ILA Study Group on Business and Human Rights

DRAFT Final Report

23 July 2018

This draft does not reflect a consensus amongst all members of the Study Group but has been published for discussion at the Study Group's working session to take place on Monday 20 August during the ILA Biennial Conference in Sydney.

1. ABOUT THE STUDY GROUP

The International Law Association (ILA) Study Group on Business and Human Rights was established in May 2012. The Study Group has a mandate:

a. to identify issues of international law which arise (or may arise) in connection with the implementation of the United Nations Guiding Principles on Business and Human Rights (the Guiding Principles);\(^1\)

b. to identify issues that might pose a barrier to the effective implementation of the Guiding Principles by States and business enterprises;

c. to consider whether any of the issues identified would, by reason of their nature or complexity, merit further study by an ILA Committee.

The current members of the Study Group are listed in Annex 1.

2. THE GUIDING PRINCIPLES

In 2011, the Guiding Principles were unanimously endorsed by the UN Human Rights Council. The Guiding Principles comprise recommendations addressed to States and business enterprises grouped under "Three Pillars", namely:

a. The State duty to protect against human rights abuses by third parties including business enterprises;

b. The corporate responsibility to respect rights, which suggests that business enterprises should, among other things, adopt a human rights policy and engage in human rights due diligence in order to identify and address adverse human rights impacts with which they may be involved; and

c. Access to remedy for victims including through both judicial and non-judicial, State-based and non-State-based mechanisms.

While the State duty to protect human rights as described in the Guiding Principles is said to reflect existing international human rights law obligations, the responsibility of business enterprises to respect rights, by contrast, is said to reflect societal expectations.²

Importantly, the Guiding Principles were developed through multi-stakeholder processes involving representatives of States, businesses (including industry associations and business lawyers), and civil society (including NGOs, lawyers, and academics, as well as affected individuals and groups).³

3. ACTIVITIES OF THE STUDY GROUP SINCE ESTABLISHMENT

Immediately following the establishment of the Study Group, members were asked to complete questionnaires which sought to identify:

a. relevant substantive issues of public international law which remained unresolved following the endorsement of the Guiding Principles; and

b. systemic issues which might pose barriers to the effective implementation of the Guiding Principles.

In advance of the 2014 ILA Biennial Conference held in Washington DC (the 2014 ILA Biennial), the Study Group prepared a Discussion Paper based on responses to the questionnaires and which sought to examine how the Study Group might take forward work to examine the relationship between the Guiding Principles and international law. The Discussion Paper noted that while there was no consensus on the nature of this relationship, there was a range of evidence that the Guiding Principles were influencing both the practice of States, and the practice of non-State actors.

For example, it was noted that various States had adopted so-called "National Action Plans" in response to the Guiding Principles and that many business enterprises had published or updated their corporate human rights policies, including in the form of codes of conduct or social responsibility and sustainability policies. It was further noted that the Guiding Principles had influenced developments in national legislation in discrete areas (in particular, corporate reporting) and had been the subject of judicial consideration in domestic litigation. The Guiding Principles also appeared to be influencing the practice of UN treaty bodies and the work of individuals holding special procedures mandates from the Human Rights Council.

² Guiding Principles at “General principles”; “Commentary to Principle 1”; “Commentary to Principle 11”; and “Commentary to Principle 12”.


The Guiding Principles have been described as an example of polycentric governance. See, Larry Cata Backer, "On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2011) 9 Santa Clara Journal of International Law 37.
A working session took place at the 2014 ILA Biennial where the Discussion Paper and the future work of the Study Group were discussed.4

Members of the Study Group met again in Geneva during the 2014 UN Forum on Business and Human Rights and a number of conference calls were held through 2015 following which it was agreed that individual members of the Study Group would prepare short papers to further elucidate particular issues of public and private international law arising in the field of business and human rights.

Papers prepared by members of the Study Group explored a wide range of issues including:

a. Human rights considerations in the context of public procurement including the scope of States' positive obligations to prevent business-related human rights abuse in the context of contracting out of public services and the measures which public buyers (of goods and services) might take to promote human rights due diligence by suppliers;

b. Developments in the area of business and human rights in the Organization of American States and the Inter-American System of Human Rights including jurisprudence referring to the UN Guiding Principles and efforts by American States to implement the UN Guiding Principles;

c. The practice of the International Labour Organisation in relation to the adoption of Conventions (which are legally binding) and Recommendations (which are not) and lessons of this practice for the debate regarding the negotiations for a new treaty on business and human rights (discussed further below);

d. Developments and issues in practice arising from the increasing prevalence of human rights clauses in commercial contracts (a mode of 'legalisation' of the Guiding Principles), including the effect they may have on promoting, or potentially undermining, corporate accountability for human rights abuses;

e. Questions of procedure and substance arising in relation to the Guiding Principles requirement of improved access to remedy for victims of business-related human rights abuse, including concerns with proposals for increased use of arbitration and mediation, the jurisdiction of domestic courts to hear cases involving extra-territorial harm, issues of characterization and the law to be applied to cases of business-related human rights abuse;

f. The relationship between climate change and businesses' responsibilities in relation to human rights, including the issue of whether human rights

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4 A record of the discussion is available at: https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1400&StorageFileGuid=05e42598-a90b-452a-b117-19ceaf473e68
violations arising as a result of climate change may also be considered as salient human rights risks demanding a corporate response according to the Guiding Principles;

g. Access to remedy in the United Kingdom for business-related human rights abuses including under the Human Rights Act, the law of tort, the criminal law, specific legislative regimes such as in the areas of employment law and data protection and also via non-judicial mechanisms such as the OECD system of "National Contact Points" (NCPs);

h. The adoption by the Committee on Economic, Social and Cultural Rights of a General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the Context of Business Activities and related questions such as whether attributing responsibility to a State based on the conduct of business actors abroad goes beyond the obligations stipulated in the ICESCR and State objections to the concept of an extra-territorial obligation to ensure corporate respect for human rights.

The Study Group also noted the numerous published articles that had been produced by its members that addressed issues relevant to the Study Group's mandate. Issues identified in the Study Group members' papers as well as their broader scholarship in the field were discussed at a meeting in London in September 2017. It was agreed at that meeting that the Co-Rapporteurs would prepare a final report summarizing the various issues identified and making suggestions as to issues which might merit further consideration by the ILA. Although the Study Group identified issues across all three pillars of the Guiding Principles, considerable attention was devoted to the area of access to remedy.

4. CURRENT ISSUES OF INTERNATIONAL LAW (INCLUDING BARRIERS) IN THE AREA OF BUSINESS AND HUMAN RIGHTS

Through its work as described above, the Study Group has identified, in a non-exhaustive manner, the following issues of public and private international law in the area of business and human rights.

As noted above, the Study Group's original mandate was, among other things, to identify issues of international law which might pose a barrier to the effective implementation of the Guiding Principles. The Study Group's work has made apparent that the Guiding Principles have spawned (or at least brought into focus) a very wide range of issues, some of which are unique to the area of business and human rights, and some of which replicate current issues of concern to international lawyers more generally.
The Study Group has identified a number of issues which might merit further study by an ILA Committee(s) or Study Group(s), and these are set out in Section 5 below.

4.1 Issues arising in connection with the work of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (the IGWG)

In 2014, the Human Rights Council adopted a resolution which established an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an internationally binding legal instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

The resolution passed the Human Rights Council by a very slim margin (with a significant number of abstentions and negative votes) and the work of the IGWG to date suggests that there is not yet a consensus amongst States that a new legal instrument is necessary, or what the content of such an instrument would be. Nevertheless, the resolution raises interesting possibilities on the development of international law as well as exploring standards involving non-State actors.

At its most recent session (in October 2017) the IGWG discussed a document entitled Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights which includes substantive proposals for the contents of a new legal instrument.

The Study Group has not had an opportunity to discuss these proposals in detail but makes the following observations:

a. The State obligations proposed have been criticised as unnecessary on the basis that they restate existing obligations;

b. International legal obligations relating to human rights are proposed to be imposed on "Transnational Corporations and Other Business Enterprises"
(TNCs and OBEs) but the legal mechanism(s) as to how this would be achieved is not yet elaborated;

c. There appear to be significant barriers to progress of the negotiations, in particular as a result of disagreements amongst States as to whether the new legal instrument should only apply in relation to business activity of a "transnational character" and not to "national enterprises" which are obliged to comply with domestic laws;¹⁰

d. While the Chair-Rapporteur recommended as a next step that a draft instrument be prepared for substantive negotiations at the fourth session of the Working Group to be convened in 2018, it would appear that the final consensus of the IGWG at its third session was that the Chair-Rapporteur should instead (only) 'undertake informal consultations with States and other relevant stakeholders on the way forward.'

Absent a draft treaty text, it is difficult to define with precision the legal issues which may need to be resolved in order to achieve consensus and to ensure the effectiveness of any new legal instrument. Nevertheless, if the work of the IGWG proceeds and a draft instrument is prepared, this may create an opportunity for the ILA to be involved in and to contribute to the negotiations as an Observer and in light of the ILA's special consultative status with the Economic and Social Council (ECOSOC).

4.2 Influence of the Guiding Principles on the development of international law

While the Guiding Principles expressly state that they do not create new international law obligations, there is some evidence that the Guiding Principles may be influencing the development of international law. For example,

a. a number of decisions of national¹¹ and international¹² courts as well as awards of arbitral tribunals have referred to the Guiding Principles;¹³

- TNCs and OBEs shall design, adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations.

- TNCs and OBEs shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.

¹⁰See A/HRC/37/67, ¶¶ 59-60.
¹¹See, e.g. Choc v Hudbay Minerals Inc, 2013 ONSC 1414 (22 July 2013); University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015)
¹²See, e.g. INTER-AMERICAN COURT OF HUMAN RIGHTS CASE OF THE KALIÑA AND LOKONO PEOPLES V. SURINAME JUDGMENT OF NOVEMBER 25, 2015
¹³See, e.g. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26; Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/2
b. the Guiding Principles have been referred to in the work of UN human rights treaty bodies; and

c. some States have taken steps to introduce legislation and regulations based upon or reflecting certain recommendations contained in the Guiding Principles, in particular in relation to human rights due diligence and transparency.

There is also substantial evidence that the Guiding Principles are influencing the conduct of business enterprises and other non-State actors. Although this evidence was not explored in detail by the Study Group, the potential contribution of non-State actor practice to the development of international law may be a topic worthy of further study by the ILA in due course. However, the Study Group does not consider it ripe for attention by an ILA Committee at this stage in the development of law and practice in this field.

4.3 Issues associated with the use of commercial contracts (between private parties, or between private actors and states or state owned enterprises) as a means for ensuring responsibility and accountability in relation to human rights matters

It is increasingly common to find human rights clauses in commercial contracts or for human rights issues to form the subject matter of special agreements or "quasi contracts" entered into with respect to commercial activities, for example agreements entered into between companies operating in the natural resources sector and local communities (including but not limited to indigenous communities) affected by the relevant operations.

These contracts and agreements give rise to a range of issues, including:

a. whether general obligations to comply with "applicable laws" are enforceable and, if so, effective to ensure responsible conduct in relation to human rights. Enforceability of the provisions in question may depend on the governing law of the contract. As a matter of English law, for example, while parties are free to incorporate principles of foreign law as part of the terms and conditions of a contract, the principles in question must be clearly identified. To the extent that provisions of public international law relating to human rights are sought to be incorporated by reference, there is a further conceptual question as to whether this can be done effectively given that, with limited exceptions,
international human rights law defines the obligations of States and not private actors;

b. whether and how human rights clauses included in commercial contracts may be enforced by third parties\(^\text{18}\) whose rights might be affected by the commercial activities of the contract parties;

c. what should the remedy be for breach of such provisions, noting that damages will ordinarily be the remedy for breach of contract whereas remedies in human rights cases may more frequently be non-pecuniary or administrative;

d. whether the enforceability of human rights clauses might be limited by domestic doctrines which place limits on the ability of domestic courts to pass judgment on the conduct of foreign States (which might be necessary, for example, where there is an allegation of corporate involvement in human rights abuses being committed by a foreign State); and

e. policy questions, such as the extent to which human rights can or should be "traded" for other benefits\(^\text{19}\) and whether the use of human rights clauses in commercial contracts results in the privatization of human rights enforcement in a manner which lacks legitimacy or which potentially undermines efforts to strengthen State-based enforcement regimes.\(^\text{20}\)

4.4 Legal issues associated with proposals to resolve human rights disputes through existing non-judicial models such as international arbitration

It has recently been proposed that international arbitration might be used to resolve human rights disputes and grievances between individuals (or groups of individuals) and corporations. One recent proposal envisages the adaption of the UNCITRAL Arbitration Rules\(^\text{21}\) which are said to be "not flexible enough to accommodate human rights disputes" and the development of model clauses that could be used in commercial contracts to enable victims to refer allegations of human rights abuses to arbitration. Other models seek to address human rights related grievances against corporations but do not provide for direct access by victims of abuse.\(^\text{22}\)

\(^{18}\) Enforcement may involve an attempt to enforce the clause as a contractual promise benefiting the third party, or by way of an action in tort based on an argument that the clause evidences the existence of a duty of care and/or provides evidence of the applicable standard of care.

\(^{19}\) See, eg, Gathii and Odomusu-Ayanu, 92.

