

Blurred Lines: From International to Domestic and Viceversa in the Field of Human Rights and Business

Líneas inciertas: De lo internacional a lo doméstico y viceversa en el tema de los derechos humanos y las empresas

Humberto Cantú Rivera

Associate Researcher and Ph.D. candidate at the Centre de recherche sur les droits de l'homme et le droit humanitaire (CRDH) of Université Panthéon-Assas Paris II. Expert Adviser to the Mexican delegation during the first session of the Open-Ended Intergovernmental Working Group on the elaboration of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Former Visiting Professional at the Office of the UN High Commissioner for Human Rights, and 2013 Scholar of The Hague Academy of International Law. CONACYT/UANL/SEP Scholar.

Email: humberto.cantu.r@gmail.com



ABSTRACT

International human rights law works in a bi-directional way: a top-down approach whereby treaties establish obligations for States, while a bottom-up approach contributes to make repeated practice of those (or similar) standards a legal obligation. The polarized field of business and human rights may benefit from following this double approach: the establishment of treaty obligations for States and corporations, if achieved, will be only sufficient if it is accompanied by a bottom-up approach that reinforces the belief that corporations have human rights responsibilities. The development of State practice based on the UN Guiding Principles on Business and Human Rights is the most important aspect that needs to be addressed to ensure the effective protection of human rights.

KEY WORDS

Business and human rights – Extraterritoriality – International and domestic law on human rights – Soft and hard law.

RESUMEN

El derecho internacional de los derechos humanos funciona de manera bidireccional: a través de un enfoque descendiente por medio del cual los tratados internacionales imponen obligaciones a los Estados, y a través de un enfoque ascendente que contribuye a que una práctica reiterada de ciertos estándares por diferentes Estados

se convierta en una obligación jurídica a nivel internacional. El polarizado campo de las empresas y los derechos humanos puede beneficiarse con este doble enfoque: de lograrse, el establecimiento de obligaciones convencionales para Estados y empresas sólo será suficiente si se ve acompañado de un enfoque ascendente que refuerce la convicción de que las empresas tienen responsabilidades en el ámbito de los derechos humanos. El desarrollo de práctica del Estado basada en los Principios Rectores de la ONU sobre Empresas y Derechos Humanos es uno de los aspectos más importantes que necesitan ser atendidos para asegurar la protección efectiva de los derechos humanos.

PALABRAS CLAVE

Empresas y derechos humanos – Extraterritorialidad – Derecho internacional y nacional de los derechos humanos – derecho no vinculante y derecho positivo

I. INTRODUCTION¹

The field of human rights and the responsibility of corporations is located at the borderline of public and private law; of national and international law; of hard law and soft law, and of law and non-law. As such, it represents a gray area that provides an ample opportunity for interpretation and development, given the intrinsic clashes between different sets of legal concepts and traditions. The field of human rights and business also highlights the differences between legal cultures and traditions —particularly between civil and common law—, and shows not just how international law (sometimes) influences or modifies legal reasoning and development at the domestic level, but also how domestic jurisdictions can in turn be catalysts for the development of international law.

This can be clearly observed in the current ideological conflict being argued at the UN regarding human rights and the responsibility of corporations. The adoption of the UN Guiding Principles on Business and Human Rights in 2011 showed the complexities —and possibilities— of involving different stakeholders to create a workable and acceptable framework for corporate responsibility, despite its non-legal character and the criticisms voiced against it. On the other side, the new effort to develop a binding treaty covering these issues clearly demonstrates a —perhaps erroneous— belief that the State-centric model in the field of human rights still is an



1. A previous version of this article was presented at the Seventh Melbourne Doctoral Forum on Legal Theory, organized by the Melbourne Law School in December 2014.

insurmountable paradigm. As well, several high-profile cases before domestic jurisdictions have had the opportunity to examine specific situations dealing with corporate responsibility for human rights, with varying results. The main argument of this paper is that those gray areas where the international and domestic regimes meet can provide profound insight on how international law and relations will continue to develop in the twenty-first century, where the State-centric model may be at one of its weakest points and where the presence, influence and power of non-traditional subjects (or participants?) of international law has become not just apparent, but undeniable.

This article, divided in two parts and four sections, will analyze in the first part the issue of human rights and corporate conduct, particularly in relation to the creation and development of norms. In this sense, the first section will analyze the bidirectional influence existing between international law and domestic practice, mainly by the political organs of the State; a second section will then focus on the role of domestic courts as interpreters of international law, showing how they may distance themselves from the action of the political organs, but also analyzing their role in the development of international legal standards. The second part of the article focuses on the existing dichotomy between the adoption of positive law and soft law; thus, the third section analyzes some of the advantages and challenges that the adoption of an international treaty on business and human rights would face, while the fourth and last section discusses why corporate self-regulation is a necessary addition to any proposal dealing with business and human rights issues. Finally, this article argues that the current blurred lines between international and domestic law and between the effects of soft law and hard law allow for the development of practical and effective norms that, if constructed correctly, can pave the way for an effective protection of human rights in the face of corporate activity.



II. Human Rights and Corporate Conduct: From International Rules to Domestic Standards?

The question of human rights and corporate conduct, particularly of the impact of corporate activities in the personal sphere of individuals, has attracted attention for several decades in different regions of the world. Several initiatives have been developed to try to control corporate conduct

to some extent,² while others have focused on developing a responsible business culture.³ It is in the latter that some advances have been made, particularly under the mandate of intergovernmental organizations such as the United Nations or the Organization for Economic Cooperation and Development (OECD). The most notorious of such initiatives are the UN Guiding Principles on Business and Human Rights, a set of standards developed by the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations, John Ruggie, based on a three-pillared scheme: the State duty to protect human rights, the corporate responsibility to respect them, and the need for victims to have access to justice. Despite NGO criticism, wide consensus has existed since 2011 on the fact that they are a starting platform from where this issue can be addressed and developed, supported especially by other UN programs and agencies, by other intergovernmental organizations such as the OECD—through its 2011 update of the Guidelines for Multinational Corporations—, or by regional organizations such as the European Union⁴ or the Organization of American States.⁵



A common standard to those initiatives has been the fact that most of them have been adopted at the international level. However, given the absence of an international treaty imposing binding obligations on States, most of them have relied on the discretion and will of States to take measures to implement their political commitments at the intergovernmental level in their domestic spheres. It is in this turning point that the question of effectiveness becomes relevant but also relative: how do international instruments affect the domestic behaviour and normativity of States, on the one hand, and how do the domestic decisions of governments affect the international status of widely adopted standards, but which lack a binding character for their main addressees, corporations? To some extent, there is a bidirectional

2. Commission on Transnational Corporations, *Draft U.N. Code of Conduct on Transnational Corporations*, 23 I.L.M. 626 (1984); Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003); Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1 (25 June 2014).

