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?

Jean-Marie Kamatali[*]

TABLE OF CONTENTS

I. INTRODUCTION

In March 2011, John Ruggie—the Special Representative of the U.N. Secretary-General on the Issue of Human Rights and

Transnational Corporations and Other Business Enterprises (SRSG)[1]—released his final report, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.[2] The SRSG's proposed new standards are based on three pillars: the state duty to *protect*, the corporate responsibility to *respect*, and the access to *remedy* principle.[3]

The Report was ordered in 2005 by the then U.N. Commission on Human Rights (now, the Human Rights Council) in order "to move beyond what had been a long-standing and deeply divisive debate over the human rights responsibilities of companies."[4] This debate was mainly between those promoting the use of international soft law and those recommending international hard law to deal 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.[5] The

---

* Assistant Professor of Law, the Claude W. Pettit College of Law, O.N.U., former dean of the law school at the National University of Rwanda. The author would like to thank the many people who helped in the editing, proofreading, and commenting on the early version of this Article, particularly Professor Michael Lewis and Brian Anderson.

1 *See* Press Release, U.N. Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), http://www.un.org/News/Press/docs/2005/sga934.doc.htm ("The creation of this mandate was requested by the United Nations Commission for Human Rights in its resolution 2005/69 and approved by the Economic and Social Council on 25 July 2005. The mandate includes identifying and clarifying standards of corporate responsibility and accountability with regard to human rights. An interim report presenting views and recommendations for consideration by the Commission on Human Rights is due at its sixty-second session in 2006 and a final report in 2007.").

2 *See* Special Rep. of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

3 *Id.* para 6.

4 Press Release, U.N. Office of the High Commissioner of Human Rights, New Guiding Principles on Business and Human Rights endorsed by the U.N. Human Rights Council (June 16, 2011) [hereinafter *UNHRC Endorsement*], http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E.

5 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* 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 19 (2d ed. 1912) ("Since the Law of Nations is based on the common consent of individual States, and not of individual Human beings, States solely and exclusively are subjects of International Law."); Logan Michael Breed, Note, *Regulating Our 21st-Century*

second group argued that the traditional view that international human rights treaties do not create legal obligations directly upon corporations is no longer valid. They stressed that the debate should not be about *whether* human rights instruments create direct obligations on business corporations, but about *which* instruments and provisions create direct human rights obligations on business corporations and *how* to use them to hold business corporations accountable for their human rights violations.[6]

Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad, 42 VA. J. INT'L L. 1005, 1017 (2002) ("International law typically constrains the conduct of states, not individual or corporate actors."); Sarah M. Hall, Note, *Multinational Corporations' Post-*Unocal *Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 409 (2002) (asserting that traditional views of international law do not subject private individuals, acting in their own capacity, to liability).

6 This group is at the source of the 2003 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (*2003 Norms*). *See* U.N. Econ. & Soc. Council, Comm'n on Human Rights, Subcomm. on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *2003 Norms*], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?Open Element; *see also* Special Rep. of the Secretary-General, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie)[hereinafter *Protect, Respect and Remedy*]; Special Rep. of the Secretary-General, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (by John Ruggie) [hereinafter *Implementation of G.A. Res. 60/251*]; Special Rep. of the Secretary-General, *Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (by John Ruggie) [hereinafter *Interim Report: Promotion and Protection*]. *See also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); KENNETH C. RANDALL, FEDERAL COURTS AND INTERNATIONAL HUMAN RIGHTS PARADIGM (1990); NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT'L. L. 1 (2003); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997); *but see* Frances Raday, *Privatizing Human Rights and the Abuse of Power*, 13 CAN J.L. & JURIS. 103 (2000).

