NEW MECHANISMS OF ACCOUNTABILITY FOR CORPORATE VIOLATIONS OF HUMAN RIGHTS

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(From left) The University of Liverpool's Dr David Whyte and Stefanie Khoury, with President of the European Court of Human Rights, Judge Dean Spielmann and Section President of the European Court of Human Rights, Ineta Ziemele

I. BACKGROUND

A global movement that seeks to address the failure of the human rights system to hold corporations accountable for violations is gathering momentum.[1] Indeed, the issue of violations of human rights by corporations has been described by one prominent human rights judge as "*the* human rights issue of the 21st century"[2]. Corporate accountability has accordingly become a pivotal issue of human rights policy reform, legal inquiry, academic interest, as well as a critical issue in the work of key NGOs. An important theme in the literature is that international law has failed to rise to the challenge of imposing universal legal standards capable of adequately protecting against human rights abuses[3].

In the most recent major corporate human rights policy initiative, the UN Secretary General's Special Representative business and human rights, Prof. John Ruggie (2005-2011) eschewed the use of binding legal standards and rejected the prospect for establishing a set of norms in international law. Instead Ruggie advocated the incorporation of a 'soft law' instrument that seeks consensus across governments, international organisations and corporations. On 16th June 2011, the UN Human Rights Council adopted a resolution that established a Working Group on the issue of human rights and business and broadly supported John Ruggie's framework for business and transnational corporations. The Working Group was charged with looking at how best to implement the UN framework.

Despite arguments from some states that an international binding treaty would be unable to adequately address the complexity of corporate responsibility, some international NGOs and some developing countries have continued to stress the importance of binding norms for corporations. The recent adoption of Resolution A/HRC/26/L.22/Rev.1 for the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights" is evidence of a new space in the struggle to make corporations accountable for violations of human rights. The initial proposal, led by Ecuador and South Africa, was supported by over 80 States, including the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, and Peru. The Resolution was adopted by majority at the Human Rights Council's 26th Session on 26th June 2014 despite fierce opposition, namely from the USA and the EU. Thus, despite Professor Ruggie's urge for caution against drafting a treaty or a solution in international 'hard' law, the UN Human Rights Council is beginning to seek ways to establish more binding legal standards.

Ongoing state-corporate collusion in human rights abuses is a continued concern for the UN Human Rights Council. A particular concern is the long term threat to the legitimacy of a system of human rights observance that relies upon state systems that are inconsistent and often ill-equipped to deal with these issues, or indeed depend upon the active intervention of governments who very often have a vested interest. Notable examples of this complicity include accusations of the use slave labour in Burma which implicated Unocal;[4] cultural genocide, ethnic discrimination, and violations to the right to a healthy environment in Ecuador that have been blamed on Texaco amongst other oil companies;[5] cultural genocide and the criminalisation of social protest in Guatemala regarding indigenous struggles

of the Sipakapa People against the GoldCorp Mining Company;[6] the criticism of the role of Royal Dutch Shell in widespread intimidation and murder/death of Ogoni activists in Nigeria;[7] murder, extra-judicial killings, kidnapping, unlawful detention, disappearances and torture of employees and activists at Coca-Cola facilities in Colombia;[8] and culpable environmental disaster and wilful lack of observance for safety norms in the workplace not least the ongoing human rights catastrophe in Bhopal, India has implicated Union Carbide and Dow Chemicals.[9]

II. IDENTIFYING THE ISSUE

Corporations may be directly or indirectly implicated in human rights violations. Direct corporate involvement in human rights violations include activities undertaken by employees of the corporation such as torture, unlawful detention, and intimidation of those opposing corporate agendas. Less direct involvement in human rights violations includes corporate collusion in state human rights violations, the sub-contracting of services that violate human rights, engaging in activities that create a context that encourage state violations, dealing with states engaged in systematic violations of human rights, and the manufacturing and sale of products, particularly weapons and military equipment, that facilitate human rights violations.[10]

