable attested violations of human rights and fundamental freedoms",[153] but the situations examined under that procedure were identified on an *ad hoc* basis, and no definition is provided of what qualifies as "a consistent pattern of gross violation of human rights": the attempts by authors to clarify the notion illustrate the scope of disagreement.[154] Similarly, the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law refer to "gross" and "serious" violations, but they do not define these notions, although the Preamble states that such violations "by their very grave nature, constitute an affront to human dignity".[155]

Three factors seem to play a role in international practice in determining the "serious" nature of a violation of international human rights law. First, the nature of the rights matters. Violations of the right to life, the right not to be subjected to torture or slavery, the right to liberty and security, freedom of expression, freedom of religion, the right to privacy, freedom of assembly and the prohibition of systematic racial discrimination, as well as certain violations of economic, social and cultural rights (particularly the rights to housing, health, food, and education) have all been identified as serious.[156]

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[151] Article 58(1), African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[152] Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 13 of the Optional Protocol to the Convention on the Rights of Child; Article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Article 11 of the Optional Protocol to the Convention on the on Economic, Social and Cultural Rights (ICESCR).

[153] ECOSOC Resolution 1503 (XLVIII), 27 May 1970, para. 1. See now UNGA Res. 60/251 establishing the Human Rights Council (mentioning, in OP3, that " the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon"), and Human Rights Council Res. 5/1 (Institution-building of the United Nations Human Rights Council), Annex (establishing a complaint procedure, modeled on the former "1503" procedure, "to address consistent patterns of gross and reliably attested violations" of human rights and fundamental freedoms (par. 85)).

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

[155] UN GA Res. 60/147, 16 December 2005.

[156] See, *inter alia, Case of Gomes Lund Et Al. ("Guerrilha Do Araguaia") v. Brazil,* (Preliminary Objections, Merits, Reparations, and Costs), Judgment, IACtHR, 24 November 2010, para. 105; CERD, About the early-warning measures and urgent procedures (clarifying the procedure followed by the Committee on the Elimination of Racial Discrimination (CERD) to address serious violations of the Convention, established in 1993); Decision 1 (63) Situation in the Lao People's Democratic Republic, 21 August 2003, CERD Annual Report A/58/18, at 17, para. 2; Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, 27 January 2005, CEDAW/C/2005/OP.8/MEXICO, at 42, para. 263; Middle East (Lebanon), SC Res. 2004, 30 August 2011; Somalia, SC Res. 2010, 30 September 2011; Middle East (Syria), SC Res. 2043, 21 April 2012; Middle East (Syria), SC Res. 2042, 14 April 2012; Situation of human rights in Iran, GA Res. 66/175, 19 December 2011,

However, only the violations of the rights to life, physical integrity and liberty, and the prohibition of slavery have been identified as serious independently of the presence of any other factors. Secondly, a quantitative element is included in the assessment, referring to the number of victims or violations: this is often designated as the *widespread or massive character of violations*. Thirdly, a violation will be deemed "serious" due to its *systematic* character. For instance, systematic racial discrimination is considered to be a gross violation.[157] 'Systematic' in this context means that a certain number of violations are committed in an organised manner, forming a pattern and affecting a certain number of victims. Although such systematic violations can be committed by States and by non-State actors alike, it will be much easier to prove the systematic nature of a violation where it is condoned as an official policy. We encouter a paradox once we try to apply these criteria, that are implicit in international practice, to the question of the conduct of corporate actors: indeed, the more "serious" and "systematic" the violation of human rights by such actors, the more such violation shall reveal a failure by the State to discharge its duty to protect, implying that the State may be engage its international responsibility.

This leads to the question of complicity, the other issue that any attempt to establish a new mechanism enforcing direct obligations under international law on corporations will necessarily have to address. Just like the notion of "sphere of influence" with which it shares a common history,[158] the idea of "complicity" as applied to corporate misconduct has sometimes been criticized for its vagueness.[159] The notion may be examined both in the relationships between the concerned company and its business partners, and in the relationships between that company and the country in which it operates. Although these two situations may be fused in practice, when a company has a partnership or joint venture with the host government, they nevertheless are analytically distinct, and should thus be considered separately.

