THE NEW GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS’ CONTRIBUTION IN ENDING THE DIVISIVE DEBATE OVER HUMAN RIGHTS RESPONSIBILITIES OF COMPANIES: IS IT TIME FOR AN ICJ ADVISORY OPINION?

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THE NEW GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS’ CONTRIBUTION IN ENDING THE DIVISIVE DEBATE OVER HUMAN RIGHTS RESPONSIBILITIES OF COMPANIES: IS IT TIME FOR AN ICJ ADVISORY OPINION?

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I. INTRODUCTION

In March 2011, John Ruggie, the UN Secretary General Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (“SRSG”) released his final report on Guiding Principles on Business and Human Rights. The new standards proposed by the SRSG are based on three pillars: the state duty to protect, the corporate responsibility to respect and the access to remedy principle.

This report was ordered in 2005 by the then UN Commission on Human Rights (now Human Rights Council) in order to “to move beyond what had been a long-standing and deeply divisive debate over the human rights responsibilities of companies”. The debate referred to here was mainly between those promoting the use of international soft law and those promoting the use of international hard law in dealing with human rights violations by business corporations. The first group argued that existing international human rights instruments do not impose direct legal obligations on corporations and therefore the only effective solution should be found in self-regulation and soft law. The second group argued that the traditional view that

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2 Ibid.


4 This group is dominated by the traditionalists who view international law including international human rights law as a law between nations where the only subjects of international law are states. See L. Oppenheim, International Law: A Treaties, 2nd ed. 1912, p. 19 “since the law of nations is based on the common consent of individual States,
international human rights treaties do not create legal obligations directly to business corporations is no longer valid. They stress that the debate should not be on “if” human rights instruments create direct obligations on business corporations but on “which” instruments and provisions that create direct human rights obligations on business corporations and on “how” to use them to hold business corporations accountable for their human rights violations. Somewhere between these two groups, but closer to the second, are voices that believe that whether the traditional views of international law are still valid or not, what matters the most is that international human rights law is a highly dynamic tool and therefore can still be adapted to meet present pressing needs of holding business corporations accountable for their human rights violations. Looking forward, this last group stresses that “there is important scope for the


6 This group is mainly dominated by Non-governmental human rights organizations such as Human Rights Watch and Amnesty International, See Intl/Network for Economic, Social & Cultural Rights (ESCR-Net) and Human
[Human Rights] Council to consider the actual and potential role of international law in further defining the corporate responsibility for human rights.”

This paper argues that while the work of the SRSG has made a significant contribution to the debate on the issue of human rights violations by transnational corporations and other business enterprises, it has done little to offer an “authoritative global standard” solution to the long-standing and deeply divisive debate over the human rights responsibilities of companies. Despite the fact that SRSG’s aim was to build meaningful consensus among all stakeholders, and turn a previously divisive debate on this issue into constructive dialogues and practical action paths, the conclusions of his work contain little traces of that. By siding with the traditional view that existing international human rights instruments do not impose direct legal obligations on corporations, and by further stressing that it is not even worth considering adopting new human rights instruments binding on business corporations, his conclusions offered a partial answer


See Intl/Network for Economic, Social & Cultural Rights (ESCR-Net) and Human Rights Watch, Id.


that dismisses and closes the doors on views of both those who still see international human
rights as containing some hard law provisions that can be used in holding business corporations
accountable of their human rights violations, and those who see international law as dynamic and
therefore capable to be adapted in order to respond to the growing need to make the respect of
human rights by business corporation a “duty” rather than a just a “responsibility”.

This paper argues further that limiting the enforcement of the corporate responsibility to
respect human rights to general social norms and market expectations, as the SRSG’s work has
so far advocated,\textsuperscript{11} is not sustainable and offers little to the victims of corporate human rights
violations.\textsuperscript{12} Until the question of whether international human rights law directly impose legal
obligations on business corporations has been authoritatively answered, the divisive debate over
the human rights responsibilities of companies is unlikely to end. It is in search for the
authoritative global answer that this paper argues for an advisory opinion by the International
Court of Justice (“ICJ”) to address this fundamental question of international law.

This paper is divided into three parts. The first part analyzes contemporary efforts in making
business corporations accountable for their human rights violations. The second part examines
why those contemporary approaches, including those of the SRSG, are unlikely to effectively
hold business corporations meaningfully accountable for their human rights violations. The third


part examines why an ICJ advisory opinion on direct business corporation liability for human rights violations offers a better hope.

