



**Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
5-6 October 2009**

**Submission by the International Commission of Jurists
October, 2009**

Introduction

In its resolution 8/7 of June 2008, the Human Rights Council requested the Office of the High Commissioner for Human Rights to organize, within the framework of the Council, a two-day consultation “in order to discuss ways and means to operationalize the framework, and to submit a report on the meeting to the Council”. The consultation, proposed originally by the African Group within the Council, was conceived of as a means to respond to calls from civil society for the Council to ensure wide and non-selective participation by grass-root organizations and victims groups in the debates around the issue of corporate human rights responsibilities. Guided by United Nations instruments, the ICJ attaches great importance to the development of an approach that is centred on the individual, including victims or potential victims of abuse, their rights and needs. As such, the ICJ welcomes the idea of an open consultation.

The ICJ is pleased that the present consultation has materialised and that opportunities have been given to non-governmental organizations and others to make submissions. In its present submission to the Consultation, the ICJ will focus only on certain aspects of the framework presented by the SRSG on the issue of human rights responsibilities of transnational corporations and other business enterprises.

The “Protect, Respect, Remedy” framework is made up of three guiding principles: the State duty to protect human rights from abuses by third parties including business enterprises, the companies’ responsibility to respect all human rights and the need to have access to remedies for those whose rights may have been affected as a consequence of activities involving business participation.

The Corporate responsibility to respect all human rights

The Human Rights Council has mandated the SRSB to “elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders”. Some of the key issues that deserve further elaboration in this context are the normative basis for such responsibility to respect human rights, the positive steps and actions that are necessarily inherent and the concept of due diligence.

A normative basis is necessary

First, the ICJ firmly believes that a more normative approach should be adopted in respect to corporations responsibilities vis-à-vis human rights as opposed to a purely utilitarian approach. Firm standards are essential to circumscribe the tendency of companies to make potentially transitory decisions to observe human rights responsibilities primarily on the basis a cost-benefit analysis.

The argument that social expectations are the basis for the corporate responsibility is important insofar as these social expectations may serve as guidance to judges to decide on civil liability applying the test of what a reasonable person would do in particular circumstances of a concrete case.¹ However, from a human rights point of view it is insufficient to ground human rights responsibilities in such expectations, because these expectations change, can be low or high in certain societies and are themselves anchored on normative social values (about what is good or normal to do in the circumstances). For instance, certain societies are more tolerant to abuse of and/or discrimination against children, women or certain groups. These acts are also expected to occur and are seen as acceptable. Should these social expectations be the basis of human rights responsibilities?

That the UDHR provides a sound basis for human rights responsibilities of nonstate actors has long been accepted. The UDHR as a basis for human rights responsibilities of non-State actors is an approach that has been adopted by many special procedures of the UN Human Rights Council in relation to non-State armed groups. Thus, four Special Rapporteurs in a joint report on Lebanon and Israel, concluded that: “Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights ...” (A/HRC/2/7 para. 19). Justice Goldstone and nine other special rapporteurs have cited this approach with approval.² The ICJ believes that the current work in this area by the SRSB would greatly benefit from a similar approach.

“Do-not-harm” and positive obligations

The concept of corporations responsibility to respect has been premised largely on a negative obligation “not to do harm” or abstain from impinging into human rights of individuals and groups. However, it has been also stated that an obligation to abstain necessarily entails steps of a positive nature with a view to fully discharging the main negative responsibility. One of example that has been often cited is the duty of non

¹ See Submission by the International Commission of Jurists and JUSTICE (UK ICJ Section) to the United Kingdom Joint Parliamentary Committee on Human Rights, April 2009

² A/HRC/10/22 para 22; Report of the UN Independent Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, para. 302

discrimination the implementation of which requires the companies to proactively put in place policies and mechanisms that would promote equality and diversity but will also detect deviant conduct and discourage it in an effective manner. In this as in other similar cases, the main duty cannot be discharged if positive steps are not taken.