The notion of complicity has been a constant preoccupation of legal doctrine since the debate on the human rights obligations of transnational corporations was relaunched in 1999-2000.[160] The notion serves to identify the responsibility of companies where another entity, their business partners (their suppliers or sub-contractors) or the host government, commits human rights abuses, which are considered as criminal offences under either international or internal law. In order to identify whether the company is directly complicit in such abuses, we will have to ask, first, whether it aided and abetted the commission of the violation. Under the case-law of the international criminal tribunals, for instance, which in turn inspired the United States federal jurisdictions for the application of the Alien Tort Statute, such assistance will be considered to lead to a finding of complicity where it has a substantial effect on the commission of the abuse,[161] and where it is given with the knowledge that it would have such an

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Opp. 2. See also Theo van Boven, 'Distinguishing Criteria of Human Rights' in: K. Vasak (ed.) and Ph. Alston (ed. English edition), *The International Dimensions of Human Rights*, Vol. I (Greenwood Press, Westport, Connecticut, 1982), 43-59, at 48.

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

[158] It will be recalled that, in the Commentary to the "Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises" proposed by the UN Sub-Commission for the Promotion and Protection of Human Rights, corporations were expected to "use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware", a responsibility that extended to all situations falling within the "sphere of influence" of the company concerned. This implied in particular that: "Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses". See above, text corresponding to note 32.

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

[160] Useful attempts are, e.g., Andrew Clapham, "Corporate Complicity in Violations of International Law: Beyond Unocal", in W.P Heere (ed) *From government to governance: the growing impact on non-State actors on the international and European legal system. Proceedings of the Sixth Hague Joint Conference held in the Hague, The Netherlands, 3-5 2003* (The Hague: T.M.C. Asser Press, 2004) 227-38; Andrew Clapham, "State responsibility, corporate responsibility, and complicity in human rights violations", in: Lene Bomann-Larsen & Oddny Wiggen (eds), *Responsibility in World Business. Managing Harmful Side-effects of Corporate Activity* (Tokyo-New York-Paris: United Nations University Press, 2004) 50-81; Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001), available at: http://business-humanrights.org/en/categories-of-corporate-complicity-in-human-rights-abuses (last consulted on 15 July 2015); and from the same authors, for a more academic version and under the same title, 24 *Hastings International and Comparative Law* 339 (2001).

[161] Under the Alien Tort Statute, it has been authoritatively held that the standard for aiding and abetting is 'knowing practical

effect, whether or not the accomplice shares the *mens rea* of the direct perpetrator.[162] Other forms of complicity have been put forward, however.[163] Where a company *is in a joint venture with the host government or with another private actor* and *has knowledge of, or should have known of*, human rights violations committed by that partner in the fulfilment of the agreement, the company should be considered complicit in the violation for not having put an end to the business relationship. We may also ask, for instance, whether the company *benefited* from the abuse, for example in instances where the state security forces repress peaceful protest against business activities. Finally, when in the face of systematic or continuous human rights violations in the host country, the company *remains silent*, refusing to denounce these abuses which the company was aware of or should have been aware of, we may ask whether it should not the considered the 'silent accomplice' of those violations : apart from the fact that, in such situations, direct complicity may be alleged – insofar as by remaining silent in the face of violations the company lends its moral support to those crimes, thus contributing to the instigation of such crimes[164] –, there exists a 'growing acceptance within companies that there is something culpable

assistance or encouragement that has a substantial effect on the perpetration of the crime' : *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (judgment of 18 September 2002). This standard is borrowed from the approach of international criminal tribunals. See, e.g., *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999), where the International Criminal Tribunal for the former Yugoslavia (ICTY) held that 'the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime' (at § 235). As emphasized by the *Unocal* judgment delivered on 18 September 2002 by the United States Court of Appeals for the 9th Circuit, the ICTY considered that in order to qualify, 'assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal' (*Furundzija* at § 209; *see also Prosecutor v. Kunarac*, IT-96 -23-T & IT-96-23/1-T, § 391 (22 Feb. 2001) ('The act of assistance need not have caused the act of the principal')) : it suffices that the acts of the accomplice 'make a significant difference to the commission of the criminal act by the principal' (*Furundzija*, at § 233). Under the criterion used by the ICTY, which borrows from the precedents set by the American and British military courts and tribunals dealing with the Nazi war crimes in the aftermath of the Second World War, the acts of the accomplice will have the required '[substantial] effect on the commission of the crime' where 'the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.' (*Prosecutor v. Tadic*, ICTY-94-1, § 688 (7 May 1997)). The International Criminal Tribunal for Rwanda also considers that the *actus reus* for aiding and abetting consists in any act of assistance, whether physical or moral, which substantially contributes to the commission of the crime : *Prosecutor v. Musema*, ICTR-96-13-T (27 January 2000).

