INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Beyond Voluntarism

Human rights and the developing international legal obligations of companies

The International Council on Human Rights Policy

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I. INTRODUCTION – PURPOSE AND DEFINITIONS

Interest is growing in the responsibility of private companies to respect human rights. What was once a marginal issue is now a major concern of companies, as well as governments, intergovernmental and non-governmental organisations, investors and consumers. In July 2000 the UN Secretary-General, Kofi Annan, launched the Global Compact, a UN-sponsored appeal which called on companies to commit themselves to respect nine core principles in relation to human rights, labour and the environment. Hundreds of companies, including many of the world's largest, have joined this initiative.

Of course, insisting that companies behave in an appropriate fashion is not new. In relation to the environment or workers' rights, companies have long been subject to regulation by government and lobbying by advocacy organisations. What is new is the degree to which such expectations are being recast in human rights terms, and the degree to which new human rights claims are being advanced in relation to the private sector. The "spotlight" of human rights concern, traditionally focused on governments, is now increasingly turned on the conduct of private actors including business.

Finding themselves caught in the glare, many companies have responded by acknowledging they have a responsibility to respect human rights, or at least that human rights are relevant to their operations. At an international level, much of the discussion has focused on the scope of company responsibilities in this area, and how, in practical terms, companies should implement the commitments they make. Does a company's responsibility extend beyond the workplace? Is responsibility limited to clear issues such as workers' rights and the non-use of child labour? Should large companies use their influence to reform oppressive laws or practices of governments? Should companies apply the same standards wherever they operate, in such areas as health and safety in the workplace – or is it sufficient to comply with national law? Is there a point at which a government's human rights record is so odious that foreign companies should not invest in the country concerned? Are voluntary codes of conduct effective in improving a company's human rights record? Who should monitor the degree to which companies live up to their undertakings with respect to human rights?

Large issues underlie these questions. A serious discussion of corporate responsibility inevitably includes the role of government. Many argue that, as the global economy becomes more integrated, the power of states is declining. Equally inevitably, it must address ethical standards – who should define them and how they should be applied? Nor can the role of business

in the global economy be separated easily from the issue of global inequities in access to trade and resources.

One larger issue concerns the role of law, specifically the application of international law when the responsibility of companies to respect human rights is defined or enforced. It is in international law that detailed human rights rules have been developed in the last half century, placing obligations on states. Though the idea of human rights encompasses much more than law, international standards such as the Universal Declaration of Human Rights (the Universal Declaration or UDHR) are a basic reference, and should be a natural starting point for discussions of business practice, especially because these often concern companies' activities abroad. Despite this, too little attention has been given to the question of whether international law can be used to hold private companies *legally* responsible for abuse of human rights. Governments and companies themselves have shown a distinct preference for limiting the debate to voluntary standards and self-regulation. They have treated documents like the Universal Declaration as a useful reference for inspiration and guidance rather than the source of legal obligations. Advocacy groups (at least at the international level) and many intergovernmental organisations have generally reinforced this tendency. Efforts have focused on encouraging companies to commit themselves to voluntary principles, and on finding means to ensure that these commitments are fulfilled. The UN Global Compact is an example of this tendency.

Purpose and outline of the report

This report examines the extent to which international rules for the protection of human rights create binding legal obligations on companies. Detailed and well-developed international human rights standards cover many areas. However, most of these rules were drafted in order to regulate the behaviour of states. To what extent do they create legal obligations on private actors like companies? Are the existing rules adequate or are new international rules needed?

Importance of human rights and international law

To assist the reader, it might help to set out at the beginning how we approach these questions. The argument we advance in this report is that there is a clear basis in international law for extending international legal obligations to companies in relation to human rights. Not everyone will be convinced that international law is a useful or appropriate tool to ensure that private companies respect human rights, or that the human rights framework should be used to judge the conduct of companies. To begin with, therefore, we explain in Chapter 2 the relevance of human rights and why we think international human rights law is important. Recognising that the non-specialist reader may not be familiar with human rights law, we go on in

Chapter 3 to introduce the international human rights system and explain the scope of several human rights guarantees and their relevance to the private sector.

Indirect and direct obligations

International rules regulate or could regulate companies in human rights matters in two ways. They can establish obligations on states to ensure that private actors such as companies respect human rights and that failures to do so result in legal consequences. In Chapter 4 we examine the degree to which existing international human rights standards already place such obligations on states. This *indirect* form of accountability has the advantage of remaining firmly within the human rights legal tradition, according to which primary legal obligations lie with states. Its weakness is that action and enforcement are left to national governments, which might be unable or unwilling to take the steps required to ensure that companies respect human rights.

Secondly, international law can create *direct* obligations on companies. Such an approach is more controversial. International law developed as a set of rules between states, to guide their conduct. International human rights law developed to regulate how states treated their own citizens. Nevertheless, in some respects this traditional approach is changing. Chapter 5 explains the extent to which existing international standards impose human rights obligations directly on private actors such as companies.

International enforcement

Whether they are direct or indirect, obligations need to be enforced if they are to be of real use. A discussion of legal human rights obligations would be incomplete if it did not consider the different legal mechanisms that can be used to enforce them. In Chapter 6 we survey the different international bodies that could or already do play some role in ensuring compliance with indirect and direct obligations respectively.

Complicity

Company responsibility for human rights abuses will be an issue both where the company itself has initiated the abuse, and in situations where it somehow colludes or is implicated in abuses committed by others, for example state security or police forces. Chapter 7 examines such situations, and proposes a framework for determining when complicity might give rise to legal liability.

Moving towards new standards

Most of this report describes existing international law. The final chapter surveys recent and on-going developments, including work in a UN human rights body to develop Draft Fundamental Human Rights Principles for Business Enterprises. These developments suggest that companies, and

multinational corporations in particular, will increasingly be expected and required to respect international legal principles in relation to human rights. The final chapter makes a number of recommendations relating to the use and application of existing law and the development of new standards.

A final point should be made about the purpose of the document. When the project got underway in February 2000, it was our view that most (though not all) of the work that was being done on the human rights obligations of businesses did not involve traditional legal enforcement tools associated with the protection of human rights. Advocates, governments, and businesses themselves tended instead to be considering measures that depend slightly, or not at all, on the existence of clear and direct legal rules. Most discussion of "standards" dealt with voluntary codes of conduct rather than legal regulation and human rights standards were referred to as guidelines, rather than legal provisions to which companies must adhere. There are signs that this is changing. The relevance of international law and of legal enforcement is beginning to be treated seriously. Indeed, there is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory or incoherent efforts.

A draft version of this report was circulated in January 2001 and we actively encouraged those receiving it to provide us with comments. In all, over 400 copies of the draft report were sent out, and some 40 comments were received. In addition, members of the Research Team held numerous discussions with international lawyers, activists, companies and governments. With only a few exceptions, those we spoke to and those who sent us comments agreed with the basic argument that international law should play a role. Some put forward pragmatic arguments for concentrating first on voluntary initiatives or restricting attention to national law. They argued that it is premature to draft clear international rules; that focusing on law at the present moment might scare off well-intentioned companies; or that enforcement is ineffective even when international legal rules are in place. These points will be dealt with below, though it is worth noting that they do not really call into question the central point.

Law is certainly only part of a bigger picture. Campaigns that play to the self-interest of companies, ethical trading initiatives, consumer boycotts and voluntary codes of conduct all have a role to play. It is time, however, to give serious attention to the role international law can play in ensuring that companies are accountable in relation to human rights.

Definitions

Companies, corporations and businesses

This draft report deals with private businesses, which can be referred to in different ways which, depending on the context, might have particular legal connotations. These meanings will in turn be different depending on national law that regulates the establishment of businesses and their rights and obligations. Further, in discussions of the human rights obligations of businesses, there are differing views about whether the focus should be restricted to multinational corporations or deal more generally with all commercial enterprises.

While recognising these distinctions and debates, we have chosen not to limit the focus of our enquiry to a particular type of commercial enterprise, for example multinational corporations. We also do not use one particular term to describe the focus of the enquiry: terms such as businesses, companies, and commercial enterprises are used interchangeably throughout the draft report. The reader should not attach any particular significance to the term used, unless it is clear from the context that we are referring to only one kind of business entity, for example multinational corporations.

International law

The origins of modern international law are found in agreements between states regarding their mutual relations. Before the establishment of international institutions like the United Nations, most international law was composed of the rules found in these mutual agreements and which bound states in the manner of a contract. Each party agreed to act (or not to act) in a certain way and compliance was based on the notion of reciprocity. As agreements proliferated certain types of rules became generally established, for example on how treaties should be interpreted.

International law also includes rules derived from the practice of states, developed over time, which may or may not be found in written agreements between states. These are referred to as customary rules of international law. Such rules emerge when the practice and intentions of states show they are acting as if they consider themselves bound by an unwritten rule.

International lawyers are accustomed to speak of “hard” and “soft” rules of international law. The former are found in agreements (often referred to as treaties, conventions, or covenants) that are clearly intended and designed to create binding legal obligations. By contrast, “soft” rules are found in resolutions or standards adopted by international organisations, or in joint declarations issued by a group of states. These “soft” rules are said to be more in the nature of guidelines. The distinction is important, because some international standards are clearly intended to create binding legal obligations. Over time, however, principles developed as “soft” law recommendations often come to be seen as creating legal obligations. In many cases, the nature of an agreement (for example, a treaty as compared with a UN General Assembly Resolution) is less important than how states react to the rules it contains.

II. BEYOND VOLUNTARISM – THE IMPORTANCE AND RELEVANCE OF INTERNATIONAL LAW

The principal argument of this report is that international law has a role to play in ensuring that companies respect human rights. We need clear international rules to strengthen the obligations of states in this regard and, where appropriate, they should place direct legal obligations on companies. Not all will agree with this position. The discussion begins, therefore, by setting out the case for legally binding obligations, and explaining why it is appropriate to apply international law, and international human rights law in particular.

The need for legal obligations

Some would argue that, without recourse to legal regulation, significant progress has been achieved in getting companies to take seriously the argument that they should respect human rights. Similarly, it is claimed that codes of conduct and other voluntary initiatives by companies are ultimately a more effective tool for changing company behaviour than legal regulation. It is asserted that companies will be more likely to respect rules they themselves design (or are involved in designing) and that external regulation by governments might be counter-productive. In addition, many see any type of regulation as unwarranted, believing market forces will ensure that companies adopt best practices, with regard to human rights or other issues.

Voluntarism and market forces alone are insufficient

The first response to these arguments is perhaps the most obvious. If self-regulation and market forces were the best means to ensure respect for human rights, one might expect, since this has been the dominant paradigm, the number of abuses attributable to companies to have diminished. In fact, in many parts of the world, the experience of workers and local communities is precisely the opposite. Quantifying the scale of abuses is difficult, of course, and no doubt many companies would point to improvements. Further, it is unrealistic to expect voluntary initiatives to produce immediate results. Nevertheless, accounts of continuing abuse must be seen in the context of political trends that are tending to reduce state intervention in the economy and increase the scope of private sector activity. At the same time, traditional means for securing workers' rights, such as unionisation, have weakened.

Furthermore, history teaches us that voluntarism alone has rarely caused states to respect human rights. In the last 50 years, co-operation and enforcement have both been required. Many UN human rights initiatives designed to change state behaviour are non-legal in nature, but in almost all

cases these are grounded in legal obligations. Of course, states "voluntarily" agree to sign and ratify treaties, but they can be legally bound also to respect customary human rights norms that develop because of common state practice. Governments also often find themselves bound by human rights treaties that an earlier government accepted.

By definition, voluntary initiatives apply only to those who accept them. A company might accept a code of conduct because of genuine commitment to the principles or because its reputation is at stake. Even where there is genuine commitment, voluntary codes may not be respected if their principles clash with other, more powerful commercial interests. People sometimes argue that, if it makes good commercial sense to respect human rights, then market forces will ensure compliance. It is not self-evident, however, that human rights norms are always "good for business". Many companies have prospered under authoritarian regimes. In any case, the issues are often too complex for markets to understand and respond to. It would be difficult, for example, to insert into market mechanisms incentives and disincentives which would give competitive advantage to those companies that behave ethically.

Some claim that it is premature to draft binding international rules. Voluntary initiatives concerning human rights are relatively new and need time to mature and spread. Further, international law evolves slowly. Drafting a new treaty, for example, might require years of complex negotiation and there would be no guarantee it would enter rapidly into force. If this is the case, however, then there is a need now to build an international consensus around binding regulation as an important method of enforcement.

It is also argued that raising the spectre of binding regulation will create a backlash. Companies will cease to co-operate with the United Nations' Global Compact or NGO initiatives because such "voluntary" approaches will be seen as a Trojan Horse – opening the way to binding regulation.[1] Companies initiate or participate in voluntary initiatives, however, for many reasons, including personal commitment, shareholder and public pressure and the threat of litigation. Pressure in favour of more and rigorous codes of conduct is unlikely to diminish. Moreover, many of the critics of voluntary codes claim that they are intended primarily to forestall new regulation

1 This view was included in a letter sent to the International Council by Maria Livanos Cattaui, Secretary-General of the International Chamber of Commerce (ICC), in response to an invitation to comment on a draft version of this report. The letter argued: "[The] ICC considers that the proposed draft risks inviting a negative reaction from business, at a time when business is increasingly engaged in corporate social responsibility initiatives, and that the approach proposed by the International Council is counterproductive to actions taken by individual companies, as well as to various other initiatives such as the Global Compact…" Letter to the International Council, 7 March 2001.

(whether at the national or international level). Arguing that discussions of legal obligations will create a backlash among companies can only increase suspicion about the true purpose of voluntary codes.

Voluntary codes of conduct, campaigns in favour of self-regulation, ethical trading programmes and other such initiatives are important. Projects that companies themselves undertake to implement rights may well make a lasting difference on the ground. Codes of conduct have been a creative and probably essential step on the road to compliance, and they do have some advantages. Legal norms, especially at the international level, are notoriously abstract and difficult to apply in practice to varied business operations. In contrast, voluntary codes are highly flexible and adapted to the circumstances of particular industries or firms. Some codes also go beyond minimum human rights standards.

In sum, neither legal nor voluntary approaches should be a substitute for the other. Both are needed, and they can be complementary. Voluntary codes will make binding regulation more likely to succeed because they have started to build consensus – or at least understanding – around some core rights. Willing consent to such norms will be helpful when binding regulations are introduced in the future. As companies introduce new management practices to implement codes, they develop business expertise that will also be essential to successful implementation of binding regulations.[2] Overall, however, we believe it is time to move beyond voluntarism – not in order to stop voluntary approaches but because a new international legal regime will become increasingly necessary. The future should hold a blend of voluntary and binding rules that together will ensure that companies respect human rights and demonstrate that they do so.

Power needs to be constrained by law

A function of law is to balance power and obligations by establishing enforceable rights and corresponding duties. International human rights law developed after the Second World War to protect the individual from abuse by the state. First, it established the minimum rights that individuals should enjoy because they are human. Second, it put corresponding obligations on states to respect those rights. The focus at this time was on states because the state was perceived to be the entity that had most effect on people's lives. Further, war crimes and crimes against humanity committed during the Second World War had proved that a state's monopoly of power was dangerous in the absence of international restraints.

Large companies, especially multinationals, are beginning to challenge the traditional economic and political dominance of governments. Although the

2 See Gordon (1999).

case should not be overstated, it is clear that many states are losing authority to supranational bodies above them while at the same time they are privatising many of their traditional domestic functions. The wealth and influence of many small states is dwarfed by that of the largest multinational companies. Such companies can bring benefits; equally, like any powerful institution, they can threaten people's rights.

Just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world. The law is not and should not be static. It must evolve if it is to meet the needs of societies, and should reflect prevalent economic, political and social norms, including ethical values. The concept of the sovereignty of states, which has been eroded by the development of human rights, should not be replaced by a new corporate sovereignty, which is unrestricted or unaccountable.

Not only multinational companies should be bound to respect international law. The rights of workers and local communities can be affected just as deeply by the operations of small businesses. Within its sphere of influence (a phrase discussed in chapter 7), a company has considerable authority and power. Its activities will affect whether people enjoy their human rights, from the rights to work and to a decent wage, to the rights to health and freedom from discrimination.

Victims, redress and deterrence

Voluntary codes rely finally on good intentions. Redress for the victims of wrongs depends on a sense of charity or business expediency of the company concerned. Rigorous and independent monitoring can certainly improve the likelihood that victims will receive remedies. Even so, such mechanisms of compliance are still not initiated by the victims themselves, nor are they required to be transparent or public or consistent.

A regime that emphasises the legal accountability of companies for human rights abuses will enable victims to claim redress, including compensation, restitution and rehabilitation for damage caused. Of course, it is true that enforcement through courts is slow, and by no means assured. The effectiveness of law, however, is not based on court proceedings which are often drawn out and expensive, but on its power to encourage, albeit gradually, a culture of compliance. Victims and their representatives can invoke a company's legal obligations in the course of their advocacy directly with the company, in the media, with governments, and in legal proceedings if they are necessary. One would not expect international legal rules to change company practice overnight – as they have not immediately transformed the behaviour of governments. Nevertheless, as soon as a

course of action is judged to be *illegal* – and a violation of human rights – a deterrence is created, particularly where the judgement has international weight and authority.

The case for *international* rules

If there is a role for law, the question then arises of whether it is appropriate to apply *international* law. The emphasis, surely, should be on national law and the responsibility of domestic authorities to put in place clear rules that will oblige companies to respect freedom of association and other rights. The inevitable process of negotiation between states in the creation of international law means that consensus will only be achieved around a bare minimum, which might not be sufficient. International law is also notoriously difficult to enforce, in human rights matters no less than in other fields.

National regulation comes first

International law does not reduce the importance of national regulation. On the contrary, international law looks first to states to enforce its rules. If international law says that companies must respect human rights, it is primarily up to states to make sure this happens through their domestic laws. In almost all cases victims of human rights abuses will be expected to seek redress first in their national courts. International enforcement mechanisms do not usually kick in until national efforts have failed or been found wanting. If there were stronger international legal rules in regard to companies, it is likely that they would give priority attention to steps that states (and national institutions) should take to better regulate corporate conduct.

Though international rules are not a substitute for national law or regulation, they can help to harmonise rules at a time of weak national regulation. They can act as a common reference point for national law, setting benchmarks, drawing attention to core minimum requirements and establishing clearly what is not permissible. Global regulation can bring coherence to standards that should be implemented by companies whose international operations straddle several countries.

Multinationals outgrow national regulation

Globalisation, however, has weakened regulation at national level, because of investor pressure and new international free trade rules.[3] The nature of multinational corporations in today's global economy also makes it more difficult for individual governments to regulate them and hold them to account. Many multinationals have outgrown the ability of individual states to regulate them effectively. The government and courts of a nominal home country may have little interest in scrutinising the activities of the company overseas. The host country sometimes has inadequate legislation. More

3 See Paul and Garred.

broadly, the political balance has often tilted in favour of multinational companies. A government will have serious conflicting interests if it tries to act on behalf of victims, or to develop laws that hold corporations accountable, and at the same time tries to attract foreign direct investment from multinationals who can choose to invest in any number of countries. The ability of multinationals to move capital between different countries, to create flexible international structures, and exploit the legal fiction that subsidiaries are independent from their parents, makes it difficult for any single state to regulate their activities. When international law is well developed it can provide some of the consistency and reach that are absent in many national legal regimes.

With rights come duties

It is entirely appropriate to apply international legal obligations to companies. After all, multinational corporations have benefited from the development of international law, and have lobbied to ensure that it protects their rights and interests. Such corporations have access to international commercial dispute and other compensation mechanisms. For example, under a treaty created through the World Bank, foreign corporate or individual investors, as well as states, are able to submit disputes to binding arbitration by the Washington-based International Centre for the Settlement of Investment Disputes (ICSID).[4] Under the provisions of a UN treaty, companies that submit disputes to a wide range of arbitration procedures are able to block national court proceedings and have the arbitral awards enforced around the world.[5] The Multilateral Agreement on Investment (MAI), which was put on hold in October 1998, would have gone much further by allowing private investors to sue states in a special tribunal for violating the agreement.[6] Companies can bring claims before several other panels. They include the Iran-United States Claims Tribunal, set up by the Security Council as part of the resolution to the Tehran hostage crisis in 1981; the United Nations Claims Commission set up after the Kuwait conflict in 1990; and panels set up under the 1988 Canada-United States Free Trade Agreement (FTA) and the North

4 The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted by resolution of the Executive Directors of the World Bank on 18 March 1965. The procedure is truly international, excluding the jurisdiction of domestic legal systems while the ICSID proceedings are underway. The ICSID does not have jurisdiction unless both parties have previously agreed to ICSID jurisdiction, which usually happens because there is an ICSID arbitration clause in the investment agreement between a state and the business. See generally Muchlinski, pp. 540-560.

5 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) accessed at www.uncitral.org/en-index.htm on 4 December 2001.

6 For discussion, see Kamminga, Menno T. "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC", in Alston (1999), pp. 557-558.

American Free Trade Agreement (NAFTA). If international law can protect the rights and interests of multinationals, it is reasonable to examine how it might also place duties on them.

BHOPAL – No International Enforcement

(Excerpt from Ramanathan, Usha *Business and Human Rights: Issues in India*, paper prepared for the International Council, September 2000.)

In December 1984 an escape of deadly methyl isocynate (MIC) gas from the Union Carbide (UC) plant in Bhopal in central India "took an immediate toll of 2,660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired or affected in various degrees."[7] Over 500,000 people are estimated to have been affected by the gas.[8] In the sixteen years since the disaster, over 15,000 people have died due to gas related causes.[9] In addition, the disaster killed over 3,000 animals and polluted water sources in the affected area.

A criminal case against the corporation, its directors and managers continues in the Indian courts. There seems little reason to doubt, however, the criminal neglect that resulted in the disaster. An investigation conducted by a scientific team after the disaster found:[10]

- There were basic defects in the design supplied by the UC, which could have triggered a disaster. For instance, "[d]ue to (a) design defect, there was back flow of alkali solution from the Vent Gas Scrubber to the tanks which had been drained in the past by the staff of Union Carbide India Ltd. (UCIL)…"[11] Moreover: "Whereas the MIC tanks had to be constantly kept under pressure using nitrogen, the design permitted the MIC tanks not being under pressure in certain contingencies".[12] In addition the storage tanks were designed to store huge quantities of MIC, which was both beyond the needs of the process as well as dangerous.
- Neither the UCC nor the UCIL took any steps to apprise the local authorities or the local public about the consequences of exposure to MIC or the gases produced by the reaction. Nor was any information given on the medical steps to be taken in the aftermath of the disaster.

Lapses of the corporation were identified as including:[13]

- Invariably storing MIC in the tanks in greater quantity than the 50% of tank capacity that had been prescribed.
- Not maintaining the MIC tanks at the preferred temperature of 0-degree Celsius (the refrigeration system being inadequate and inefficient, with no stand-by) but at ambient temperatures, which were much higher.
- Not taking emergency remedial measures when the runaway Tank No. E610 did not maintain pressure from October 22, 1984 onwards (the disaster occurred 6 weeks later).

- Not sending out an immediate alarm when the gas escaped, and not working at limiting the damage.

Much litigation, in both Indian and US courts, has followed. The Government of India passed legislation authorising it to take charge of all litigation against UC, and in 1989 (after US courts denied they had jurisdiction to hear the case) reached a comprehensive settlement with UC. In return for a payment of $470 million, all pending civil and criminal cases were quashed, and this was agreed to by the Indian Supreme Court. Nevertheless, the victims continue to assert their complaints in the courts, and continuing efforts are underway to pursue a criminal case. The victims have had to bear a large share of the cost generated by the disaster. It is estimated that 92% of claimants for personal injury have received as little as Rs.15,000 [roughly $300] in compensation. 30% of the injury claims have been rejected and over 200,000 claims remain to be decided.[14] The state now talks of closing files and putting a time limit on claims of victims who, according to the state's records, have not responded to summons. Lost files, unsent correspondence and the lack of access that victims have to their files have compounded the possibility of undetermined claims.

A hospital constructed for victims is not yet operational. Medical research into the effects of the disaster has ceased and little information is reaching the victims on medical issues.

The threat of prolonged and expensive litigation daunted the Supreme Court, the state and, on reflection, the victim; the corporation was the one entity that could turn the threat of delay and escalating costs to good account. The possibility of non-enforceability of awards haunted the court, the state, and by imputation, the victim; the corporation gained ground to negotiate on the uncertainties of the outcome of the litigation. The internationalising of business interests jeopardised jurisdiction for the victims; it left the corporation with a plenitude of escape routes. The absconding accused and the disappearing corporation provide a cover of immunity.

7 *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38 at 40 (hereafter 'May 4 order')

8 *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129 at 149 (hereafter 'Keshub Mahindra')

9 Muralidhar, S. "Human Rights Issues: in Parasuraman.

10 *Keshub Mahindra* at 148.

11 *Ibid.*

12 *Ibid.*

13 *Ibid* at 148-49.

14 Muralidhar, S. in Parasuraman, at 32.

Strengths of the human rights framework

A final question needs to be addressed: why is it appropriate to measure company conduct against the yardstick of human rights? Why not use existing national laws dealing with consumer and environmental protection, labour rights, and health and safety? What are the advantages of using the human rights framework?

The human rights framework can provide a common and universal standard. This will assist efforts to judge company practices across national boundaries. Moreover, human rights standards can be a benchmark against which to assess the effectiveness of national regulation. Additionally, using the language of human rights can strengthen advocacy efforts to put a stop to objectionable practices.

Human rights law is a common and universal benchmark

Human rights law is relatively new, having been largely developed since the Second World War. It is only one means of measuring whether, in ethical terms, the actions of companies are good or bad. Religions have traditionally spoken about the fairness of commercial dealings, prohibited unconscionable conduct such as usury and emphasised the ethical duties that apply to everyone, including business people.[15] Business conduct is also judged by other standards – commercial or environmental, for example – and public approval of corporate behaviour has always been a strong influence. Further, the protection of human rights is only one branch of law. In legal terms, company conduct can also be judged in terms of tort or personal injury law, criminal law, company law or, more recently, consumer law.

All these different ethical and legal standards, however, vary between countries and legal systems. International human rights law provides a universal benchmark against which the behaviour of companies can be objectively measured. It is the only existing internationally-agreed expression of the minimum conditions that everyone should enjoy if they are to live with dignity as human beings. It provides a wide range of guarantees – including the rights to food, health, education, work and housing; the rights not to be arbitrarily killed or tortured; and rights to political and cultural freedoms. (In Chapter 3 we explain in greater detail the scope of human rights guarantees and their relevance to companies.) Human rights distil the basic rights that all individuals have in common across different cultures. Of course, not all wrongs are human rights violations. Only the most serious moral wrongs have been elevated to the level of an abuse of human rights. The human rights framework cannot solve all the ethical dilemmas of business. It

15 A useful discussion of this point is found in Weeramantry, pp. 27-49.

provides a coherent set of principles that have been interpreted and applied around the world for more than half a century.

Codes of conduct, even if adopted on an industry-wide basis, cannot provide such a yardstick. There will be debate about whether the standards in the codes are set too low or too high. They will always be open to the charge of selectivity. A recent OECD (Organisation for Economic Co-operation and Development) study of 246 voluntary codes showed that the *only* issue which all included was the prohibition on child labour. Less then half recognised the right to freedom of association.[16] Many codes are a minimalist response to public pressure and are highly selective.[17] The clothing and footwear industries have reacted to public outcry about abuses of labour rights in factories, and the mining industry to images of impoverished local communities alleged to have been forcibly removed from their land.

Of course, international human rights standards are not free of controversy. It is indisputable, nevertheless, that an overwhelming majority of governments have formally committed themselves to respect these standards.[18] Additionally, in regard to most of the relevant standards, both developed and developing countries have actively participated in drafting them.

Integrating human rights principles into other branches of law

Many types of harm will be prohibited by national law, or give rise to the possibility of legal action, even if the harm is not seen as a human rights abuse. For example, employees dismissed from their company on account of race or religious belief might be able to launch a civil action for unjust

16 See Gordon (2000). See also ILO, and Wilson.

17 The U.K.'s Co-operative Bank, for example, decided which ethical policies to adopt by doing a market survey of its customers' views and came up with an eclectic range of investments to avoid, from tobacco manufacturing to "oppressive regimes." See Williams, Simon. "How Principles Benefit the Bottom Line: The Experience of The Co-operative Bank", in Addo, pp. 63-68, at pp. 64-65. On the basis of its survey the bank promised never to invest their customers' money in "oppressive regimes, organisations involved in blood sports, the fur trade, extensive factory farming methods; companies which test cosmetics on animals and tobacco manufacturers". See also the contribution in the same book by Webley, Simon. "The Nature and Value of Internal Codes of Ethics", pp. 107-113, at p. 108.

18 The controversy in the early 1990s about the universality of human rights has been muted, if not ended, by the agreement of 171 governments at the 1993 Vienna World Conference on Human Rights that "All human rights are universal…While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." *The Vienna Declaration and Programme of Action*, Adopted by the United Nations World Conference on Human Rights, Vienna, 25 June 1993, para. 5.

dismissal, claiming damages or reinstatement as a remedy. They might also claim a breach of contract. In some countries, national human rights procedures might allow or even demand that government authorities (or a national human rights commission) step in to ensure the victims receive redress. Finally, if an effective remedy at the national level is not provided, they might be able to petition an international human rights procedure.

In this example, the harm can be characterised in different ways – as a civil wrong giving rise to a claim of action (a tort), as a violation of national anti-discrimination or civil rights legislation, or as an abuse of human rights. When companies engage in abusive practices that impact on human rights, their conduct ought to be proscribed by national legislation. This regulation, however, may take many forms and may not be considered primarily as human rights legislation. These harms should not necessarily be recast as human rights abuses, nor is human rights legislation always needed to prevent, punish and provide redress for such harms. That would be absurd. The argument is rather that, in certain situations, *viewing* such harms in human rights terms will help to prevent them more effectively.

Further, human rights principles can be used to shape and influence other regulatory regimes or branches of law, whether company law, criminal law, tort law or commercial practice. To take one example, the human rights discourse is already influencing the regulation of corporate reporting, and regulators increasingly require businesses to report on financial, human rights and environmental performance (the so-called "triple bottom line"). Similarly, human rights might help to cut through a problem that arises in common law systems. Judges often say that overseas subsidiaries should be sued in the country where they operate, not in the country where their parent company is located. This procedural rule is a major obstacle to victims suing companies for wrongs. Calls for reform might crystallise around seeing this as a violation of the right of a victim to access to justice.

Following the disastrous leak of methyl isocyanate gas from the Union Carbide pesticide factory in Bhopal, India, in 1984, three different types of legal proceedings were pursued: tort law claims for damages, criminal prosecutions, and constitutional "fundamental rights" claims (i.e. human rights claims). Each had their weaknesses. The human rights claim, nevertheless, resonated with many local activists because:

> "Casting the Bhopal injuries in terms of human rights violations underscored the sense of irreparable harm. If the right to life is absolute and inalienable, it cannot be bought and sold on the open market of civil liability...[especially] where the prospect of low tort damages encourages companies to risk accidents rather than investing in safety equipment. The human rights

> language also holds the appeal of universality, so that a human who is injured by industrial hazards should have the same rights to care and compensation no matter where [in the world] the injury occurs."[19]

Advocacy power of human rights

The above comment shows the advocacy power of human rights. Its language has the ability to mobilise support around proposals to improve the lives of human beings and to censure perpetrators. This advocacy power is especially important to give vulnerable or marginalised groups a voice. Indigenous groups, for example, have long argued in favour of a United Nations declaration on the rights of indigenous peoples, following on from an existing declaration on the rights of minorities. The women's movement has significantly strengthened its advocacy impact by insisting that women's rights are human rights.

Using the language of human rights through lobbying and the media has already made an impact in persuading businesses to accept the need to respect human rights. Denouncing a course of conduct as a violation of human rights immediately conveys the opprobrium of society, and, given the international dimension to human rights, raises the prospect that the conduct will be of international concern. Companies may be even more likely to respond to bad publicity of this sort than governments, because their reputation is a vital element of their economic performance.

Legal framework brings advantages for companies

The common view is that companies will oppose the development of binding legal obligations to respect human rights. Voluntary approaches and self-regulation appear to offer them distinct advantages, whereas legal regulation raises the prospect of (expensive) compliance procedures and possible litigation. In fact, the impact is not so clear cut. Companies that are genuinely committed to respecting rights should have nothing to fear from legal regulation. Indeed, clear laws might provide significant advantages.

First, where commitments are voluntary, more enlightened companies can lose out to competitors which do not make similar commitments or are not serious about compliance (the so-called "free rider" phenomenon). It was, for example, those US companies that felt the constraints of the 1977 US Foreign Corrupt Practices Act (which prohibited US companies from paying bribes abroad) who supported the call for new, international anti-corruption

19 Anderson, Michael R. "Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights?", in Robinson and Dunkley, pp. 154-171, at p. 167.

treaties. They wished to make sure that similar standards would bind all governments and all companies. International standards provide a level playing field.

Secondly, some business leaders acknowledge that they would prefer obligation and clarity to voluntarism and confusion. When the scope of duties is doubtful, companies cannot easily defend themselves or prevent criticism.

Thirdly, where clear minimum standards exist, companies that do more can rightly claim to be more socially responsible. As things stand, however, the most inadequate voluntary code can be hyped by the company concerned – while even excellent ones are difficult to defend against critics.

Finally, a more pragmatic argument might be made. The debate on human rights and business has moved rapidly in the past few years. Though discussion still centres on voluntary approaches, increasing attention is being given to the role of national and international regulation. International standard-setting initiatives are underway in several places, and a number of such initiatives have official government endorsement. Such endorsements move the standards along the continuum from pure self-regulation towards the emergence of new legal obligations. This trend is described in Chapter 8. The point to note here is that companies would be short sighted, and governments negligent, if they ignore this trend.

III. INTERNATIONAL HUMAN RIGHTS LAW – OUTLINE AND EXAMPLES

The degree to which international law creates binding legal obligations on companies, and how these might be enforced, will be discussed in the following chapters. This chapter lists key human rights and the possible ways in which actions by private companies might affect these rights.

The discussion is intended to illustrate *potential* impacts. The purpose is not to say in the case of any particular right that one or another course of action amounts to a violation. In addition, the discussion focuses on negative impacts. Business practice can often be said to support human rights, for example through providing financing for schools or health facilities. Before looking at specific rights, the basic contours of the international system for the protection of human rights are described.

Outline of the international human rights system

The term "human rights" can mean different things to different people and organisations. In this report, the starting point for defining "human rights" is international human rights law — that is, those standards negotiated and agreed by governments that set out the rights which deserve international recognition and protection as human rights.

International human rights law is relatively new. For the most part it was developed after the UN was established at the end of the Second World War (1945). All states joining the UN must accept its founding document, the UN Charter. The Charter includes the promotion of respect for human rights as a key purpose of the UN, and requires UN Member states to co-operate with the UN in this task.

The UN Charter does not provide a list of human rights. The first UN document to do so was the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. The Universal Declaration of Human Rights recognises all the main human rights, including civil and political rights (such as the right to life, to free speech, to freedom of religion and to take part in government), and economic and social rights (such as the right to health, to social security and to education). The Universal Declaration takes the form of a resolution passed by the UN General Assembly. It is not a treaty that states formally ratify.

After adopting the Universal Declaration of Human Rights, the Member States of the UN began work on drafting international human rights treaties. The main UN human rights treaties are listed below. The date beside each indicates the year it was adopted.

- International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD – 1965)
- International Covenant on Economic, Social and Cultural Rights (ICESCR – 1966)
- International Covenant on Civil and Political Rights (ICCPR – 1966)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – 1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT – 1984)
- Convention on the Rights of the Child (CRC – 989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW – 1990)

Other treaties deal with apartheid, genocide and refugee protection. Some of these treaties have been accepted by almost every state, and most have been accepted by a solid majority of the world's states. More states accept the treaties every year. In addition, the International Labour Organisation has adopted dozens of treaties that cover numerous rights for workers, in particular concerning health and safety issues, prohibitions on forced and child labour, and the right to organise unions (the ILO and its most relevant treaties are discussed further in this and later chapters).

Member states of the UN have drafted and agreed to dozens of texts dealing with human rights, ranging from principles for investigating arbitrary killings to guidelines for the use of force and firearms by law enforcement officers. These documents (called declarations, guidelines, principles, rules, etc.) are not legally binding treaties, but they set out how states are expected to act on specific human rights matters.

States have also formed regional inter-governmental organisations and some of these have adopted human rights treaties. The three main regional human rights treaties are:

- African Charter on Human and Peoples' Rights (1981), adopted by the Organisation of African Unity, a regional organisation of all African states.
- American Convention on Human Rights (1969), adopted by the Organisation of American States, a regional body that includes almost all states in North, Central and South America.
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), adopted by the Council of Europe, a regional organisation that used to be restricted to Western Europe but

now includes states in Eastern and Central Europe and states formed after the collapse of the Soviet Union.

These regional organisations (and others, including the Organisation of the Islamic Conference, a grouping of Muslim states, and the Organisation for Security and Co-operation in Europe) have also adopted non-treaty standards on human rights.

Survey of specific human rights guarantees

The following list of specific human rights guarantees *is by no means exhaustive*. It is provided primarily to explain a number of the most relevant rights, and to illustrate the links that can be made between companies and human rights abuses.

Non-discrimination

The prohibition against discrimination is at the heart of human rights law, and is set out clearly in numerous human rights texts. Discrimination is explicitly prohibited on grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[20] The list, or its interpretation, is not closed. The list in the Universal Declaration implicitly includes discrimination on the grounds of marital status, nationality, ethnic origin and economic position.[21] The prohibition on discrimination in some human rights standards explicitly obliges states to ensure that it is respected by private persons such as companies (a point discussed further in Chapter 4).

The relevance of non-discrimination for companies should be clear. Discrimination issues might arise in decisions on who is employed, and in the application of a whole range of normal workplace policies (rates of pay, conditions of work, promotion, etc.). Discrimination issues might also arise in relations with consumers, or in the manner in which products are marketed. Issues are most likely to arise in company policies with regard to groups who tend to be marginalised or socially excluded, those who suffer as a result of unequal power relationships, or those who have physical attributes that increase the likelihood of discrimination.