The responsibility of companies in many instances will go beyond “do no harm”, and may under certain circumstances extend to responsibilities analogous to the obligations to protect and fulfil in the state responsibility context. For example, if a private company is undertaking a function intimately involved with protecting a human right, such as in the case of a private security company providing quasi-policing services, or fulfilling a right, such as a private medical clinic in respect of the right to health, the responsibilities of the company will be heightened. There are also special responsibilities in respect of companies that are publicly-owned or, being privately-owned, perform tasks that are public by nature. Beyond the discussion of public functions, there is an important corpus of law that defines the duties of States to protect certain rights in absolute terms when the concerned person is under the care and control of public authorities (e.g. prisoners, handicapped or medical patients in hospitals) or under the care of the employer in the case of labour law (e.g. employees inside the workplace). With regard to situations in which law (international, regional and national) establishes a duty of care for the employer or other private enterprise that does not necessarily perform a public function in respect to a person under its orders and/or control and trust, it would be important to identify the standards of conduct for private enterprises failure to observe which carries legal liability under national law.

Due diligence and complicity

The SRSG has presented the concept of due diligence as central to his work. Among the factors that the SRSG calls on companies to consider when determining the scope of their due diligence obligations is the contribution to abuse they may make through their relationships with business partners, suppliers, State agencies, and other non-State actors.³ This area is the particular focus of the ICJ Panel report on corporate complicity, which provides important insight into the civil and criminal liabilities of corporations for human rights violations not necessarily committed directly by the corporation. These cases present perhaps the greatest challenge to establishing a concise checklist of due-diligence obligations. After all, for the purposes of criminal or civil liability, the question of whether a corporation knew or should have known about its own conduct and the direct impact of those is likely to be a much clearer issue than whether the corporation knew or should have known about how their activities would impact human rights interests through their partners, subsidiaries, buyers, suppliers, etc.

The ICJ Panel Report in exploring the civil legal obligations of corporations in cases of complicity lays out the three principles of liability: Causation, Knowledge, and Proximity. Causation, itself is understood to exist in three circumstances: (i) where the abuses would not occur without the contribution of the company; (ii) where the company’s activities exacerbate or contribute to specific abuses; and, (iii) where the company’s conduct facilitates the abuses or changes the way the abuses are carried out. A corporation is

³ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “Protect, Respect, and Remedy: A Framework for Business and Human Rights,” U.N. Doc. A/HRC/8/5, para. 57 (Apr. 7, 2008), *available at*: <http://www.unhcr.org/refworld/docid/484d2d5f2.html>.

understood to satisfy the second principle of liability if “[it] or its employees actively wish to cause the abuses or, even without desiring an outcome, they know or should know from all the circumstances, of the risk that their conduct will contribute to the human rights abuses, or are wilfully blind to that risk.”⁴

What a corporation should know is precisely the subject of due diligence standards, and is dependant on a number of objective factors including what information is available to the company from its own past experience, its employees and consultants, as well as from the media and civil society.⁵ The ICJ Expert Panel offers specific objective factors to be examined for determining whether a company or its officials knew or should have known about their involvement in human rights violations. They are in summary:

- 1) Information obtained through the company’s own inquiries
- 2) Information brought to the attention of the company by an outside party
- 3) Unusual circumstances of a business transaction that raise suspicions
- 4) Duration of the business transaction
- 5) Position of the individual official within the company⁶

Likewise, the Report recommends that the corporation consider the following additional factors when conducting due diligence into the risks of human rights violations:

- 1) Do the actors involved have a track record of human rights abuses?
- 2) Does publicly available information draw attention to the risk of abuses in the situation or general context?
- 3) Does information available to experts familiar with the context, situation, place, and/or actors concerned, point to risks of abuse?⁷

Whether the company should know of a risk is also dependent on “whether a reasonable person in the company’s shoes would have undertaken an inquiry as to the potential risks involved in his or her conduct, and as a result would have foreseen the risk of harm.”⁸ Generally, the more serious or more probable a certain risk is, the more likely it is that the corporation should know about it. Additionally, whether the company should know is related to the third principle of Proximity, which is defined to include geographic closeness as well as the duration, frequency, intensity and/or nature of the connection, interactions or business transactions concerned. As the Panel stated: “The closer in these respects that the company or its employees are to the situation or actors involved the more likely it is that the company’s conduct will be found in law to have enabled, exacerbated or facilitated the abuses and the more likely it is that the law will hold that the company knew or should have known of the risk.”⁹ Accordingly, the greater the proximity of these

⁴ Corporate Complicity & Legal Accountability, Vol 1: Facing the Facts and Charting a Legal Path, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 9 (2008)

⁵ Corporate Complicity & Legal Accountability, Vol. 3: Civil Liability, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, p. 17 (2008).