II. CONTEMPORARY APPROACHES TO MAKING BUSINESS CORPORATIONS ACCOUNTABLE FOR THEIR HUMAN RIGHTS VIOLATIONS

Contemporary standards and practices governing corporate responsibility and accountability for human rights violations have been dominated by the state duty to protect; accountability for international crimes; and soft law and self-regulation.\(^\text{13}\)

The duty to protect is one of the primary responsibilities any state has to its citizens. This duty not only extends to actions of state’s agents, but also those of private entities.\(^\text{14}\) International human rights covenants have recently been interpreted to contain such a duty. As the General Comment of the Human Rights Committee has stated, under the International Covenant on Civil and Political Rights (“ICCPR”) “the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities”.\(^\text{15}\) This comment suggest that the failure to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress harm by a non-state actor would give rise to violations by States parties of Covenant rights.\(^\text{16}\) As a result, States parties have a responsibility to hold business corporations accountable for their human rights violations. Failing to do so may constitute a violation of human rights treaties by states themselves.

The second source of corporate responsibility can be found in the expansion and refinement of individual and corporate responsibility by international and domestic criminal law.

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\(^\text{13}\) H.R.C. Res. 4/35, supra note 9.
\(^\text{16}\) Id.
The Nuremberg trials provided a legal precedent not only in making individuals, as non-state actors, accountable for their gross human rights violations, but also in defining corporate responsibilities and obligations in this regard. The principle of individual responsibility for international crimes introduced in the Principles of the Nuremberg Tribunals\(^\text{17}\) was reiterated and reinforced in Statutes of the International Criminal Tribunal for the Former Yugoslavia,\(^\text{18}\) the International Criminal Tribunal for Rwanda,\(^\text{19}\) and the International Criminal Court (“ICC”).\(^\text{20}\) Although no corporations were prosecuted at Nuremberg, the Nuremberg trials have been the primary legal precedent for finding that corporations are bound by international law.\(^\text{21}\) In the \textit{I.G. Farben Case} for example, it was held that the action of Farben “constituted a violation of the Hague Regulations [on the conduct of warfare]”.\(^\text{22}\)

At the national level, the United States Alien Torts Claim Acts (“ATCA”) is an important example of successful steps towards making corporations accountable for human rights violations. In a series of ATCA cases, U.S. courts have confirmed that “some violations of international law can be committed by private actors acting on their own”.\(^\text{23}\) In the \textit{Kadic case}, the Second Circuit Court of Appeals has recognized tort liability for torture, genocide and war crimes committed by both state and non-state actors.\(^\text{24}\) In \textit{Doe I v. Unocal Corp.}, the Ninth Circuit Court of Appeals found that a corporation can be held liable for private acts of slavery


\(^{19}\) See Statute of the International Criminal Tribunal for Rwanda, art. 6.


\(^{22}\) Ratner, \textit{supra} note 9, at 443-47 (2001) (quoting United States v. Krauch, 8 CCL No. 10, Trials at 1081, 1140 (1952) (U.S. Mil. Trib. VI 1948)).

\(^{23}\) CALPHAM, \textit{supra} note 5, at 255.

\(^{24}\) See Kadic v. Karadzic, 70 F.3d 232, at 239 (quoting Restatement (Third) of the Foreign Relations Law of the United States §§ 404, 702 (1987)).
and forced labor. Similarly, in *Beanal v. Freeport-McMoRan*, the District Court for the Eastern District of Louisiana found that a private corporation can be held liable for genocide and that “[A] corporation found to be a state actor can be held responsible for human rights abuses which violate customary international law.” In this last case, private actors were viewed as state actors when they willfully participated in joint action with the state or its agents. More forcefully, however, the Second Circuit Court of Appeals held that “under the jurisprudence of this Circuit corporations are liable in the same manner as natural persons for torts in violation of the law of nations.”

As far as soft law sources for holding accountable business corporations for their human rights violations are concerned, a number of rules have been identified. They include:

- declarations of principles by intergovernmental organizations setting their normative role;
- standards and guidelines developed by some intergovernmental organizations to enhance accountability for compliance by business companies; and emerging multi-stakeholder principles to redress sources of corporate-related human rights violations.