\(^{20}\) See, eg, Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing Global Supply Chain Sustainability Through the Ethical Audit Regime', Globalizations (7 April 2017).


\(^{22}\) See, for example, the Bangladesh Accords. Recent settlements of complaints have attracted criticism on the basis of non-transparency of the process which has assured anonymity to corporate defendants, and confidentiality of details of settlements.
Proposals to use international arbitration to resolve human rights claims against business enterprises entails a host of difficult issues, including:

a. whether claims of human rights abuse are capable of settlement via arbitration;\(^{23}\)

b. whether awards rendered in relation to claims of human rights abuse would be enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

c. whether, as a matter of policy, it is desirable to refer human rights claims against corporations to arbitration including in light of:

i. concerns about increasing delay and costs in commercial arbitration (which in the present context would infer an advantage for corporations compared with individual victims of human rights abuse);

ii. criticism of the use of arbitration in contexts (such as workplace disputes) where there is an imbalance of power and resources between the parties;

iii. the risk that the reference of claims to arbitration would undermine State-based judicial and enforcement mechanisms and/or the development of domestic law; and

iv. criticism of the manner in which human rights issues have been dealt with in investor-State arbitration including, for example, concerns regarding the qualifications and experience of arbitrators in relation to matters of public international law (including international human rights law) and the lack of an appeals process.

Although the Office of the High Commissioner for Human Rights has undertaken a project on Access to Remedy which has led to reports and recommendations to the Human Rights Council, the use of arbitration as a mechanism to address human rights grievances has not yet been considered in detail. It may be a timely subject for consideration as part of the family of State-based non-judicial mechanisms or non-State based mechanisms.

Similarly, the use of mediation to resolve human rights disputes raises issues that would benefit from consideration, some of which overlap with the issues that arise with respect to arbitration. There is also a growing number of multi-stakeholder initiatives aimed at the implementation of corporate respect for human rights that

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\(^{23}\) As a matter of domestic law, some States limit the type of disputes which may be referred to arbitration often excluding, for example, categories of dispute where there is an imbalance of power between the relevant parties, e.g. labour disputes. Determining which law governs in relation to questions of arbitrability (e.g. the law applicable to the contract, the law of the place where the alleged abuse took place, or the law of the place of arbitration) may also involve complex issues or yield unpredictable outcomes in terms of whether victims' access to remedy is improved as a consequence of the arbitration proposal.
include dispute resolution mechanisms, but these might be considered lacking in effectiveness in the area of enhancing access to remedy to victims of human rights abuse. The compliance review and accountability mechanisms adopted by many international organisations (particularly international financial institutions) are another interesting case study that has not yet received ample scholarly analysis. There might be scope for consideration by the ILA of the structural and substantive impediments that limit the effectiveness and suitability of existing models of dispute resolution to address claims for remedy by victims of human rights abuse. This might assist identifying possible avenues for exploration towards more effective dispute resolution in the field of business and human rights.

4.5 The extent of States' international legal obligations to regulate "extraterritorially" in order to protect human rights against business related human rights abuse

This issue was the subject of considerable research and debate in the course of formulation of the Guiding Principles, and the extent of States' obligations and discretionary power to regulate was summarized in them. The extent of the obligation imposed under human rights treaties continues to be re-examined.

The 2017 Committee on Economic, Social and Cultural Rights General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities includes a number of propositions concerning the nature and extent of the State obligation to regulate the activity of business organisations in other States, to avoid adverse impacts in those other States. Those propositions have attracted scholarly comment, and articulate a more expansive expression of the nature and extent of the State duty than some States would subscribe to: as evidenced by the written responses of States to the General Comment in its draft form. With increased pressure on States to do more to ensure corporate accountability for their human rights impacts, it may be timely for a Committee of the ILA to consider the extent of State obligations in this area; to articulate the scope of 'extraterritorial' human rights obligations, the concept of "jurisdiction" in this context and the extent of States' discretion to regulate extraterritorially.

24 For example, the Dutch banking sector agreement on responsible business conduct relating to human rights.
25 Guiding Principles 1 and 2 and Commentaries thereto. The articulation of the principles attracted comment and concern from a number of States: see, for example, the correspondence between the UN Special Representative and the UK Foreign & Commonwealth Office in 2009.
4.6 The interplay between public procurement law and States' positive obligations to prevent business related human-rights abuse

Increasing attention is being paid to the relationship between public procurement law and States' human rights duties as well as the corporate responsibility to respect human rights as articulated in the Guiding Principles, where it is said that States should:

a. exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights; and
b. promote respect for human rights by business enterprises with which they conduct commercial transactions.

As far as international law is concerned, there appears to be potential for States' international responsibility to be engaged in cases of human rights abuses occurring within a State's jurisdiction and which are linked to the State's procurement activity. Further, it is arguable that a State's failure to take adequate steps to deter or prevent human rights abuses by commercial actors with whom the State contracts for goods and services might in some circumstances entail a breach of the State's positive obligations in relation to the protection of human rights.

However, the extent and means by which States may seek to promote objectives such as respect for human rights may be constrained by the primary aims of public procurement law, which typically include the promotion of efficiency or value for money, non-discrimination (between parties bidding for public contracts) and open competition.

In this regard, it bears noting that the Draft Elements propose that it should be an obligation of States to "take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that fully comply with all requirements as established in this instrument."27

An issue potentially meriting further study in this area is the question of what measures States may take to promote corporate respect for human rights consistently with their other obligations under international law in the area of public procurement (in relation, for example, to international trade and investment law where there is in any event an ongoing debate regarding whether and how to incorporate corporate accountability provisions in trade and investment treaties).28

27 The report of the third session of the IGWG also indicates that there was resistance to this proposal. A/HRC/37/67 ¶68
Legal personality: can international, transnational and domestic law adapt to accommodate the demands of the Guiding Principles?

The corporate responsibility to respect human rights articulated in the Guiding Principles applies to 'business enterprises' and is not therefore limited by concepts of separate corporate personality. It may be worth examining the relevance of public and/or private international law to the 'entity versus enterprise' theories of the corporate form (which might be a useful contribution to policy development in this area, given the pressures to regulate transnational business activity across boundaries and corporate forms, and to provide jurisdictional anchors for litigation aimed at achieving remedy from business for human rights harms). The incremental pressures on the corporate form that are being felt within domestic tort laws through human rights litigation might be better understood and appropriate outcomes achieved through an analysis of the developing legal principles and policy objectives articulated by governments and international institutions.

A relevant focus would be the corporate separateness that impedes the regulation of respect for human rights through supply chains. Taking account of the polycentric governance theories that underpin the Guiding Principles, it may be worthwhile to explore the purposes of the traditional corporate constructs to identify ways in which the barriers they impose to the promotion of human rights and access to remedy might be tackled.

CONCLUSION AND RECOMMENDATIONS

The Study Group recommends that the following issues or topics merit further study by the ILA, and should therefore form the basis for the establishment of one or more Committees or Study Groups to examine the issue(s):^29

a. The nature and extent of the State's obligation and discretion to regulate (by executive, legislative or judicial authority) business activity that may have adverse human rights impacts outside the State's territory.

b. The question of what measures States may take to promote corporate respect for human rights consistently with their other obligations under international law in the area of international trade and investment law, and public procurement

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^29 There is, of course, ongoing debate as to the existence and extent of corporate legal obligations under international human rights law. This was not a topic which the Study Group engaged with in detail but given the amount of existing scholarly focus on the topic, the Study Group does not consider that it warrants further study by the ILA at this time.
c. The possible development of a "model law" imposing a duty on business enterprises to conduct human rights due diligence and defining such matters as: the nature and extent of the duty; penalties and liabilities attaching to a failure to act with due diligence; defences to liability, potentially including an "adequate procedures" defence similar to that increasingly seen in anti-bribery and corruption legislation. The development of a model law would promote thoughtful debate around the desirability (or otherwise) of seeking to anchor such laws in developed international legal principle, or adopting novel approaches to reflect the origins and characterization of the corporate responsibility to respect human rights. Developing a model law might also help identify relevant implementation obligations that could be imposed on States in the proposed binding instrument under consideration by the IGWG.

d. Persistent governance gaps in the area of access to remedy and recommendations to close those gaps, building on the work of the OHCHR on Access to Remedy. This could include specific consideration of the possibility to adapt existing models of dispute resolution – such as arbitration and mediation – to facilitate the resolution of disputes in the area of business and human rights (including complaints or claims by victims).

e. The implications of climate change for business and human rights, including whether climate change may be considered a salient human rights risk demanding responses from states and businesses in accordance with the Guiding Principles, and what the relationship might be between access to remedy under pillar three of the Guiding Principles and loss and damage in international climate law.

The Study Group also notes that the IGWG negotiations are being observed by a significant number of non-governmental organisations in consultative status with the Economic and Social Council (ECOSOC), including various legal NGOs. The Study Group therefore recommends that the ILA send an observer delegation to future sessions of the IGWG, as it could make a significant contribution to the development of international law in this context. In the event that an ILA Committee on Business and Human Rights is established, the observer delegation should ideally comprise members of that Committee.
### Annex 1 – Members of the Study Group

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<tr>
<th>Name</th>
<th>Role</th>
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Annex 2 – Selected draft papers prepared by Members of the Study Group
Human rights and public procurement:
Towards an holistic international law analysis

Dr Claire Methven O’Brien and Dr Olga Martin Ortega

1. Introduction

The ‘state duty to protect’ under Pillar I of the UN Framework on Business and Human Rights and UN Guiding Principles on Business and Human Rights (UNGPs) calls for states to fulfil their obligations and address their potential impacts on human rights as an economic actor, including in the area of public procurement. This paper outlines the current international legal framework regulating public procurement, and identifies issues relevant in assessing the extent to which this legal framework may, directly or indirectly, permit or require measures to promote and protect human rights.

In section two the paper defines public procurement and provides a brief account of its role, scale and relevance in the business and human rights context. Section three briefly outlines how public procurement is regulated under international law, with reference to the WTO Government Procurement Agreement, as well as under EU rules and the UNCITRAL model law. In section four we introduce the obligations of states and public authorities under international human rights treaties and relevant soft law standards, in relation to their purchasing activities, considering states’ duties with reference to two scenarios, concerning respectively human rights abuses linked to public procurement that occur inside, and beyond, a state’s territorial jurisdiction. Section 5 relates specific content of the UNGPs relevant to public procurement. Section 6 concludes.

2. Definition and context

Public procurement is the purchase by the public sector of the goods and services it needs to carry out its functions. It comprises three main phases: procurement planning; the procurement process; and contract management. In the second phase, the relevant government body establishes and executes a tender procedure with the aim of concluding a contract. During this phase, a contractor is selected and terms and conditions are drafted for the contract based on the requirements established and publicised during the planning process. The third phase is a process of contract administration or management with the objective of securing effective performance. Legal rules concerning procurement generally focus on the second phase which may be regulated by national, supranational, or international procurement regimes, depending inter alia on monetary value and the subject matter of the procurement.

The subject matter of procurement is commonly divided into three categories: i) goods (supply of products); ii) services; and iii) works (construction). In practice, the scope of goods and services bought by public authorities ranges widely, from infrastructure and urban development projects, to the acquisition of complex items such as weapon systems, to the commissioning of essential public services in the health and social care sector, to buying common goods such as stationery, furniture, and foodstuffs.

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1 Claire Methven O’Brien is Strategic Adviser (Human Rights and Development), Danish Institute for Human Rights. Olga Martin Ortega is Reader in Public International Law, Department of Law, University of Greenwich.
5 Ibid.
Government purchasing thus represents a significant share of the total global economy. Worldwide, it has a value of approximately €1000 billion per year, while across OECD countries it accounts for 12% of GDP, on average. Individual governments, who rank amongst the largest single purchasers operating in the global marketplace, possess a correspondingly high potential to influence, through procurement, the terms of trade and corporate conduct across a wide range of sectors.

3. Public procurement law

In general, government purchase contracts may be subject to the ordinary private law of the state concerned (as in the UK) or, alternatively, a state’s administrative law (as in France). Public authorities should also comply with their obligations under domestic law and other legal regimes and agreements during public contracting, for instance, in the areas of environment and anti-corruption. However, for those government purchases falling within the scope of public procurement laws, additional rules may apply at international level (for instance, under the WTO Agreement on Governmental Procurement and international finance instruments), under supranational legal regimes (e.g. European Union) as well as nationally (state and federal levels) as outlined below. Typically, the main policy objectives or “primary” aims of procurement laws include:

- Achieving value for money (or “efficiency”) in public purchasing;
- Non-discrimination as between tenderers; and
- Open competition.

However, governments have often sought to use public procurement to promote “secondary” domestic social policy aims, such as the integration of marginalised or disadvantaged groups into the labour market and, more frequently in recent decades, environmental sustainability. On the other hand, the extent and means by which public buyers are permitted to exercise buying preferences to advance such aims remains constrained by procurement laws’ primary objectives, giving rise to tensions and dilemmas in a number of areas, across legal regimes as illustrated, in a preliminary way, below.

