Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses

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Foreword

This contribution to the Working Paper Series is the Master of Public Policy thesis jointly written and submitted by James P. Nussbaumer and Natalya Pak. The editors of the Working Paper series of the Hertie School of Governance rightly believed that this work represents excellent research on the crossroads of law and politics. The topic – legal responsibility of Transnational Corporations (TNCs) for the violation of human rights – is of particular significance for the quality of governance in countries where governments are unable or unwilling to defend their citizens against the power of TNCs. The authors attempt to find out whether legal remedies against human rights violations committed by TNCs are conceivable and realistically feasible. This leads them to a major issue of international legal discourse, namely the question of whether international human rights compacts have binding force on private actors. However, the authors go beyond many of the existing studies by placing this legal question into the perspective of different policy options which might be taken in order to improve human rights protection against actions of TNCs. As a result, the study provides an informative and stimulating approach to the policy dimension of human rights protection.

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BEYOND IMPUNITY:
STRENGTHENING THE LEGAL ACCOUNTABILITY OF
TRANSNATIONAL CORPORATIONS
FOR HUMAN RIGHTS ABUSES

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EXECUTIVE SUMMARY

Transnational corporations (TNCs) are an increasingly powerful governance actor on the global stage which significantly affect the enjoyment of human rights. Yet, the existing international human rights regime remains largely state-centric and fails to adequately account for business entities. Human rights abuses in the extractive, security, apparel, finance, natural resource and other sectors in developing countries—with the direct and indirect participation of TNCs—reveal that corporate impunity is an international legal problem. Although some innovative human rights litigation has taken place at the domestic level against TNCs, this paper argues that this patchwork regime of human rights accountability based on fragmented national jurisdictions is inadequate to deter abuses and provide remedies to victims.

We explore four legal approaches to address this problem: (1) incorporating human rights obligations into international investment agreements, (2) international cooperation to impose human rights obligations on TNCs through domestic laws, (3) creating an international tribunal with special jurisdiction over TNCs and (4) using international criminal law to prosecute corporate misconduct. Within each approach, we propose one or more policy interventions and discuss their benefits and drawbacks. This assessment is conducted with respect to the effectiveness, feasibility and costs of the various policy options. We conclude that these legal approaches represent complementary solutions to the corporate impunity problem but with different time horizons for their realization. Civil society actors concerned about corporate legal accountability should take these factors into account in pursuing an appropriate advocacy strategy.
I. INTRODUCTION

"We're still living at the stage of the law of the jungle... There [are] no globally agreed upon rules of what's right and what's wrong for transnational corporations, no sense of global responsibility to match the global reach of corporations."

– Peter Hansen, former Executive Director of the U.N. Center on Transnational Corporations (CTC) in 1989

In 2000 the residents of Bougainville, Papua New Guinea filed a class action lawsuit in US District Court against Rio Tinto Plc under the Alien Tort Claims Act. The claimants alleged that they were victims of numerous human rights violations as a result of Rio Tinto’s mining operations in Bougainville. In particular, they presented evidence that the group’s operations destroyed their villages, the island’s environment, harmed the health of its people and racially discriminated against villagers. Finally, they claimed that Rio Tinto incited a ten-year civil war and military blockade which resulted in innocent civilians being tortured, murdered and bombed, women raped and whole villages being burned.

Rio Tinto Plc is a mining giant, a British corporation operating more than sixty mines in forty countries worldwide. Its decision to build a copper mine in Panguna, Bougainville meant displacing villagers and destroying massive portions of rainforest in Papua New Guinea. This became possible with the support of the local government which was allegedly offered 19.1% of mine profits. The results were devastating. Wastes produced in mining gold and copper destroyed forests, polluted rivers and contaminated people living in the vicinity of mine. As a result of villagers’ resistance to the surrender of their land, a civil war began and lasted for 10 years. During this war, Rio Tinto assisted the government in sustaining a blockade by providing speedboats, helicopters and other material support. 15,000 people were killed, tortured and died from lack of medicine due to the blockade.

However, the court dismissed the case in 2000, largely relying on a letter from the US government urging dismissal. It was ruled that the proceedings involved “political questions” and “acts of state” which were not the appropriate domain of US courts. Human rights abuses were established by the court, but they were not remedied.

3 Ibid.
4 Ibid.
Certainly, the Papua New Guinean government violated the fundamental human rights of its own people. Yet Rio Tinto’s participation in these crimes was not addressed. It is clear from the facts of the case that Rio Tinto’s activities triggered and sustained these crimes. Is it possible to hold this corporation with enormous economic and political strength, backed by influential governments, legally responsible? It seems that the ‘law of the jungle’ prevails.

Bougainvilleans did not seek justice in their domestic courts, because they knew well it would be impossible given the government’s own involvement in the crimes. For this reason, they sought a remedy in an international forum, but this endeavor proved unsuccessful. Similar cases take place wherever businesses see potential for profit, which could be anywhere in the world. Yet, it seems logical that if corporations abuse human rights and commit crimes in pursuit of tremendous profits, they should be effectively held responsible for such conduct. This in turn requires both adequate domestic oversight as well as enforceable global regulation.

A. Problem Definition

“Only individuals have a sense of responsibility.”

– Friedrich Nietzsche

Corporations are able to move assets and operations worldwide due to numerous incentives and rights guaranteed by host states through international investment agreements and treaties, often signed with little concern for human rights. International agreements governing trade, investment and intellectual property have proliferated in recent years and increasingly grant corporations rights and standing to pursue claims against states. Bilateral and regional trade and investment agreements commonly provide for investment arbitration and allow “legal persons” to bring claims against states for regulatory measures “tantamount to expropriation.” At the multilateral level, agreements such as the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) require states to take a vast array of measures to protect “private rights,” including

7 Preamble, TRIPS Agreement.
providing civil judicial remedies for corporate “rights holders.” Yet, few obligations have attended this development, and business is often run at the expense of human rights.

Second, transnational corporations (TNCs) often operate in zones of weak governance where the rule of law may be absent. When abuses of human rights occur in such contexts, victims often lack access to an effective remedy in their national court systems. Effective access to a remedy is a fundamental human right recognized by several human rights treaties. Yet this right is frequently denied when access to remedies is blocked in domestic or foreign courts. Because of weak governance in many states where TNCs operate (host states), victims have increasingly sought remedies through litigation in the states where they are domiciled (home states). However, as will be shown below, jurisdiction is often denied in such cases, resulting in denials of justice and impunity for perpetrators or those complicit in human rights abuses.

Third, while corporate capital, production, sales and harm to human rights have globalized, the global reach of corporations stands in stark mismatch to largely domestic regimes of regulation and territorially defined jurisdictions. Although gross violations of human rights have spurred international calls for the development of international regulation and international enforcement of human rights against TNCs, such a framework is still absent. Moreover, unilateral regulation of corporate conduct can put domestic companies at a disadvantage or deter foreign direct investment (FDI), resulting in regulatory competition.

Finally, TNCs are complex legal entities. This complexity derives from the fact that there are a number of factors which make it difficult to define a corporation’s responsibility for human rights. A corporation may be established in one country, have headquarters in a second country, shareholders from a third country, and operate in a fourth one, which make TNCs very difficult regulatory targets. As a result, it is often difficult to define what element should be used in determining the legal human rights accountability of a TNC.

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8 Ibid, Art. 42.
9 The term “right holder” is mentioned 44 times in the TRIPs text, illustrating the emphasis that the multilateral trading regime has given to the rights of private entities.
The debate over the human rights obligations of multinational corporations (MNCs) is part of a larger discourse on the role of international law in the modern era of globalization. Traditionally public international law has been the exclusive domain of states. Under the ‘classic’ conception of international law, “only states possess international legal rights and duties; therefore no other entities are capable of possessing international legal rights and obligations.” From this perspective, the human rights obligations of MNCs are simply “a null set.” However, certain practices such as piracy and slavery have long been recognized as international crimes under customary international law, prohibitions which clearly reach to private actors. These peremptory norms or *jus cogens* have expanded in the post-World War II era to include acts such as genocide, torture, forced labor, war crimes and crimes against humanity. The proliferation of human rights treaties has altered the modern legal order not only in prioritizing the individual, but in providing standing for individual complaints.

The post-war prosecution of senior German industrialists affirmed a nexus between private enterprise and international criminal law. It illustrates that economic actors may be directly or indirectly implicated in grave violations of human rights. Three I.G. Farben executives were convicted at Nuremberg for their involvement in the construction of a slave-labor factory at Auschwitz. Friedrich Flick was found guilty of complicity in war crimes and crimes against humanity by participating in the deportation and enslavement of civilians for use of slave labor in Flick mines, and the plunder and spoliation of occupied territories. While these are extreme cases, there is also concern in the modern era about

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the role of arms merchants, private military companies, mining firms and diamond companies in armed conflicts.\textsuperscript{19}

In the 21st Century, the state-centric conception of international law seems increasingly archaic. The past few decades have witnessed a fundamental reordering of the international legal regime. The ICC’s recent indictment of Sudanese President Omar al-Bashir, the emergence of “horizontal direct effect” within the European legal order,\textsuperscript{20} the rise of ‘investor-state arbitration,’ the adherence of non-state actors to international treaties\textsuperscript{21} are all indicative of a qualitative change or transformation in the status of private actors under international law. Considering that over half of the world’s largest economies are corporations and not states,\textsuperscript{22} increasing attention to legal accountability in the private sphere seems to reflect that “old assumptions are giving way to new realities.”\textsuperscript{23}

When talking of human rights one can distinguish between natural law and positivist approaches.\textsuperscript{24} Under a natural law, or deontological approach, all humans have rights whether they are articulated in law or not; and both natural and legal persons are obligated to respect these rights.\textsuperscript{25} From a positivist approach, human rights obligations derive from treaties and customary international law. The latter approach recognizes both a narrow class of peremptory norms applicable to private actors (e.g. prohibition of slavery, torture, genocide) and a broader class where state action is implicated.\textsuperscript{26} From either perspective, one could draw the conclusion that there are a number of human rights obligations directly applicable to companies, but there is currently a lack of mechanisms for enforcing those obligations.

\textsuperscript{20} In 1976, the European Court of Justice held that the Art. 141 EC (ex Art. 119 EC) prohibition on gender discrimination “applies not only to the action of public authorities, but also extends to… contracts between individuals.” Defrenne v. Société Anonyme Belge de Navigation Aérienne (Case 43/75). Horizontal direct effect has also been applied in the fields of free movement of workers (Angonese v. Cassa di Risparmio di Bolzano SpA [2000] ECR I-4139) and freedom of establishment and services in the controversial Laval case (Laval un Partnert Ltd. v. Svenska Byggnadsarbetarföreningen et al [2007] C-341/05).
\textsuperscript{21} For example, thirty-eight armed groups in Burma, Burundi, India, Iran, Iraq, the Philippines, Somalia, Sudan, Turkey and Western Sahara have signed commitments “acknowledging the norm of a total ban on anti-personnel mines established” by the 1997 Anti-personnel Landmine Treaty (“Ottawa Treaty”). See www.genevacall.org.
\textsuperscript{23} Clapham (2008), p. 926.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
obligations. As Beth Stephens points out, “lack of international enforcement…should not be mistaken for the absence of an international norm.”27 This explains our emphasis on improving or creating new forums for enforcement. At the same time, jurisdiction to hear complaints still derives from domestic legal authority and therefore state action remains necessary to our proposals.