In the first category are included instruments such as the International Labour Organization’s (“ILO”) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises. The second category includes, for example, the Organization for Economic Co-Operation and Development, *OECD Guidelines for Multinational Enterprises* (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

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25 Doe v. Unocal Corp., 395 F. 3d 932, 946-47 (9th Cir. 2002). Dismissed by stipulation pending rehearing en banc, 403 F.3d 708 (9th Cir. 2005).
29 H.R.C. Res. 4/35, *supra* note 9, at ¶46
Development’s ("OECD") Council Decision of June 2000, asking adhering countries to the OECD Guidelines to set up national contact points to handle inquiries from anyone with a complaint against a multinational firm operating within the sphere of the OECD.\(^\text{32}\) Another example is the International Finance Corporation’s Performance Standards on Social and Environmental Sustainability, imposed by the IFC on companies receiving its funds.\(^\text{33}\) The last category includes, for example, the Kimberley Process Certification Scheme which seeks to stem the flow of conflict diamonds – rough diamonds used by rebel movements to finance wars against legitimate governments.\(^\text{34}\)

In the third category of self-regulation are policies and practices that business corporations voluntarily adopt themselves to observe human rights obligations. The SGSR conducted a survey of such policies in governments and Fortune Global 500 firms.\(^\text{35}\) This survey found that almost all the FG 500 firms claim to have policies or management practices in place relating to human rights.\(^\text{36}\)

III. WHY THE CURRENT APPROACHES CANNOT LEAD TO AN EFFECTIVE AND CONSISTANT SOLUTION

1. Legal Limitations and Challenges

   (a) The duty to protect

   The duty to protect contains some loopholes that make it difficult to hold business corporations accountable for their human rights violations. Even assuming that the General Comment of the Human Rights Committee requiring states to protect its citizens “against acts

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\(^{32}\) Id. at p. 31.

\(^{33}\) International Finance Corporation, Performance Standards on Social & Environmental Sustainability (2006), \textit{available at} \url{http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/SFILE/IFC+Performance+Standards.pdf}.

\(^{34}\) See \textit{Kimberly Process, Kimberley Process Certification Scheme, available at} \url{http://www.kimberleyprocess.com/}.

\(^{35}\) H.R.C. Res. 4/35, \textit{supra} note 9.

\(^{36}\) Id. at ¶ 66.
committed by private persons or entities” may be binding, recent developments in the relationship between business corporations and governments reveal that a system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights.

First, some countries such as the United States do not recognize that a government has an affirmative obligation to protect its citizens’ rights from invasion by private actors, except in very limited cases. Further, as a study by Human Rights Watch has shown, even wealthy and democratic governments sometimes fail to protect their citizens from the abuses of businesses. Second, the increasing economic powers of business corporations and the desperation of less developed states for foreign investment has made multinational corporations increasingly independent from and even beyond government control. Furthermore, because most and worst human rights violations by business corporations usually take place in countries that are either engaged in conflicts, corrupt, lacking in rule of law mechanisms, or suffering from extremely poverty, it is impossible to expect citizens of those countries to rely on ineffective or non-existent means of protection from their governments. This was also the view of the UN Secretary General. As he put it, it seems beyond doubt that when a non-state actor engages in

38 See Ratner, _supra_ note 9.
42 See Ratner, _supra_ note 9, at 462-63.
human rights violations it raises an issue of potential international concern, especially in “countries where the government has lost the ability to apprehend and punish those who commit such acts.”

International human rights treaties were adopted not only to protect citizens from their governments’ abuses but also to protect citizens against their government’s inaction in case of abuse. This is why regional human rights treaties allow citizens recourse to regional remedies when local remedies are unavailable, ineffective or insufficient. Article 17 of the Rome Statute of the ICC pushes this protection even deeper by providing that the Court will have supremacy over investigations and prosecutions by states that are unwilling or unable to genuinely carry out the investigation or prosecution. This, if international criminal law and institutions such as the ICC were developed not to deny but to complement the state’s duty to protect, why would this argument be relevant in international criminal law and less relevant in international human rights law?

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45 See Sir Dawda K. Jawara v. The Gambia, African Commission on Human and People’s rights, Communication Nos. 147/95 and 149/1996, ¶ 32, available at http://www.achpr.org/english/Decision_Communication/Gambia/Comm. 147-95.pdf (stating “a remedy is considered available if the Complainant can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint”); see also Velásquez Rodríguez, supra note 15, at ¶ 63 (noting that “Article 46(1) (a) of the Convention speaks of ‘generally recognized principles of international law.’ Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2).”).
46 Rome Statute of the International Criminal Court, art. 17. Article 17 states:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether . . . (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Id.
The result, therefore, is that the unavailability of local remedies for citizens in some countries and the impossibility for poor and economically weak states to make their judicial system independent and impartial enough to handle cases of multinational corporations weakens the argument in favor of the duty to protect and justifies the need for victims to have, and rely directly on, international instruments and remedies. Making regional or international remedies available requires, however, answering first the questions of whether existing international human rights treaties creates direct legal obligations on business corporations.

(b) International criminal law

Using international criminal law to make business corporations accountable also presents its limitations. In practice, international criminal law applies only to individuals, deals only with those human rights violations which have been qualified as international crimes, and narrows its field to only those most serious crimes such as genocide, crimes against humanity, and war crimes. Such limitations make it difficult to use international criminal law to hold business corporations accountable for most of their human rights violations.