⁶ Corporate Complicity & Legal Accountability, Vol 1: Facing the Facts and Charting a Legal Path, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, p. 22, 23 (2008).

⁷ Corporate Complicity & Legal Accountability, Vol. 3: Civil Liability, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 18 (2008).

⁸ *Id.* at 18.

⁹ *Id.*

relationships, the greater will be the companies' due diligence obligations with respect to its partners.

Once a company learns of a risk, it must determine how to address that risk. In an ideal world, where risks could be calculated perfectly and mitigated completely without cost, a corporation would be obligated to eliminate any and all possibilities of committing or being complicit in violations of human rights. In reality, however, obtaining information can be costly, and risks cannot always be identified with precision or mitigated completely. The negligence framework for civil liability recognizes these realities and again employs the reasonable person standard with regard to required action.

Whether a company has acted reasonably will depend upon three main factors: i) the probability of harm; ii) the severity of the harm; and, iii) the preventative measures available to the company.¹⁰ As these factors increase in magnitude, so too does the corporation's responsibility to mitigate the risk. The concept of proximity, with respect to both the perpetrator and the victim, re-emerges here as an important component in determining whether preventative measures were available to the company. This is because, "the closer the company, the more likely it is that it will have the power, influence, authority or opportunity necessary for its conduct to have a sufficient impact on the conduct of the principal perpetrator..."¹¹ Thus, ICJ Panel concluded: "[I]t is generally true, both in relation to acts and omissions, that the closer a company's relationship with a victim including in real time and space or the more intertwined the company is with the principal perpetrator, in terms of length and depth of the relationship, the more likely it is that a court will find that the company should have taken particular positive steps to avoid the risk of harm from materializing."¹²

As the SRSR continues to explore and define the due diligence obligations of corporations in the context of his mandate, the ICJ hopes that the framework, as summarized here and laid out in greater detail in the Corporate Complicity and Legal Accountability Expert Report, proves to be a useful tool for clarifying the duty to investigate and mitigate the risk being complicit in the commission of human rights violations.

Access to effective remedies

A commitment to corporate accountability for human rights requires a commitment to consistent and reliable enforcement of those rights. Adequate deterrence and the interests of justice require that victim's grievances be heard and that appropriate and binding remedies be available. It is a general principle of law that all rights require effective remedy in the event of their infringement. For a remedy to be effective it must be prompt, accessible, and be decided by an independent authority, meaning a judicial authority in respect of gross or serious abuses.

¹⁰ For a discussion of these factors, see generally *id.* at 19-21.

¹¹ Corporate Complicity & Legal Accountability, Vol 1: Facing the Facts and Charting a Legal Path, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, p. 24 (2008)

¹² Corporate Complicity & Legal Accountability, Vol. 3: Civil Liability, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, p. 19 (2008).

The SRSG has determined that the current regime for holding corporations accountable for their violations based on national judiciaries and a patchwork of various international mechanisms is insufficient.

National judiciaries are currently the most important mechanism for corporate accountability. But national regimes for enforcing corporate liability are typically weakest where they are needed most. A 2006 survey by the Special Representative to the UN Secretary General on the Issue of Human Rights and Transnational Corporations found that the bulk of serious human rights violations committed by corporations occur in developing countries.¹³ The will to pass and enforce laws against corporations is often lacking in these states, though, as they are wary of the effect that enforcing liability may have on their ability to attract foreign direct investment.¹⁴ Those developing countries with the will to prosecute violations often lack the institutional capacity to do so.¹⁵

The ICJ has followed with great interest the evolution of discussions in this area because of its mission and experience in promoting and safeguarding the rule of law and the independence of the judiciary in the promotion and respect of human rights. Since its foundation the ICJ has worked with the judiciary and judicial institutions and serves as a forum for judges and lawyers.