A second point of contention is whether it is desirable to regulate MNCs on a global scale. Some argue that it is not and for several reasons. First, this could have a negative effect on foreign direct investment (FDI) in developing countries and would hinder their economic development. Critics of regulation point to evidence that FDI has a positive impact on economic development which generally results in improved governance and higher social standards in the long run.28 Second, opponents of regulation point to several corporate social responsibility initiatives which indicate that regulation is not necessary. Examples of this line of reasoning can be found among critics of ATCA litigation29 and the UN Norms.30 Third, it is argued that imposing human rights standards extraterritorially on MNCs could be perceived as a form of neo-colonial imposition of standards on developing countries and can serve as disguised protectionism.31

Advocates of regulation respond to these objections. First, with respect to the role of FDI in development, critics note that a ‘wait-and-see’ approach is not appropriate in the field of human rights. The literature on “rights-based development” challenges the view that respecting labor and environmental regulation must be at odds with long-term development.32 Second, proponents of binding regulation argue that voluntary initiatives and self-regulation are insufficient and by no means substitute for legal protection of human rights. They also point out that such regulation can even be desirable for business by

setting common standards, decreasing risk and retaining social trust.\textsuperscript{33} Third, the premise that global regulation represents neo-colonialism is challenged, since relevant standards such as the UN Norms have been drafted in legitimate, multilateral bodies such as the UN with the participation of developing country representatives.

Much of this debate boils down to the extent of positive and negative externalities of corporate activity in developing countries.\textsuperscript{34} Globalization advocates, economists and trade groups point to the positive externalities of corporate investment such as jobs, higher wages, economic growth and technology transfer in developing countries. Critics such as environmental, labor and human rights NGOs point to negative externalities such as pollution, displacement, negative health effects and support of undemocratic governments. We do not deny that corporate investment in developing countries can produce many important benefits. At the same time, there is no reason not to reduce negative externalities by assigning a cost to human rights violations. Doing so at a global level would also help to address the collective action problems inherent in regulatory competition.

The literature on market failure tells us that one way to solve negative externalities is by assigning property rights.\textsuperscript{35} In a similar vein, one way to resolve the negative externalities mentioned above is by enforcing the human rights of communities in developing countries.\textsuperscript{36} While the human rights of these communities vis-à-vis TNCs already exist, there is ample evidence that enforcement is deficient. This paper essentially explores proposals to improve enforcement, thus imposing costs on firms for direct or indirect human rights violations. By providing increased judicial enforcement and access to remedies, states would allow victims to pursue claims privately, thus raising the cost to firms for human rights violations. However, as some violations may also implicate criminal responsibility,

\textsuperscript{34} Sethi, S. Prakash (2003), Setting Global Standards, Hoboken, NJ: John Wiley & Sons, p. 114.
\textsuperscript{36} Thomas McInterny points out that certain human rights should not be viewed in terms of negative externalities such as freedom from torture or arbitrary arrest since they “apply in an all or nothing fashion” whereas “societies allow differing degrees of externalities.” He distinguishes these from rights such as fair wages or clean air which may involve regulatory trade-offs. This distinction could lead us to a coherent theory of criminal versus civil liability in the proposals which follow. In any case, if he is correct that, “when it comes to human rights purely voluntary approaches are wholly unacceptable and may even be immoral,” then the externalities case for regulation is unnecessary. See “Reframing the Mandatory versus Voluntary Debate in Advancing Labor, Environmental and Human Rights Protection,” November 2007. Available at: http://www.idlo.org/DocNews/TMCUnido2007.pdf.
mechanisms of criminal liability and effects of such enforcement are also explored in this paper.

The literature on regulation addresses private litigation as a tool of implementing social standards. Compared to intrusive monitoring and inspection regimes—more common at the domestic level—civil claims are considered a relatively non-coercive regulatory tool based on “market deterrence” which “places a price on conduct that creates unreasonable risks of harm to other people.” The advantage of this tool is that it has a high degree of “automaticity,” meaning that it relies on existing institutions, i.e. courts. A disadvantage of private litigation is that it may involve high transaction costs and relies on the ability of victims to bring claims and bear the initial costs of doing so. With respect to criminal liability, it is disputed whether this is an appropriate concept for “legal persons,” i.e. corporate entities, at both the domestic and international level. First, criminal law relies on the notion of *mens rea* (criminal intent) which may be difficult to attribute to an organization. Second, corporations cannot be put in jail. However, with concern over organized crime and terrorism, most countries now accept criminal liability of organizations in some form. This principle has now become “part of the new international legal order designed to combat corruption and other international crimes.”

This thesis makes a contribution to the existing literature by combining both a legal and policy perspective to the corporate accountability debate. While law journals contain the occasional discussion of global corporate accountability, there is rarely attention to the policy merits of competing proposals. At the same time, many NGO policy reports focus on specific issues, sectors, countries or companies and rarely devote attention to the global

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39 Ibid.
legal architecture.\textsuperscript{45} This thesis goes beyond existing studies by analyzing global legal reforms within a policy framework. This entails attention to relative effectiveness, feasibility and costs.

\textbf{C. Methodology}

To understand the relationship between business and human rights it is necessary to define both concepts. Corporations may be ‘\textit{transnational}’ in terms of operation and ‘\textit{multinational}’ in terms of their structure;\textsuperscript{46} we use the terms interchangeably in this paper. The term “corporation” may imply a variety of different business structures, e.g. subsidiary, holding company, or joint ventures. For the purpose of this paper, we do not differentiate between the various forms that corporate institutions may take, but rather focus on businesses with a foreign presence which may have an impact on the human rights of local communities.\textsuperscript{47} Although the term “human rights” is generally understood in reference to states, all human rights can potentially be violated by non-state actors, i.e. corporations.\textsuperscript{48} By human rights we refer in this paper to those human rights recognized by customary international law and international treaties.

In Part II, we first give an overview of existing mechanisms of corporate accountability and identify gaps and inadequacies in their application. In particular, we discuss voluntary and legal mechanisms on the domestic and international level. We conclude that while voluntary codes of conduct and business human rights policies may contribute to improved corporate behavior in specific industries, their overall impact is insufficient since they address limited categories of human rights and vary significantly in scope.\textsuperscript{49} By analyzing the drawbacks of existing legal mechanisms, we identify areas which require improvement and policies which should be developed in order to ensure observance of human rights by international businesses.

In Part III, we outline four legal approaches which may be utilized on the international and domestic level. Under each legal approach, we also propose one or more specific policy


\textsuperscript{47} However, the corporate structure is important in attributing responsibility for human rights violations.


\textsuperscript{49} Ratner (2001), p. 530.
options. First, we look at international investment agreements and argue that including human rights provisions in these agreements is needed to allow states greater ‘policy space’ to regulate corporate behavior. Second, we propose incorporating human rights obligations against MNCs in states’ domestic law through international cooperation and harmonization of civil and criminal liability standards. Third, we propose creating a forum at the international level with jurisdiction to hear human rights claims against TNCs. Fourth, we propose making greater use of international criminal law as a tool of corporate accountability through the International Criminal Court (ICC).

Following each proposal we discuss the relative advantages and disadvantages of each strategy, addressing their effectiveness, feasibility and potential costs. We evaluate effectiveness with respect to two policy goals which follow from our problem definition above: (1) to deter participation in human rights violations by private companies and (2) to provide access to remedies for victims of such violations. Feasibility refers to the likelihood of realizing a given proposal in light of the respective legal and political environments. Costs may entail both the resources (time, effort, transaction costs) needed to reasonably advocate for these proposals and also the financial and material resources required to implement them. We focus particularly on legal approaches because litigation has a strong potential to deter violations and provides remedies for victims.

In arriving at these four legal approaches, we relied on articles in law reviews, social science literature, policy proposals by civil society actors, as well as primary sources such as prominent cases, international documents and treaties.

II. EXISTING MECHANISMS OF CORPORATE HUMAN RIGHTS ACCOUNTABILITY

A. VOLUNTARY MECHANISMS

1. Codes of Conduct

Since the 1970s corporate conduct and its adverse impact on communities and human rights has spurred much debate. However, at that time the response of corporations was that human rights were the primary concern of states, and not of private entities. However, nowadays, although corporations are still not subject to legal responsibility for human rights, this argument is no longer sustainable. In the absence of clear legal

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mechanisms to pressure TNCs, various market-based initiatives have emerged such as NGO campaigns and consumer initiatives which target companies’ brands.\textsuperscript{51} New realities have forced corporations to adjust their policies in a way so that they can at least indicate their adherence to internationally recognized human rights standards, and perhaps self-regulation was a natural response. In this context, corporations have introduced numerous codes of conduct,\textsuperscript{52} and declarations; or they have acceded to existing initiatives such as the UN Global Compact,\textsuperscript{53} ILO Tripartite Declaration of Principles,\textsuperscript{54} Kimberly Process Certification Scheme,\textsuperscript{55} the Extractive Industries Transparency Initiative,\textsuperscript{56} SA 8000\textsuperscript{57} and many others. Voluntary codes of conduct vary depending on the industry that companies operate in, their content, and the scope of human rights which are addressed.

These voluntary initiatives have contributed to more conscious corporate behaviour, and this effect should not be understated. However, there are a number of drawbacks to such voluntary self-regulation, and it has even spurred some innovative litigation on the domestic level.\textsuperscript{58} Most codes contain quite ambitious declarations and although they sometimes explicitly refer to internationally recognized human rights norms, there are no methods to legally enforce such commitments. The result is that various companies and industries “adopt[] stronger or weaker codes, each of which observed with varying degrees


\textsuperscript{52} This type of self-regulation is particularly popular among companies with high profile images and therefore brand-vulnerable, e.g. companies in the apparel industry such as Gap, Levi Strauss & Co., Reebok, Nike, Adidas.

\textsuperscript{53} The UN Global Compact was launched in 2000. Available at: http://www.unglobalcompact.org/AboutTheGC/index.html


\textsuperscript{55} The Kimberly Process Certification Scheme was established in 2003 following UNSC resolution 55/56 in response to concern over ‘blood diamonds.’ The certification scheme is not binding upon participants but rather sets a number of recommendations to ensure that the trade in diamonds does not contribute to war and conflicts.