[162] Again, this is the understanding of the *mens rea* required for the existence of direct complicity under the Alien Tort Claims Act. Quoting from § 245 the *Furundzija* case of the ICTY and from § 180 of the *Musema* case of the ICTR, the United States Court of Appeals for the 9th Circuit noted that 'it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime' and that, 'in fact, it is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit' ; '[r]ather, if the accused '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''.

[163] See the *Report of the United Nations High Commissioner for Human Rights to the 56th session of the General Assembly*, UN Doc. A/56/36 (2001) (distinguishing direct, beneficial and silent complicity); or the OHCHR Briefing paper, 'The Global Compact and Human Rights : Understanding Sphere of Influence and Complicity', reproduced in *Embedding Human Rights into Business Practice. A joint publication of the United Nations Global Compact and the Office of the High Commissioner for Human Rights* (no date (presumably 2003)) (available at: http://www.ohchr.org/Documents/Publications/Embeddingen.pdf (last consulted on 15 July 2015)), 14-26 at 19.

[164] For instance, in the Trial Chamber judgment delivered in the case of *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda convicted a village mayor as an accomplice as it considered that his presence 'sent a clear signal of official tolerance for sexual violence', thus in effect encouraging the offence (*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998). According to the charges of the indictment, 'Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities'. The judgment of 2 September 1998 follows this argument : "The Tribunal finds, under Article 6(1) of its Statute [according to which 'A person who planned, *instigated*, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute [genocide, crime against humanity, war crimes defined as serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977], shall be individually responsible for the crime'], that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of [multiple acts of rape] and in his presence in respect of [an act of rape and other sexual offences] and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place" (§§ 693 and 694). In the subsequent judgment of 1 June 2001 filed by the Appeals Chamber in the same case (§§ 474 to 483), it was clarified that Article 6(1) of the Statute did not

about failing to exercise influence in such circumstances'[165]. It is this four-tiered approach to complicity which the website of the Global Compact advocates. Similarly, in its 2005 report prepared at the request of the Commission on Human Rights, the Office of the High Commissioner for Human Rights states that

> Four situations illustrate where an allegation of complicity might arise against a company. First, when the company actively assists, directly or indirectly, in human rights violations committed by others; second, when the company is in a partnership with a Government and could reasonably foresee, or subsequently obtains knowledge, that the Government is likely to commit abuses in carrying out the agreement [[166]]; third, when the company benefits from human rights violations even if it does not positively assist or cause them; and fourth, when the company is silent or inactive in the face of violations.[167]

The notion of complicity is a legal notion which originates in the criminal law. It has been relied upon in the context of litigation based on the Alien Tort Statute, however, although this statute provides for the possibility to invoke the civil liability of certain actors for violations of the law of nations. In the words of the United States Court of Appeals for the Ninth Circuit, this is justified insofar as "what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law": the Court therefore considered in that case that "the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context". But insofar as it appears in the Global Compact and in the draft Norms presented in 2003, the notion of complicity is used in a broader sense, which should not necessarily be limited to the significance it takes in the criminal law context. If and when work is launched on a new international instrument establishing a mechanism to impose direct human rights obligations on coporations, the question shall arise whether the notion of "due diligence", given its now consensual nature, should not be preferred to the more contested notion of "complicity". Even if such a choice is made, however, the substantive questions that may arise from the fact that the corporate actor is involved in certain human rights violations without having actively caused them, shall have to be addressed.