National judicial remedies

In December 2008- at its congress in Geneva- the ICJ launched an initiative on access to justice for corporate involvement in human rights abuses. This project is the largest of its kind in terms of resources and scope. It aims to study in depth 10 countries distributed across all continents and survey the legislation and practice of up to 10 more. For each study there will be one national workshop in which judges, prosecutors and lawyers will test the content, conclusions and recommendations. Some of these workshops will have a sub-regional character congregating representatives from neighbouring countries. The process is meant to result in the establishment of a global agenda that will provide principles for action and highlight the reforms that are needed.

The following paragraphs provide a brief preliminary list of issues that have been highlighted in the draft studies that the ICJ has received so far.

Legal redress for instances of corporate involvement in human rights abuses often faces obstacles of varied nature, some of them substantive and others of a more procedural nature. Obstacles to justice in this area also correspond to general obstacles to access to legal remedies that are aggravated in the context of abuses involving big corporations and communities. While of a general nature, the relevance of these kinds of obstacles should not be overlooked in an approach that aims at exploring and recommending avenues of redress for victims. There also obstacles of a more specific nature that arise mostly in the context of disputes between corporations and individuals or communities. These also deserve careful consideration.

¹³ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect, and Remedy: A Framework for Business and Human Rights," U.N. Doc. A/HRC/8/5 at para.16 (Apr. 7, 2008)

¹⁴ *Ibid* para. 14-15.

¹⁵ *Ibid*

Among the relevant general obstacles, attacks on the independence of the judiciary, corruption, lack of investigative and other capacity and problems with enforcement of judicial decisions are among those more frequently cited in the ICJ draft studies for the Democratic Republic of the Congo, Nigeria, the People's Republic of China, Poland and South Africa.¹⁶

Judicial independence- An ongoing case before the courts of Ecuador that has attracted wide international attention, that between the indigenous communities and the oil company Texaco/Chevron, highlights the issues in relation to the *independence of the judiciary*. Recently, Texaco/Chevron made public video footage that allegedly shows the judge of the case involved in a case of misconduct. The judge and the plaintiffs' legal counsel argued that the video footage showed nothing that could be interpreted as corruption or misconduct, but the allegations served to support the company in pressing its long running claim that a fair trial in full respect of due process for the company is not possible in Ecuador.¹⁷ The judge stepped down to allow the proceedings to continue, but challenges to the integrity of the judicial system continue and there are claims on both sides that judicial independence is at threat.

Issues of judicial independence are also at the core of the many obstacles victims of corporate abuse face in countries such as DR of Congo and the PR China. In China, the judiciary is considered not to be independent and the ruling Communist Party is said to exercise supervision and control of it, which prevents them from developing independent and consistent interpretations of the law. Judges, as well as other persons with power and influence belong to the Communist Party and courts can be required by the Supreme Court to collaborate with local authorities in maintaining social stability. The work of lawyers is subject to the supervision of the State, which constitutes a severe limitation on the independent exercise of the legal profession. Lawyers who are willing to take cases that are sensitive to local authorities and powerful businessmen are reportedly harassed and even physically attacked.

Corruption- This is a pervasive problem in many countries under study, for instance in Nigeria, China and the DR of Congo. Although the salaries of Congolese judges have recently been raised, a culture of corruption remains in place. One example is the set of practices relating to the obtaining of legal aid. Under Congolese law the provision of such aid requires a certificate of indigence, which in principle should be obtained free of charge, but judicial offices in practice charge an amount that makes it impossible for many to get such aid. In some countries where there is an absence of free media and mechanisms to ensure transparency, such as in China, foreign companies reportedly use bribes and influence on public official and judicial officials because they do not have confidence in the fairness of the legal system. Issues of corruption arise dramatically in countries where freedom of the press is suppressed and where institutional checks and balances are weak.