\textsuperscript{56} The Extractive Industries Transparency Initiative (EITI) was launched at the World Summit on Sustainable Development in Johannesburg, South Africa in September 2002. EITI establishes principles related to the disclosure and publication of companies’ payments and governments’ revenues from oil, gas, and mining which will contribute to revenue transparency, promote accountability and reduce corruption in resource-rich countries. The EITI Principles, available at: http://eitransparency.org/eiti/principles.

\textsuperscript{57} Social Accountability Standards 8000 (SA 8000) is a set of voluntary standards developed to address labour rights in 2001. It was introduced by Social Accountability International (SAI), an international non-profit organization consisting of representatives of trade unions, human rights organizations, academia, and industry. It emphasizes public reporting, stakeholder dialogue and verification of factory conditions. Further information is available at: http://sai.citysoft.biz/index.cfm?fuseaction=Page.viewPage&pageID=473.

\textsuperscript{58} Halpern (2008), p. 141. See for example the case of Marc Kasky \textit{v. Nike, Inc.}, April 20, 1998, where Marc Kasky, a Nike critic, claimed that by violating its own code of conduct Nike was guilty of unfair competition and breaching California false advertising laws.
of seriousness.” Further, practice shows that on many occasions corporations have proven to be bad monitors of their own compliance. Another problem associated with the emergence of a bulk of voluntary codes is that such codes may be confused with the actual legal responsibilities of corporations and regarded as substitutes for such responsibility.

2. OECD Guidelines

Apart from initiatives undertaken by corporations, intergovernmental organizations have also attempted to formulate codes and recommendations for corporations with regards to human rights. In this respect, the OECD Guidelines for Multinational Enterprises stand out. The Guidelines represent an intergovernmental agreement which includes a set of recommendations to multinational corporations providing “voluntary principles and standards for responsible business conduct consistent with applicable law” in the areas of employment, environment, human rights, combating bribery and others. The Guidelines have been adopted by OECD member states and eleven non-OECD states.

With respect to human rights, the Guidelines are regarded as being complementary non-legal standards in addition to domestic ones as they state that corporations should “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments.” The Guidelines are implemented through the work of National Contact Points (NCPs) which are established by the adhering parties. The role of the NCPs is to organize promotional activities, as well as to consider complaints which may be filed by any person or entity against TNCs if the applicant believes that the corporation has violated the Guidelines. The NCP will determine if the issue merits further examination, offer conciliation or mediation between the parties and possibly give recommendations. If the TNC is found to have violated the Guidelines it is supposed to voluntarily change its conduct based on the NCP’s recommendations. If the corporation

62 Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Peru, Romania and Slovenia.
63 See the OECD Guidelines, General Policies II.2.
64 OECD, General Policies I.1.
65 Procedural Guidance, Art. I.B.
66 Procedural Guidance, para. I.A.
67 See Procedural Guidance I.C.2(d).
does not fulfil the recommendations, the NCP may further publish information on non-compliance. It is presumed that public scrutiny then will put pressure on the respective TNC.

The Guidelines clearly stand out among non-legal mechanisms promoting corporate human rights responsibility as they lay out a precise code of conduct which is universally applied by corporations from all member states. Additionally, they are applicable not only within the OECD but worldwide, as the Guidelines cover OECD enterprises operating in non-OECD member states. Finally, the Guidelines establish a complaint procedure which resembles an embryonic form of enforcement.

Yet the Guidelines have many drawbacks. The non-binding and voluntary nature of the Guidelines has been criticized as a “gentlemen’s agreement.” Indeed, according to the Guidelines, TNCs do not assume legal liability for non-compliance which makes them less effective for companies that are not significantly affected by public blame. Another drawback is that even in cases of human rights violations committed by TNCs, such complaints are considered by the NCPs, which are usually established within governmental institutions which promote international trade and investment rather than human rights. Finally, the Guidelines do not offer further recourse to victims if conciliation is not attainable through the NCP.

**B. LEGAL MECHANISMS**

1. **International Level**

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69 On August 28, 2008 the UK’s NCP issued a statement finding that the UK company Afrimex Ltd. violated the Guidelines by paying bribes to a rebel group in the Democratic Republic of the Congo (DRC) and purchasing minerals from mines in the DRC that employ child and forced labor. The complaint was brought by Global Witness. For further information see: [http://www.asil.org/insights090123.cfm](http://www.asil.org/insights090123.cfm). However, such findings are rare and are not required by the Guidelines.


71 For example, the German NCP is part of the Federal Ministry of Economics and Technology entrusted with the promotion of foreign trade and investment. The Italian NCP is within the Ministry of Economic Development, and the Korean NCP is located in the Ministry of Commerce, Industry and Energy.

72 According to a report produced by Rights and Accountability in Development (RAID) and the Centre for Research on Multinational Corporations (SOMO), NCPs generally favour business and even seem to be “designed to discourage complaints” by responding too slowly, being intransparent and interpreting the Guidelines in a restrictive manner. See “Review of National Contact Points for the OECD Guidelines for the Period of June 2003 – June 2004.” Available at: [http://www.germanwatch.org/tw/kw-nctp04.pdf](http://www.germanwatch.org/tw/kw-nctp04.pdf).

There are a handful of treaties at the international level which attempt to establish minimum standards of criminal and civil liability for company behavior. For example, the OECD Anti-Bribery Convention requires that member states criminalize the act of bribing a foreign public official and establish liability for “legal persons.” The UN Convention against Corruption requires state parties to provide civil, administrative or criminal penalties for the private sector (Art. 12), liability of legal persons (Art. 26) and recognizes the right of persons who have suffered damages from corruption to initiate legal proceedings for compensation (Art. 35). Examples of other treaties which establish liability for legal persons include the Council of Europe Convention on Cybercrime and the UN Convention against Transnational Organized Crime. There are also treaties which regulate jurisdiction and the procedural standards related to the civil liability of legal persons. For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and its Protocol provide for an international liability regime with the objective of adequate and prompt compensation for damages resulting from the transportation of hazardous waste. Similar treaties establishing liability for legal persons include the International Convention on Civil Liability for Oil Pollution Damage, and the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

These treaties have a number of limitations. First, they are narrow in scope and provide for common standards only in certain areas such as corruption, bribery and pollution. Second, they do not generally reference human rights and do not provide for liability standards related to internationally recognized human rights. At the same time, however, they point to a model which might be used for a convention on corporate liability with wider application. This is all the more true since most of these treaties provide for liability of “legal persons,” indicating an emerging international consensus on this point. Section III.B.1.b of this paper will discuss proposals for such a convention.

81 Art. 2(6), adopted 21 June 1993, not yet in force.
2. Domestic Legal Systems

A recent report on corporate legal accountability outlines applicable principles related to business liability for human rights abuse in national courts. There may be two types of legal accountability of TNCs: civil and criminal. Whereas criminal liability often only applies to individuals, i.e. company officials and management, civil liability may cover corporate entities as well as their personnel. However the type of legal accountability of TNCs will depend on the jurisdiction and applicable law in question. Thus, ‘gross human rights abuses,’ including for example crimes against humanity (i.e. torture, killings, slavery and forced disappearance), will likely constitute both a violation of international and national criminal laws. However, the same types of human rights abuse may lead to civil liability in some common law countries as violating torts law, and non-contractual obligations in civil law countries. Generally, complicity of corporations in gross human rights violations will give rise to either criminal or civil liability. The term complicity may have different implications in civil or criminal procedures, as well as in different jurisdictions. Yet, three common factors are important in determining whether a corporation is complicit in human rights violations. First, it should be established that a company’s conduct enables, exacerbates or facilitates human rights abuse (causation/contribution). Second, it must be demonstrated whether a corporation knew or should have known that its conduct would lead to or contribute to human rights violations (knowledge/foreseeability). Finally, the proximity to the principal perpetrator of human rights abuse is an important factor (proximity).

a. Criminal Liability

Crimes punishable under international criminal law are also punishable under most domestic criminal systems. According to the International Commission of Jurists (ICJ), domestic systems usually limit criminal liability of TNCs to acts that aid or abet the
commission of crimes (contribution and knowledge). For example, the District Court of the Hague found Frans van Anraat, a Dutch businessman, to have been complicit with the Saddam Hussein regime’s crime of genocide against the Kurdish population. He supplied the Iraqi government with thiodiglycol (TDG), a chemical used in the production of mustard gas which was used against Kurds in the 1980s. Frans van Anraat was found to have known about the Iraqi government’s genocidal intent and nevertheless continued supplying thiodiglycol. Therefore he was found to have enabled and significantly contributed to the commission of the crime and was subsequently sentenced to 17 years in prison.

Although gross human rights abuses are criminalized in most national systems, the requirements and threshold for establishing complicity vary from country to country. In some states, it is sufficient to establish that the aider and abetter knew that the perpetrator intended to commit a crime and that his/her actions were likely to contribute to the commission of the crime. In other jurisdictions, both perpetrator and aider/abettor should have the same intent, which makes it more difficult to establish criminal liability. It follows that because of differences among national criminal systems, TNC officials may incur lighter punishment or even evade punishment by delegating responsibility to the principal perpetrators (which may be states, private security companies or other companies in the supply chain). Additionally, in many jurisdictions individuals cannot initiate criminal proceedings on their own. So in states where TNCs conspire with governments or governmental officials in human rights abuse, the victims of such crimes may find it extremely difficult to seek redress in criminal courts, as the government will likely be reluctant to initiate criminal proceedings.

b. Civil Liability

Compared to criminal litigation, civil litigation is often seen as a more appropriate and, in some instances may be the only, means for victims to vindicate their rights against

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90 Ibid, p. 25.
91 Ibid, p. 30. Among those jurisdictions where the intent or the purpose of the aider and abettor should coincide with the intent of perpetrator are the United Kingdom, Canada, South Africa, Germany, Belgium and Japan.
corporate abuse. Indeed civil litigation implies remedies (compensation, restitution and even guarantees of non-repetition).\textsuperscript{92} In contrast to criminal procedures, victims may initiate civil litigation independent of states, and human rights may be effectively invoked. Arguably, civil litigation against TNCs has a strong deterrent effect, as corporations found responsible for human rights abuses risk incurring economic losses associated with compensation and litigation fees.