Perhaps most controversially, corporations are now involved in combat, detention and security activities that commonly involve accusations of human rights violations. Despite growing concern about corporations and human rights there is currently a lacuna in effective corporate accountability mechanisms to deal with these violations.[11] The enhanced power that many private corporations have accumulated including their enhanced role in delivering state security functions has not been matched by checks and balances capable of scrutinizing and holding corporations accountable. Corporations are not subject to the same human rights accountability mechanism as states and extant corporate accountability mechanisms are widely acknowledged as weak or ineffective.[12]

III. THE RESEARCH

It is within this context of increasing interest and attention from the international community to address corporate violations of human rights that this research emerged. The research that led to this briefing is part of a long-term project conducted by the authors of this briefing and funded by the British Academy, that explores the perspectives of judges and officials at the Inter-American (IACtHR) and European Courts of Human Rights (ECtHR) on the feasibility of developing mechanisms capable of holding corporations accountable for violations of human rights.

Interviews with 14 judges at the IACtHR and the ECtHR in the course of this research revealed that all of the judges interviewed supported the contention that a range of non-state entities in general, and corporations in particular, should be held accountable for human rights violations, although not necessarily held ***responsible***. In light of this, a large majority of respondents were against the idea of using the existing human rights courts to impute responsibility directly upon corporations; rather, the majority supported the creation of a new, specialised body to address the issue of corporate harms. A significant minority of judges were supportive of the idea of developing existing mechanisms within their respective courts in order to encompass corporate violations of human rights within the gambit of the court's supervisory mechanism (albeit through the development of new principles triggering state responsibility).

For the purpose of exploring this research finding further, the Arts and Humanities Research Council funded this follow-up study to examine in more detail the form that such a mechanism might take and how it might function. This short study uses data gathered from three focus groups held at the ECtHR in Strasbourg on 27th March 2014. The focus groups included a range of different people involved in the work of the Court: judges, members from the Registrar's office, ad hoc judges and lawyers from the Court. The focus groups were held following a brief seminar on the topic which included presentations from ECtHR President Justice Dean Spielmann and Section President Justice Ineta Ziemele. Participants were divided into three groups of 6-8 people. They were then asked to focus their discussions around three principle areas: firstly, the positive aspects of a new mechanism; secondly, the barriers to creating a new mechanism; and thirdly, ideas about what the new mechanism might look like or would require to come to fruition. Data was gathered and analysed using the Ketso methodology, developed at the University of Manchester.[13]

IV. OPTIONS FOR A NEW MECHANISM FOR CORPORATE ACCOUNTABILITY

1. What are the advantages of a new mechanism for corporate accountability?

Participants identified a number of advantages of establishing a new mechanism for corporate accountability. The major advantage of a new mechanism was the potential of establishing a "tailor-made approach" to address corporate violations of human rights. The suggestions centred around two principle axes. The first explored the re-orientation of human rights law in order to allow direct responsibility[14] for human rights violations to be imputed to corporations; the second explored ways of modifying the existing human rights system. There was awareness across the three groups that the European human rights system already addresses the most important human rights violations. In this respect there was a general acknowledgement that the ECtHR has dealt with cases against states that involve violations of human rights by corporations acting in Europe. Rather than "recreate the wheel" (F3/1)[15], as one participant put it, the discussion should rather be centred on how to use existing human rights courts. Suggestions for how the European Court might be modified included:

a) Creating a new ***specialised sub-Chamber*** or ***forum*** specifically tailored to deal with corporate accountability (outlined in more detail below at Section IV).

b) ***Extending jurisdiction of the European Court of Human Rights*** in order to address state responsibility for violations of human rights by corporations domiciled in European states that operate outside Europe.

c) ***Expanding upon existing mechanisms*** by reinforcing the interpretative power of judges to address corporate harms and underline the responsibility of the state. Suggestions included allowing for more generous interpretations of the doctrine of *positive obligations*[16], including the *horizontal effect*[17], *due diligence*[18], and *duty to remedy*[19].

The majority of participants were against the idea of creating a totally new forum, seeing this option as one participant suggested as "politically unrealistic" (F1/4). This same participant went on to remark that there "… will always be a strong economic argument that [corporations and states] will make as an objection to any form of accountability … there are many states that for economic reasons would be very reluctant to impose a regime of accountability on their national corporations". It is this appraisal of the current situation that prompted the majority of respondents to focus their discussions on the possibilities for developing a new mechanism within the existing regional human rights courts. As one participant noted "[we] should try to imagine some kind of low key proposal, a softer proposal that will stand a chance of being accepted" (F1/4).