**World Trade Organization (WTO) Agreement on Government Procurement**

The Agreement on Government Procurement (GPA) is a pluri-lateral agreement within the framework of the WTO. It has limited membership and applies only to those members of the WTO who have chosen to accede to it. The objectives of the GPA are:

- Greater liberalisation and expansion of international trade;

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10. Currently the GPA has seventeen parties. One of these is the European Union, so that the GPA applies to forty-five WTO members in total. Thirty more WTO members participate in the GPA Committee as observers, of whom ten are taking steps to accede to the Agreement: WTO, *Agreement on Government Procurement: What is the GPA?* [https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (last visited Nov. 10, 2015).
Non-discrimination: measures prepared, adopted, or applied to public procurement must not afford greater protection to domestic suppliers, goods, or services, or discriminate against foreign suppliers, goods, or services;

- Integrity and predictability, to ensure efficient and effective management of public resources; and
- Transparency, impartiality, avoidance of conflicts of interest and corruption.

A Revised GPA text adopted in 2012 seeks to encourage broader acceptance *inter alia* by introducing new exceptions for environmental and social policy linkages. First, the scope of the revised Agreement excludes “procurement conducted for the specific purpose of providing international assistance, including development aid.”\footnote{WTO, Agreement on Government Procurement 2012 revised at Art. II(3), available at https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm} Second, it includes a general exception in cases where derogation is “necessary to protect human, animal or plant life or health.”\footnote{Ibid at Art. III(2.b)} Third, it explicitly provides for the possibility to address environmental considerations via technical specifications and award criteria: Article X (6) authorises technical specifications which “promote the conservation of natural resources or protect the environment,” while the indicative list of evaluation criteria in Article X (9) includes environmental characteristics. The possibility of addressing social characteristics by these means is not mentioned, but may not be prohibited, provided such measures are in accordance with the other provisions of the Agreement.\footnote{R Thrasher, *On Fairness and Freedom: The WTO and Ethical Sourcing Initiatives* (2014), available at http://www.bu.edu/pardee/research/global-economic-governance-2/wtoethicalsourcing/}  

**European Union**

In the European Union (EU), the award of public contracts above a certain monetary value by Member State authorities is required to comply with the principles of the Treaty on the Functioning of the European Union (TFEU) and the “four freedoms” guaranteed by the EU’s legal regime, namely, free movement of goods, services, capital, and people within EU boundaries\footnote{Consolidated Version of the Treaty on the Functioning of the European Union art. 26 (2), May 9, 2008, 2008 O.J. (C 115) 47 available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E026 [hereinafter TFEU].} as well as principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. Hence, it may restrict cross-border flows in these four areas only if restrictions are imposed in pursuit of the public interest and meet certain other conditions.\footnote{Case 274 Reyners v. Belgium, 1974 E.C.R. 631.}

review procedures. Together these describe how public authorities should purchase: i) “works” which extends to building and civil engineering contracts; ii) “supplies” which refers to contracts for the purchasing of goods and supplies; and iii) “services” which includes contracts for advertising, property management, cleaning, management consultancy, financial, and ICT related services.

Under EU procurement law, public authorities may take multiple factors into account when awarding a contract, as long as they are “linked” to the subject matter of the procurement. Such factors may now include sustainable development considerations, subject to various conditions, pursuant to decisions of the CJEU and the Public Sector Directive 2004/18/EC which established a legislative basis for public authorities to take “secondary” environmental and social considerations into account during the procurement process.

Further case law has addressed the use of “fair trade” labels, considering under what conditions this is consistent with EU law. Building on this jurisprudence Public Sector Directive 2014/24 establishes that contracting authorities that seek to purchase works, supplies or services with specific environmental, social or other characteristics can refer to particular labels, as long as the requirements for the label are linked to the subject-matter of the contract.

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43, 62, 68, 70) and also to clarify certain concepts whose meaning had been uncertain and to incorporate new case law from the Court of Justice of the EU into the procurement regulations (EU Public Sector Directive, supra note 11; EU Utilities Directive, supra note 26)


18 Under Directive 2014/24, services are fully covered by the procurement rules unless they are explicitly excluded or covered by the so-called “light regime.” The “light regime” applies to social, health, and cultural services, as well as other services listed exhaustively in Annex XIV of Directive 2014/24. EU Public Sector Directive, supra note 11.


20 See Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J. (L. 134) 114, Article 26 (stating “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”), Recital 1 (stating “This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2”) and Recital 5 (stating “Under Article 6 of the Treaty [now Article 11 TFEU], environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts”); see also id. at Arts. 27, 50, & 55.

21 In Wensstrom (Case C-448/01 EVN and Wensstrom, 2003 E.C.R. I-14527) it was held lawful to use an ecological award criterion and to establish an award criterion that is related to the production method of the purchased product, as long as such criterion is relevant for the contract and if the criterion is expressly linked to the subject-matter of the contract. Evropatki Dynamiki v European Environment Agency (Case T-331/06 Evropatki Dynamiki - Proigmene Systimata Tilepikoinion Pirosforikis kai Tilematikis AE v European Environment Agency (AEE), 2010 E.C.R. II-136) considered whether a bidder’s general policies can be considered at the award stage of a contract. The ruling provides guidance on assessing environmental criteria, and describes the level of flexibility a contracting authority has in assessing what constitutes “equivalent” evidence. In the Max Havellaar case (Case C-368/10 Commission v Netherlands, delivered on 12 May 2012), it was held that award criteria may concern aspects of the production process that do not materially alter the final product, so that fair trade label requirements can constitute elements of the contract performance and can be used as award criteria for public contracts.
**United Nations Commission on International Trade Law (UNCITRAL)**

**Model Law on Public Procurement**

UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonisation and unification of international trade. The **UNCITRAL Model Law on Public Procurement** provides an outline for national public procurement legislation. It contains principles and procedures intended to achieve value for money and avoid abuses in the procurement process, for instance, corruption. It is currently being used by 23 states and 6 organisations and development banks to form the basis or shape their public procurement regimes, including the OSCE and the World Bank. In its **Preamble**, the Model Law sets out six main objectives: economy and efficiency; international trade; competition; fair and equitable treatment; integrity, fairness, and public confidence in the procurement process; and transparency. A **Guide to Enactment** accompanying the Model Law suggests detailed procurement regulations and provides supporting guidance. There is no specific mention of human rights in the Model Law. Despite this, the **Model Law** does allow for the integration of social and economic criteria into procurement processes, such as promoting accessibility of procurement to small and medium sized enterprises (SMEs) or disadvantaged groups, environmental criteria and ethical qualification requirements. The **Guide to Enactment** further notes that human rights can feature as social aspects of sustainable procurement, and can be addressed through socio-economic evaluation criteria. It also provides that the Public Procurement Agency or a similar body can be tasked to review procurement proceedings to ensure that procuring entities have respected applicable law; though this provision was drafted with the intention of referring to procurement law, it might be given broader application so as to extend to human rights laws, especially where they are incorporated into domestic law or where human rights receive constitutional protection.

4. International human rights law and public procurement

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25 *Id.* at Art. 9(2)(b) (stating that suppliers or contractors shall meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement (…) That they meet ethical and other standards applicable in this State)


4.1 General principles

A state is only responsible for acts or omissions which are both attributable and in violation of an obligation to which it is subject.\(^2^9\) In the current context, where it is envisaged that a business actor, rather than the state itself, is the immediate perpetrator of human rights abuses, for the state to be in breach of human rights obligations, it is thus required that either: i) the act of the business that harms human rights is attributable to the state; or ii) the state has defaulted on “positive obligations” to protect rights-holders against abuses by non-state actors including in certain cases by responding to abuses once they have occurred. In either case, the harm to human rights that occurs must breach a human rights obligation arising under treaty to which the state is a party or some other norm or principle of international law binding on the state in question.

i) Attribution

Attribution of acts (or omissions) to states is regulated by Articles 4 to 11 of the ILC’s Articles on State Responsibility. Article 4 provides that states are responsible for the acts of their organs, including de facto organs. Article 8 provides that states are responsible for the acts of non-state actors where these are done under the state’s instructions or where the state otherwise “directs or controls” such actions.\(^3^0\)

ii) Positive obligations

According to the doctrine of positive obligations arising under some international human rights instruments, a state’s duties are not restricted to refraining from actively interfering with human rights. Rather, a state may be required to protect rights-holders against abuses committed by private persons or entities, for instance, through deterrent measures, such as legislation, policies or, in the case of known threats, specific operational steps.\(^3^1\) Accordingly, the state may be liable for abuses arising from its failure to take such measures. It is also the case that complicity or acquiescence with the acts of individuals can, by virtue of positive obligations, in certain circumstances engage state responsibility.\(^3^2\) States have been held liable before some international human rights mechanisms for harms arising from a failure to regulate businesses.\(^3^3\)

Notably, however, besides the requirement of jurisdiction, the establishment of positive obligations requires the existence of a “sufficient nexus”,\(^3^4\) that is, the defaults of the state or specific public actors should have “sufficiently direct repercussions”\(^3^5\) on human rights. At the same time, positive obligations are circumscribed by requirements of reasonableness: their scope is influenced by the need for states to balance rights and interests as well as potential resource implications. Consequently, positive obligations also vary in their application as regards different human rights.


\(^3^0\) Article 8, Conduct directed or controlled by a business, provides that: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.


\(^3^2\) E.g. Ireland v. UK, App. No.5310/71, Judgment, 18 January 1978, para.159

\(^3^3\) E.g. Fadeyeva v the Russian Federation [2005] ECHR No.55273/00 §89 and §92. See also Powell and Rayner v the UK [1990].

\(^3^4\) Fadeyeva v. the Russian Federation, App. No. 55273/00, Judgment, 30 November 2005, para.92.

4.2 Human rights abuses linked to public procurement and occurring within the state’s jurisdiction

Applying the above principles, it can be observed that human rights abuses occurring within a state’s jurisdiction that are linked to the state’s procurement activity could potentially give rise to international legal liability, in certain circumstances. While in the general case private and state-owned businesses are not assimilated to the status of de facto organs of the state, the requirement of attribution could perhaps be satisfied in the case of some types of procurements, for instance, in relation to the delivery of certain kinds of services and works or some procurements by certain state-owned enterprises in specific circumstances.

In addition, subject to the provisos noted above, a state’s failure to take adequate deterrent measures, such as legislation, policies or operational steps, to prevent human rights abuses by non-states actors with whom it contracts with could also entail a breach of positive obligations and hence international legal liability.

4.3 Human rights abuses linked to public procurement and occurring outside the state’s jurisdiction

Most human rights treaties define the obligations of states by reference to the concept of ‘jurisdiction’ which is generally interpreted as relating to acts and omissions occurring on the territory of the state concerned. Exceptionally, jurisdiction has been recognised in relation to extraterritorial acts, in two scenarios: a) where the state exercises “effective overall control” of a geographical area beyond its own borders (“spatial model” of jurisdiction); b) where a state “exercises authority or control over an individual” outside its own territory (the “personal” or “state agent authority and control” model of jurisdiction).

As regards public procurement, it can be observed that, on the basis of these principles, state liability in relation to human rights abuses linked to procurements that take place outside its territorial jurisdiction, but within a territory subject to its “effective overall control” (e.g. a territory under military occupation), or which affect individuals held under the control of state agents, may provide a basis for state liability under human rights instruments on the same footing as described in 4.2 above in relation to procurements occurring within the state’s territorial jurisdiction.

Besides these specific scenarios, it is suggested, international law does not currently provide a general basis for state liability for human rights abuses occurring outside its territorial jurisdiction and linked to it by procurement, because positive obligations do not usually apply in relation to extraterritorial acts by non-state actors. Consequently, public purchasers would not be liable for abuses for which businesses to which they are linked via purchase contracts are directly responsible, or those occurring further up government supply chains, apart from the scenarios outlined above.

4.4 State-owned enterprises

States are not generally liable for acts or omissions of state-owned or state-controlled companies. State responsibility requires that a corporate entity is exercising elements of governmental authority or that the state is using its ownership interest in or control of the corporate entity specifically to achieve a particular result. According to the ILC Commentary to Article 8, Draft Articles on State Responsibility:

“...international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient

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basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.”

However, the European Court of Human Rights (ECHR) has held states directly responsible for breaches of human rights by government-owned or controlled enterprises, applying a combination of criteria to determine whether a corporation acted as an agent of the state, including: the degree of its institutional and operational independence, with reference, for instance, to de jure or de facto state supervision and control; and the context in which the activity in question is carried out where issues such as whether the corporation has a monopoly position in the market may be considered. 38

If state-owned or controlled enterprises do qualify as state agents, then they might have potential liabilities, in relation to human rights abuses linked to their procurements, on the same footing as other public authorities as outlined above. On the other hand it should be noted that whether procurements by state-owned or controlled enterprises fall within, or outside, the scope of procurement rules may be a matter specifically addressed by such regimes, or other legal rules, and such provisions could be expected to bear on any determination of this issue by human rights tribunals.