Civil claims in each domestic system have their own peculiarities and standards for admissibility. However, in most jurisdictions TNCs may be brought to civil courts if their conduct satisfies a test of \textit{intent} and \textit{negligence}.\textsuperscript{93} Thus a TNC may be subject to civil liability if it is proven that while knowing that its conduct would violate human rights, it nevertheless undertook that conduct (\textit{intent}). Alternatively, civil liability will follow if a company could foresee or ought to have known about the effects of its activities and yet conducted activities which led to human rights violations without taking precautionary measures (negligence). Finally, the causation between the conduct and harm should be established.\textsuperscript{94} Although this sounds quite straightforward in practice, in all jurisdictions, it has proven difficult to hold TNCs liable under civil procedures. It may be difficult to establish a causal link between a company’s conduct and the human rights violation in question. For example, in one case involving US military personnel, it was claimed that a bank which provided the Iraqi government with letters of credit contributed to injuries incurred by the personnel. These letters of credit were used by the Iraqi Government to purchase chemical weapons used during the Gulf War. The US District Court found that the letters of credit did not lead to the injuries.\textsuperscript{95}

In cases involving ‘business families’\textsuperscript{96} where the parent company is established in one country and its subsidiary in another (where the violation took place), victims may face considerable hurdles in establishing the parent company’s liability (as it is often desirable to seek compensation from the parent company).\textsuperscript{97} When supply chains are involved, these

\textsuperscript{93} Ibid, pp. 13-15.
\textsuperscript{94} Ibid, p. 19.
\textsuperscript{95} Ibid, p. 25.
\textsuperscript{96} Ibid, p. 43.
\textsuperscript{97} In most cases it is indeed the parent company that shapes and creates policies for its subsidiaries. See for example \textit{Rachel Lubbe & Ors v. Cape plc.}, Case No: QBENI 1999/0841/1, where the parent company was held responsible for injuries brought by its subsidiary in South Africa. Subsidiaries are often not capable of paying compensation for injuries due to limited funds.
issues become even more difficult, because the law addresses each company as having a separate legal personality.\textsuperscript{98}

Additionally, victims of human rights violations may find it meaningless to seek civil litigation against a TNC which committed crimes or human rights violations in concert with the host state government. In this case the balance of power will most certainly be skewed in favor of the TNC. Another aspect of this problem is that under civil law, claims are subject to statutes of limitation. Thus if victims apply to courts after a regime change, their claims may be barred on limitation grounds. Finally, many jurisdictions operate according to the “loser pays” principle where the losing party must pay all legal fees. This has been a barrier to justice as poor, sick or injured victims are likely to abstain from litigating against powerful TNCs which command far greater resources.

### 3. U.S. Alien Tort Claims Act (ATCA)

In contrast to other national jurisdictions, the U.S. Alien Tort Claims Act is unique in that it opens the doors of US courts to victims of human rights abuse perpetrated by TNCs regardless of the nationality of the companies or the victims. In particular, this statute grants jurisdiction to federal courts over a “civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{99} According to one theory, the statute was enacted in 1789 in response to attacks on diplomats and the lack of jurisdiction by the Continental Congress to provide redress.\textsuperscript{100} The statute remained largely dormant and was not invoked until 1980, when the Second Circuit delivered its landmark decision in *Filártiga v. Pena-Irala*.\textsuperscript{101}

This case involved a Paraguayan family who filed a complaint against a Paraguayan police officer, Américo Norberto Peña-Irala, for the torture and death of Joelito Filártiga in Paraguay. The Second Circuit found that ATCA was applicable and torture constituted a violation of international law. This was a watershed decision which spurred much debate on the scope of the law and other potential claims.\textsuperscript{102} For the first time, a US court stated

\textsuperscript{98} Ibid, p. 34.
\textsuperscript{101} *Filártiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980).
\textsuperscript{102} There have been a number of important post-Filartiga cases: *Tel Oren v. Libyan Arab Republic* 726 F.2d 774, 775 (D.C. Cir.1984), 470 U.S.1003 (1985) involved a claim against various Palestinian and Arab organizations...
that it might have jurisdiction even if neither party was from the US and that they could rely on international human rights norms. Further, in relying on modern international human rights law, the court opened the door for other courts to invoke such provisions. The subsequent claims filed under the ATCA after Filártiga were mainly brought against private persons and non-governmental officials. Later in Kadic v. Karadžić the court reestablished that “international prohibitions against genocide and certain war crimes apply to all actors, including private citizens.” This interpretation allowed for further lawsuits against corporations for violations of international human rights law.

As a result, it is not a surprise that US courts have become overloaded with foreign victims’ claims against TNCs. The uniqueness of ATCA, the general perception of amenability and receptiveness by US courts to international human rights and the culture of granting high amounts of compensation for torts have also significantly contributed to the desirability of US courts for addressing human rights abuse of TNCs. As a result, US courts have developed a high hurdle for the admissibility of such claims. Thus, as a rule, before proceeding to the merits, US courts must weigh the facts against the so-called doctrine of forum non conveniens to decide whether it has jurisdiction over a particular case. The application of forum non conveniens starts with an inquiry as to whether there is an alternative appropriate forum, which is usually the case when foreign plaintiffs apply to US courts against TNCs (which might also be non-US corporations). If a court establishes that such a forum exists, then in answering the question why it still has to assume jurisdiction, it has to consider the public and private interests of litigants. As a result of this high threshold, most cases are dismissed on the grounds of forum non conveniens.

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105 According to this doctrine, a court may dismiss the proceedings if there is another more appropriate forum for the litigation.

106 The first case establishing the threshold of public and private interest elements was Gulf Oil Corp. v. Gilbert 330 U.S. 501 (1947). Public interests are: the administrative difficulties flowing from court congestion, the local interest of having localized controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems in conflict of law, or in the application of foreign law, the unfairness of burdening citizens in an unrelated forum with jury duty.

107 Private interests to be weighed include: the relative ease of access to sources of proof; availability of compulsory process for the attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility to view the premises; and the enforceability of a judgment if one is obtained.
Apart from the doctrine of *forum non conveniens*, US courts have on many occasions invoked the *act of state doctrine* in dismissing foreign claimants’ applications. In the case of *Sarei v. Rio Tinto Plc.* mentioned above, the court dismissed the appeals largely on the grounds of the act of state doctrine, thus making it impossible for the victims to seek redress in US courts regardless of the fact that Rio Tinto was indeed involved in the crimes described earlier. A related concern is that ATCA litigation may place US courts in the role of making foreign policy, something they are not entrusted with.\(^\text{109}\)

It follows from this discussion that while the significance of ATCA should not be understated, it does not offer an adequate and predictable domain to seek redress for numerous victims of corporate abuse worldwide. While it is in principle still possible to litigate against TNCs under this statute, US courts, constrained by legitimate concerns, generally give less deference to foreign plaintiffs’ choice of forum.

This analysis of existing corporate accountability mechanisms illustrates that there are several drawbacks pertaining to each mechanism and the accountability framework as a whole. First, self-regulation introduced by TNCs, which may be an attempt to avoid external regulation,\(^\text{110}\) is not sufficient to address corporate human rights abuses. Second, while sector-specific international treaties address some elements of corporate misconduct, they do not explicitly refer to human rights, and in most cases are very narrow in scope. Third, ATCA litigation while promising also presents many hurdles to victims seeking justice. In summary, it is easy to conclude that “this patchwork of mechanisms remains incomplete and flawed” and that it “does not cohere as...a more systemic response” to corporate impunity.\(^\text{111}\)

### III. Legal Approaches

#### A. Incorporating Human Rights Obligations Into International Investment Agreements (IIAs)

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\(^\text{108}\) According to the *act of state doctrine*, US courts are precluded from examining the actions of foreign sovereigns, even if these acts violate international law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).


\(^\text{111}\) Ruggie (2008), paras. 87 and 106.
TNCs are able to move capital across the globe due to special incentives created by host governments. Such incentives include protection of property rights, stable legal security and dispute settlement structures. In this respect, international investment agreements (IIAs) have become extremely important documents enshrining these rights.

1. Overview of IIAs

IIAs are international treaties concluded between capital-exporting (investing states) and capital-importing states (host states).¹¹² In most cases, IIAs are concluded between developed and developing/least developed countries. There are three forms of IIAs:

- Bilateral investment treaties (BITs) signed between two states;
- Regional investment treaties (RITs) signed between several states comprising one region; and
- Chapters within other trade and investment agreements signed bilaterally or regionally¹¹³

These documents contain a number of standard provisions to ensure that foreign investors have international rights protecting their investments in host states. Such provisions include:

- “National treatment” and “most favored nation;”
- Fair and equitable treatment; and
- Prohibition of expropriation, or adequate compensation in the case of legitimate expropriation.

All IIAs contain special ‘dispute resolution clauses’ which allow foreign investors to initiate ‘investor-state arbitration’ for alleged violations of IIA provisions before an international arbitration tribunal.¹¹⁴ Arbitration proceedings are usually confidential,¹¹⁵ and arbitral awards are final and enforceable.¹¹⁶

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¹¹² According to UNCTAD, there are currently more than 2,500 IIAs concluded between states; most of these agreements are BITs. Available at: http://www.unctad.org/en/docs/webiteiiia20076_en.pdf.
¹¹⁴ There are several international arbitral tribunals capable of resolving such disputes. Among them are the UN Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 18 March 1965, which also introduces arbitral procedural rules and institutional framework for dispute settlement. There are also special international treaty regimes such as the Energy Charter Treaty or NAFTA capable of arranging special ad hoc tribunals.
Therefore, with the expansion of IIAs, transnational firms have assumed even greater rights and have the right to seek remedies before an international arbitral tribunal. However such an arrangement may lead to a conflict between human rights and international investor rights. Since TNCs seek to operate in places favorable to investment, less developed states are under pressure to relax regulatory standards to attract such investment, even at the expense of human rights.

2. State Duty to Protect, Corporate Responsibility to Respect

According to international human rights law, states are positively obliged to adopt measures to protect human rights. In other words, there is a state duty to introduce measures to ensure that the economic activities of TNCs on their territory do not hinder human rights. However the expansion of investor rights has been made with little regard for state duty to protect human rights. The introduction of measures to protect human rights by host states may even be challenged by TNCs before arbitral tribunals, as they might be found to violate obligations under IIAs. Thus, IIAs may constrain states in exercising their duty to protect and promote human rights; and this imbalance is particularly acute in developing countries, where such measures are most needed.

Additionally, according to the UN Sub-Commission on the Promotion and Protection of Human Rights, human rights have “centrality and primacy…in all areas of governance and development, including…investment and financial policies.” It follows from this statement that states, in shaping investment policies, should at least adhere to the primacy of human rights endeavors.