Discrimination issues might also arise when companies fail to discriminate positively *in favour* of a group that is disadvantaged, in particular because in the past the group was treated unfairly or socially excluded. In some cases,

20 UDHR Art. 2; ICCPR Arts. 2(1) and 26.

21 All of these are expressly included in the prohibition of discrimination against migrant workers found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, one of the most recent human rights treaties to be negotiated.

companies might be expected to adopt affirmative action policies that aim to rectify historical discrimination (but only for the time necessary to right the traditional wrong and not so as to entrench a new illegitimate discrimination).[22]

Outside the workplace, discrimination issues might arise in the company's relationship with the community where it operates, or communities with which it comes into contact or who are affected by its operations. To show more clearly the link between non-discrimination and business, we describe below non-discrimination guarantees in relation to women.

Women's rights

A substantial body of international human rights law is devoted to addressing the special needs of women. As a group, women have suffered and still suffer from unequal power relationships in society. Throughout the world, inequality in the enjoyment of rights by women is deeply embedded in tradition, history and culture, including religious attitudes.[23] Discrimination against women is often associated with discrimination on other grounds, such as race, colour, language, religion, property or other status.

Given the history and consequences of gender inequality, it is not surprising that the main effort to address the human rights concerns of women focussed on discrimination. All major human rights instruments contain prohibitions on discrimination on the basis of gender.[24] In addition, a specific treaty (CEDAW) is aimed at the elimination of discrimination against women, and defines "discrimination against women" as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[25]

Further, many of the anti-discrimination provisions in these treaties require states to ensure that gender discrimination is not practised by private actors, including companies (this point is discussed again in Chapter 4).

22 ICERD Art.2 (3) calls for "special concrete measures… to secure adequate development or protection of individuals belonging to certain racial groups…". CEDAW allows "temporary special measures" to speed up equality between men and women and to protect maternity (Art.4) and to help rural women (Art.14).

23 *Equality of rights between men and women* (article 3), 29/3-2001. CCPR/21/Rev.1/Add.10, ICCPR General Comment 28, para. 5.

24 To mention only a few provisions, see UDHR Art. 2; ICCPR Arts. 2, 3 and 26; ICESCR Art. 2.

25 CEDAW Art. 1.

As employers, companies clearly can be implicated in discrimination against women. The International Labour Organisation has produced a range of instruments aimed at ensuring women's equality in the workplace, which states are obliged to enforce against private employers.[26] The International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the enjoyment of just and favourable conditions of work. This guarantees to women the right to conditions of work not inferior to those enjoyed by men, with equal pay for equal work.[27] An ILO Convention from 1952 guarantees a woman's entitlement to maternity leave and is currently being updated.[28]

CEDAW also contains language to protect the particular interests of women in the field of employment. States parties must take all appropriate measures to ensure the right of men and women to the same employment opportunities[29]; ensure the right to equal remuneration and equal treatment[30]; prohibit dismissal on the grounds of pregnancy or of maternity leave[31]; and introduce maternity leave with pay or with comparable social benefits without the loss of former employment, seniority or social allowances.[32] It should be noted that numerous women in most countries are employed in sectors that are not covered or protected by labour laws.[33]

There is a growing concern nationally and internationally to prevent and combat sexual harassment at the workplace, which is considered a form of violence against women.[34] The UN Commission on Human Rights adopted a resolution in 2001, that encourages states to punish acts of violence against women, including sexual harassment, committed by private persons.[35]

26 See for example Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, 1958; and Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951.

27 ICESCR Art. 7(a)(i).

28 Convention (193) on Maternity Protection (Revised), 1952. The Convention applies to women employed in industrial undertakings and in non-industrial and agriculture occupations, including women wage earners working from home (Art. 1).

29 CEDAW Art. 11, 1 (b).

30 CEDAW Art. 11, 1 (d).

31 CEDAW Art. 11, 2 (a).

32 CEDAW Art. 11, 2 (b).

33 CCPR/21/Rev.1/Add.10, CCPR General Comment 28, para. 31.

34 See Declaration on the Elimination of Violence against Women; and Report of the Special Rapporteur on violence against women, Radhika Coomaraswamy, E/CN.4/1997/47, Chapter III.C.

35 E/CN.4/Res.2001/49.

Life, liberty and physical integrity of the person

International law prohibits arbitrary killing,[36] torture and other cruel, inhuman or degrading treatment or punishment,[37] slavery and the slave trade,[38] including forced labour, arbitrary (i.e. unlawful and unjustified) arrest and detention of anyone,[39] and protects the right of anyone detained to be treated with humanity and dignity.[40]

The way in which companies impact on these rights will often arise from direct or indirect support for government policies. For example, a company's presence in conflict areas may aid one side that is committing abuses. Companies engaged in resource extraction (oil, mining, etc.) may open up areas and, through the transport links and infrastructure they create, give armed forces access to what were once remote communities. Extracting the resource — where benefits are not shared equally — may itself help to create or perpetuate conflict. Many allegations of business complicity in abuses of the right to life and physical integrity arise from such situations. (Slavery-like practices such as forced labour are considered below.)

More directly, companies may engage security personnel (for example, to guard their property). Much has been written about the obligations of companies to ensure that private security forces whom they employ, or state security forces whom they pay for or otherwise support, or which are used by the state to protect their operations, do not abuse rights and respect detailed international standards on use of force and firearms.[41] The use by businesses of private security forces is a classic example of private actors fulfilling a traditional function of states. It raises the question of whether such actors should be bound by the standards that would bind state security forces doing the same job. In some countries, traditional state functions, such as the operation of detention or prison facilities, have been privatised. Clearly, companies that take over such tasks should assume some responsibility for protecting the rights of detainees.

There is a link too between protection of the right to life and protection of the natural environment. Though not always accepted, arguments grounded in

36 UDHR Art. 3; ICCPR Art. 6.

37 UDHR Art. 5; ICCPR Art. 7; and the more detailed Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

38 UDHR Art. 4; ICCPR Art. 8; Slavery Convention, signed in Geneva, 25 September 1926; and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by the UN Economic and Social Council, by Resolution 608 (XXI), 30 April 1956.

39 UDHR Art. 9; ICCPR Art. 9.

the right to life are raised when environmental contamination causes death or serious illness. (The link between human rights and the environment is examined in more detail below.)

Civic freedoms

This cluster of rights protects freedom of expression and opinion,[42] freedom of peaceful assembly and association,[43] freedom to adopt and practice a religion and hold other beliefs,[44] the right to privacy, and freedom from arbitrary interference with family, home or correspondence.[45]

Company policies can prevent the free expression of political or other views in the workplace, or otherwise obstruct the expression of religious and cultural beliefs. Bans on union activity are an obvious example. (Trade unions as examples of freedom of association will be considered in the next section.) Yet many apparently innocuous policies in the workplace — dress codes, working hours — can have negative impacts on religious and cultural beliefs and practices. International law protects rights including freedom of expression and assembly precisely to ensure space exists for dissenting views. Dissent and disagreement are likely to focus not only on the state but on other powerful actors. Companies can find themselves the target of demonstrations and other forms of peaceful protest and in some cases companies have colluded with state forces to suppress these.

There is a relationship between recognising rights such as freedom of religion and culture, and protecting other rights such as non-discrimination. For example, women should not normally be segregated from men in the workplace. But this might be acceptable if required by religious beliefs, and might be compatible with the obligation not to discriminate against women, *if* women have access to the same jobs, opportunities for advancement, security, training and pay, as men. Businesses will often face dilemmas when they try to take account of local cultures and religions, without condoning cultural norms that violate rights.

40 ICCPR Art. 10.

41 See for example, Amnesty International, *Human Rights Principles for Companies – an introductory checklist*, AI Index: ACT 70/01/98, January 1998, principle 2; The principle standards are the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by 8th UN Congress on the Prevention of Crime and the Treatment of Offendors, Havana, Cuba, 27 August to 7 September 1990; and UN Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly, Resolution 34/169, 17 December 1979.

42 UDHR Art. 19; ICCPR Art. 19, subject to prohibition in Art. 20 of hate speech.

43 UDHR Art. 20; ICCPR Arts. 21 and 22.

44 UDHR Art. 18; ICCPR Art. 18, reinforced by UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

This illustrates a broader point: that rights to expression, assembly, association and religion are not absolute. The international standards build in limitations to ensure the freedoms are exercised responsibly. Restrictions are allowed if this is necessary to ensure other people's rights are not damaged and that law and order, public morals or health are not threatened.

Employees' rights

International human rights standards protect a number of employees' rights including the right to work,[46] right to form and join trade unions and for those unions to function freely,[47] prohibition on discrimination in the workplace,[48] prohibition of slavery or servitude and forced labour and right to free choice of employment,[49] protection of children from exploitation (including prohibiting harmful work and setting minimum age for employment),[50] right to just and favourable conditions of work (including equal pay, decent living wages and safe and healthy working conditions),[51] and right to rest, leisure and reasonable limitations of working hours.[52]

In addition, the ILO has adopted many treaties that protect employees' rights. There is considerable controversy about which of the large number of ILO standards could be considered the most important core workers' rights. The answer becomes clearer from a human rights perspective. The core workers' rights could be described as:

- *Freedom of association and the rights to organise and bargain collectively*:[53] Workers should be able to establish and join organisations independent of government and of their own choosing, without prior authorisation of the company or fear of retaliation, and through these associations bargain collectively.

45 UDHR Art. 12; ICCPR Art. 17.

46 UDHR Art. 23; ICESCR Art. 6.

47 UDHR Arts. 20 and 23(4); ICESCR Art. 8.

48 General protection against discrimination (UDHR Art. 2; ICCPR Arts. 2(1) and 26) as well as specific references to discrimination in the workplace (UDHR Art. 23; and ICESCR Art. 7).

49 UDHR Arts. 4 (slavery) and 23 (free choice of employment); ICESCR Art. 6 (free choice of employment); and ICCPR Art. 8 (slavery, servitude, forced or compulsory labour).

50 ICESCR Art. 10 and see the detailed standards in the UN Convention on the Rights of the Child.

51 UDHR Art. 23; ICESCR Art. 7; and the broader right in UDHR Art. 25 "everyone has the right to a standard of living adequate for the health and well-being of himself and his family".

52 UDHR Art. 24; ICESCR Art. 7 (d).

- *Non-discrimination*:[54] Workers should not be discriminated against on any of the illegitimate grounds set out above, nor on the grounds of union membership, whether in recruitment, job security, pay and conditions, promotion, training or redundancy.
- *Prohibition on bonded and forced labour*:[55] Employees should not be forced or compelled by threat of penalty to work for a business.
- *Prohibition on forms of child labour*: Child labour should be abolished, and children must be protected against exploitation and employment that endangers their health or safety.
- *Safe and healthy work environment*:[56] Employees should be provided with a safe and healthy work environment and should not be exposed to unreasonable hazards.
- *Payment of a living wage*: Workers should be paid enough to cover their basic needs, with some discretionary income (enabling the employees to maintain a standard of living adequate for his or her health and well-being and that of his or her family, including food, clothing, housing and medical care).
- *Reasonable working hours and overtime*:[57] Employees should not be made to work more than 48 hours per week except in exceptional circumstances and when appropriately paid.

53 The basic norms in UDHR and ICESCR are elaborated in ILO Conventions No. 87 (Freedom of Association and Protection of the Right to Organize, 1948) and No. 98 (The Right to Organize and Bargain Collectively, 1949). UDHR Art. 20 provides that "no one may be compelled to belong to an association", though this right not to join a trade union is not repeated in either of the two Covenants or in ILO standards. ILO organs believe that a qualified right to strike (which must be peaceful and can be denied to some public servants and those engaged in essential services) is essential to enable workers collectively to protect their interests (see Leary, Virginia. "The Paradox of Workers' Rights as Human Rights", in Compa and Diamond, pp. 22-47, at p. 34). It is protected in a qualified way by ICESCR Art. 8, which says the right must be "exercised in conformity with the laws of the particular country". In addition, see ICESCR Art. 2 regarding legitimate restrictions on unionisation in armed forces, police and state administration.

54 In addition to UDHR, and the many UN conventions and declarations prohibiting discrimination on various grounds such as race, gender, religion, migrant workers, see ILO Convention No. 111 (Discrimination [Employment and Occupation] Convention, 1958).

55 In addition to UDHR and ICCPR, see ILO Convention No. 29 (Forced Labour Convention, 1930) and ILO Convention No. 105 (Abolition of Forced Labour Convention, 1957).

56 In addition to ICESCR Art. 7, see ILO Convention No. 155 (Occupational Safety and Health and the Working Environment, 1981).

The first four rights would be accepted by most commentators as "minimum" or "internationally recognised" workers' rights. The ILO Declaration on Fundamental Principles and Rights at Work declares that all ILO members, even if they have not ratified any conventions, are obliged by their membership to abide by ILO standards covering the first four rights set out above.[58] The next three are equally firmly founded because they are protected in the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights (which 145 states have ratified).

Clearly, companies may impact on all these rights. Indeed, most multinational corporations refuse formally to support freedom of association and the right to collective bargaining in their codes of conduct.[59] If workers are unable to organise, they are poorly placed to ensure respect for other rights such as safety in the workplace or the right to a living wage. The right to organise is often explicitly denied, for example in export processing zones, where unions are frequently prohibited (though other forms of workers' associations may be permitted).

Some workers' rights are very controversial. There is debate, for example, as to whether business should be required to pay a "living wage" to its employees or (as many standards say) only the legal minimum in the country or prevailing industry wage, whichever is the higher. These may be lower than a living wage. Opponents argue that it is impossible to define the living wage, especially across borders. Nevertheless, a human rights perspective leads inevitably towards it. The Universal Declaration (Article 25) recognises that:

57 In addition to the general right to leisure in UDHR Art. 24, see the more detailed provisions in ILO Convention No. 1 (Hours of Work [Industry]) which limits normal working hours to eight per day and no more than 48 per week. ILO Convention No. 14 says that workers should generally have at least one 24-hour period of rest each week.

58 Adopted by the International Labour Conference, (86th session, Geneva, June 1998). The same four rights are included in the UN Global Compact, Principles 3-6. For discussions on what constitutes minimum workers' rights, see Leary in Compa and Diamond (cited above, footnote 53), pp. 22-47. A highly-regarded 1984 Dutch study on labour standards and trade, cited by Leary, concluded that the first three rights as well as minimum age for employment, make up minimum internationally recognised labour standards. The study used three criteria to select the conventions: those related to basic human needs and human rights, those with a sufficient degree of international acceptance of the standard and those that would not impose economic hardship or impair economic development. See National Advisory Council for Development Cooperation, *Recommendation on Minimum International Labour Standards*, The Hague, Ministry of Foreign Affairs, November 1984. See also Forcese (Commerce with Conscience, 1997), pp. 19-20; and Bhala, pp. 29-39.

59 In one study, 60% of the 246 codes of conduct reviewed covered labour standards, but of these only 29.7% mentioned respect for association and bargaining rights. Gordon and Miyake (2000), p. 12 and p. 14.

> "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care."

Article 23 speaks of "just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity", while Article 7(a)(ii) of the International Covenant on Economic, Social and Cultural Rights refers to a wage which provides "a decent living for themselves and their families", basing this on the minimum conditions of life provided for in the convention itself.

Below, two of the core labour guarantees – prohibitions on child labour and forced or bonded labour, are considered in more detail.

Child labour

The ILO estimates at least 250 million children between the ages of five and 14 work in conditions that flout international standards.[60] While elimination of child labour is the ultimate objective of the relevant international human rights instruments,[61] it is recognised that child labour will not be abolished overnight because its incidence is linked closely to poverty and underdevelopment.[62] Certain forms of child labour, nevertheless, are considered intolerable, regardless of a country's level of development or economic situation. These worst forms of child labour include all forms of slavery and practices similar to slavery; child prostitution or child pornography; the use, procuring or offering of children for illicit activities; and work which, by its nature or the circumstances in which it is carried out, "is likely to harm the health, safety or morals of children".[63]

The UN Convention on the Rights of the Child obliges States Parties to protect children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education.[64] It also stipulates that children should be protected from performing any work that is likely to be "harmful to the child's health or physical, mental, spiritual,

60 "Statistics: Revealing a Hidden Tragedy", ILO, accessed at www.ilo.org/public/english/standards/ipec/simpoc/stats/4stt.htm on 3 December 2001.

61 See for example Art. 1 of the ILO C38 Minimum Age Convention, 1973, which provides that "each Member ...undertakes to pursue a national policy designed to ensure the effective abolition of child labour…"

62 International Programme on the Elimination of Child Labour, ILO accessed at www.ilo.ch/public/english/standards/ipec/index.htm on 3 December 2001.

63 ILO Convention C182 Art. 3, Worst Forms of Child Labour Convention, 1999. For the purposes of the Convention, the term child apples to all persons under the age of 18.

64 CRC Art. 32, 1. Article 1 of the CRC defines a child for the purpose of the Convention to mean "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

moral or social development".[65] States are obliged to take legislative, administrative, social and educational measures to ensure the right is implemented, particularly by providing a minimum age for admission to employment and regulating the hours and conditions of employment appropriately.[66]

In addition to identifying unacceptable forms of child labour, another human rights instrument, (the ILO C138 Minimum Age Convention), stipulates that no child younger than 15 should be employed.[67] Countries, whose economy and educational facilities are "insufficiently developed" may initially allow employment of children from the age of 14, after consultation with employers and workers organisations (if these exist).[68] The minimum age for any type of employment or work which is likely to jeopardise the health, safety or morals of young persons is 18 years.[69]

The international human rights standards on child labour are clearly relevant to companies. Different minimum ages for different types of work should be respected and certain types of work should not be carried out by children. Employers should furthermore ensure that work does not interfere with a child's education.

Slavery, forced and bonded labour

The right not to be held in slavery or servitude is well established.[70] The ILO adopted a convention in 1930 which aimed at suppressing the use of forced or compulsory labour in all its forms.[71] "Forced or compulsory labour" was defined in that convention as meaning "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[72] Article 5 specifically provided that no concession granted to private individuals or companies should involve any form of forced or compulsory labour for the production or collection of products.[73] Bonded labour (also referred to as debt bondage) is

65 CRC Art. 32, 1.

66 CRC Art. 32, 2.

67 Art. 3, ILO C138.

68 Art. 2, ILO C138.

69 Art. 3, ILO C138.

70 This right was already established in the 1926 Slavery Convention, which obliged States Parties to prevent and suppress the slave trade, and to bring about the complete abolition of slavery in all its forms. The Convention defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." (Art. 1).

71 Art. 1, 1, ILO Convention (29) Concerning Forced Labour.

72 Art. 2, ILO Convention (29) Concerning Forced Labour.

defined as a practice similar to slavery.[74] The Universal Declaration on Human Rights states unequivocally that no one shall be held in slavery or servitude, and that slavery and the slave trade are prohibited in all their forms.[75] The prohibition was also given legally binding status in the ICCPR, which contains an absolute prohibition on slavery, slave trading, servitude and forced labour.[76]

Although historically slavery was defined rather narrowly, it is now defined to include "all contemporary manifestations of this practice", including forced labour.[77] Slavery is also an international crime for which private actors can be held responsible.[78] Despite some significant progress against bonded labour in the last 25 years, it is estimated that some 20 million people are still held in this form of slavery.[79]

Forced and compulsory labour has taken different forms over time. In recent years there has been an explosive increase in the number of persons trafficked across national borders and continents, and then forced to work in sweatshops, as domestic servants or as prostitutes. In such forms of contemporary debt bondage, the persons involved – or their families – must repay the expenses advanced to them for their illegal transport and immigration. While international concern over trafficking is not new, the magnitude of the problem is.[80]

The ILO's two forced labour Conventions were adopted at a time when states were perceived to have the primary responsibility in relation to forced labour, although the role of non-state actors was also recognised. Today, private individuals and enterprises – including organised crime – are often the principal actors involved.

73 Another ILO Convention later reiterated the obligation of States Parties to suppress forced or compulsory labour as a means *inter alia* of political coercion or education, of labour discipline or as punishment for having participated in strikes.

74 Art. 1(a) of the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. The same Supplementary Convention prohibits bonded labour.

75 UDHR Art. 4.

76 ICCPR Art. 8.

77 "Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organisation to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)", ILO, Part IV.9.A.P 198 (1998).

78 *Kadic v. Karadvic*, 70 F.3d 232, 239 (2nd Cir. 195).

79 Working Group on Contemporary Forms of Slavery, 24th Session, E.CN.4/Sub.2/1999/17.

80 "Stopping Forced Labour", ILO Report, June 2001, p. 10.

Using domestic law based on international standards, national courts can play a role in prosecuting such persons. In a ruling against the managers of a fish-processing company, the Indian High Court in Bombay found that they had treated a worker as a bonded labourer by confining her to factory premises and even dragging her back when she tried to escape. The woman was awarded compensation and the court ordered continued monitoring of the situation and gave a worker's organisation access to the workplace.[81] In North America several high-profile cases in sweatshop industries have resulted in severe penalties and heightened public awareness.[82] Chapter 7 examines a case where US courts have investigated complaints that Unocal, a US oil company, was complicit in forced labour practices used by the Government of Mynamar to build a pipeline.

Economic, social and cultural rights

The most relevant economic, social and cultural rights are the right to adequate food,[83] right to education,[84] right to the highest attainable standard of physical and mental health,[85] right to adequate clothing and housing,[86] and the right to participate in cultural life.[87] The broader right to adequate standard of living is a shorthand way of referring to the individual rights to food, clothing, housing, medical care and social services.[88]

Economic, social and cultural rights are the least understood rights and are often seen as being distant from business. Some of the most important rights in this category are therefore described in this section, as well as potential impacts. These rights will be particularly important for companies that provide schools or health clinics in a "company town", or deliver services that were more usually provided by states.

*The **right to food***: This right guarantees the ability of people to feed themselves adequately or to have the means to procure food.[89] It means

81 "Stopping Forced Labour", ILO Report, June 2001, p. 14.

82 "Stopping Forced Labour", ILO Report, June 2001, Executive Summary.

83 UDHR Art. 25; ICESCR Art. 11.

84 UDHR Art. 26; ICESCR Art. 13.

85 UDHR Art. 25; ICESCR Art. 12.

86 UDHR Art. 25; ICESCR Art. 11.

87 UDHR Art. 27; ICESCR Art. 15.

88 UDHR Art. 25, and only food, clothing and housing in ICESCR Art. 11.

89 Viz. "the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation." CESCR, General Comment 12 on right to food, para. 9.

having enough *quantity* and *quality* of *nutritious* food that is *safe* and is not contaminated with toxic substances[90] and which is *culturally acceptable* in the society concerned. Especially significant for business is the fact that the right to food does not describe a simple calorie or nutrient count. It includes the idea that food should be *economically accessible* (and reasonably priced) and *physically available*. The idea of food availability takes account of the fact that people may need access to productive land or other natural resources, or well-functioning distribution and market systems, and that vulnerable groups may need protection and assistance in order to secure food for themselves. The supply of food, and access to it, must be *sustainable* for current and future generations. In effect, the right to food is not merely about food as a commodity. It is about *entitlements*: who controls the resources that enable food to be produced or traded or transferred or otherwise provided?[91] Most famines do not occur because food is lacking, but because people do not have access to it or cannot afford it.

Companies might hoard food to push up prices, or otherwise deliberately promote scarcity of an essential food product. Private business is often an essential link between producers and consumers. At any stage in the process, particular policies may impact on the quality and quantity of food available, on access to it or on cost. Much of the debate about international trade focuses on the risk that corporations might control the ability of communities to produce or obtain food, especially in developing countries. If acquiring the patent to a piece of traditional knowledge or life form that provides food denies free access to that resource by the community, the right to food can be threatened.

The ***right to health***. This is a complex right because ill-health has many causes – from lack of education to poor housing and from poor medical treatment to lack of medicines. There is, of course, no absolute right to be healthy. The entitlement is rather a right to the *highest attainable standard of physical and mental health*, which varies according to time and place. To achieve this, the right to health covers the underlying factors that affect health, including food, nutrition, housing, water and sanitation, working conditions and the environment. The right to health broadly guarantees access to adequate health care, nutrition, sanitation and clean water and air,

90 The CESCR speaks of food being "free from adverse substances" which requires "a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must be taken to identify and avoid or destroy naturally occurring toxins." General Comment 12, para.10.

91 For a powerful discussion of the right to food as entitlement to economic freedoms, see Sen, pp. 162-164 and chapter 7 generally.

including a healthy workplace.[92] It affirms that: (1) everyone should have access to functional public health facilities, goods and services; (2) these facilities should be accessible to all without discrimination, including marginalised groups, and should be within safe physical reach and should be affordable, so that poor people are not disproportionately burdened with health expenses; (3) information about health issues should be available and positively promoted by the state; (4) all health facilities, goods and services should comply with medical ethics and be culturally appropriate; and (5) the health facilities should be of good quality scientifically. Reproductive health is included within the right, as are the rights to be informed and have access to safe, effective, affordable and acceptable methods of family planning. There is an emphasis on prevention, on primary health care and on reducing mortality of infants and under-fives.[93]

When private companies are a key provider of health care, as is increasingly the case, their activities can touch all components of this right. Companies can cause ill-health — through the products they produce or through environmental hazards associated with their production processes. Where companies knowingly market unhealthy products, or where they recklessly pollute the environment, causing disease, the link to the right to health is clear. Recently, a number of pharmaceutical companies have come under fire for maintaining high prices for medicines to treat HIV/AIDS, and for defending patent rights that give them exclusive control over the manufacture and sale of these medicines. In addition, these companies have been criticised for under-investing in research on drugs that might treat (or prevent) illnesses and disease more prevalent in poorer countries. In both situations, a number of pharmaceutical companies have recognised that their policies can have an impact on the right to health, though they have stressed that governments have the primary duty to ensure access to medicines.

*The **right to education*** guarantees free and compulsory primary education, and equal access to secondary education and higher education. Education facilities need to be *available*, meaning in sufficient quantity and with the

92 The UN Committee on Economic, Social and Cultural Rights has said the minimum "core obligations" of states under the right to health are (1) to ensure the right of access to health facilities, goods and services without discrimination, especially for vulnerable or marginalised groups; (2) to ensure access to the minimum amount of food, nutritionally adequate and safe food, in order to ensure freedom from hunger to everyone; (3) to ensure access to basic shelter, housing and sanitation and an adequate supply of safe and potable water; (4) to provide essential drugs, as from time to time defined by WHO's Action Programme on Essential Drugs; (5) to ensure equitable distribution of all health facilities, goods and services; and (6) to adopt and implement a national public health strategy and plan of action. Committee on ESCR, General Comment 14 on "The right to the highest attainable standard of health".

93 In this respect, see health rights of children in CRC Art. 24.

necessary buildings, sanitation, safe drinking water, trained teachers and teaching materials. Education needs to be *accessible* to everyone without discrimination, convenient to reach (including through distance learning techniques), and affordable *(economic accessibility)*. Teaching needs to be of sufficient quality, culturally appropriate (e.g. for minorities and indigenous people) and *adaptable* in order to meet the needs of a changing society.

Where businesses are involved in running or supporting schools, they need to ensure that all groups have access to them without discrimination. This applies especially to girls and to marginalised groups. Where a company dismisses an under-age child from its factory, because of the prohibition on child labour, the right to education could mean that it has a responsibility to ensure the child is not cast into potentially worse conditions on the street, but is able at least to go to primary school.

*The **right to housing*** is not confined to having a roof over one's head (in the same way that the right to food is not merely about eating enough food). It affirms that everyone has a right to *adequate* housing — housing that is safe, habitable and affordable, with protection against eviction. Adequacy is usually taken to mean that everyone should have housing: (1) with some degree of *security of tenure*; (2) with *access to basic services* and facilities, including safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services; (3) that is *affordable*; (4) that is *habitable*, giving adequate space and protection from the elements; (5) that is *accessible* to all, meaning that vulnerable groups such as the elderly, disabled, or victims of disasters, should be given priority in housing and may have special needs; (6) that is in a *location* which allows access to employment and basic services; and (7) that is appropriate to their *culture*. Forced evictions violate the right to housing unless there are clear legitimate reasons (such as damage to rented property, or persistent non-payment of rent without cause).[94] As with all other rights, the prohibition on non-discrimination should guide decisions about housing.

When a business is planning to use a particular piece of land, it should first ensure that no-one is being forcibly evicted from this land, and that property rights are respected, especially if vulnerable groups inhabit the land, such as indigenous peoples. The unjustified, forced displacement of people, which usually also violates the right to housing, is a gross violation of rights and could amount to an international crime.

94 See Committee on ESCR, General Comment 4 on the "right to adequate housing"(Art.11(1)), and General Comment 7 on "Forced Evictions" (as a violation of right to adequate housing).

Vulnerable groups

Human rights law has long recognised that certain groups need special protection. Such groups include landless peasants, marginalised peasants, rural workers, rural unemployed, urban unemployed, urban poor, migrant workers, indigenous peoples, children, elderly people, women and the disabled. They are vulnerable to human rights abuses because of their physical attributes (e.g. the disabled) or because they have suffered discrimination for a long time (e.g. women) and do not have equal power in society preventing them from protecting their rights.

There are two obligations in relation to vulnerable groups. First, businesses should make sure that their activities do not hurt (even unintentionally) these vulnerable groups. Second, human rights law allows, and sometimes requires, temporary positive discrimination in favour of these groups, in order to right a historical wrong that may otherwise never be rectified by time. As an example of human rights guarantees for vulnerable groups, we will look at protections for indigenous peoples.

Indigenous Peoples

The UN has defined indigenous populations in the following way, which combines both objective and subjective elements:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts thereof. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems."[95]

Many indigenous groups are particularly vulnerable to human rights violations. They frequently suffer discrimination, and their rights to life, to health, to land and to culture have been violated over time and on a large scale in many societies. The UN has for some years worked on drafting a Declaration on the Rights of Indigenous Peoples.[96] However, contentious issues, notably the right to self-determination, have delayed agreement. In

95 E/CN.4/Sub.2/1983/21/Add.8, para. 369. This is regarded as an acceptable working definition by many indigenous peoples (see "Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)", published in 2001 by World Intellectual Property Organisation, p. 23.)

the meantime, other UN bodies attempt to highlight and address the particular problems that indigenous peoples face.[97]

In 1989 the ILO adopted the Indigenous and Tribal Peoples Convention (C.169),[98] which, among other provisions, calls for special measures to ensure that indigenous people are effectively protected with regard to recruitment and conditions of employment, to the extent that they are not effectively protected by laws applicable to workers in general.[99] The Convention reiterates the prohibition against bonded labour and other forms of debt servitude.[100] While it does not grant any new rights to individual members of indigenous groups, it recognises the need to protect the rights of indigenous *groups*.[101]

A wide range of business activities have the potential to violate the rights of indigenous peoples. Traditionally, most attention has focussed on extractive industries (oil drilling, logging, mining, etc.) that operate in areas where indigenous populations live. The capacity of such activity to damage the natural environment, together with the importance that indigenous peoples attach to their land, has caused conflict or social dislocation in numerous cases.

In recent years new issues have been added to the list of potential human rights hazards which indigenous peoples face when they come into contact with private companies. Harvesting of indigenous genetic resources with the

96 UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2.1993/29/Annex I.23 August 1993.

97 See for example *General Recommendation XXIII on Indigenous Peoples*, by the Committee on the Elimination of Racial Discrimination, fifty-first session, 18 August 1997, contained in document A/52/18, annex V. See also the final report by the Special Rapporteur on Human Rights and the Environment, Fatma Zohra Ksentini, E/CN.4/Sub.2/1994/9, 6 July 1994, paras. 74-94.

98 Adopted on 27 June 1989 by the General Conference of the International Labour Organisation. Entered into force on 5 September 1991.

99 Art. 20 (1).

100 Art. 20 (2) (c).

101 Other examples of recent emerging international norms relevant to indigenous peoples include CRC Art. 30; Agenda 21 of the UN Conference on Environment and Development (1992), in particular chapter 26; and Part I, para. 20 of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights and indigenous people, on the basis on non-discrimination. See also the preamble and article 3 of the UN Framework Convention on Climate Change (1992); and article 10(2)(e) of the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994).

intention of utilising such resources for commercial, scientific and military purposes is one such new issue. Many indigenous groups have expressed their strong disapproval of such projects.[102] They say that very often their consent was not obtained, raising the question of whether rights to privacy have been violated. They argue that the proceeds from development of genetic resources or from commercial exploitation of their traditional knowledge have rarely been shared with them.[103] This is despite the fact that the Convention on Biological Diversity in Article 8(j) provides that member states "…encourage the equitable sharing of the benefits arising from the utilisation of (indigenous) knowledge, innovations and practices." At present no system ensures "equitable sharing" of the income generated by commercial exploitation of knowledge held by indigenous groups.

Indigenous groups are becoming increasingly protective of their cultural heritage, and resistant to its exploitation for commercial purposes. In 2000, the toy maker *Lego* was strongly condemned by indigenous groups for giving a new range of toys names from indigenous Maori folklore. *Lego* had apparently not consulted or sought consent from Maori groups before acting.

Right to information

The freedom to "seek, receive and impart information and ideas of all kinds" is a component of the right to freedom of opinion and expression.[104] Increasingly, however, the right to information is considered so important that it deserves independent recognition.[105] At the core of the right to information is the obligation of public bodies to disclose information, and the right of every member of the public to receive information. "Information" includes all records held by a public body, regardless of the form in which they are stored.[106]

For the purposes of disclosure of information, the definition of public body should focus on the types of service provided, rather than on the nature of the institution. Private bodies which carry out public functions (such as running postal services, maintaining roads or operating rail lines) are therefore covered. They are equally included when they hold information

102 See for example *Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project,* accessed at www.indians.org/welker/genome.htm on 3 December 2001.

103 The World Intellectual Property Organisation in 2000 established an Intergovernmental Committee to look at protecting traditional knowledge.

104 ICCPR Art. 19.

105 Report by the Special Rapporteur on Freedom of Opinion and Expression, E/CN.4/2000/63, para. 42.

106 *Ibid*. para. 44.

whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.[107] Institutions should meet individual requests for information unless they can show that the information falls within the scope of the limited regime of exceptions. Refusal to disclose information is not justified unless:

- The information relates to a legitimate aim listed in the law;
- Disclosure threatens to cause substantial harm to that aim; and
- The harm outweighs any public interest benefit from releasing the information.

Some private bodies can therefore be obliged under international human rights law to provide information relating to aspects of their activities, when these can be considered public functions. The other important principle established by the right to information is that information held by private companies should be disclosed when a key public interest, such as the environment, is at risk.

Environment and human rights

It is common knowledge that some business practices have environmental implications. Mining, logging, oil drilling, chemical production and waste-disposal projects all have potential to disrupt or harm ecosystems and the natural environment.

By damaging the environment, such activities may also compromise the rights of people who are affected. Contamination of a community's water resources as a result of uncontrolled deforestation, or pollution of indigenous lands as a result of industrial processes, illustrate such problems. Certain groups may be disproportionately vulnerable to environmental damage because of their culture, the nature of their economy or their socio-economic status. Although international human rights instruments contain few specific provisions relating to the environment, many fundamental human rights – to life, to health, to privacy, non-discrimination and self-determination, for example – can have significant environmental dimensions.[109]

107 *Ibid*.

108 *The Public's Right to Know: Principles on Freedom of Information Legislation*, Article 19 – The International Centre Against Censorship, June 1999. Endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression E/CN.4/2000/63, para. 43) and enclosed as an Annex to his report to the UN Commission on Human Rights in 2000 (E/CN.4/2000/63).

109 See in more recent instruments specific references to environmental rights: Art. 24 of the African Charter on Human and Peoples' rights and CRC Art. 29(e). See also the 1992 United Nations Declaration on Environment and Development (Rio Declaration) and the Earth Charter Benchmark Draft, from the Rio + 5 Forum, 1997.

In 1972, an international meeting formulated, for the first time, the issue of environmental protection specifically in terms of a "right to environment",[110] commencing the process of explicitly linking environmental law with human rights. Since then, there has been an increasing recognition internationally that "human rights, an economically sound environment, sustainable development and peace are interdependent and indivisible."[111] In April 2001, the UN Commission on Human Rights, addressing the links between environment and human rights, for the first time concluded that everyone has the right to live in a world free from toxic pollution and environmental degradation.[112]

Thus, environmental issues can be placed in a human rights context, either as a free standing right to environment or as a prerequisite for the enjoyment of other rights. The right to live in a healthy environment is protected in the Protocol of San Salvador, an agreement concluded by the Organisation of American States (OAS).[113] Further, a Draft Declaration of Principles on Human Rights and the Environment from 1994 attempts to comprehensively address the issue.[114]

Business activities that harm the environment can be subject to human rights complaints that are grounded in non-environmentally explicit provisions. A recent judgement from the European Court of Human Rights (October 2001) found that the UK Government had violated the human right to respect the private and family lives of people living near London's Heathrow Airport by failing to control night-time noise from aeroplanes. The Court observed that, since Heathrow airport and the aircraft that used it were not owned or controlled by the Government or a government agency, the UK Government could not be said to have "interfered" with the applicants' private or family life. However, the Court found the State had a positive duty to take reasonable and appropriate measures to secure the applicants' rights and to strike a fair balance between the competing interest of the individual and of

110 Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972. Principle 1 of the Declarations states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".

111 See also the final report by the Special Rapporteur on Human Rights and the Environment, Fatma Zohra Ksentini, (cited above, footnote 97) at Annex I.

112 E/CN.4/Res/2001/35.

113 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, adopted at San Salvador 17 November 1988, Article 11.

114 Draft Declaration of Principles on Human Rights and the Environment, 1994, Sierra Club Legal Defence Fund, enclosed as an annex to the Final Report of the UN Special Rapporteur on Human Rights and the Environment, E/CN.4/Sub.2/1994/9.

the community as a whole. In the "particularly sensitive" field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others.[115] As a result of this judgement, the UK Government will now be obliged to establish and enforce more rigorous regulations of night-time noise-pollution around Heathrow Airport.

Many countries have recognised the right to a clean and healthy environment in their constitutions. The majority of Eastern European constitutions promulgated after the fall of communism include an express right to environment, as do a number of Western European states.