The prevailing philosophy of corporate responsibility in criminal law that “corporations don’t commit offences; people do” makes it difficult to use criminal law to create corporate responsibility for human rights violations. There have been studies to prove that the arguments such as individualism, deterrence, and retribution long used to support the limitation of criminal responsibility to individuals, can further be used to justify corporate criminal responsibility. Yet, the practice has remained the same: under international law, only individuals may be held responsible for crimes.

47 See E. Bodnheimer, Philosophy of Responsibility 117 (1980).
49 Liesbeth Zegveld, Accountability for Armed Opposition Groups in International Law 44 (2002).
The individual responsibility under international criminal law has been limited only to those human rights violations qualified as gross human rights violations, but even under this category, only crimes such as genocide, crimes against humanity, war crimes, and torture can be prosecuted by international criminal courts.⁵⁰ Although laws and cases such as those discussed above regarding the Alien Torts Claim Act seem to be making headway for holding non-state actors accountable for their human rights violations beyond gross human rights violations, those opportunities still depend up on national laws. In countries where such provisions do not exist, where extraterritorial or universal jurisdiction is not recognized, or where the state is incapable or unwilling to prosecute, victims have no recourse to hold business corporations accountable.

(c) Soft law

The problem with soft law and self-regulation lies in their very nature as “soft” and voluntary, and therefore do not impose binding obligations. More problematic, however, is that their supporters want to promote soft law and self-regulation as alternatives to human rights hard law, rather than as a complement, because they see legally binding mechanisms as inappropriate tools to address human rights violations by business corporations.⁵¹

Yet, as the study carried out by Dinah Shelton on the role of non-binding norms in the international legal system has stressed, soft laws are unlikely to offer effective enforcement solutions to victims unless they accompany or are accompanied by hard law.⁵² This equally applies to self-regulation and codes of conduct adopted by business corporations. Many commentators who evaluated the utility of such regulations have found that their deficiency results from their “lack of enforceable standards, lacunae in the human rights which are included,  

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⁵¹ H.R.C. Res. 4/35, supra note 9, at ¶ 45

and the way these are articulated”. The experience of the ILO, probably the longest in trying to develop compliance of labor laws through soft law and codes of conduct, should serve as a lesson to those who believe that such rules could play a key role in the future development of defining corporate responsibility for human rights. As Westfield has concluded in his study on corporate codes of conduct in the 21st century, “the continuous reports of labor rights violations in the ubiquitous global market place . . . raise the question of whether the private, voluntary, self-regulated codes of conduct can remain the approach for contending with labor rights violations.”

With recent problems in the world economy, even the biggest believers in self regulations are changing their minds. As the former Federal Reserve Chairman Alan Greenspan recently confessed, he has been wrong all along in believing that “banks operating in their self-interest would be sufficient to protect their shareholders and the equity in their institutions.” The argument that in pursuing their self-interests, business corporations still need binding regulations to uphold and protect shareholders interests, challenges the views of some authors such as Falk, who believe that companies can be trusted to uphold and protect human rights as a matter of self-interest. If self-interest and self-regulation are insufficient to protect shareholders, what hope is there that they will protect citizens of compromised states from being exploited?

2. Political Limitations and Challenges

53 See Fiona McLeay, Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of A Large Puzzle, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 223 (Olivier De Schutter, ed. 2006).

54 As stressed in H.R.C. 4/35, supra note 9, at ¶ 44.


57 See Philip Alston, The ‘Not-a-Cat’ Syndrome, in Alston, supra note 9, at 22. Quoting Richard Falk, Alston says that those multinational corporations that have neither legal nor moral human rights obligations “have no established moral obligations beyond their duties to uphold the interests of their shareholders . . . the effort they make to improve their public image in relation to human rights are a matter of self-interest that does not reflect the existence or acceptance of a moral obligation.” Id.
The question of whether business corporations are or can be bound by international human rights law seems to have been addressed, particularly at the United Nations level, more as a political and economic problem than a legal problem. This is illustrated by comparing the method, support and objectives of the “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” with the work of the SRSG.  

The Sub-Commission on the Promotion and Protection of Human Rights that drafted the Norms on the Responsibilities of Transnational Corporations was the main subsidiary body of the then UN Commission on Human Rights. Unlike the Commission, which was a political body composed by representatives of states, this sub-committee consisted of independent human rights experts acting in their personal capacity. Although it had initially accepted the Sub-Commission’s primary procedural recommendation, the UN Commission argued later that these norms were not “requested by the Commission,” and that as a draft proposal they have “no legal standing”. It thus moved this issue from the sub-committee to more political organs such as the High Commissioner for Human Rights (HCHR) and the Secretary General.