3. Global Compact, available at <https://www.unglobalcompact.org>; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (21 March 2011); OECD, *OECD Guidelines for Multinational Enterprises*, 2011.

4. European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (25 October 2011); Council of the European Union, *EU Strategic Framework on Human Rights and Democracy*, Doc. 11855/12 (25 June 2012).

5. Organization of American States, *Promotion and Protection of Human Rights in Business*, AG/doc.5452/14 (4 June 2014)

influence between international standards and domestic law, where the first ones find their way through public policy and legislations at the domestic level, and which then can represent the practice of States under international law. A different role is left to domestic jurisdictions, which in some cases can act as interpreters of international law, and therefore directly contribute to — and potentially affect— the status of a definite set of international standards.

A. The bidirectional influence between international law and domestic practice

International law and domestic legal standards tend to reciprocally affect each other. Just as in many contexts international law may affect legal dispositions and practice in the domestic order, and even dictate what type of conduct is expected from a State within its jurisdiction, practice under national law can serve to reinforce the status of an international standard, particularly through the concept and development of customary rules. It is a dual approach through which both sets of norms may feed each other, and mutually provide each other with legitimacy at both the national and international levels. Thus, this dual approach comprehends a top-down perspective on the one hand, and a bottom-up scenario on the other hand, through which norms and standards of different regimes are able to develop their legal —if not binding— character within a specific jurisdiction,⁶ as well as a general recognition of their normative status.

The first of these two approaches, the top-down perspective, appears to be the most common method in current international law practice: whenever a State ratifies or adheres to an international treaty, it obliges itself to ensure the enforcement of the international norms within its jurisdiction. Particularly in international human rights law, this duty is included in most instruments at the universal⁷ and regional⁸ levels, and involves an obligation of the State



6. On soft law and its role as a proto-legal rule, see Malgosia A. Fitzmaurice, 'International Protection of the Environment', 293 *Collected Courses* (Martinus Nijhoff, 2001) 128-132.

7. A version of this obligation is included in all nine core human rights treaties, although in different form depending on if the treaty is a prospective (recognition of certain human rights) or a restrictive treaty (prohibition of certain conducts). In this sense, such provisions can be found in the following articles: *International Covenant on Civil and Political Rights*, art. 2.2; *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 2.1.c; *International Covenant on Economic, Social and Cultural Rights*, art. 2.1; *Convention on the Elimination of All Forms of Discrimination Against Women*, art. 2.b; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 2.1; *Convention on the Rights of the Child*, art. 4; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art. 84; *International Convention for the Protection of All Persons from Enforced Disappearance*, arts., 3, 4; *Convention on the Rights of Persons with Disabilities*, art. 4.a.

8. *American Convention on Human Rights*, art. 2; *European Convention on Human Rights*, art. 1; *African Convention on Human and Peoples' Rights*, art. 1.

to adapt its domestic policy and legislation to the content and scope of the international human rights provisions. Thus, in the context of human rights treaties, it is a recognized obligation that the adhering or ratifying State must ensure through legislative and other measures that the rights contained in the international provision are enforced and justiciable at the domestic level.

However, in the context of business and human rights, this traditional method faces several ‘technical’ difficulties that derive directly from the ‘soft’ character of the instrument containing the UN Guiding Principles on Business and Human Rights.⁹ This is so because the Guiding Principles constitute a set of UN-endorsed policy recommendations, where their implementation by States and corporations is considered to be largely voluntary,¹⁰ and where only some of its provisions can be clearly recognized as State obligations under international law.¹¹ Nevertheless, a caveat that should be taken into consideration before completely discarding the UN Guiding Principles as soft law devoid of any legal value or significance¹² can be found in some classic notions of public international law, particularly in relation to unilateral acts and the formation of customary rules of international law.¹³



Regarding unilateral acts, the fact that the Guiding Principles were unanimously endorsed by the Member States to the UN Human Rights Council in 2011 could suggest that each State, through their vote, expressed its conformity¹⁴ and acceptance of the content of the final Ruggie report, and therefore of its commitment to such principles.¹⁵ Thus, these unilateral acts by the members of the Human Rights Council may constitute an impor-

9. Cf. Jean D’Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2013) 129, 174-8, where the author argues that norms enshrined in a non-legal or soft instrumentum can still produce legal effects.

10. Ruggie famously noted that corporations will be held accountable by the ‘courts of public opinion’, based on the expectations society has in relation to corporate conduct. However, and despite the possibly negative practical implications for companies and the influence such impacts may have on their conduct, such social expectations are far from having any legally binding effect. Report of the 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*, A/HRC/8/5 (7 April 2008) para 54.

11. The only obligation of the State under international human rights law vis-à-vis corporate activity is to have a legal framework in place by which human rights violations by corporations may be properly prosecuted by the State, and through which victims may have access to remedies.

12. On the involuntary legal effects resulting from State conduct, see James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (Oxford University Press, 2012) 416.

13. See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10^{ème} ed. (Daloz, 2010) 390.

14. See René-Jean Dupuy, *Dialectiques du droit international: Souveraineté des États, communauté internationale et droits de l’humanité* (Pedone, 1999) 119, who writes that whenever a State conforms to a text voted in an intergovernmental context, it grants to such instrument a certain legal value.

15. On the creation of State commitments as a result of its actions in international fora, see Denis Alland, *Manuel de droit international public* (PUF, 2014) 170. See also International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000) 60: “...States can be bound by a rule if they can be shown to have consented to it or otherwise recognized it. It is not impossible for such consent or recognition to be manifested by voting in favour of a resolution.” However, cf. Theodor Meron, ‘International Law in the Age of Human Rights’, 301 *Collected Courses* (Martinus Nijhoff, 2004) 412.

tant precedent that reflects a common *opinio juris* of different States of the international community,¹⁶ representative of the different legal traditions,¹⁷ which may well be at the early stages of formation of a customary rule of international law in relation to the three pillars of the business and human rights framework.¹⁸ Additionally, the fact that several States¹⁹ and regional organizations have decided to develop national plans to implement the provisions of the Guiding Principles within their domestic jurisdictions seems to further reflect an existing desire to ensure their effectiveness through legislation or public policies, in order to render them operational.²⁰ In this sense, the unanimous *opinio juris* expressed in 2011 before the Human Rights Council has been relatively followed-up by regional organizations and State practice, which could denote the gradual crystallization of a customary rule of international law recognizing not only the State duty to protect human rights and to provide access to remedies to victims of human rights abuses by non-State actors, but also of an existing corporate responsibility to respect internationally recognized human rights.²¹ The UN Guiding Principles on Business and Human Rights are an example of a formally non-binding instrument adopted at the international level that directs State practice in a particular way, and that reflects the classic top-down perspective of international law.