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115 According to Art. 48(5) of the ICSID Convention, arbitral awards and other submissions related to the dispute may be published only with the consent of the parties. Thus in many cases, parties to the dispute prefer confidentiality.
116 Arbitral awards are enforced by domestic courts according to the provisions of two conventions: the ICSID Convention, Art. 53-55, or the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, 10 June 1958, Art. 3.
117 Mann (2009), p. 15.
119 According to Ruggie (2008), non-OECD countries which have signed investment agreements find it more difficult to create or change social and environmental platforms in favor of human rights as they might be contested by foreign investors.
In contrast to states, corporations under international law do not have a positive obligation to actively protect human rights. However, of all internationally recognized human rights, there are few which cannot be affected or infringed by TNCs due to the wide scope of their operation. As Ruggie suggests, the responsibility of TNCs to respect human rights is twofold.\textsuperscript{121} First, corporations should conduct their business activities with \textit{due diligence}, which means they should consider what impact their operations may produce on human rights; and if their operations are capable of challenging human rights, they should abstain from such activities.\textsuperscript{122} Second, corporations should not be \textit{complicit} in human rights abuses.\textsuperscript{123}

3. \textbf{Policy Proposals}

\textit{a. Include Human Rights Clauses in IIAs and Affirm States’ Right to Regulate}

The UN High Commissioner for Human Rights has expressly stated that, in the absence of access to investment arbitral tribunals by individuals, these tribunals should consider human rights.\textsuperscript{124} There is a clear positive trend in considering human rights in international investment arbitration, as the number of investment arbitration cases where tribunals have explicitly referred to human rights norms or to the jurisprudence of international human rights courts is growing.\textsuperscript{125} This indicates that arbitral tribunals are receptive to the idea of incorporating human rights law into international investment law. However international investment and human rights remain two distinct bodies of law, and there is no obligation for these tribunals to take account of the latter.

Therefore human rights clauses should be incorporated into IIAs, and this will ensure that state parties to the IIA are not found in violation of their obligations under the IIAs while

\textsuperscript{121} Ruggie (2008), pp. 9-20.
\textsuperscript{122} Ibid, p. 17.
\textsuperscript{123} Ibid, p. 20.
\textsuperscript{125} For example, in the case \textit{Lauder v. Czech Republic} the UNCITRAL tribunal made reference to the European Court of Human Rights jurisprudence in defining expropriation (Ronald S. \textit{Lauder v. Czech Republic}, final award 3 September 2001). In \textit{Tecnocas Medioambientales S.A. v. Mexico}, the ICSID Tribunal referred to the case law of the Inter-American Court of Human Rights as well as the European Court of Human Rights, in dealing with the expropriation question (ICSID Case No. ARB (AF)/00/2, 29 May, 2003). Another arbitral award contains similar references to the same human rights courts (see \textit{International Thunderbird Gaming Corp. v. United Mexican States}, 2006 LW 247692). In the case of \textit{Aguas del Tunari S.A. v. Bolivia}, the tribunal referred to the right to water (ICSID Case No. ARB/02/2, 21 October 2005).
fulfilling their human rights duties. In fact, the International Institute for Sustainable Development has proposed two model clauses for this purpose:

a) Each party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations;

b) All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party…

The benefit of such provisions is that they would apply equally to domestic firms and TNCs operating in the host state. Additionally, they would allow tribunals to refer to international human rights instruments in the case of dispute. Thus, according to Article 42(1) of the ICSID Convention, “the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute…” Consequently, in case of persistent violations of human rights by a TNC, the host state would be able to invoke the proposed provision as justification for adopting measures compatible with human rights protection. This proposal is more likely to be implemented should developed states assume a leading role in its promotion.

States possess the sovereign right to regulate, yet under IIAs and investment arbitration jurisprudence this right may be constrained under special conditions. Incorporating human rights language into IIAs would affirm this right and make it easier for states to pursue human rights measures. Thus the state duty to protect and promote human rights could then be more easily fulfilled through the introduction of special regulations, statutes or policy directives. Such regulations might include Environmental and Human Rights Impact Assessments where investors are obliged to investigate the potential impact on communities prior to investment projects. Through domestic regulation, states might oblige corporations to produce Sustainability Reports or even require corporations to

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128 Pankerci-Compagniet v. Lithuania, Award, 11 September 2007, ICSID Case No.ARB/05/8. The tribunal emphasized that “It is each State’s undeniable right and privileged to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion… what is prohibited however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power” (emphasis added).


130 For example, the Swedish Government in 2007 introduced a regulation obliging companies to produce Sustainability Reports according to the GRI standards. Available at: [http://www.sweden.gov.se/sb/d/8194/a/93506](http://www.sweden.gov.se/sb/d/8194/a/93506).
take into account the impact of their operations on the community and environment. Additionally, states may control corporate human rights activities simply by incorporating human rights into labour legislation and laws dealing with security and bribery. Finally, governments may introduce requirements on corporations to consider their human rights impact through Export Credit Agencies. As Ruggie suggests, these institutions are capable of promoting “broader public interests” by requiring partners to “perform due diligence” with respect to their potential impact on human rights. Human rights provisions would ensure that such regulations cannot be challenged as *unfair, unreasonable or inequitable* by TNCs in investment tribunals, as they would be made in pursuit of legitimate policy objectives.

**b. Include Counterclaims Provisions in Future IIAs and Allow Nationals of Host States to Sue TNCs for Human Rights Violations**

Counterclaims provisions have been proposed by international lawyers as a means to remedy the power asymmetry which exists between MNCs with numerous avenues of recourse under current IIAs and low-income developing countries. Under existing IIAs, states cannot initiate investment arbitration against private companies. Counterclaims would allow states to assert actions against TNCs once a dispute has been initiated by them. Once the host state is capable of bringing a counterclaim, investors would be induced to comply with local laws and regulations. There has already been an attempt to include a counterclaims provision in the investment agreement for the Common Market for Eastern and Southern Africa (COMESA). Its draft investment agreement contained the following provision:

*A respondent may assert as a defense, counterclaim, right of set-off or other similar claim, that a claimant has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures, or that the claimant has not taken all reasonable steps to mitigate possible damages.*

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131 According to the UK Companies Act which was adopted in November 2006 and entered into force on 1 October 2007, a director of the company shall “…have regard… to the impact of the company’s operations on the community and the environment” (Art. 172(d)). Available at: [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf).


134 *Parkerings-Compagniet v. Lithuania*, para. 332.


136 COMESA adopted an investment agreement for the COMESA Common Investment Area in May 2007, which envisages a free investment area by 2010.

Another proposal is to allow the nationals of the host state to lodge claims against investors (TNCs) for human rights violations. This provision is justified by the fact that IIAs grant many rights to international investors without any responsibilities. Indeed, if an investor is given full control and de facto domination of a certain territory and its population, as may happen in the course of various concessions granted by host states, it should be held responsible for its actions. In this context, the proposal would be easily implemented as a quid pro quo exchange between foreign investors and host states. Weiler has even developed a draft provision for future investment agreements which states:

The nationals of a Party may submit to arbitration... a claim that an investor of another Party has breached an obligation... and that the national has suffered loss or damage by reason of, or arising out of, that breach.

The possibility to bring counterclaims by host governments against TNCs in investment arbitration is particularly important for less-developed countries, as it allows space not only to comply with international human rights obligations but also to force TNCs to be more conscious of their impact on human rights in host states. The same holds true for individual complaints. The potential liability of investors in arbitration would offer a strong incentive for them to include human rights standards in their operations and observe these standards. Both proposals may be regarded as being complementary to the first proposal, as they would ensure that parties to IIAs are not legally constrained in respecting and promoting human rights. Victims would be entitled to adequate compensation and provision of such would not be difficult to accommodate in investment agreements. Finally, it would diminish the asymmetry between rights and obligations of states and investors created by the investment agreements.

4. Policy Assessment

Advantages

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143 Ibid, p. 433.
A “human rights approach to investment liberalization” would acknowledge the nexus between human rights and international business and would ensure that states are not limited in introducing regulations compatible with human rights. This policy approach is economically efficient as it does not require host states to introduce radical measures such as trade sanctions or other barriers to force TNCs to respect human rights on their territories. Additionally, it would not require global action on a multilateral level but rather would be negotiated on a bilateral basis between parties to the IIA. Arbitration involving human rights would target individual firms responsible for human rights violations and would not be a potential source of conflict at the multilateral level. Further, the possibility to bring action against foreign investors for human rights violations will partly “improve upon the Achilles heel of human rights – effective enforcement.”

Disadvantages

Although this policy approach is very promising, it has some potential disadvantages and might face various objections. First, in the competition among states to attract foreign investment, states have few incentives to include human rights standards and increase the potential liability of foreign investors in IIAs. Second, although it has been shown that foreign investment might negatively affect human rights, it might still be contended that international investment law and human rights law are two separate bodies of law subject to enforcement in different institutions. Therefore, arbitral tribunals might not be the appropriate forum to resolve human rights disputes between TNCs and host state nationals. Third, promoting human rights through the investment nexus might simply fail where host states are complicit with MNCs in human rights violations.

B. INCORPORATING HUMAN RIGHTS OBLIGATIONS ON TNCs THROUGH DOMESTIC LAW

This section discusses proposals to apply international human rights obligations on companies through domestic reforms coordinated at the international level. While enforcement would remain in domestic forums, this approach seeks to ensure that the applicable standards include internationally agreed human rights norms. It also involves international cooperation to reduce the various barriers to private claims which exist in national courts. The first proposal is to reform the OECD National Contact Points (NCPs)

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144 UNHCHR Report (2003), para. 56.
146 Ibid, p. 431.
and to make the OECD Guidelines binding in adhering states. The second proposal is a new treaty regime which would set minimum standards for corporate liability and reduce barriers to human right claims. Both proposals rely on international cooperation to deal with uneven domestic standards and the problem of regulatory competition.

1. Policy Proposals

a. Make the OECD Guidelines Binding and Reform National Contact Points (NCPs)

“The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential.”

– John Ruggie, UN Special Representative for Human Rights and Transnational Corporations

There are three main problems with the OECD Guidelines, as noted in Part II.A.2. First, the Guidelines are “recommendations” by adherent countries to their companies, and observance is “voluntary and not legally enforceable.” Second, half of all National Contact Points (NCPs) are located solely in ministries of trade or commerce and do not have a multi-stakeholder or inter-ministerial structure. Third, procedural standards for dealing with complaints of non-compliance are weak and vary greatly across countries.

At the same time, the Guidelines are interesting in that they represent a set of well-defined international standards. They also provide a forum for considering complaints by private parties. Since reforms in 2000, NCP tasks have evolved from mainly public information to those related to mediation and conciliation. NCPs have also gradually adopted some adjudicatory features, though procedural standards remain vague and underdeveloped in many respects.

Greater legal accountability would be achieved by making the Guidelines binding and providing NCPs with a more adjudicatory role. NGOs such as OECD Watch have called for “model” NCPs which would be “expert quasi-legal panel[s] with sufficient autonomy to reach decisions and make recommendations, chaired by a senior judge.” Such a forum would have the basic administrative guarantees that are currently lacking and would

147 Ruggie (2008), para. 98.
149 OECD (2008a), Annual Meeting of the National Contact Points - Report by the Chair, 25 June 2008, p. 4.
professionalize what is largely an *ad hoc* and quasi-diplomatic exercise. This would help to overcome the collective action problem of asking states to regulate their own MNCs where it is not clear that other states are doing so.