A common feature of the focus group discussions was an emphasis on the need for a mechanism that would have "a realistic impact" (F1/1) or that could be most realistically achieved (F2/1; F1/4). Nonetheless, there was a sizable minority who maintained some optimism in developing a new forum.

2. The Barriers to creating a New Mechanism

Participants were asked to reflect on the barriers to creating a new international mechanism to address corporate harms. Responses have been grouped into the following five themes.

The first barrier identified by all groups was the economic and political power of corporations. Participants anticipated that the introduction of a new mechanism would be hindered due to the lobbying power of corporations and their political influence. This hindrance was clearly identified by a participant who commented that the main barriers are the "(…) lack of political will in the first place and the enormous power of TNCs in the second" (F2/1). The same participant went on to assert that an impartial investigation into corporate violations of human rights was "not feasible at all" (F2/1). This was supported by a colleague who suggested that "they [the investigators] would never be impartial" (F2/3). Over all, focus group participants had very little hope in the possibility of establishing a new forum that would not be influenced by corporate interests or as another participant pointed out "the weakness [of a new forum] is that corporations are very powerful in pleading their cause" (F1/4).

Second, a related concern was that that the imposition of legal restrictions on corporations could have the effect of imposing an effective social wage on weaker economies (F2). For some, this "Eurocentric approach" (F1/4) could be detrimental to the economy of the host country. In the words of one participant, "[the companies] will close their operations and… because they won't have any taxes to collect from that company or so they won't only be tortured but unemployed and tortured!". There was therefore widespread concern about the economic damage that might transpire by imposing binding legal norms on corporations. The concern was that by imposing a form of accountability, corporations would simply exercise their right to "forum-shop" (F1/2) for a new State with more lenient regulations.

Third, a minority of participants identified the structure of the modern corporation as "the biggest obstacle to any traditional mechanism" of corporate accountability. One participant noted that the scale of the modern corporations was a key problem because of "the difficulty of determining which [company is responsible]." A related point made by other respondents was that because of the size of a lot of corporations, it's often difficult to determine who may be responsible for a particular act. One asked: "Is it the maison mère, the local branch, or…." (F1/4). Another participant suggested that "it is actually the beneficial owners of the corporations that should be held liable because they set up the whole chain and it is their will do certain things" (F1/7). In other words, participants argued that it is in fact the shareholders who should be held liable since they are the real owners of the company.

The seminar was hosted at the European Court of Human Rights, in Strasbourg, and attracted more than 50 participants

Fourth, one focus group raised the related problem of how to distinguish the responsible party without a direct delegation of authority between the host state and the corporation. One respondent asked: "[if there is not] this link between the state and the company, then what do we do? Who is responsible?" (F2/4).

Finally, a majority of participants noted that there remains a lack of expertise in the ECtHR and other regional courts to deal with corporate violations of human rights. This opinion was shared by several participants in Group 2 who agreed that "we [the ECtHR] are not well equipped in terms of our expertise to deal with issues which would involve MNCs who are in breach of human rights" (F2/3).

All of the focus groups pointed to the difficulties of accurately designating a responsible party; defining which State ought to be implicated; and which rung of the corporate ladder is responsible, i.e. the headquarters or the subsidiaries. The transnationality of some corporations was identified as a problem for any mechanism that might be used to seek redress for corporate harms.

Despite the problems outlined above, there was unanimity that the current gap in international standards applying to corporate human rights violations requires some kind of international mechanism, be it a new forum or a development within the already-existing human rights supervisory mechanisms. As one participant proposed, "countries do not want to deal with these [corporate accountability] issues [alone], so they won't regulate the companies unless (…) there is a national or international forum to allow that space for them. Then maybe we would see some changes" (F2/1).

3. What form might this new mechanism take?

There were several recommendations on the appropriate form and location of a new mechanism to address corporate harms.