While there are few international enforcement mechanisms in the field of environmental rights, national laws have been used successfully in some cases to address environmental human rights violations by private corporations. In 1997, Turkey's highest administrative court declared unconstitutional the activities of a new gold-mining project, sponsored by the French-based conglomerate Eurogold. The judges ruled that the mine would have caused significant pollution, and violated a provision of Turkey's Constitution which protects every Turk's fundamental right to a healthy, intact environment. The mine was subsequently shut down.[116]

115 *Hatton & Others v. the United Kingdom*, Application no. 36022/97, judgement of 2 October 2001.

116 See Sachs, "What do human rights have to do with environmental protection? Everything", accessed at www.globallearningnj.org/global_ata/Human_Rights_and_Environmental_Protection.htm on 4 December 4 2001.

IV. INDIRECT OBLIGATIONS – DUTIES ON STATES

As indicated at the outset, international law can play both a direct and an indirect role in holding companies accountable under human rights law. First, international law can and does set out the obligations of states to ensure national laws and procedures effectively enforce international standards in relation to companies. This chapter explores these *indirect* obligations on businesses. Secondly, international law could impose obligations directly on corporations, even when national laws in the countries in which they do business are inconsistent with international standards. Chapter 5 will look at this *direct* application of international standards to companies. Chapter 6 will examine how indirect and direct obligations might be enforced using existing international procedures.

The importance of national law

To date, discussions of international legal principles designed to ensure that companies respect human rights have tended to focus on direct accountability. This is not surprising. Many of the most high profile cases of alleged abuses of rights by companies involve multinational corporations. As noted above, there is a sense that these corporations have "outgrown" national regulation, so that they are in effect beyond the reach of national law (at least beyond the efforts of poorly equipped and under-resourced governments in developing countries). There are good reasons, however, for turning to national law first.

The state is the basic unit of international law and most international law puts obligations on states – rather than individuals – even though (as discussed in Chapter 5 below) it is increasingly attributing responsibilities to private actors.[117] When international law aims at changing law or practice in the world, it must largely rely on states to effect the change. For example, there are international treaties that require states to outlaw corruption. It is then up to each state to ensure that their laws define and criminalise corruption and to bring individuals to justice. Without national action by governments, the rules are practically unenforceable.

117 Some international legal rules do aim directly at individuals, such as the prohibition on committing slavery or genocide. In the absence of a world government, however, many of these rules would not be enforced unless each state had the necessary laws and used its own legal machinery to prosecute individuals. Gradually states are working together to create some global institutions which can directly enforce these rules against individuals. For example, the International Criminal Court will be able to prosecute individuals for international crimes such as genocide, though only if individual governments cannot or are unwilling to do so.

There are other reasons for stressing the importance of national law. Where companies abuse rights and no redress or accountability are available, this indicates a *failure* of national law. To ignore the role of the state – and focus only on the company – might appear to imply that such failure is inevitable. Even if a direct approach to a company results in a beneficial outcome (redress for victims and an end to the abuse), there is no guarantee that this outcome will apply more generally without some action on the part of national authorities. A key weakness of voluntary codes is that they appear to give up on the possibility of effective state action.

The duty to protect – obligations on states to regulate private actors

The main purpose of human rights law is to ensure that the minimum rights of every human being are respected. Human rights law has sought to protect individuals principally against abuse of *state* power by *public* officials. Human rights standards require the state to regulate the actions of its own institutions and authorities — the police force, the army, public education authorities, local governments, public hospitals and so on. Harmful acts of private persons (like companies) might be criminal or otherwise prohibited by *national* law, but have tended not to be the concern of *international* human rights law. However, this distinction between public authorities and private actors is breaking down. Several provisions in human rights treaties, and authoritative interpretations of these treaties, have the effect of requiring states to ensure that private persons as well as public institutions do not abuse rights.

A state has three types of obligations in implementing human rights standards. It must *respect* these rights, which means making sure that state officials and public agents do not do anything to violate people's rights. Its obligations would include prohibiting arrests without warrants, outlawing torture, and preventing discrimination by public authorities. The state must *fulfil* the rights, which means taking positive action through government authorities and agents so that people can enjoy their rights. This might include improving the quality of health care, bringing clean water to poor areas, or training judges to be truly independent. The state must also *protect* human rights. It is under this heading that a state is obliged to protect people by preventing private actors from abusing rights.[118]

118 For example, ICERD states in Article 2 "to engage in no act or practice of racial discrimination" and "ensure" public authorities conform to that edict (i.e. "respect"), to "prohibit" discrimination by private groups (i.e. protect) and to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination" (i.e. fulfil).

Provisions in human rights treaties

A wide range of human rights treaties, which are legally binding on states that ratify them, explicitly, or through interpretation, require states to regulate the behaviour of non-state actors, to stop or prevent them abusing the rights guaranteed in the treaty.

A UN convention prohibiting *discrimination against women* (CEDAW) requires states "to take all appropriate measures to eliminate discrimination against women **by any person, organization or enterprise**".[119] This is so even in areas of human activity reaching far beyond public authorities, including the family and marriage, employment, and modifying "the social and cultural patterns of conduct of men and women…".[120] The responsibility of states in relation to private actors is probably most fully accepted in relation to *violence against women*. On this subject, the UN Committee that oversees implementation of this treaty has said that

> "discrimination under the Convention is not restricted to action by or on behalf of Governments… Under general international law and specific human rights covenants, States may also be responsible for private acts…"[121]

This has been backed up by a highly authoritative UN declaration prohibiting violence against women that includes in the definition of violence against women acts occurring "in public or private life".[122]

The UN convention prohibiting *racial discrimination* obliges states to "prohibit and bring to an end… racial discrimination **by any persons, group or organization**".[123] The UN Committee that monitors the treaty, has backed this up by saying:

> "To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must

119 CEDAW Art. 2(e).

120 CEDAW Art. 5(a).

121 UN Committee on the Elimination of Discrimination against Women, *General Recommendation 19, "Violence against women"*, 30 January 1992, UN Doc: A/47/38, para. 9.

122 Art. 1 of the 1993 UN Declaration on the Elimination of Violence against Women, UN General Assembly Resolution 48/104 of 20 December 1993, UN Doc: A/RES/48/104.

123 ICERD Art.2(1)(d). The Convention itself also obliges states to criminalise the spreading of ideas of racial superiority and inciting others to racial discrimination and violence and make racist organisations illegal (Art. 4); states must also protect against racially motivated violence "whether inflicted by government officials or by any individual group or institution" (Art. 5(b)). States must ensure that victims of racial discrimination have effective remedies, including compensation (Art. 6).

ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination".[124]

The UN committee monitoring the International Covenant on Civil and Political Rights has interpreted some of the treaty's provisions as imposing obligations on states to stop or prevent abuses by private actors.[125] In commenting on the *right to life*, the committee has said that "States parties should take measures not only to **prevent and punish deprivation of life by criminal acts**, but also to prevent arbitrary killings by their own security forces".[126] The *right to privacy* protects people from "all such interferences and attacks whether they emanate from State authorities **or from natural or legal persons**" and the state must use law and other means to prohibit such interference.[127] Because of the rise of "modern mass media" (ie including private media), the *right to freedom of expression* should include "effective measures [by the state]…to prevent such control of the media as would interfere with the right to everyone to freedom of expression".[128]

The UN Convention on the *Rights of the Child* is built on the belief that parents or guardians have the primary responsibility to bring up a child. States should assist parents, but are also legally obliged by the treaty to ensure the child is protected in this private sphere. Included are the duty to regulate private institutions that care for children (Article 3(3)); protect children from violence or abuse in the home (Article 19); abolish traditional practices that harm children's health (Article 24(3)); and protect children from economic exploitation and hazardous work (Article 32).[129]

124 Committee on the Elimination if Racial Discrimination *General Recommendation 20, "Non-discriminatory implementation of rights and freedoms, (Art. 5)"*, 15 March 1996.

125 The *travaux préparatoire* (or preparatory documents summarising the drafting discussions) of this treaty suggest that a majority of states saw the treaty as protecting human life against "unwarranted actions by public authorities as well as by private persons". See Clapham, Andrew. "Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts", in Scott, pp. 513-535, at p. 514.

126 UN Human Rights Committee, *General Comment No.6*, UN Doc: HRI/GEN/1/Rev.1 at p. 6, para. 2.

127 UN Human Rights Committee, *General Comment 16, "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)"*, 8 April 1988, para.1.

128 UN Human Rights Committee, *General Comment No.10, Freedom of expression (Art.19)*, 29 July 1983.

129 For a full explanation of the extent to which states are obliged to regulate private actors, see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, New York, 1998, especially under Articles 3 and 19.

Most ILO treaties on *workers' rights* expect states to ensure that both private employers and public institutions respect labour rights, whether they deal with collective bargaining, forced labour or health and safety.[130] Standards in the ILO are drafted jointly by delegations from governments, from employer and from trade union organisations and they reflect the workplace role that each of these parties play.

In delineating state obligations in relation to the *right to food*, the UN committee monitoring implementation of the International Covenant on Economic, Social and Cultural Rights has said: "States Parties should take appropriate steps to ensure that activities of the **private business sector and civil society** are in conformity with the right to food".[131] The committee warned states that violations by states of the right to food will include "…failure [of a state] to regulate activities of individuals or groups so as to prevent them from violating the rights to food of others".[132]

In 1997 a group of international experts drew up guidelines on interpreting violations of *economic, social and cultural rights* in which they summed up how international law has developed by concluding that:

> "The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights."[133]

Therefore, if a government fails to ensure that private employers comply with basic international labour standards, this could amount to a violation by that state of the right to work or the right to just and favourable conditions of work.[134]

130 For example, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise (Adopted 9 July 1948 by the General Conference of the ILO), requires in Article 11 that every state party "undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise".

131 UN Committee on Economic, Social and Cultural Rights, *General Comment 12, "The right to adequate food"*, 12 May 1999, UN Doc: E/C.12/1999/5,CESCR, para. 27.

132 *Ibid*., para.19.

133 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26 1997, para. 18.

134 *Ibid*. para. 6.

Interpretations by human rights courts

Regional human rights courts have recognised the responsibility of states for abuses committed in the private sphere. A major case decided by the Inter-American Court of Human Rights will be discussed below. The European Court of Human Rights (European Court) has also become comfortable with the concept. In the Netherlands a 16-year-old mentally handicapped girl was sexually abused by the son-in-law of the director of a private nursing home. Because of a gap in Dutch criminal law no one could be criminally prosecuted. In deciding the case, the European Court found that the Dutch government had violated the girl's right to privacy by not ensuring such a criminal remedy. It said that the positive obligation of the state to ensure respect for private and family life "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[135] The girl was awarded damages and the Dutch authorities changed the criminal law.

More recently, in *Z. and others v. UK*, the European Court concluded that authorities in the United Kingdom had violated the right of four children not to be ill-treated when it failed to take reasonable steps to prevent them from being horrifically abused over a four-year period by their parents.[136] In another case, the European Court recognised that the right to life "may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".[137]

The protection of privacy and home life set out in the European Convention on Human Rights (Article 8) has been broadly interpreted by the European Court to include the right to be free of environmental pollution. In *Guerra v. Italy*, it found that Italy had violated the right to privacy by failing to prevent a fertiliser plant from releasing toxic fumes (including arsenic compounds) that injured hundreds of people in its vicinity.[138] The court again preferred to rely on the right to privacy rather than other, seemingly more specific, provisions such as the right to life. Similarly, as discussed in Chapter 3, the right to

135 *X and Y v. The Netherlands*, 91 ECHR Series A (1985), para. 23.

136 *Z. and Others v. United Kingdom*, Application No. 29392/95, judgment of 10 May 2001. It is also significant that the Court had no problem with saying that the abuse by the parents amounted to inhuman and degrading treatment (prohibited by the European Convention on Human Rights) even though the parents were private or non-state actors.

137 *Osman v. UK*, judgement of 28 October 1998, at p 522.

138 *Guerra and Others v. Italy*, ECtHR, Reports of Judgements and Decisions 1998-I, No. 64 (19 Feb. 1998), at para. 58. See Scott, Craig. "Multinational Enterprises and Emergent Jurisprudence on Violation of Economic, Social and Cultural Rights", in Eide, Krause and Rosas, pp. 563-595.

privacy was applied when the court found that the UK Government had violated the European Convention by failing to adequately regulate night-time noise pollution arising from flights at London's Heathrow airport. This suggests that the right to privacy may have more potential for holding corporations accountable via state responsibility.[139]

Thus far the European Convention on Human Rights has only been applied to the conduct of European companies within Europe. Could it be used to protect against the actions of European corporations *outside* European territory?[140] It is well-established that states can be responsible under the Convention for protecting people in Europe against acts of torture that might occur outside their jurisdiction. In the *Soering* case, the European Court decided that a German national detained in the United Kingdom could not be extradited to the United States to be tried for murder because he would face the possibility of capital punishment, and prolonged confinement on "death row" which would amount to cruel, inhuman and degrading punishment.[141] It may be possible to argue that European states have a positive obligation to prevent their companies from violating human rights (at least the right to privacy, family and home), even when such violations occur outside Europe. To date, such an argument has not been presented to the Court.[142]

When is a state responsible for abuses by private actors?

Of course, it would not make sense to use human rights law to hold states accountable for every crime or harm inflicted by private actors. Doing so would trivialise the notion of human rights. So criteria are gradually being developed to determine when a state is liable under human rights law for the

139 The now-defunct European Commission on Human Rights stated that "the protection afforded by Article 8 to an individual's physical integrity may be wider than that contemplated by Article 3 of the Convention depending on the facts of the case". *Jeremy Costello-Roberts v. UK*, report of the Commission, 8 October 1991, para. 49, discussed in Clapham (1998), at p. 217. Even in cases where environmental pollution constitutes a nuisance but does not result in health problems, the European Court has held that the state has a positive duty "to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8", see *Lopez Ostra v. Spain*, 41/1993/436/515 (9 Dec. 1994), p. 15, para.51.

140 See, for instance, the European Parliament's resolution regarding application of uniform safety standards by subsidiaries of European companies operating abroad, Resolution on the poison gas disaster in India, 13 Dec. 1984 [1985] OJ C12/84.

141 Judgement of 19 July 1989, Series A, vol. 161.

142 At issue here is subject-matter jurisdiction, as opposed to personal jurisdiction. Under the Brussels Convention, any company domiciled in a European state can be sued by plaintiffs domiciled anywhere as long as there is a link between the forum state and the subject matter of the dispute – for instance, the responsibility of the management in monitoring company operations abroad. 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, OJ (1998) C 27/1. See Betlem, Gerrit. "Transnational Litigation against Multinational Corporations Before Dutch Civil Courts", in Kamminga and Zia-Zarifi, pp. 283-305.

actions of non-state actors and what states must do to ensure that these actors respect human rights.

An important means of measuring state responsibility, and one that is gaining increasing acceptance, is the *due diligence test*. This test says that a state must have taken reasonable or serious steps to prevent or respond to an abuse by a private actor, including investigating and providing a remedy such as compensation. It gauges the efforts and willingness of a state to act. When Angel Manfredo Velásquez Rodríguez was forcibly disappeared and probably killed in 1981 by the Honduran army or unknown attackers, the Inter-American Court of Human Rights articulated this test for the first time. The Court said that, even if the attackers were private individuals, the total failure of the authorities to try to find the victim or perpetrators or give any remedy to the family was itself a violation.[143] Honduras would also have been liable if it had supported or acquiesced in the private abuse. Over time more international human rights standards,[144] and the bodies that monitor them, are using the due diligence test.[145]

If international law requires that states prohibit certain conduct by private actors, is that conduct itself a violation? The court in the *Velásquez Rodríguez* case clearly spoke about the acts of private actors themselves violating the treaty. There is some authority for the quite logical argument that if a state is required to prevent and stop conduct by private actors, the

143 *Velásquez Rodríguez* case, Judgement of 29 July 1988, Inter-American Centre on Human Rights (Series C) No. 4 (1988). "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…) 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 violations or to respond to it as required by the Convention" (para. 172). "Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane" (para. 177).

144 The UN Declaration on the Elimination of Violence against Women says that states are obliged to: "Exercise **due diligence** to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, **whether those acts are perpetrated by the State or by private persons**" (Art. 4(c)). This was authoritatively reaffirmed in September 1995 by the Beijing Fourth World Conference on Women, which adopted the Beijing Declaration & Platform for Action. See para.124(b) which reaffirms the obligation of governments to exercise due diligence to prevent, investigate and punish violence against women whether committed by the state or private actors. Para.113 reiterates that the definition of violence against women includes violence in "public or private life".

145 The UN Committee on the Elimination of Discrimination against Women, which monitors implementation of the convention has said: "Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." *General Recommendation 19, "Violence against women"*, 30 January 1992, UN Doc: A/47/38, para.9.

conduct itself is indirectly prohibited by the international law rule. This idea is most well developed in the jurisprudence of the European Convention on Human Rights.

Privatisation and the "private" sphere

There are reasons why states are increasingly held to be in breach of their human rights obligations when they fail to prevent abuses by private actors. Women's organisations have successfully argued that a restrictive reading of international human rights law – limiting its application to acts of state agents – denies women protection in many situations where they need it. Women are more likely than men to suffer physical abuse, discrimination and harassment in the so-called "private" spheres of the home, the local community or the factory. As people have begun to take domestic violence, sexual discrimination and child abuse more seriously, so it has become easier to argue that the state has a duty to prevent such abuses.

In addition, more attention is being given to private actors because many public services that were provided by governments have been privatised. As state institutions, postal, transport and telecommunications services were bound to respect human rights. A state should not be able to absolve itself of human rights responsibilities by delegating such functions to private enterprises.[146] The right to privacy would be meaningless if it set constraints on the surveillance techniques of state police forces but not private security firms. The right to humane treatment for those detained would be illusory if it applied only in state prisons, but not immigration detention centres or prisons run by private companies. Even if their power is slowly shrinking, states retain an obligation to regulate those who take on some of these functions.[147] Citizens should not lose their channels of legal complaint and redress.[148] Companies are legal constructs regulated by law in all respects. Part of that regulation should be to ensure that, if they take on former

146 The European Court of Human Rights said in *Costello-Roberts v. United Kingdom* that a state "could not absolve itself of responsibility by delegating its obligations to private bodies or individuals", ECHR (1993), Series A., Vol.247-C, para. 27.

147 This has been recognised by treaty monitoring bodies and some treaties themselves. The Human Rights Committee, commenting on the right of everyone deprived of their liberty to be treated humanely (Art. 10, ICCPR) has said that this principle applies to all detainees held "under the laws and authority of the State… in all institutions within their jurisdiction where persons are being held". This would include private hospitals, prisons and security operations, which are nevertheless carried out with the authority of the state. See UN Human Rights Committee, *General Comment 21, "Concerning humane treatment of persons deprived of their liberty (Art.10)*", 10 April 1992, para. 2. As discussed above, the UN Convention on the Rights of the Child provides that any place that cares for children, whether state or private, must comply with standards. States are required to ensure that: "the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision" (Art. 3(3)).

functions of the state, they should be required to respect similar standards of conduct.

Summary – indirect obligations

It seems clear that human rights law is not limited to a concern with abuses committed by the state or those acting on its behalf. The idea that states can be responsible for abuses committed by private actors, *including companies*, has been reaffirmed formally in human rights treaties, general comments by UN expert bodies which interpret these treaties, and decisions of regional human rights courts in Europe and the Americas. It is important to remember that these relate to human rights treaties that are legally binding on the states that have ratified them. A consensus of states in the world has also recognised this, in declarations adopted by the UN General Assembly, and at the 1995 Beijing World Conference on Women.

The concept was recognised early on in the UN, in the drafting of the racial discrimination treaty finalised in 1965. It has been recognised in relation to a wide range of rights, including the right to life, freedom from torture, freedom from discrimination (in relation to women and race), prohibition on violence against women, right to privacy, freedom of expression, right to adequate food, as well as many workers' and children's rights.

This range of authority suggests that a rule of international customary law is emerging which would bind all states regardless of which human rights treaties they have ratified. Almost 10 years ago, the UN committee overseeing the Convention on the Elimination of Discrimination against Women considered that "under general international law" states were responsible for protecting individuals from abuse by private actors.[149]

In the context of this report, indirect obligations on the state and the due diligence test provide opportunities to extend the international legal regime to companies. In regard to a number of human rights, one can imagine developing criteria to judge whether a state's laws, regulations and enforcement procedures are adequate to ensure that companies respect human rights. Are adequate laws in place to control threats to the right to health posed by particular types of production? Is action taken against companies that suppress the right of workers to organise? Are there adequate remedies provided in national law so that employees dismissed on account of their race or religion can seek redress? Further enquiries along these lines should be an essential part of the development of international regulation.

148 Hatchard, John. "Privatisation and Accountability: Developing Appropriate Institutions in Commonwealth Africa", in Addo pp. 289-305, especially pp. 289-290.

149 See footnote 145 above.

V. DIRECT OBLIGATIONS – DUTIES ON COMPANIES

No doubt, much can be achieved by ensuring states live up to their obligations to protect human rights. Nevertheless, when states are unwilling, or unable, to take effective action against companies, the question of direct accountability arises. To what extent does international law impose obligations directly on companies to respect human rights? And how might these obligations be enforced? This chapter will examine these questions.

Chapter 2 set out the case for international law. To counter the view that this law applies only to states, the first section of this chapter explains how actors other than states participate in and are "subjects" of international law.

International law is not only for states

International law is traditionally made *by* states and *for* states. It aims above all to bring some order to inter-state relations. The issues dealt with by international law in the past were mainly of interest to states, such as land and sea boundaries, diplomatic privileges and immunities, legal disputes between states, recognition of states and treaties. Before the Second World War, international lawyers generally believed that international law applied only to states, and that *only* states could be the "subjects" of international law.[150] It has been widely accepted since the Second World War, however, that other actors, including individuals and companies, participate in the international legal system. States have given them some specific rights, duties and powers under international law.

It is now accepted, for example, that *international organisations* (such as the United Nations or the Organisation of African Unity, set up by agreement between two or more states) have some rights and obligations under international law.[151] It has equally been accepted that *insurgent or rebel groups* in a civil war have certain rights and obligations under the laws of war. Under Article 3 (found in all four of the Geneva Conventions of 1949 for the

150 See Oppenheim, p. 19: "Since the law of nations is based on the common consent of individual States, and not individual human beings, States solely and exclusively are subjects of international law".

151 This was confirmed as early as 1949 following the murder of Count Bernadotte, the UN mediator in Palestine, when the International Court of Justice decided that the UN had "international personality" and could bring a compensation claim against Israel for allegedly failing to prevent or punish the murderers (See *Reparations for Injuries* Case ICJ Reports, 1949, p. 174). In addition, recognised international organisations can make international agreements with other international organisations and individual countries. For example, Art. 43 of the UN Charter envisages the UN entering into agreements with states to create stand-by military forces. Top UN civil servants also enjoy diplomatic privileges and immunities similar to national diplomats.

protection of victims of war), and provisions in the two Additional Protocols of 1977, insurgent forces as well as state armies are obliged to protect prisoners and respect prohibitions such as those on attacking civilians, taking hostages, carrying out terrorist acts, or using starvation as a method of combat.[152]

Largely due to the growth of human rights law, *individuals* also participate increasingly in the international legal system. They have rights, mirrored by the obligations of states to respect those rights. (Individuals also have obligations not to commit international crimes such as genocide, *apartheid* and war crimes; this is dealt with below.) Under many UN and regional human rights treaties in Africa, the Americas and Europe, individuals are able to seek to enforce their right against the state by complaining to an international body of experts or judges that acts like a court. Thousands of individuals have had their claims adjudicated by international bodies.[153]

In some situations *companies* have also been granted the benefit of certain rights that are found in human rights documents, along with access to international tribunals to enforce them. Companies cannot be considered to have human rights in the same way that every person has inherent rights because they are human. But the European Court of Human Rights has recognised that companies can enjoy rights such as the rights to fair trial, privacy, and aspects of freedom of expression.[154] When Switzerland argued that a Swiss company, Autronic AG, should not be able to complain that the Swiss government had violated its right to freedom of expression, the Court said

> "Neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 [freedom of expression]. The Article applies to 'everyone', whether natural or legal persons."[155]

152 As recently as 1999, states finished negotiating a protocol to the UN Convention on the Rights of the Child to prohibit child soldiers. It requires armed groups to prevent the participation of children in armed conflict and not to recruit them into their armed forces. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted by UN General Assembly, 16 May 2000, UN Doc: A/54/L.84, Art. 4.

153 Indeed, more such rights are still being created. In 1999 an individual petition procedure was created for the UN Convention on the Elimination of All Forms of Discrimination against Women and another is under discussion for the International Covenant on Economic, Social and Cultural Rights.

154 It would stretch the concept of human rights too far, however, to say that companies can enjoy some of the rights to physical integrity such as the rights to life or freedom from torture. See generally Addo, Michael K. "The Corporation as a Victim of Human Rights Violations", in Addo, pp. 187-196.

Further, as described in Chapter 2, companies benefit from other rights granted by international law, for example to bring claims against states relating to commercial disputes before international tribunals. Treaties can impose certain obligations directly on companies, even though they are usually enforced against companies by states. This is familiar in the maritime world, where treaties place direct liability for oil pollution damage on the "owner of a ship"[156] and declare as criminal the illegal traffic of hazardous wastes.[157]

Some actors other than states, therefore, have certain rights and obligations under international law. This is true of international organisations, insurgent or rebel groups, companies, and private individuals. It does not matter that they have taken no part in negotiating the treaty that creates an obligation. The point is that no *conceptual* obstacle prevents states from requiring companies to abide by legally binding international human rights obligations.

The evolution of the role of non-state participants should not obscure some fundamental characteristics of international law that remain. International law is still intended primarily to regulate relations between states. States remain the most important subjects of international law and have all the rights and obligations possible under that law: They can enforce claims in international tribunals, make international treaties, and their diplomats enjoy privileges. In relation to human rights, the continuing legal pre-eminence of states means that victims of human rights violations look first and primarily to states for protection and remedies. Finally, states are still the only actors that *make* international law; they draft, adopt, sign and ratify treaties, or create customary international law through what they say and do.[158] States create the international human rights law that can confer rights and obligations on individuals or companies.

155 *Autronic AG v. Switzerland*, Eur. Ct. H.R. Series A.178 (1990); 12 (1990) E.H.R.R. 485. at para. 47.

156 Protocol of 1992 to Amend The International Convention on Civil Liability for Oil Pollution Damage 1969, International Maritime Organisation, 1992, Art. 4. The treaty also prohibits ship owners from limiting liability below a certain amount, Art. 6. The "polluter pays" principle is also imposed on legal persons in the Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, adopted June 1993, which has not yet been ratified by enough states to come into force.

157 Global Convention on the Control of Transboundary Movements of Hazardous Wastes, adopted Basel, 1989, which says such illegal traffic is criminal (Art. 4 (3)) and requires states to outlaw it in national laws (Art. 9(5)). "Persons" are defined as any natural or legal person (Art. 2 (14)).

158 Some scholars, however, have argued that international commercial activity creates a form of international law, known as *lex mercatoria*. See Horn, Norbert. "Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making", in Horn, pp. 45-81.

Applying international standards directly to companies

No theoretical obstacle therefore prevents commercial enterprises from "participating" in international law. They already have some rights and duties and nothing prevents states from creating further obligations. To what extent, however, have international human rights standards already been applied directly to companies? Are companies legally obliged to respect these standards? To answer these questions it is necessary to look

- at international human rights standards, and in particular the Universal Declaration of Human Rights;
- at standards adopted by inter-governmental organisations to regulate the activity of multinational corporations; and
- at the duties of individuals under international law, including those that relate to international crimes.

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948 and is the source of most modern human rights norms. Its preamble states:

> "The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and **every organ of society**, keeping this Declaration constantly in mind, **shall strive by teaching and education to promote respect for these rights and freedoms** and by progressive measures, national and international, **to secure their universal and effective recognition and observance**…"(emphasis added).

The simplicity and power of these words cannot be overstated. Commenting on this part of the preamble during the 50th anniversary of the Universal Declaration in 1998, Professor Louis Henkin, a noted scholar of international law, emphasised:

> "*Every individual* includes juridical persons. *Every individual* and *every organ of society* excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."[159]

An "organ" in the sense used in the preamble suggests an institution or group of people or thing which performs some function, in this case for "society".[160] It is not difficult to see that "organs of society" encompass businesses, since they play a clear economic (and increasingly social)

159 See Henkin, at p. 25, emphasis in the original.

function in society. This is especially true for companies or other legal persons that are artificial constructs created in law as a way of organising commerce, to encourage investment and reduce risk.

The preamble's language exhorts organs of society to *promote* human rights, which implies talking about human rights values and helping others to understand the meaning and importance of these values, and also to work for the universal *protection* of human rights. To protect (or "secure") implies using whatever influence one has to affect law and practice and to intervene to help prevent or stop specific abuses of groups and individuals.

Is this responsibility of "organs of society" legally binding on companies? The Universal Declaration is a declaration, not a treaty; it exhorts but was not intended originally to create legally binding obligations. For the Universal Declaration to have become binding customary international law it is necessary to show that states, through their repeated words and deeds, have accepted that it has become binding.

The fact that the Universal Declaration is widely violated does not in itself prevent the rules from becoming binding because, in most cases, states do not deny the legitimacy of the rule but claim there is an exception or deny or reinterpret the facts.[161] For example, the prohibition on torture has undoubtedly become a rule of customary international law even though the practice is found in a majority of states. In the area of human rights the fact that states say they consider themselves bound is of crucial importance.

Further, the fact that there is no direct way to enforce in a tribunal the exhortation in the Universal Declaration aimed at "organs of society", does not by itself remove its potential binding effect. The lack of a procedure to enforce a right should not be confused with whether the substantive right or obligation exists.[162] This will be an important point in regard to many of the emerging international legal responsibilities of companies. As domestic court cases increasingly rely on international standards, creative lawyers are likely to argue in court that the preamble is the principal statement of a company's

160 In relation to humans or animals, an "organ" is a part or member of that creature, which performs some vital function such as hearing, speaking or digesting, suggesting that to be an "organ of society" the function played should be quite important. For the meanings of "organ" as they would have been known by the generation that drafted the Universal Declaration, see *The Shorter Oxford Dictionary*, 2nd edition, Oxford, Clarendon Press, 1936, Vol. II, p. 1384.

161 See *Nicaragua* case in which the ICJ said: "If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justification contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than weaken the rule"- ICJ Reports (1986) 14 at 98. See also Higgins, pp. 20-22.

internationally-recognised responsibility to promote and protect human rights.

It is now widely accepted that *some* provisions of the Universal Declaration have become binding international law on states. The (first) world conference on human rights in Teheran in 1968 reflected this development when it proclaimed that the Universal Declaration "constitutes an obligation for the members of the international community" and this appeared in a document that is arguably, at least in part, declaratory of international law.[163]

It is unclear, however, *which* parts of the Universal Declaration have become binding. The list would include the Declaration's prohibitions on torture, discrimination and slavery. The exhortation to organs of society, however, is found in the preamble or introduction and not in one of the 30 substantive articles that set out the rights of every human being. A rule of interpretation generally holds that preambles to international instruments are not themselves legally binding.

There is, however, one reference in a substantive provision of the Universal Declaration that also encompasses companies. Article 30 contains a strong warning to groups as well as individuals to "do no harm". This provision, which is echoed in the International Covenant on Civil and Political Rights and regional human rights treaties, says:

> "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

Although the wording of this clause was motivated by fear that fascist or racist ideologies might re-emerge after the Second World War, it could apply to any individual or groups, including corporations, who intend to violate the rights set out. However, this interpretation goes beyond the original intention of the drafters and has not yet been tested. It is also uncertain whether Article 30 has become legally binding.

162 Higgins, p. 53 and reference therein to Lauterpacht, H. *International Law*, 1950, p. 27. The Indian Constitution, for example, sets out "fundamental duties" of every Indian citizen, including to defend the country and to protect the environment. Although the duties are not legally enforceable in Indian courts, "the citizen, it is expected, should be his own monitor" and the duties have force because they will be used to assess the reasonableness of restrictions on the exercise of citizens' rights. (Art. 51A, *The Constitution of India*, quote taken from commentary on this article in Das Basu, Acharya Durga. *The Shorter Constitution of India*, 12th ed., New Delhi, Prentice-Hall, 1996, p. 310. The author says that Art. 51A brings the constitution into line with Art. 29(1) of the Universal Declaration).

163 *Proclamation of Teheran*, proclaimed by the International Conference on Human Rights at Teheran, 13 May 1968, para. 2.

Even though the preamble does not set out legally binding norms, it can be used to interpret or understand the rest of the document. It sets out the purpose and object of the document and the rest of the document should be read with this understanding. The part of the preamble we have been examining, therefore, indicates that, in order to give the maximum protection to individuals and to ensure they enjoy all the substantive guarantees in the declaration, every government, individual and organ of society must play their part. The preambular and substantive provisions in the Universal Declaration have a similar "indirect legal effect" as an authoritative guide to the interpretation of human rights articles in the UN Charter which themselves create legal obligations.[164]

Regardless of the legal force of the Universal Declaration, few documents have acquired such authority in both law and politics. The Universal Declaration has been endorsed in the preamble of every UN human rights treaty whose substantive provisions also elaborate guarantees originally found in the Universal Declaration. All UN member states except six[165] have ratified, and are therefore legally bound by, at least one of these human rights treaties that refer to the Universal Declaration. Provisions of the Universal Declaration have been incorporated into many national constitutions and laws. The Universal Declaration has also been approved repeatedly in political resolutions and world conferences of organisations such as the UN. The most important was the 1993 UN World Conference on Human Rights in Vienna, in which 171 states "reaffirm[ed] their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights".[166]

Whether or not legally binding and enforceable, the reality is that states have drafted an international document that speaks to private enterprise as an "organ of society". The document calls on businesses to respect the same human rights guarantees that states themselves are required to respect. The preamble to the Universal Declaration is, in effect, a fundamental affirmation by states of corporate responsibilities. It declares they should promote and respect all the rights guaranteed in the Universal Declaration. It is difficult to see how companies might maintain that they are an exception or for any other reason have no duty to abide by such responsibilities. The Universal Declaration is also a living document, which can be re-interpreted and applied to new situations. If they wish to do so, states may remove any

164 In 1971 the International Court of Justice said that South Africa's *apartheid* policies in Namibia violated the UN Charter. *Advisory Opinion on Namibia*, ICJ Reports (1971), pp. 16-345 at 57.

165 Brunei Darussalam, Kiribati, Micronesia, Nauru, Oman and Palau.

166 The Vienna Declaration and Programme of Action, adopted 25 June 1993, Vienna.

ambiguity by confirming that "organs of society", including companies, do have binding obligations under international law to uphold the Universal Declaration.

"Elementary considerations of humanity" and international criminal law
A tradition of moral, religious and political thinking considers that the most fundamental ethical or legal restraints on the power of rulers or governments issue from a higher religious or natural law. In a modern form of this tradition, it is argued by some that some human rights are legally binding on *all* states by customary law, even if the states concerned have not ratified any treaties or participated in any political declarations containing these rules.[167] These "peremptory norms of international law", or *jus cogens* norms as they are often called, are said to be so fundamental that any agreement between states that conflicts with them will be void.[168]

The list of *jus cogens* obligations is not clear-cut, but probably includes the prohibitions on:

- genocide
- systematic racial, religious (and probably gender) discrimination
- slavery
- crimes against humanity
- causing the enforced disappearance of a person
- murder
- torture (and probably other cruel, inhuman or degrading treatment or punishment)
- prolonged arbitrary detention
- denial of the right to self-determination
- use of force by one state against another
- any consistent pattern of gross violations of other human rights.[169]

There is no text or practice that says individuals or companies are bound to respect these principles, and one rule (the prohibition on the use of force) is

167 See Brownlie, pp. 512-515. See also Akehurst, pp. 57-58.

168 Art. 53 of the Vienna Convention on the Law of Treaties provides: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

only relevant to relations between states. Nevertheless, it is significant that these norms have been singled out by states as having a "constitutional character"[170] or the "character of supreme law".[171] The International Court of Justice has described these norms as deriving from "the principles and rules concerning the basic rights of the human person"[172] or as "elementary considerations of humanity".[173] If the exhortation in the Universal Declaration that all organs of society should respect human rights is to have meaning, it must mean — at the very least — that businesses should not violate these fundamental rights.

Many of the most serious human rights violations, including most acts that breach "elementary considerations of humanity", would also constitute a criminal offence under national criminal law. International criminal law plays a role when the acts committed are particularly grave. Some acts are so heinous that they amount to a crime under international law, regardless of whether they are also criminalised in particular countries.

Acts that are international crimes by treaty or under customary international law, include piracy, the slave trade, genocide,[174] torture,[175] war crimes, and crimes against humanity. The most recent description of some of the most serious international crimes appears in the statute of the International Criminal Court (ICC), which states agreed in Rome in July 1998. If states are unwilling or unable to prosecute individuals who are suspected of genocide, crimes against humanity,[176] war crimes committed in wars between states[177]

169 Restatement (Third) of the Foreign Relations Law of the US, 1987, section 702, which deals with a related concept of acts *erga omnes*, contains all the rights in this list except religious and gender discrimination, denial of self-determination and crimes against humanity. See also the citations in Brownlie, footnotes 23-25 and accompanying text.

170 "…there are norms of a constitutional character that are part of the legal system not as a result of state 'practice' but because the system has recognized them as essential and as having constitutional", Henkin, p. 18.

171 *Ibid*. p. 38.

172 *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 3 at 32.

173 *Corfu Channel* case (Merits), ICJ Reports (1949), 4, at 22.

174 The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly, Resolution 260 A (III), 9 December 1948, Arts., IV, VI.

175 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly, Resolution 39/46, 10 December 1984, Arts. 3 – 9.

176 Crimes against humanity include the following acts if they are widespread or systematic and part of a policy: murder, exterminating a population (e.g. preventing access to food or medicine), slavery and trafficking, forced and arbitrary displacement of people, arbitrary imprisonment, torture, sexual violence such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, enforced disappearance of people.

and crimes committed in civil wars, the ICC will be able to do so.