Lack of or weak investigative and judicial capacity- Most countries under study report serious lack of capacity to deal with the complex issues involved in cases concerning

¹⁶ Due to the preliminary nature of the findings and the fact that each country study is in draft form, references of sources about the reported practices are not given here but will be given in the final version of each study.

¹⁷ The positions of the two parties are available at www.amazonwatch.org, www.texacotoxico.org and at <http://www.chevron.com/ecuador/>

transnational corporations and human rights abuses. Capacity limitation includes problems in relation to knowledge of relevant legal provisions, methods and techniques of investigation and resources and infrastructure. These problems are aggravated in the case of developing countries, and especially those that are going or have gone through periods of protracted conflict such as DR of Congo and Colombia.

Issues of lack or weak capacity extend to problems of collaboration between the various actors of the investigation and justice system in each country. In cases of abuses involving companies, there are often civil servants such as labour inspectors or others, police officers, investigating judicial officials, prosecutors and judges that may eventually be involved at different stages of the process. Lack of clarity or deficiencies in the role of any of them may affect the functioning of the others and the whole system.

One area in which lack or weak capacity is glaring is in the context of gathering the necessary evidence to make even a *prima facie* case that an abuse involving a corporation has been committed. Frequently, the transnational structure of the corporation, its operation through subsidiaries or contractors and the rules concerning separate legal personality impose additional challenges to the indigenous investigatory capacity of all countries, including even the most developed ones such as the Netherlands.

Enforcement- Lack of enforcement of judicial decisions is another general feature present in many of countries under study and it is most serious in several developing countries even when these have independent and effective judiciaries such as in India. In the DR of Congo, for instance, only an approximate of 30 per cent of civil judgements are enforced. Enforcement costs through judicial channels amount to 6 to 10 per cent of the awarded compensation. In other countries, corruption and lack of cooperation from authorities result in poor enforcement of judicial decisions.

Among some of the most relevant issues concerning access to justice that are specific to cases involving companies are the following.

Legislation- Although many countries have a relatively developed legal system with sophisticated liability provisions, including in some cases newly-establish liability for corporations as such, the concept of legal liability as it attaches to companies or legal entities is still largely underdeveloped. This applies in particular to the issue of criminal liability where conceptual and doctrinal objections remain in most countries and, to some extent, at the international level. In this respect, Justice Ian Binnie, a member of the Supreme Court of Canada and ICJ Commissioner, has stated:

“The conceptual difficulties with criminal liability appear to have been overstated. While interesting, they do not pose an insurmountable obstacle. There are well-established tests for attributing the conduct of directing minds to corporate entities. Legal systems around the world have successfully extended and modified principles of civil and criminal liability to corporate entities. Attribution even of criminal culpability for certain *men rea* offenses is now increasingly common through proof of the misconduct of the directing minds. Problems at the international level can be addressed in the same way.”¹⁸

¹⁸ “Legal Redress for Corporate Participation in International Human Rights Abuses- A Progress Report” by Justice Ian Binnie, In *The Brief*, Summer 2009, vol. 38 No. 4, p. 44 at p. 46

However, certain countries, such as South Africa, appear to present sophisticated legal liability systems, possibly available also for foreigners, that are still to be explored and tested by victims or their legal counsel.

Limitations to available legal action- In many countries there is no available means for collective legal action by groups of affected individuals (called in certain countries “class action”), which appears to deny an important avenue of redress for communities or groups that are jointly or similarly affected by activities of transnational corporations in their regions. Similarly, although the concept of public interest litigation has become widespread, its existence in legal instruments and its use in certain countries may be called into question. For instance, in China, public interest litigation does not exist as such but still it is referred to as a potential avenue of redress.

In some countries the victim’s capacity to start legal action is severely limited by the enactment of criminal legislation or procedural law that provides extraordinarily broad protection to the so-called “national interest” or even “national security”. State involvement in the relevant abuses is a common feature in these cases.