First, a reorganisation of the ECtHR was suggested: rather than divide the cases by Section corresponding to the nationality of the judges (there are currently five Sections and the Grand Chamber), it was suggested that the cases be dealt with according to the specialisation and competencies of the judges. The logistics of this approach was explained by one participant as expanding upon what has been "(…) happening at the Registrar's filtering system [where] they have instituted a specialist sub committee and they have been put together by skill and competencies; and there is absolutely no reason why that shouldn't encompass the entire court. So we're suggesting that there be a corporate chamber" (F3/1). It was suggested that this could be done on a case-by-case basis where the ECtHR might sit "in some special formation dealing with special issues and cases" (F3/5).

Second, some proposals included locating the new mechanism at the International Court of Justice (ICJ) in The Hague, discussed in Group 1. The status of the ICJ as an international forum of longstanding political legitimacy, the plural legal system upon which it is based[20], and its organisation into specialised chambers (see Article 26[21] of the ICJ) makes this an institution that some saw as appropriate as a host of a 'corporate human rights chamber'.

Third, some argued that rather than one forum for corporate accountability at the international level, it would be more appropriate to have regional *fora* that might be better equipped to deal with violations in a particular part of the world, with some harmonization between the tribunals.

Such *fora* could be set up as permanent tribunals. It was suggested that judges sitting in these specialised branches could be *ad hoc* or seconded from the relevant regional human rights court. Participants explained that this would provide easier access for victims as well as perhaps provide more legitimacy to the process given that victims may not be able to travel to a different region or continent to petition their rights. In response to this point, one participant suggested that "maybe we (the Court) should have an ECtHR branch in Bangladesh or Cambodia for instance. The UN has offices all over the place, so the Court could have offices as well" (F1/7).

Fourth, all three groups raised the possibility of extending the Rome Statute in the International Criminal Court (ICC) to apply to corporate, as well as natural, persons. However, there was caution about for reopening the debate within the framework of the ICC. Some pointed out the ICC has an "enormously high threshold" (F2/4) and applies a particular interpretation of the crimes and perpetrators of the crimes that it pursues. One participant stated that it was understandable that the ICC did not adjudicate against corporations because, corporate violations are "peanuts" (F2/1) compared to the grave breaches or crimes against humanity the court deals with.

Finally, one group proposed that a regional human rights commissioner could oversee the implementation of national legislation and/or national initiatives to address corporate harms. According to one participant, "the most realistic possibility at the regional level is to set up some form of commissioner who has the responsibility for developing corporate responsibility at the national level and bringing it back to the regional system" (F1/4). From this starting point, perhaps a regional or international mechanism might be set up at the behest of one or two countries that are willing to push legal mechanisms of corporate accountability. The groups noted that standards might be agreed in a charter that might be tailored for the specificity of corporations in the same way that the Social Charter is tailored to account for civil and political rights as well as for economic and social rights. Group 1 explored what the role and portfolio of a regional corporate human rights commissioner might look like. They concluded that it should be a person "…whose responsibility it is to develop corporate codes of conduct, to preach best practices to states regarding accountability and remedies and some sort of fact-finding capacity with respect to egregious violations of companies registered in European countries irrespective of where those violations take place" (F1/4). The question arose whether this person would have an investigatory or authoritative role. Would s/he have "the competence to hold a company accountable [or clearly identify a human rights violation] or have more of an arbitrational role" (F1/6)? The feasibility of harmonizing national laws to address corporate harms was questioned; yet the response to this problem by a number of participants was that such an approach would also provide the opportunity for European states to be more assertive in their legislative functions.

V. CONCLUSIONS

The Council of Europe's Parliamentary Assembly has addressed the issue of business and human rights. In Resolution 1757 (2010), the Parliamentary Assembly critiqued the legal vacuum created by the reliance on "corporate social responsibility" measures which are, the Resolution points out,

"… essentially only 'soft' law instruments or voluntary codes of conduct. They lack effective judicial or other legally binding mechanisms to protect victims of abuses by businesses". Resolution 1757, amongst other things, calls upon Member States to:

> *7.2. Encourage the implementation of the United Nations "Norms on the Responsibilities of Transnational Corporations and other Business enterprises with Regard to Human Rights"*[22] *by business entities registered within their jurisdiction;*
>
> *7.3. Legislate, if necessary, to protect individuals from corporate abuses of rights enshrined in the Convention and in the revised European Social Charter (ETS No. 163).*