It is possible to foresee officers of a company or other employees being implicated in crimes against humanity or genocide. In such cases they would be liable to prosecution by their own country or by another country anywhere in the world under rules of universal jurisdiction. However, while no conceptual barrier should prevent prosecution of companies as legal entities for international crimes, states did not give the ICC the authority to try companies, only individuals.[178]

UN declarations, human rights treaties & world conferences

The various expert committees that oversee implementation of UN human rights treaties have generally stressed that states are parties to these treaties and that therefore only states are legally bound to comply with them. Some comments in relation to economic, social and cultural rights, nevertheless, have softened this position by placing some level of responsibility on private entities such as companies.[179] The Committee on Economic, Social and Cultural Rights has said, for example, of the *right to adequate food*:

> "While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organizations, civil society organizations, **as well as the private business sector** – have responsibilities in the realization of the right to adequate food…The **private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food**…"[180]

177 War crimes cover a long list of attacks on people or property committed in international or civil wars including wilful killing, torture, unlawful deportation, taking of hostages, employing poison or asphyxiating, poisonous or other gases, sexual violence, intentional use of starvation, indiscriminate attacks on civilians.

178 Clapham, Andrew. "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court", in Kamminga and Zia-Zarifi, pp. 139-195.

179 In addition to the treaty interpretations below, five regional non-governmental networks and more than 50 non-governmental organisations working on economic, social and cultural rights met in Quito, Ecuador in July 1998 and adopted the Quito Declaration on the Enforcement and Realization of Economic, Social and Cultural Rights in Latin America and the Caribbean. This stated that, while states have the primary obligation to respect these rights, "other actors such as multinational corporations and multilateral organizations also have the duty to respect these rights and are accountable to them" (Art.17). In listing the most common violations of these rights the Declaration refers to "…threats to, and violations of, economic, social and cultural rights by private actors, such as companies that disregard their obligation to respect the fundamental rights of workers and the rights of communities to a healthy and protected environment" (Art. 49).

The Committee has spoken in similar terms about the right to health.[181]

UN member states have been more willing to place responsibilities on private entities such as companies when expressing themselves in declarations (like the Universal Declaration discussed above). Echoing the early consensus that non-discrimination was the most fundamental human rights norm, the General Assembly stated as early as 1963 that "institution[s], group[s] and individual[s]" as well as states are prohibited from discriminating on grounds of race.[182] In 1981 the General Assembly said that no "State, institution, group of persons, or persons" should discriminate against people because of their religion or beliefs.[183] Although such declarations are technically not legally binding in the way treaties are, they are not without legal effect, as will be discussed towards the end of this chapter.

Some of the UN world conferences in the 1990s, on environment (Rio de Janeiro, 1992),[184] women (Beijing, 1993),[185] and social development (Copenhagen, 1995)[186], took for granted that companies shared certain responsibilities with government, and some set out specific goals for businesses. While not legally binding in a strict sense, these documents expected the private sector to take on certain internationally-agreed responsibilities. Adopted by heads of states or ministers of the vast majority of countries, they represent in most cases a global consensus of states. The inclusion of private business in such declarations hastens the transformation of non-binding international standards for businesses into obligations of a more legal character.

180 UN Committee on Economic, Social and Cultural Rights, *General Comment 12, "The right to adequate food (Art. 11)*", 12 May 1999, para. 20. Emphasis added.

181 UN Committee on Economic, Social and Cultural Rights, *General Comment 14 "The right to the highest attainable standard of health (Art. 12)*", 4 July 2000, para. 42.

182 "No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin", Art. 2 UN Declaration on the Elimination of All Forms of Racial Discrimination, UN General Assembly Resolution 1904 (XVIII), 20 November 1963.

183 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by UN General Assembly Resolution 36/55, 25 November 1981, Art. 2 (1).

184 Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc: A/CONF.151.26 (vol.1) (1992). See chapter on business and industry in Agenda 21.

185 The Beijing Declaration and Platform for Action, adopted by the Fourth World Conference on Women, Beijing, 4-15 September 1995, puts specific and detailed responsibilities on the private sector, employers, enterprises in the areas of preventing violence against women (paras. 125 and 126); strengthening women's economic capacity and commercial networks (para. 177); promoting harmonisation of work and family responsibilities (para. 180).

The OECD Guidelines for Multinational Enterprises

Two inter-governmental documents, one drafted by the ILO, the other by the OECD, aim specifically to create standards for companies. We look first at the OECD standard. The ILO's standard is discussed below.

The OECD's 29 member states produce 2/3 of the world's goods and services.[187] Its mandate is to promote policies that achieve the highest sustainable economic growth for its members, sound economic expansion globally and an expansion of free trade.

In 1976 the OECD adopted a Declaration on International Investment and Multinational Enterprises designed to protect the rights of investors.[188] As part of this 1976 package, it produced the *Guidelines for Multinational Enterprises*. Critics say these "OECD Guidelines" were a concession to criticism about the power of multinationals over governments and talk in the UN at the time of a New International Economic Order. Ministers from OECD states adopted revised OECD Guidelines in June 2000. They set out standards of practice for multinationals covering disclosure of information, workers' rights and industrial relations, environmental protection, bribery, consumer interests, science and technology, ensuring competition and payment of taxation. For our purposes, the most significant change introduced in the 2000 revision was a tentative general statement that said that multinationals should respect human rights. This entirely new paragraph, para. II.2, states that:

> "[Enterprises should] respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."

186 Copenhagen Declaration on Social Development and Programme of Action, adopted by the World Summit for Social Development, Copenhagen, 12 March 1995, UN Doc: A/CONF.166/9 (1995). Para. 45 says that: "Particular efforts by the public and private sectors are required in all spheres of employment policy to ensure gender equality, equal opportunity and non-discrimination on the basis of race/ethnic group, religion, age, health and disability, and with full respect for applicable international instruments". Para. 86 calls for the "encouraging [of] business enterprises to pursue investment and other policies… that will contribute to social development". Para.12 says that to make economic growth and market forces conducive to social development requires "encouraging transnational and national corporations to operate in a framework of respect for the environment… with proper consideration for the social and cultural impact of their activities".

187 Members of the OECD: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

188 The Declaration included a commitment to national treatment of investors, minimisation of "conflicting requirements" on multinationals and other harmonisation measures designed to encourage multinational investment.

While the statement is rather vague, the term "affected by their operations" is broad and extends the responsibility of enterprises far beyond respect for the labour rights of their workers. It would include, for example, ensuring that their activities do not harm the human rights of those in the communities in which they operate. The wording also makes clear that multinational enterprises should measure their conduct against the *international* obligations of the host state and not merely national laws, especially if these are weaker than international standards. The revision also added a recommendation on elimination of child and forced labour and is slightly stronger than the old guidelines on disclosure of environmental information.

The OECD document says expressly that it is a non-legal recommendation that companies are invited to follow voluntarily.[189] Nevertheless, it clearly has some force. First, it is a declaration of public policy made by a high-level, inter-governmental ministerial body. In status the Guidelines might be compared to the detailed "political" commitments made by states of east and west Europe in the Helsinki process (originally the Conference on Security and Co-operation in Europe). These commitments were seen as having legal force. The June 2000 OECD ministerial meeting endorsed the report of the OECD Secretary-General which emphasised that:

> "...the Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting. The Guidelines' recommendations express the shared values of governments of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises. The Guidelines aim to promote their positive contributions to economic, environmental and social progress."[190]

Secondly, the Guidelines are, rather curiously, accompanied by a detailed implementation procedure (discussed in chapter 6 below) that *is* binding on OECD member states, though not on multinational enterprises.[191] States and businesses are able to take a dispute about the meaning of the Guidelines to officials at national level and OECD headquarters. In practice this means complaints can be lodged about the behaviour of a company. Although the

189 Chapter I on "Concepts and Principles" says "Observance of the Guidelines by enterprises is voluntary and not legally enforceable". See Fatouros, para. 20.

190 *OECD Guidelines for Multinational Enterprises: Review 2000*, Report by Secretary-General, 27 June 2000, C(2000)96/REV.1., para.3.

191 Decision of the Council on the OECD Guidelines for Multinational Enterprises, adopted by the Council at its 982nd session, 26-27 June 2000 and see the *Commentaries* on the Revised Guidelines, 27 June 2000, prepared by the Committee on International Investment and Multinational Enterprises (CIIME). This body oversees the national contact points which receive queries about interpretation and itself issues clarifications.

procedure is quite weak, in some aspects it reflects a quasi-judicial approach. There is a provision for determining if issues are *bona fide*, for ensuring that "the parties" are heard, for giving reasons for decisions, for referring unresolved issues to a higher OECD Committee and for maintaining confidentiality. These procedures acknowledge that a company's reputation could be damaged by claims that it is violating the Guidelines.[192] Here too is an echo of similarly "non-binding" commitments that east and west made during the Helsinki process. It is worth noting that the latter was eventually backed up by enforcement mechanisms that were far more intrusive and mandatory than those associated with most legally binding treaties.[193]

Thirdly, it is still an open question to whether the Guidelines' provisions have become part of customary international law through consistent state practice since 1976. Further research would be needed to assess whether an intention to create legally binding norms emerges from delegates' statements during the OECD's review of its Guidelines, from the work of the Committee that interprets the Guidelines, and from their application in national law and practice.[194]

Fourthly, we have seen that the Universal Declaration is used to interpret the meaning of brief but legally binding references to human rights in the UN Charter. The OECD Guidelines can be used in a similar way. Being an up-to-date consensus of developed nations about general principles of international business regulation and public policy, complemented by 24 years of interpretative clarifications, the Guidelines can be used as a tool to interpret the meaning and application of international instruments and domestic laws (such as the anti-corruption treaties and the US Foreign Corrupt Business Practice Act of 1977).[195]

192 The use by states of this implementation procedure will also be evidence of state practice which could transform some of the recommendations into customary international law - Baade, Hans W. "The Legal Effects of Codes of Conduct for Multinational Enterprises", in Horn, pp. 3-38, at p. 13. For impact of the enforcement or "consultation" procedure, see Horn, Norbert. "Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making", in Horn, pp. 45-81 at 48-49.

193 The Conference on Security and Co-operation in Europe (CSCE) created the so-called Moscow mechanism which authorised a handful of states to send experts to investigate a human rights problem in a country, even if that country objected. It was created by the third meeting of the Human Dimension of the CSCE, August 1991, Moscow.

194 On this and other arguments about the possible binding quality of the OECD Guidelines, see Baade in Horn (cited above, footnote 192) in which at p. 9 he quotes an official OECD document from 1977 which states that the Guidelines, "though voluntary in origin, may… in the course of time – and when they have been frequently applied – pass into the general corpus of customary international law, even for those multinational enterprises which have never accepted them".

195 For a discussion of this, see Horn, p. 58.

ILO Tripartite Declaration

The International Labour Organisation brings together governments, employer organisations and trade union organisations (a fuller description of the ILO is provided below when ILO enforcement procedures are examined.) In November 1977 the ILO's Governing Body (which includes employer and worker representatives) adopted a *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.[196] Directed at multinationals, as well as governments and employers' and workers' organisations, the Tripartite Declaration covers employment issues such as non-discrimination, security of employment, training, wages, benefits and working conditions, health and safety, freedom of association and the right to organise.

Like the OECD guidelines, the Tripartite Declaration states clearly that it is not legally binding on states or the business sector. Even more so than the OECD, which has only 29 members, however, the Tripartite Declaration represents the authoritative voice of the vast majority of the world's governments. It is undoubtedly a high-level statement of international public policy. The Tripartite Declaration also has a procedure to clarify its meaning, though it is softer, and more political than the OECD procedure and is used less frequently (the procedure is discussed in chapter 6).

Although most of the Tripartite Declaration deals with employer/employee issues, reflecting the labour rights mandate of the ILO, a very significant article (Article 8) says:

> "All parties [i.e. governments, **employers** and trade unions]… should respect the Universal Declaration of Human Rights and the corresponding International Covenants [on civil and political rights and on economic, social and cultural rights] adopted by the General Assembly of the United Nations as well as the… principles [of the ILO] according to which freedom of expression and association are essential to sustained progress."

It is significant that this document, which calls on all employers to respect human rights, was accepted by employer organisations from all over the world (who are represented in the ILO), as well as by governments and trade unions. The reference to freedom of expression reflects the ILO's doctrine that workers' rights cannot be protected in the absence of respect for other rights, such as freedom of expression.

More recently, the employer organisations in the ILO (along with governments

196 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the ILO, at 204th Session, Geneva, November 1977.

and trade union representatives) voted in favour of the ILO Declaration on Fundamental Principles and Rights at Work,[197] which declares that all member states, even those that have not ratified relevant ILO conventions, are bound by their membership of the ILO to respect the core rights of freedom of association and collective bargaining and the prohibitions on forced labour, child labour and discrimination in the workplace.

Voluntary business codes of conduct

Companies are increasingly recognising that they have a responsibility to respect human rights, even if they do not think of this duty as legally binding. This recognition is reflected in many voluntary codes of conduct, the number of which has mushroomed in recent years. Most codes use aspirational language ("strive", "seek", "work towards", "try to minimise", "give proper regard to") or state broad values of the organisation, such as business integrity, openness, enriching the community, treating people with dignity and respect, or conducting business responsibly. A few codes, however, also express clear, blanket commitments to implement the Universal Declaration.[198] Most contain at least some quite specific commitments about the company's conduct towards groups with which it has a direct connection, such as employees, sub-contractors, suppliers and host governments. Although codes generally refer to a very limited range of human rights, many make specific commitments in areas such as non-discrimination, labour rights (such as no child or forced labour), and in some cases freedom of association and collective bargaining. Many codes require a company's subcontractors to comply with its provisions, and many contain detailed descriptions of prohibited corrupt practises and make commitments to protect the environment and consult local communities affected by their operations.

Company codes are often public relations exercises, but this can be said too about the declarations of support for human rights by certain governments. Their spread reflects the gradual emergence of commitments that could form a basis for legitimate, agreed international standards. Where codes are clearly worded, they can also have legal significance because they set out the values, ethical standards, and expectations of the company concerned, and might be used as evidence in legal proceedings with suppliers, employees or consumers.

197 Adopted by the International Labour Conference, June 1998.

198 E.g. Body Shop, *Trading Charter* (1994) says: "We aim to ensure that human and civil rights, **as set out in the Universal Declaration of Human Rights**, are respected throughout our business activities. We will establish a framework based on this declaration to include criteria for…" (emphasis added).

Responsibility of individuals to respect human rights

Although national law creates the fiction that corporations are legal persons or entities in their own right, they are of course made up of real people, who make individual or collective decisions that are imputed to the corporation. This chapter has already described how individuals might be held responsible under international criminal law. To what extent does international law say that individuals have a duty to respect human rights in the course of their work on behalf of a private enterprise?

While its main purpose is to place obligations on states, international human rights law also imposes duties on individuals. The statement in the Universal Declaration that "everyone has duties to the community in which alone the free and full development of his personality is possible" (Art.29 (1)) shows that drafters of this and later standards assume that individuals who are given rights must also have duties.[199] This said, individual duties cannot be equated with the obligations of states, which are primarily responsible for protecting the human rights of everyone, whether or not they live up to their individual duties.

UN human rights standards and human rights treaties in Africa, the Americas and Europe have recognised three broad kinds of individual obligation. First, individuals have obligations to their society or community – to fulfil what may be called civic duties, such as paying taxes or performing civil or military service. Secondly, they have a duty to exercise their rights in a responsible way. For example, the state may set limits on some personal freedoms.[200] Thirdly, individuals have an obligation not to abuse human rights and to act positively to promote and implement these rights.

199 See the discussion of the drafting of the Universal Declaration, in International Council on Human Rights Policy, pp. 19-26. The strong link between rights and duties was made expressly in human rights treaties drafted in the Americas and Africa. The American Declaration on the Rights and Duties of Man (adopted 1948) by the Organisation of American States says in its Preamble: "Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty". The African Charter on Human and Peoples' Rights (adopted 1981) by the Organisation of African Unity, also states in its Preamble: "Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone".

200 For example, you should not libel or slander someone else when exercising your right to freedom of expression. (Other rights such as the right not to be tortured or arbitrarily killed can never be limited or suspended in any circumstance.)

201 The American Declaration of the Rights and Duties of Man (adopted 1948) has a whole chapter on individual duties which includes the duty to protect children, to acquire an education, to vote, to obey laws, to perform civil and military service, to help support social security, to pay taxes and to work. The African Charter on Human and Peoples Rights (adopted in 1981) includes in its chapter on duties the duty not to discriminate against others, to respect the family, to serve the national community, not to endanger national security and to support the country's territorial integrity, to work and pay taxes, to strengthen African values and African unity.

Drafters of the treaties in Africa and the Americas decided to supplement general statements of duties with quite long descriptions of the duties of individuals.[201] UN standards also commonly describe in some detail the obligations of individuals who exercise particular positions of power or influence over others, including parents,[202] physicians and health personnel in relation to detainees,[203] and lawyers and prosecutors.[204] The preambles to both covenants (on civil and political rights, and on economic, social and cultural rights) say that "the individual…is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant…". During the drafting of these covenants in the 1960s, the Australian delegate argued that individual duties should be included because, although the texts were "concerned with the obligations of States, nevertheless, States being the sum of individuals, the latter must co-operate if the covenant was to be implemented".[205] Some international lawyers argue that international law should cut through the legal fictions of the "state" or "corporation" and recognise that it is individuals who fulfil obligations imposed on a state organ.[206] One does not have to go so far to recognise that the individuals who make up a company have a duty to abide by human rights principles.[207]

Do individuals have a *legal* obligation to abide by these duties? The specific civic duties in regional human rights treaties are found in the main part of the treaty, suggesting that the drafters intended them to be part of the legal obligations set out in the treaty. States are left to back them up by the force of law (for example, laws requiring payment of taxes or performing military service).

202 CRC requires states to recognise that parents/guardians have the primary responsibility for bringing up children (Art.18(1)), providing for them (Art. 27(2)) and helping them exercise their rights (Art. 5), with the role of the state being to support these functions.

203 UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by the UN General Assembly, Resolution 37/194, 18 December 1992.

204 See UN Basic Principles on the Role of Lawyers and UN Guidelines on the Role of Prosecutors, both adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

205 UN Doc: E/CN.4/SR.308, p. 13, quoted in International Council on Human Rights Polic, p. 28.

206 See citations in Charney, at p. 764, footnote 37.

207 It is interesting to note a proposal in September 1997 by the Inter-Action Council (a group of some 30 former heads of state or government formed 16 years ago) that the UN General Assembly should adopt a Universal Declaration of Human Responsibilities which would have said that "no politicians, public servants, **business leaders**, scientists, writers or artists are exempt from general ethical standards." (Article 13).

As discussed earlier, the absence of a procedure to enforce a duty does not imply that the duty concerned is not real. It is true, nevertheless, that the more general duties to respect human rights are found in preambles or in documents that were not drafted to be legally binding. Even so, as discussed earlier in relation to "organs of society", the exhortation that individuals should promote and respect human rights is a highly authoritative statement by UN member states. It has been reaffirmed repeatedly for over 50 years. It sets out a model of expected moral behaviour that applies to individuals, including those who work in commercial enterprises.

Conclusions on direct international legal obligations

States can impose obligations directly on companies, should they choose collectively to develop international law in this direction. The international legal system is made by states but is no longer exclusively *for* states and has already granted some rights and obligations to a range of non-state actors, including international organisations, rebel groups, corporations and even individuals. International law is now evolving to regulate companies, both directly, and indirectly through states.

Many inter-governmental organisations have concluded that businesses *should* respect principles designed to protect human rights. Some existing standards already refer explicitly or by interpretation to companies, including the preamble of the Universal Declaration, the OECD Guidelines and the ILO Tripartite Declaration. Standards that protect labour rights apply most obviously, but more general support for the claim that human rights standards should apply to private business has accumulated during the 1990s, when heads of state or ministers meeting at UN world conferences took for granted that businesses share responsibility with government for the protection of certain classes of rights.

Although they are not legally binding as are obligations in a treaty, these human rights norms – adopted by states and applying to companies – do have some legal significance or effect as "soft law". This phrase was developed to describe declarations, resolutions, guidelines, principles and other high-level statements by groups of states such as the UN, ILO and OECD that are neither strictly binding norms nor ephemeral political promises.[208] They often reflect the compromise reached, when states wish to bring some stability and order into an area of international affairs, and to structure behaviour around a set of norms, but not enough states are prepared to create a legally-binding treaty.

Soft law standards are not without authority and practical impact. They may

208 See generally Chinkin; Akehurst, pp. 54-55 and articles cited therein.

have at least some "anticipatory effect" in judicial or quasi-judicial decision-making and in shaping new, binding, international norms.[209] Such soft law "may… in actual practice acquire considerable strength in structuring international conduct".[210] "Soft" environmental principles, for example, have had a significant impact in changing government and corporate conduct and in the development of binding laws.[211]

Though many people continue to say that existing declarations which refer to corporations are voluntary and impose no legal obligations on companies to abide by human rights norms, the reality is more complex. Both the OECD and ILO documents have some impact as authoritative and high-level declarations of states. Parts of the Universal Declaration *have* become binding under customary international law. Though this is probably not true of the preamble, and the status of Article 30 (which warns groups not to destroy human rights) and Article 29 (which says individuals have duties) is still unclear. Nevertheless, the Universal Declaration remains one of the most respected and authoritative human rights document. It shows that states intended businesses to accept a share of the responsibility for protection of human rights.

Beyond these soft law documents, there are also binding international legal norms that bear on companies. We have seen how, to the extent that companies are associations of individuals, the most egregious human rights violations can also be outlawed by international criminal law, covering such acts as crimes against humanity and war crimes.

The development of international law and the emergence of binding norms is a complex and living process. Its evolution is propelled by the actions and statements of states as well as international and domestic court decisions, the writings of commentators and, in this case, by the way the statements and conduct of companies themselves influence government policy. As more and more states (individually, and collectively in inter-governmental bodies) and legal commentators say that companies should respect human rights standards, the language of ethical duty is shifting by degrees towards a language of legal obligation. Some would argue that the line has already been crossed – and this can indeed happen before practical ways are created to enforce such obligations in international tribunals. It is already increasingly difficult for companies, especially multinationals, to publicly reject human rights principles and for states to deny that these principles should also apply to companies.

209 Akehurst, p. 54.

210 *Ibid*., p. 55.

211 See generally Dupuy.

As an example of this shift, national courts are applying international human rights obligations in cases between private persons.[212] Companies are likely to find that increasingly they will have to defend themselves in national courts against complaints that they have abused human rights. Commenting on this trend, one prominent writer on these issues noted:

> "The concluding message is that international human rights obligations can fall on states, individuals and non-state actors. Different jurisdictions may or may not be able to enforce these obligations, but they exist just the same. With more and more national jurisdictions applying international human rights law as the law of the land we look set to see an increasing acknowledgement of the relevance of human rights norms for judging the conduct of private actors. We are witnessing a shift in emphasis; we could say that human rights are being privatised."[213]

Seen in this light, it is possible to argue that international law *already* creates direct legal obligations on companies that can be enforced, at least by national courts in some jurisdictions.

Progressive development of international law

Looking further into the future, one can see a conscious and gradual evolution of international law towards clear, binding norms that are directly applicable to companies. Law is more than a body of pre-established rules that merely need to be discovered and interpreted. Law is an agent of social policy. Rosalyn Higgins, now a judge of the International Court of Justice, has emphasised that "[a] refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics."[214] The purpose of international law is to meet the needs of international society. As needs change so does international law. The International Court of Justice commented on the dynamic nature of international law when it confirmed in 1949 that international organisations like the United Nations had developed international rights and obligations that were unheard of before:

> "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their

212 See for example The UK Court of Appeal decision in Douglas and Others v Hello!, judgement of 21 December 2000.

213 Clapham (forthcoming).

214 Higgins, p. 5, quoting an earlier article she had written.

> nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States."[215]

A former judge of the International Court of Justice, Christopher Weeramantry, has called for a move "towards a new legal order" to bring "multinational actors… within the mores of human rights, and the principle of accountability". He has emphasised:

> "We must attune the international law of the future to the concept that a large variety of new actors have appeared on the international scene, with rights and responsibilities which international law will recognize as inhering in them. The great corporations are a very important group of these new international actors whom the law of the future will recognize as accountable to the international legal system."[216]

Nevertheless, because most international human rights standards were written with states not companies in mind, it is not always easy to apply human rights standards directly to corporate conduct. A few international bodies have shown how some rights (such as the rights to food and to housing) can be re-interpreted to apply secondary responsibilities to private sector activity in ways that do not distort the object and purpose of the relevant treaty. Not all rights can be reinterpreted as easily, however. This is true of some civil and political rights, such as the right to elections and the right to a fair trial, and rights that states can restrict on public policy grounds (to protect morals, law and order, and health). The latter group include the rights to freedom of expression, assembly, and public manifestation of religion. More analysis will be needed to show how rights like these can be applied directly to non-state actors including companies.

215 *Reparations for Injuries* case, ICJ Reports (1949), at 178.

216 Weeramantry, p. 49.

VI. ENFORCING OBLIGATIONS THROUGH INTERNATIONAL PROCEDURES

Earlier chapters showed that states have responsibilities under international human rights standards to take reasonable steps to ensure that private actors, including companies, respect a wide range of human rights. They also considered the degree to which international law creates direct obligations on companies to respect human rights. This chapter surveys the various international procedures that might be used to enforce indirect and direct obligations respectively.

While this section focuses on international enforcement, one should bear in mind some of the points made earlier about the importance of national law. It is through national law, regulation and action that companies will primarily be held accountable for practices that abuse human rights. States can employ a variety of means. In some situations a government might pass a specific law requiring companies to abide by certain human rights standards. In most cases, however, states would regulate companies through existing or new instruments that are not considered to be human rights legislation. For example, company laws might require disclosure of information relevant to determining whether the company is responsible for abuses carried out by subsidiaries. Consumer protection laws might demand that companies comply with procedures to ensure the safety of their product, while laws on advertising might guard against discrimination. Environmental regulations should ensure that production processes do not endanger human life and health, and in some cases criminal law will proscribe offences of corporate manslaughter. In addition, steps will be required to ensure that victims have access to fair and effective judicial procedures which offer a real opportunity for redress, including compensation.

Given the importance of enforcement at national level, why are international procedures necessary, and under what circumstances does it make sense to rely on them? The essential answer is that they are necessary because enforcing human rights obligations on companies at national level is fraught with difficulties, and in many countries has proved largely ineffective. Before looking at international enforcement procedures, therefore, we briefly describe some of the most common and troublesome legal obstacles that victims encounter when they try to seek redress through national courts and procedures.

Legal obstacles at the national level

Numerous legal obstacles impede victims from using the courts to hold companies accountable to human rights standards. Listed here are some

common weaknesses that make it especially difficult for victims to seek an effective remedy through national courts. If judicial activism cannot overcome these weaknesses, states are obliged to intervene and make changes to ensure they fulfil their duty to provide an effective remedy.[217]

The list below draws on different types of litigation at national level, and in particular on four country studies prepared as part of this project. This area would benefit from further comparative research. In some cases international human rights law has been advanced as part of the legal argument. More often, although the conduct could be described in terms of violations of human rights standards, there is no scope or need to do so and court cases are based on other forms of action based on personal injury (alleging negligence), employer-employee laws, criminal law, company law, consumer laws and environmental laws.[218]

Cost

Litigation is expensive, and large corporations have far greater resources than individual litigants. Obvious costs include lawyers' fees, and few countries, particularly in the developing world, provide legal aid for such actions. Of course, costs can be offset by allowing lawyers to forego fees until the outcome of the case and then, if successful, to take a proportion of the damages awarded. Only some countries allow such contingency fee arrangements. Lawyers and advocacy groups can also take cases without charging at all (pro bono), but even when they do other costs arise. In some countries, litigants must pay into court a proportion of the damages sought before proceedings can begin. Even a small proportion may far exceed the resources of the litigant.[219]

Standing

In most cases only a person or group that has suffered direct harm can begin proceedings against a corporation. This limits action by civil society groups.

217 Article 2(3) of the ICCPR makes it clear that the obligation to provide a remedy includes ensuring "that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State".

218 Papers were prepared by: Tamás Gyulávári (Hungary), Sarj Nahal (United Kingdom), Romina Picolotti and Juan Miguel Picolotti (Argentina) and Usha Ramanathan (India).

219 In Hungary, 6% of the total amount claimed in compensation must be deposited (up to a maximum of 750,000HUF or US$2,500). Although there are some minimal reductions in certain cases, this pre-condition is a bar for many victims, given that the average monthly salary is US$300-500 and legal aid provisions are inadequate. In Argentina 3-7% of the total claim must be paid as court fees. In a claim for say, US$500,000 damages this would amount to four times the yearly income of most Argentines, not taking into account lawyers' fees. A process to ask the court to waive the court fees is complex and can delay the proceedings for a year.

Where, as is often the case, victims are poor or from a vulnerable group, such rules leave responsibility for action to those least well able to initiate it. India is almost unique in its very liberal public interest litigation procedure, which allows almost anyone legitimately concerned about the public interest to petition the Supreme Court, even by sending a letter. This has expanded the space for raising human rights concerns in the highest Indian court and encouraged the court to be involved in public policy-making.

Delay

Civil litigation against companies is not only costly, it also often takes a long time to produce results. Sixteen years after the deadly gas leak from a Union Carbide plant in Bhopal, India, that eventually killed about 15,000 people and affected 500,000, large amounts of compensation from a court settlement have still not been paid out. Prolonged litigation often works to the disadvantage of the victims — in particular where their need for a remedy is immediate. Companies on the other hand can use the threat of delay (and rising costs) to their advantage.

Long delays in court cases are a common story in most jurisdictions. Effective interim measues would mitigate this problem. Litigants in Argentina can invoke *amparo*, a form of injunction that freezes the *status quo*, but this remedy is valueless because the *amparo* is suspended as soon as the company being sued appeals against it. Delays and ineffective interim measures are the norm in many developing countries, where courts are badly under-resourced and reforms in procedural rules have not kept pace with broader developments.

Damages and deterrence

In some countries, it appears that the level of damages that can be awarded or the fines that can be imposed against companies are so low that it is often cheaper for large corporations to pay fines or damages than invest in management or structural changes that prevent harm from recurring. In Argentina, for example, courts cannot award exemplary damages (over and above what will compensate a victim) even when there are aggravating circumstances.

Risks of government involvement

The problems that arise when litigants are powerless or poor may be eased when the law permits governments to intervene and prosecute the case on their behalf. But there are risks here too, which the Bhopal case illustrates. Mass torts like Bhopal, with upwards of 500,000 separate claims, could not have been separately litigated in court. The Indian Government therefore passed a law to take over the action against Union Carbide, which barred victims from themselves pursuing claims. Critics say the result has been deeply unsatisfactory. Victims were deprived of their rights to be heard and

access to justice, while the final settlement was grossly inadequate, and large sums from it are still not paid out 16 years after the accident. Moreover, the government initially agreed that Union Carbide would be immune from criminal prosecution (the decision was later overturned by the courts). Since then there have been no criminal convictions and the government has not tried to extradite foreign defendants to India.

Burden of proof

It is often difficult for victims in civil proceedings against corporations to satisfy the necessary standard of proof, because the company has complete control over documents and evidence and there is a strong trend for commercial enterprises to be secretive. Rules requiring the company to provide access to documents ("discovery") are sometimes inadequate. It may be necessary to shift the burden of proof. The Indian Factories Act was amended so that a company that is alleged to have broken the law has the onus of proving it took all reasonable steps to meeting its obligations. With some egregious acts, such as poisoning of people by toxic waste or other release of chemicals, a company should be liable without the victim having to prove that the company was negligent (i.e. strict liability). This is the case under some Indian environmental laws.

Fear and social stigma

Despite laws prohibiting reprisals against employees and others who sue companies, few victims actually bring proceedings, and most fear the publicity and the social and personal consequences of complaining. Researchers have reported that women who make up 65-85% of the workforce in Export Processing Zones in India do not speak up about poor conditions because they fear to lose their jobs.

Parent companies & subsidiaries

Particular obstacles to effective enforcement arise at national level when the company is a multinational corporation. These problems are of both a legal and political nature.

Victims sometimes wish to sue a parent company in a foreign country instead of or in addition to suing the subsidiary that carried out the acts in their own country. This may be because the subsidiary is insolvent or uninsured and the only hope of compensation is from the parent, or because justice will not be done in their own country. It may also make sense to sue the parent company because the latter was responsible for decisions that determined the company's world-wide operations, and because profits from subsidiaries flowed back to the parent company. However, in most common law countries judges have discretion to stop a case from proceeding because the place in which proceedings are started is not the appropriate place to launch the action (called the *forum non conveniens* doctrine). This doctrine presents a

major hurdle to litigants in cases where the witnesses, other evidence and the subsidiary are all located in another country.[220]

A second major obstacle makes it difficult to sue parent companies for the wrongs of their subsidiaries, whether local or overseas. In many countries courts will uphold the legal fiction that parent companies are legally completely separate from their subsidiaries and are therefore not liable for wrongs they commit. Classically, it is said that the parent company is no more responsible for the actions of its subsidiary than a member of the public would be for the negligence of a corporation in which she holds one share. In many cases parent companies escape liability even though they effectively control their subsidiaries through structures such as cross-directorships and by retaining control over shares or key policies. Only in exceptional cases will courts "pierce the corporate veil". Exceptions include cases where the corporate group structure is a sham or façade, or when an express agreement exists between a parent and subsidiary that one acts as the agent of the other. One lawyer with much experience in this area noted: "The effect of the corporate veil makes it practically difficult for claimants injured by multinationals to get justice anywhere… [they] fall through the net completely."[221]

Another hurdle is closely linked to the corporate veil issue. In personal injury cases the litigant must establish that the parent company owed a duty of care to the plaintiffs, who are often employees of the subsidiary company.[222] As a result, litigants are required to show that the parent company had sufficient involvement in, control over and knowledge of the subsidiary's operations to justify a claim of negligence.

Legal obstacles – summary

We have focused here on *legal* obstacles. A fuller survey might include numerous political and social obstacles, as well as perhaps the greatest obstacle – the fact that in so many countries judicial procedures function very imperfectly due to under-resourcing, corruption political interference or some

220 However, the UK House of Lords gave a glimmer of hope in July 2000. It decided that 3,000 victims of asbestos poisoning in a South African mine run by the subsidiary of UK-based Cape Plc could sue the parent company in an English court because justice could not be done in South Africa. In South Africa there would be no legal aid or access to funds to pay for the many expert witnesses required, no expert legal firm had the means to take up such a case under the existing rules and judicial procedures could not handle such group actions. See Eaglesham.

221 Quote from an interview conducted with UK solicitor Richard Meeran. See also reference to Meeran article in Kamminga and Zia-Zarifi.

222 This is doctrine that applies in common law countries, that is countries with an Anglo-American legal tradition.

combination of these. Taken together, these obstructions are such that in many cases states are effectively unwilling or unable to ensure companies operating in their jurisdictions respect human rights. It will make sense to use procedures that deal with indirect obligations where states are unwilling to fulfil their duty to protect human rights. It will make sense to think of direct enforcement in cases where it is illusory to expect effective action from the state concerned.

ENFORCING INDIRECT OBLIGATIONS

This section will describe a range of existing *international* mechanisms that could be used to hold states accountable for stopping or preventing abuses by companies. It considers human rights procedures in the UN and regional systems that allow individuals or groups to complain about the failures of a state under a human rights-related treaty. The inter-governmental UN Commission on Human Rights will be considered because in the future it could also begin to scrutinise how states regulate companies. The section will also examine much stronger possibilities under NAFTA, an international free trade agreement. It ends with a special note on the World Trade Organisation (WTO). The latter does not provide a method of complaining about company conduct, but its procedures need to be exploited to prevent the enforcement of free trade rules that may indirectly sanction human rights abuses.

The enforcement procedures discussed in this chapter include proper judicial or quasi-judicial tribunals, as well as looser procedures that are more political in nature and not self-consciously legal. If the aim is to force companies to respect human rights indirectly, by holding states to account, either type of procedure can bring results and they have different strengths and weaknesses. The more judicial the procedure, the greater the likelihood is that it will conclude with a specific remedy. On the other hand, more fluid investigations might be easier to initiate and might be more appropriate for examining broad patterns of abuse that are not limited to a specific complaint.

United Nations and regional human rights systems

Human rights treaties in the United Nations, and in the regions of Africa, the Americas and Europe, allow individuals to complain to judicial or quasi-judicial bodies that their human rights have been violated by states. In each system, except in Africa, states have been held responsible in a few cases for failing to prevent or remedy abuses committed by non-state actors, including companies. In all these systems there is untapped potential to expand the scrutiny of states' responsibilities in relation to companies.

UN treaty bodies

Committees of independent experts (treaty bodies) monitor how states implement six of the UN human rights treaties. These committees deal with civil and political rights; economic, social and cultural rights; racial discrimination; torture; women's rights; and children's rights. They scrutinise reports on implementation that states submit. Future research could examine the extent to which state reports, and parallel reports prepared by NGOs,

deal with the conduct of private companies and how states oversee company conduct, and whether the committees pick up on such issues in their comments on state reports. For example, the Committee on the Rights of the Child recently scrutinised the report of the Democratic Republic of Congo under the Convention on the Rights of the Child. When commenting on the negative impact of the continuing armed conflict on children, the Committee took note, tentatively, of "the role of numerous actors in the conflict, including the armed forces of several States…armed groups and *numerous private companies*" and emphasised, rather ambiguously, the "responsibilities of several other States [than DRC] and *certain other actors* for the negative impact of the armed conflict upon children and for violations of some provisions of the Convention."[223]

All but two of the committees[224] are able to receive complaints from victims about abuses by their state, if the state has consented to this procedure. Victims cannot complain unless they have exhausted remedies available within their country, and NGOs normally cannot lodge a complaint unless they are representing a victim.[225] The committees can recommend that victims receive compensation or other remedy. Many years may pass after the abuse before a judgement is given, but in an urgent situation most committees can call for interim measures in order to prevent damage occurring that cannot later be undone. Committee members are part-time and unpaid and, their level of expertise and independence varies.

The Human Rights Committee, which monitors the ICCPR, has dealt with the protection of indigenous cultural heritage from the impact of economic development. In the case of *Hopu and Bessert v. France*[226], a local community from Tahiti (an overseas province of France) complained to the Human Rights Committee that a luxury hotel development infringed on their tribal lands, including an ancient burial ground, and on traditional fishing grounds that were the community's primary source of subsistence. A private business (Société hotelière RIVNAC) was developing the project in

223 UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of Congo*, 27th session, UN Doc: CRC/C/15/Add.153, June 2001, para. 6. Emphasis added. The Committee was referring to UN Security Council mandated investigations, which have said that some businesses are involved in illegitimately exploiting the DRC's mineral resources.