Conclusion

This section briefly outlines two potential scenarios under which a new mechanism could be established under international law, specifically designed to address corporate abuse. This could be achieved either by providing that States bound under the new instrument accept that the corporations operating under their jurisdiction can be attributed human rights wrongs where the domestic remedies available to victims have proven insufficient to remedy such harms; or by providing that corporations under the jurisdiction of the State concerned can be prosecuted for serious human rights violations or violations of humanitarian law amounting to international crimes, where national jurisdictions have failed to address such international crimes. These are of course highly ambitious scenarios. For this very reason, they are politically attractive to non-governmental organisations and human rights advocates, because of the symbolic nature of such a victory: whereas the international machinery has been traditionally

require the incitement to commit a crime be "direct and public", despite the fact that, with respect to the crime of genocide, Article 2 § 3, c) of the Statute of the ICTR provides that "direct and public incitement" to commit this crime is punishable.

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

[166] Although, in the description of this category of complicity, reference is made only to the business partner of a company which is a government, the same reasoning should hold for the situation where the business partner is a private understanding. This is confirmed by the OHCHR Briefing paper, 'The Global Compact and Human Rights : Understanding Sphere of Influence and Complicity' referred to above, supra note 163, which describes as 'complicity in case of joint venture' as the situation where 'the company has a common design or purpose with its contractual partner to fulfil the joint venture. It knew or should have known of the abuses committed by the partner'.

[167] *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005, UN doc. E/CN.4/2005/91, para. 34 (citing International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, (Geneva, February 2002), pp. 125-136).

addressed to States, with the narrow exception of international criminal law, it would now be extended to reach directly non-State actors. However, the option poses conceptual difficulties. Almost inevitably, since it would seem too restrictive to limit this option to violations of international humanitarian law, it would require defining the content of "serious" human rights violations, "serious" in the sense that they affect essential values of the international community, that they are committed on a broad scale, and that they are "systematic", i.e., form part of a policy rather than remain separate occurences. And it would require addressing the difficulties associated with the notion of "complicity" where the responsibility of the corporation, as in many cases, will be only indirect — the result of the activity of the corporation being entangled with that of the State.

Because it is ambitious and politically sensitive, it is likely that, were it to be proposed, this option would initially raise strong objections from a range of States, particularly from the Western European and Others Group (WEOG). The only plausible format under which this option may achieve a certain degree of consensus across States is one in which a mechanism would be established to allow transnational corporations and other business entrerprises conducting transnational activities to be held accountable for violations of international humanitarian law — war crimes, crimes against humanity, crimes of genocide and crimes of aggression. This however will seem excessively restrictive to many. While some corporations could conceivably commit human rights violations that would also qualify as international crimes,[168] a large range of human rights violations, even though potentially "serious" in nature, would escape such qualification.

4. An instrument in support of mutual legal assistance

One weakness of the various solutions explored above is that, for the most part, they overlap at least in part with already existing instruments or mechanisms. This is the case even for our third option, apparently the most innovative, focused on the establishment of a new mechanism to enforce directly human rights obligations on companies under international law: after all, Special Procedures of the Human Rights Council, including (although not limited to) the Working Group on Business and Human Rights, already perform such a function in principle — although admittedly with limited success. Overlap as such may not necessarily be a problem, where it leads to systems operating in parallel to mutually strengthen each other. It may be of greater concern in the present context, however, in which a strong consensus exists to build on the Guiding Principles on Business and Human Rights and to encourage States to work towards implementation (since any parallel process may be seen as distracting from this priority[169]), and in which existing mechanisms have already moved towards clarifying the scope of the duty to protect imposed on States, as well as various components of the corporations' responsibility to respect human rights.[170] Keeping in mind this background, one should be cautious about proposals that could be competing with these developments, not only because of the limited added value of such proposals, but also because of the risk of new initiatives undermining existing dynamics.

In contrast the the other avenues mentioned above, the fourth option therefore would be strictly subsidiary to the current efforts. It would target one specific obstacle to the ability of such efforts to benefit victims: the weakness of cooperation between States in providing effective remedies to victims of human rights

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

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

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

harms that have their source in the conduct of transnational corporations. The lack of effective cooperation between the different States across which such corporations operate, indeed, appears as a major source of impunity in this area. In order to tackle such impunity, States may have to cooperate where the activities of the transnational corporation cross borders for the collection of evidence, for the freezing or seizure of assets, or for the execution of judgments. It is on this obligation of cooperation that the instrument could build.