This would entail a number of additional reforms. First, there must be clear rules and timelines NCPs must follow when complaints have been filed. Currently, a few countries have established clear timelines, whereas others take over a year to inform complainants whether or not it will review the submission.\(^{151}\) Second, all NCPs should issue a final statement with findings of compliance or non-compliance based on the complaint. This policy would follow the example of the UK which recently issued a finding of non-compliance in the *Afrimex* complaint cited above.\(^{152}\) Unfortunately, this is currently the exception rather than the norm, as a glance at NCP complaints (or “specific instances”) reveals over 30 cases where no final statement has ever been issued.\(^{153}\) Third, NCPs should have the ability to award compensation to affected victims or to refer well-founded cases to domestic courts with the ability to do so. This might require authorization legislation at the domestic level, but it would help to ensure that victims of human rights abuses receive an appropriate remedy. However, even if this is not possible, simple authoritative findings of violations would be an improvement over the current regime, as even a “name and shame” approach would entail reputational costs for companies and could lead to improved compliance. Fourth, NCPs should not be located solely in government agencies concerned with investment, but either in inter-ministerial or multi-stakeholder forums,\(^{154}\) or a national human rights institution.\(^{155}\)

These reforms would build on an existing reform trend of the Guidelines. The Guidelines have been revised several times in 1979, 1982, 1984, 1991 and 2000. The most recent revision included important reforms giving NGOs standing to file complaints and language related to supply chains. It is clear that those “pioneer” countries with more effective NCPs (e.g. the UK and the Netherlands) have an incentive to ensure that other countries are also effectively implementing the Guidelines. There is also increased political pressure


\(^{152}\) See fn. 69.


\(^{154}\) Currently only Chile and Finland have “quadrupartite” NCPs with participation of government, industry, trade unions and NGOs. The Dutch NCP is a multi-stakeholder body independent of, but supported by, the government. OECD (2008a), pp. 4 and 17.

\(^{155}\) Ruggie (2008), para. 99.

**b. Harmonize Civil and Criminal Liability of TNCs**

As outlined in Part II.B.2, there is great diversity in states’ approach to the civil and criminal liability of MNCs, especially for extraterritorial conduct. With the exception of the U.S. ATCA, this liability is based on domestic law with little reference to international human rights norms. National courts also apply widely diverging standards related to jurisdiction, admissibility, conflict of laws procedures and liability criteria. This legal patchwork creates both barriers to justice for victims and distorts competition by holding some companies to higher standards than others.

An international treaty would address these issues by defining the relevant criminal and civil liability standards as well as procedural guarantees which would either be directly binding or transposed into the domestic laws of member states. Such a treaty would ‘harmonize’ or set minimum standards by referencing international human rights law and defining other relevant standards. Further, this treaty would clarify bases of jurisdiction for domestic courts, provide a conflict of laws procedure and establish mutual recognition and enforcement of judgments. Within the European Union, these issues have been settled by Council Regulation 44/2001.\footnote{Council Regulation (EC) No. 44/2001 of 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.} The obstacle of *forum non conveniens* has also effectively been abolished since the European Court of Justice (ECJ) ruled in 2005 that this Regulation is also applicable to plaintiffs from non-EU states.\footnote{Andrew Owusu v. N.B. Jackson, Case C-281/02, 2005 E.C. R. OJ C 106.} This has led legal analysts to ask whether this creates a “European ATCA,” in that EU standards of jurisdiction, applicable
law and the parent-subsidiary liability relationship “appear [] either more generous... or at least potentially as generous” than those in the U.S.\textsuperscript{160}

We propose a treaty that would clarify issues related to jurisdiction and civil/criminal liability across industrial sectors. A ‘Framework Convention on Corporate Accountability and Liability’ as was proposed at the 2002 World Summit on Sustainable Development offers a good model.\textsuperscript{161} First, it would establish liability for breaches of international law and agreements, including human rights treaties. Second, it would establish common duties on companies which might include reporting on environmental and social impacts in foreign countries and prior consultation with affected communities. Third, it would guarantee legal rights of redress for persons adversely affected by corporate activities. This involves clearly establishing jurisdiction to foreign claimants where parent companies are domiciled, which would remove barriers such as \textit{forum non conveniens}. Fourth, it would define the relevant liability standards for parent companies vis-à-vis subsidiaries, joint ventures and other local structures and also address issues related to the supply chain.\textsuperscript{162} Finally, such a treaty should have an implementation mechanism which can effectively monitor and enforce the treaty obligations.

2. Policy Assessment

Advantages

Both proposals discussed in this section seek to set minimum standards and strengthen domestic forums with a role in hearing complaints related to violations of human rights by MNCs. Reforming OECD National Contact Points (NCPs) would do this by providing a baseline of procedural guarantees and by basing adjudication on a common international standard, the OECD Guidelines. A treaty-based regime would harmonize national approaches to jurisdiction and liability and reference international human rights norms which would then be applicable to domestic courts. Both proposals rely on domestic forums to hear complaints but stop short of creating a truly international forum, a proposal that will be considered in the next section.


Relying on domestic forums to implement common standards has advantages in terms of legitimacy and enforcement at the national level. First, it should be attractive to states in that it offers them some flexibility in implementation. This means that, beyond the minimum standards, states could continue to rely on domestic rules or adapt them accordingly. Second, a judgment from a domestic court or NCP would be more easily accepted and enforced than an international one. Third, domestic courts or NCPs may be closer and more accessible to victims than the international tribunal to be discussed in the next section.

Making the OECD Guidelines binding and reforming NCPs has the advantage of improving upon an existing regime with fewer transaction costs than creating a new one. Further, OECD members and non-OECD adherents to the Guidelines currently account for 85% of all foreign direct investment (FDI), meaning the regime is comprehensive albeit not complete.163 A treaty regime also has the advantage of utilizing the authority and legitimacy of domestic courts. This ensures access to the full range of remedies and procedural guarantees of a domestic court. Allowing NCPs to refer well-founded complaints to national courts would create a link between the two approaches.

Disadvantages

One disadvantage to the OECD-based approach is that it would exclude “emerging” non-OECD countries such as China, India and Russia whose companies are increasingly important transnational economic actors. In fact, excluding such countries might even dissuade developed countries to bind their own MNCs to human rights standards and ostensibly making them less competitive. However, this problem is not a serious obstacle considering that several non-OECD countries have subscribed to the Guidelines.164 Diplomatic pressure and incentives could be applied in forums such as the G-20 to induce other countries to subscribe to the Guidelines. Another problem is that NCPs judging their own companies may raise issues of impartiality, e.g. in cases involving state-owned enterprises. This implies that an independent supranational forum would be preferable to NCPs. Further, one could argue that the “institutional culture” of the OECD Investment

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163 OECD Guidelines, p. 63.
164 See supra note 62.
Committee is not amenable to these reforms as its *raison d'être* is to promote investment interests.\(^{165}\)

A Corporate Liability Convention such as that discussed above and along the lines of what has been proposed for the EU\(^{166}\) would help address the collective action problem of corporate accountability by ensuring that individual states or regions (i.e. the EU) do not place themselves at a disadvantage by adopting unilateral measures. At the same time, treaties are only binding on states that have ratified them. Treaties are also “difficult and time-consuming” to negotiate, involving large transaction costs.\(^{167}\) Further, the international cooperation required for consensus is likely not to lead to strong provisions without a particularly strong civil society movement serving as watchdog. Finally, such a *general* treaty, as opposed to sector-based treaties, is likely to galvanize significant opposition from the business community.

**C. Holding TNCs Accountable Through an International Tribunal With Special Jurisdiction**

Attempts to develop regulatory frameworks encompassing universal human rights standards for transnational corporations and subjecting TNCs to standards of operation compatible with universal human rights provisions have proven to be inadequate in terms of enforcement and redress. Currently there is no international tribunal designed to effectively address human rights violations committed by TNCs and provide redress to victims of such violations. Human rights litigation against MNCs is possible only on the domestic level either through the jurisdiction of domestic courts where the judiciary may be weak or through extraterritorial jurisdiction of foreign courts. The previous section discussed proposals which seek to coordinate the standards and approach of domestic courts, but stopped short of creating an international forum. This approach has the limitation of not guaranteeing justice where local courts might be weak or inadequate. Yet, the absence of an international forum to address corporate human rights abuses does not


alter the responsibility of business. Therefore this section proposes creating an international forum which could complement domestic courts in these cases.

1. Policy Proposal: Create an International Corporate Tribunal

We propose creating an international tribunal with jurisdiction over corporate crimes and human rights violations. This idea has been suggested by legal scholars and is seen as a viable solution to the absence of effective means to enforce human rights against MNCs. Thus the creation of an international tribunal with special jurisdiction is seen as one possibility to adequately address MNCs human rights accountability.

One commentator has suggested establishing an International Corporate Criminal Court (ICCC) to address corporate crimes. This Court, as the author suggests, might be established by the UN Security Council based on the examples of the International Criminal Tribunal for Rwanda (ICTR) and the Former Yugoslavia (ICTY). Both the ICTR and the ICTY are ad hoc tribunals established for a limited period of time in response to and for the purpose of addressing heinous crimes committed by individuals on specific territories.

Another approach is to establish such a tribunal based on the adoption of an international treaty. Examples of such tribunals include the International Criminal Court (ICC) with jurisdiction to address crimes against humanity, war crimes and genocide committed by individuals. Another example is the International Tribunal for the Law of the Sea (ITLOS), a permanent court with jurisdiction to hear disputes involving not only states, but also “juridical persons,” related to “all ocean space, its uses and resources.”

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170 Ibid, p. 213.
171 The ICTR was established by the UNSC in November 1994 following the Rwandan genocide and other serious crimes committed in violation of international law during the period of January 1, 1994 to December 31, 1994.
172 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was established by the UNSC to prosecute crimes committed during the wars in the former Yugoslavia.
173 The ICC was established by the Rome Statute, adopted and opened for signature on 17 July 1998.
174 The International Tribunal for the Law of the Sea was established following the adoption of the UN Convention on the Law of the Sea (UNCLOS) on 10 December, 1982 and entered into force on 16 November 16, 1994. The Tribunal is entrusted with the authority to decide on disputes related to the fishery and marine environment between member states.
175 UNCLOS, Art. 291(2) and Art. 187(e).
176 UNCLOS, Preamble.
Building on this approach and following the models of the abovementioned tribunals, we suggest creating an International Corporate Tribunal (ICT) whose jurisdiction could include environmental degradation, forced and child labour, displacement of indigenous populations, corruption and fraud. Moreover, the applicable norms on which to base such a tribunal already exist, i.e. the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms).