224 The Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child cannot receive individual complaints.

225 However, the new optional protocol to the Convention on the Elimination of Discrimination against Women (entered into force 22 December 2000) allows someone to lodge a complaint without the consent of victim(s) if they can justify why they could not obtain the consent.

226 UN Doc: CCPR/C/60/D/549/1993.

partnership with (and leasing the land from) a government-owned company. The Committee upheld the community's complaint against France, saying:

> "the construction of a hotel complex [on the ancestral burial ground] … did interfere with their right to family and privacy. The State party has not shown that … [it] duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex".[227]

The Committee held France responsible for its role in the development, but this development was carried out in partnership with RIVNAC, a private company. The Committee's reasoning could apply in other circumstances where a business entity acts in conjunction with the state.[228]

The Committee on Economic, Social and Cultural Rights is the only treaty body that has expressly interpreted the rights it oversees to apply to private enterprise (as discussed above). It can raise issues relating to private enterprises when it scrutinises country reports or makes general comments on the meaning of the treaty. Unfortunately, individuals cannot complain to the Committee about abuses, though such a mechanism has been proposed for many years.[229]

Two UN committees, those that deal with torture and discrimination against women respectively, have an additional power. They can investigate systematic violations by a state of the rights they oversee. Any person or organisation, including NGOs, can ask for an investigation provided the source of information is "reliable". Investigation is confidential and occurs only in severe cases. In some circumstances the conclusions can be made public. It would be worth exploring how such procedures could be invoked to investigate, for example, cases in which states have failed to protect women against systematic or grave violations of human rights by companies.

UN Commission on Human Rights

The Commission on Human Rights is the main political body of the United Nations that deals with human rights. It consists of representatives of 53 states and meets for six weeks annually in Geneva. At the same time, its procedures are relatively open to civil society and the media. The Commission can condemn human rights violations in countries and can

227 *Ibid*, at para.10.3.

228 See Scott in Eide, Krause and Rosas (cited above, footnote 138).

229 In a resolution adopted in 2001, the UN Commission on Human Rights appointed a Rapporteur to study and report on the creation of an Optional Protocol to the CESCR that, if ratified by a state, would allow individuals to submit petitions to the Committee claming rights protected in the treaty had been violated.

order investigations. It has no method to enforce its findings other than reason and public embarrassment.

The Commission has not yet dealt seriously with allegations of human rights abuses by businesses, though some of its resolutions now refer, almost in passing, to state responsibilities in relation to such abuses. A resolution in 2001 on the dumping of toxic wastes urges governments to prevent the transfer and dumping of wastes by industry.[230] A resolution on HIV/AIDs urged governments to ensure that all people have access to medicines and medical technologies, in terms that imply engaging with, and possibly regulating private enterprise.[231] The Commission might soon consider company responsibility more seriously if its subsidiary body, the Sub-Commission for the Promotion and Protection of Human Rights, sends it for consideration the draft Fundamental Human Rights Principles for Business Enterprises. A working group of the Sub-Commission is drafting this document (it is discussed in more detail in Chapter 8).

The Commission has appointed various experts (called Special Rapporteurs) to study specific rights, carry out investigations in particular countries and recommend measures that all governments should take. The reports of several experts in 2001 touched on the role of companies. For example, the Special Rapporteur on the right to food warned that some patents held by multinationals, combined with their universal protection, "deprive poor farmers of access to the means of growing their food".[232]

Advocates should encourage country and thematic rapporteurs to explore the relationship between human rights violations, company activity and the responsibilities of states in relation to private actors.

230 UN Commission on Human Rights, Resolution 2001/35, 20 April 2001, UN Doc: E/CN.4/RES/2001/35, para.5.

231 UN Commission on Human Rights, Resolution 2001/33, 20 April 2001, UN Doc: E/CN.4/RES/2001/33.

232 See the report of the Special Rapporteur on the right to food, E/CN.4/2001/53, 7 February 2001, para. 73. See also the appeal to "private interests" to make every effort to increase the technological capacity of countries to use the internet, by the Special Rapporteur on freedom of opinion and expression, E/CN.4/2001/64, 13 February 2001, at para 66; the discussion of private security firms and military assistance companies, in the report of the Special Rapporteur on the right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation, and his recommendation that greater regulation of such companies is needed E/CN.4/2001/19, 11 January 2001; the criticism by the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, of the role of transnational corporations in contributing to the dumping of toxic waste, with adverse consequences for the rights to life and health, and recommendations for ensuring such companies are bound by law to respect human rights, E/CN.4/2001/55, 19 January 2001.

Regional human rights tribunals

Africa, the Americas and Europe each have a human rights treaty under which individuals can complain to a human rights commission or court about a violation if they have already exhausted possibilities to obtain a remedy in their own country.

As discussed earlier (in Chapter 4), the European Court of Human Rights and the Inter-American Court of Human Rights have both held states responsible for human rights abuses that were or may have been committed by private actors, including private enterprises. The African Commission on Human and Peoples' Rights has not yet dealt with the obligations of states in relation to private companies, though the African Charter's strong emphasis on duties and on economic, social and cultural rights might lead it to do so.[233]

European Social Charter

The European Social Charter complements the civil and political rights enshrined in the European Convention on Human Rights. It is an ambitious attempt to protect a wide range of economic and social rights, many of which are more directly relevant to corporate conduct. The Charter includes labour rights, the rights of children, the elderly, the family, and migrant workers, the right to protection against poverty and social exclusion, and maternity rights. However, states can take an *à la carte* approach when they ratify the treaty. They are required to accept only 16 of its 31 substantive articles. The Social Charter is limited explicitly to the territory and citizens of the European contracting states. Foreigners benefit from the Social Charter only if they are citizens of other contracting states, or if they are lawfully working in such states.

Although individuals cannot make complaints about violations of the Social Charter, it provides for two other procedures, more diplomatic in style, which could be exploited to hold states accountable for the actions of private companies.

First, as with many UN human rights treaties, every two years states must report on what they have done to implement the Social Charter to a committee of seven independent experts. The experts present their conclusions to the Committee of Ministers of the Council of Europe. As it is in the UN, this procedure is weak and includes no real enforcement mechanism. Its effectiveness depends entirely on the rigour, expertise and courage of the experts concerned, and on civil society pressure to force states to implement the committee's recommendations.

233 The Organisation of African Unity (OAU) recently adopted a protocol to the African Charter on Human and Peoples' Rights to establish an African Court of Human and Peoples' Rights, though it has not been ratified by enough states to come into force and actually be set up.

A second, a more contentious, procedure allows international and national employer and trade union organisations, and NGOs which have consultative status with the Council of Europe, to lodge collective complaints about a state's failure to comply with the Social Charter.[234] A Committee of Independent Experts investigates the complaints after collecting information, including from the relevant state and affected industries, and can hold hearings. It submits conclusions to the Committee of Ministers who must then make recommendations to the state concerned.[235]

Of the nine collective complaints so far, seven have dealt with state work practices. Two have dealt with the alleged failure of a state to monitor labour conditions in private companies adequately. The very first complaint was brought by the International Commission of Jurists and the European Trade Union Confederation. It alleged that Portugal had failed to stop employment of minors under the age of 15 in several economic sectors and that in some cases working conditions threatened their health.[236] The Committee found that Portugal had a duty to protect the children concerned. The Committee of Ministers, however, merely asked Portugal to clarify in its next periodic report how it had rectified the problem.[237]

234 The complainant must establish its standing by showing that it represents the interests of the group whose rights are allegedly violated. Rule 20, European Committee of Social Rights procedures for collective complaints, 9 September 1999.

235 Third Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995). In fact, the Committee of Independent Experts submits its conclusions to a Sub-committee of the Council of Europe's Governmental Social Committee, composed of a representative of each state party and including, as consultants, up to two representatives of trade unions and NGOs and two representatives of groups representing employers.

236 *International Commission of Jurists v. Portugal*, Report of the European Committee of Social Rights, Case 1/1998, accessed at www.humanrights.coe.int/cseweb/GB/GB3/GB32.htm on 3 December 2001. The ICJ argued (see para. 6):"…notwithstanding the statutory provisions adopted and the measures taken by Portugal to prohibit child labour and to ensure that this rule is enforced, a large number of children under the age of 15 years continue to work illegally in many economic sectors, especially in the north of the country. It further maintains that the Labour Inspectorate, which is the principal body for supervising compliance with the legislation on child labour, is not in a position to perform its functions effectively. It states that the working conditions imposed on these children are harmful to their health. It recalls that states which are bound by Article 7 para. 1 of the Social Charter are required not just to set the minimum age of admission to employment at 15 but also to take the necessary measures to ensure satisfactory application of this rule. Moreover, it recalls that the prohibition on employing children under the age of 15 also applies to children working in family businesses".

237 Council of Europe, Committee of Ministers, "Resolution ChS (99) 4 on Collective Complaint 1/1998, *International Commission of Jurists vs. Portugal*", (15 December 1999).

International Labour Organisation

The International Labour Organisation (ILO) was established in 1919 by the Treaty of Versailles, and has become the main organisation for protection of the rights of workers. The ILO has drafted and promoted 183 treaties. The decision by trade ministers to keep labour rights issues out of the WTO, and their reaffirmation that the ILO is the proper place to monitor such issues, has spurred the ILO to look more closely at the impact of trade on labour rights and to develop responses to better protect workers.[238] Some commentators have proposed that the WTO's enforcement mechanism should be linked formally with the ILO's standard-setting and fact-finding capacities.[239] This proposal has not been welcomed at either the WTO or the ILO.

The ILO is the only major international organisation in which both companies and unions have official seats at the table. The International Labour Conference (the supreme legislative organ which meets annually) and the Governing Body (the executive council) operate a "tripartite structure", under which national delegations must include representatives of national employer and trade union associations as well as the state.[240] Both employers and unionists are free to vote against their government's representatives.

Its tripartite structure makes the ILO a natural place to discuss the role of businesses in securing respect for human rights, especially workers' rights. The fact that decisions are made by consensus, however, makes change difficult.

The ILO emphasises that states ratify ILO conventions and states alone have binding obligations under international law to implement workers' rights. This said, its 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy is aimed directly at private enterprise (the implementation procedure for this document is discussed in the next section, dealing with enforcement of direct obligations). With regard to indirect obligations, the ILO has two types of procedures to supervise how states are implementing their obligations.[241] A "regular" system of periodic reporting by states on their compliance with ILO standards, and a "special" system which allows specific allegations of violations to be investigated.[242] Both rely only

238 Ehrenberg, at pp. 405-408.

239 Ehrenberg.

240 International Labor Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference*, art. 3, para.1 (1919).

241 This discussion draws on Leary, Virginia. "Lessons From the Experience of the International Labour Organisation", in Alston (1992), pp. 580-619.

242 *Ibid*.

on diplomatic pressure and publicity to encourage states to comply and are sometimes constrained by the tripartite system.

ILO member states report periodically (annually or every five years depending on the convention) on what they have done to implement ILO standards. Reports are scrutinised by a Committee of Experts, composed of 20 independent legal experts. The Committee also receives information from other sources, including international bodies, and employers' and workers' organisations, and submits its findings to the International Labour Conference. Despite its technical expertise, access to a wide range of information and deliberations held in relatively apoliticised closed sessions, the Committee is highly circumspect in judging even the most egregious violations of labour standards.

When the Committee does find shortcomings in a state's practice, it can issue a "direct request" for information to the government and relevant worker and employer organisations of the country concerned. When violations are persistent or more serious, the Committee publishes "observations". Should violations continue, or the relevant government question the Committee's assessment, the ILO can institute "direct contact" by sending officials to assess the situation in the country and initiate an informal dialogue with the government.[243] Especially serious infringements of ILO standards are discussed each year at the International Labour Conference and government representatives can be called before Conference committees to discuss violations. Though the whole process is focused on the state and does not address the role of private business in implementing ILO standards, it could be used to investigate the degree to which states are domestically enforcing ILO standards in relation to companies.

Any member state, employers' or workers' organisation can initiate a contentious proceeding. Member states do so by lodging a formal complaint with the Governing Body that another state is violating a convention (provided both states are parties to it). In response, or on its own motion, the Governing Body may appoint a quasi-judicial Commission of Inquiry, comprised of three independent experts. It can examine witnesses and solicit information from the parties and in the field, after which it makes a public report. If the government does not challenge the findings in the International Court of Justice it is deemed to have accepted the findings and must amend its practices, a process which is monitored through the ILO's regular supervisory mechanism.

243 Leary in Alston (cited above, footnote 241), at pp. 598-599.

A separate, less onerous, procedure exists for complaints by workers' and employers' organisations. Any such organisation can make a "representation" claiming any member state is not respecting ILO standards. A three-member tripartite committee investigates the allegation rather than the more independent Commission of Inquiry. This committee submits its findings to the Governing Body, which proceeds under the ILO's tripartite political process to decide how to follow up. It is significant that both employer and union organisations are able to lodge such complaints.

The contentious procedure has been used rarely, though more so lately.[244] A complaint by workers' representatives in 1996 led to the launch of a Commission of Inquiry into whether Myanmar was complying with the forced labour convention (No. 29). After a highly critical report and attempts to persuade the Myanmar government to change its laws and practice, in November 2000 the ILO Governing Body recommended sanctions against a member, for the first time in its history. It called on international organisations to suspend relations with Myanmar which could be seen as directly or indirectly abetting in Myanmar's forced labour policies.[245]

Renewed political interest in the work of the ILO may cause it to monitor more actively states' obligations to regulate private companies. The current scrutiny is slow and cumbersome but allows some effective fact-finding, especially if the contentious procedure were to be used more often. The fact that trade union organisations are able to lodge complaints opens up many possibilities for the future.

The North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement (NAFTA), signed in 1992, liberalised the flow of trade, investment and services between Canada, the United States and Mexico.[246] It includes a provision that allows private companies to take a government (other than their own) to binding arbitration if it violates NAFTA's investor protection provisions.[247] Most recently, Mexico was ordered to pay $16.7 million to California-based Metalclad Corporation

244 *Ibid*, pp. 609-610.

245 See *ILO Governing Body opens way for unprecedented action against forced labour in Myanmar*, ILO Press Release, 17 November 2000 (ILO/00/44). It is worth noting that the ILO's report and decision were used in court proceedings against Unocal, an oil company that is being sued in US courts for its alleged complicity in forced labour in Myanmar. Unocal entered into an agreement with the authorities to build a pipeline in Myanmar, and the authorities used forced labour in its construction. The case is discussed in Chapter 7.

246 "The North American Free Trade Agreement", Dec. 17, 1992, 32 *International Legal Materials* (1993), p. 605.

247 NAFTA, arts. 1115-1138.

after it reneged on an agreement to allow Metalclad to build a hazardous waste treatment and disposal plant because of concern about the environmental impact. The company argued that Mexico had in effect expropriated its future profits.

In response to public criticism that private investors would have disproportionate power to enforce free trade and free investment at the cost of social policies, the drafters created two mechanisms which, remarkably, allow a broad range of citizens and groups to complain that a state has failed to comply with its own domestic (not international) environmental and labour standards.[248] These mechanisms do not directly assess the human rights impact of NAFTA's free trade and investor protection provisions. They are parallel procedures that deal with some of the environmental and labour consequences of NAFTA, which are lacking in the World Trade Organisation (discussed below). They are the most effective mechanisms existing today for victims (at least in the three NAFTA countries) to hold private businesses indirectly accountable to at least a small range of rights.

Complaints under the environmental side accord

The North American Agreement on Environmental Cooperation (The Environmental Side Accord)[249] provides in its first article that its aim is to protect the environment and strengthen the way the three governments make and enforce environmental laws.[250] The Accord establishes a Commission for Environmental Cooperation (CEC) to encourage the three states to enforce their environmental regulations and to receive complaints from private parties when one state fails to do so. The CEC consists of a Council (with representatives from the three states), a Joint Public Advisory Committee (to provide technical and scientific support for the other bodies) and a Secretariat.

Any citizen or NGO in one of the three countries can submit a claim that a government is failing to enforce its environmental laws.[251] The Accord is not

248 The intense civil society concern that NAFTA would provoke a "race to the bottom" on environmental and labour standards also led the drafters to add to the agreement's preamble that it aimed to promote sustainable development, stronger environmental laws and enhanced workers' rights and not merely free trade.

249 See "North American Agreement on Environmental Cooperation". See also Charnovitz (1994).

250 The Accord excludes worker health and safety laws and laws relating primarily to managing the harvest or exploitation of natural resources. See Zedalis, at p. 135.

251 As a way of rejecting perceived vexatious complaints, the Secretariat can only accept a complaint if it "appear[s] to be aimed at promoting enforcement rather than at harassing industry" (Council Provision 99-06, para.5.4). The Secretariat judges this by whether the Submission is focused on a state's actions rather than a particular company (*ibid*., para.5.4(a)).

clear on whether a complainant must have suffered harm directly to have standing to complain. In a number of cases, a relaxed approach has been taken; submissions have been accepted that are partially based on harm to the public rather than personal harm (for example, when international NGOs submit complaints).[252] Importantly, a Submission can complain about possible *future* harm (and not merely existing damage), for example by claiming that a state has failed to carry out an environmental impact assessment.

If the Secretariat admits a submission, it asks the relevant government to explain its actions. If the response is inadequate, the CEC Council may decide by a 2/3 majority that the Secretariat should prepare a factual record. The Secretariat then gathers information from public records, NGOs and experts and prepares a document with the original complaint, the state's response, information from other sources and expert opinions. The factual record will be released publicly only if the CEC Council decides in favour by a 2/3 majority.[253]

This procedure is not judicial and does not aim to judge the conduct of individual companies or provide compensation or other remedies to victims. However, unlike the OECD and ILO procedures for directly scrutinising companies, discussed below, the reports openly discuss actions of named companies whose violations of environmental law have gone unchecked.[254] They can expose to the glare of publicity the failure of a government to enforce environmental standards and the original offending behaviour of a company.[255] The factual record may also have some value, as yet untested, in a domestic court. Conceivably, a finding of fact by such an international body could have strong evidential value in a domestic claim against a corporation.

In rare circumstances, if the factual record reveals a persistent pattern of failure to enforce environmental measures, states (though not individuals)

252 See for instance SEM-96-001/Comité para la Protección de los Recursos Naturales, A.C.; Grupo de los Cien Internacional, A.C.; Centro Mexicano de Derecho Ambiental, A.C. (Jan. 18, 1996). (Coalition of Mexican environmental groups complained about proposed plan to develop tourism industry on Cozumel).

253 CEC, Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Council Resolution: 99-06 (28 June 1999), accessed at www.cec.org/citizen/guide_submit/index.cfm?varlan=english on 3 December 2001.

254 See for instance the claim filed by the Academia Sonorense de Derechos Humanos Domingo Gutiérrez Mendívil, which alleges that Mexico has failed to effectively enforce the General Law of Ecological Equilibrium and Environmental Protection in relation to the operation of the company Molymex, S.A. de C.V. (Molymex) in the town of Cumpas, Sonora, Mexico. SEM-00-55/ Academia Sonorense de Derechos Humanos Domingo Gutiérrez Mendívil (2000 ongoing).

may invoke a dispute resolution panel which could lead to monetary fines being imposed on a state or, in extreme cases, suspension of NAFTA privileges.[256]

It may be possible to expand the scope of environmental complaints by arguing that environmental degradation has also caused violations of human rights. The crucial issue here is how closely a complaint must establish a link between the failure to effectively enforce environmental law and danger to human life or health. In the most recent case filed at the CEC, an indigenous group in the Mexican state of Chihuahua claimed that the Mexican government failed to provide them with adequate environmental protection and remedial measures in the face of ongoing degradation of their tribal lands.[257]

Complaints about violations of labour standards

Like the Environmental Side Accord, the text of the Labor Agreement does not set common, minimum standards for labour regulations, nor does it refer to existing international standards.[258] It only requires the states to enforce their existing labour laws (whether or not these fall below international standards) as they relate directly to three groups or tiers of rights. Each tier is subject to additional action when there is a dispute about implementation of labour laws:

Tier I

- freedom of association and protection of the right to organise;
- the right to bargain collectively; and
- the right to strike.

255 See for instance the Submission regarding Canada's failure to enforce its regulations regarding the protection of fisheries from the activities of the British Columbia Hydro utilities company, in which the Secretariat repeatedly referred to its independent experts to point out (albeit implicitly) shortcomings in Canada's protection scheme. SEM-97-001/ B.C. Aboriginal Fisheries Commission, British Columbia Wildlife Federation, Trail Wildlife Association, Steelhead Society, Trout Unlimited (sección Spokane), Sierra Club (EU), Pacific Coast Federation of Fishermen's Association, Institute for Fisheries Resources (11 June, 2000).

256 Zedalis, at p. 133.

257 SEM-000-06/Comisión de Solidaridad y Defensa de los Derechos Humanos, AC (COSYDDAC). This complaint has only recently been filed and is being revised in accordance with the CEC's requests.

258 The Labor Agreement's Preamble states: "The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces". North American Agreement on Labor Co-operation, Sept. 14 1993 (32 *International Legal Materials*) 1993, p. 1499. NAFTA Labor Agreement, Annexe 1.

Tier II

- prohibition of forced labour;
- elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds as determined by each country's domestic laws;
- equal pay for men and women;
- compensation in cases of occupational injuries and illnesses; and
- protection of migrant workers.

Tier III

- labour protection for children and young persons;
- minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; and
- prevention of occupational injuries and illnesses.

The Labor Agreement is implemented through a mixed international/ domestic structure which uses a mix of diplomatic and public pressure and offers trade sanctions as a last resort in a limited number of cases. The agreement is managed at international level by a Commission for Labor Cooperation, composed of a Council (with a cabinet-level minister from each of the three states) and an independent Secretariat which conducts and monitors the Commission's operations.[259] A National Administrative Office (NAO) in each country implements the Agreement and liases between the public and their government.[260]

As with the environmental agreement, individuals and NGOs can submit complaints to the NAO that one of the other countries is persistently failing to enforce its labour laws. The rules on harm are similar to the environmental procedures. If declared admissible, the NAO may convene a public meeting. The Labor Agreement emphasises that these are not judicial proceedings: witnesses are not examined and legal rules of evidence do not apply. The NAO will assess the credibility of the allegations through public hearings, as well as information gathered from other NAOs and a wide range of NGO or expert sources.

Many of the complaints relate to the failure of a government to ensure that private businesses abide by labour laws, including allegations that companies have fired workers who tried to organise trade unions; have

259 NAFTA Labor Agreement, Part Three, Sections A, B.

260 NAFTA Labor Agreement, Part Three, Section C.

discriminated against women in export processing factories through widespread pregnancy testing; and have forced striking workers to go back to work. Importantly, companies whose activity leads to the claim against a state are openly identified and discussed in this process and the findings of fact are released in a public report.[261]

There are four methods for addressing problems that arise in relation to implementation of labour rights: consultations between NAOs, ministerial consultations, evaluations by experts and arbitration, and penalties. The method used depends on which rights are involved. In all cases the NAOs can consult and can recommend that the states consult at ministerial level. Strangely, however, for rights that are considered core rights internationally – freedom of association, the right to strike and the right to bargain collectively – such consultations are the end of the matter.

Claims alleging abuses of any other right (i.e. rights in the second and third tiers above) are treated differently. Only states can make the claim that another state is violating these rights, and only if the alleged violation is "trade-related". In such cases, if ministerial consultations fail, a state may request an Evaluation Committee of Experts (ECE).[262] This group of independent experts examines the way states enforce their technical labour standards internally and in comparison with the other two states and makes non-binding recommendations about enforcement. Their report is discussed by the Labor Agreement Council.

More adversarial proceedings with a real threat of sanctions are only possible in relation to the third tier of rights: labour protection for children and young persons, minimum employment standards and prevention of occupational injuries. If ministerial consultations and expert review have failed to find a solution, two out of three labour ministers can vote to establish an arbitration panel, though this procedure has yet to be invoked. If the panel upholds the findings, the offending state must begin to implement an agreed plan within 60 days and, if it fails to do so, may have to pay a fine up to .007 percent of the total trade in goods between the three states. This money is paid into a fund in that state to be used for improving enforcement of its own labour laws. The state then has six months to begin enforcing its laws and, if it refuses to comply, may suffer further trade measures.[263] However, sanctions

261 See for instance the complaint brought about the alleged failure of Mexican authorities to enforce freedom of association rights to protect the Mexican flight attendants' union in organising workers at a privately owned Mexico-based airline, Executive Air Transport Inc. (TAESA). Mexico/TAESA, U.S. NAO 9901.

262 NAFTA Labor Agreement, Part Three, Section B, Art. 29.

263 NAFTA Labor Agreement, Part Three, Section B, Art. 29. See also Lee, Thea. AFL-CIO Review of the NAALC (1998), accessed at www.naalc.org/english/publications/review_annex5_us.htm on 3 December 2001.

are only possible in relation to labour laws that cover the same general subject matter as laws in the other three states and are trade-related.[264]

In all cases the NAO may also engage in direct consultation with the state concerned and with the complainants to negotiate a settlement.[265] Other innovative approaches to complaints have been to convene international academic seminars on particular aspects of labour law or to authorise reviews by national experts.[266]

Twenty-three complaints have been made under this labour rights mechanism. Four have been dismissed as insufficient while the others have resulted in various degrees of consultation. None have so far led to monetary sanctions.[267]

There are weaknesses with the NAFTA labour and environmental side agreements. As discussed, it is unfortunate that they do not incorporate existing international law to set common minimum standards. The labour agreement is considerably weaker than the environmental agreement because its three-tier system only offers diplomacy and expert review to resolve questions relating to most labour rights, and restricts the possibility of fines or sanctions for only the third tier of rights. The four methods of resolving disputes, from consultations to penalties, should be open to all the rights. A significant criticism is the lack of an independent agency to oversee implementation and the dispute resolution procedures.[268] The three NAOs, which have been accused of timidity, have considerable discretion in deciding which complaints they will accept and how they will investigate them. The system has also been criticized for taking years to resolve disputes and for failing to include a formal appeal procedure.[269]

Nevertheless, NAFTA's labour and environmental side agreements are important steps forward in explicitly linking international trade liberalisation with social concerns. The mechanisms do allow almost any concerned citizen or group in one country to complain about corporate behaviour if one of the other two governments has persistently failed to enforce its domestic

264 Lee, Thea. AFL-CIO Review of the NAALC (1998).

265 In response to a complaint regarding anti-union plant closures in Canada, the U.S. NAO engaged in consultations with its Canadian counterpart, the Quebec labour department and labour organisers and reached a settlement under which the Quebec government agreed to investigate the closures. Canada/McDonalds, U.S. NAO 9803.

266 Mexico/U.S. NAO 940003.

267 For a summary of every case and analysis of the results according to different rights, see Human Rights Watch, pp. 24-55.

268 *Ibid*., chapter 4.

269 *Ibid*.

regulations. Companies whose activities have led to the complaint are openly named in reports, which allows public opinion to be mobilized. The labour agreement, "for all its deficiencies in practice, remains the most ambitious link between labor rights and trade ever implemented."[270]

270 *Ibid*., p. 1.

ENFORCING DIRECT OBLIGATIONS

This section surveys the very few existing international procedures that can be used to scrutinise corporate conduct directly. It looks first at complaints procedures under the two documents that apply directly to corporations, in the OECD and the ILO. It then considers how victims are using courts in multinationals' home countries to bring complaints alleging human rights abuses by them in another country. Although enforcement is through national courts, such cases clearly have an international dimension because the abuses took place elsewhere and the complaints often rely on international human rights standards. Finally, it examines how some international organisations, including the World Bank, can demand that companies adhere to certain standards as a condition of doing business with the organisation.

OECD Guidelines for Multinational Enterprises

In 2000 the OECD revised its Guidelines (discussed in chapter 5) and tried to revitalise the rudimentary mechanism for promoting and interpreting the document.[271] At the lowest level of the mechanism are National Contact Points (Contact Points). These are usually government offices[272] – at times individual officers and often housed in trade or economic ministries – and there should be one office in each OECD member state. The Contact Points are responsible for promoting awareness of the Guidelines, handling enquiries about their operation and, in the case of disputes about their interpretation, handling initial discussions between the parties.

The performance of the Contact Points has been disappointing. Many countries have failed to create one altogether. In some instances, government officials designated as the Contact Point were unaware of their responsibilities.[273] Responding to such criticisms, the 2000 revision of the Guidelines gives Contact Point offices an enhanced role in dealing with disputes about the Guidelines and states that they should "operate in

271 Karl, Joachim. "The OECD Guidelines for Multinational Enterprises", in Addo, at p. 93.

272 However, the Guidelines give member states great flexibility to include business representatives, employee organisations and even NGOs in the Contact Point system. See the OECD, National Contact Points, Procedural Guidance, DAFFE/IME/WPG/(2000)9, which says the NCP: "May be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organized as a co-operative body, including representatives of other government agencies. Representatives of the business community, employee organizations and other interested parties may also be included".

273 Van Eick, Sylvie. *Taming the Shrews: The OECD Guidelines on Multinational Enterprises*, 1997.

accordance with core criteria of visibility, accessibility, transparency and accountability".[274]

Procedure for interpreting Guidelines

When member states, companies and employee organisations believe the Guidelines have been violated by a multinational, they can ask Contact Points for a consultation. Significantly, the Guidelines allow "other parties concerned" also to make such a complaint and this broad phrase apparently includes NGOs. It appears that a complaint can relate to the activity of a company anywhere in the world, not just in the Contact Point's own country.[275]

The Contact Point makes "an initial assessment of whether the issues raised merit further examination", though there is no guidance about how they decide this.[276] If the case proceeds further, the Contact Point acts as a mediator (offering "good offices", using "consensual and non-adversarial means") between the company and the complainant. Contact Points have played this role in the past, sometimes with some results in dealing with non-compliance with the Guidelines. The Contact Points are meant to consult with the parties, government, business and employee organisations, "other non-governmental organisations, and relevant experts", as well as Contact Points in other countries. Where mediation fails, the Contact Point makes its own statement and recommendations.

If a conflict is not resolved at national level, Contact Points can refer it to the OECD's Committee on International Investment and Multinational Enterprises (CIIME), which has ultimate responsibility for the Guidelines. Government authorities, and the business and trade union groups that have official status with the OECD, can directly ask the CIIME to interpret the Guidelines. The CIIME makes decisions by consensus.

The CIIME has acquired a degree of sophistication in interpreting the Guidelines. The parties submit "substantiated submissions" to the CIIME that can be detailed and legalistic. Experts are consulted, including on questions of legal interpretation. Despite the formality of the process (especially before the CIIME), neither the Contact Points nor the CIIME perform a traditional judicial or even quasi-judicial function. As with the ILO Tripartite Declaration procedure (discussed below), they do not judge the behaviour of individual companies but merely clarify the meaning of the Guidelines for the future.

274 OECD, National Contact Points, Procedural Guidance, Preamble. DAFFE/IME/WPG/(2000)9.

275 "If issues arise in non-adhering countries, [the National Contact Point will] take steps to develop an understanding of the issues involved…", *ibid*., Procedural Guidance, I.C.5.

276 Procedural Guidance, I.C.1.

Nor are decisions technically binding on the parties, since the Guidelines themselves are treated as recommendations. There is no real enforcement. Contact Points and the CIIME cannot even invoke popular pressure, since it is not the OECD's practice to reveal the identity of companies against which complaints have been made. The OECD uses the mechanism to educate business managers about their obligations under the Guidelines, and aims to work gradually towards a voluntary culture of compliance.

After the Guidelines were adopted in 1976, the trade union organisation that has official status with the OECD brought a swathe of cases which resulted in more than 40 decisions by the end of the 1980s. They showed clearly that the CIIME made interpretations that supported labour rights.[277] However, one commentator who worked for a time in the OECD has written that

> "…these [early] decisions largely fell on deaf ears at the national level. Given that the Guidelines provided no binding retrospective or prospective application, and carried no sanctions in the case of violations, the lack of domestic response is unsurprising."[278]

The trade union movement lost enthusiasm and only three labour cases were brought in the 1990s. Commentators have suggested that the weakness of the Guidelines' implementation was a deliberate strategy by the OECD to pre-empt stricter regulation under the draft UN Code of Conduct on Transnational Corporations that was being negotiated at the time.[279]

The OECD Guidelines and monitoring procedure are the only international mechanism that looks directly and exclusively at the conduct of multinational companies and which allows civil society to lodge what are in effect complaints. Unfortunately, decisions are not enforced in any way and the fact that the identity of the company is kept confidential means there is no public scrutiny. The procedure has little immediate impact on the behaviour of specific companies. Nevertheless, it could become a source of useful precedents on acceptable business behaviour.

277 See Salzman. The following summary of cases is also taken from this monograph. In the *Firestone case* local Swiss management of Firestone had failed to inform the trade unions that it had been negotiating to close the plant for more than a year before it was closed. The CIIME said that the Guidelines require headquarters of multinationals to provide local management with accurate information so that local employees can be informed. In the *Badger case* a US parent of the Belgian subsidiary called Badger refused to provide funds to pay compensation to the Belgian employees who were dismissed when Badger became bankrupt, claiming limited liability. The CIIME used the Guidelines to say that parent companies did have some responsibility to support a subsidiary even if not required by national law.

278 *Ibid*.

279 *Ibid*. and see references in footnote no.32 therein.

Contact Points themselves could encourage more openness, since they have discretion to release the results of their inquiries after they have consulted with the parties "unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines". They might even reveal the name of the company involved. Such transparency is unlikely unless it is encouraged by the CIIME, by OECD member states, and by advocates who submit cases.[280] It is too early to judge whether the revised Guidelines will successfully revitalise the Contact Point system. It is unlikely to do so unless advocates explore how to open up the procedure, including the potential of both the Contact Points and CIIME to clarify what is and what is not acceptable behaviour of multinationals under the Guidelines.

ILO Tripartite Declaration

The ILO, and its procedures for monitoring the conduct of states, were discussed above. Here we focus on the complaints procedure under the Tripartite Declaration (introduced in Chapter 5). As discussed earlier, the ILO has always been at pains to emphasise that states ratify ILO conventions, and states alone have binding obligations under international law to implement the labour rights in these standards. The International Labour Office (the secretariat of the ILO) offers the private sector technical assistance to implement the Tripartite Declaration and business codes. It emphasises, however, that the Tripartite Declaration is a non-binding set of recommendations and that any initiatives by businesses to draft or comply with codes of conduct are purely voluntary, or "beyond compliance" as one ILO official described it.

Interpretation of Tripartite Declaration

When the meaning of the Tripartite Declaration is disputed, governments can ask a sub-committee of the Governing Body – the Sub-committee on Multinational Enterprises (Sub-committee) – to provide its interpretation. Workers' and employers' organisations can also ask for interpretations, but only if their governments fail to do so. The Sub-committee's 18 members are appointed using the tripartite formula. Its three chairpersons (representing government, workers and employers) decide whether a request is admissible. The full Sub-committee votes if the chairpersons cannot decide by consensus. The chairpersons and the International Labour Office draft a response that must be adopted by the Sub-committee and approved by the Governing Body.

Only 23 requests for interpretation have been made since the procedure

280 The OECD has emphasised the confidentiality of the proceedings: "information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure" (OECD, National Contact Points, Procedural Guidance, I.C.4(a)).

began in 1986. Of these, only a handful have actually resulted in an interpretation.[281] The procedure has potential, nevertheless, because it is triggered by a real dispute or allegation of wrong. The criteria for admissibility say the purpose of the procedure is to "interpret the provisions of the Declaration when needed to resolve a disagreement on their meaning, *arising from an actual situation, between parties* to whom the Declaration is commended".[282] As with the OECD procedure, however, the mechanism does not judge the conduct of specific companies or provide any remedy to victims. The names of the multinationals involved are kept strictly confidential and the process is so slow that disputes will often be resolved or have become irrelevant by the time they are concluded. As in the OECD, interpretations are mainly useful to clear up ambiguities about the standards companies should follow for the *future*.[283]

The renewed focus on the ILO (since it was agreed that the WTO should not have responsibility for protecting workers' rights) gives some hope for revitalizing the Tripartite Declaration procedures, though the employer organisations are likely to oppose this. While citizen groups cannot lodge complaints about the conduct of businesses, trade union organisations in the ILO can do so. The mechanism may be useful as a source of precedents for the future, though the lack of sanctions and failure to name companies call into doubt its effectiveness as an enforcement mechanism.

Domestic litigation to hold corporations accountable abroad

The essential role of national courts was noted at the beginning of this chapter (when it was also noted that many legal obstacles hamper their usefulness to victims seeking remedies). National courts can also sometimes provide a form of 'international' complaints mechanism. This section briefly examines cases that advocates in the US, UK, Australia and Canada have brought in domestic courts to hold corporations accountable for their actions in other countries.

US litigation against corporations for abuses abroad

The largest number of lawsuits exploring corporate liability for human rights violations committed abroad have been brought in the United States. Lawsuits are currently pending against a number of multinationals including:

281 www.ilo.org/public/english/employment/multi/inter/index.htm, accessed 3 December 2001.

282 Paragraph 1, ILO Governing Body, Procedure for the Examination of Disputes (Multinational Enterprises: Tripartite Declaration of Principles)', adopted March 1986, *Official Bulletin*, Vol. LXIX, 1986, Series A, No.3. (Emphasis added.)

283 In one interpretation, the Sub-committee stated that "the purpose of the interpretation procedure is to clarify the meaning of the Declaration for its better application for the future". Belgium: Request for Interpretation of the Tripartite Declaration (Letter dated 27 January 1987 from the Belgian Government), ILO Doc: GB.270/MNE/1 (Nov. 1997).

Shell (for its alleged role in the events that led to the execution of Ken Saro-Wiwa in Nigeria); Chevron (for its alleged role in supporting violent government suppression of protestors on an off-shore platform in Nigeria); Unocal (for alleged complicity in the use of forced labour in Burma); Texaco (on the basis of claims that it is destroying the Ecuadorean rain forest); ExxonMobil (for alleged complicity in abuses committed by Indonesian security forces in Aceh); and Coca-Cola together with bottlers of its soft drinks in Colombia (for alleged complicity in the suppression by paramilitaries of union activity, including the killing of a union activist at a bottling plant).