The call by the UN Human Rights Council (noted above) to begin drafting a a legally binding agreement that addresses corporate harms appears to be consistent with the current policy of the Council of Europe. A binding agreement may not offer a quick fix to solve the problem of corporate violations of human rights, but it could at least begin to tackle some of the related issues (regulatory gaps, uneven standards of domestic oversight, monitoring and enforcement) but also would begin to offer alternative means of remedy for victims. Such a move would, of course require some form of judicial enforcement mechanism. In this report we have considered some of the options to develop such a mechanism, as proposed by human rights professionals: judges, lawyers and court officials.

In conclusion, those respondents identified a number of significant barriers to the development of such a mechanism. Amongst such perceived barriers, the most widely referred to was the power of the corporate lobby; other barriers cited in the focus group discussions were barriers that are also commonly promoted by corporations themselves (the economic impact of regulating corporate conduct, the complexities of law and of corporate structures). Yet, respondents were also clear about the pressing need for reform, and were generally clear about the central role that courts and related legal form can play. In summary, the judicial mechanisms proposed included:

> *1. A reorganisation of the ECtHR to create a section that could bring together judges specialisation and competency in the cases involving non-state actors.*
>
> *2. A corporate human rights chamber based at the International Court of Justice (ICJ) in The Hague.*
>
> *3. Specialised permanent tribunals at a regional level (linked to existing human rights courts) with some level of harmonization across tribunals and judges from the human rights courts.*
>
> *4. The extension of the Rome Statute in the International Criminal Court (ICC) to apply to corporate, as well as natural persons.*
>
> *5. National mechanisms overseen by regional human rights commissioners (appointed by the UNHRC or the regional human rights courts)*

Clearly some of those proposals will need to be fully worked through before they become serious 'proposals'. However, in this context, it is worth noting that some of those proposals have had some extended consideration. Thus, for example, corporate persons did feature in earlier versions of the Rome Statute. Moreover, the preamble to the 'Draft Statute of the World Court of Human Rights' proposed by Nowak and Kozma[23] sets out a '21st Century' approach to human rights which recognizes "States can no longer be considered as the only actors that can be held accountable for human rights violations", and that a "World Court of Human Rights should become the focal point for non-criminal accountability of both States and non-State actors".[24] A similar proposal for a World Court of Human Rights tabled by Martin Scheinin also incorporates non-state actors.[25]

The conclusions reached in this report and therefore not necessarily novel; neither do they constitute an exhaustive exploration for alternative mechanisms. Rather this report is offered as a contribution to a debate that is gaining some momentum. Modest though this research project is, it is significant in the sense that it reflects the views and the practical experience of human rights professionals. For this reason we regard it as a significant point of orientation for exploring the mechanisms that will be required to implement a new set of human rights standards for corporations.

ENDNOTES

1. See, variously, Brecher, J.; Costello, T. and Smith, B. (2002) *Globalization from Below: The Power of Solidarity*. Cambridge: South End Press.2002; Edelman, M. (2001) 'Social Movements: Changing Paradigms and Forms of Politics', in *Annual Reviews: Anthropology*, Vol. 30, pp. 285-317; Klein, N. (1999) *No Logo: Taking Aim at the Brand Bullies*. New York: Picador USA.

2. Ziemele, I. (2014) *'How to hold corporations accountable for human rights violations? Relevant developments in international human rights law'* presentation to: New Mechanisms of Accountability for Violations of Human Rights by Corporations Seminar, European Court of Human Rights, 28 March 2014.

3. See, for example, Bittle, S. and Snider, L. (2013) 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' in *Critical Criminology*, Vol. 21, pp. 177-192; Clapham, A. (2006) *The Human Rights Obligations of Non-State Actors*. New York: Oxford University Press; Khoury, S. and Whyte, D. (2014) 'The Rarefied Politics of Global Legal Struggles: Corporations, Hegemony and Human Rights' , in *Crime and Justice in International Society*, W. de Lint, M. Marmo, N. Chazal (eds.), Routledge.