From a different standpoint, a bottom-up scenario may also influence international developments, and even reinforce the normative status of soft norms, in this case the UN Guiding Principles. This can be observed in the previous example: the practice of States at the domestic level implies



16. See Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, (Cambridge University Press, 2013) 158; Vincent Chetail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland et al., *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy* (Martinus Nijhoff, 2014) 118.

17. See Dupuy and Kerbrat, above n 12, 371-2.

18. See Meron, above n 14, 387, considering law-declaring resolutions as part of a movement (including treaties) towards the codification of a *lex scripta*.

19. So far, several EU Member States have developed or are in the process of developing National Action Plans regarding the Guiding Principles, in order to comply with the EU strategy on this subject. For a more detailed analysis of the European approach, see Humberto Cantú Rivera, 'Regional Approaches in the Business & Human Rights Field' (2013) 35 *L'Observateur des Nations Unies*. As well, the United States of America have announced their intention of developing a national action plan on business and human rights.

20. See Meron, above n 14, 435; see also Dupuy, above n 13, 116.

21. At this point, it is important to note that the State recognition of a customary rule of international law regarding corporate conduct in the human rights sphere may be a viable option, particularly considering that State consensus on an expected conduct from a domestic moral person (the corporation) still rests on the notion that only the State has international legal personality, therefore eluding the debate related to the subjects of international law. See John H. Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 67-68; cf. Rosalyn Higgins, *Problems & Processes: International Law and How We Use It* (Clarendon Press, 1994) 50, who argues that the classic notion of "subjects" should give way to a notion of "participants" of international law.

recognition of an *opinio juris* that may therefore have an effect in the eventual development of a customary rule. It is important, however, to discern between the different types of State practice that may lead to such a development. To a remarkable extent, international human rights instruments have provisions aimed primarily at adapting the domestic regime through legislation, and through ‘other measures’ as appropriate.²² Thus, the main focus in the human rights field is in relation to legislative action, and only to a certain extent on the development of public policies deriving mainly from executive action. Legislative action, on one hand, is the most formally effective method to ensure uniformity between domestic regimes and international standards, and serves to further refine the provisions of an international human rights instrument where they actually take effect;²³ it is through the conformity between dispositions of two different dimensions that legal coherence can be attained, and thus a necessary step for the standardization of the rule of law. It is only through legislative action that the effectiveness and enforcement of domestic standards compliant with international human rights law can be achieved, given the relative permanence and stability of the law. Interesting examples of the bottom-up approach are the Dodd-Frank Wall Street Reform and Consumer Protection Act of the United States of America, particularly its Section 1502 on due diligence regarding conflict minerals, and the EU’s draft regulation on conflict minerals,²⁴ both of which introduce within their legal spheres the corporate human rights due diligence and impact assessments advanced in the UN Guiding Principles on Business and Human Rights. Both examples reflect the ‘hardening’ of a soft norm of international law at the domestic level, which given the absence of an international obligation to implement such standards domestically, could be interpreted as the development of a collective *opinio juris* regarding the corporate responsibility to respect human rights.

In addition, the design of National Action Plans on the implementation of the Ruggie framework at the national level is a policy development that can generate an important progress that could contribute in a bifold manner: not only to the effective and coordinated governmental effort in the domestic sphere

22. See above n 6.

23. Dupuy, above n 13, 118.

24. European Commission, *Directive 2014/.../EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups*, COM/2013/0207 final (15 April 2014).



—thus leading to policy coherence—, but also to the creation of an important momentum that could potentially favor the strengthening of the UN Guiding Principles on Business and Human Rights under international law. Public policies,²⁵ considered to be within the “other measures” clause in human rights instruments, can be powerful complements to national legislation if they include programs to improve awareness and use of the Ruggie framework, especially those related to the corporate responsibility to respect. Considering the expansion in the number of States that have developed or are currently working on developing a business and human rights national plan, or that are including business and human rights issues within broader public policy projects, it is at least partially clear that the bottom-up approach will continue contributing to the progress of these soft law norms at the international level, and to confirm the bidirectional influence between international law and domestic practice.

B. Domestic jurisdictions as interpreters of international law

Domestic jurisdictions have an important role to play in the interpretation and development of international law.²⁶ Through the analysis of disputes brought before them that have international elements or rely on international norms and standards, they are usually the initial instances where normative developments can take place.²⁷ Their role in checking the conformity of acts of the political branches of government²⁸ (the Executive and Legislative powers) with domestic and international standards can represent State practice, and also contribute —through their domestic jurisprudence— to the clarification and refinement of international law.²⁹ It is not



25. Daniel Vázquez and Domitille Delaplace, ‘Public Policies from a Human Rights Perspective: A Developing Field’, (2011) 14 *SUR-International Journal on Human Rights* 37.

26. For important contributions discussing this topic, see Hersch Lauterpacht, ‘Decisions of Municipal Courts as a Source of International Law’ (1929) 10 *British Year Book of International Law*; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011); Benedetto Conforti and Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, 1997); Elaine Mak, *Judicial Decision-Making in a Globalised World* (Hart, 2013).

27. In addition, the subsidiarity principle that is normally required to access supranational jurisdictions creates a duty for domestic courts to assess any claims before they can reach regional human rights tribunals or universal mechanisms. Crawford explains: “Human rights are in the first place a matter of national law; so is foreign investment. International law acts in such cases not as a first order definer of rights and duties but as a second order criterion of appropriateness or lawfulness — a critical standard.” See James Crawford, *Chance, Order, Change: The Course of International Law* (Brill, 2014) 215. For a more detailed insight on this topic, see Gerald L. Neuman, ‘Subsidiarity’ in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013); Paolo G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law*; Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press, 2011) 110.

28. See Antonios Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’ (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 141.

29. Vaughan Lowe, ‘The Function of Litigation in International Society’ (2012) 61 *International and Comparative Law Quarterly* 213-4: “Of course, regardless of the outcome of the case, international litigation always has the effect of reasserting and reinforcing the institutions of international law through which the dispute is pursued, and in this way strengthening the international legal system as such. It also reasserts and strengthens the rules and principles applied by the tribunal. This reinforcing effect is itself a factor that may be counted by repeat players as a significant advantage resulting from litigation.”

surprising, then, that several business and human rights cases have recently been at the forefront of domestic procedures in several jurisdictions around the world. However, the dissimilarities in the approaches followed in such cases is worth mentioning, and may be reflective of the disparity in the position of the different judiciaries regarding these issues, which may mirror their governments' stance in relation to business and human rights. With this in mind, the following paragraphs will briefly consider the impact that cases in the United States, France and Mexico have had in their own jurisdictions, and the effect they may have in the international agenda of this topic.³⁰