Two well-know examples come to mind to illustrate the problem. The first example has been ongoing since thirty years. On 3 December 1984, a toxic gas was leaked from a plant operated by Union Carbide India Limited (UCIL) in the Indian city of Bhopal. According to the most conservative estimates, about 5,200 people died, and several thousand other individuals suffered severe disabilities — the unofficial figures are significantly higher. UCIL was owned by the US-based company Union Carbide Corporation (UCC), which was the majority shareholder, as well as by other investors, including Indian financial institutions. The legal reaction came in two forms. First, already on 7 December 1984, just days after the disaster, a class action was filed by victims against the parent company before the New York District Court. Secondly, on 29 March 1985, the Bhopal Gas Leak Disaster (Processing of Claims) Act was adopted, essentially allowing the Government of India to act "*parens patriae*" as the sole representative of the interests of victims of the disaster. Having received this mandate, the Government of India filed a complaint on 8 April 1985 in the Southern District of New York on behalf of all victims of the Bhopal disaster, similar to the purported class action complaints already filed by individuals in the United States. According to the Federal Court of Appeals that reviewed the initial judgment adopted in the case, "The [Union of India's] decision to bring suit in the United States was attributed to the fact that, although numerous lawsuits (by now, some 6,500) had been instituted by victims in India against UCIL, the Indian courts did not have jurisdiction over UCC, the parent company, which is a defendant in the United States actions."[171] These actions by the victims of the gas plant disaster in Bhopal and by the Government of India failed, however. UCC moved to dismiss the litigation on the grounds of *forum non conveniens*, a motion granted by the court on the condition that UCC accept the civil jurisdiction of the Indian courts to hear the cases.[172] The dismissal was affirmed on appeal.[173] On 5 October 1987, the U.S. Supreme Court declined to review.[174]

In September 1986, once it had become clear its chances to be successful in its complaint before the United States federal courts were weak, the Government of India instituted a civil suit against Union Carbide Corporation (UCC) in the Court of the District Judge in Bhopal, on behalf of all victims of the disaster. When the proceedings eventually reached the Indian Supreme Court in 1988, the Court urged UCC, Union Carbide India Limited (UCIL) and the Indian Government to reach a final global settlement. In two successive orders of 14 and 15 February 1989, the Supreme Court recommended a 470 million USD global settlement. This was accepted by UCC, UCIL and the Indian government, although it was negotiated without participation of the victims.[175] Following payment by UCC and UCIL, a fund was established, to be administered by the Bhopal Gas Victims Welfare Commissioner, in order to compensate the victims.

Criminal proceedings were launched in parallel to the civil claims. The Indian Central Bureau on Investigation (CBI) initiated prosecution in December 1987, accusing UCC Chairman Warren M. Anderson, seven managers of Union Carbide Indian Limited (UCIL) and three corporate entities — UCC, Union Carbide Eastern and UCIL — with "culpable homicide not amounting to murder," the most serious offense charged. Although the Supreme Court of India held in 1991 that the criminal case could proceed

[171] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 198 (2d Cir. 1987).
[172] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F.Supp. 842, 54 USLW 2586 (S.D.N.Y. May 12, 1986).
[173] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987).
[174] Executive Committee Members v. Union of India, 484 U.S. 871 (Oct. 05, 1987) (NO. 86-1719); and Union of India v. Union Carbide Corp., 484 U.S. 871 (Oct. 5, 1987) (No. 86-1860).
[175] *Union Carbide Corporation v. Union of India and Others*, A.I.R. 1990 Supreme Court 273. Although, as activists were quick to point out, this sum represents less than 10,000 USD per victim (in fact, the recoveries were between 2,500 USD and 7,500 USD per person for deaths and between $1,250 and $5,000 for permanent disabilities), subsequent attempts to reoped the litigation by questioning the equity of the settlement failed.

despite the settlement that has been reached on the civil claims, Mr. Anderson and UCC refused to appear before the Indian criminal court in 1992, alleging that the court lacked criminal jurisdiction over them and arguing that the criminal charges had been quashed as part of the global settlement. The Chief Judicial Magistrate, Bhopal (CJM), declared them absconders and directed that a warrant be issued against Mr. Anderson to initiate proceedings for extradition. Though the Indian Government formally requested the U.S. to extradite Mr. Anderson to India, the request was denied in June 2004; the Indian defendants, on their part, were convicted in June 2010. Mr. Anderson died in September 2014, when a new request for extradition filed in 2010 was still pending.