60 This commission was replaced by the Human Rights Council in 2006 by General Assembly Resolution 60/151. See G.A. Res. 60/151, U.N. Doc. A/RES/60/151 (Feb. 21, 2006). This Sub-Commission was then replaced by the Advisory Committee by Human Rights Council Resolution 5/1. H.R.C. Res. 5/1, U.N. Doc. HRC/RES/5/1 (Jun. 18, 2007).
62 Id. at 116.
63 Office of the High Commissioner for Human Rights, Responsibilities of transnational corporations and related business enterprises with regard to human rights, ¶ (c), U.N. Doc. E/CN.4/DEC/2004/116 (Apr. 20, 2004). The High Commissioner’s statement read: “Affirm that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub Commission should not perform any monitoring function in this regard”. Id.
64 Id. at ¶ (b).
In its report to the Commission the HCHR did, however, recommend that the Commission maintain “the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration.” Yet, in its subsequent work, the Commission ignored the norms, and rather called on the UN Secretary General to appoint the SRSG. In the early phase of his mandate, the SRSG quickly declared that “in any case, the Norms are dead.” Cassel and O’Brien warned, however, that if he “is to bury the Norms, he should take care not to dig the grave too deep, as there remain existing sources and legitimate roles of international human rights law to play in sanctioning the misdeeds of transnational corporations.” Despite these and other warnings, the SRSG buried the Legal Norms deeply and shifted to focusing on consensus and co-operation with business.

More revealing beyond John Ruggie’s rejection of draft Norms and his option for political consensus, however, is his opposition to any initiative leading to the future adoption of a human rights treaty on business corporations. Despite the criticisms of his 2008 and 2010 reports by the majority of human rights organizations and their call for “clear global standards

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65 See Transnational Corporation Norms, supra note 60, at ¶ 52(d).
69 For example, in his first report Ruggie wrote: “the Norms exercise became engulfed by its own doctrinal excess . . . its exaggerate legal claims and conceptual ambiguities created confusion and doubt . . . .” Interim Report – Promotion and Protection, supra note 59, at ¶59. In his second report, Ruggie concluded that soft law standards and initiatives “will play a key role in any future development of defining corporate responsibility for human rights”. H.R.C. Res. 4/35, supra note 9, at ¶ 44. In his final report he wrote: “Some stakeholders believe that the solution lies in a limited list of human rights for which companies would have responsibility, while extending to companies, where they have influence, essentially the same range of responsibilities as States….the Special Representative has not adopted this formula.” Promotion and Protection, supra note 9, at ¶ 6.
adopted by governments,” the SRSG’s views remained that “negotiations on an overarching treaty now would be unlikely to get off the ground, and even if they did, the outcome could well leave us worse off than we are today.” His argument includes points that the treaty making process risks being painfully slow, it would undermine effective short-term measures to raise business standards, and it would be difficult to enforce. Most of these points, however, have been properly rejected as unconvincing arguments against global regulations for companies.

While most of his points are understandable they remain part and parcel of the political realities of international law. The UN charter, the two covenants on human rights, and many other human rights instruments would not have come to life, if the world had given in to potential difficulties and slowness in their negotiations, adoption and enforcement. Besides, allowing business corporations to go unpunished for fear of undermining short-term measures to raise business standards is to forget that such violations are committed by a small number of companies that do not represent the majority. Tolerating such practices is unfair to honest human rights abiding business corporations, and it is unjust to victims of such violations.

Overall, there is no contradiction in pursuing both political and legal solutions as long as there is complementarity between political and legal solutions and between international and national legal remedies.

The SRSG has himself agreed that there is no “single silver bullet solution” to the problem of human rights violations by business corporations. As it looks today, his conclusions are just as unlikely to be the single silver bullet. There is still, therefore, some room

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72 “Problematic pragmatism, supra note 66, at 9-14.
73 See Promotion and Protection, supra note 59, at ¶ 7.
to continue investing for additional or alternative legal solutions; an advisory opinion on this issue being one of the options.

IV. THE NEED FOR AN ICJ ADVISORY OPINION

The power of the ICJ to give an advisory opinion on “any legal question” is recognized and organized in Article 96 of the UN Charter and Article 65 of the ICJ Statute. But the mere fact that it has this power does not mean that it is an appropriate tool in this case. To demonstrate its appropriateness three questions must be addressed: First, why calling upon ICJ’s opinion now? Second, who could submit this question? Third, what difference could an advisory opinion make in this very specific case?