The most known cases involving corporations and human rights violations have been brought before the American judicial system. For several years, the Alien Tort Statute served as an unparalleled domestic instrument allowing American tribunals to have universal jurisdiction over claims brought by aliens based on the violation of the 'law of nations', an ambiguous concept that is best represented by customary international law in modern times. However, the Supreme Court narrowed down its scope in two recent opinions, the famous *Kiobel*³¹ and *Daimler AG*³² opinions: in the first one, the Court determined that if a law does not have an explicit intent of extraterritorial application, it does not apply outside of American jurisdiction or where the link with the American judiciary is weak. Thus, it limited the possibility of aliens bringing claims under the Alien Tort Statute unless the case has sufficient force to displace the extraterritoriality threshold. In the second one, *Daimler AG*, the Court further refined — although minimally— its *Kiobel* opinion, determining that a corporation can only be regularly sued in its place of incorporation or where it has its principal place of business, effectively reducing the possibility of bringing claims against foreign corporations to those cases in which the relevant corporate conduct took place in U.S. territory. In principle, this position would leave the door open to cases in which American corporations were involved, or where wrongful conduct by domestic or foreign corporations



30. These jurisdictions were chosen because they represent respected judiciaries from a common law system, a civil law system, and from a developing country using a civil law system. Thus, it is representative of different legal systems and traditions from different continents in the world (even if they are mostly Western or Western-influenced States).

31. *Kiobel et al. v Royal Dutch Petroleum Co. et al.*, 569 US ... (2013).

32. *Daimler AG v Bauman et al.*, 571 US ... (2014)

—that fulfils the Sosa criteria of universality, obligatory nature and specificity— took place in the United States. Currently, the status quo of the question of admissibility of claims alleging corporate involvement in gross human rights violations, given two recent contradictory rulings involving American corporations operating abroad, revolves around the issue of determining if all corporate conduct taking place outside of the territory of the United States is beyond the scope of American jurisdiction regardless of the nationality of the alleged offender.³³

From these cases, it has become clear that the Supreme Court of the United States and several other lower courts have been involved in interpreting international law to apply it to cases brought under domestic statutes. Most of them have also been discussing whether they should act as forums to adjudicate claims based on international law, and even whether international law allows them to do so.³⁴ This should come as no surprise, given the particular American position in relation to international law;³⁵ however, their reasoning in resolving the claims before them has been especially problematic for the business and human rights agenda, and for the human rights movement in general. The increase in the requirements to analyze the merits of a claim brought under the Alien Tort Statute has limited the possibility of effectively providing remedies to victims of human rights violations; and while the presumption of innocence applies equally to corporations and to natural persons,³⁶ it has been relatively clear that courts are somehow reluctant to ensure the human right to remedy where foreign or domestic corporations may be called to account, citing ‘foreign policy’ reasons.³⁷ This has had a double effect in the international agenda: it has shifted the focus from litigation to prevention, mainly for corporations but also for States;³⁸ and it has pushed victims of human rights abuses to look



33. *Cardona et al. v Chiquita Brands International Inc. et al.*, 12-14898 (11th Cir, 2014); *Al Shimari et al. v Caci Premier Technology Inc. et al.*, 13-1937 (4th Cir, 2014).

34. Transcript of Oral Argument, *Kiobel et al. v Royal Dutch Petroleum Co. et al.*, 10-1491 (2012) 13.

35. On this point, see Anu Bradford and Eric A. Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 47-9; Harold Hongju Koh, ‘On American Exceptionalism’ (2003) 55 *Stanford Law Review* 1483-7; Louis Henkin, ‘International Human Rights Standards in National Law: The Jurisprudence of the United States’ in Benedetto Conforti and Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, 1997) 204.

36. See Emmanuel Decaux, ‘Le projet de l’ONU sur la responsabilité des entreprises transnationales’ in Isabelle Daugareilh (ed.), *Responsabilité sociale de l’entreprise transnationale et globalisation de l’économie* (Bruylant, 2010)

37. See Benedetto Conforti, ‘National Courts and the International Law of Human Rights’ in Benedetto Conforti and Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, 1997) 4, on the ‘political question’ doctrine and foreign policy acts.

38. Especially through the development of National Action Plans by States to implement the UN Guiding Principles on Business and Human Rights at the domestic level, and through the adoption of human rights due diligence and impact assessments by corporations.

for remedies in the home countries of transnational corporations,³⁹ which may be more appropriate forums to hear their claims.

Another important jurisdiction that must be considered is the French system, given its long-standing tradition regarding international law and dispute-settlement, as well as a recent case argued on the basis of international humanitarian law and customary rules of international law involving French corporations. In *Jerusalem Tramway*,⁴⁰ the Versailles Court of Appeals determined that international treaties codifying customary norms of international humanitarian law were not applicable to private parties (such as the defendants in the case) nor had any direct effect on them, because they had not signed nor ratified the Geneva conventions; the same was held for the customary norms of international humanitarian law invoked in the case.⁴¹ As well, the Court notably stated that corporate social responsibility principles (such as the UN Global Compact) were not legally binding, but rather expressions of moral aspirations. This obviously brings the issue of international legal personality of corporations to the discussion —a question that had been analyzed in *Kiobel* during its instance before the Second Circuit Court of Appeals, and that had reached the same conclusion: that under customary international law, corporations have not been recognized as having an international legal personality. However, the court seemed not to take into consideration recent developments in relation to corporate responsibility in the field of human rights, particularly at the intergovernmental level, where France had been a strong supporter.

This important ruling showcases how difficult it is to hold corporations accountable for violations of international law, as well as the complexities of bringing a claim based on international law before a domestic tribunal. In addition, as an interpretation of international law by a domestic court, this decision may reinforce the belief that corporations don't have responsibilities under international law (especially in the fields of human rights and humanitarian law), and contribute to an understanding that they cannot be held legally liable for non-compliance with existing conventional or custo-



39. See, e.g., *Friday Alfred Akpan et al. v Royal Dutch Shell PLC et al.*, Rechtbank's-Gravenhage [District Court of The Hague], C/09/337050/HA ZA 09-1580, 30 January 2013.

40. Cour d'appel de Versailles [Versailles Court of Appeal], 11/05331, 22 March 2013, 23.

41. Ibid 25; cf. Manuel Devers, 'La responsabilité civile des entreprises multinationales pour fait internationalement illicite' in Anne Peters et al. (dirs.), *Les acteurs à l'ère du constitutionnalisme global* (Société de législation comparée, 2014) 170-6, 184-7.

mary standards. This position would then be contrary to the adoption of policies and legislation at the domestic level in favour of creating corporate human rights responsibilities, and eventually be an obstacle for the development of a customary rule in this regard.