Although the UN Norms do not have the status of an international treaty, they contain a list of duties and obligations by which TNCs should abide. In particular, they recognize the general obligation of TNCs and states to “promote universal respect for, and observance of, human rights and fundamental freedoms.” In other words, TNCs shall abide by international human rights deriving from other recognized human rights instruments. Additionally, it is the responsibility of states to “secure the fulfillment of, respect, ensure respect of and protect human rights” and “establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.” The UN Norms already contain crucial provisions for human rights and TNCs, and this document provides the possibility to establish an international body to monitor compliance with the Norms. Although this document is not precise in terms of its implementation and does not specifically suggest the establishment of an ICT, it contains a list of necessary duties and obligations for TNCs, and offers the possibility to further discuss its transformation into a multinational treaty establishing an ICT.

The ICT might be established by the United Nations which would further develop the UN Norms along with specific rules and procedure. If established, the ICT would be comprised of judges who are experts in human rights and corporate law, appointed by the UN

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178 The UN Norms were approved on 13 August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights. The Norms were considered by the UN Commission on Human Rights in April 2004. Hereinafter referred to as the UN Norms.
179 Preamble, UN Norms.
180 Choudhury (2005), p. 54.
181 Preamble, UN Norms.
182 The UN Norms, G.17.
183 Part H, titled General Provisions of Implementation, states: “Transnational corporations and other businesses enterprises shall be subject to periodic monitoring and verification by the United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms” (emphasis added).
member states. The Court would have jurisdiction in cases where domestic litigation is not possible or justice is otherwise unlikely. In this regard, the ICT may have admissibility criteria similar to that of the ICC. For example, Article 17 of the Rome Statute provides that a case will be admissible if the state is ‘unwilling’ or ‘unable’ to genuinely prosecute the crime. Alternatively, victims might be required to exhaust domestic remedies before applying to the ICT. Both arrangements would correspond to the ‘complementarity’ principle.

The authors acknowledge that there are still a number of procedural questions to be agreed upon by member states. This includes questions related to counselling arrangements and jurisdiction (e.g. whether the tribunal will have jurisdiction only over cases involving persons and entities from state parties to the convention, or if it would operate under universal jurisdiction).

2. Policy Assessment

Advantages

The ICT would have certain advantages over national courts in terms of credibility/legitimacy, efficiency and effectiveness, and it would also complement domestic solutions on the international level. Operating as a UN body, it would have higher credibility and trust, particularly from victims of human rights violations. Indeed the United Nations with its universal membership comprising both developed and developing countries holds a leadership position in promulgating human rights and represents the best venue for such an institution. By transferring human rights litigation to an international forum, domestic courts would be relieved from the obligation to de facto participate in making foreign policy by adjudicating powerful TNCs established in other countries. Where domestic remedies are not adequate or do not exist, the ICT will complement these domestic gaps. The dedicated professionals of the ICT would contribute to the efficient adjudication of corporate crimes and human rights violations, and the established case law of the tribunal would develop a necessary understanding of the complex relationships between international human rights law and corporate activities. As Bernhard suggests, the

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185 Ibid. p. 58.
Tribunal would be a “focal point” of coordination among various states.\textsuperscript{188} This means it would contribute to the advancement of human rights in those states and develop a uniform approach to the problem, ensuring that victims do not obtain different remedies simply because they live in different states.\textsuperscript{189} The procedural problems associated with domestic litigation would be overcome, and victims would no longer suffer from the necessity to meet varying jurisdictional requirements. Further, the jurisprudence of the ICT would contribute to uniformity in the application of human rights law in corporate cases as well as to uniformity in granting victims redress notwithstanding their country of origin. Finally, adjudication of human rights violations in an international body would put pressure on TNCs to adhere and comply with universally recognized principles and standards regardless of where they operate.

**Disadvantages**

There are a number of drawbacks related to the establishment and operation of the ICT. It is likely that some states will be resistant to the establishment of an international body capable of addressing corporate legal accountability simply because they are not willing to expose their businesses to international jurisdiction. Although the establishment of other international tribunals mentioned above suggests that this problem may be solved through extensive negotiations and concessions, global action requires high levels of commitment which is difficult to facilitate when it may potentially harm business. To enforce its decisions, the ICT will also have to rely on state support and domestic courts for implementation. Like other international tribunals which are usually quite distant from the place of violation and are not familiar with the context and other aspects of the case, the ICT might also be criticized for being incapable of “sufficiently acknowledging victims’ interests.”\textsuperscript{190}

**D. Using International Criminal Law**

\textit{“Follow the trail of the money and you will find the criminals. If you stop the money then you stop the crime.”}

– Luis Moreno-Ocampo,
Prosecutor, International Criminal Court\textsuperscript{191}

\textsuperscript{188} Bernhard (2008), p. 211.
\textsuperscript{189} Choudhury (2005), p. 60.
\textsuperscript{190} Bernhard (2008), p. 211.
1. The International Criminal Court (ICC)

One area of international law where obligations clearly reach to private actors and where a powerful enforcement mechanism has been set up to hear complaints is international criminal law (ICL). With the entry into force of the Rome Statute of the International Criminal Court (ICC) in July 2002, the ICC now has authority to prosecute certain international crimes. The ICC currently has jurisdiction over the crimes of genocide, crimes against humanity and war crimes. 192 The ICC may exercise jurisdiction over these crimes where: (1) the accused is a national of a state party to the ICC, (2) the alleged crime was committed on the territory of a state party or (3) in situations referred to the Court by the UN Security Council. 193 The ICC currently has 108 member states. 194

The ICC has jurisdiction only over “natural persons.” A proposal submitted during the Rome Diplomatic Conference 195 to extend the jurisdiction of the ICC to “legal” or “juridical” persons was not accepted, but could be reconsidered at the first Review Conference to be held in 2010. This section will first consider the existing potential of the ICC to promote corporate accountability based on individual criminal responsibility, i.e. that of corporate executives or employees, using the complicity provisions of the Rome Statute. Second, this section considers revitalizing the proposal to extend ICC jurisdiction over legal persons.

2. Policy Proposals

a. Use the Complicity Provisions of the Rome Statute to Prosecute Corporate Officials

Complicity is an important principle of international criminal law and was recognized by the International Military Tribunal (IMT) at Nuremberg and other allied war crimes trials. The Statute of the IMT provided criminal responsibility for “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or

192 Art. 5, Rome Statute.
193 Art. 13, Rome Statute.
control.\textsuperscript{196} Control Council Law No. 10, which authorized the allied powers to try suspected war crimes in their occupation zones, established criminal liability for an individual who was “an accessory,” “abetted,” “took a consenting part [in],” “was connected with plans or enterprises” or “was a member of any organization or group connected with the commission of [a] crime.”\textsuperscript{197} In addition to the cases mentioned above,\textsuperscript{198} two suppliers of Zyklon B gas were convicted by a British Military Court for violating the “laws and usages of war” despite the argument that they were “merely an accessory before the fact, and even so, an unimportant one.”\textsuperscript{199} The principle of complicity was later endorsed by the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, the latter noting that “all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified.”\textsuperscript{200}

The Rome Statute provides criminal responsibility for an individual who “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”\textsuperscript{201} Noting the role that private companies may play in fueling armed conflict, commentators have examined how this provision may be used to establish criminal liability “for a supplier of small arms, the managing director of an airline that ships prohibited weapons or even a diamond trader.”\textsuperscript{202} While demonstrating the requisite intent may pose special challenges depending on the circumstances of the case, it is argued that knowledge of such crimes is easier to establish on the international level since “intense publicity about war crimes and other atrocities” is often made known by UN and NGO reports and the popular media.\textsuperscript{203}

We propose that the Prosecutor actively investigate the role of economic actors in situations under ICC jurisdiction. NGOs play an important role here in prompting such

\begin{footnotes}
\item[196] “Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.),” 1951, 82 UNTS 279, Art. 6.
\item[198] See supra p. 4.
\item[200] \textit{Prosecutor v. Akayesu} (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 530.
\item[201] Rome Statute, Art. 25(3)(c) (emphasis added).
\item[203] Ibid, p. 451.
\end{footnotes}

investigations by submitting communications and evidence to the Office of the Prosecutor. The Prosecutor “shall analyze” and may seek additional information from “non-governmental organizations” or “other reliable sources” in deciding to pursue an investigation. Such submissions drew the Prosecutor’s attention to “links between the activities of some African, European and Middle Eastern companies” and atrocities in the Democratic Republic of the Congo (DRC) in 2003. Since that time, he has warned that foreign businessmen who exchange cash or weapons for diamonds with those they know have committed war crimes face criminal liability. With reference to an ongoing investigation involving the DRC, he cited UN reports that companies based in 25 countries had connections with illegal exports of natural resources and may have funded groups who committed war crimes. Since 2004, however, it is not clear if this remains a priority for the Prosecutor or if these statements are merely aimed at promoting due diligence on behalf of companies. Civil society should play a key role in keeping this issue on the agenda.

b. Extend ICC Jurisdiction Over Legal Persons

The draft statute at the beginning of the Rome Diplomatic Conference in 1998 contained a French proposal stating that the Court would have “jurisdiction over legal persons…when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.” The proposal was supported by several delegations who noted the role of the radio station which urged the killing of Tutsis during the Rwandan genocide, the involvement of multinational oil companies in population transfers and the role of private security and military companies. The proposal was elaborated into a final Working Paper within the Working Group on General Principles. However, the proposal was ultimately...
withdrawn when it became clear that there was not adequate time to reach a consensus on such an innovative proposal. For some delegations, the notion of corporate criminal responsibility did not exist in their legal systems, which would raise problems of complementarity. Others were concerned that it could be applied to self-determination movements or against state-owned entities.

This proposal should be considered again at the first Review Conference of the ICC Statute. After a seven-year ‘waiting period,’ it will be possible in July 2009 for any state party to propose an amendment to the Rome Statute. The first Review Conference is scheduled to be held by States Parties in Kampala, Uganda in 2010. The Assembly of States Parties decides by a majority of those present and voting whether to take up a proposal. Considering there was inadequate time to debate the issue in 1998, it would seem the time is ripe for a reconsideration of this proposal. At the Rome Conference, only one nongovernmental organization, the Lelio Basso Foundation, took an active role in trying to include legal persons within ICC jurisdiction. The literature indicates that this issue remains on the agenda, and NGOs concerned about corporate accountability should therefore consider a broader advocacy effort on this point. However, such an amendment would require the support of two-thirds of Member States and ratification by seven-eighths to come into force.