Finally, a third procedure was launched in 1999, in the form of three class action lawsuits filed for environmental damage (including, subsequently, for groundwater contamination) in the U.S. District Court for the Southern District of New York against UCC and former UCC Chairman Warren M. Anderson. On 15 November 1999, the first a class action lawsuit (under the name of *Bano v. Union Carbide*) was filed by seven individual survivors and five survivors' organization, seeking compensation for the impacts of the pollution around the UCC-Bhopal plant; the action was dismissed, *inter alia*, on grounds of the expiration of the statute of limitations.[176] In November 2004, a similar lawsuit was filed against Union Carbide on behalf of other plaintiffs who were injured by the water pollution at Bhopal, by plaintiffs whose claims were not barred ("Sahu I"); and in March 2007 a third suit was filed on behalf of other plaintiffs alleging property damage ("Sahu II"). A judgment of the United States Court of Appeals for the Second Circuit, adopted in June 2013, put a provisional end to the proceedings.[177]

The second example orginated in the environmental pollution caused in Peru and Ecuador by the activities of Texaco (to which Chevron has now succeeded) between 1964 and 1992. Although the Ecuadorian government had authorized Texaco to launch oil exploration activities in the Amazon in 1964, the massive pollution of forests and of rivers in both Ecuador and Peru led victims to file two class actions in reparation in the Southern District of New York, alleging that the pollution led to damage to their property and to their health.[178] The claim was dismissed on *forum non conveniens* grounds.[179] The victims then turned to the Ecuadorian courts, obtaining an initial judgment in *Aguinda v. Chevron* (Chevron had succeeded Texaco in 2001) ordering the defendant company to pay over 18 billion USD in compensation for the environmental damage caused. The subsequent litigation was closed by a final judgment on 12 November 2013 from the Ecuador Supreme Court finding Texaco/Chevron liable for environmental damage, though reducing the assessment of the damages to 9.51 billion USD. The judgment however is still pending execution, due to the legal battle fought by Texaco/Chevron before the US courts. The case has a long and complex history, involving the reliance on international arbitration by Chevron (arguing that Ecuador had violated a bilateral investment treaty between Ecuador and the United States) and accusations filed against the representatives of the Ecuadorian plaintiffs that they had been manipulating witnesses and conspired to extort damages from Chevron before Ecuadorian courts, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act.[180]

These cases, spanning decades and each presenting a number of different legal ramifications, are too complex to be described in any detail here. Yet, they do illustrate at least some of the difficulties victims face in transnational cases in which corporations operating across various jurisdictions allegedly have

[176] *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y., 28 August 2000), *affirmed in part, vacated in part by*: *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2nd Cir. (N.Y.) 15 Nov 2001) (No. 00-9250); o*n remand*: *Bano v. Union Carbide Corp.*, 2003 WL 1344884 (S.D.N.Y., 18 March 2003), *judgment affirmed in part, vacated in part by Bano v. Union Carbide Corp.*, 361 F.3d 696 (2nd Cir. 2004); *on remand: Bano v. Union Carbide Corp.*, 2005 WL 2464589 (S.D.N.Y., 5 Oct. 2005)
[177] *Sahu et al. v. Union Carbide Corp. et al.*, No. 12-2983-cv, 27 June 2013.
[178] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (No. 94 Civ. 9266), 1994 WL 16495105 (claims filed by residents of the Oriente region of Ecuador suing Texaco for environmental and personal injuries that allegedly resulted from Texaco's exploitation of the region's oil fields); *Ashanga v. Texaco Inc.*, S.D.N.Y. Dkt. No. 94 Civ. 9266 (similar allegations made by certain residents of Peru, who live downstream from Ecuador's Oriente region).
[179] *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (holding that hold that dismissal on the ground of *forum non conveniens*, as decided by the district court, is erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming the lower court's decision to dismiss the case).
[180] 18 U.S. Code Chapter 96.