In these cases, US courts have been willing to entertain lawsuits claiming that corporations – American or not – have violated international law outside the US. These claims are based on the 200-year-old Alien Tort Claims Act (ATCA) which allows foreigners to sue in US courts for damages for violations of international law.[284] It applies to the small group of customary international law norms such as the prohibition of slavery, genocide, torture, crimes against humanity and war crimes. Complainants must show that a corporation was in some way linked with a government itself bound by these norms. Although most ATCA cases concern violations committed abroad, some have related to corporate abuses committed in the US.[285] The litigation and appeal process is not completed in any of these cases.

The threshold for showing the necessary level of connection between a company and the violation committed by political authorities is high, and legislation similar to ATCA is not found in any other country. The most important US cases are discussed in more detail in Chapter 7, which examines the notion that a company can be "complicit" in human rights violations committed by state agents. At this point it is only worth noting that the ATCA cases have shown that it might be possible to sue a commercial corporation successfully in the US for violations of international human rights law committed abroad.

In another important group of US cases, victims of the Nazi Holocaust laid claims against corporations that used them as slave labourers more than 50 years ago, against banks that financed these multinationals, and against banks that illegally took and maintained the assets of Holocaust victims.[286]

284 28 United States Code Ss 1350. The ATCA says: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

285 Such as *Jama v. Immigration and Naturalization Service* in which a US immigration detention facility run on behalf of the authorities by a commercial corporation has been sued for violations such as cruel, inhuman or degrading treatment.

286 The companies being sued included: Daimler-Chrysler, Friederich Krupp AG, Siemens AG, Philipp Holzmann AG, Volkswagen AG, Ford Motor Company and Ford Werke AG, Bayer AG, Bertelsmann AG.

The forced labour cases sought restitution and disgorgement of unjustly gained profits, for violations of customary rules of international law. These lawsuits have been hugely important in encouraging corporations to settle claims before they are adjudicated by a court.

Litigation in other jurisdictions

In Britain, tort litigation has been launched against corporations based in Britain for injuries inflicted abroad.[287] In a leading case against RTZ (formerly a Rio Tinto subsidiary), the victim suffered from cancer after working at RTZ's uranium mine in Namibia. He was allowed to pursue his claim in Britain. Two other claims have been launched, against Thor Chemical and against Cape Asbestos for its operations in South Africa. Both make it more likely that victims will be able to seek redress from companies based in the UK. The potential of the Human Rights Act, which gave the European Convention on Human Rights the force of domestic law in British courts since 2 October 2000, still has to be explored.

Cases in Australia and Canada have also raised the possibility that domestic courts may be used to address claims of corporate excesses abroad. In Australia, a lawsuit against the BHP mining company for its activity in Papua New Guinea led to an out-of-court settlement and cessation of the company's environmentally disruptive activities. In Canada, the case of *RIQ v. Cambior* was brought in the province of Quebec against a Canadian mining company whose operations in Guyana had allegedly led to widespread environmental damage. While this claim was unsuccessful on jurisdictional grounds, the court's decision suggested that other claims tailored to cross the initial jurisdictional hurdles may be more successful.

The *Cambior* case is also significant because it was litigated in Quebec, which follows a civil law system similar to that of continental Europe. To date, the possibility of litigation against corporations that violate international human rights standards has not been tested in most European states.

It appears that these types of cases – where courts in the "home" country are used to ensure companies do not abuse human rights in the "host" country – offer some advantages. For example, they hold the promise of extending the protection of an independent and well-functioning judicial system to victims (or potential victims) in countries where corporations can take advantage of the absence of the rule of law. In doing so they demonstrate in a convincing way the *international* dimension of human rights. Litigation is based on the belief that companies should not engage in activity abroad that would be outlawed at home. Though it is too soon to assess the legal implications, and little positive and final jurisprudence has

287 See generally Meeran.

emerged, the fact that litigation occurred has probably sent an important message to multinational companies about the need to ensure respect for human rights.

Direct enforcement through international procurement policies

Previous sections examined the few means that are available at the international level for directly enforcing human rights obligations on companies. At national level, a government can insist that companies which take government contracts should respect certain standards of conduct. Governments naturally expect companies to observe national laws, but in some areas they may want to insist on higher standards than the law requires. Where the contractual relationship relates to commercial activity abroad, issues of jurisdiction and extra-territoriality may also complicate the application of national law. In such situations, governments can (and do) use their influence as major sources of revenue for companies, to demand compliance with certain standards. They may insist that companies which benefit from government loans, or security guarantees for investment abroad, should respect environmental standards. Multinationals headquartered in the country concerned might be refused contracts on overseas development projects if they have breached anti-corruption standards or deal with sub-contractors who employ child labour.

Similar forms of regulation occur at the international level. Several official international agencies have established guidelines to regulate the types of companies with whom they will do business. These guidelines might cover simple procurement of goods and services or more generally establish requirements for companies that undertake projects on behalf of the agencies. Not all observers consider that procurement guidelines amount to an enforcement mechanism, and it is true that such policies at best only encourage compliance. The expectation is that companies will comply in order not to lose business; but the choice is left with the company. On the other hand, where large international agencies are involved, the temptation to comply will be a powerful incentive. The section below examines one example of such a policy.

World Bank Policy Guidelines

The World Bank's guidelines cover three areas: environmental protection and sustainable development (Operational Directive 4.0 *et seq*.), protection of indigenous peoples (Operational Directive 4.20), and promotion of gender equality. These guidelines are significant because they incorporate many relevant international human rights standards.

Although the Bank's guidelines have no legal force, they enable the Bank (and others) to scrutinise its own conduct and, indirectly, the behaviour of companies involved in World Bank projects. Failure by the Bank to comply

with its own guidelines may cause the Bank to withdraw from a project (and thereby dissuade other funders from investing in it). The Bank can also block companies that do not comply from participation in future projects.

Under its environmental guidelines, the Bank analyses the "type, location, sensitivity, and scale of the proposed project, as well as the nature and magnitude of its potential impacts".[288] An environmental impact assessment (EIA) is required for those projects that could potentially damage the environment. Borrowing governments conduct EIAs in co-operation with the Bank. However, in practice lack of technical expertise often means that contractors (usually multinationals) carry out many EIAs.

The objective of the Bank's policy on indigenous peoples is to ensure that indigenous groups themselves can participate in discussions of projects that will affect their communities.[289] The Guidelines are meant to ensure that indigenous peoples benefit from Bank-supported projects and in any case to minimise the damage that projects cause. Programmes are expected to take account of the cultural and social needs of indigenous peoples, following extensive dialogue between project managers and the local communities.[290] The guidelines can be detailed. The Bank should require, for example, that borrowers assume the responsibility for any involuntary resettlement of indigenous peoples that may occur as a result of a project it funds. Resettlement must improve, or at least restore, the economic position and living standard of resettled people, taking into account land tenure, environmental protection and management, and employment training.[291]

Bank guidelines are often stronger on paper than in reality and their implementation may not be monitored well in the absence of scrutiny by NGOs and other independent organisations. Nevertheless, they are often the only mechanism for holding companies accountable for the impact of major extraction projects. Though their usefulness is contested, the Guidelines have forced multinational companies to become more familiar with human rights provisions, and to take responsibility in some cases for acting in ways that do not violate them.

World Bank Inspection Panel

In 1994 the Bank established an independent Inspection Panel. This is a permanent body, with its own secretariat, and is composed of three

288 Operational Directive (OD) 4.01, Annexe E.

289 OD 4.20, paragraph 8.

290 OD 4.20.14(a): "The key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous people affected by the project."

291 OD 4.30.5.

independent experts.[292] Private individuals in the territory of a borrowing state who have been adversely affected by a Bank project are entitled to register grievances with the Panel alleging that a project does not conform with the Bank's guidelines or operational procedures.[293] The Inspection Panel has authority (subject to the political oversight of the Bank's Board of Executive Directors) to investigate every aspect of a particular project, can review Bank (but not private or governmental) records, and can conduct onsite investigations.[294]

Local groups (or NGOs)[295] are able to lodge claims if they can show they have suffered an actual or threatened harm as a direct result of an action or omission by the Bank, before the project is more than 95% complete. First, the Bank must establish whether the claimants have shown a *prima facie* violation by the Bank of its operational procedures. If so, and if all other remedies have been exhausted, the Panel recommends to the Executive Directors to authorise an investigation. This is by no means automatic. Up to October 1999 the Panel had received 15 formal requests for inspection, 13 of which concerned infrastructure, environmental and land reform projects. The other two concerned structural adjustment programs. The Panel recommended further investigation in six cases and the Board authorised investigation in two cases. The remaining four cases were subject to remedial action plans.[296]

The Panel acted aggressively in its first five years of operation, but in 1999 the Bank reined it in by reminding the experts that their task was to focus on non-compliance with Bank procedures rather than the harm that projects cause.[297] The Panel is a review procedure, not an enforcement mechanism. It cannot issue judgements or give remedies in favour of those harmed by the Bank's projects, nor can it monitor projects on its own initiative without first receiving a complaint. A Panel can only make non-binding recommendations to the Bank's Board of Executive Directors. Nevertheless, the publicity surrounding an adverse report by the Panel can put huge pressure on the Board to change or end a project. In July 2000, for example, the Board

292 World Bank Resolution Inspection Panel, Resolution No.93-10 IBRD, 34 *International Legal Materials* (1995), p. 520.

293 Shihata.

294 Schlemmer-Schulte, at pp. 243-244.

295 If local representation is unavailable for the indigenous group, the Bank can authorise recourse to outside groups – in practice, often northern NGOs. The Inspection Panel Report and Recommendation on Request for Inspection. Re: Request for Inspection China: Western Poverty Reduction Project (1998), para. 22.

296 Schlemmer-Schulte.

297 Shihata.

decided on significant delays and changes to a controversial resettlement project in western China after a critical Panel report, even though Bank staff had recommended that the project should go ahead.[298]

Although the Panel process does not formally refer to companies, in practice the Panel interacts quite closely with companies that actually manage the projects. The Bank's guidelines, as monitored by the Inspection Panels, have enabled community groups (especially indigenous peoples) and NGOs to complain about the adverse impact of big development projects and the role of private companies in implementing them. Although the Panels cannot provide specific remedies, their reports can influence the direction of projects or even force the bank to withdraw financing altogether.

298 See Tibet Information Network, *News Update*, 5 July 2000 and 7 July 2000.

THE WORLD TRADE ORGANISATION (WTO) – A SPECIAL NOTE

The World Trade Organisation does not really offer possibilities for enforcing either direct or indirect obligations on companies to respect human rights. It is included in this discussion because there is the risk that, through its trade liberalisation measures and dispute settlement procedures, human rights issues might suffer. In particular, there is the risk that the WTO's free trade agenda will reduce some of the constraints on companies in relation to respect for human rights. For the purposes of this report, therefore, it is important to consider how advocates can ensure human rights principles are taken into account as the WTO pursues trade liberalisation.

The WTO has found itself at the heart of arguments concerning human rights and globalisation and the impact of corporate power on human rights. Established in 1995 as the successor to the 1947 General Agreement on Tariffs and Trade (GATT), the WTO now boasts over 140 members who account for over 90% of world trade. The WTO's primary objective is to "liberalize international trade and place it on a secure basis" which will "thereby contribut[e] to the economic growth, development and welfare of the world's people".[299] It administers a series of international agreements that seek to remove tariffs, subsidies and other barriers to trade.[300] It also settles trade disputes. The WTO is very much a rule-based organisation: a state's membership is about following rules or facing enforcement action. Critics say that more free trade does not necessarily bring more benefits to the people of the world and that the benefits it brings are not equitably distributed.[301] They argue that restrictions on trade are sometimes necessary to protect people from harm or social risk and violations of human rights.

In effect, international economic law and international human rights law, having developed in splendid isolation, are now colliding in the halls of the WTO. Some argue that a number of human rights "trump" or override trade law.[302] Critics of free trade claim, for example, that the right to food security and the right to a livelihood should modify WTO rules that enable corporations to patent indigenous knowledge and traditional plant forms.[303]

299 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the Multilateral Trade Organization, 33 *International Legal Material* (1993) p. 13.

300 The WTO is concerned with trade in goods as well as services, intellectual property, government procurement and investment measures.

301 See *Globalization and its impact on the full enjoyment of human rights*, UN Sub-Commission on the Promotion and Protection of Human Rights, submitted by J.Oloka-Onyango & Deepika Udagama, UN Doc: E/CN.4/Sub.2/2000/13, and the following Progress Report, UN Doc: E/CN.4/Sub.2/2001/10.

They say that intellectual property rights defended by the WTO protect the interests of private companies against those of ordinary people and their governments. Corporations do indeed seem to exercise considerable influence in the WTO, albeit behind the scenes, and lobby governments to bring cases at the WTO that would advance their commercial interests.

It has been argued, for example, that US banana-producing companies Chiquita and Dole were behind the US complaint in the WTO about European subsidies to Caribbean banana exporters. In another dispute, between the companies Kodak and Fuji, even the veneer of state involvement was stripped away and the case was explicitly referred to as a commercial conflict between rivals. The US and the European Commission have created official procedures to investigate complaints by their companies about competitors in other states, and to pursue them through the WTO system if they have merit.[304] In practice, therefore, although the WTO ostensibly deals with disputes between states, in some cases such disputes are straightforward attempts by corporations to secure commercial advantage over foreign rivals.

It has been suggested that the WTO's powerful enforcement mechanism, which includes the threat of trade sanctions, might be harnessed to enforce human rights.[305] The initial, unresolved WTO-human rights debate, however, is about how to bring human rights considerations into the deliberations of the WTO's political and quasi-judicial organs with the objective of ensuring that free trade measures do not cause human rights of particular groups or individuals to be violated.

During the Uruguay Round of negotiations (1986-94) which led to the creation of the WTO, some governments (most representing developed countries) proposed including a social clause that would explicitly link labour and environmental standards to international trade standards. The proposal was vehemently opposed by developing nations, who perceived it to be a

302 The argument is that some international human rights have primacy over trade law because fundamental rights such as the prohibition on torture or arbitrary deprivation of life are peremptory norms (this term was explained in Chapter 5) of international law and that any treaty (such as the WTO Agreement) which is inconsistent with these norms is void. See for example, Allman. The "technical annexe" to this submission sets out the argument for primacy of human rights.

303 See the outspoken criticisms by Vandana Shiva in her 2000 BBC Reith Lecture *Poverty and Globalisation*, accessed at http://news.bbc.co.uk/hi/english/static/events/reith_2000/lecture5.stm on 3 December 2001.

304 U.S. Omnibus Trade and Competitiveness Act section 301 (19 U.S.C. sections 2412-14 (1994)) and EU Regulation 2641/84 as Modified by Regulation 522/94, respectively. See Killman. See also Taylor.

305 See Stirling.

hidden form of protectionism aimed at preventing them from exploiting the commercial advantage of their cheap labour costs. Business interests also opposed the proposal, which was defeated. The ILO was said to be the best forum to develop and enforce labour standards.[306] This section explores possible opportunities to integrate human rights principles in the WTO decision-making process through its dispute resolution mechanism. It does not address the bigger issues concerning the impact of free trade policies on human rights, and whether particular free trade measures should be modified.

WTO dispute settlement mechanism

The WTO has one of the most effective systems for peacefully resolving inter-state disputes. It combines detailed rules with rigorous quasi-judicial bodies whose decisions are backed-up by the right of the aggrieved state to impose trade sanctions against offending states. The procedures are not dormant paper provisions; they are regularly and successfully invoked to enforce trade rules.

A state can refer a trade dispute with another state to the Dispute Settlement Body (the DSB), which is comprised of all WTO members and administers the Dispute Settlement Mechanism.[307] If negotiations fail to resolve the dispute, the DSB sets up a Panel to investigate and make a ruling.[308] Panels consist of three (or exceptionally five) international trade experts, selected with the agreement of the parties. Panel hearings have something of the adversarial flavour of a court trial and parties increasingly employ commercial law firms to prepare their cases. The parties (as well as third party states with material interest in the dispute)[309] submit written legal and factual briefs and present oral arguments to the Panel. Panels may also consult technical experts (including from intergovernmental organisations, NGOs and trade unions), who may play an important role in complex cases. In an interesting development, the Panel (and the Appellate Body described below) has

306 The criticisms, however, spurred the drafters to include in the preamble to the WTO Agreement that economic relations should be conducted in a way that raises standards of living, ensures full employment and increases real income in an environmentally sustainable way.

307 In the absence of some global government, the DSB represents the collective will of the international community to adopt and enforce WTO rulings – see WTO Agreement, Arts. II:3, IV:3.

308 Set out in the Dispute Settlement Understanding (DSU). The DSB also acts as a political safety net for member states who prefer not to put all their faith in the rule of law: it may (although has not to date) reject by consensus decisions of the WTO quasi-judicial organs such as the Panel.

309 DSU, art. 10.

discretion to accept unsolicited *amicus* briefs by NGOs with an interest in particular issues.[310]

If one party rejects the Panel's legal analysis, it can appeal to the Appellate Body. This is a standing body composed of seven lawyers and economists who serve four-year terms. As with the Panels, the Appellate Body receives written submissions and hears oral arguments and may accept submissions from NGOs.[311] The Appellate Body tends to apply principles of international law stringently and to place WTO rules in the context of other international or multilateral agreements.[312] This may provide opportunities in the future to argue that the international rule of law, considered as a whole, includes human rights standards.

If a state fails, within a "reasonable period of time",[313] to change regulations which the Panel or Appellate Body find to violate WTO rules, the aggrieved state is authorised to retaliate by imposing trade sanctions (proportional to the harm suffered) until it does comply. This is a remarkable enforcement mechanism. Although offending states might still choose to ignore the rulings and sanctions (in the way the European Union has accepted higher US-imposed tariffs in order to maintain a special banana subsidy for its former African and Caribbean colonies), the dispute settlement mechanism and underlying culture of compliance have been critical to the success of the WTO in enforcing its trade rules.

The mandate of the Dispute Settlement Mechanism is to safeguard the equality or balance of competitive trading opportunities between WTO members. The free trade imperative trumps other concerns. This is clear from a string of decisions which have struck down government attempts to restrict imports on social, cultural, health or environmental grounds.[314] Some

310 US – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, para.109. Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, Appellate Body Report (1998).

311 The Appellate Body must take the facts as found by the Panel (viz. the Appellate Body cannot reconsider and weigh evidentiary matters which might be necessary to decide how to apply the legal rules – see Australia – Measures Affecting Importation of Salmon, Appellate Body Report (1998)). It can only look at whether the Panel made mistakes in law, upholding, modifying or reversing the Panel's conclusions (DSU, art.17:13)

312 The Appellate Body reports are the most developed international institutional statements on the interaction between economic liberalisation and other international obligations.

313 DSU, art. 21.

314 These include failed attempts to restrict the importation of tobacco on health grounds (Thailand, 1990); asserting cultural preferences (Canada, 1997); taxing alcohol (Japan, 1996); requiring quarantine for certain animal and plant products (European Union, 2000); banning hormone injected meat from all countries including the US (European Union, 1998) and enforcing environmental protection (US, 1998).

of these decisions have been fiercely criticised, and in the future the WTO may be forced to give more attention and weight to the social policy objectives of governments.

Perhaps states that take up private commercial claims in the WTO should adopt a "clean hands" policy. A government will take up the case if, among other criteria, the company can demonstrate that it is complying with basic human rights standards. Another approach would be a "do no harm policy": the government would refuse to take up complaints in the WTO when the measures being sought would adversely affect human rights.

Exceptions to free trade: Article XX & human rights

WTO member states are obliged to follow some key free trade rules. They must grant all trading partners the same treatment they offer to their most-favoured trading partners ("most favoured nation" rule) and must treat imported goods as they treat similar or "like" products produced in their own country. There are, however, important exceptions. States may introduce trade-restrictive measures if these are "necessary" to achieve one of 10 objectives set out in Article XX of the WTO Agreement. Restriction is allowed, for example, to protect public morals (art.XX (a)), to protect human, animal or plant life or health (art.XX(b)) and to conserve exhaustible natural resources (art.XX(g)).[315] These exceptions appear to recognise the potential negative impact of free trade rules — and could allow the WTO to balance free trade and its impact on human rights.[316]

In some older decisions the Dispute Settlement Mechanism interpreted "necessary" very narrowly, requiring that measures were justified only if no alternative was available that restricted trade less. Recently, however, the Appellate Body has been more expansive in its reading of the exceptions, and has suggested that they may be invoked when they are "necessary" to enable the state to conform with its international obligations. So far this interpretation has not been used to suggest that a state may impose trade restrictions in order to comply with its international human rights obligations.[317] But there may be scope to apply this argument in relation to exceptions based on protection of "public morals" or "human health" or in

315 There are other exceptions in the WTO Agreement. Art. XXI allows an exception on the grounds of national security. Art. XVIII allows exceptions to provide governmental assistance to economic development. Art. VI allows restrictions on trade to protect a state from unfair trade practices, such as dumping of cheap goods, which put domestic industry at a disadvantage.

316 The notion of interpreting Art. XX so as to create a 'safe harbour' where trade-restrictive measures based on international human rights standards would be immune to WTO regulations is based on analogous arguments made in the environmental arena. See for instance Hudec, Robert. "GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices", in Bhagwati and Hudec, at p. 95.

regard to the prohibition of products produced by prison labour (art. XX(e)).[318]

International harmonisation

As well as imposing tariffs, states restrict imports by imposing technical standards which imported products must meet.[319] The WTO does not distinguish between goods on the basis of how they were made (called PPMs or processes and production methods) and it is trying to reduce and harmonise the way states rely on PPMs. To prevent states from applying different, discriminatory restrictions on domestic and imported products, the WTO encourages states only to use international standards and a state will be suspect if it deviates from such standards (e.g. by imposing more stringent health and safety standards). The WTO usually refers only to relatively innocuous international standard-setting bodies as the International Organisation for Standardisation. However, standards created by other international bodies, such as the World Health Organisation and the ILO may be relevant.

It might be possible in the future to use this drive for harmonisation to enforce international human rights standards through the WTO. For instance, products that look the same may be distinguished in terms of how they were produced. In such a case the working conditions of producers would be relevant. If a product was made by child or forced labour, states that ban imports produced by child labour might rely on an ILO standard to argue in favour of trade restriction. States that enforce prohibitions against child or forced labour could claim in the Dispute Settlement Mechanism that states which permit companies to use such labour give a commercial advantage (preferential treatment) which is denied to corporations in states that enforce the international prohibition on child or forced labour. Such use of WTO principles is still speculative.

WTO procedures are rigorous, and its tough remedies are able to enforce free trade rules effectively. However, they do not provide an avenue for complaints about the behaviour of corporations or the failure of states to hold corporations accountable. This is one reason why there is much public concern about the WTO, and fear that its decisions may cause violations of

317 The Appellate Body has most clearly stated this principle regarding the applicability of multilateral environmental agreements in United States – *Import Prohibition of Certain Shrimp and Shrimp Products* Case (1998).

318 Charnovitz (1998).

319 Two WTO regimes already seek to limit the impact of such technical regulations on trade: the Agreement on Sanitary and Phytosanitary Measures (governing the use of material that can harm life and health if ingested through food or inhalation) and the Agreement on Technical Barriers to Trade (Technical Barriers Agreement — governing all other technical regulations).

certain human rights. Because corporations have a direct interest in trade disputes, their resolution can alter corporate conduct. Although the mandate of WTO bodies is very narrowly focused on whether a measure will further open up international trade, and although the organisation still appears uncomfortable with the role of civil society, opportunities exist to influence its procedures. The international human rights framework could be integrated eventually within the Dispute Settlement Mechanism. It can be argued that trade restrictive measures may be "necessary" to comply with international human rights law. Advocates can test further the discretion of WTO Panels and the Appellate Body to accept submissions from independent experts and NGOs. They can also argue that the WTO drive for "harmonisation" must include at least some human rights law in the package of international standards to which all members sign up.

CONCLUSIONS ON INTERNATIONAL ENFORCEMENT PROCEDURES

Having reviewed the various options available to enforce direct and indirect obligations through international procedures, this concluding section assesses their effectiveness.

The first point to note is that only two of the enforcement procedures surveyed above were designed with companies in mind. Most were created to scrutinise the obligations of states and are only gradually being used to monitor how states could hold companies accountable. The two procedures that can directly scrutinise corporate behaviour – the ILO Tripartite Declaration and the OECD Guidelines – are both rather weak. They are officially endorsed by governments, but rely on the voluntary co-operation of multinationals. Neither provide any remedies. Individual companies are not identified publicly or judged. Finally, the purpose of the procedures is essentially to clarify the meaning of standards for the *future*.

Other existing international procedures scrutinise corporations only by focusing on the obligations of states to enforce standards against private actors. The labour and environmental side agreements to NAFTA are two of the most effective mechanisms for (indirectly) complaining about and changing the behaviour of companies. Complaints about (some) labour or environmental failures can lead potentially to the strongest remedies of all the procedures considered. Ultimately offending states may suffer monetary fines or even suspension of NAFTA privileges. However, they apply only to those three countries that are part of NAFTA, and in regard to a very limited range of rights. In relation to labour rights, sanctions are available only for three of the eleven groups of labour rights included in the labour side agreement. In practice no case has so far lead to such penalties and private discussions and public exposure are the main tools to encourage change.

The UN mechanisms which enforce international human rights standards are the weakest in providing enforceable remedies, relying mainly on diplomatic and sometimes public pressure. This said, the power of public exposure should not be underestimated, especially given the sensitivity of companies to bad publicity. The UN Commission on Human Rights is not a complaints procedure as such, but gives advocates the opportunity to lobby for expert reports, public debates and formal resolutions of the Commission.

Rules differ on who has standing to lodge complaints (accessibility). In most cases only those who have suffered harm can complain to UN human rights treaty bodies and regional human rights commissions/courts. On the other hand, the rules in some trade or economic fora are relatively open. Victims,

community groups, and even NGOs who have not suffered harm, can activate procedures in NAFTA (labour/environmental complaints) and in the OECD (interpretation of standards for multinationals). Both employers' and trade union organisations are able to ask for interpretation of the ILO's Tripartite Declaration. Community groups can approach the World Bank Inspection Panel, though of course companies can opt out of that procedure (if they choose not to be involved in the project).

None of the international procedures have any system for financially assisting those who wish to lodge complaints. Where victims have access to international procedures they are likely to find the costs of communication and travel prohibitive if personal appearances are necessary or useful, even

Criteria for assessing enforcement procedures

Accessibility

Who can complain to tribunals or be involved in political processes? Do victims or their representatives have the right to lodge complaints (i.e. do they have "standing")? In most cases procedures should be flexible enough to allow civil society organisations to lodge complaints about harm suffered by others, even if they themselves are not directly harmed by the conduct. Can organisations that are not directly involved in a tribunal's proceedings lodge *amicus* briefs (that is, expert opinions which help the tribunal)? Is access defeated because the process is too expensive or in too distant a location? Is any financial assistance available – some form of legal aid – and are costs reduced for those who cannot afford to bring a case? Are the procedures so difficult and complex that few understand enough to use them properly? Is practical information about the procedures readily available?

Speed

Any proceedings on individual cases or investigations of patterns of conduct need to be resolved while the decisions can still make a difference. Most international procedures are appallingly slow. However, even findings that are too late for particular victims can be important in showing what behaviour is acceptable or not for the future. Victims need urgent responses or interim measures within days or weeks; more considered quasi-judicial proceedings within months; and consistent political oversight of corporate conduct over a period of years.

Mandate/jurisdiction

Is the body able to examine directly the conduct of companies or only do so indirectly by examining the responsibility of a state to regulate corporate conduct? Can the body look at corporate actions both at home and overseas (that is, is there extra-territorial reach)? If proceedings are judicial or quasi-

though the procedures do not have administrative fees or orders for costs as in domestic court procedures. Usually only NGOs or other funded organisations, possibly aided by lawyers working for a reduced or no fee, are able to bear the costs.

It is possible for experts or NGOs to submit *amicus* briefs in the regional human rights courts. NGOs will sometimes be asked to provide expert advice to bodies in NAFTA and the OECD. Unsolicited submissions will often be considered informally. Indeed, both the ILO and UN treaty bodies rely heavily on NGO submissions when they scrutinise compliance by states.

Most of the mechanisms which receive complaints have a narrow mandate. They can scrutinise how a state or corporation has acted only in relation to

judicial, do strict legal rules block scrutiny? For example, if domestic remedies have to be exhausted before a victim can approach an international body, is this rule applied flexibly so that a domestic procedure will not need to be attempted if it is patently ineffective or inordinately long? Is the body able to enquire into implementation of only a limited range of human rights-related standards such as workers' rights or environmental rights, or does it have a much wider human rights brief?

Independence/expertise

To hold corporations accountable internationally both political bodies comprised of states and more independent tribunals exercising quasi-judicial functions will need to take action, at different moments. If a tribunal is investigating facts and applying the law, is it competent, with the right expertise? Does it have enough independence from political influences to make honest decisions?

Remedies

If dealing with individual cases, can the body grant remedies such as compensation or ordering certain actions to stop? Are decisions backed-up by the force of sanctions? Is publicity the only way of enforcing decisions and, if so, is the body able publicly to identify businesses that have breached international standards? What impact do the body's scrutiny and findings have on the longer term conduct of companies and states and on domestic laws? Do the decisions set useful precedents for the future?

Legitimacy/transparency

Is the process and the outcome public? Are the process and decisions respected as authoritative by victims, corporations and states? Is sufficient information available and disseminated about the organisation and how its processes work?

a few rights: labour rights in the ILO;[320] labour and environmental regulations in NAFTA; and indigenous, environmental and gender standards in the World Bank (to the extent that they are incorporated into Bank policies). The regional human rights courts and some of the UN treaty bodies are able in theory to apply a much broader range of rights, most of which could be applied to corporations. The European Court of Human Rights has relied principally on the right to privacy when examining whether a state has properly controlled a private enterprise, though it has also based decisions on violations of the right to life and the right not to be ill-treated.

Some bodies, especially the interpretative procedures of the OECD and ILO, suffer from lack of transparency. This damages their legitimacy and authority. Many of the mechanisms are also cumbersome and slow, so that decisions are made too late to be of practical use. This is often the case, for example, in the UN treaty bodies that are trying to cope with a backlog of individual complaints, partly because they are grossly under-resourced.

The weaknesses of existing international mechanisms are easy to point out. However, it is also clear that there are enormous, untried opportunities for coaxing, encouraging and extending these mechanisms to improve scrutiny of the conduct of businesses, address violations of international human rights norms, and provide remedies, more effectively than at present.

320 Although the ILO explicitly recognises that respect for labour rights is only possible if a wide range of other rights, such as civil and political rights, are also respected.

VII. COMPLICITY – ASSESSING CORPORATE RESPONSIBILITY FOR VIOLATIONS COMMITTED BY POLITICAL AUTHORITIES

Previous chapters looked at the degree to which direct and indirect means exist to make companies legally accountable in relation to human rights. The analysis distinguished between legal duties that fall on states to regulate corporate conduct, and duties that might fall directly on companies under international law. Such a distinction could create the impression that it is possible to decide when it is appropriate to call on the state to act, and when to approach a company directly. In practice, such decisions are not clear-cut. In many cases, the company and the state share responsibility for a pattern of abuse, and both should be held legally responsible (though perhaps in varying degrees).

This chapter looks at how close a company needs to be to any human rights violation for it to be considered responsible in some way. A company might be responsible because it has itself directly committed the abuse, in which case it would be considered the principal actor or perpetrator. Alternatively, the company might be responsible for participating in or assisting abuses committed by others, especially government authorities and armed groups, in which case it could be said to be complicit in the abuses. This chapter will consider primarily the latter situation.

Whether a company is culpable as a principal actor or accomplice might depend on such factors as the company's knowledge of the violations, its intentions, whether its actions helped to cause the violation, and the relationship between the company and the victims or perpetrators. As yet international legal rules have not been agreed that determine when a company is complicit in human rights violations committed by others. Different branches of law – public international law, domestic criminal law, tort law, contract law, consumer law or company law – apply different tests. Further, complicity includes notions of political or moral responsibility. Even where legal complicity cannot be proved, public opinion may attach blame.

This chapter will focus in particular on different circumstances in which companies are often said to be "complicit" in violations committed by government authorities. Companies have often been most criticised in such situations. It considers how legal rules of culpability might deal with such accusations of complicity. In most cases the legal principles discussed have not so far been applied in assessing the complicity of companies for human rights abuses. It draws in particular on the two most relevant areas of law – tort and (international) criminal law. Whereas principles of international criminal law are established, an international law of torts does not exist

(except in relation to wrongs committed by one state against another). On this, therefore, we draw on tort law at the national level, principally in common law countries.

The various legal tests, however, do not adequately deal with the many complex situations in which companies find themselves today. The analysis necessarily goes beyond law, to indicate where people might consider companies complicit under concepts of social responsibility, public policy or morality, and might expect the law to develop accordingly. There is growing recognition that companies will have human rights responsibilities within their "sphere of influence", and the chapter ends by exploring further the meaning of this phrase and how it could guide an understanding of corporate responsibility for human rights violations committed by others.

Introducing tort & criminal law principles

This section will introduce basic concepts in tort law and criminal law that help to determine whether a company is responsible as a principal or secondary actor for acts that also amount to human rights abuses.

Torts or personal wrongs

A tort is a wrongful act that causes harm to a person. The victim can sue those responsible for the tort in a civil action (i.e. not a criminal case) and claim damages or other remedies. Tort law protects some of the same rights protected by human rights law, such as aspects of physical integrity, and can enable victims to obtain a tangible remedy in national courts for some human rights abuses, though it has its limitations.[321]

A person (or company[322]) directly commits a tort if she inflicts the harm intentionally or negligently. A person only has a duty not to act negligently or

321 Tort law protects against a rather patchwork range of injuries, to a person's body and security (e.g. assault and battery, false imprisonment, and [in the USA] invasion of privacy), her land (e.g. trespass, nuisance) or other chattels (e.g. conversion), economic interests and reputation (e.g. defamation). Tort law is particularly useful in holding private business legally accountable because it is concerned with the wrongful conduct of anyone, whether a government official or *private* individual. In contrast, as we have seen, human rights law was originally concerned principally with the conduct of *public* officials and has had to be moulded to protect more clearly against abuses by private actors. The categories of tortuous injuries are also not closed and could expand to give remedies to a wider range of human rights. However, tort law also has disadvantages as a vehicle to protect human rights. On the different nature of the two systems of law and how torts can provide a remedy for human rights wrongs, see two articles, Sir Mason, Anthony. "Human Rights and the Law of Torts" and Lord Bingham of Cornhill. "Tort and Human Rights", both in Cane and Stapleton, pp. 13-24 and pp. 1-12 respectively.

322 A company is a legal construct and it can only be held liable for a tort because it is vicariously liable for the acts of its employees. See Fridman, at pp. 28-29. For the purposes of our discussion here we will not make a distinction between the company and the employee(s) committing the wrongful (tortuous) act.

carelessly towards people to whom she owes a "duty of care". Unless other public policy considerations apply, she will have a duty to take reasonable steps to avoid harmful acts or omissions "if the relation between the parties is of sufficient proximity that, in the reasonable contemplation of the defendant, carelessness on his part is likely to cause damage to the plaintiff."[323] This proximity could be 'physical' proximity or 'causal' proximity. A company has a duty of care towards its employees and others – including in the local community – who are close to it, as well as towards consumers of its products or services, even though they may not be physically close.

Tort law deals with "complicity" by describing some very limited situations in which an individual could be responsible for a tort committed by someone else, usually because of the special relationship between the individual and either the victim or the person committing the tort. This might be applied to a company in three circumstances. First, if a company has entered into a "joint enterprise" with government authorities, it could be responsible for all the torts committed by its 'partner' in carrying out this joint plan.[324]

Secondly, common law sometimes imposes a duty on people to prevent others from being injured, or to control others who might cause injury, if the company has a special relationship with the injured person or the person committing the tort.[325]

Thirdly, in exceptional circumstances a business might be responsible for torts committed by an independent contractor.[326] Some duties of care – in particular those relating to safety – are so important that they cannot be delegated to another. In some situations companies will contract with government authorities to provide services (for example to clear roads into a mining area or to provide security for company operations). The government agencies involved can be seen as independent contractors, and the company may have a duty to take reasonable steps to ensure those agencies do not injure people to whom it also owes a duty.

323 Fleming (1985), p. 36.

324 They would be considered "joint tortfeasors".

325 This duty of positive action to protect or control others is an exception to the usual rule of common law that there is no duty to rescue a person in danger or to otherwise interfere with the activities of strangers. See Giliker and Beckwith, pp. 37-38.

326 A business is vicariously liable for torts committed by employees. It is not usually responsible for torts committed by independent contractors, because the business does not have sufficient detailed control over the way in which the work is carried out.. The distinction between an employee and independent contractor is based mainly on the degree to which a business can control the actions of the person. See generally Fleming (1985), pp. 433-438.

Criminal law

A person is guilty of a crime if she has guilty intent (*mens rea*) and has committed the guilty act (*actus reus*) required for the particular offence. (Discussed below are some of the international crimes for which anyone, including business people, could be tried as principal actors, though international tribunals are not yet able to separately prosecute companies as legal entities.)

International criminal law and every national criminal legal system make accomplices to a crime criminally responsible. Complicity is reflected in several well-established concepts in international and national criminal law, such as aiding and abetting, conspiracy, procurement, incitement, common purpose or, in French civil law, *"l'aide et l'assistance, la fourniture des moyens"*. Being an accomplice to the principal crime is itself a crime under international law in several tribunals. This was the case at the Nuremberg war crimes trials[327] (and the principles subsequently codified[328]) and it is found in the Genocide Convention,[329] the statutes of the future International Criminal Court,[330] and the two criminal tribunals for the former Yugoslavia[331] and Rwanda. Two international crimes of complicity are most relevant.

Aiding and abetting is when a person provides some active assistance to the person who commits the crime. Active assistance implies "practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime."[332] One must knowingly participate in the crime: "knowledge that these acts assist the commission of the offence."[333]

327 Especially in the scores of trials heard under Control Council Law No.10 before the occupying powers' various national military tribunals. See US and British cases cited in the *Furundžija Case and Tadič* Case judgments quoted below.