1. Why an advisory opinion of the ICJ

At least four reasons can be identified to justify why an advisory opinion of the ICJ is needed. First, it is well recognized that business corporations violate human rights, and a method of holding them accountable is needed to provide a remedy to victims of such violations. Second, there are serious loopholes in existing approaches of holding business corporations accountable for their human rights violations. This is particularly the case when a country cannot or does not want to exercise its duty to protect its citizens from corporate abuses, when the acts committed do not constitute crimes punishable by under the ICC Statute, and when the only available rules are those of soft law or self-regulation. Third, there is no consensus in customary international law, treaty law, general principles of law or other sources of international law on the question of whether existing international human treaties are binding on business corporations. Fourth, the recent jurisprudence of the ICJ on non-state actors in international law and human rights can significantly assist in answering this question.

(a) Need for accountability

74 U.N. Charter, art. 96; ICJ Stat., art. 65.
The fact is that business corporations do violate human rights, and therefore victims need a remedy against such violations. There is sufficient documentation on human rights violations by business corporations. Human rights violations have been documented in Iraq,\textsuperscript{75} Bosnia Herzegovina,\textsuperscript{76} Burma,\textsuperscript{77} South Africa,\textsuperscript{78} the Democratic Republic of the Congo,\textsuperscript{79} China,\textsuperscript{80} Nigeria,\textsuperscript{81} India,\textsuperscript{82} the U.S.,\textsuperscript{83} Sudan,\textsuperscript{84} and the Niger Delta region\textsuperscript{85} to name a few. Even the SRSG, while only doubting whether human rights violations have been increasing or decreasing overtime, does not question whether such violations take place.\textsuperscript{86} Also, the UN Security Council has even endorsed a number of reports on human rights violations by business corporations.\textsuperscript{87}

\textsuperscript{77} See Doe I v. Unocal Corp. 395 F. 3d 932.
\textsuperscript{86} See Promotion and Protection, supra note 59.
For victims of human rights violations, recognizing their status as victims is not enough. What they need is a legal protection and remedies as a matter of right, not as a matter of charity. One of the weaknesses in the methodology of identifying and clarifying standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights is that it has been more about seeking a consensual commitment of business corporations than protecting victims of the abuses. Such an approach ignores that “some companies are implicated in human rights abuses and violations because of their deliberate or negligent actions and inactions, and because they believe they can act with impunity.”

John Ruggie, the SRSG, has repeatedly stressed that in his work he listened to voices of victims. Yet, human rights organizations are almost unanimous in saying that his report failed to emphasize what victims would have most wished to see: greater attention to accountability, including appropriate sanctions. This begs the question of how much the voices of victims are reflected in his reports. As a Joint NGO Statement to the Eighth Session of the Human Rights Council stated, responding to the third Report of the SRSG, “for victims of human rights violations, justice and accountability can be as important as remedial measures.” And, as another joint statement to his 2010 report correctly put it: “victims of human rights abuses by, or

89 Some have accused John Ruggie to be too close to business corporations and their causes and a strong advocate of “a global governance concept based on co-operation with business rather than on its global regulation.” See Jen Martens, Problematic Pragmatism, The Ruggie Report 2008: Background, Analysis and Perspectives, Misereor, Global Policy Forum Europe, June 2008, at 3.
92 See Amnesty International, supra note 90.
93 See Press Release, supra note 70.
involving, companies deserve the same level of protection and voice in the international system as victims of other types of violations.”

(b) Gaps in legal protection

There exist large gaps in legal protection in cases where a country cannot, or does not want to exercise its duty to protect, when acts committed do not constitute crimes punishable under the ICC Statute, and when the only available rules are soft-law or self-regulation.

Studying the socio-political contexts in which human rights violations by business corporations take place, the SRSG found that in twenty-seven countries where such violations occurred, most of those were low-income or on the low side of the middle-income category. Nearly two thirds of those countries either recently emerged from a conflict or still were in one. Those countries were also characterized by “weak governance.” On a “rule of law index developed by the World Bank, all but two fall below the average score for all countries, and on the Transparency International Corruption Perception Index their average score was 2.6 (with “zero” labeled as “highly corrupt” and “10” as “most clean”). On the Freedom House index of political systems their average was 1.9 (with “not free” is ranked as one, “partially free” as two, and “free” as three).