A final example that will be analyzed is a recent ruling by the Supreme Court of Mexico in relation to the human right to a decent standard of living, and in particular to the right to housing. The High Court received a claim⁴² that a real estate corporation had violated norms of international law that the State had ratified,⁴³ particularly in the field of economic, social and cultural rights, while developing luxury apartments. The Court made three particular statements that are interesting to the subject discussed in this article: first, it stated that human rights have a horizontal effect, therefore binding private parties in their contractual or non-contractual relations with each other; second, the Supreme Court mentioned that there is a social expectation —framed in the same terms as the commentary of John Ruggie on the corporate responsibility to respect in the UN Guiding Principles on Business and Human Rights— that corporations will abide by the law and respect human rights, not violate them; and finally, that human rights are a public policy exception, and thus in force regardless of the decision of the parties to ‘opt-out’ of their application in any given context. This judgment has made clear that the judicial system in Mexico may be willing to focus on ensuring that corporations respect human rights, including in their contractual relations, and it’s even more remarkable given its position as an important host in Latin America to foreign direct investment. Thus, for the global business and human rights agenda, this ruling may be representative of an openness of developing countries to contribute to the advancement of human rights standards for corporations.

The previous examples show how difficult it is for domestic jurisdiction to assess claims containing international law elements, as well as the disparity in their approach depending on their legal tradition. This also highlights how little agreement there is —and how much guidance is needed— in topics such as extraterritoriality, applicability of international norms (of



42. Suprema Corte de Justicia de la Nación [Supreme Court of Justice], Amparo directo en revisión 3516/2013, 22 January 2014.

43. Notably the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights and its Additional Protocol.

a conventional or customary character) directly to corporations, and the difference between corporate social responsibility and corporate human rights responsibility. Realizing that some of them may be controversial when discussed in an intergovernmental setting, it is nevertheless important that expert groups or processes —such as the UN Working Group on business and human rights, the OECD Working Party on responsible business conduct or other similar entities— provide some guidance on the current *status quo* of these questions under international law, in order to create a common denominator to which the different actors involved in this type of issues can refer to.⁴⁴ However, the main question is: Should it be a treaty-making process, or a soft law instrument with no binding force but commanding general support from a different range of actors?

III. The Dichotomy of Hard Law Versus Soft Law: On the Current International State of Play in the Field of Business and Human Rights



The issue of the role of corporations and their obligations under international law is not a novel one. Dating back to the 1970s and the proposal for a New International Economic Order,⁴⁵ the UN Commission on Transnational Corporations was tasked with the drafting of a binding code of conduct for transnational corporations, establishing direct obligations under international law. However, the fall of the socialist bloc and the advancement of capitalism led to the abandonment of such a project in 1994. The next project related to the responsibilities of corporations was the UN Global Compact, a corporate social responsibility (voluntary) initiative launched in 1999 by the Secretary-General of the United Nations, which still operates and includes general references to human rights in relation to corporate conduct. Yet another effort to create a binding set of standards was made by the UN Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary organ to the now extinct Commission on Human Rights,

44. See Lowe, above n 28, 220-1: “The adoption of model laws, or treaties and resolutions, can all do much to anticipate the sort of systemic questions that have been mentioned, and can set out basic principles which tribunals can be directed to follow. Those approaches deserve serious consideration as alternatives, often even preferable, to litigation as a means of developing international law.”

45. General Assembly, *Declaration on the Establishment of a New International Economic Order*, A/RES/S-6/3201 (1 May 1974), para 4.g [“4. The new international economic order should be founded on full respect for the following principles: ... g. Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;...”]

which in 2003 adopted the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,⁴⁶ which were nevertheless discarded by the Commission in 2004.⁴⁷ The 2005 appointment of John Ruggie as the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, followed by the unanimous endorsement of the UN Guiding Principles on Business and Human Rights in 2011 by the Human Rights Council, seemed to lead the discussion to a fresh start, one based on consensus and not on confrontation (as had been the case with the two previous efforts to develop binding standards).

In a sense, the dichotomy that had been present in this field —revolving around the adoption of hard or soft measures to encourage corporate conduct that is respectful of human rights— seemed finally left behind, given the support by a wide range of actors to the UN Guiding Principles; despite its criticisms, adoption and use by those actors seemed to legitimize John Ruggie’s claim that their adoption marked “the end of the beginning.” Nevertheless, the hiatus that accompanied the adoption of the UN Guiding Principles on Business and Human Rights on the issue of adopting hard or soft norms to regulate the conduct of corporations did not last enough. In June 2014, a group of States, led by Ecuador and South Africa, called for a vote on a resolution that would establish an open-ended intergovernmental group of experts to draft a binding treaty on business and human rights.⁴⁸ While the vote was deeply divided, it did get enough support from developing countries to pass; however, and in stark contrast to their position in 2011, developed countries (including the United States and the EU Member States sitting in the Human Rights Council) voted against this decision. Instead, they supported the adoption of a different resolution to extend for a second three-year term the mandate of the Working Group on business and human rights,⁴⁹ in an effort to continue strengthening the use of the Guiding Principles. From this standpoint, the next two subsections



46. Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

47. Commission on Human Rights, *Responsibilities of transnational corporations and related business enterprises with regard to human rights*, E/CN.4/DEC/2004/116 (20 April 2004).

48. Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1 (25 June 2014).

49. Human Rights Council, *Human rights and transnational corporations and other business enterprises*, A/HRC/RES/26/22 (15 July 2014).

will focus on this dichotomy: what are the prospects of an international treaty on business and human rights? Is there a realistic expectation that such an instrument could effectively curb human rights violations by corporations? And on the other hand, how effectively are the Guiding Principles, and particularly their second pillar, being used by corporations? Is it realistic to expect them to use human rights due diligence and impact assessments without a binding (international or domestic) framework imposing an obligation?

A. On the prospects of an international treaty on business and human rights

The proposal to create an overarching international business and human rights treaty has been brought to the spotlight at a particularly difficult time: on the one hand, several States have announced or developed plans to implement the UN Guiding Principles on Business and Human Rights at the domestic level, and corporations, national human rights institutions and NGOs are reporting the use of the UN framework in their activities; on the other hand, as it was seen before, courts from several judicial systems have been reluctant to impose international norms (of a customary or conventional character) upon corporate actors for their alleged involvement in human rights abuses in different parts of the world. In this sense, while there is an apparent move towards a diffuse adoption of the Guiding Principles by many relevant actors, including the political branches of several States, there has also been a cautious judicial approach towards giving recourse to victims for damages suffered at the hands of corporate projects, particularly when such situations have taken place in a foreign State. While there is certainly a point in developing international instruments that allow holding corporations accountable for their performance vis-à-vis human rights, it is also important to assess the prospects of a binding instrument from a realistic perspective considering the *status quo* of public international law.⁵⁰

As it currently stands, the proposal is that the open-ended intergovern-

50. For an interesting insight on this, see John Gerard Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization' in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (forthcoming 2015).