328 Principle VII of the Nuremberg Principles, drafted in 1950 by the International Law Commission (ILC), says that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity…is a crime under international law". See also the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind which deals with aiding and abetting in Article 2(3)(d).

329 Convention on the Prevention and Punishment of the Crime of Genocide. Crimes listed in Article III include "complicity in genocide" and "direct and public incitement to commit genocide".

330 A person could be prosecuted for a crime by the International Criminal Court (the ICC) if she knowingly "aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" (Article 25(3)(c), Statute of ICC) or "in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" (Article 25(3)(d)).

331 Article 7(1) the Statute of the former Yugoslavia tribunal says that "A person who planned, instigated, ordered, committed or *otherwise aided and abetted in the planning, preparation or execution of a crime*…shall be individually responsible for the crime" (emphasis added).

An accomplice may also be attached to a group of people with a "*common design*" or "common purpose" to commit criminal acts and the crime is committed by all or some of the members of this group.[334] Everyone in the group is then responsible for the crimes committed as part of this common design even if individually they only assisted – for instance, as driver to a gang intent on murder.

With regard to common design, the emphasis is on a coming together to perform a criminal plan. A person will be responsible for all the crimes a group commits even if her own contribution was slight. With regard to aiding and abetting, the emphasis is on the act itself, which must have a substantial, not insignificant effect on the crime.

Assessing Complicity

Much criticism of multinational corporations has focused on companies that are perceived to be associated with gross and systematic violations of rights in countries where they operate. Obvious examples include Shell in Nigeria, BP-Amoco in Colombia, Unocal in Myanmar, Talisman in Sudan or the business community generally in China. Typically, the charge made is that a company colludes, conspires or acquiesces in a pattern of abuses that are committed by state forces, but that would not have happened had it not been for the presence or support of the company. In most cases it is the silence of companies that brings censure rather than active assistance in the violations. Either way, the companies are said to be "complicit" in the abuses of the authorities. This section explores different meanings of such corporate complicity, how the law might deal with such situations, and discusses where the law may lag behind considerations of morality or public policy.[335] It is worth stressing again that the analysis is somewhat hypothetical. The purpose is to show how legal principles *might* be extended or are relevant.

332 *Prosecutor v. Anto Furundžija*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber Judgement, IT-95-17/1-T, 10 December 1998, at para. 249. This judgement is one of the most recent and exhaustive analyses of aiding and abetting in international criminal law.

333 *Ibid*. para. 249.

334 For a recent and exhaustive analysis of the international criminal law of common design, see *Prosecutor v. Dusko Tadič*, International Criminal Tribunal for Former Yugoslavia, Appeals Chamber Judgement, IT-94-1-A, 15 July 1999. It draws on past cases, international instruments and shows how this crime is found in many common law and civil law legal systems, including Germany, the Netherlands, France, Italy, England and Wales, Canada, USA, Australia and Zambia.

335 For a recent discussion of different meanings of complicity, see a paper by Andrew Clapham & Scott Jerbi, *On Complicity*, Geneva, March 2001, accessed at www.business-humanrights.org/Clapham-Jerbi-paper.htm on 3 December 2001, which distinguishes between direct complicity (positively assisting), indirect complicity (benefiting from human rights violations) and silent complicity (silence or inaction in the face of human rights violations).

There are four different situations in which the charge of "complicity" is made:

(i) A company actively assists, directly or indirectly, in human rights violations committed by others.

In this scenario the company's assistance helps to cause or bring about human rights violations. There is a causal link and the company knows, or should know, the consequences of its actions. A positive action or active participation by the company is involved.

Active participation may be direct, as with the German companies that actively recruited forced labour from the Nazi regime and advised the authorities on developing the forced labour system. In South Africa under the apartheid regime, some firms informed on trade union officials to the security police and called police in to disperse peacefully striking workers.

Active assistance may also be more indirect, though the distinction between direct and indirect is blurred and not of great utility. When the International Criminal Court statute was negotiated in Rome in July 1998, for example, government delegations suggested that a construction company might knowingly cover up a mass grave. Others remembered coffee companies in Rwanda that helped the 1994 genocide by storing arms and equipment used by those who carried out the genocide, and the radio station that had incited genocide.[336] Indirect assistance often involves financial or other material support to abusers. Some companies, especially mining companies, have financed security forces to protect their installations, knowing that they are likely to commit human rights violations. In the course of recent claims against banks for complicity in Nazi era abuses, the Deutsche Bank admitted that its branch in Poland knowingly financed construction of the Auschwitz crematorium. In such cases a connection can be established between the financing and the violations in that the financing provided the perpetrators with the means to carry out their abuses.

Tort law

A company that knowingly and deliberately assists a government to commit abuses could be directly liable under common law tort principles for intentionally inflicting harm (e.g. assault and battery) if a sufficient causal link can be shown between the company's act and the harm. In the absence of deliberate intention to inflict harm (or, at least in the US, substantial certainty that harm would occur), a company could nevertheless be liable for negligently inflicting harm if it owed a duty of care towards the victim. If a company gains economically from the victims and has a "right of control" over the government authorities involved (for example, through some

336 These examples are cited in Clapham in Kamminga and Zia-Zarifi.

contractual arrangement), it may be liable for failing to take reasonable steps to prevent the injury.

Criminal law

Practical assistance is the form of complicity with which criminal law is most familiar. It is not necessary to show that an aider and abetter to a crime desired the crime to be committed.[337] In most cases this might be hard to prove. What is essential is that the company knew or ought to have known that its acts would assist the crime. It need not know the precise crime that the principal actor intended to commit, but should be aware that one of a number of crimes would probably be committed.[338]

It is also not necessary for the aider and abettor to be physically present at the scene of the crime. "The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offence."[339] The act of assistance itself can be a lawful act that is made criminal because it is linked to the crime committed by another.

Whether a company official is an aider and abettor in criminal law will largely depend on whether a sufficient causal link can be established between the act of the company and the ability of the perpetrator to carry out the violation. Assistance should have a "substantial effect" on the crime. Friedrich Flick, a German steel industrialist, was convicted of crimes against humanity during the Second World War, not only for seeking out forced labour, but also for giving large sums of money to the SS and thereby knowingly participating in persecutions and other atrocities that they perpetrated.[340] Two industrialists were sentenced to death for knowingly supplying zyklon B poison gas to Auschwitz for the purpose of killing people.

Assistance must clearly facilitate or contribute to the principal act, but need not be the determining or sole cause.[341] The financing of abusive security forces by a company may well amount to such a substantial link. Was IBM

337 *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Trial judgement, ICTR-96-4-T, 2 September 1998, paras. 538-539, where the court quoted from a UK case National Coal Board v. Gamble: "an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor".

338 *Furundžija* case, para.246.

339 *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, International Criminal Tribunal for Rwanda, Trial Judgement, ICTR-96-3-T, 6 December 1999, para. 43.

340 *United States v. Friederich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10 (1949).

341 *Furundžija* case, para.231.

aiding and abetting the Nazi regime when it provided automated punch-card tabulators, knowing they would be used to identify Jews and run concentration camps?[342] The holocaust would surely still have taken place without such assistance, but the technology provided an infrastructure that facilitated or improved the regime's capacity to carry out abuses.

Conflict diamonds and taxes

Recently, diamond companies have been put under intense pressure not to buy so-called 'conflict diamonds' from armed groups in places such as Sierra Leone and Angola (discussed further in chapter 8 below). Such transactions breach UN Security Council sanctions. They are also a financial lifeline for armed groups which enables them to carry on their war and, in many documented cases, to commit gross human rights abuses. Under criminal law principles, the questions would be whether a sufficient causal link can be established between commercial transaction and atrocities, and whether the companies knew or ought to have known that their trading facilitated the commission of war crimes.

Would paying taxes to a government that systematically commits human rights abuses be sufficient? Under principles of criminal or tort law, the link between a payment of general taxes and abuses would not be sufficient, and companies would not be penalised for performing such legal obligations. However, such an otherwise legal and unobjectionable act may be perceived, in moral terms, to contribute to abuses if, for example, the regime collected a war tax that went directly into financing a well-known abusive military force or if the taxes were its principal source of revenue. We will discuss below the factors that make moral culpability more likely, such as a very close political or economic relationship with the authorities committing the violations.

(ii) Joint venture

A company may be part of a joint venture or similar formal partnership with a government, and might reasonably foresee or subsequently obtains knowledge that the government would probably commit abuses in carrying out its part of the agreement. 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. In most, but not all cases, the joint venture is a perfectly legitimate contract pursuing legal, commercial aims. The company willingly enters into such a joint venture with the likely perpetrator, even though it may do nothing actively to assist the perpetrator other than fulfil its side of the joint venture.

342 See generally Black.

Criminal law

It may be possible to show in criminal law that, by fulfilling its side of the contract, a company has actively aided and abetted a crime. Some of the instances of aiding and abetting referred to in the previous section were based on contracts similar to joint ventures. In many cases, however, it may not be possible to establish a sufficient causal link between the company's obligations under the joint venture and the crimes committed by the authorities. In such cases it may perhaps be argued that all parties to the joint venture are responsible for the crimes committed by one of them, because they have entered into a "common design." In Rwanda in relation to the genocide and in some of the post-War Nazi cases, some companies shared the same criminal intent as the government to commit particular crimes.

Even if a joint venture did not envisage that the government partner would commit crimes, the company might be involved in "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[343] Normally it must be shown that the original common design did envisage the parties would commit some sort of crime. So, if a group intends to force people to leave an area at gunpoint, and one member of the group shoots and kills people, everyone in the group could be responsible for murder if the risk of death was a predictable consequence of the common design and the accused was reckless or indifferent to that risk.[344] To make way for a commercial development, a government might order that a community be moved and in the course of doing so its forces might arbitrarily kill or arrest people. The government's abuses may have been predictable and foreseeable by the company. If the original common design did not envisage any unlawful act, it might be sufficient to show that they combined for a lawful purpose carried out by unlawful means.[345]

Tort law

A company in a joint venture might be directly liable under principles of tort law. If it actively assisted a government to carry out abuses it might be liable

343 *Tadič* case, Appeals Chamber, at para.204.

344 The accused must be more than negligent or careless about whether the crimes could occur. "What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk". *Tadič* case, Appeals Chamber, at para. 220.

345 Comments of Judge Advocate in a British post-War trial, *Trial of Franz Schonfeld & others*, British Military Court, Essen, 11-26 June 1946, UNWCC, Vol. XI, p. 68, quoted in *Tadič* case, Appeals Chamber Judgement, para. 198.

for intentionally inflicting harm (direct tort liability). If it owed a duty of care to victims it might be negligent for example in failing properly to select, train or control security forces who carried out abuses.

Alternatively, a company might be responsible for harms committed by a government because they entered into a "joint enterprise". It would be necessary to show an agreement between the parties to carry out a common purpose or common design.[346] The degree of participation of the company required by English and Australian courts has been described as very similar to the criminal law concept of conspiracy or aiding and abetting.[347] This means that, when it entered a commercial agreement with the government, the company knew that it would be substantially assisting or encouraging the government to commit acts which in law amounted to a tort. Significantly, the participants need not realise that they are committing a tort.[348] US law appears to add another, more stringent, test of joint enterprise, requiring that the joint enterprise gives the business a "right of control" or influence over the actions of the authorities.[349]

In situations where a company sub-contracts tasks to government agencies (such as clearing land, moving a community, or building infrastructure), it might be possible to argue that the company is vicariously liable for the abusive way in which these tasks were carried out by the government.

Burma and UNOCAL

In *Doe v. Unocal*, a group of Burmese citizens has sued the Unocal oil company in the USA for complicity in serious abuses committed by government forces in the building of the Yadana natural gas pipeline in Burma.[350] Unocal (and Total-Fina) is in a joint venture with the Burmese government in which it is constructing the pipeline and the government is clearing forest, levelling ground and providing labour, materials and security for the project. In doing this, government security forces allegedly carried out forced displacement, rape and other torture, forced labour and arbitrary

346 That is, "concerted action to a common end", *The Koursk* [1924] P 140 at 156, quoted in Fleming (1998).

347 Fleming (1998), p. 289.

348 Fleming (1998), pp. 288-89. A Canadian author has said, however, "the common design or plan must either be unlawful in itself, or at least involve the reasonable likelihood that one or more of its participants will engage in unlawful behaviour" (footnotes omitted), Klar, p. 394.

349 Restatement (Second) of Torts § 491 cmt. C (1965) which says that a joint enterprise requires: (1) an agreement, express or implied, among members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

350 See generally Bowersett.

arrest. Unocal was warned beforehand that such abuses might occur and knew about them in the course of the operation and did not withdraw from the venture.

A Federal District Court in California summarily dismissed the claim in December 2000.[351] The judge said that the joint venture alone was not enough to make Unocal responsible for the abuses of its partners even though Unocal knew about the abuses. Something more was needed, such as evidence of a deliberate conspiracy between Unocal and the military to commit the abuses, participation of Unocal in the abuses, or evidence that Unocal controlled the military or otherwise influenced them. The partnership between the government and Unocal to achieve a legal and profitable objective was not sufficient. The case is on appeal to the US Ninth Circuit Court of Appeals.

The District Court may have relied too heavily on the need to show a criminal conspiracy or common design to commit the crimes, when it is clear from our discussion above that an accused could also be responsible for aiding and abetting a crime. The Unocal decision may also be flawed from a public policy and moral perspective. The objective of building a pipeline was not unlawful, but some of the methods used by the government partner in the venture clearly were. Unocal benefited from the violations because the forced labour assisted the government in fulfilling its side of the contract. More critically, the court accepted that Unocal knew before entering into the contract that such violations were likely. The violations and damage caused were therefore a reasonably foreseeable consequence of entering into the joint venture. Even without such prior knowledge, Unocal should at least have acted decisively as soon as it found out. The violations would not have happened without the joint venture to build the pipeline. The ruling as it stands could give companies a licence to avoid responsibility for the consequences of deliberate acts that associate them with such abuses.

(iii) A company benefits from the opportunities or environment created by human rights violations, even if it does not positively assist or cause the perpetrator to commit the violations.

It has been suggested that at least three forms of government abuses of human rights may permit companies to benefit commercially:[352]

- *Governments may commit abuses to produce infrastructure designed for use by business*. For example, Unocal in Burma could be said to benefit

351 *Doe v. Unocal*, 110F. Supp. 2d 1294 (C.D. Cal. 2000), US (Federal) District Court judgment of 31 August 2000.

352 Forcese (*Putting Conscience into Commerce*, 1997), pp. 21-22.

from forced labour, which was used to build the infrastructure for the Yadana pipeline.

- *Governments may commit abuses to provide firms with resources*. The Tahitian authorities, for example, violated a local community's rights to family and privacy by authorising a luxury hotel project, with which it was in partnership, to infringe on their tribal lands and damage their ability to live from fishing.
- *Governments may accommodate commercial interests by resorting to repression to forestall labour unrest*. For example, union activity has been suppressed in a number of Export Processing Zones around the world. South African security forces during apartheid suppressed black union activity for the benefit of white businesses.

If a company has not assisted a government to commit the abuses and issues of joint enterprise or common design do not arise – that is, if the company really just passively benefits from the government's wrongdoing – it will not be responsible under existing principles of criminal or tort law.

In many situations, however, the companies concerned stand accused of encouraging or helping governments to intervene on behalf of commercial interests. In South Africa some businesses invited the police into their premises to suppress union activity. In the real world "mere" passive benefit may quickly slide into another, more active category of potential complicity, such as direct or indirect assistance. In such circumstances the criminal law and tort law principles discussed in sections (i) and (ii) above could be invoked to hold a business accountable.

Beyond law, the idea that companies are morally complicit if they passively benefit from violations is gaining ground. The UN Global Compact (under Principle 2) warns that "should a corporation *benefit* from violations by the authorities … corporate complicity would be evident" (emphasis added). As others have commented, "to accept the benefits of measures by governments or local authorities to improve the business climate which themselves constitute violations of human rights, makes a company a party to those violations."[353] Even if it has not actively helped the perpetrators, a company that voluntarily enters a business environment, or stays there, when they know or should know that they are somehow benefiting from ongoing human rights violations, has, at least, a moral duty to take reasonable steps to prevent or stop the violations.

353 Amnesty International (Dutch Section) and Pax Christi, p. 51.

(iv) A company is silent/inactive in the face of human rights violations

In this last scenario, a company is aware that human rights violations are occurring, but does not intervene with the authorities to try and prevent or stop the violations. A company might stay silent, for example, when an employee is arbitrarily arrested by the government for trying to organise a trade union, or accept systematic discrimination in employment law against particular groups on the grounds of colour, ethnicity or gender.[354] Although it will be difficult to argue legal complicity in such situations, principles of tort and criminal law might be relevant, and would become more relevant the closer the company is to the abuse. Further, inaction or silence in the face of serious abuses will raise serious questions of moral complicity.

Criminal law

Criminal law usually punishes actions, rather than omissions or inaction such as silence in the face of injustice. However, responsibility for inaction is not unknown to criminal law. Civil law countries, for example, consider there is a positive duty to come to the aid of a person in danger.[355] This is relevant where the victim is proximate or close to a company, as in the case of a worker or member of a local community.

Silence is also not always neutral in criminal law and can amount to active assistance. We have described aiding and abetting as providing "practical assistance, *encouragement or moral support*."[356] A spectator to a crime could be convicted of aiding and abetting if her status or authority is such that her presence will encourage or give moral support to the crime and thereby influence the perpetrator.[357] Some governments might be influenced by the silent endorsement of powerful companies in their country, especially

354 These examples could also be seen as falling into the category of passively benefiting from violations.

355 See e.g. Articles 233-6 of the French Penal Code which punishes anyone who wilfully refrains from assisting a person in danger, when he or she could have done so without risk to himself or herself or to third parties.

356 *Furundžija* case, para.249. Emphasis added.

357 The war crimes tribunal for the former Yugoslavia convicted Furundžija, a local military police commander, for doing nothing when fellow soldiers raped a person he was interrogating. The Appeals court said "an approving spectator who is held in such respect by the other perpetrators that his presence encourages then in their conduct, may be guilty of complicity" While this and other cases have dealt with accomplices in the military who were *hierarchically superior* to the principal actor, other international criminal cases arising from the Second World War convicted accomplices who were not superior officers but who gave silent but active support. See *Furundžija* case, para.207 and 249, and the cases cited. See also *Akayesu* case in the Rwanda tribunal, in which a commune mayor was convicted of aiding and abetting sexual violence partly because he allowed the acts to take place on the premises of the bureau communal, which showed official tolerance of the acts.

if the company had close political or economic relationships with the authorities.

Tort law

In civil law systems, the duty to rescue a person in danger may also be relevant when a company does nothing to prevent those close to it from suffering personal harm. There are important exceptions to the general rule in most common law jurisdictions that there is no general duty to rescue or to control the harmful actions of another person. As mentioned above, common law does sometimes impose a duty to prevent injury to others, or a duty to control another who might injure someone, if there is a special relationship between a person (or company) and the injured person or the person committing the tort. Employers have a special duty to protect employees from harm; hotel or restaurant owners have the same duty in relation to patrons, and hospital staff in relation to patients. It could mean that a business has a duty to protect an employee against human rights abuses by a government that amount to a tort, such as false imprisonment.

Of particular relevance, a person who stands to gain economically from a relationship with another person can be obliged to prevent injury to that person within the context of their relationship.[358] This rule is usually applied where a person has a direct commercial relationship with the injured person, such as owners of entertainment businesses who should protect their patrons. Where a company gains economic benefit – for example, from indigenous people who could be abused and forcibly displaced by a government to make way for a new hotel, or from a community who is subjected to forced labour to build a gas pipeline – a company might have an obligation to take reasonable steps to prevent such injury. English tort law also asserts that a person is obliged to control another with whom she has a special relationship, if she has a "right of control" over that person.[359] The argument that companies have a duty to prevent abuses of a local population could be particularly strong where they both gain economically from the injured persons and, through some sort of contractual agreement with a government, have a right of control over the actions of governmental authorities that cause the harm.[360]

358 Klar, pp.153-157; Fleming (1998), p. 169.

359 Fleming (1998), pp. 170-172; Klar, pp. 157-165. This principle has been applied to the duty of parents or guardians to control children, prison staff in relation to prisoners, staff in a mental hospital in relation to dangerous patients.

360 Although the common law has a conservative streak in this area, a leading tort scholar has said "the strength of these sentiments is steadily being sapped by an increasing sense of heightened social obligation and other communitarian tendencies in our midst. Accordingly the legal doctrine which they once sustained is itself under retreat." Fleming (1998), p. 163.

There is growing recognition that it is helpful to consider a company's "sphere of influence" when deciding whether it might be responsible for directly violating human rights, or complicity in such violations. The first principle of the UN's Global Compact calls on business to "support and respect the protection of international human rights within their *sphere of influence*" (emphasis added). Defining the extent of this sphere is still controversial. This concept is discussed further below. At the very least it should encompass violations committed *against* people with whom a company has some close connections, such as workers and members of a local community, as well as violations committed *by* people with whom the company has a close relationship. All the criminal law and tort law principles that could hold a company responsible for inaction turn on the proximity of the company to victims or perpetrators -- either physical proximity or closeness of relationship.

A company's inaction in relation to victims or perpetrators that are outside its "sphere of influence" would not be caught by criminal law or tort law principles. In other words, "mere presence" in a country where human rights violations are being carried out, with no other factors such as benefit or indirect assistance, is not sufficient to make a company responsible under existing legal principles, even if the company knows the violations are occurring.

Even if not covered by law, however, "mere presence" will often incur public criticism because of the moral argument that "in the face of grave injustice, silence is not neutral."[361] A company that operates in a country governed by a regime that systematically carries out gross human rights violations will be perceived to lend political and commercial support to that regime. This might be seen as the moral equivalent of the criminal complicity equation, that is, that presence + authority = endorsement. The banning of independent trade unions, demonstrations and a free media in a country will inevitably alter worker activism and the business environment of all companies in the country and raise at least the suggestion of passive benefit. In the end, it may be difficult for a company to avoid the accusation of moral complicity in the eye of a sceptical public if there is a link, no matter how slight, between the violations and the work of the company. The more serious the violations, the greater will be the pressure on companies to act.

361 Amnesty International (Dutch Section) and Pax Christi, p. 53.

A company's connection with (potential) victims and (potential) perpetrators

("Sphere of influence" & "proximity")

As already noted, there is growing recognition that, at least within its sphere of influence, a company has a moral, and sometimes a legal responsibility, not to be complicit in human rights violations committed by others. A company's sphere of influence will tend to encompass those to whom it has a certain political, contractual, economic or geographical proximity.

It has also been noted that concepts of proximity reoccur in criminal and tort law. Tort law includes the duty of care towards one's "neighbour"; the duty to rescue those with whom one has a specially close relationship; the duty to try to prevent people with whom one has a special relationship from doing harm to others; and the joint responsibility of everyone involved in a joint enterprise. Criminal law complicity also asserts that co-conspirators in a common design are liable for the crimes of the group.

The idea of "sphere of influence", does not depend for its force on legal principles alone, however. At least three moral arguments underpin its importance. First, the people closest to a company, such as its employees, are those with whom it is most likely to have a special relationship. It follows ethically that, whatever its general obligations to society, a company should take care not to harm its employees and should seek to improve their lives. Secondly, within its sphere of influence a company is most likely to know, or ought to know, the human rights consequences of its actions and omissions. If a company can predict or reasonably foresee that its actions or failures will result in human rights violations, then it is at least morally obliged to try to stop or prevent them from occurring. Thirdly, it is in relation to the people or institutions with whom it is most proximate that it will have power, authority, influence, leverage or opportunity to protect victims or intervene with abusers.

A company's sphere of influence is described below by looking at the closeness of the relationship with (potential) victims, and with authorities who may (potentially) abuse human rights.

Connection with victims: (workers, consumers, host community)

A company will tend to have its closest relationships with its workers over whom it has control and authority, and with communities living near its operations or who are otherwise dependent on the company, for example in a 'company town' run largely by the company. Where companies produce goods, they also have a connection with consumers, even though the latter are not physically proximate in many cases.

Apartheid South Africa: three levels of business responsibility

The South African Truth and Reconciliation Commission (the Commission) examined the role of businesses under the apartheid regime. Its final report shows how the different meanings of complicity can be applied to a real situation.[362]

The Commission concluded that business was central to the economy that sustained the apartheid state. However, it did not conclude that all businesses operating in South Africa supported or benefited equally from apartheid and recognized that apartheid involved costs as well as benefits for businesses. At the same time, it rejected the view that businesses were merely responsible for 'failing to speak out'. Instead, it distinguished three levels of moral responsibility of (white) businesses.

Companies that actively helped to design and implement *apartheid* policies were found to have had *"first-order involvement"*. The mining industry was especially guilty of working with the government to shape discriminatory policies such as the migrant labour system for their own advantage. Although not expressly referred to as first-order involvement, the report also emphasised the culpability of companies that informed on trade union officials and called in police to brutally disperse striking workers.

Companies which knew the state would use their products or services for repression were accused of *"second-order involvement"*. This is another form of complicity through active assistance, albeit more indirect. Banks, for example, knowingly provided covert credit cards for repressive security operations;[363] the armaments industry, at least "once the army rolled into the townships in the 1980s,"[364] knew the equipment it produced would be used to abuse human rights domestically and abroad;[365] development bank used its resources to support the homelands which were created to segregate and control blacks.[366] The Commission contrasted second-order business dealings with more indirect transactions that could not have been reasonably expected to contribute directly or subsequently to repression, such as building houses for state employees.

Finally, the Commission identified *"third-order involvement"* – ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society."[367] Although it is not entirely clear, the Commission appeared to condemn companies that prospered under apartheid because the system depressed the earnings of black South Africans and boosted their own. The Commission acknowledged that some companies financed opposition parties and resistance movements.

The closer a company is to actual or potential victims, the greater will be its control and authority over their lives, and the greater will be the impact of its action (or inaction) and understanding of their consequences. This implies a stronger duty to respect and protect the human rights of these proximate populations, and (all things being equal) more power to achieve this end. This can be seen as similar to the legal duty of care everyone has to avoid causing damage negligently to those who are so closely and directly affected by one's acts that one ought reasonably to have them in mind when acting.

The responsibility of a company towards proximate populations begins with the duty to ensure that its own actions do not violate their rights. This is a minimum duty to 'do no harm'. But the close proximity of the company to such groups may lead to a moral responsibility to do more. A project sponsored partly by the Confederation of Danish Industries has been examining the scope of business responsibility for human rights.[368] The authors of the project acknowledge that companies have *positive* responsibilities to *protect* human rights (i.e. ensure others do not violate their rights) and *fulfil* human rights (i.e. take proactive steps to improve respect for human rights), in relation to its workers; people affected by products it makes; "anyone residing on its [the company's] land;" and any population dependent on the company when it *de facto* replaces the government (such as in a plantation economy or 'company town').[369]

In relation to workers, the more onerous duty to protect suggests that companies should take reasonable steps to protect workers from violations committed by the state. For example, the duty might include a responsibility to seek the release of employees who are arbitrarily arrested for their political views, especially if this is part of a pattern of abuse. The positive duty of a

362 See South African Truth and Reconciliation Commission Report, Volume Four, Chapter Two, *Business and Labour*.

363 Addressing the issue of knowledge, the Truth Commission made it clear that even if the Bank providing the credit cards did not know the specific use that was made of them, "there was no obvious attempt on the part of the banking industry to investigate or stop the use being made of their facilities in an environment that was rife with gross human rights violations" (*ibid*., para. 31)

364 *Ibid*., para.78.

365 *ibid*., paras. 73-80, especially para.75.

366 *ibid*., para. 107.

367 *Ibid*., para. 32.

368 The Human Rights and Business Project is jointly sponsored by The Confederation of Danish Industries, The Danish Centre for Human Rights and The Danish Industrialization Fund for Developing Countries.

369 See Jungk.

company to proximate populations could go further, at least as a matter of best practice. For example, it might be expected through training and projects to tackle endemic problems such as discrimination against women.

Where companies have *de facto* replaced governments in an area, either because the government is ineffective or because it has delegated government-like responsibilities to the company, they may be providing roads, hospitals, schools, transport and energy. In such situations, a company steps into the shoes of government and has a wider range of minimum civil, cultural, economic, political and social rights to respect and protect. Other local populations living in and around a company's operations could be severely affected by the company's activities, especially indigenous or minority groups affected by extractive industry. The company may also have to cope with conflicting rights – for example, if the interests of an indigenous group are at odds with the interests of other inhabitants.

Through its products and services, companies are linked to consumers. Companies should act to ensure that their clients' and consumers' health, safety and livelihoods are not threatened by their products or by their activities. This would include taking reasonable steps to prevent a product from being intentionally or unintentionally misused. For example, a chemical company should ensure that it does not sell toxic chemicals to another company, where it is reasonably foreseeable that the second company would misuse them to abuse human rights.[370] A company that did supply such chemicals to a government could be considered complicit, in having actively assisted a government to abuse human rights, similar to the provision of credit cards to covert agents by banks in apartheid South Africa.

Connection with perpetrators: (governments, armed groups, business partners)

Companies can have direct and close connections with business partners such as suppliers and contractors, or with the company's host or home governments, or with armed groups that control territory in which they operate.

The contractual relationships of companies with their business partners gives them an opportunity to insist on respect for human rights, whether dealing with suppliers, contractors, sub-contractors, licensees, joint venture partners or others with whom the company has a working relationship.[371] Depending on their degree of control over and knowledge (or imputed knowledge) of

370 *Ibid*.

371 The OECD Guidelines say enterprises should "encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines" (para. II.10).

their business partners, companies may be seen to be complicit in abuses that the partners commit where the company concerned does not try to prevent or stop those abuses. These situations are not limited to the clothing and footwear industries, which have been particularly vulnerable to allegations that they have permitted workers to suffer sweatshop conditions in the factories of sub-contractors across the world.

There are many complex shades of relationships with host governments (or armed groups that control territory in which companies operate). A company's connection with authorities that violate rights might be weak, because the company's activities in the country are negligible or do not significantly help the authorities financially or otherwise to commit abuses. Sometimes, however, companies significantly contribute to government's ability to carry out systematic abuses.[372] Above we described different examples of complicity. Companies may offer investment that brings in vital revenue for the government concerned, enabling it to commit abuses. Companies may finance repressive security forces, or provide infrastructure or products fuel particular violations (such as roads that enable armies to penetrate isolated areas and forcibly displace populations).

At a certain point, the political, economic or personal relationships between a corporation and a state become very close, and the corporation's influence is such that it is perceived to have a greater duty to exercise its influence in favour of human rights. Silence in the face of serious violations is interpreted as active endorsement by such companies, because they have access and influence as well as knowledge of the abuses taking place.

It is not, of course, the role of a company to substitute a government's public policy decisions with its own views. The responsibility of a company in relation to human rights is much more limited and guided entirely by universal human rights standards to which the government is also bound. Some companies argue that in reality they have little influence over government authorities. However, in reality, there is little doubt that in many cases the influence of large companies is considerable.[373]

The proximity of a company to a government can colour all transactions and may give an otherwise normal and legal act an air of illegitimacy and complicity. For example, if a government that lacks democratic legitimacy or carries out systematic human rights violations relies almost entirely for its

372 Forcese (*Putting Conscience into Commerce*, 1997), pp. 21-25.

373 A Vice-President in Reebok has said: "Companies are influencing government all the time. We can do it for the better or the worse. It might be at a cocktail party or at a formal review when the Ministry of Labour asks us about our five-year plans or through some kind of coalition of multinationals in that country. Often you don't know what you can do unless you try." Quoted in Frankental and House, p. 103.

revenue on oil industry royalties, the companies concerned risk being seen as complicit in any breakdown of the rule of law or systematic abuse. Where companies are dominant in a country they will have influence and will be expected to exercise that influence for good.

Nature and scale of abuses

The nature and scale of abuses is an important factor. In simplified terms, violations in a country may range from random or isolated incidents to a pattern of widespread or systematic abuse which reflects a policy, and that may be large scale or found throughout the territory or repeated. While there is no hierarchy of rights, abuses that attack the immediate physical survival of people — such as arbitrary killings, torture, enforced disappearances, forced displacement, deliberate starvation or denial of medical care — require swifter and stronger action. Companies that operate in countries with such abuses are more likely to be seen to be complicit, especially if they have a close relationship with the government or if they benefit from the violations, or have a joint venture or other close commercial tie with the authorities.[374]

Interplay between connections

There is a sliding scale of responsibility and interplay between a company's connections to perpetrators and victims (assuming in all cases that the company knows or should know of the human rights abuses). First, a company will have a responsibility to take reasonable steps to prevent or stop abuses, if it has a direct connection with the victims (e.g. a community displaced by a mine) and knew or should have known about the abuses. This responsibility stands alone, even if there is no connection with the authorities.

Secondly, if there is no connection between the company and the victims, the company may nevertheless be seen to be complicit with human rights abuses if its close links with government confer some authority, power, influence, leverage or opportunity to intervene to prevent those abuses. In relation to both victims and authorities, the company's responsibility to act will be stronger if the violations in the country are gross and systematic.[375]

Thirdly, a company has the highest degree of responsibility if both connections are strong: if it has proximity to the victims as well as a close political and economic relationship with the authority violating their rights.

374 In its resolution 1379 (20 November 2001), the UN Security Council called on all states to consider taking measures " … to discourage corporate actors, within their jurisdiction, from maintaining commercial relations with parties in armed conflict that are on the Council's agenda when those parties are violating applicable international law on the protection of children in armed conflict."

375 Frey, ", at p. 187.

Shell International was severely criticised when it initially refused to intervene to prevent the execution of Nigerian author Ken Saro-Wiwa and other Ogoni activists after clearly unfair trials for alleged murder.[376] The condemned activists represented MOSOP, an advocacy group working on behalf of the Ogoni people, who live in the Niger delta and were directly affected by Shell's oil operations there. MOSOP had criticised Shell's environmental record in the area. The issue fell within Shell's sphere of influence both because a local community was affected and because the company had close links with the Nigerian government, which depended on the oil industry for a large proportion of its revenues.

As a company's responsibility increases, so will the scope of its duties. Starting with negative obligations (to do no harm) a company will acquire positive duties to intervene to prevent or stop human rights violations and help create conditions in which violations will no longer occur. That positive responsibility is strongest in relation to victims with whom the company has a direct connection: workers and their families, business partners, consumers and local communities on whose land an operation is located or where the company exercises *de facto* government functions. It is strong where companies have proximity both to victims and to authority.

Most companies would accept a high degree of responsibility towards their workers and even their local community. It is still controversial whether a company has any responsibility in relation to broader society, because it has influence by virtue of its relationship with the authorities. We have tried to set out a framework for analysing and understanding possible degrees of complicity. In the creation of a future legal regime it will be necessary to develop a coherent, fair and consistent set of principles of culpability, grounded firmly in law, public policy and morality.

376 Saro-Wiwa's family and others, assisted by EarthRights International are suing Shell in the USA for alleged complicity in these and other abuses.

VIII. MOVING TOWARDS NEW INTERNATIONAL STANDARDS

Previous chapters described the extent to which existing international law places direct and indirect legal obligations on companies to respect human rights and provides means for enforcing these obligations at international level. The analysis shows that there is a clear basis in existing international law for extending to companies international legal obligations in relation to human rights. Although rules for direct legal accountability are not yet firmly established, international law is not static but constantly evolving, and a movement towards direct legal accountability is underway. Chapter 2 argued that governments and companies should give greater attention to legal standards precisely for this reason. This chapter briefly describes several international standard-setting initiatives that are evidence of this trend.

Standard-setting gathers momentum

The notion that the private sector should be subject to international legal obligations – including in relation to human rights – is not new. In the past, there has been a tension between international rules designed to protect foreign investors and the right of states in their "national interest" to control the establishment and operations of foreign companies.[377] In 1974 the 'Group of 77' (a group of developing states), with the support of the socialist bloc, launched the New International Economic Order and promoted the right to economic self-determination. Out of this emerged proposals to regulate multinational companies. The movement for a New International Economic Order drew its strength from the assertion by newly independent and capital importing states of their sovereign right to limit the power of foreign economic interests. At the same time, a consistent theme was the need for standards to regulate multinational companies. Although not referred to in the same terms, the substance of this debate is reflected today in discussion about social responsibility, environment, labour and human rights. The UN General Assembly adopted codes dealing with specific issues such as consumer protection (1985),[378] the FAO adopted a code of conduct on the distribution and use of pesticides (1990),[379] and the WHO adopted a code regulating the sale and marketing of breast-milk substitutes (1981 – discussed below).[380] We looked in detail earlier at the ILO Tripartite

377 Muchlinksi, pp. 47-59.

378 *Guidelines for Consumer Protection*, adopted by UN General Assembly, Resolution 39/248 of 16 April 1985.

379 Accessed at www.fao.org/waicent/FaoInfo/Agricult/AGP/AGPP/Pesticid/Code/PM_Code.htm on 3 December 2001.

Declaration (1977) and the OECD Guidelines (1976) – both of which were adopted in this context.

In the same period a major effort was initiated to prepare a UN Code of Conduct for Transnational Corporations, and for many years work proceeded in the UN on a draft. The 1990 version of this Draft Code included obligations to respect human rights, and set out duties to protect consumers and the environment.[381] By 1992, however, negotiations on the Draft Code had failed, largely because the need of developing states for foreign direct investment outweighed their desire to control multinationals. Although all these various standards were aimed at multinationals, they also set out minimum standards that states were expected to incorporate into their domestic laws.

The examples described below include one initiative that dates from this earlier era of standard- setting (baby-milk), and several more recent initiatives. They include the development of binding legal rules (in treaties dealing with anti-corruption and tobacco control) as well as non-binding ones. Examples of the latter are included as evidence of a trend towards legal regulation for two reasons. First, in the cases cited, the standards, though not expressly legal, have been officially developed or endorsed by governments and, in some cases, intergovernmental organisations. Such endorsement, particularly if widespread, moves them towards the status of soft law instruments. Second, with regard to at least some of them, it is likely that the rules being developed will eventually become legally binding.