3. Policy Assessment

Advantages

International criminal law is a rapidly expanding field with much potential for ending impunity related to corporate misconduct. This section considered the option available to the Prosecutor of the ICC to investigate corporate executives or company officials based on the complicity provisions of the Rome Statute; NGOs have played a key role in


213 According to the Lelio Basso Foundation, the following delegations spoke in favor of the proposal: Rwanda, France, Italy, Portugal, Solomon Islands, Egypt, Tanzania and Libya. The following spoke against: Belgium, Colombia, Venezuela, Sweden, Switzerland, Austria, Japan, Finland and Norway. See Clapham (2000), p. 157.

214 Art. 121, Rome Statute.


217 Art. 121, Rome Statute.
initiating such investigations through submissions of information. We also considered
resurrecting the proposal presented at the Rome Diplomatic Conference granting ICC
jurisdiction over legal persons. These proposals have several advantages.

First, an ICC investigation of company officials for complicity in international crimes
would have high visibility and therefore the potential to deter businesses from involvement
in armed conflicts and to promote due diligence. Second, the Prosecutor is independent of
states and more likely to bring such an action. The ICC’s indictment of Sudanese president
Omar al-Bashir, for example, shows that the Prosecutor is not shy in pursuing high-profile
or controversial cases. Third, prosecution of a company official would have benefits in
terms of establishing an important material legal precedent in ICL. This would bring the
Nuremberg precedents of *Krupp*, *Flick* and *IG Farben* into the modern age, which would
also have authority in domestic jurisdictions.

There are also benefits to extending ICC jurisdiction over legal persons. First, not all
corporate crime can be reduced to individual actors. Illicit conduct may be the product of
corporate policy or may have been devised by an individual no longer in the company.
Second, individuals may be scapegoated or shielded in opaque corporate structures, and
there may be no deterrent effect to the company in such circumstances by only prosecuting
one or more of its officials. Third, where profit accrues to a legal entity due to direct or
indirect participation in atrocities, prosecution of individuals does not remedy this injustice.
Fourth, corporate criminal liability allows victims access to corporate assets.

**Disadvantages**

There are several limitations and drawbacks to using the ICC as a tool of corporate
accountability. First, the Prosecutor is not obliged to pursue cases no matter how
persuasive the evidence provided to him by human rights NGOs. Therefore this approach
offers very little to victims in terms of providing private rights of action or increased access
to remedies. Second, if the Prosecutor did decide to pursue such a case, it could become a
political liability if it provoked opposition from member states or deterred new states from
joining. There is already concern about the wide discretion and independence granted to

Objection Stripped Bare,” *Criminal Law Forum* 19, p. 148.
219 Ibid, p. 149.
220 Ibid.
the ICC Prosecutor, which might be exacerbated if a corporate complicity case was perceived as not well-founded. Third, ICC litigation is expensive and distant from victims. Indeed, this is the rationale for the complementarity principle which favors resolution by national courts. Fourth, ICL is concerned with a very narrow range of human rights abuses, i.e. those implicating the gravest breaches of international law. Thus the strategy is a limited one.

The high hurdles for amending the Rome Statute must also be recognized. As noted above, a coordinated advocacy campaign would have to convince two-thirds of member states to adopt the amendment and then seven-eighths to ratify it. This would likely require much effort and energy (costs) from NGOs and sympathetic states for limited benefits. Also, although there is increasing convergence on the issue of criminal responsibility for corporate persons, there remain a few states which do not recognize the concept. Overall, it would seem that the costs significantly outweigh the benefits of pursuing a jurisdiction amendment, given the seven-eighths ratification hurdle. However, putting the issue on the agenda might still prompt an important dialogue on the role of businesses in armed conflict, and there is currently a conference planned on the topic.

**E. OVERALL ASSESSMENT**

To different degrees, the four legal approaches discussed in this section represent forms of ‘regulation.’ In our proposals, we have also placed a special emphasis on private claims as a form of implementation. The goal of these approaches, and the specific policy proposals within them, is twofold. First, the aim is to deter participation in human rights violations by private companies by placing a cost on such conduct. Second, the goal is to provide access to remedies for victims of such violations. In assessing the advantages and disadvantages of our various proposals, we have employed various criteria. One criterion is **effectiveness** in terms of the two goals mentioned above. Another criterion is **feasibility**, i.e. the likelihood of realizing a given proposal in light of political realities. A final criterion is a consideration of the relative **costs** associated with the various proposals.

Reforming international investment agreements to include human rights considerations is a modest proposal and thus attractive in terms of feasibility. In terms of effectiveness, this

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221 Argentina, Spain and Germany recognize corporate criminal liability in only a few limited cases, if at all. FAFO (2006), p. 31. Also see Weigend (2008).

222 Email from Prof. Andrew Clapham, 30 March 2009.
approach has the advantage of at least stopping human rights measures from being challenged in investment tribunals.\textsuperscript{223} Beyond this, however, the effectiveness is limited by the bilateral nature of most agreements, i.e. reforms would only be effective between the two state parties. The effectiveness dimension would be enhanced if nationals could bring complaints against companies under the agreement and therefore have increased access to remedies. However, this policy proposal is seen as not very feasible, even by critics of investment agreements, who also point out the high costs of such arbitration.\textsuperscript{224} At the same time, only two states would need to be persuaded of the merits of a human rights-friendly IIA (low costs), which could set an important precedent for other states.

Incorporating human rights obligations on TNCs through domestic law would be effective insofar as it addresses the collective action problem inherent in unilateral regulation. It also would be effective in improving access to justice, since it would diminish jurisdictional and other procedural barriers across domestic courts. Such a regime would only be binding on those states which consent to it, but this is true of all forms of international cooperation. The feasibility of this approach would depend on the depth and scale of reforms. A full-fledged treaty on corporate liability will likely not happen tomorrow, but reform of OECD NCPs is a relatively modest and legitimate policy demand which could be backed by those ‘high-performing’ states which have already enacted reforms. There are high transaction costs associated with international cooperation, especially new treaty regimes. Whether the attending benefits are proportionate is less clear, especially since the negotiations and consensus needed to reach agreement may result in a treaty that is weak and ineffective.

Creating an International Corporate Tribunal can be considered an extension of the previous approach, with increased costs and benefits. It would be more effective than a system based solely on domestic courts, as it would fill in gaps where states are unwilling or unable to exercise jurisdiction. In doing so, it would also enhance victims’ access to justice. The feasibility of this option depends largely on the constituency advocating for it. There is an increasing number of environmental and human rights NGOs concerned about the ‘root’ problem of corporate accountability rather than single-issue or corporate campaigns. At the same time, this movement is fragmented and has limited resources. One


\textsuperscript{224} Mann (2008), p. 14.
determinant of success is if such NGOs can form productive ‘synergies’ with states as was the case in the movement leading to the Rome Treaty establishing the ICC. Finally, the costs of creating a new tribunal are higher than working with existing courts, but the benefits are also proportionally strong.

Using the International Criminal Court is a limited approach in two respects. First, it is limited to a narrow class of particularly egregious crimes. Second, it is limited by the Prosecutor’s monopoly on the indictment process which effectively rules out private access to remedies. However this does not mean that the approach is not effective, as prosecution of a company official or corporation itself would be highly visible and likely to deter violations by other economic actors. The prosecutorial approach seems feasible to the extent that the Prosecutor has signalled concern over the issue in stating he would “work together with national investigators and prosecutors in order to determine the contribution, if any, that these businesses are making to the commission of crimes in the DRC.”

The feasibility of extending ICC jurisdiction over legal persons is less strong, however, given the strict amendment procedure.

There is no reason why corporate accountability advocates cannot pursue multiple approaches simultaneously. Indeed some approaches have longer time horizons than others. Whereas a multilateral treaty regime would take several years to complete, reforming bilateral investment treaties can be done in a much shorter timeframe. Likewise, reforming NCP procedures is a shorter-term strategy than extending ICC jurisdiction over legal persons and creating a new corporate tribunal. Therefore the appropriate approach for a corporate accountability NGO will depend on a given actor’s time horizon. NGOs should seek synergies with like-minded states based on an analysis of where there is policy convergence among several states.

Indeed all of these legal approaches complement each other, e.g. international forums can supplement domestic ones, representing the last resort venue for victims of human rights abuse. Likewise home state liability can supplement regulation in the host state. Each legal approach tackles one element of the larger problem.

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226 For example, now that the US and EU both provide somewhat similar degrees of court access for foreign civil claims against domestic companies, it is in their interest for other countries to adopt reforms providing the same.
IV. CONCLUSION

“Nothing is illegal if a hundred businessmen decide to do it.
And that’s true anywhere in the world.”
– Andrew Young, former US Ambassador to the UN

The residents of Bougainville are still waiting for their day in court. Eight years after their original complaint and two decades after the outbreak of civil war in Papua New Guinea, a Court of Appeals ruled in December 2008 to remand the case to a lower court to examine whether the plaintiffs must exhaust remedies in their national courts before making use of ATCA. A Bougainville protest leader has stated, “We know that with the legal system in PNG, we have no chance of getting justice for all the damage to our people and the environment.”

Private litigation is not a panacea for remedying human rights abuses involving private companies. The Rio Tinto case illustrates that host governments often share responsibility for human rights violations. At the heart of much litigation in home states are governance failures in host states which enable such abuses. In addition to neglecting the state duty to protect, governance deficits may include a lack of administrative capacity, corruption and a weak judiciary incapable of dispensing justice. However, binding obligations on MNCs and improved enforcement would lead MNCs to exercise due diligence in their relationship to state authority. Also in matters such as environmental pollution and labor rights, it is clear that a MNC can itself be the source of human rights violations and hinder the development of ‘good governance.’

The global financial crisis illustrates the dangers of unregulated markets. At no time in recent history has the world’s attention been drawn to such a degree to the costs of market failure. While increased regulation seems inevitable, the exact nature and scope of that regulation remains to be seen. The proposals discussed in this paper, which just a year ago may have been dismissed as naïve, must be considered in light of this historical moment. The current crisis represents in many ways a ‘policy window’ of opportunity to address the

issue of corporate impunity. The feasibility of these proposals will depend in many ways on the ability of civil society to leverage this opportunity and mobilize demands for change.
Primary Sources

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), 1951, 82 UNTS 279.


Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) of 18 March 1965.


UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958.

Universal Declaration of Human Rights (1948).

Cases


Defrenne v. Société Anonyme Belge de Navigation Aérienne (Case 43/75).
Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir.1980).


Parkerings-Compagniet v. Lithuania, Award, 11 September 2007, ICSID Case No.ARB/05/8.

Piero Foresti, Laura de Carli et al v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1.

Prosecutor v. Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998.


Rachel Lubbe & Ors v. Cape plc., Case No: QBENI 1999/0841/1.


Tecnicas Medioambientales S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, 29 May, 2003.

Tel Oren v. Libyan Arab Republic 726 F.2d 774, 775 (D.C. Cir.1984).


Secondary Sources


OECD (2008), Annual Meeting of the National Contact Points - Report by the Chair, 25 June 2008.


Newspaper Articles