4. See for example Chambers, R. (2005) "The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses" in *Human Rights Brief*, vol. 13, no. 14; Muchlinski, P. (2001) "Human rights and multinationals: is there a problem?" in *International Affairs (Royal Institute of International Affairs 1944-)*, vol. 77, no. 1, pp. 31-74. For more information about this case see the Business and Human Rights Centre http://business-humanrights.org/en/unocal-lawsuit-re-myanmar#c9309.

5. See for example, Abelowitz, D. (2001) "Discrimination and Cultural Genocide in the Oil Fields of Ecuador: The U.S. as a Forum for International Dispute" *New England International & Comparative Law Annual*, vol. 7, pp. 145-153; Kimberling, J. (2005-2006) "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron Texaco, and Aguinda v. Texaco" *N.Y.U. Journal of International Law & Policy*, vol. 38, pp. 413-664.

6. Yagenova, S.V. and Garcia, R. (2009) "Indigenous People's Struggles Against Transnational Mining Companies in Guatemala: The Sipakapa People vs GoldCorp Mining Company" in *Socialism and Democracy, Special Issue Latin America: The New Neoliberalism and Popular Mobilization*, vol. 23, issue 3, pp. 157-166. For more information see also the Business and Human Rights Centre http://business-humanrights.org/en/guatemala-sipakapa-indigenous-peoples-demonstrate-against-goldcorp-expansion-plans-citing-threats-to-their-livelihoods-rights-includes-statement-in-spanish#c99314.

7. See for example, Kaeb, C. (2008) "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks" in *Northwestern Journal of International Human Rights Law*, vol. 6, issue 2, pp. 327-353; Saro-Wiwa, K. (1995) "Nigeria in crisis: Nigeria, oil and the Ogoni" in *Review of African Political Economy*, vol.22, issue 64, pp. 244-246; Young, R.J.C. (1999) "'Dangerous and wrong' Shell, intervention and the politics of transnational companies" in *Interventions: International Journal of Postcolonial Studies Special Issue Caribbean Configurations?: The Legacy of C. L. R. James*, vol. 1, issue 3, pp.439-464.

8. See for example, Gill, L. (2007) "'Right There with You' Coca-Cola, Labor Restructuring and Political Violence in Colombia" in *Critique of Anthropology*, vol. 27, no. 3, pp. 235-260; Kovalik, D. (2003-2004) "War and

Human Rights Abuses: Colombia & the Corporate Support for Anti-Union Suppression" in *Seattle Journal of Social Justice*, vol. 2, pp. 393-408; Martin-Ortega, O. (2008) "Deadly Ventures? Multinational Corporations and Paramilitaries in Colombia" in *Revista Electronica de Estudios Internacionales*, vol 16, pp. 1-13.

9. See for example, Pearce, F. and Tombs, S. (1989) "Bhopal: Union Carbide and the Hubris of Capitalist Technocracy" in *Social Justice*, vol. 16, no. 2, pp. 116- 44; Walters, R. (2009) "Bhopal, Corporate Crime and Harms of the Powerful" in *Global Social Policy*, vol. 9, no. 3, pp.324-327.

10. See, for example Tofalo, I (2006) 'Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations' in De Schutter, O (ed.) *Transnational Corporations and Human Rights* Oxford: Hart; and Cernic, J (2010) *Human Rights Law and Business: corporate responsibility for fundamental human rights*, Groningen: Europa Law Publishing.

11. Werhane, P (2012) 'Multinational Corporations and Global Justice' *Business Ethics Quarterly*, 2012, Vol. 22 Issue 1, p193-198.

12. Matten, D, Crane, A and Chapple, W (2003) "Behind the Mask: revealing the true face of corporate citizenship" *Journal Business Ethics*, vol. 45, no. 1.

13. See http://www.ketso.com/learn-about-ketso

14. The proposal to introduce direct responsibility has been addressed by scholars who argue that "international law should move in the direction of generally extending human rights obligations of States to private corporations to the extent such obligations are susceptible to application to non-state actors" (Vasquez**,** C.M. (2005) "Direct vs. Indirect Obligations of Corporations Under International Law" in *Columbia Journal of Transnational Law*, vol. 43, p. 948, pp. 927-959; see also Ratner, S.R. (Dec. 2001), "Corporations and human Rights: A Theory of Legal Responsibility" in *The Yale Law Journal*, vol. 111, no. 3, pp. 461-465, pp. 443-545). The European Convention prohibits the abuse of Convention rights by all actors, State and non-State, at Article 17. It stipulates that:

Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The IACtHR has explicitly stated its position on non-state actors in its early landmark case *Velasquez-Rodriguez v Honduras* (1988) in which it stated that the breach of the Convention:

(...) Is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a state is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law(§ 170).