4.5 Private delivery of public services

Additional principles of international human rights law may apply in the context where a state “contracts out” essential public services or establishes hybrid public-private bodies to deliver such services. The ECHR, for example, has held that the “State cannot absolve itself entirely from its responsibility by delegating its obligations to secure the rights guaranteed by the Convention to private bodies or individuals”, so that states may be liable for the actions of private actors performing public functions. 39 It is thus foreseeable that human rights may be engaged by arrangements for delivery of contracted-out essential services, or by specific services provided to particular users, for example: i) where access to the services in question is prerequisite to respect for human rights of service users; ii) where the quality or manner of delivery of the services may impact on the enjoyment of human rights by service users; or iii) where the terms of contracts between public authorities and private providers fail to secure respect for workplace rights of the employees or other workers of such providers, where these are also recognised as human rights. If, in these scenarios, a public authority’s failure to take “reasonable and appropriate” measures to protect the rights of services users or workers’ results in breach, on the basis of the above principles, this may provide a basis of potential state liability. 40

5. UN Guiding Principles on Business and Human Rights

In line with the general position under human rights law outlined above, the UNGPs affirm that the “State duty to protect” extends to business-related human rights abuses. In particular, UNGP 1 provides that “States

shall take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulation and adjudication." The UNGPs also indicate that business actors themselves have a “responsibility to respect” human rights and that the victims of business-related human rights abuses have a right to access an effective remedy.\(^\text{41}\)

More specifically, Pillar I of the UN Framework, the “State duty to protect” extends to situations where a commercial “nexus” exists between public actors and businesses. As UNGP 6 notes, this entails that states should promote awareness and respect for human rights by businesses in the context of public procurement, while UNGP 5 recalls that, where states privatise or “contract out” public services, they retain their human rights obligations to service users and must “exercise adequate oversight” to ensure these are met, including by ensuring that contracts or enabling legislation communicate the state’s expectation that service providers will respect the human rights of service users. UNGP 4 provides that states should, where appropriate, require state-owned or controlled enterprises to exercise human rights due diligence.\(^\text{43}\) UNGP 8 provides that states should align policies and practice across all governmental departments, agencies and institutions that shape business practices with human rights obligations in order to achieve policy coherence.\(^\text{44}\)

6. Conclusion

As noted, public procurement has often been used to promote governments’ domestic social policy aims, thus indirectly contributing to the realisation of human rights, for instance, in the area of non-discrimination in the labour market. The extent to which public purchasers can use their “buying power” to advance such “secondary” or “horizontal” policy aims has generally been analysed with reference to the scope of permissible derogations from free trade principles encapsulated in public procurement rules as a branch of trade law.\(^\text{45}\)

By contrast, analysis of whether and to what extent state obligations arising under international human rights law should, vice versa, be seen as conditioning the scope and content of public procurement law has been lacking, as has consideration of how human rights norms should influence the interpretation and application in practice of the various specific elements of the latter. As this paper has demonstrated, established human rights principles, as well as emerging soft law standards on business and human rights suggest a need for further investigation in this area. Amongst several issues, highlighted above, that appear to warrant further inquiry are the interplay between public procurement law and states’ “positive obligations” to prevent business-related human rights abuses by non-state actors, including in the context of contracting-out of public services, as well as what measures public buyers may take to promote aspects of the corporate responsibility to respect human rights, such as human rights due diligence and corporate human rights reporting, consistently with public procurement law.

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\(^{41}\) Guiding Principles, supra at 3.


\(^{43}\) Id. at 6-7.

\(^{44}\) Id. at 10.

This paper explores the developments in the business and human rights field that have taken place at the Organization of American States, some of which are consolidated and others are in early or intermediate stages. Moreover, these strategies and developments could push the boundaries in the field in the Americas, if received by the States in the region—some of which may be eager to do so, to counter perceived corporate abuses that have taken place in their jurisdiction—and could eventually also contribute to universal developments, as happened before with doctrines as the *uti possidetis juris* one, originally an American doctrine.

1. Pronouncements of the main bodies of the Inter-American System

Throughout its history, the main bodies of the Inter-American System of Human Rights, namely the Commission and the Court, have examined abuses in which private actors—corporations included—have been involved. While it may seem that the focus of their examination of those cases has been on State responsibility, given the jurisdictional limitation those bodies have in contentious matters, it cannot be ignored that both the Court and the Commission have taken the opportunity of clarifying positive State obligations, both in thematic or country reports and in judgments and recommendations, to highlight or warn of risks of corporate violations or the necessity of addressing some obstacles and challenges of protection that exist when abuses are perpetrated or assisted by businesses, thanks in part to the attention paid in the Inter-American system to the horizontal dimensions of human rights, i.e. *Drittwirkung*.\(^1\) In this sense, it may be argued that, as has been indicated by the same Commission and in doctrine, the fact that those bodies lack competence to *decide* on corporate accountability in cases triggered by petitions does not bar them from alluding to such responsibility otherwise, namely in reports, press releases and *obiter dicta*.\(^2\)

On the other hand, a study of the practice of the main bodies of the system concerning business and human rights issues reveals that they have addressed them even before the Guiding Principles on Business and Human Rights were adopted in 2011, acknowledging the presence of corporate involvement in abuses in the region before then. However, recently the bodies have increasingly tackled and referred to the importance of considering protection from corporate abuses, likely spurred by and reflecting the developments on the issue at the universal level; and have often referred to them, as

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happens with the ever more frequent mention of the Guiding Principles and other legal materials when doing so is pertinent.

Let us briefly look at some of the practice of the Court and the Commission. Firstly, it must be indicated that ever since the first contentious judgment of the Inter-American Court of Human Rights, issued in the Velásquez-Rodríguez case, and reiterated in cases such as Cotton Field, it has acknowledged and declared that private actors may incur in violations of human rights, and that such fact is the basis of the State obligations to prevent those violations and respond to them with the aim of protecting victims. Yet, they have also noted that while they may morally condemn those violations, they lack the jurisdictional power to decide on their existence and impose obligations on those private actors when responsible. Nonetheless, by requiring States to develop a normative and practical response to private abuses, they indirectly determine that private violators must have legal responsibility, even if it is a domestic one.

In the light of the aforementioned recognition of the factual capacity of private actors as businesses to participate in human rights violations, it is worth considering what the Inter-American Court and Commission of Human Rights have expressly said on business and human rights aspects. For instance, Chapter VIII of the 1997 country report of the Inter-American Commission on Human Rights on Ecuador was devoted to the impact on human rights of development activities, where it considered that “[o]il development and exploitation do, in fact, alter the physical environment and generate a substantial quantity of toxic byproducts and waste”, and took note of the fact that some inhabitants of one region alleged that:

“The Government has failed to regulate and supervise the activities of both the state-owned oil company and of its licensee companies. They further allege that the companies take few if any measures to protect the affected population, and refuse to implement environmental controls or to utilize existing technologies employed in other countries. Those who spoke before the delegation indicated that the Government had failed to ensure

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that oil exploitation activities were conducted in compliance with existing legal and policy requirements.”

Furthermore, considering that “Human exposure to oil and oil-related chemicals, through the skin or ingested in food or water, or through fumes absorbed via the respiratory system, has been widely documented to cause adverse effects to human health and life”, the Commission called the State “to take steps to prevent harm to affected individuals through the conduct of its licensees and private actors” and indicated that “the American Convention requires that all individuals of the Oriente have access to effective judicial recourse to lodge claims alleging the violation of their rights under the Constitution and the American Convention, including claims concerning the right to life and to live in an environment free from contamination”. Such recommendations and conclusions evince the importance attached by the Commission to the State obligations of protection from corporate conduct that has a negative impact on the enjoyment of human rights (to health, life, and food, among others), which include a duty to provide access to justice from negative corporate impact on the enjoyment of human rights. Moreover, the express indication that corporate conduct can prevent the enjoyment of human rights is an example of how despite contentious competence-related limits the Inter-American system has recognized and condemned those abuses through considerations that can have both an expressive function and practical implications insofar as they remind the competent authorities of the necessity of specifically dealing with them.

Likewise, in its 2009 report on Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources, the Commission pointed out that States are under an obligation to protect from corporate abuses, which demands among others providing remedies against them; and also identified some possible violations attributable to businesses. In this sense, relevant paragraphs of the report indicate the following:

“[E]nforcement of the environmental protection measures in relation to private parties, in particular of extractive companies and industries, is required to avoid the State’s international responsibility for violating the human rights of indigenous or tribal populations affected by environmentally destructive activities […]The activities of logging companies in indigenous or tribal peoples’ territories, for example, are highly destructive and produce massive damage to the forest and its ecological and cultural functions […]to the detriment of indigenous and tribal peoples […] In too many cases, the consultation of indigenous peoples is carried out in climates of harassment and even violence perpetrated by private security guards hired by the companies that are responsible for the projects […]the duty of reparation is applicable not only

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7 Ibid.
to the negative impact of activities carried out by State authorities, but also by commercial companies or other private actors. In this latter type of cases, states are in the obligation of securing the existence of effective and accessible reparation mechanisms.\(^8\)

Another example of how the main bodies of the system paid attention to and recognized the possibility of corporate abuses before the adoption of the Ruggie Framework and the Guiding Principles is the Provisional Measures Resolution of 6 March 2003 in the *Case of the Communities of the Jiguamiandó and the Curbaradó*, in which the Inter-American Court said that the “cultivation of African palm and the exploitation of the natural resources [by some companies] on the Communities’ territory endanger the lives and survival of these families”, and that since this and other facts revealed a *prima facie* threat to rights, the Court called upon the State to adopt and conduct some measures.

As indicated above, while they referred to the importance of protecting from corporate abuses before, after the adoption of the Guiding Principles the main bodies of the Inter-American system have ever more referred to the necessity of doing so and have sometimes relied on those Principles and other developments, although they have not always expressly mentioned them. As to the Court, one can mention the judgments in the *Kaliña and Lokono Peoples* and in the *Hacienda Verde Workers* cases, in which it recognized corporate abuses (identifying specific ones, which serves a shaming purpose as well, but stopping short of judicially declaring a corporate wrongful act, which the Court cannot do, thus doing all it can and helping to push the boundaries and perhaps crystallize or generate regional practice) and the duties States had to prevent and respond to them, supporting its assertions on the Guiding Principles and other recent developments. In this sense, in the former case the Court mentioned, for instance, how “the mining activities that resulted in the adverse impact on the environment and, consequently, on the rights of the indigenous peoples, were carried out by private agents; first by Suralco alone, and then by the joint venture, BHP Billiton-Suralco”\(^9\) (emphasis added), and went on to say that:

“224. In this regard, the Court takes note of the “Guiding Principles on Business and Human Rights,” endorsed by the Human Rights Council of the United Nations, which establish that businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities. Hence, as reiterated by these principles, “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent,

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investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

225. Thus, the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises has indicated that businesses must respect the human rights of members of specific groups or populations, including indigenous and tribal peoples, and pay special attention when such rights are violated.

226. Based on the above, the Court finds that, because the State did not ensure that an independent social and environmental impact assessment was made prior to the start-up of bauxite mining, and did not supervise the assessment that was made subsequently, it failed to comply with this safeguard; in particular, considering that the activities would be carried out in a protected nature reserve and within the traditional territories of several peoples”\(^\text{10}\) (emphasis added).

On the other hand, in the *Hacienda Verde* case, the Court referred once again to the Guiding Principles and stressed the obligation of States to prevent and discourage exploitation and referred to slave work in *haciendas* belonging to private Brazilian companies.\(^\text{11}\)

Just as the Court has done all it can to push for the recognition of corporate abuses in concrete cases and for the development of corporate responsibility in the region, likely propelled by universal normative developments, recent reports of the Commission have consistently and increasingly done so as well. It is possible to cite, for instance, its report on *Indigenous Peoples, Communities of African Descent, Extractive Industries*, in which the Inter-American Commission on Human Rights referred to the “Protect, Respect and Remedy” framework and the Guiding Principles, recognized that there can be an impact of “business activities of various kinds” on human rights, and touched on aspects as the extraterritorial protection of human rights (considering that this has been “the subject of deep discussion at the United Nations level” and urging foreign states of origin to put mechanisms in place voluntarily to secure better human rights practices of their corporate citizens abroad”); the necessity that investment is compatible with human rights standards; the intensification of State duties to monitor corporate conduct depending on the activities businesses carry or their nature, as when they are under State control; access to information; the availability of redress mechanisms; the undeniability of corporate influence in many situations; jurisdictional barriers to litigation against businesses; environmental issues; child labor; and the importance of preventing the

\(^{10}\) Ibid., paras. 224 through 226.

impunity of corporate misdeeds. Some of those same issues have been raised, for instance, by the Committee on Economic, Social and Cultural Rights.

Other recent reports include the 2016 report on Guatemala, which expresses concern on possible abuses of private security and other companies; abuses motivated by economic reasons; chilling effects on litigation against companies; and reminded of the fact that States are not discharged of their obligations simply because companies conduct certain operations. Possible harassment against human rights defenders has also been noted along with the possibility of certain corporate activity being a factor increasing human mobility.

As it has been argued, while the Court does not have jurisdiction over entities other than States, an indirect way in which it can impact the development of international law regarding corporate accountability for human rights abuses is precisely through its jurisdictional function. This indirect contribution can take place through the introduction via case law of universal standards or criteria that, according to the Court, would become binding for States Parties to the American Convention on Human Rights as a result of its res interpretata function.

Such is the case, for example, of instruments as the UN Guiding Principles on Business on Human Rights, or even of the 169 ILO Convention, both of them adopted outside the Inter-American system. In the case of the latter, reiterative jurisprudence by the Court based on the standards related to free, prior, and informed consent have molded the criteria applicable to indigenous peoples whose rights have been affected by development or extractive projects. Regarding the former, reference to them by the Court in the

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17 A potentially overreaching approach can be found in Judge Ferrer MacGregor’s separate opinion in the Court’s order on monitoring compliance of the judgment in the Gelman case, in which he argues that any foreign standard that is introduced to the case law of the Court (including those of the European Court of Human Rights and other international bodies) becomes instantly binding for its Member States as a result of its interpretive function. See I/A Court H.R., Case of Gelman v. Uruguay. Monitoring Compliance with Judgment. Separate Opinion of Judge Ferrer Mac-Gregor Poisot of March 20, 2013, fn. 91. In this sense, any position or reference adopted by the Court in relation to any international standard, including the UN Guiding Principles on Business and Human Rights, would instantly make them binding for Member States, as part of the Inter-American corpus juris.
aforementioned Kaliña and Lokono Peoples’ case would instantly make their different pillars applicable to States parties, lest they violate the interpretation made by the Court, which it deems binding for States subject to its jurisdiction.