mental working group crafts an “instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises;”⁵¹ From an impartial standpoint, there are several potential benefits that this instrument could contribute. In the first place, the adoption of a business and human rights treaty would theoretically allow States and corporations to have a level-playing field, where the same international human rights norms could be applicable to them regardless of their nationality. In a sense, it would create the same rights and obligations for the different actors involved, reducing the political and economic tension that exists in the struggle to attract foreign direct investment, particularly between developing countries. As well, it would establish an homogeneous standard that could be equally applicable to the companies of different States, which would help to reduce the competitive advantage they could have depending on the regulatory oversight exercised upon them by their home State.⁵² Secondly, the process to adopt an international treaty on business and human rights could potentially pave the way for the development of an international mechanism to supervise these type of cases; this point alone has been the focus of many NGOs in the past, given the inability of domestic judicial instances to hold accountable corporations with transnational operations. In the third place, corporations could finally be within the scope of a human rights treaty, and such an instrument could potentially create direct binding obligations stemming from international law. Thus, the development of an international binding instrument that is directly applicable to corporations, and that could create a mechanism to protect and enforce human rights vis-à-vis corporate activity would be the climax of a decades-long struggle to impose international obligations on corporations, which would contribute to fill one of the most important gaps in international human rights law of the past four to five decades. Finally, a business and human rights treaty could be crafted in order to complement the work and progress achieved by the UN Guiding Principles on Business and Human Rights, particularly if the second pillar on the corporate responsibility to respect human rights through due diligence and impact assessments and



51. Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1 (25 June 2014) para 1.

52. For a closer analysis on the concept of competitive advantage, see Anupam Chander, ‘Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy’ (2013) 107 *American Journal of International Law* 833-4.

through the development of grievance mechanisms at the corporate level are included in the international instrument. In a sense, their inclusion could be a catalyzer for the crystallization of corporate human rights due diligence as a nascent customary rule of international law.

However, despite the potential benefits of developing an international business and human rights treaty, the complexities of the subject and the reality of international law and international relations may be serious obstacles to the success of this new effort. Although from a moral and theoretical perspective it may be convenient to have international standards that regulate the conduct of corporations in relation to human rights, its practical implications may be particularly difficult to achieve. This is a result of the Westphalian structure of international law, where sovereignty and an almost exclusive State-centric approach dominate the scene. A reformulation of international law would be necessary if corporations are to be the addressees of direct obligations under international human rights law, so that they can be held accountable directly instead of having to pass through the indirect approach that currently takes place under the State responsibility umbrella.⁵³



Let's consider a hyperbolic example that may nevertheless shed some light on one of the main concerns of the treaty approach. First of all, an important consideration that must be pondered is whether the new instrument would be open for signature by corporations. This is an important aspect, given the traditional State-centric approach of international law in general, and of human rights in particular. States determine whether they engage or not in any given international obligation deriving from a treaty that imposes standards of conduct;⁵⁴ if specific human rights standards would be developed for corporations, wouldn't they also have a right to decide if they join —or not— a specific international instrument? If they don't have this option, how would a new instrument differ from the expert commentaries of UN Treaty Bodies, of Special Procedures mandate-holders or even of the basic dispositions of international instruments —such as the covenants

53. See Vincent Chetail, above n 15.

54. Unless such conduct has achieved such a level of universal recognition to be considered customary law; however, its identification by domestic courts (and even by international courts) is subject to interpretation, making it a less stable option than a codified standard.

of the International Bill of Human Rights —on the State duty to protect human rights within their jurisdiction? As it has been seen in some of the case-law discussed above, courts have considered —despite the criticism against their reasoning— that since corporations haven't signed nor ratified international treaties, they are not subjects of international law and thus are not bound by the same human rights and humanitarian provisions than States. However, if the option of opening up the proposed instrument to ratification by corporations, how would international oversight be arranged to be capable to monitor the behaviour and activities of thousands of corporations from different countries of the world?⁵⁵

Another important aspect is that the proposed instrument will seek to regulate the activities of transnational corporations. However, as such, transnational corporations don't exist from a legal perspective: they are a group of domestic corporations working under a same name or brand in different parts of the world, normally through subsidiaries with their own legal personality and nationality, in a complex set of business relationships.⁵⁶ This is an important difficulty from a procedural point of view: how can any domestic court impose a sanction against a transnational company without having to take into consideration the possibilities of diplomatic protection,⁵⁷ investment arbitration⁵⁸ or even more, the enforceability of its judgments?⁵⁹ Considering the latest judicial cases in this regard, it would not be surprising that any judicial effort to hold corporations accountable for their human rights performance would be challenged by the different approaches to issues such as corporate veil piercing, extraterritoriality or even corporate liability in the field of human rights that exist throughout different jurisdictions.

Other issues closely related to general international law, particularly treaty law, are also worth mentioning. As with all treaties, a business and human



55. However, cf. Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business' (Paper presented at the *Workshop on Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument*, Geneva, Switzerland, 11-12 March 2014) 9: "While it might not be feasible for such a body to monitor or investigate all allegations of corporate human rights abuses, it should use selected cases to issue authoritative interpretation of human rights norms applicable to business."

56. See Devers, above n 40, 148.

57. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Judgment)* [1970] ICJ Rep.

58. See Kaj Hober, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), for an analysis on State responsibility and attribution in the context of investment arbitration.

59. *Chevron Corp. v. Steven Donziger et al.*, 11 Civ. 0691 (LAK) (SD NY, 2014).

rights treaty would be an opt-in instrument that will only be binding on the State that ratifies it, provided that such ratification is made with few or no reservations as to the effect of the treaty's provisions and main intent. Thus, considering the rejection of the treaty proposal by several prominent industrialized economies (the United States and the European Union, specifically), the effect any binding instrument would have on those States and the corporations registered within their jurisdiction is at least discouraging for the overall goal. Additionally, the adoption of a text will possibly be the result of a low common denominator that all intervening States can agree to, which is not a particularly encouraging perspective for the protection of human rights. Thus, considering the possible risks to the main goal of the business and human rights agenda —ensuring corporate respect, compliance and accountability in the human rights field—, it would be important that States, corporations, NGOs and other relevant stakeholders continue working towards the development of domestic measures to implement practical standards that are effective for the protection of human rights.⁶⁰ Such measures should not drift attention and momentum away from the implementation of the UN Guiding Principles on Business and Human Rights, or from the consensus on the need to have an inclusive process that aims at achieving change in corporate culture⁶¹ and a major commitment from States in ensuring respect of international human rights law.