The IACtHR went on to detail that a human rights violation,

(...) Initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the *lack of due diligence* to prevent the violation or to respond to it (...) (§172, emphasis added).

The African Commission on Human and Peoples' Rights has recently adopted Resolution 148: Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (2009) which has been specifically tasked to investigate the violations of human and peoples' rights by non-state actors working in Africa.

15. Particular findings and quotes are referenced using a coding system developed to ensure the anonymity of the participants. In this coding system, the "F" followed by a number refers to the focus group; the number following the backslash refers to the person speaking, e.g. F3/4 would indicate participant 4 in focus group 3.

16. THE DOCTRINE OF POSITIVE OBLIGATIONS REQUIRES STATES TO ACT IN ORDER TO PROTECT AGAINST, AS WELL AS TO ABSTAIN FROM COMMITTING VIOLATIONS OF HUMAN RIGHTS. SEE FOR EXAMPLES AT THE ECTHR: *APPLEBY V UK* [JUDGEMENT OF 6 MAY 2003] APP. NO. 44306/98 ECHR 2003-IV; *COSTELLO-ROBERTS V UK* [JUDGEMENT OF 25 MARCH 1993] (APP. NO. 13134/87) (SER. A) NO. 247-C; *FADEYEVA V RUSSIA* [JUDGEMENT OF 9 JUNE 2005] (APP. NO. 55723/00) REPORTS OF JUDGMENTS AND DECISIONS 2005-IV; *FUKLEV V UKRAINE* [JUDGEMENT OF 7 JUNE 2005] (APP. NO. 71186/01); *X AND Y V THE NETHERLANDS* [JUDGEMENT OF 26 MARCH 1985] (App. 8978/80) (Ser. A) No. 91. For examples at the IACtHR see: *Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, [Judgement of 1 July 2009] Inter-Am. Ct. H.R. (Ser. C) No. 198.; *Durand and Ugarte v Peru*, [Judgement of 16 August 2000] (Ser. C) No. 68; *Godínez Cruz v Honduras*, Merits [20 January 1989] Inter-Am. Ct HR (Ser. C) No. 3, No. 5; *Maritza Urritia v Guatemala* [Judgement of 27 November 2003] Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003).

17. The horizontal effect effectively makes the state responsible for the acts and omissions of third parties. See for examples at the ECtHR: *Demir and Baykara v Turkey* [Judgement of 11 December 2008] (App. No. 34503/97) ECHR 1345; *Garaudy v France* (Dec.) [24 June 2003] (App. No. 65831/01) ECHR 2003-IX; *Guerra and Others v Italy* [Judgement of 19 February 1998] (App. No. 14967/89) I Eur. Ct. H. R. 2101; *López Ostra v Spain* [Judgement of 9 December 1994] (App. No. 16798/90) 303-C Eur. Ct. H. R. (Ser. A); *Norwood v UK* [Decision 16 November 2004] (App. No. 23131/03) ECHR 2004-XI; Öneryildiz *v Turkey* [Judgement of 30 November 2004] (App. No. 48939/99) ECHR 2004-XII; *Tătar v Romania* [27 January 2009] (App. No. 67021/01). See for examples at the IACtHR: *Bámaca Velásquez v Guatemala* (Merits) [25 Nov. 2000] Inter-Am. C.H.R. (Ser. C), No. 70; 6. *Blake v. Guatemala* [14 January 1988] Inter-Am. Ct HR, Merits (Ser. C) No. 36; *Comunidad de Paz de San José de Apartadó v Colombia* [2 February 2006] Provisional Measures, Inter-Am. Ct. H.R.; *Peace Community of San José de Apartadó* (18 June 2002) Order of the Court, Inter-Am. Ct. H.R. (Ser. E) (2002); *Comunidad Mayagna (Sumo) Awas Tingni v Nicaragua* [23 June 2005] Inter. Am. Ct. H. R., Case No. 11.577, (Ser. C), No. 127; *Kichwa Peoples of the Sarayaku community and its members / Matter of the Indigenous Community of the Sarayaku People v Ecuador* [15 June 2005] Inter-Am. Ct. H.R. (Ser. C) No. 124 (2004); *Pueblo indígena Kichwa de Sarayaku regarding Ecuador (Matter of)*, [17 June 2005], Opinion Judge Cançado Trindade; La Rochela Massacre v. Colombia, Merits, Reparation and Costs, [7 May 2007] Inter-Am. Ct. HR (Ser. C) No. 163; *Mapiripán Massacre v Colombia* [15 September 2005] (Merits, reparations, and costs,) Inter-Am. Ct. H.R., (Ser. C) No. 134; *Sawhoyamaxa v Paraguay* [Judgment 29 March 2006] Inter-Am. Ct. H. R. (Ser. C) No.146; *Velásquez-Rodríguez v. Honduras*, [29 July 1988] Merits, Inter-Am. Ct. H.R. (Ser. C) No. 4; see also Dissenting Opinion of A.A. Cançado Trindade in *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic* [18 August 2000] Order for Provisional Measures, Inter-Am. Ct. H.R. Series E, No. 2.