Finally, it is important to mention that since the Commission’s functions include the promotion of human rights in the region, this gives flexibility to that main body of the Inter-American system to conduct different activities in the business and human rights field, such as issuing reports or entering into cooperation and promotion agreements. In this regard, on 16 March 2015 the Commission celebrated a Memorandum of Understanding with the Danish Institute for Human Rights, in which the parties undertook to cooperate in the promotion and protection of economic, social and cultural rights based on relevant instruments and principles, including the United Nations Guiding Principles on Business and Human Rights (see pages 2 and 3 of the Memorandum of Understanding).

2. Business and human rights in the Organization of American States

In addition to these developments within the Inter-American Human Rights System, other developments have taken place in the regional sphere, notably within the General Assembly of the Organization of American States. This political body adopted in June 2014 a resolution\(^{18}\) whereby it requested the Committee on Juridical and Political Affairs to hold a special meeting, in order to exchange best practices and experiences in relation to the promotion and protection of human rights in the business sphere in early 2015.\(^{19}\) The Committee held the special session in January 2015, with the participation of numerous Latin American States, OAS officials, civil society organizations, the Latin American member of the UN Working Group on Business and Human Rights, and representatives of corporations. While the session certainly was held for the exchange of best practices, in several occasions the participation of States centered on how they promoted corporate social responsibility within their jurisdiction,\(^{20}\) which conceptually is very different from the more legally-oriented discourse on the obligation of business to respect human rights.

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\(^{19}\) This decision was the result of two previous developments: firstly, a report adopted by the Inter-American Juridical Committee on “Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas” (CJI/doc.449/14 rev.1), presented a few months earlier, in March 2014; and secondly, as a continuation to the First Latin America and Caribbean Regional Forum on Business and Human Rights, which will be commented upon afterwards.

\(^{20}\) Committee on Juridical and Political Affairs, *Summary of the meeting of January 29, 2015*, CP/CAJP/SA-560/15 (18 February 2015). Notable exceptions were the participations of Chile and Colombia, two of the leading Latin American States working on business and human rights.
Ecuador, on the other hand, continued promoting the need to establish a binding international instrument to regulate corporate behavior and impact on human rights.22

The first session on this topic at the Organization of American States was followed in late June by a second meeting between the (newly-appointed) Latin American member of the UN Working Group on Business and Human Rights and several OAS missions, to discuss the state of implementation of the UNGPs and challenges being faced by the different States.23 In addition, as indicated in the previous section a cooperation agreement between the Danish Institute for Human Rights and the Inter-American Commission on Human Rights to develop capacity in the region was signed,24 and the topic has been included in the work stream of the Unit on Economic, Social and Cultural Rights of the Inter-American Commission.25 Finally, a couple of resolutions addressing this question were adopted during the 46th session of the General Assembly of the Organization of American States in Santo Domingo in 2016, one focusing on fostering the implementation of the Guiding Principles,26 the other one on actively participating and engaging with the global treaty initiative, as well as with any other that may develop regionally.27

While these developments are important, it would be particularly convenient for the Organization of American States and its different bodies –including the Inter-American Commission on Human Rights– to design a regional action plan on this issue, in order to have a clear scheme that would allow it to scale up the efforts and abandon the piecemeal approach that so far has characterized its work.28 Such an approach could probably address important questions, such as the adoption of regional policies to improve the work and capacities of national human rights institutions in this field, the development of


22 Suffice to see the footnote added to the resolution requesting the meeting to be held, which states: “Ecuador wishes to underscore the efforts undertaken in the United Nations and in other bodies to develop a binding international instrument on Human Rights and Transnational Enterprises…”; General Assembly, Promotion and Protection of Human Rights in Business, AG/RES. 2840 (XLIV-O/14) (4 June 2014). The Ecuadorian delegation insisted on this position during the special meeting.


25 It is important to note that the Unit on Economic, Social and Cultural Rights of the Inter-American Commission is currently considering issuing its 2017 thematic report on the topic of business and human rights.


27 Ibid., §51.iii (Conscious and Effective Regulation of Business in the Area of Human Rights).

28 An interesting comparison with the EU process can be found in Humberto Cantú Rivera, ‘Regional Approaches in the Business & Human Rights Field’ (2013) 35 L’Observateur des Nations-Unies 53.
Abstract

This contribution to the work of the International Law Association’s Study Group on Business and Human Rights considers the relationship between business responsibilities for human rights and climate change. While it is now widely accepted that the adverse effects of climate change undermine the enjoyment of human rights, and that businesses have a responsibility to respect human rights, the relationship between business responsibilities for human rights and climate change is unclear. This paper first considers state duties to protect human rights from climate change harms, including harms arising from business activities, and second, considers how the business responsibility to respect rights might apply to climate harms experienced by the most vulnerable. In conclusion, the paper considers whether human rights violations arising from climate change may be considered salient risks that demand a response that aligns with the UN Guiding Principles.

Introduction

The relationship between human rights and climate change has been firmly on the agenda of the United Nations (UN) Human Rights Council since at least 2008, and was the subject of a report in 2016 by Professor John Knox, the Special Rapporteur on Human Rights and Environment. It is now accepted that the adverse effects of climate change undermine the enjoyment of a broad range of human rights, including rights to life, to health, to food, to water and sanitation, to adequate housing, to culture and equality, to freedom of movement, and to self-determination, with the worst effects felt by the most vulnerable. Yet the implications of climate change for business and human rights remain

1 Sara L Seck, PhD, Associate Professor; Senior Fellow, International Law Research Program of the Centre for International Governance Innovation (CIGI ILRP). Contact information: until June 30, 2017: Associate Professor, Faculty of Law, Western University (Ontario, Canada) sseck@uwo.ca; after July 1, 2017: Associate Professor, Schulich School of Law, Dalhousie University (Nova Scotia, Canada) secksara@gmail.com. The author would like to thank Jessica Buckerfield, Omolola Fasina, Michael Slattery and Kirsten Stefanik for research assistance funded by CIGI ILRP and Western Law.
unclear. This lack of clarity was evident in the keynote address of the former Special Representative on Business and Human Rights, Professor John G Ruggie, during the opening plenary of the UN Forum on Business and Human Rights in Geneva in November 2016. The focus of his keynote was upon the relationship between the Sustainable Development Goals (SDGs) and the 2011 UN Guiding Principles on Business and Human Rights. Yet in highlighting the importance of business not “cherry-picking” implementation of the SDGs, Ruggie stated:

“On what basis will they pick? The answer is: materiality, or put simply, business risks and opportunities. But business and human rights in the first instance is not about what is material to the firm: it is about the salient risks, or most severe potential harms, that business activities and relationships pose to people. Salient risks may turn out to be material to the business if they are left unattended. But a traditional materiality test will often miss them. Nor can business initiatives to promote social goods substitute for failing to address salient risks. This is a fundamental difference between human rights and climate change: in human rights there is no equivalent to buying carbon offsets.” [emphasis added]

This statement very much begs the question. It is clear that climate harms can be severe, and pose salient risks to people, and it is clear that these risks arise as a consequence of anthropogenic greenhouse gas emissions emanating from business activities and relationships among other sources. Yet, what is the relationship between international law on business and human rights, and climate change? The answer is simply not obvious. Nevertheless, given Professor Ruggie’s statement, it would appear curious that in Marrakech, concurrently with the UN Business and Human Rights Forum, thousands of people from around the globe gathered to participate in the 22nd Conference of the Parties of the UN Framework Convention on Climate Change (COP 22), and the participants included coalitions of business actors and investors committing to act on climate change. Might these commitments reflect

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9 See the We Mean Business Coalition, online: [https://www.wemeanbusinesscoalition.org](https://www.wemeanbusinesscoalition.org) and We Mean Business, Take Action, online: [https://www.wemeanbusinesscoalition.org/take-action](https://www.wemeanbusinesscoalition.org/take-action). Commitments made by businesses and investors, among others, are then fed into the UNFCCC NAZCA tracking system, online: [http://climateaction.unfccc.int](http://climateaction.unfccc.int). See further Global Climate Action, online: [http://climateaction.unfccc.int](http://climateaction.unfccc.int) (stating: “At the twenty-first session of the Conference of the Parties (COP 21) in Paris, it was agreed that mobilizing stronger and more ambitious climate action by all Parties and non-Party stakeholders is urgently required if the goals of the Paris Agreement are to be achieved.”)
at a minimum an acknowledgement by some of the existence of a business responsibility to respect the human rights of those most vulnerable to climate harms?

This brief contribution will provide an introduction to state obligations with regard to human rights affected by climate change, then consider how the responsibility to respect rights as elaborated in the UN Guiding Principles might apply to businesses in the climate change context. The focus of this analysis will be upon the impact of climate change on human rights, rather than human rights violations arising from the implementation of measures designed to mitigate climate change, a topic that has received comprehensive study elsewhere.10

1. Climate Change and Human Rights: State obligations

In the days leading up to COP21 in Paris, the UN High Commissioner for Human Rights issued a statement “that urgent, effective and ambitious action to combat climate change is not only a moral imperative, but also necessary in order to satisfy the duties of States under human rights law.”11 Subsequently, in February 2016, the Special Rapporteur on Human Rights and the Environment released a comprehensive report designed to clarify state obligations “to protect against the infringement of human rights by climate change.”12 According to the Special Rapporteur, state duties arise both with regard to decisions about “how much climate protection to pursue” and to decisions relating to the nature of implementation measures for mitigation and adaptation.13 While state climate obligations flow from “the nature of their obligations to protect against environmental harm generally,”14 the scale

In decision 1/CP.21, the commitments from all actors are recognized, including those launched through the Lima–Paris Action Agenda, as well as the urgent need to scale up the global response to climate change and support greater ambition from governments.

At COP 22 in Marrakech, a High-Level Event on Accelerating Climate Action was held to highlight outcomes from the Action Events throughout the conference and culminated with the launching of the Marrakech Partnership for Global Climate Action; a new framework to catalyse and support climate action.”

See further on the Marrakech Partnership for Global Climate Action, online: http://unfccc.int/files/paris_agreement/application/pdf/marrakech_partnership_for_global_climate_action.pdf

12 Knox, Climate 2016, supra note 3 at para 37.
13 Knox, Climate 2016, ibid at para 33.
and complexity of climate change transform it into a truly global challenge as “[g]reenhouse gases emitted anywhere contribute to global warming everywhere.” Despite this, and although still impossible to establish with certainty, improvements in scientific knowledge are making it easier to trace causal chains between individual contributions and climate harms. Nevertheless, the approach of states to the climate problem has not been one of trying to “describe the extraterritorial human rights obligations of every State in relation to climate change” but rather to treat “climate change as a global problem that requires a global response,” in accordance with the duty of international cooperation. According to the Special Rapporteur, “[t]he failure of States to effectively address climate change through international cooperation would prevent individual States from meeting their duties under human rights law to protect and fulfil the human rights of those within their own jurisdiction.” However, while some human rights obligations relating to climate change must be implemented immediately, others, including the reduction of greenhouse gas emissions, “can be expected to vary based on differing capabilities and conditions” in accordance with understandings of progressive realization of social, economic, and cultural rights.

In his 2016 climate report, the Special Rapporteur classifies state obligations to protect against the infringement of human rights affected by climate change into procedural obligations, substantive obligations, and obligations in relation to vulnerable groups. State procedural obligations include “duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm.” While States have “adopted an exemplary practice in the assessment and provision of information about climate change” through the work of the Intergovernmental Panel on Climate Change, Knox argues that within their national environmental assessment legislation States should also assess “the climate effects of major activities within their jurisdiction” including fossil fuel development, as well as climate impacts on vulnerable communities. In terms of public participation, every state “should ensure that their laws provide for effective public participation in climate and other environmental decision-making, including by marginalized and vulnerable groups.” There must be “real opportunities” to be heard, and “the rights of freedom of expression and association must be safeguarded for all people in relation to all

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15 Knox, *Climate 2016*, ibid at para 34.
16 Knox, *Climate 2016*, ibid at paras 34-36.
17 Knox, *Climate 2016*, ibid at paras 41-42. See also Atapattu, *supra* note 10 at 89 (observing that the extraterritorial application of law in the socio-economic rights context may be better understood as the application of the “general international law principle of non-interference.”)
18 Knox, *Climate 2016*, ibid at n27.
20 Knox, *Climate 2016*, ibid at paras 50-64 (procedural), paras 65-80 (substantive), and paras 81-84 (vulnerable groups).
22 Knox, *Climate 2016*, ibid at paras 52-54. See also Article 4(1)(f) of the UNFCCC cited by Knox at para 55.
climate-related activities.” Finally, states should ensure that their legal systems provide for “effective remedy for all human rights violations, including those arising from climate-related actions.”