For views expressed after the adoption of the 2003 *Norms*, see David Kinley & Rachel Chambers, *The U.N. Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447, 447-97 (2006); Press Release, Amnesty International, United Nations: Human Rights Responsibilities of Transnational Corporations and Other Business Entities (Aug. 6, 2003), http://www.amnesty.org/en/library/asset/POL30/012/2003/en/03f3309e-d6a5-11dd-ab95-a13b602c0642/pol300122003en.pdf; Press Release, Human Rights Watch, U.N.: New Standards for Corporations and Human Rights (Aug. 12, 2003), http://www.hrw.org/en/news/2003/08/

Somewhere between these two groups (but closer to the second) are others who believe that regardless of the validity of traditional views of international law, what matters most is that international human rights law is a highly dynamic tool that can be adapted to meet the presently pressing need to hold corporations accountable for their human rights violations.[7] Looking forward, this last group stresses that "there is important scope for the [Human Rights] Council to consider the actual and potential role of international law in further defining the corporate responsibility for human rights."[8]

This Article argues that while the work of the SRSG has made a significant contribution to the debate surrounding 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 a meaningful consensus among all stakeholders, and turn a previously divisive debate into constructive dialogues and practical action paths,[9] the conclusions of his work contain few traces of that goal. The SRSG sided with the traditional view that existing international human rights instruments do not impose direct legal obligations on

12/un-new-standards-corporations-and-human-rights; Nicholas Howen, Int'l Comm'n of Jurists Secretary-General, Address at the Business and Human Rights Conference organized by the Danish Section of the ICJ: Business, Human Rights and Accountability (Sept. 21, 2005), http://www.icj.org/dwn/database/Nickspeech-Denmark-22092005.pdf.

7 This group is mainly dominated by non-governmental human rights organizations such as Human Rights Watch and Amnesty International. *See* Int'l Network for Econ., Soc. & Cultural Rights (ESCR-Net) & Human Rights Watch (HRW), *Joint Statement: General Debate Item 3: Human Rights and Transnational Corporations*, BUS. & HUM. RTS. RESOURCE CENTRE (June 4, 2010) [hereinafter *ESCR-Net/HRW Joint Statement*], http://www.reports-and-materials.org/ESCR-Net-HRW-statement-to-Human-Rights-Council-re-Ruggie-4-Jun-2010.doc; *Comments in Response to the UN Special Representative of the Secretary-General on Transnational Corporations and Other Business Enterprises'* Guiding Principles*: Proposed Outline*, AMNESTY INT'L (Oct. 2010), http://www.businesshumanrights.org/media/documents/ruggie/amnesty-intl-comments-re-ruggie-outline-guiding-principles-oct-2010.pdf; *U.N. Human Rights Council: Weak Stance on Business Standards; Global Rules Needed Not Just Guidance*, HUMAN RIGHTS WATCH (June 16, 2011), http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

8 *ESCR-Net/HRW Joint Statement*, *supra* note 7.

9 Special Rep. of the Secretary-General, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, ¶ 15, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) [hereinafter *Business and Human Rights*]; *see also UNHRC Endorsement*, *supra* note 4.

corporations[10] and further stressed that it is not even worth considering adopting new human rights instruments binding on corporations.[11] Thus, his conclusions offered a partial answer that summarily dismissed views concerning hard law provisions that could be used to hold corporations accountable for their human rights violations and those regarding the dynamic adaptability of international law as a tool capable of responding to the growing need to make the respect of human rights by corporations a *duty* rather than a just a *responsibility*.

Further, this Article argues that limiting enforcement of the corporate responsibility to respect human rights to general social norms and market expectations, as the SRSG has so far advocated,[12] is not sustainable and offers little to the victims of corporate human rights violations.[13] Until the question of whether international human rights law directly imposes legal obligations on corporations has been authoritatively answered, the divisive debate over companies' human rights responsibilities is unlikely to end. Thus, this Article, in search of the authoritative global answer to this quandary, argues for an advisory opinion by the International Court of Justice (ICJ) to address this fundamental question of international law.

This Article is divided into three parts. Part II analyzes contemporary efforts to hold business corporations accountable for their human rights violations. Part III examines why those contemporary approaches, including those of the SRSG, are unlikely to effectively hold corporations meaningfully accountable for their human rights violations. Part IV examines why an ICJ advisory opinion on direct corporate liability for human rights violations offers a better hope.

---

10 *Implementation of G.A. Res. 60/251*, *supra* note 6, ¶ 22. *See also Business and Human Rights*, *supra* note 9, ¶ 55 ("[R]especting rights is not an obligation that current international human rights law generally imposes directly on companies . . . .").