18. The concept of due diligence as applied in such cases has been most significantly developed at the IACtHR. It not only triggers the responsibility of the state for the violation of a right by a non-state actor, but also requires the state to provide a *remedy* for the violation. See for example at the IACtHR: *19 Tradesmen or Merchants v Colombia* [Dec. Admissibility] (App. No. 14807/89) 72 DR 148, [Judgement: Merits, Reparations and Cost 3 July 2004] Inter-Am. Ct H.R. (Ser. C) No. 10 (ECommHR); *Báldeon Gárcia v Peru* [6 April 2006] Inter-Am. Ct H.R., Judgement: Merits, Reparations and Costs (Ser. C) No. 147; *Community U'wa (Third Report on the Situation in Colombia)* [Third Report on the Human Rights Situation in Colombia 26 February 1999] Chapter X, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, Original: English; *Velásquez-Rodríguez v. Honduras*, [29 July 1988] Merits, Inter-Am. Ct. H.R. (Ser. C) No. 4.

19. The duty to prevent has been elaborated upon by the ECtHR (see for example *Osman v United Kingdom* [29 October 1998] (App. No. 23452/94) Reports of Judgements and decisions, EHRR 1998-VIII), which has established that the state authorities must take preventive measures beyond establishing an effective criminal law system if private actors impose a 'real and immediate risk' to the life of a person, which is known or ought to have been known by the authorities (Schönsteiner, J., 2011, 'Irreparable Damage, Project Finance and Access to Remedies by Third Parties' in S. Leader and D. Ong (eds.) *Global Project Finance, Human Rights and Sustainable Development*. Cambridge: University Press: 292). For examples from the IACtHR involving preventative measures see for example: *Order for Provisional Measures in the matter of Indigenous People of Kankuamo regarding Colombia* [20 November 2000] I.A.Ct.H.R. Series E, No. 1; *Order for Provisional Measures in the matter of the Jiguaminadó and Curbaradó Communities regarding Colombia*, [6 March 2003] I.A.Ct.H.R. Series E. No. 1.

20. According to McWhinney (Judicial Settlement of International Disputes. Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court, M. Nijhoff Publ., Dordrecht, 1991:170-171) the ICJ has staked a claim to universality both in the election of its members and in the range of different legal cultures and legal systems it represents. He argues that the ICJ integrates and synthesises "diverse jurisprudential strains, for purposes of producing a new, pluralist, jus gentium-based international law, both substantive and procedural" (ibid: 171).

21. It reads:

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

22. This refers to the "Draft Norms" that were subsequently ditched by the Ruggie process.

23. Nowak, M and Kozma, J (2009) *A World Court of Human Rights*, Geneva: Agenda for Human Rights.

24. Ibid.: 22-23.

25. Scheinin, M (2009) *Towards a World Court of Human Rights*, Geneva: Agenda for Human Rights.

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