B. On the continuation of “non-voluntary” soft law: from Guiding Principles to corporate self-regulation

An important part of the current discussion on business and human rights has focused on the eventual development of binding norms at the national or international level, destined to regulate corporate activity. However, this new perspective has also recognized the potential, stemming from corporate initiatives, to enhance the supervision of business activities in relation to human rights. Further, it is recognized that corporate initiatives should coexist next to State regulation, under both domestic and international law, in order to create a more complete regime of standards applicable to busi-

60. John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton, 2013) 2: “The core business and human rights challenge lies in devising instruments of public, civil and corporate governance to reduce these tendencies and to provide remedy for harm where it does occur.”

61. *Ibid* 190.

ness activities.⁶² The UN Guiding Principles have contributed to this new approach, where business and human rights issues have become more visible at the international level; this is largely due to the (favorable or adverse) activities of NGOs towards such principles, but also to the development of initiatives by corporations to act in light of the UN Framework. These initiatives have appeared, to some extent, in response to the growing demand of responsible business conduct by society, which has been a powerful motivator to foster the development of a corporate conscience in relation to the effect of their activities in the human rights field. Thus, it is reasonable that a way forward from the UN Guiding Principles will necessarily involve the active participation of business if any attempt is to have a short-term and effective impact on the respect and protection of human rights. Such participation, in the form of corporate self-regulation, has the potential to reach where governmental regulation may not be able to, considering the different aspects and challenges that business and human rights issues may present.⁶³

Academia has for some time focused on discussing why corporations should have an obligation to respect human rights, based on arguments relating to their position in society,⁶⁴ on business ethics or even because an indirect reference is included in the Universal Declaration of Human Rights.⁶⁵ However, it is undeniable that an economic logic will determine where or not a company adopts certain standards or procedures in any operation or activity it is involved in. This much was recognized by Ruggie as Special Representative on business and human rights during his mandate, and has been replicated by others,⁶⁶ including the members of the UN Working Group on Business and Human Rights.⁶⁷ As an economic unit, corporations will be mainly guided by their economic interests, and thus they can only be expected to comply with the law if it is positive law (that is, in force in a jurisdiction they are subjected to) and it does not interfere



62. See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012) 200, where he argues for corporate regulation at different levels and through different approaches.

63. *Ibid.* 201.

64. *Ibid.* 203.

65. *Ibid.* 147.

66. See e.g. Fiona Harris, 'Brands, Corporate Social Responsibility and Reputation Management' in Aurora Voiculescu and Helen Yanacopoulos (eds.), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (Zed Books, 2011).

67. Michael K. Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *Human Rights Law Review*, where he argues some reasons why the business case is important to corporations. On the business case, see also Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law* (Routledge, 2011) 69-70

with their economic pursuits and their creation of profit.⁶⁸ While this position may seem antiquated and even reminiscent of Friedman's argument that the only obligation of companies is to create profit for their shareholders, it still holds true that absent a domestic legal framework imposing obligations on them—including human rights obligations—, no other legal expectation is justified. The corporate social responsibility movement has been discussed as trying to cover some of the extra-legal areas where corporations can have a positive impact; nevertheless, such initiatives are positive efforts—and not obligations under any circumstances—that while commendable, will depend exclusively on the goodwill of the company and its circumstances.

However, some notions from both arguments (the economic logic and the inexistence of dispositions under domestic law) can be advanced to discuss why corporate self-regulation may be an important addition to legal obligations of a domestic or international nature. The second pillar of the Guiding Principles on Business and Human Rights posits that corporations should adopt human rights due diligence and impact assessments to identify, mitigate and eventually redress any damage inflicted upon the human rights of others, in an exercise that should allow the participation of external stakeholders and that should be conducted in a cyclical manner.⁶⁹ Thus, it suggests the adoption of initiatives at the corporate level through which companies can self-impose review procedures of their operations and activities, in order to ensure that they respect human rights. The adoption of such measurement standards, as well as the development of industry practices, can be useful mechanisms to make corporations contribute to the respect of human rights,⁷⁰ if not for other moral reasons, for the sake of not being left behind by its competitors, which can eventually become an asset that is marketable and which therefore can become a profit or a loss for a



68. For example, Chris Pitts argues: "It's entirely normal for soft law standards like the GPs to move toward harder law treaties. And as a former Chief Legal Officer charged with ensuring corporate compliance with standards, I can assure you that executives are more inclined to comply with hard law (like a treaty) — whereas they often will ignore or seek ways around soft law." Chris Pitts, 'For a Treaty on Business & Human Rights' (Paper presented at the workshop 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons', Notre Dame Law School, 14 May 2014) 2.

69. Christine Parker and John Howe, 'Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 298, on self-regulation based on external pressures.

70. See for example Nicola Jägers, 'Will Transnational Private Regulation Close the Gap?' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press, 2013) 300-1, discussing transnational private regulation.

company. The Guiding Principles' suggestion that corporations should measure and address their impacts on human rights provided a fertile ground from which important private initiatives have developed,⁷¹ and which have become more regular practice in the private sphere.

It is important to recognize that a relevant factor for this corporate stance is grounded on their participation in the Ruggie process, and on the focus of empowering them to show how they comply with human rights standards instead of only accusing them of their violation. Their inclusion and participation in the current business and human rights movement is necessary for the development of the responsible business conduct approach; this approach leaves behind the voluntary versus mandatory dichotomy, and instead accepts that for appropriate oversight of corporate activity in the field of human rights to be effective, both type of measures are necessary and interrelated, mutually complementing what the other measure lacks. Self-regulation by corporations, paired with the development of national frameworks that concentrate State action in the effective protection of human rights (including the requirement of human rights due diligence and impact assessments under domestic law), but which also provide businesses with incentives to respect human rights and contribute towards their improvement where possible, should be the goal towards which business, States and civil society aim to.⁷² At the end of the day, only self-regulation will allow corporations to develop tailored measures to respect human rights within their operations, and only States will have the possibility to enact laws and policies that can not only sanction corporate wrongdoing, but also reward exemplary corporate behaviour in the field of human rights.⁷³

The improvement in the respect of human rights by corporations requires the convergence of different approaches, both national and international, public and private, mandatory and voluntary.⁷⁴ Legislation can be an es-



71. A notable example is the Extractive Industry Transparency Initiative (EITI), which aims at fostering transparency in a joint effort by governments, corporations and civil society; cf. Parker and Howe, above n 66, 293, who argue that while corporate self-regulation may look impressive, it does not achieve corporate respect of human rights.

72. On polycentric governance, see Ruggie, above n 57, xlii-xl; see also Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 31-3.

73. See e.g. Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Responsibility for Violations of Human Rights' (2012) 3 *Journal of Human Rights and the Environment* 39.

74. Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 *Utrecht Journal of International and European Law*.

sential tool to encourage or sanction corporate behaviour, but other forces (such as industry standards and corporate initiatives) may provide more effective elements for the implementation of measures to protect human rights. Market or industry incentives may provide the additional motivation necessary to make corporations adopt a responsible business conduct vis-à-vis human rights, one that may complement the public regulatory scheme and achieve sufficient cultural change in the practice of corporations to ensure that human rights are embedded among their main concerns in their quest for profit and business opportunities.