Substantive environmental rights give rise to state obligations to “adopt legal and institutional frameworks that protect against, and respond to, environmental harm that may or does interfere with the enjoyment of human rights.” These obligations apply where environmental harm is caused by private actors including businesses, as well as governmental entities, and includes an obligation to provide remedies for human rights abuses caused by corporations. While States do have “discretion to strike a balance between environmental protection and other societal goals such as economic development and the promotion of other human rights” the Special Rapporteur highlights that “the balance struck cannot be unreasonable or result in unjustified, foreseeable infringements of human rights.” This obligation requires each State to “protect those within its jurisdiction from the harmful effects of climate change” including through the formulation and implementation of “national adaptation plans” and by “building the resilience of socioeconomic and ecological systems.” With regard to mitigation, the duty of international cooperation requires states to not only implement their current intended nationally determined contributions, “but also to strengthen those contributions to meet the target set out in article 2 of the Paris Agreement.” It is, however, arguably that meeting the targets in the Paris Agreement is not enough from a human rights perspective, given that climate change has already caused immense harm to the most vulnerable through extreme weather events such as typhoons, and warming of the Arctic.

Finally, the Special Rapporteur discusses the “heightened duties” of states “with respect to members of certain groups that may be particularly vulnerable to environmental harm, including women, children and indigenous peoples.” Impacts on vulnerable communities should be identified in climate change assessment processes, and those who are marginalized or vulnerable should be “fully informed of the effects of climate change” so that they may “take part in decision-making processes” and have their concerns taken into account, as well as seek remedy for rights violations. Obligations to

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24 Knox, Climate 2016, ibid at paras 59-60.
25 Knox, Climate 2016, ibid at paras 62-3.
26 Knox, Climate 2016, ibid at para 65, citing Knox, Mapping, supra note 13 at paras 44-57.
28 Knox, Climate 2016, ibid at para 67.
29 Knox, Climate 2016, ibid at paras 68-69.
30 Knox, Climate 2016, ibid at paras 70-77. He continues, at para 78: “This challenge should not be underestimated. Keeping the increase in global temperature to well below 2°C requires States to move rapidly and steadily towards a world economy that no longer obtains energy from fossil fuels.” See further UNFCCC, 21st Sess, COP21, UN Doc UNFCCC/CP/2015/L.9 (2015), Annex, Article2, online: UNFCCC <http://unfccc.int/resource/docs/2015/cop21/eng/109.pdf> [Paris Agreement]
31 See for example the experience of the Philippines with extreme weather including typhoons as discussed in the Philippine Climate Petition and related materials, infra note 80. See also Sheila Watt-Cloutier, The Right to be Cold: One Woman’s Story of Protecting Her Culture, the Arctic, and the Whole Planet (Penguin Canada, 2015).
32 Knox, Climate 2016, ibid at para 81.
33 Knox, Climate 2016, ibid at para 82.
“facilitate the protection of vulnerable communities wherever they are located” are part of the duty to cooperate at the international level, and embedded into the Paris Agreement.34

The 2016 Report of the Special Rapporteur provides useful insights into the relationship between the state duty to protect human rights and climate harms. However, the climate report does not consider business responsibilities, aside from a brief reminder that according to the UN Guiding Principles for Business and Human Rights “corporations themselves have a responsibility to respect human rights” and all pillars of the “normative framework for business and human rights apply to all environmental human rights abuses, including impairments of human rights in relation to climate change.”35 Other earlier sources have also considered state obligations in relation to climate justice. Indeed, in 2014, the International Law Association adopted a set of Legal Principles Relating to Climate Change, designed to articulate state duties.36 Yet while the ILA Principles offer insights into the relationship between state duties to address climate change and sustainable development, equity, international cooperation, and obligations of prevention and precaution, for example, they are largely silent on the link between climate change and human rights, and offer nothing on business responsibilities.37 Other sources include the International Bar Association’s 2014 Climate Justice report,38 and the ‘Oslo Principles on Global Obligations to Reduce Climate Change’, adopted by a group of legal experts on 1 March 2015.39 The Office of the High Commissioner for Human Rights has also documented its “key messages” on human rights and climate change, in which it confirms that States as duty-bearers have “an affirmative obligation to take effective measures to prevent and redress climate impacts” both direct and indirect, and so “to mitigate climate change” as well as to ensure that all rights are protected.

34 Knox, Climate 2016, ibid at paras 83-4.
35 Knox, Climate 2016, ibid at para 66.
37 Ibid. Draft Article 7 does speak to the obligation of prevention, and the need for states to exercise due diligence in order to meet this obligation, but offers no specific detail with regard to business actors and does not ground the obligation in a human rights frame. Indeed, the sole mention of human rights is found in draft Article 10(b): “Climate Change and International Human Rights Law: States and competent international organisations shall respect international human rights when developing and implementing policies and actions at international, national, and subnational levels regarding climate change. In developing and implementing these policies and actions, States shall take into account the differences in vulnerability to climate change of their populations, particularly indigenous peoples, within their borders and take measures to ensure that all their peoples’ rights are fully protected.”
39 Oslo Principles, Oslo Principles on Global Climate Change Obligations, online: Global Justice Program <http://globaljustice.macmillan.yale.edu/news/oslo-principles-global-climate-change-obligations> [Oslo Principles]. See also Global Network on the Study of Human Rights and the Environment, Declaration on Human Rights and Climate Change, (2016) http://gnhre.org/declaration-human-rights-climate-change/ [GNHRE Declaration] at Principle 17 (“All States and business enterprises have a duty to protect the climate and to respect the rights set out in this Declaration.”) However, the GNHRE does not elaborate further on steps business enterprises should take in order to implement this duty and respect rights.
holders “have the necessary capacity to adapt to the climate crisis.” 40 Each of these three sources has also considered the role of businesses as duty-bearers with a responsibility to take action on climate justice. The next section will briefly examine each of these in turn.

2. Business Responsibilities for Human Rights Affected by Climate Change

While the focus of the COP21 in Paris was clearly on whether or not States would reach a new climate agreement, a submission made by the OHCHR to COP21 in November 2015 highlights that “businesses are also duty-bearers” and that businesses must “be accountable for their climate impacts and participate responsibility in climate change mitigation and adaptation efforts with full respect for human rights.”41 According to the OHCHR, several considerations “should be reflected in all climate action” so as to “foster policy coherence and help ensure that climate change mitigation and adaptation efforts are adequate, sufficiently ambitious, non-discriminatory and otherwise compliant with human rights obligations.”42 These considerations are:

1. To mitigate climate change and to prevent its negative human rights impacts
2. To ensure that all persons have the necessary capacity to adapt to climate change
3. To ensure accountability and effective remedy for human rights harms caused by climate change
4. To mobilize maximum available resources for sustainable, human rights-based development
5. International cooperation
6. To ensure equity in climate action
7. To guarantee that everyone enjoys the benefits of science and its applications
8. To protect human rights from business harms
9. To guarantee equality and non-discrimination
10. To ensure meaningful and informed participation43

Yet, while the commentary to each of these considerations could examine how they might apply to businesses, instead, the focus is exclusively on the role of States, with the sole exception of consideration 8, according to which:

8. The United Nations Guiding Principles on Business and Human Rights affirm that States have an obligation to protect human rights from harm by businesses, while businesses have a responsibility to respect human rights and to do no harm. States must take adequate measures to protect all persons from human rights harms caused by businesses; to ensure that their own

40 OHCHR, “Key Messages on Human Rights and Climate Change”, online:
41 OHCHR Understanding, ibid.
42 OHCHR Understanding, supra note 38.
43 Ibid
activities, including activities conducted in partnership with the private sector, respect and protect human rights; and where such harms do occur to ensure effective remedies. **Businesses are also duty-bearers. They must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights. Where States incorporate private financing or market-based approaches to climate change within the international climate change framework, the compliance of businesses with these responsibilities is especially critical.**[^44] [emphasis added]

There is clearly room for greater clarity on what precisely is required of businesses as duty-bearers, and the relationship between the duties and responsibilities of businesses and those of states.

A different set of expectations emerge from the “Oslo Principles on Global Obligations to Reduce Climate Change”, adopted by a group of legal experts on 1 March 2015.[^45] The Oslo Principles claim to “identify and articulate a set of Principles that comprise the essential obligations States and enterprises have to avert the critical level of global warming”.[^46] Legal responsibility for climate change is said to rest not only with states, but also with “enterprises”: “[w]hile all people, individually and through all the varieties of associations that they form, share the moral duty to avert climate change, the primary legal responsibility rests with States and enterprises”.[^47] This responsibility arises from a duty of humanity as “guardians and trustees of the Earth” to “preserve, protect and sustain the biosphere” as part of the “common heritage of humanity”.[^48] The Oslo Principles claim to reflect existing legal obligations to “respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere.”[^49] These are derived from “local, national, regional, and international” sources of law including “international human rights law, environmental law, and tort law” as well as the Precautionary Principle.[^50] The Oslo Principles thus explicitly view climate change as a human rights issue.[^51]

While the Oslo Principles claim that both States and enterprises have obligations to ensure that global average temperature increases remain below a 2 degrees Celsius threshold, obligations to reduce

[^44]: *Ibid* at 3.
[^45]: *Oslo Principles, supra* note 39.
[^47]: *Ibid*. Note that ‘Enterprises’ is not defined.
[^48]: *Ibid*.
[^49]: *Ibid* at 3.
[^50]: *Ibid* at 3: ‘a. The Precautionary Principle requires that: 1) GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and 2) the level of reductions of GHG emissions required to achieve this, should be based on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts. b. The measures required by the Precautionary Principle should be adopted without regard to the cost, unless that cost is completely disproportionate to the reduction in emissions that will be brought about by expending it.’
GHG emissions are qualified by cost, and obligations to refrain from new activities with excessive GHG emissions are qualified by indispensability “in light of prevailing circumstances”. The obligations of States are “common but differentiated” and considered on a per capita basis with least developed countries subject to less stringent obligations. More specific State obligations are proposed, including Principle 21 which requires States to refrain from subsidizing in any form facilities that create “unnecessarily high or, in the given circumstances, unsustainable quantities of GHG, either within or outside their territories.” The Commentary suggests that a consequence of this Principle may be that States are legally obligated to enact legislation preventing financial institutions within their jurisdiction from “enabling, inducing or instigating such activities.” Yet curiously the Oslo Principles do not take the position that States (or at a minimum, developed States above an identified per capita emissions level) have an obligation to prevent such activities from being carried out at all, even those that take place within State territory or jurisdiction, or under effective State control.

At times, the Commentary to the Oslo Principles relies on the UN Guiding Principles, yet the four Principles that directly articulate obligations of enterprises do not clearly reflect the business responsibility to respect rights. According to Principle 27, enterprises must assess the vulnerability of their facilities and properties to climate change and disclose this information to those likely affected including “investors, clients, and securities regulators,” yet no mention is made of workers or surrounding communities, for example. Principle 28, directed at fossil-fuel production enterprises, provides that disclosure to “investors, securities regulators, and the public” must be made of an assessment of the impact of limitations on future production or use of fossil-fuels arising from the “carbon budget” concept. The focus again is upon those who stand to lose financially, in this case from a change in usage of fossil fuels, rather than upon the climate vulnerable who experience losses linked to emissions from fossil fuels. Principle 29 addresses the need for enterprises to conduct environmental assessments that consider the potential carbon footprint of and climate impacts on proposed new activities.

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52 Oslo Principles, supra note 39 at 4 (Principles 6-8).
53 Oslo Principles, supra note 39 at 5-6 (see for example Principles 13-19).
54 Oslo Principles, supra note 39 at 6.
55 Oslo Principles, Commentary, supra note 51 at 81. Here the Commentary relies for support in part on the UN Guiding Principles for Business and Human Rights. Ibid at 81, n260.
57 Oslo Principles, supra note 39, at 7 (Principle 27).
58 Oslo Principles, supra note 39 at 7 (Principle 28). This Principle was inspired by the “stranded assets” work of Carbon Tracker. Oslo Principles, Commentary, supra note 51 at 94.
facilities. Finally Principle 30 is directed at enterprises “in the banking and finance sectors” who “should take into account the GHG effects of any projects they consider financing.”

While commendable as a first step, the Oslo Principles do not clearly track the business responsibility to respect human rights as articulated in the UN Guiding Principles. Most crucially, the obligations specific to enterprises including fossil-fuel producers in the Oslo Principles appear to focus on assessment and disclosure of harms to the enterprise itself, or its investors, rather than harm to rights-holders. Although Principle 29 and 30 suggest a need to be aware of the carbon footprint and GHG emissions of a proposed project, there is no suggestion that the aim of assessments should be to seek out alternatives with zero emissions, nor for assessments to actively seek the views of those most vulnerable to climate harms whose voices are essential for rights-respecting decision-making. Moreover, there is no mention of the need for business to take responsibility to remedy climate harms as would be required under Principle 22 of the UN Guiding Principles. This is not surprising, given the challenge of linking the emissions of a specific industry player with specific harms experienced by climate vulnerable populations. But this does not mean that the harms are not felt, or that GHG emissions from businesses are not responsible for these harms, particularly as the wording of Principle 22 specifically contemplates that the responsibility arises even in cases where a business enterprises has merely “contributed to adverse impacts.” Interestingly, the Commentary to the Oslo Principles suggests that the drafters grappled extensively with how to align the obligations of enterprises with concerns that dominate climate law including the need to differentiate between the obligations of developed and developing/least developed states due to concerns over capacity, as well as the need to differentiate based upon current, historic and per capita responsibilities for GHG emissions. These are not issues addressed in the UN Guiding Principles, although Principle 14 touches upon the idea that the “means through which a business enterprise meets its responsibility to respect” may be “proportional to, among other factors, size.”