It is probably after reviewing the above situations in which human rights violations by business corporations take place that the SRSG acknowledged in his first interim report:

there are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host Governments cannot or will not enforce their obligations and where the classical international human

94 ESCR Joint Statement, supra note 6.
95 See Interim Report – Promotion and Protection, supra note 59, at ¶ 27.
rights regime, therefore, cannot possibly be expected to function as intended.\textsuperscript{98}

Loopholes in state’s duty to protect were again highlighted by another survey concluded by the SRSG in June 2010, where it was revealed that the majority of states surveyed “have been slow to address the more systemic challenge of fostering rights-respecting corporate cultures and practices,”\textsuperscript{99} and that “in fact, overall state practice exhibit substantial legal and policy incoherence as well as gaps, often with significant consequences for victims, companies and States themselves.”\textsuperscript{100}

The consistence between the results of the study highlighted in the SRSG’s 2006 Interim Report and those of the above mentioned 2010 survey should have been constituted the “legitimate arguments” of the SRSG, as he mentioned in his 2006 interim report, needed “in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations”. Unfortunately, the above mentioned results were never reflected in the SRSG’s final reports, nor in his subsequent works where his opposition to using existing human rights instruments or developing new ones was rather clear.

The above loopholes, together with those discussed earlier about the nature of international criminal law, soft law and self-regulations, make it difficult or impossible for most victims to be protected and to hold business corporations accountable for their human rights violations.

\textsuperscript{98} See Interim Report – Promotion and Protection, supra note 59, at ¶ 65.
\textsuperscript{100} Id.
(c) Lack of consensus

There is a lack of consensus on the question of whether existing international human rights treaties are binding on business corporations. The conclusion of the SRSG that existing international human rights instruments do not impose legal obligations on corporations cannot claim to be the final or most authoritative voice on this question. The traditional view of corporate immunity on which the SRSG found his conclusion is generally based on two key arguments: first, that as non state actors, business corporations are not and cannot be subjects of international obligations;\footnote{See IAN BROWNLEI, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 66 (7TH Ed. 2008), Ian Brownlie, Rebirth of Statehood, in ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE 5 (M. Evans, ed. 1997).} and second, that human rights law purports to govern the relations between the government representing the state and the governed and not between private entities.\footnote{See Zegveld, supra note 49, at 38, 41. For more arguments in opposition to the view that non-state actors have duties under international human rights law see, Clapham, supra note 5, at 33, 58.} However, these traditional views have been opposed by a significant number of authors and appear to be in contradiction with contemporary practices of international law. As Christian Tomuschat has emphasized, “a concept that would visualize human rights exclusively as a burden on the governmental apparatus would be doomed from the very outset.”\footnote{CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 320 (2003).} Furthermore, Philip Alston sees those lawyers who are reluctant “to contemplate any fundamental rethinking of the role of the state within the overall system of international law” as lacking “imagination” and “reluctant to bite the hand that feeds them.”\footnote{Alston, supra note 5, at 21.}

It has been well articulated that a treaty entered into by states can create international duties for, and even between, non-state actors.\footnote{See Antonio Cassesse, The Status of Rebel under the 1977 Geneva Protocol on Non-International Armed Conflicts, 30 Int’L & COMP. L.Q. 416-39 (1981). On the question of abuse of human rights by private actors in private relations see, ANDREW CLAPHAM, HUMAN RIGHTS IN PRIVATE SPHERE 89-133 (1996).} A number of authors agree that “the rule that
any obligation requires the consent of the party concerned has long been abandoned,” and that
the assumption that human rights are rights that people hold against the state only is no longer
valid. As Theo van Boven has correctly concluded, “the responsibility of Non-State actors
and their duties to respect and to comply with international law, must be regarded as inherently
linked with the claim that they qualify as acceptable parties in national and international
society.”

A number of state practice and jurisprudence have also challenged the traditional view
that international human rights law does not impose legal obligations on business corporations.
Examples here include a recent case in which the U.S. District Court for the Southern District of
New York confirmed that “corporations are liable in the same manner as natural persons for torts
in violation of the law of nations.”

There is a lack of agreement between the approaches and recommendations of the SRSG
on the one hand, and those contained in the 2003 “Norms on the responsibilities of transnational
corporations and other business enterprises with regard to human rights” and supported by the
majority of human rights NGOs and academics on the other hand. This disagreement justifies
the need for the United Nations to seek an advisory opinion from the ICJ.

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107 Advancing the argument that the “main feature of human rights is that these are rights that people hold against the state only,” see Zegveld, supra note 49. Arguing that this criticism is no longer valid see, Andrew Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 88 INT’L. REV. OF THE RED CROSS (No. 863)491, 503, September 9, 2006.
110 See, e.g., United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights ¶19, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005). “Employer groups, many States and some businesses were critical of the draft while non-governmental organizations and some States and businesses as well as individual stakeholders such as academics, lawyers and consultants were supportive”. Id.
An advisory opinion could also help those looking for the best methods on how to make business corporations accountable through binding human rights rules. There is a need to find a consensus on whether energy should be focused on using existing human rights instruments or on creating new instruments that explicitly address this issue. If the ICJ closes the door to the option of using existing international human rights instruments, all efforts could be directed toward adopting a new human rights instrument.