IV. Conclusion

The business and human rights field is one of the most active and complex areas of law in the current legal discipline. It involves different sets of standards from diverse origins and with different functions, thus creating a complex web of processes and interactions between hard law, soft law, international law and domestic law and policies. However, even the most ardent proponent of any particular position in this field cannot help but to recognize that a single approach will not be sufficient to properly grasp the complexities of these issues; thus, it is necessary that the lines that once divided international law from national law, and hard law from soft law, are blurred, in order to propose practical solutions that take the best characteristics from every approach.

From this standpoint, it is clear that international law and domestic practice interact with one another, reinforcing each other and setting the stage for the consolidation of international norms based on domestic usage by States. Domestic courts also contribute to this process, although in a different manner, given their role to ascertain what the law is at a particular moment; thus, they establish what the *lex lata* is, contributing in this way to the development of judicial State practice but also, sometimes, through the refining process of evolving norms and standards, at both the domestic and international levels. The current business and human rights situation calls for practical reasoning that can discern when a doctrinal debate may be an obstacle for the adoption of pragmatic norms; such norms should be constructed with the aim of having an impact in the most efficient way for the protection of human rights, while also being an inclusive process that



allows all stakeholders to work together in the development of a coherent, efficient and effective business and human rights architecture.

Bibliographical References

- Addo, Michael K. 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *Human Rights Law Review*;
- Alland, Denis. *Manuel de droit international public* (Paris: Presses Universitaires de France, 2014);
- Amao, Olufemi. *Corporate Social Responsibility, Human Rights and the Law* (London: Routledge, 2011);
- Bradford, Anu & Posner, Eric A. 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal*;
- Cançado Trindade, Antônio Augusto. *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011);
- Cantú Rivera, Humberto. 'Regional Approaches in the Business & Human Rights Field' (2013) 35 *L'Observateur des Nations Unies*;
- Carozza, Paolo G. 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law*;
- Chander, Anupam. 'Unshackling Foreign Corporations: Kiobel's Unexpected Legacy' (2013) 107 *American Journal of International Law*;
- Chétail, Vincent. 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Alland, Denis et al., *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, 2014);
- Conforti, Benedetto & Francioni, Francesco (eds.), *Enforcing International Human Rights in Domestic Courts* (Leiden: Martinus Nijhoff, 1997);
- Conforti, Benedetto. 'National Courts and the International Law of Human Rights' in Conforti, Benedetto & Francioni, Francesco (eds.), *Enforcing International Human Rights in Domestic Courts* (Leiden: Martinus Nijhoff, 1997);
- Crawford, James. *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012);
- Crawford, James. *Chance, Order, Change: The Course of International Law* (Leiden: Brill, 2014)
- D'Aspremont, Jean. *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2013)
- Decaux, Emmanuel. 'Le projet de l'ONU sur la responsabilité des entreprises transnationales' in Daugareilh, Isabelle (ed.), *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie* (Brussels: Bruylant, 2010);
- Deva, Surya. *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012);
- Deva, Surya. 'The Human Rights Obligations of Business: Reimagining the Treaty Business' (Paper presented at the *Workshop on Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument*, Geneva, Switzerland, 11-12 March 2014);
- Devers, Manuel. 'La responsabilité civile des entreprises multinationales pour fait internationalement illicite' in Peters, Anne et al. (dirs.), *Les acteurs à l'ère du constitutionnalisme*





- global* (Paris: Société de législation comparée, 2014);
- Dupuy, René-Jean. *Dialectiques du droit international: Souveraineté des États, communauté internationale et droits de l'humanité* (Paris: Pedone, 1999);
- Dupuy, Pierre-Marie and Kerbrat, Yann. *Droit international public*, 10ème ed. (Paris: Dalloz, 2010);
- Fitzmaurice, Malgosia A. 'International Protection of the Environment', 293 *Collected Courses* (Leiden: Martinus Nijhoff, 2001);
- Harris, Fiona. 'Brands, Corporate Social Responsibility and Reputation Management' in Voiculescu, Aurora & Yanacopulos, Helen (eds.), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (London: Zed Books, 2011);
- Henkin, Louis. 'International Human Rights Standards in National Law: The Jurisprudence of the United States' in Benedetto Conforti & Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (Leiden: Martinus Nijhoff, 1997);
- Higgins, Rosalyn. *Problems & Processes: International Law and How We Use It* (Oxford: Clarendon Press, 1994);
- Hofer, Kaj. 'State Responsibility and Attribution' in Muchlinski, Peter, Ortino, Federico & Schreuer, Christoph (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008);
- International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000);
- Jägers, Nicola. 'Will Transnational Private Regulation Close the Gap?' in Deva, Surya & Bilchitz, David (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013);
- Knox, John H. 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Mares, Radu (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff, 2012);
- Koh, Harold Hongju. 'On American Exceptionalism' (2003) 55 *Stanford Law Review*;
- Lauterpacht, Hersch. 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Year Book of International Law*;
- Lowe, Vaughan. 'The Function of Litigation in International Society' (2012) 61 *International and Comparative Law Quarterly*;
- Mak, Elaine. *Judicial Decision-Making in a Globalised World* (Oxford: Hart, 2013);
- Mares, Radu. 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Mares, Radu (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff, 2012);
- Meron, Theodor. 'International Law in the Age of Human Rights', 301 *Collected Courses* (Martinus Nijhoff, 2004);
- Neuman, Gerald L. 'Subsidiarity' in Shelton, Dinah (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013);
- Nolan, Justine. 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Deva, Surya & Bilchitz, David (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, (Cambridge University Press, 2013);
- Nolan, Justine. 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 *Utrecht Journal of International and European Law*;
- Nollkaemper, André. *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011);
- Parker, Christine & Howe, John. 'Ruggie's Diplomatic Project and its Missing Regulatory

Infrastructure' in Mares, Radu (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff, 2012);

Pitts, Chris. 'For a Treaty on Business & Human Rights' (Paper presented at the workshop 'Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons', Notre Dame Law School, 14 May 2014);

Ruggie, John G. *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013);

Ruggie, John Gerard. 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization' in Rodríguez-Garavito, César (ed.), *Business and Human Rights: Beyond the End of the Beginning* (forthcoming 2015);

Simons, Penelope. 'International Law's Invisible Hand and the Future of Corporate Responsibility for Violations of Human Rights' (2012) 3 *Journal of Human Rights and the Environment*;

Tzanakopoulos, Antonios. 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International & Comparative Law Review*;

Vázquez, Daniel and Delaplace, Domitille. 'Public Policies from a Human Rights Perspective: A Developing Field' (2011) 14 *SUR-International Journal on Human Rights*.