caused, or contributed to, human rights violations.[181] How could such obstacles to effective access to justice for victims be overcome? Significant progress could be achieved by setting out in detail the duties of States to cooperate in order to put an end at the impunity of corporations for human rights violations. Extraterritorial obligations of international cooperation are contained in several human rights treaties. For example, States parties to the Convention on the Rights of Persons with Disabilities, among the most recent of the core human rights treaties, "recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention" and commit to "undertake appropriate and effective measures in this regard..."; the Convention also lists illustrative measures to fulfil this commitment. [182] A duty to cooperate for the full realization of human is also included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires States parties to provide each other "... the greatest measure of assistance in connection with criminal proceedings ..." relating to torture including "... the supply of all evidence at their disposal necessary for the proceedings".[183] A comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.[184] The first two Optional Protocols to the Convention on the Rights of the Child oblige States to cooperate to prevent and punish the sale of children, child prostitution, child pornography and the involvement of children in armed conflict. The two Protocols require States to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes.[185]

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

> All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.[186]

The restatement of the duties of States included in the Maastricht Principles can be extended to all human rights. The implication is that, in transnational situations, States should cooperate in order to ensure that any victim of the activities of transnational corporations that result in a violation of human rights has access to an effective remedy, preferably of a judicial nature, in order to seek redress. A new instrument could usefully list the duties of States in this regard.[187] Such a list could include assisting foreign courts in taking evidence or statements from persons; in effecting service of judicial documents; in executing searches and seizures, in freezing evidence, in providing originals or certified copies of financial, corporate or business records, or in identifying and tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; in facilitating the voluntary appearance of persons in the

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

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

[183] Art. 9 (1).

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

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

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

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

requesting State. It could also include cooperating in the execution of judgments, by identifying, freezing and tracing proceeds of crime or facilitating the recovery of assets.

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

One advantage of this approach is that it would overcome what appears to be an important stumbling block in the current discussions. As all observers of the current process are well aware, the resolution adopted by the Human Rights Council following the proposal of Ecuador included a footnote, stating that: ""“Other business enterprises” denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law." The footnote ostensibly aims at clarifying the meaning of the expression "transnational corporations or other business enterprises". It is, however, unworkable. Transnational corporations are simply corporations that have activities that span different jurisdictions, either because they operate directly outside the national territory in which they are domiciled (for instance, because they have set up a branch or built a production plant in another jurisdiction), or because they own (in part or in full) a subsidiary company established in another jurisdiction, or because they are supplied by, or sub-contract part of the production process or other activities, to business partners located abroad. In other terms, "transnational corporations" *are* "business enterprises that have a transnational character in their operational activities", although they also are "local businesses registered in terms of relevant domestic law", albeit local business that have "transnationalized" some of their operations. As John Ruggie puts it, the definition of "other business enterprises" proposed "is unlikely to survive the first round of critical scrutiny and go on to serve as the basis of any viable treaty instrument".[188]

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

IV. Conclusion

In order to introduce to four potential options for a new legally binding instrument on the issue of human rights and transnational corporations and other business enterprises, this paper has recalled the long history behind this debate. The purpose was twofold. First, the reactions of certain States to the initiative proposed by Ecuador can only be explained by the ghosts still haunting the corridors of memory: our world is very different from that of the 1970s, but as the voting patterns show, the initiative was largely seen as reopening a discussion following the very same parameters. This is unhelpful: geopolitical considerations should not be allowed to distract from the pragmatic search for solutions that the victims have the right to expect.

Secondly, by reviewing the past achievements, we are better equipped to assess the emerging scenarios. Some of the suggestions examined above, that could inspire the Open-Ended Intergovernmental Working Group, simply replicate what is already done, though less visibly and perhaps less effectively than might be desirable: that is the case of the suggestions to clarify the scope of the States' duty to

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

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

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

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