Another potentially useful earlier source is the July 2014 International Bar Association (IBA) report *Achieving Justice and Human Rights in an Era of Climate Disruption* (Climate Justice Report), which adopts a ‘justice and human rights-centred approach’ with the explicit intention of “shift[ing] the focus of much-needed reform from purely economic and scientific considerations to the human rights

59 Oslo Principles, supra note 39 at 7 (Principle 29).
60 Ibid at 28-30.
61 UN Guiding Principles, supra note 7 at 20 (Principle 22): “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”
63 UN Guiding Principles, supra note 7 at 14 (Commentary to Principle 14). Principle 14 states: “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.”
and equity consequences of climate change”.

Section 3.1.3 is dedicated to Climate Justice and Corporate Responsibility. However, while the Report “supports the increasing international recognition of corporate responsibility for environmental and human rights harms,” it takes the position that this responsibility “must be accompanied by development of coherent and clear regulatory standards that make compliance possible” and accordingly places the “impetus ... upon states and international organisations to come to coherent and consistent standards to regulate corporates and multinationals within their jurisdiction as part of their efforts to mitigate and adapt to climate change.” Accordingly, the Report presents a “multi-faceted approach to corporate responsibility that will increase the ability of corporations to self-regulate, including in response to increased regulation by states”.

While a multi-faceted approach is clearly necessary, the starting point of the IBA Climate Justice Report appears out of step with the UN Guiding Principles according to which the business responsibility arises even where states are not in compliance with the duty to protect. Nevertheless, the IBA does recommend that corporations “adopt and promote” the UN Guiding Principles “as they pertain to human rights and climate change” and that the OHCHR “develop a model internal corporate policy” to advance corporate responsibility specifically in the climate change context. A model policy should require corporate commitment to three steps: first, the adoption of an explicit policy stipulating measures to prevent or mitigate climate impacts linked to operations; second, the implementation of a due-diligence process “to identify, prevent, mitigate and account” for “actual climate change impacts” which must then be translated “into active efforts to minimise or reverse” impacts; and third, implementation of “remediation processes that allow for open communication with stakeholders most affected by the corporation’s operations”. The measures to be adopted “must include due diligence of corporate projects, including the environmental practices of the company’s affiliates, and as far as is reasonably practicable, its major contractors and suppliers”. In terms of translating awareness of impacts into active efforts, the Report provides further guidance, stating:

The corporation should consider measures it can implement to assist in achieving the objective of limiting global warming to no more than a 2°C increase. The corporation’s goal should be to implement the most advanced available technology to minimise its carbon footprint. In situations where negative impact on the environment is unavoidable given current technology

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66 IBA, Climate Justice Report, supra note 64 at 148.

67 Ibid.

68 UN Guiding Principles, supra note 7 at 13 (Commentary to Principle 11): “The responsibility to respect human rights is a global standard of expected conduct. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”

69 IBA, Climate Justice Report, supra note 64 at 148 [Update: has the OHCHR taken steps in this direction?]

70 Ibid at 148-9. Specifically, the rationale given for the third recommendation is that ‘internal assessments of potential environmental or human rights impacts can fall short of a complete picture of the actual impact on nearby and distant communities.’

71 Ibid at 148.
or if the cost of such technology is prohibitive, the corporation bears responsibility for corresponding mitigation and remediation.\textsuperscript{72}

While this is an important statement on business responsibilities for human rights with regard to climate change, it fails to consider that there may be situations where the negative impact on human rights affected by climate change would be so severe that, irrespective of the implementation of mitigation and remediation measures, a proposed project should simply not proceed.\textsuperscript{73} This would be in keeping with UN Guiding Principle 13, which explicitly states that the responsibility to respect requires business enterprises to “[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur” as well as to “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”\textsuperscript{74} The Guiding Principles do not suggest that adverse human rights impacts are to be avoided only where the cost of doing so falls below a certain threshold, or only where technology permits. Having said this, as Professor Ruggie highlighted in his keynote address, it is salient or potentially severe risks to people that require attention, although severe risks like climate change harms that arise from cumulative contributions rather than a single direct causal link lend themselves to being underestimated and so ignored.\textsuperscript{75}

More promisingly, the Climate Justice Report identifies the need for open communication with affected stakeholders including “nearby and distant communities” so as to obtain a “complete picture” of “climate change impacts, which are not strictly localised to any one area”.\textsuperscript{76} Implementation of remediation processes are also to provide opportunities for “open communication with stakeholders most affected by the corporation’s operations.” Yet these recommendations raise practical concerns due to the causal difficulty of linking individual GHG emissions to specific “directly affected” stakeholders, even if, as Professor Knox observes in his 2016 report on climate change and human rights, these linkages are becoming easier to establish.\textsuperscript{77} The Task Force makes some suggestions as to what standard would establish causation. One is relying on credible scientific claims of future harm; another is similar in fashion, but has less legal certainty, and that is to adhere to the Precautionary Principle.\textsuperscript{78} Alternatively, the Task Force suggests adhering to a standard of partial causation that would

\textsuperscript{72} Ibid at 149.
\textsuperscript{73} See further the analysis in Seck & Slattery, supra note 65 at 81 (suggesting that conceptualizing the atmosphere as a global public trust would support the necessity of such an approach).
\textsuperscript{74} UN Guiding Principles, supra note 7 at 14 (Principle 13).
\textsuperscript{75} As a result, it is unlikely that Principle 23(c) of the UN Guiding Principles, which provides that businesses should “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate”, would generally be understood as applicable to climate change risks. Ibid at 21 (Principle 23). A different point is that rights are not necessarily absolute, for, depending on the context, respect for some rights may lead to infringement of other rights. This is not addressed in the UN Guiding Principles.
\textsuperscript{76} IBA, Climate Justice Report, supra note 64 at 149.
\textsuperscript{77} Knox, Climate 2016, supra note 3 at paras 34-36.
\textsuperscript{78} IBA, Climate Justice Report, supra note 64 at 131. Notably, the Precautionary Principle is not defined in the IBA Climate Justice Report. See Rio Declaration on Environment and Development, 14 June 1992, 31 ILM 874, Principle 15, for the most commonly quoted definition: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to
require only showing the defendant’s conduct was a substantial factor in bringing about harm, or,
avoiding any need to establish an anthropogenic source of climate change harm, a claimant would need
only to establish a prima facie case that the defendant is a net emitter of greenhouse gases, creating a
rebuttable presumption of causation and shifting the burden of proof to the defendant. 79 Similar
strategies have been adopted in some examples of climate litigation, perhaps most notably the
Philippines Climate Petition, an attempt to seek an investigation into the accountability of the “investor-
owned Carbon Majors”, producers of “crude oil, natural gas, coal, and cement” to whom nearly 22% of
estimated global industrial emissions can been attributed since the industrial revolution. 80

Three other recommendations are identified in section 3.1.3 of the Climate Justice Report to
further climate change justice and corporate responsibility. First, businesses are encouraged to
incorporate ISO carbon footprint standards in GHG management programs, while states and
international organisations should develop and adopt in parallel “clear and implementable objective
standards for corporate reporting in respect of human rights issues pertaining to the environment”. 81
The IBA then suggests that international institutions must then monitor corporate compliance with GHG
emissions limits. 82 This recommendation could be seen as a version of implementation of the business
responsibility to respect rights, with due diligence to prevent climate harms requiring first the
identification and then disclosure of GHG emissions. 83 However, it does not consider how to integrate
“meaningful consultation with potentially affected groups and other relevant stakeholders” into the
identification and assessment of human rights risks, including those most vulnerable, as suggested by
Principle 18 of the UN Guiding Principles. 84 In practice, there are an increasing number of international
tools that have developed to guide disclosure of GHG emissions and climate risks to the business itself,
yet few if any take an explicitly human rights-centred approach that would align with the UN Guiding
Principles and so require disclosure of salient risks to rights-holders. 85 Having said this, the recently

prevent environmental degradation.” See also the definition of the Precautionary Principles in the Oslo Principles,
supra note 48.
79 IBA, Climate Justice Report, supra note 64 at 132.
80 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, “Petition To the Commission on
Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human
Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change” (22 September 2015),
online: Greenpeace <http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-
Rights-Complaint.pdf> [Philippines Petition]. See further Sara L Seck, “Revisiting Transnational Corporations and
Extractive Industries: Climate Justice, Feminism, and State Sovereignty” (2017) 26 Transnational Law and
Contemporary Problems 1 (forthcoming summer 2017) [Seck, Climate Justice].
81 IBA, Climate Justice Report, supra note 64 at 149-50.
82 Ibid at 151-2.
83 UN Guiding Principles, supra note 7 at 17 (Principle 18) and 20 (Principle 21).
84 UN Guiding Principles, supra note 7 at 17 (Principle 18 and Commentary).
85 See for example CDP, formerly known as the Carbon Disclosure Project, online: https://www.cdp.net/en; the
Global Reporting Initiative, “Beyond Carbon, Beyond Reports” online: https://www.globalreporting.org/information/current-priorities/Pages/Climate-change.aspx; Task Force on
Climate-Related Financial Disclosures, online: https://www.fsb-tcfd.org/about/#; TCFD Recommendations Report,
Executive Summary, online: https://www.fsb-tcfd.org/publications/recommendations-report/#; UN Global
Compact, “Caring for Climate”, online: http://caringforclimate.org and Caring for Climate, “Transparency and
Disclosure”, online: http://caringforclimate.org/workstreams/transparency-and-disclosure/.
developed and updated implementation guidance to the *UN Guiding Principles reporting framework* does hint at the link between climate change and human rights in the list of relevant information that a company could include in its answer to the second overarching question on the embedding of human rights.\(^8\)

Second, the IBA report draws attention to the state duty to protect human rights and the need for “robust regulation of corporations within each state’s jurisdiction” including the development of “sufficient judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory”.\(^8\) This recommendation aligns with the UN Guiding Principles in its focus on the role of the state in ensuring access to remedy where human rights have been violated, as well as the Special Rapporteur on Human Rights and Environment’s claim that for states to be in compliance with their duty of cooperation, they must address access to remedy for climate harms.\(^8\) In practice, this is difficult to implement, however.\(^8\) The Task Force then highlights the need for states to identify clear obligations for corporations “so that corporates are able to put in place strategies to comply with regulation” which must “strike the proper balance between under- and over-regulation” and not be “characterised by gaps and loopholes” that would create “enforcement difficulties and hamper the effectiveness of remedies”.\(^9\) As noted above, this is arguably out of step with the business responsibility to respect human rights, as it is no excuse to a human rights violation that a state has failed to regulate as required by the state duty to protect.\(^9\) While the need for legal certainty is clearly essential for efficient business conduct, and a key component of the rule of law, the question in the climate context surely must be why the need for business certainty should take precedence over the needs of the climate vulnerable to be protected from grave harm. The answer to the certainty conundrum must be for businesses to engage in rights-respecting conduct that takes seriously the severity of climate harms

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87 IBA, *Climate Justice Report*, supra note 64 at 152 (emphasis in original).


89 See for example discussion in Seck, *Climate Justice*, supra note 80 at 16-22 (noting challenges to the Philippines Climate Petition that allege it would involve the exercise of extraterritorial jurisdiction and so is not permissible under international law).

90 IBA, *Climate Justice Report*, supra note 64 at 152. Given the challenges associated with the design of such regulation, it is not surprising that the Task Force then returns to the importance of regulation “through legislation requiring full disclosure of GHG emissions both at home and abroad”. Moreover, the Task Force does not suggest here, as it does later in the report, that regulation “ultimately” include “more stringent regulation of global fossil fuel reserves” due to the “cumulative carbon budget”, nor does it suggest that regulation could mean a prohibition on fossil fuel extraction. *Ibid* at 176.

91 See *supra* note 68, citing UN Guiding Principles, *supra* note 7 at 13 (Commentary to Principle 11).
for the climate vulnerable, and to act irrespective of the existence of state legislation. That is, certainty is to be achieved by adopting the perspective of those whose rights would be violated.

Having said this, if the perspective of the climate vulnerable were to inform our assessment of current climate solutions such as carbon taxes and cap and trade, it is unlikely that they would meet the state duty to protect. While putting a price on carbon is clearly better than no price, there is no guarantee that the price will be sufficiently high to reduce anthropogenic emissions to the extent necessary to at a minimum keep global temperature increases below the 1.5° or 2° threshold of the Paris Agreement. In any case, today, many people already suffer from violation of the enjoyment of their human rights due to climate change. Meeting the Paris Agreement threshold would represent compliance with an international climate law target, but does not represent a threshold at which human rights issues suddenly become salient. Implementation of carbon taxes and cap and trade do not guarantee that climate harms will be prevented, and in any case the funds raised are generally not used to provide remedy to those who suffer climate harms. It may be that the answer to certainty from the perspective of the climate vulnerable would be that irrespective of state law, business responsibilities for human rights affected by climate change require all businesses to seek to become carbon neutral, and in the interim to both reduce and offset emissions while taking into account the need to provide remedy for climate harms, consistent with the polluter pays principle.