Baby milk

In the 1970s high profile NGO campaigns sought to protect and promote breast-feeding of babies and prevent the inappropriate marketing of breast-milk substitutes. Supported by UNICEF and the WHO, these campaigns led governments in the World Health Assembly (the WHA – the WHO's governing body)[382] to adopt in 1981 the International Code of Marketing of Breast-milk Substitutes.[383] The Code sets out minimum standards for the marketing, promotion, supply, labelling and use of breast-milk substitutes. Although not

380 Other specific standards at the time sought to regulate restrictive trade practices, transfer of technology, allocation of marine resources and commodity agreements. Christine Chinkin has argued that the various soft law instruments at this time sought to order international economic legal principles around concepts of "distributive justice" – see Chinkin, at p. 853.

381 Accessed at www.unol.org/c4/ga3.shtml on 3 December 2001.

382 The WHA is the legislative body of the WHO and includes government Health Ministers and health experts.

383 Adopted by Resolution WHA34.22 of 21 May 1981. World Health Organization, *International Code of Marketing of Breast-milk Substitutes*, Document WHA34/1981/REC/1, Annex 3, Geneva 1981.

in the form of a treaty, it has become a flexible, clear and authoritative focus for campaigning to change national laws and company practices. It contains far more detailed standards than could have been expected in a binding convention. Parts of the Code were weaker than had been hoped by campaigners. Subsequent resolutions of the WHA, however, have strengthened some aspects of its interpretation, and expanded and applied it to new situations.

States are called on to incorporate the Code in full into their laws and regulations, supported by UN technical assistance, and are required regularly to report to the WHO on implementation. So far 51 states have incorporated all or part of the Code into law.[384] The Code is remarkable in the very direct way it speaks to companies. Typical of its provisions is the requirement that:

> "Manufacturers and distributors should not distribute to pregnant women or mothers of infants and young children any gifts or articles or utensils which may promote the use of breast-milk substitutes or bottle-feeding." (Article 5.4)

The implementation provisions provide that:

> "Independently of any other measures taken for implementation of this Code, manufacturers and distributors of products…should regard themselves as responsible for monitoring their marketing practices according to the principles and aim of this Code, and for taking steps to ensure that their conduct at every level conforms to them." (Article 11.3)

NGOs are also given the direct responsibility of reporting violations to companies and to government authorities (Article 11.4). The fact that the Code legitimises the role of NGOs, and its clear language regarding company responsibilities, has encouraged the development of a sophisticated international network of NGOs that monitors and reports on violations of the code.[385]

Conflict diamonds

The UN Security Council has imposed sanctions since 1993 against UNITA, the rebel group fighting the Angolan government.[386] The most recent sanctions in 1998 prohibited trade in diamonds supplied by UNITA.[387]

384 International Breast Feeding Action Network, *Breaking the Rules* 2001, Geneva, May 2001.

385 *Ibid*. The report, which surveys compliance in 14 countries, says that all baby food companies disregard many provisions of the Code and it names offending companies.

386 *União Nacional para a Independêcia Total de Angola* – National Union for the Total Independence of Angola.

Governments and the UN only paid lip-service to these sanctions until NGOs and the media exposed the link between the trade in so-called "conflict diamonds"[388] and the financing of internal conflicts in Africa.[389] Desiring to revitalise its sanctions regimes against rebel groups, the UN Security Council appointed more aggressive sanction committees and panels of experts that named governments, individuals and companies who were breaking sanctions.[390] Moreover, the Council endorsed most of their recommendations, including calls to create a certificate of origin regime to control the diamond trade.[391] It encouraged intergovernmental meetings to develop such a system and put pressure on individual countries to tighten up their controls. The Security Council imposed new sanctions to curb the trade in conflict diamonds with the RUF in Sierra Leone[392] and ordered new and broader investigations into the plundering of natural resources by governments and companies during the conflict in the Democratic Republic of Congo.[393]

Worried that public outrage about conflict diamonds would lead to blanket consumer boycotts, causing severe damage to legitimate trade, diamond exchanges promised to crackdown on traders dealing in conflict diamonds. Meeting in Antwerp in July 2000, the World Diamond Congress (an industry association) recognised the need for an international system to certify where diamonds originated. Industry set up the Word Diamond Council (the WDC) with the sole mandate to eliminate trade in conflict diamonds.

387 The Security Council has imposed three sets of sanctions against UNITA: In September 1993 [Resolution 864(1993)] it imposed an embargo on arms and fuel to UNITA. In August and October 1997 [Resolutions 1127(1997) and 1135 (1997)] it ordered UNITA offices around the world to be closed, prohibited the travel of UNITA officials and close adult relatives and prohibited flights to and from UNITA areas. In June 1998 (Resolution 1173 (1998)] it froze UNITA assets abroad, and prohibited the purchase of Angolan diamonds not accompanied by a government certificate.

388 That is, diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments and are used to fund military action in opposition to these governments or in violation of Security Council-imposed sanctions.

389 See for example Global Witness.

390 See *Final Report of the Monitoring Mechanism on Angola Sanctions*, 21 December 2000, UN Doc: S/2000/1225 and the *Addendum*, 11 April 2001, UN Doc: S/2001/363.

391 For example, see Security Council Resolution 1295 (2000) of 18 April 2000 concerning Angola, at paras. 16, 18 and 20.

392 Security Council Resolution 1306 (2000) of 5 July 2000.

393 Security Council Presidential Statement of 2 June 2000, UN Doc: S/PRST/2000/20. For the main report of the experts that investigated, see *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, 12 April 2001, UN Doc: S/2001/357.

At the same time, South Africa initiated an intergovernmental group, known as the Kimberley Process, which brings together states involved in diamond exporting, processing or importing. Civil society and the diamond industry – mainly through the WDC – also participate. Ministerial meetings in Pretoria in September 2000 and in London in October 2000 helped to establish the basic elements of an international certification regime.[394] The UN General Assembly added to the momentum with a resolution passed by consensus in December 2000. Based largely on the text of documents coming out of the Pretoria and London meetings, it called for an international certification system and the "need for national practices to meet internationally agreed minimum standards."[395]

Those involved in the Kimberley Process met several times in 2001, and in November agreed on standards for an international certification system aimed at tracking sales and exports of diamonds and stopping trade in conflict diamonds. The system places obligations on companies as well as governments in this regard, and it is expected that it will be endorsed by the UN General Assembly. The current agreement has been criticised for lacking "strong verification and monitoring measures", though these might be included as the process continues.[396]

The international process is already filtering down to the national level. A major breakthrough came when a draft bill was introduced into the US Congress (the US imports half of the world's diamonds) to prohibit the importation into the USA of diamonds unless the exporting countries have in place a system of controls on rough diamonds.[397] The bill was passed by the US House of Representatives on 28 November 2001. It is significant that the bill was drafted after negotiations and on the basis of consensus with the WDC and NGOs. It defines the required system of control partly by reference to the UN General Assembly resolution of December 2000 and any future

394 See *Conclusions of the Ministerial Meeting, Pretoria, 21 September 2000*, reproduced as an annex to UN Doc: A/55/638; and *London Intergovernmental Meeting on Conflict Diamonds: communiqué issued on 26 October 2000*, reproduced as an annex to UN Doc: A/55/628

395 UN General Assembly Resolution 55/56 of 1 December 2000, *The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts*, UN Doc: A/RES/55/56. Quote from para.3(c).

396 See "Global Witness' Statement on Kimberley Process Agreement", accessed at http://www.diamonds.net/news/newsitem.asp?num=6004&type=all&topic=conflict, accessed 14 December 2001.

397 "Clean Diamonds Act" bill, (S1084) introduced to the US Senate 21 June 2001 and referred to the Committee on Finance. Accessed at www.diamonds.net/news/newsitem.asp?num=5439&type=all&topic=Conflict on 3 December 2001.

international agreement to which the US is a party, and endorses moves towards effective internationally agreed controls.

Security issues and the extractive industry

As with conflict diamonds, extractive industries (mining and oil) have been stung by NGO and media criticism, most of which has focussed on alleged complicity in human rights abuses committed by state and private security forces deployed to protect their operations. The US and UK governments sponsored an initiative to establish industry guidelines to cover security and human rights issues. A year-long process brought together representatives of the US and UK governments, oil and mining companies[398] and human rights and other NGOs.[399] In December 2000 they finalised the *Voluntary Principles on Security and Human Rights*. The Principles deal with a number of issues, including how to incorporate human rights concerns in risk assessment; how to ensure that public and private security forces employed by the company respect human rights; prohibitions on employing for security purposes individuals implicated in human rights abuses; and obligations to report on human rights abuses by such forces.

This process did not involve any intergovernmental organisation. The resulting standards, nevertheless, amount to more than a purely industry-generated code because the US and UK governments endorsed them. The Clinton administration saw the principles as "the emerging global standard for strengthening human rights safeguards in the energy sector around the world."[400] However, they are not accompanied by a monitoring mechanism, and require no follow-up by states (such as incorporation into national laws). They would have more weight if they were endorsed by a larger collective of states, for example within the UN.

Illicit trade in small arms

The last decade has seen intense pressure on governments and international organisations to curb the accumulation of, and illicit trade in, small arms. Small arms and light weapons predominated in 46 of the 49 major conflicts fought in the 1990s. Hundreds of thousands of civilians were killed in these wars – very often because light weapons were used in a manner that violates international human rights and humanitarian law.[401] Ineffective UN guidelines

398 Chevron, Texaco, Freeport McMoran, Conoco, Shell, BP-Amoco, Rio Tinto.

399 Human Rights Watch, Amnesty International, International Alert, Lawyers Committee for Human Rights, Fund for Peace, Council on Economic Priorities, Business for Social Responsibility, the Prince of Wales Business Leaders Forum, International Federation of Chemical, Energy, Mine and General Workers' Unions.

400 Comment by the then US Assistant Secretary for Democracy, Human Rights and Labor, Harold Koh, at a US Dept. of State briefing on 20 December 2000. See US Dept. of State Office of the Spokesperson, Doc: 2000/1330.

dating from the early 1990s[402] have been overtaken by new national, regional and international initiatives, spurred on by alarm at the human costs of such conflicts and NGO campaigning on the issue.

Most of the illegal trade in small arms involves weapons that are manufactured in accordance with national laws, but that end up in the illegal market. State control of the private sector, therefore, needs to address issues such as the licensing and auditing of manufacturers; methods for marking small arms so they can be traced; registration and licensing of brokers; and stricter controls over the export and import of small arms. International standards should also address the weakness of existing state controls on their manufacture and trade.[403] The global nature of the trade is a further reason for international action.[404]

Regional and global initiatives over the last few years have shown the gradual development of international standards and controls. Most standards have been in the form of political commitments by groups of states. They include the November 2000 guidelines of the Organisation for Security and Co-operation in Europe (OSCE) committing its 55 member states to tighter controls over arms brokers, and prohibiting the transfer of unmarked small arms; the European Union's Code of Conduct on arms exports;[405] and guidelines adopted by the Organisation of African Unity.[406]

A major UN conference on the arms trade in July 2001 (the UN illicit arms trade conference)[407] ended with political commitments by governments to

401 United Nations *Backgrounder* for the UN Conference on the Illicit Trade of Small Arms and Light Weapons in all its aspects, New York, 9-20 July 2001, accessed at www.un.org/Depts/dda/CAB/smallarms/presskit/sheet1.htm on 3 December 2001.

402 See the UN *Guidelines for international arms transfers in the context of General Assembly resolution 46/36 II of 6 December 1991*, UN Doc: A/46/42 and *Guidelines on conventional arms control/limitation and disarmament, with particular emphasis on consolidation of peace in the context of General Assembly resolution 51/45 N*, UN Doc: A/54/42.

403 United Nations, *Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 of 15 December 1999, entitled "Small Arms"*, UN Doc: A/CONF.192/2, 11 May 2001, paras. 18-30.

404 A global approach is needed because of the "global nature of the sources of small arms and light weapons and the increasingly transnational networks of brokers, dealers, financiers and transporters." *Ibid*., para.21.

405 Accessed at http://projects.sipri.se/expcon/eucode.htm on 3 December 2001.

406 Accessed at www.un.org/Depts/dda/CAB/smallarms/files/2001confpc2e.pdf on 3 December 2001.

407 UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, New York, 9-20 July 2001, see www.un.org/Depts/dda/CAB/smallarms (accessed 3 December 2001).

ensure effective laws and regulations were in place to control the production, export, import and transfer of small arms, and in particular that manufacturers of these weapons be regulated more effectively. However, these were a watered down version of original proposals, due to opposition from the USA and some other states.

Powerful interests oppose tighter and binding controls. Nevertheless, several international initiatives envisage legally binding treaties that would require states to control the private and public trade in small arms. One regional treaty, adopted by the Organization of American States (OAS) in 1997 already exists.[408] The UN Crime Commission in Vienna is working on a protocol to the proposed Convention against Transnational Organized Crime, which will cover illicit arms manufacturing and trade.[409] The July 2001 UN conference considered a proposal to draft an international treaty that would create a mechanism and common standards to mark and trace small arms and light weapons. It was recognised even before the conference that there was insufficient support from states to move ahead with this option. The conference did, however, encourage the adoption of legally binding agreements at regional level. The momentum for more binding controls over the arms trade is still growing.

European Parliament – Call for EU legislation

In 1998 the European Parliament passed a resolution calling on the European Union (EU) to draft a Code of Conduct which would place legal obligations on multinational companies based in EU states, and create a new mechanism to monitor its implementation.[410] The Parliament does not have legislative powers in this area. Its initiative, therefore, was only a recommendation to the European Commission and European Union. It is aimed at the overseas operations of multinationals whose headquarters are in EU states as well as their contractors, suppliers and licensees.

The proposed Code of Conduct would not create new standards, but bring together an ambitious range of existing international documents, starting with the Universal Declaration, and including standards on labour rights, minority and indigenous rights, protection of the environment, protection of

408 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Matters, adopted by 24th Special Session of OAS General Assembly, 13 November 1997, AG/RES.1 (XXIV-E/97).

409 Within the Vienna-based UN Commission on Crime Prevention and Criminal Justice, an *Ad hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime is working on a draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

410 European Parliament, *Resolution A4-0508/98 of 1998, Resolution on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct*.

civilians in armed conflict, corruption, and behaviour of the police.[411] To date, EU states have made no moves to draft such a document. If they did so, it would be a major breakthrough, because it would state unambiguously that these existing documents, most of which were drafted with states in mind, do create legal obligations on companies (at least those based in Europe). The resolution shows that the European Parliament itself assumes the standards apply to multinationals.

The resolution calls on the European Commission to establish a new monitoring mechanism (called a "European Monitoring Platform"), to monitor how multinationals implement the proposed Code. It would also monitor implementation of other existing international standards and corporations' own voluntary codes of practice. The monitoring mechanism could therefore be set up before any new Code is drafted. It would consist of independent experts as well as representatives from business, trade unions, and environmental and human rights NGOs.[412] It would also include representatives from the developing world. The mechanism would have at least three functions: to receive reports (voluntarily offered by multinationals or requested by the mechanism), about the multinationals' compliance with the standards; to receive complaints about multinational behaviour from local groups and trade unions – the mechanism would select some complaints and investigate them; and to publish results annually.

The power to receive complaints gives the "platform" a quasi-judicial air, but it is not clear victims would have any remedies or whether offending companies could be sanctioned. The proposed mechanism appears to be more of a forum where complaints about the behaviour of European multinationals would be discussed.

Recognising that a legally binding code and permanent mechanism are a long way off, the European Parliament also decided that in the meantime it would monitor the overseas conduct of European multinationals itself.[413] It appointed a parliamentary rapporteur to receive complaints, which are discussed at least once a year in public hearings. The first such hearing was

411 The standards that the Resolution (para.12) says the Code should include: the ILO Tripartite Declaration; OECD Guidelines; the core ILO conventions; Universal Declaration of Human Rights; the two Covenants on civil and political rights and on economic, social and cultural rights; ILO Convention No. 169 (indigenous rights), the draft UN Declaration on the Rights of Indigenous Peoples; the UN Declaration on the Elimination of all Forms of Racial Discrimination; UN Convention on Biological Diversity; the 1992 Rio Declaration; Common Article 3 of the 1949 Geneva Conventions; the UN Code of Conduct for Law Enforcement Officials; and the OECD anti-bribery convention.

412 See the Explanatory Statement to the Resolution, which has a little more detail than the resolution's very broad text.

413 The resolution calls it a "temporary European Monitoring Platform".

held in November 2000 and concentrated on the sale of breast-milk substitutes in Pakistan, involving Nestlé, and the sportswear clothing industry in Indonesia, involving Adidas. Representatives of the relevant companies, NGOs and trade unions are invited to provide evidence.[414]

The resolution also called on the European Commission to ensure that multinationals acting on behalf of, and financed by, the EU comply with existing standards or have their funding withdrawn. At the same time the Commission is urged to financially assist developing countries to comply with these international standards, as well as with groups in those countries that monitor company practices. It remains to be seen whether, and how, the Commission will seek to enforce these requirements. Some funding has been committed to support research into the resolution's proposals for a new legal and monitoring framework.[415] The European Commissioner for Employment and Social Affairs has also included this issue in her portfolio.[416]

Proposed Framework Convention on Tobacco Control

Member states of the WHO are now negotiating the first international treaty on tobacco control. Health concerns provide the rationale for efforts to deter the use and spread of tobacco, and the WHO has noted that action in this area will promote and protect the right to health. The Framework Convention on Tobacco Control and its protocols aim to circumscribe the global spread of tobacco.[417] When in force, they will directly affect the tobacco industry since states parties will be obliged to control tobacco, including its advertising and promotion, and will possibly be required to regulate prices, tax-free products, sponsorship, internet advertising and package design and labelling. The WHO says it has proposed a treaty because 16 non-binding resolutions by the WHA over 25 years have been ineffective. Interestingly, the WHO has also argued that legal standards are needed because voluntary codes and self-regulation by the tobacco industry have been ineffective.[418]

414 Howitt, R. "Update on progress towards a European Code of Conduct for European enterprises operating in developing countries", 15 November 2000, accessed at www.cleanclothes.org/codes/howitt9.htm on 3 December 2001.

415 *Ibid*.

416 See http://europa.eu.int/comm/dgs/employment_social (accessed on 3 December 2001).

417 See documents on the WHO Tobacco Free Initiative website http://tobacco.who.int/en/fete/index.html (accessed on 3 December 2001).

418 See, for example, World Health Organisation Press Release WHO/47 of 1 November 2001, accessed at www.who.int. A WHO official is quoted: "We know what works and what doesn't. Voluntary codes have proved to be a failure. A World Bank-WHO study, on the other hand, found that interventions like comprehensive advertisement bans and price increases have a measurable and sustained impact on decreased tobacco use."

Anti-corruption treaties

Several high-profile initiatives have tackled corruption in recent years. Relatively new international treaties adopted by the Organization of American States[419], the OECD[420], and the Council of Europe,[421] require states to criminalise bribery of and by individuals and legal persons, including companies.[422] In this area national regulation came first. The US Foreign Corrupt Practices Act was passed in 1977. Pressure from US corporations that felt disadvantaged in comparison to non-US businesses, together with a growing awareness of the corrosive effects of corruption on a country's economy and society, led to pressure for such regulation. Transparency International, an NGO that campaigns on corruption issues, has stressed that widespread corruption undermines democracy and support for the rule of law and is closely linked to abuses of human rights.

European states, in particular, have started to harmonise their criminal and civil legal systems in order to address corrupt practices committed abroad. This demonstrates that states will accept the extra-territorial reach of national law to protect an ethical principle. The European treaties are extremely broad in scope, and cover bribery of and by domestic, foreign, and international civil servants and politicians, as well as private actors. Both active and passive bribery (allowing bribes to be paid) are prohibited, as well as influence-peddling and money-laundering. A wide range of sanctions include criminal penalties against individual and legal persons, confiscation of the proceeds of corruption, a ban on hiring private professionals involved in corruption, expulsion and banning from future public office of public officials involved in corruption, and, remarkably, the stripping of parliamentary immunity from legislators convicted of corruption. They also allow investigators to suspend bank secrecy laws when they are gathering information in relation to corruption, and establish transnational teams of

419 OAS, Inter-American Convention against Corruption, adopted 29 March 1996, entered into force in March 1997.

420 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted 21 November 1997, entered into force 15 February 1999.

421 Criminal Law Convention on Bribery, adopted 27 January 1999, not yet in force.

422 Inter-American Convention against Corruption, Art. VIII: "…each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and **businesses domiciled there**, to a government official of another State…" (emphasis added); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 2: "Each Party shall take such measures… to establish the liability of **legal persons** for the bribery of a foreign public official" (emphasis added). The official commentary to the Convention says that states whose legal system does not already apply criminal responsibility to legal persons are required to change their law.

investigators to deal with the global nature of corruption.[423] These are useful models for powers that would be needed in any future agreement to pursue corporations in criminal and civil proceedings for violations of human rights abroad.

UN Sub-Commission

Draft Fundamental human rights principles for business enterprises

Most of the above examples have dealt with a single issue or a single sector of industry. Within the United Nations a process is underway to develop a comprehensive declaration setting out the responsibilities of companies in relation to human rights. The Draft Fundamental Human Rights Principles for Business Enterprises have been prepared under the authority of the UN Sub-Commission on Promotion and Protection of Human Rights. The Sub-Commission, a subsidiary body of the Commission on Human Rights, is composed of 26 independent experts and in its long history has developed and proposed numerous human rights standards, a number of which have been endorsed by the Commission and the UN General Assembly.

The Draft is wide-ranging, dealing with general obligations to respect human rights; specific duties in areas such as workers' rights, the right to health, food and other economic, social and cultural rights; civil and political rights such as freedom of expression; as well as the application of human rights standards to newer issues such as corruption, consumer protection and environmental protection.[424] These quite detailed and comprehensive principles are likely to be officially endorsed by the Sub-Commission in the near future. After that, they may be considered and endorsed by the governments who make up the UN Commission on Human Rights. The Preamble to the current draft states that although

> "… governments have the primary responsibility to promote and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing … human rights" [and]

423 The European Union adopted a Convention on Mutual Legal Assistance on 29 May, 2000 to facilitate this type of co-operation.

424 Draft for Discussion, Draft Fundamental Human Rights Principles for Business Enterprises, Addendum 1, UN Doc. E/CN.4/Sub.2/2002/X/Add.1, E/Cn.4/Sub.2/2002/WG.2/WP.1/Add.1–this version can be found at http://www1.umn.edu/humanrts/principles11-18-2001.htm, accessed 4 December 2001. Se also, for background, Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, *Draft Universal Human Rights Guidelines for Companies*, 21 May 2001, with Addendum 1 that contains the previous draft. UN Doc: E/CN.4/Sub.2/2001/WG.2/WP.1 (Introduction), and UN Doc: E/CN.4/Sub.2/2001/WG.2/WP.1/Add.1 (Addendum 1).

> "transnational corporations and other business enterprises, their officers, and their workers are further obligated directly or indirectly to respect international human rights and other international legal standards"

In its first article, the Draft states

> "… transnational corporations and other business enterprises also have the obligation to respect, ensure respect for, prevent abuses of, and promote international human rights within their respective spheres of activity and influence."

The Draft Principles aim both to supplement existing international law, and help to clarify the scope of legal obligations on companies. The drafting process has included consultation with NGOs, trade union organisations, employer federations, some governments and companies and intergovernmental organisations such as the ILO.[425]

Future prospects

Human rights standard-setting in relation to companies is well underway. Indirect obligations are being strengthened through new or proposed treaties that touch on human rights issues. Governments are negotiating and endorsing other standards that speak directly to companies. Intergovernmental organisations are drafting or considering standards that aim to place obligations on companies in relation to human rights. For many people interested in the topic, and for a number of those who commented on this report, a key issue is to identify the most reliable means for ensuring that this development proceeds in a manner that is likely to result in greater human rights protection. Should we focus on strengthening the obligations on states to regulate the conduct of private actors like companies? Should we prioritise efforts to establish clear, direct legal obligations on companies? If the latter, do we rely on the progressive application by national courts of international law (i.e. applying human rights standards to companies)? Should efforts focus on single-issue soft law declarations (such as those dealing with conflict diamonds) or should we concentrate instead on achieving some form of general international declaration such as the Sub-Commission principles? Are new enforcement procedures needed or should existing procedures be strengthened?

It is too early to reach firm conclusions on these questions. However, a few observations can be made. First, it is unlikely that states will (any time soon)

425 See the report of a seminar which brought together these groups, *Report of the Seminar to Discuss UN Human Rights Guidelines for Companies, Geneva 29-31 March 2001*, Addendum 3 UN Doc: E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3 (Addendum to UN Doc: E/CN.4/Sub.2/2001/WG.2/WP.1).

negotiate a new international treaty that defines companies' obligations to respect human rights. Even if the political will was present to begin this process, recent experience on developing new human rights treaties in the UN system suggests that such a document would require years of negotiations.[426] A new treaty would, of course, have the distinct advantage of clarifying that companies do have international legal obligations in relation to human rights. On the other hand, it would depend for its effectiveness on the number of states ratifying it and on whatever enforcement procedures it contained. With regard to the latter, it is worth noting that existing UN human rights enforcement procedures are poorly-resourced and often ineffective.

Soft-law standards have advantages. Often easier to negotiate, they can be relatively effective when accompanied by active civil society campaigning, as in the case of breast-milk substitutes and conflict diamonds. This is particularly true when standards are sponsored by a major global intergovernmental organisation such as the UN, and the industry under scrutiny is aware of the commercial risks of ignoring public criticisms. Soft law standards can also be a direct inspiration for national legislation and action.

The single issue (or single sector) approach is often easier, and the specific focus such tailored standards provide may partly account for their relative success. On the other hand, this piecemeal approach carries the risk that certain debates have to be re-played as each standard is negotiated. This may lead to contradictory outcomes and further confusion. It is interesting to note in this regard that the process of developing international human rights standards for states has proceeded from the general to the particular. Within the UN and regional organisations, states have tended first to agree on broad, comprehensive declarations and treaties (for example, the Universal Declaration of Human Rights), which have subsequently inspired other more specific standards (for example, the Convention against Torture). It seems reasonable to think that, in a similar way, a comprehensive standard for companies would give greater coherence to single-issue approaches, and anchor these in a more solid legal foundation. This suggests that the principles under consideration in the Sub-Commission should be supported.

The question of the appropriate forum should also be considered. Organisations like the OECD and the European Union do not include developing countries. To gain real legitimacy – and therefore effectiveness – new rules in relation to human rights should be developed through processes that ensure the participation of all interested governments and civil society groups. Where the rules affect companies, they too should be able to participate in their preparation. The United Nations, despite all its

426 See Howen.

weaknesses, is the best placed to develop standards regarding the human rights responsibilities of private enterprise. States from the south and north are able to express their views in this global organisation. The UN is the guardian of international human rights standards and has much experience setting standards in this area. UN procedures are relatively transparent compared to many other intergovernmental organisations, and civil society has a recognised role in contributing to the drafting of human rights documents. In these terms, too, the Sub-Commission document recommends itself.

Although there are advantages to soft law standards, a new international treaty would be the surest way to ensure a clear and solid foundation for legal accountability. Even if not widely ratified initially, it would affect the development of customary international law and would likely have an impact in national court proceedings. If pursued, however, questions will arise about its proper scope. In particular, corporate accountability is being sought in relation to environmental and development issues, not all of which can easily be subsumed in a human rights framework. In other words, a new treaty setting out the obligations on companies might have to address broader issues of social and environmental responsibility.

The UN Global Compact was referred to earlier in this report. Launched by the Secretary-General, this initiative invites companies voluntarily to commit themselves to a set of nine principles relating to labour rights, other human rights, and protection of the environment. The Global Compact does not include a process for monitoring whether companies fulfil their pledges, and for this reason has been criticised. On the other hand, the UN secretariat and companies involved have argued that the initiative enables companies from around the world to engage with human rights and environmental issues and, through sharing "best practice", to find effective ways to support these principles in practice. The argument of this report is that the UN should complement this voluntary initiative. It should emphasise equally the *obligation* that businesses have to respect human rights standards and that states have to enforce them. If the UN takes on such a role, some states and some companies will object. The UN should, nevertheless, make it clear that while the Global Compact is a voluntary initiative, it does not preclude the UN complementing this approach with a move towards greater legal accountability.

IX: CONCLUSIONS

The principal conclusion of this report is that there is a clear basis in international law for extending international legal obligations to companies in relation to human rights. This basis is particularly strong in regard to indirect obligations. States are under a duty to protect human rights, and increasingly this requires them to prevent private actors, including companies, from abusing rights. Though less solid, there is also some basis for extending direct legal obligations to companies and a trend towards doing so is clearly underway.

The debate on business and human rights has given too little attention to the role of law, and international human rights law in particular. Governments and companies have shown a distinct preference for voluntary approaches and self-regulation. However, it is increasingly clear that voluntary codes and non-official means of monitoring compliance should be complemented by legal rules and legal accountability. In the absence of such a framework of legal accountability, voluntary approaches will remain ineffective and contested. In a world where business is increasingly global, only international law can provide this framework. International human rights law offers an objective and coherent benchmark by which to measure whether business conduct world-wide respects fundamental human rights.

Indirect obligations – duty on states to prevent abuses by companies
Traditionally, human rights law focused on states and their agents. More and more, however, it is recognised that private actors, including companies, affect the enjoyment of human rights, and a principle of international human rights law is emerging that requires states to ensure human rights are not violated by such actors. A state must take reasonable steps to prevent or respond to abuses by private actors, and this duty includes the obligation to provide victims with effective legal remedies through courts and other bodies.

- Advocates should make use of UN and regional human rights procedures to ensure that states fulfil their duty to protect human rights against abuses by companies. More cases are needed to delineate the scope of a government's responsibility to exercise "due diligence" in preventing or stopping private abuses.
- Special Rapporteurs and Working Groups of the UN Commission on Human Rights should be encouraged to scrutinise the failings of states to prevent abuses by companies. UN treaty bodies should act on interpretative statements they have made that the private sector has responsibilities to respect the rights guaranteed in the treaties. Experts

should raise with governments instances of abuses by private enterprise when they examine a government's periodic report on implementation of the treaty. To do so effectively, they should seek credible information from NGOs detailing abuses and failures of the state to respond.

- Private citizens and NGOs already use NAFTA's rules to complain when a state has failed to comply with its own domestic environmental and labour standards. Although limited to three countries and a small range of rights, such cases are important and can establish useful precedents to apply elsewhere.
- Trade union federations are in a unique position to activate the ILO's contentious procedure under which it is possible to investigate serious violations of ILO standards by member states. Complaints like that against Myanmar are welcome and more extensive use of this mechanism might allow greater scrutiny of serious state failures to prevent abuses by companies. NGOs should work with labour representatives in the ILO to this end.

Direct obligations

International legal obligations can be imposed directly on companies. No theoretical obstacle prevents states from imposing obligations on companies to respect human rights, should they decide to do so. The international legal system is made *by* states but is no longer exclusively *for* states. International standards, most importantly the Universal Declaration of Human Rights, provide that businesses should respect and promote human rights. These are authoritative statements of public policy made by high-level gatherings of states and have considerable force as "soft law". In addition, individual company officers are already legally bound by international criminal law (and usually national law as well) not to commit international crimes such as crimes against humanity, which include the most serious human rights abuses.

At some point, and some would argue that this point has already been reached, the soft law duties of companies will be recognised as, or consciously transformed into, unambiguous and binding legal obligations on companies.

The UN Sub-Commission's Draft Fundamental Human Rights Principles for Business Enterprises provide the foundation of an authoritative and comprehensive statement of the scope of companies' obligations in relation to human rights. The principles offer the best chance to clarify, at least in a soft law instrument, that international law can impose direct obligations on companies. A comprehensive document such as this would give coherence and greater effectiveness to single issue approaches.

At present, only the OECD and ILO operate international procedures that look directly at the behaviour of companies (the procedures to interpret the OECD Guidelines and ILO Tripartite Declaration respectively). Both mechanisms have so far failed to make a significant impact. Nevertheless, NGOs, and trade unions in the case of the ILO, could complain about abuses by corporations and gradually encourage a shake-up in the way these largely dormant procedures operate. The credibility of the OECD depends on the organisation acting on its commitment that the revised OECD Guidelines procedure will be visible, accessible, transparent and accountable. With regard to both procedures:

- The identities of the companies about which a complaint has been lodged should be on the public record as a matter or routine.
- Member states of the OECD and ILO should act to ensure that decisions on complaints are enforced against companies.
- Procedures should be speeded up so that decisions are made before disputes have been resolved or have become irrelevant.

Complicity

In addition to being liable for abuses they commit, companies may be liable if they are complicit in human rights violations committed by others – especially agents of the state. Though clear international legal rules for judging such cases do not yet exist, principles of tort and criminal law from national legal systems (and international criminal law) are relevant. These principles are likely to shape the development of international legal rules to determine when companies are complicit in human rights abuses.

There are four situations in which a company might be complicit in human rights abuses committed by political authorities:

- When a company actively assists, directly or indirectly, in a violation committed by others;
- When a company is in a joint venture (or similar formal partnership) with a government, and could reasonably foresee (or subsequently obtains knowledge) that the government is likely to commit abuses in carrying out its part of the agreement;
- When a company benefits from the opportunities or environment created by human rights violations, even if it does not positively assist or cause the perpetrator to commit the violations; and
- When a company is silent/inactive in the face of human rights violations.

Legal complicity is clear in the first situation, and possible – depending on the facts and the law applied – in the second and third situations. It is unlikely

that companies could be held legally accountable in the fourth situation. Nevertheless, companies may be widely condemned in such cases, on moral grounds.

A company's "sphere of influence", determined by its proximity to both victims and perpetrators, is a crucial factor in determining both legal and moral complicity.

Enforcement – national and international action

Existing international enforcement procedures for both direct and indirect obligations are weak and, so far, have proved largely ineffective in holding companies legally accountable for human rights abuses. That said, the only chance for improvement lies in continuously testing their limits. International advocates should step up litigation before international human rights and other complaints procedures, to expand and clarify the scope of direct legal accountability of companies and the obligations of states to ensure companies respect human rights.

In the meantime, national courts and national legal regimes are crucial. The various domestic legal regimes that govern companies in individual countries should be strengthened so that they effectively reflect international human rights principles and result in companies being required domestically to respect human rights. This would include company law, environmental regulations, domestic criminal law, consumer law and remedies that victims can obtain through their own proceedings in the courts.

The strengthening of national legal regimes is a both a bottom-up and top-down approach. As individual countries increasingly apply international human rights principles in their domestic laws, this will influence the development of international standards. It will help to build a consensus around corporate responsibilities. Such a consensus would also be encouraged by model laws and moves to harmonise aspects of these legal regimes.

More litigation at the international level would complement the work of a number of lawyers who are already creatively using domestic courts to hold companies accountable for abuses in their own country and overseas. These cases in domestic jurisdictions are challenging procedural obstacles such as the doctrines of *forum non conveniens* in common law countries and the corporate veil. They are shaping the concept of corporate complicity with abuses committed by governments. They are exploring the use of traditional bases for legal claims, such as negligence, to hold companies accountable for wrongs that can also be characterised as human rights violations.

Although victims face many obstacles in seeking redress through national courts, three deserve urgent attention.

- The “corporate veil” is perhaps the most significant barrier to suing parent companies for the acts of their subsidiaries in another country. It permits companies to avoid responsibility through clever corporate structures.
- Common law countries should reform the doctrine of forum non conveniens, to ensure that victims are able to obtain redress
- The huge disparity in financial resources between many companies and litigants should be tackled to create greater equality of arms in court proceedings. This would include reforming the rules in many jurisdictions on plaintiffs providing security for costs before proceedings can begin.

World Trade Organisation

The WTO is not presently an avenue to complain about the behaviour of companies or even about the failure of states to hold companies accountable. Nevertheless, the WTO cannot be ignored. The decisions of its dispute resolution mechanism might inadvertently sanction human rights abuses by the companies that benefit from greater free trade and by states that regulate that free trade domestically. Legitimate exemptions to free trade measures in the WTO should permit states to impose some trade restrictive measures in order to protect human rights. Further, the WTO drive for “harmonisation” should take into account the international human rights obligations of member states.

Further discussion

The research undertaken for this report suggest that international law in this area has attracted rather too little attention. This is no doubt partly attributable to the complexity and ambiguity of the rules and to continuing debates among international lawyers as to their applicability. In describing existing international law, and analysing the different ways in which it can be used to ensure companies respect human rights, we hope this report clarifies an important debate that is just beginning. It may help to lay the foundation for a more informed discussion on the development of international legal rules for companies in relation to human rights.

ANNEXE I: **LIST OF COMMENTATORS**

The International Council would like to thank the following individuals for their comments on an earlier version of the present report.

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ANNEXE II: **USEFUL WEB SITES**

Throughout the report we refer to many international treaties, agreements and declarations. These various documents can be located at the following web sites:

- All United Nations standards dealing with human rights issues can be found on the web site of the Office of the UN High Commissioner for Human Rights at:
  http://www.unhchr.ch Click on "treaties". There are links to the UN's main treaty database providing updated information on which countries have ratified the treaties.
- The Sub-Commission Draft Fundamental Human Rights Principles for Business Enterprises, as well as a useful collection of other relevant binding and voluntary standards, can be found at:
  http://www1.umn.edu/humanrts/links/omig.html
- All standards adopted by the International Labour Organisation can be found at:
  http://ilolex.ilo.ch:1567/english/index.htm
- Standards adopted by regional organisations can be found on the web site of the respective organisation.
  http://www.oas.org for the Organisation of American States (OAS)
  http://www.oau-oua.org for the Organisation of African Unity (OAU)
  http://www.echr.coe.int for the Council of Europe
  http://www.osce.org for the Organisation for Security and Co-operation in Europe (OSCE)
  http://www.oecd.org for the Organisation for Economic Co-operation and Development (OECD).

There is much information available on-line that deals with the relationship between private companies and human rights. Companies, NGOs, governments and intergovernmental organisations all publish relevant material. One site that includes links to many relevant organisations and actors is found at:

http://www.business-humanrights.org

This site usefully arranges links into a number of categories, including by country, type of human right, and sector of industry. It also includes a collection of voluntary principles and codes.

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>
> The Council will stimulate co-operation and exchange across the non-governmental, governmental and intergovernmental sectors, and strive to mediate between competing perspectives. It will bring together human rights practitioners, scholars and policy-makers, along with those from related disciplines and fields whose knowledge and analysis can inform discussion of human rights policy.
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