Fairness and equality of arms- The principles of fairness and equality of arms are part of most legal systems of the world but their application in the context of cases concerning powerful corporations and poor/weak communities or individuals, in other words, between parties that are inherently unequal poses challenges to procedural law and the judicial role. In certain countries, such as Poland, the law contemplates tools for the judge to take decisions to make possible the equality of arms in practice. Such tools include the possibility that the judge acts *motu proprio* and not only at the request of the parties to issue certain orders to move the process forward, to shift the burden of proof in certain circumstances or to cure procedural deficiencies born out of lack of knowledge or resources of one of the parties. Traditional labour law also contemplates an active role for the judge in protecting the integrity of the proceedings and its fairness for both parties in the interest of justice beyond the interests of the parties to the dispute. However, there are indications that in this area as in many others, judges either do not have adequate means to exercise their powers or are reluctant to do so..

Another aspect that may work as an obstacle to access to justice in this context is the asymmetrical access to information, and in particular information on the pertinent legal processes and avenues, by the parties to the disputes. Often, poor and uneducated groups do not know the intricacies of the justice system or the relevant legal provisions that protect their rights. Further, legal counsel, when available, is poorly trained with limited access to key legal resources. The best trained and equipped law firms are often hired by corporations or have some connexions with them that create a conflict of interest for them to act in representation of victims to sue companies. Top legal professionals are not attracted by conditions of work in representation of the poor.

Difficulties in gathering and protecting information and evidence- In some countries discovery can be ordered by the judge and is a necessary part of civil proceedings. However in other countries the burden of proof is for the party that alleges a particular point of fact to provide the necessary proof. This could be a major difficulty in certain cases where most information, including documentation, is in the possession or under the control of the corporation. Generally, corporations will not readily grant access to the

company's premises or employees when they see a potential threat of legal liability and in many cases, such as in Poland, reports indicate practices of intimidation of witnesses, especially when they are still in an employment relationship with the company in question. The lack of adequate legislation that protects potential witnesses and whistleblowers in many jurisdictions creates an atmosphere in which collaboration with justice and the search of the truth is strongly discouraged.

The practice of settlements outside court- Settlements outside court have become a common practice and even a principal motivation for civil litigation against companies. By definition companies fear bad publicity and the association of its brand with acts reproachable in the eyes of the public and consumers. Typically settlements involve the payment of important amounts to the plaintiffs but without the company recognising responsibility in the wrongdoing. It is also the practice that the settlement will end all legal proceedings whether active or prospective. In view of these considerations, questions could be raised whether settlements out of court are to be left largely unregulated or unsupervised by the judge who has the interest of justice as a primary concern.

In a similar vein, the ICJ draft studies for India, Congo and Nigeria reveal that many people still use intensively traditional mechanisms of justice or dispute resolution. In many cases, the outcome settlement may not be reached through proceedings respectful of fundamental due process guarantees and in some others settlement may be reached under social pressure. After all, traditional or informal dispute resolution mechanisms are run by the communities themselves and are therefore subject to the particular power relations within the communities in question. Some information indicates that companies or company's agents may have been using some of these mechanisms to achieve rapid and more satisfactory arrangements with certain groups. This is an area that requires further study and in which any conclusions at the present stage would be premature

Towards international remedies

Current international corporate accountability mechanisms are also deficient, resulting in a "patchwork...[that is] incomplete and flawed."¹⁹ The decentralized National Contact Points established to review compliance with OECD Guidelines for Multinational Enterprises fail to provide redress to victims, apply the Guidelines unevenly, are only available for corporations based out of forty countries, and often fail to report the outcomes of investigations.²⁰ The International Labour Organization subcommittee established to monitor its Tripartite Declaration of Principles for Multinational Enterprises fails to entertain disputes, while the UN Global Compact's process for encouraging the resolution of violations is informal and largely promotional.²¹ Other multi-stakeholder mechanisms are emerging, but they are highly contextual and not comprehensive.²² Ad hoc arrangements between civil society and corporations to investigate corporate abuses are also rare and may lack consistency of methods and

¹⁹ "Protect, Respect and Remedy..." para 87.

²⁰ *Ibid* para 98.