Recommendation four of section 3.1.3 of the IBA Climate Justice Report turns to sector-specific initiatives in banking and finance. Here, reference is made to the work of the UNEP Finance Initiative, Equator Principles financial institutions, and the OECD’s Arrangement on export credit agencies. In this context, the International Finance Corporation’s Performance Standards on Environmental and Social Sustainability are of interest as they define the responsibility of clients for managing social and environmental risks and are broadly viewed as international standards for project financing by Equator

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92 For insights into why they should be used for this purpose, see Craig Brown and Sara L Seck, “Insurance Law Principles in an International Context: Compensating Losses caused by Climate Change”, (2013) 50:4 Alberta Law Review 541-576 (special issue on insurance law).

93 A commonly cited version of the polluter pays principle is from the Rio Declaration on Environment and Development, 14 June 1992, 31 ILM 874, Principle 16: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” Reaffirmed in in United Nations Conference on Sustainable Development, Rio+20: The Future We Want, UN Doc A/CONF.216/L.1 (2012) at para 15.


Principles financial institutions and export credit agencies. The IFC Performance Standards were last updated in 2012 and consist of eight standards that touch on a wide range of sustainability concerns. Performance Standard 1 specifically identifies the business responsibility to respect rights, noting that each performance standard has human rights dimensions that can be identified if clients are guided by the standards when engaging in due diligence. The Performance Standards likewise integrate some consideration of climate change, and treats both human rights and climate change as “cross-cutting topics” that are “addressed across multiple Performance Standards.” However, Performance Standard 1 notes that “specific human rights due diligence as relevant to the particular business” may be appropriate to complement social and environmental risk assessment in “high risk circumstances”, suggesting that a human rights due diligence process would be the exception, not the norm. The concerns of affected communities are considered throughout the IFC Performance Standards. Performance Standard 1 mandates the identification of environmental and social risks and impacts including GHG emissions, and, climate change risks in adaptation. Performance Standard 3 provides guidance on pollution prevention and control and in this context seeks the reduction and quantification of GHG emissions. The link between GHG emissions is explicitly linked here to the threat to the public health and welfare of current and future generations. Performance Standard 4 is concerned with community health and safety, and considers climate change impacts to the extent that they exacerbate project impacts on already vulnerable communities. It also places an obligation on clients to “identify

96 IFC, Equator Principles Financial Institutions, online:
http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/partnerships/equator+principles+financial+institutions.
98 IFC Performance Standards, supra note 95, Overview, at 3.
99 IFC Performance Standards, supra note 95 at 8, n.12.
101 Performance Standard 1, supra note 95 at 7-8. See further André Abadie and Michael Torrance, “Performance Standard One: Assessment and Management of Environmental and Social Risks” in Michael Torrance, ed, IFC Performance Standards on Environmental & Social Sustainability: A Guidebook (Markham, ON; LexisNexis Canada 2012) 37. [hereinafter Torrance, IFC Guidebook]
102 Performance Standard 3, supra note 95 at 22, 24 See further Tina Costas, "Performance Standard Three: Resource Efficiency and Pollution Prevention" in Torrance, IFC Guidebook, supra note 194 at 120, 128-135. The “quantification of GHG emissions will be conducted by the client annually in accordance with internationally recognized methodologies and good practice.” Performance Standard 3 at 24.
103 Performance Standard 3, supra note 95 at 22. Performance Standard 3 explicitly states that the “client will consider alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions during the design and operation of the project.” PS3 at 24.
104 Performance Standard 4, supra note 95 at 27 and 29. For example, “communities that are already subjected to impacts from climate change may also experience an acceleration and/or intensification of impacts due to project activities.” Performance Standard 4 at 27.
those risks and potential impacts on priority ecosystem services that may be exacerbated by climate change.” Performance Standard 6 is concerned with biodiversity conservation and living natural resources, and identifies climate regulation as one of the supporting services, which are regarded as the natural processes that maintain the other ecosystem services. Further detail can be found in the accompanying Guidance Notes.

Despite this evidence that climate change considerations feature within the Performance Standards, there do not appear to be any attempts to bring forward climate change related complaints to the Compliance Advisor Ombudsman (CAO). Since the CAO has come into existence, it has handled over 300 cases, yet while “[I]rreparable environmental damage” to a “unique ecology” has been raised in a complaint concerning the development of a gold mine in Columbia, and several complaints have raised air pollution issues more generally, climate change has not yet been specifically considered. More generally, the World Bank Group and the IFC have been subject to criticism for continuing to financially support oil, gas, and coal projects, despite repeated recommendations that such funding no longer be provided. While the WBG has increased funds for renewable energy, and funding for climate mitigation and adaptation, support for fossil fuel projects has continued, including

105 Performance Standard 4, supra note 95 at 29.
106 Performance Standard 6, supra note 95 at 40, n1.
107 IFC Guidance Notes: Performance Standards on Environmental and Social Sustainability, online: www.ifc.org/wps/wcm/connect/e280ef804a0256609709fffd1a5d13d27/GN_English_2012_Full-Document.pdf?MOD=AJPRES For example, Guidance note 2 provides that it is the responsibility of clients “to consider their potential contribution to climate change when developing and implementing projects and to minimize GHG emissions from core business activities to the extent that this is cost-effective” (at 2) It also recognizes that environmental impacts associated with GHG emissions are considered “to be among the most complex to predict and mitigate due to their global nature” (at 2) Guidance note 33 provides that in dictating the extents of climate change considerations in the risks and impacts identification process, “a project’s vulnerability to climate change and its potential to increase the vulnerability of ecosystems and communities to climate change” should be considered (at 12).
108 The CAO can engage in a review of a complaint if: it relates to a project in which the IFC is participating or actively considering; the issues raised are environmental and social in nature; and the complainant is affected by the issues. CAO, 2013 Annual Report: Compliance Advisor Ombudsman (CAO) (Washington, DC: Office of the CAO, 2013) at 8, online: Compliance Advisor Ombudsman <http://cao-ombudsman.org> See Compliance Advisor Ombudsman (CAO) database for cases handled online: www.cao-ombudsman.org/cases/
109 Colombia/Eco Oro-01/Bucaramanga, online: www.cao-ombudsman.org/cases/case_detail.aspx?id=187
projects that transition from oil and coal to gas and reduce gas flaring. Yet in 2013, the World Bank spent $1 billion on fossil fuel exploration projects. More recently, Germany has insisted that the World Bank no longer support fossil fuel exploration and development.

Another international standard of broader application that merits attention are the OECD Guidelines for Multinational Enterprises, currently adhered to by 48 countries including all OECD members and a smaller set of non-OECD countries. The Guidelines consist of nine subject specific chapters, with overarching chapters on “Concepts and Principles” as well as “General Policies.” The human rights chapter was introduced in the 2011 revision, in order to implement the business responsibility to respect human rights of the UNGPs. Leading into the 2011 revisions, the suggestion was made by an IBA Working Group, among others, that the Environment Chapter of the OECD MNE Guidelines be amended to clarify its application to climate change. Many of the suggested changes were adopted, including the recommendation that enterprises should reduce greenhouse gas (GHG) emissions as part of improving corporate environmental performance through supply chains, as well as a recommendation that enterprises should promote environmental awareness among consumers through the provision of accurate information on GHG emissions. The Chair of the OECD Working Party on Responsible Business Conduct suggested in November 2015 that these changes, along with changes to the disclosure chapter, create the expectation that businesses will “do their due diligence” on climate impacts, including climate impacts that arise along their value chain. Yet to date there have been very

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113 See for example 2015 Annual Review, online: www.ifc.org/wps/wcm/connect/2eaabb804ae4b8799548bdddbe70b6aa3/WBG+in+Extractive+Industries+-+2015+Annual+Review+.pdf?MOD=AJPERES (discussing the relationship between gas flaring and climate change at 18; identifying climate change as one of the challenges confronting the Governance of Extractive Industries (GEI) at 25; and describing the China Gas project, a proposed IFC investment as aiming to “reduce local pollution and GHG emissions by supplying natural gas to residential, industrial and commercial as well as transport users through pipelines and CNG/LNG refilling stations, substituting coal and oil which are more polluting and carbon intensive fuels” at 36.)


115 Karl Mathiesen, “Germany tells World Bank to quit funding fossil fuels” Climate Home (1 December, 2016) online: http://www.climatechangene.ws/2016/12/01/germany-tells-world-bank-to-quit-funding-fossil-fuels/


117 See OECD Guidelines for Multinational Enterprises: About the OECD Guidelines for MNEs online: http://mneguidelines.oecd.org/about/


few attempts to raise climate change issues as specific instances with National Contact Points (NCPs),\(^{121}\) non-judicial grievance mechanisms established in all adhering countries to which specific instance complaints may be brought.\(^{122}\) Of NCP specific instances that have raised climate change concerns, none appear to date to have been accepted for consideration.\(^ {123}\) Beyond the OECD MNE Guidelines themselves, it is useful to consider the extent to which sector-specific guidance integrates human rights and climate change guidance. For example, a Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector\(^ {124}\) was released in 2015 which explicitly incorporates the importance of business respect for the rights of indigenous peoples, and also provides guidance on gender considerations in stakeholder engagement.\(^ {125}\) Yet it is silent on climate change. On the other hand, the 2016 OECD-FAO Guidance for Responsible Agricultural Supply Chains refers on several occasions to the need to reduce GHG emissions and address climate change impacts.\(^ {126}\)

3. Conclusions: From Salient to Material Risks

This paper has briefly examined the relationship between human rights and climate change, and the business responsibility to respect human rights under the UN Guiding Principles. As noted by Professor Ruggie, a key question is whether human rights risks are “salient” which he defines as the “most severe potential harms, that business activities and relationships pose to people.”\(^ {127}\) Given the nature of the climate change problem, it is easy to overlook the severity of the harms due to the challenge of proving causation between specific emissions and specific harms, and the collective nature of emissions. Yet if business responsibilities for human rights are to meaningful, understandings of salience must account for both existing and future climate harms. Indeed, Mary Robinson, in her capacity as the Special Envoy of the UN Secretary-General on Climate Change has described climate change as “the greatest threat to human rights in the twenty-first century.”\(^ {128}\)

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125 Ibid at appendix B and C; at 75-85.
127 Ruggie Keynote, supra note 5.
128 Knox, Climate 2016, supra note 3 at para 23. A further consideration is whether respect for human rights is sufficient to address the climate problem. For example, the 2016 GNHRE Declaration on Human Rights and Climate Change, supra note 39 provides in Principle 17 that “All States and business enterprises have a duty to protect the climate and to respect the rights set out in this Declaration”. The GNHRE does not elaborate further on steps business enterprises should take in order to implement this duty and respect rights. What is made clear in Principle 2, however, is the focus on human rights may not be enough: “All human beings, animals and living systems have
Although there is no concrete evidence to date that a business’ failure to respect the human rights of climate vulnerable populations will lead to legal accountability, there is no question that potential litigants and their lawyers are actively considering and implementing novel litigation strategies designed to reach this end. Moreover, in a first, Chevron has acknowledged to shareholders that climate litigation poses a material risk that merits disclosure. In another first, Walmart announced in April 2017 that it will remove a “gigaton of greenhouse gas emissions from its supply chain by 2030.” Walmart’s move is arguably at least partially in accordance with the UN Guiding Principles, if viewed as the implementation of findings of human rights due diligence across relationships through the exercise of leverage. It is also part of a trend. As of April 29, 2019, 2,138 companies and 479 investors have committed to climate action, according to the NAZCA website, which tracks climate action commitments by “companies, cities, subnational, regions, investors, and civil society organizations.” While the nature of the commitments to date would not meet the responsibility to respect human rights in accordance with the UN Guiding Principles, they nevertheless represent the beginning of a solidification of social expectation that non-state businesses do have independent responsibilities to respect the right to a secure, healthy and ecologically sound Earth system.” While the most recent report by Professor Knox is his capacity as the Special Representative on Human Rights and Environment may assist in breaking down the divide between humanity and other with its focus on the relationship between biodiversity and human rights (stating in para 5: “The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights”), Knox acknowledges that “components of biodiversity also have intrinsic value that may not be captured by a human rights perspective.” John Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: biodiversity, UNHRC, 34th Sess, UN Doc A/HRC/34/49 (2017), online: http://srenvironment.org/wp-content/uploads/2017/02/A_HRC_34_49-Final.pdf

130 Madeline Cuff and James Muarr, “Oil giants are waking up to carbon bubble risks” (March 15, 2017), online: GreenBiz, https://www.greenbiz.com/article/oil-giants-are-waking-carbon-bubble-risks
132 See UN Guiding Principles, supra note 7, at 18 (Principle 19 and Commentary). What precisely would be required of human rights due diligence in the climate context is unclear. The topic of due diligence and the business responsibility to respect rights has been the subject of a section of the (draft) Second Report of the International Law Association’s Study Group on Due Diligence in International Law (July 2016) at 27-39, online: https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageld=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f
133 See for example World Economic Forum, “Scaling Up Climate Action through Value Chain Mobilization” (January 2016), online: https://www.weforum.org/reports/scaling-up-climate-action-through-value-chain-mobilization
134 NAZCA Tracking Climate Action, online: http://climateaction.unfccc.int
rights of the climate vulnerable. Perhaps in time this social expectation will grow from a responsibility to prevent climate change, to a responsibility to remedy past and future climate harms.