(d) Existing jurisprudence

The Jurisprudence of the ICJ and other international courts on non-state actors in international law and human rights could be useful on this question.

Jurisprudence from the ICJ and other international courts regarding non-state actors and international law and human rights could be useful to answering the question as to responsibility of business corporations for their violations of human rights. In *The reparation for injuries suffered in the service of the United Nations*, the ICJ held in its advisory opinion that “throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.”111 This statement was made before concluding that “to achieve these ends the attribution of international personality is indispensable.”112 It results, therefore, that the ICJ never excluded the possibility for non-state actors to have international rights and duties. On the question of whether a non-state entity is a subject of international rights and duties, the ICJ neither accepted nor rejected this possibility, but rather ruled that the answer should be found in

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112 Id.
the “purposes and functions as specified or implied in its constituent documents and developed in practice” of each entity. 113

With Globalization, transnational corporations have been defined as business corporations “that cross a national border, carrying with it a package of business attributes, including capital but also products, processes, marketing methods, trade names, skills, technology and management.” 114 These business corporations have become more numerous and more powerful. Numbered at more than 70,000 with roughly 700,000 subsidiaries and millions of suppliers reaching every corner of the globe, transnational corporations no longer engage in external arm’s length transactions which Governments can buffer effectively at the border by point-of-entry measures like tariffs, non-tariff barriers, exchange rates and capital controls. 115 Their ability to operate and expand globally has increased greatly over the past generation as a result of trade agreements, bilateral investment treaties and domestic liberalization. 116

There is a need for the ICJ to examine whether the recent increase in the role, rights and practices of transnational corporations and the corresponding decrease in distressed states’ ability to prevent corporate human rights violations justifies the need for those corporations to be bound by international human rights law.

Cases in which the ICJ and international courts held that non-state entities are bound by international humanitarian law could also assist in answering the question of whether non-state entities, including business corporations, can be subjects of international human rights obligations. In the Nicaragua case, for instance, the ICJ held that “the acts of the contras towards the Nicaraguan Government are . . . governed by the law applicable to conflicts of that

113 Id. at 180.
116 Id. at ¶ 12.
Also the Appeals Chamber of the Sierra Leone Special Court has held that, ‘it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law.”

2. Who could submit this question and what difference an advisory opinion could make?

Article 96 of the United Nations Charter provides:

The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Given the general representation and historical experience in initiating advisory proceedings before the ICJ, the General Assembly would be the best organ to initiate this process. The UN Human Rights Council could, however, be more technically prepared to submit such a request, if authorized by the General Assembly.

Although an advisory opinion by its very nature is non-binding, it can powerfully influence legal developments. As Judge Azevodo put it, the fact that an advisory opinion does not produce the effects of res judicata “is not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even its legal consequences.” As to the value of an advisory opinion of the ICJ, Professor O’Connell is of the opinion that because the ICJ is the highest judicial organ of United Nations and the most qualified interpreter of international law, its opinions act as a kind of guideline for

119 UN Charter, art. 96.
120 See Shabtai Rosenne, The Law and Practice of International Court 661-666 (1985) (discussing the UN General Assembly’s experience as the principal organ to initiate advisory proceedings).
121 Id. at 746.
the conduct of states. She agrees that “it is true that its decisions are not binding, but they set specific obligations for the countries . . . . It truly happens very rarely that countries disregard decisions by the International Court of Justice”.

An advisory opinion from the ICJ on the question of whether international human rights law imposes legal obligations on business corporations has the advantages of unifying different views existing at the United Nations level. It could also unify different views among academics, international lawyers, and human rights organizations. Moreover, it could also help in deciding if a new human rights treaty that would bind non-state actors such as business corporations is necessary. Above all, however, it would define where the ICJ stands on this question and provide measurement for victims of human rights violations by business corporations on how close or how far the accountability for violation of their rights truly is.

V. CONCLUSION

Neither the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights nor the reports of the SRSG seem to have been successful in building a consensus among international lawyers and institutions on how to deal with violations of human rights by business corporations. The main reason for this failure has been that neither side has managed to answer, in a more complete or authoritative manner, the questions of whether international human rights instruments create legal obligations on business corporations. An advisory opinion on this question by the ICJ would serve as an important guidepost in the path to developing a consensus on how international human rights law may effectively prevent worse corporate abuses. Also it would help in deciding if efforts on how to

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deal with human rights violations by business corporations should be addressed by using existing human rights instruments, by adopting new ones, or by relying only on consensus approaches and co-operation with business.