²¹ UN Global Compact, Note on Integrity Measures, <http://www.unglobalcompact.org/AboutTheGC/integrity.html>

²² For example, the Voluntary Principles on Security and Human Rights promote corporate human rights risk assessments and training of security providers in the extractive sector, and the Kimberley Process Certification Scheme works to stem the flow of conflict diamonds.

standards. Their success depends largely upon the corporation's willingness to engage, and on the social groups' capacity to name, shame, and pressure the corporation. Non-binding codes of corporate conduct are often weak and frequently unobserved and do not generally provide for strong monitoring systems.²³ Other international human rights mechanisms are also insufficient for the purposes of providing redress to victims and deterring corporate abuses.²⁴

Given the deficiencies of the current system, discussion of additional accountability mechanisms or an alternative regime is warranted. Below, one of such alternatives is outlined but there are others that need to also be explored.

Expansion of the Jurisdiction of the International Criminal Court?- The ICC's jurisdiction currently applies only to individuals, including potentially corporate officials, but it does not extend to corporate entities themselves.²⁵ Enlarging the Court's jurisdiction to criminally prosecute corporations has the potential to substantially increase the deterrence and remedial functions of the Court and of criminal law in general. The ICC currently has the power to levy fines and penalties against perpetrators.²⁶ If corporations fell under the Court's jurisdiction, reparations might come from the corporate account rather than any individual officer accused, thus increasing the potential available funds for reparations. Furthermore, expansion of the ICC jurisdiction to corporate entities would better serve the interest of justice in some cases. As the ICJ Panel on Corporate Complicity concluded: "[I]t might be more appropriate to hold a corporation responsible rather than a corporate official, if the commission of the crime had been facilitated by an explicit and collective decision of the management of a company."²⁷ Lastly, while corporations themselves cannot be jailed, they could be subject to specific orders to change internal policies.²⁸ The public attention that would result from a conviction would create significant additional incentives to improve business culture.²⁹

Criminal accountability for corporate entities is not a novel concept under criminal law.³⁰ However, a proposal to extend the ICC's jurisdiction to private corporations was not adopted during negotiations of the ICC Statute.³¹ It appears that the main reasons for such an outcome had to do more with lack of time for a thorough consideration of the matter rather than with substantive objections of a conceptual or doctrinal nature. Successfully re-introducing such proposal in the discussions of the States Party to the Rome Statute over the course of the next year would require overcoming the obstacles

²³ Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YLJ* 443, p. 532 (2001).

²⁴ International human rights treaties and their review mechanisms are binding only on the states that ratify them. States that could be found to have failed to act to prevent abuses may be unwilling or unable to fulfill their obligation for the reasons discussed above. *Id.* at 461-63. In some cases, such as in South Africa during Apartheid, the state may even be an active participant in the abuses. *Id.* at 462.

²⁵ Art. 25(1), ICC Statute.

²⁶ Art. 79, ICC Statute.

²⁷ Corporate Complicity & Legal Accountability, Vol. 2: Criminal Law and International Crimes, International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 56 (2008).

²⁸ *Id.*, at 59

²⁹ *Id.*

³⁰ For example, France recognizes that private entities such as corporations can be found guilty crimes. *Id.*, at 57 and accompanying note.

³¹ *Id.* at 56

that prevented its enactment in the first place.³² Even if such an amendment were successfully introduced, questions remain whether this jurisdictional expansion would be sufficient for remedying the accountability gap that exists in transnational business. Without additional changes to the ICC Statute, prosecution would still be dependent on the will of the Prosecutor or the U.N. Security Council,³³ and would be limited to the most serious human rights violations of genocide, crimes against humanity, war crimes, and crimes of aggression.³⁴

³² The ICJ Expert Legal Panel on Corporate Complicity in International Crimes determined that while there may be legal and political challenges to overcome, “there are no insurmountable conceptual obstacles to imposing criminal liability on businesses as legal entities.” *Id.* at 57. For a discussion of the conceptual legal challenges, see *Id.* at 56-59.

³³ See, Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982).

³⁴ Art. 5., ICC Statute.