11 *See Protect, Respect and Remedy*, *supra* note 6, ¶ 6. *See also* John Ruggie, *Business and Human Rights: Treaty Road Not Traveled*, ETHICAL CORP. (May 6, 2008) [hereinafter Ruggie, *Treaty Road Not Traveled*], http://www.ethicalcorp.com/content/john-ruggie-business-and-human-rights-%E2%80%93-treaty-road-not-travelled ("There is one thing the report does not do: recommend that states negotiate an overarching treaty imposing binding standards on companies under international law.").

12 *See ESCR-Net/HRW Joint Statement*, *supra* note 7.

13 *See*, *e.g.*, HUMAN RIGHTS WATCH & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, ON THE MARGINS OF PROFIT: RIGHTS AT RISKS IN THE GLOBAL ECONOMY (2008) [hereinafter ON THE MARGINS OF PROFIT], *available at* http://www.hrw.org/sites/default/files/reports/bhr0208_1.pdf.

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.[14]

The state duty to protect is one of the primary responsibilities a state has to its citizens. This duty not only extends to actions of a state's agents, but also to those of private entities.[15] International human rights covenants have recently been interpreted to contain such a duty. As the General Comment of the Human Rights Committee (General Comment No. 31 [80]) 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 . . . ."[16] This Comment suggests 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 State parties of ICCPR rights.[17] As a result, State parties have a responsibility to hold corporations accountable for their human rights violations, and failing to do so may constitute a violation of human rights treaties by the 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. The Nuremberg trials provided legal precedent not only for holding individuals (as non-state actors) accountable for their gross human rights violations, but also in defining corporate responsibilities and

14 *Implementation of G.A. Res. 60/251*, *supra* note 6.

15 *See* Velásquez Rodriguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); *see also* Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention? Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, 21 BROOK. J. INT'L L. 679, 711 (1996).

16 U.N. Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31 [80]].

17 *Id.*

obligations in this regard. The principle of individual responsibility for international crimes, introduced in the *Principles of the Nuremberg Tribunals*,[18] was reiterated and reinforced in Statutes of the International Criminal Tribunal for the Former Yugoslavia,[19] the International Criminal Tribunal for Rwanda,[20] and the International Criminal Court (ICC).[21] Although no corporations were prosecuted at Nuremberg, the Nuremberg trials have been the primary legal precedent for finding that international law is binding on corporations.[22] In the *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]."[23]

At the national level, the U.S. Alien Torts Claim Acts (ATCA)[24] 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

18 Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf ("Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.").

19 *See* Statute of the International Criminal Tribunal of the Former Yugoslavia, art. 7, U.N. Doc. S/25704, at 38-39 (May 3, 1993).

20 *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6, U.N. Doc. S/RES/955, at 5-6 (Nov. 8, 1994).

21 *See* Rome Statute of the International Criminal Court, art. 25, U.N. Doc. A/CONF.183/9, at 21-22 (July 17, 1998).

22 *See generally* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute*, 71 ALB. L. REV. 326 (2008).

23 Ratner, *supra* note 6, at 478 (quoting United States v. Krauch (I.G. Farben Case), *reprinted in* 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081, 1140 (1952) (U.S. Mil. Trib. VI 1948)) (The I.G. Farben Case involved IG Farben, a large German conglomerate of chemical firms. Degesch, an IG Farben subsidiary, manufactured Zyklon B, the poison gas used at extermination camps during World War II. IG Farben also developed processes for synthesizing gasoline and rubber from coal, and thereby contributing to Germany's ability to wage a war despite having been cut off from all major oil fields. Directors of IG Farben were indicted, among others, for war crimes and crimes against humanity through participation in the enslavement and deportation to slave labor on a gigantic scale of concentration camp inmates and civilians in occupied countries, and of prisoners of war, and the mistreatment, terrorization, torture, and murder of enslaved persons. They were found guilty for constructing a plant next to the concentration camp in Auschwitz with the clear intent to use inmates as slave workers.).

24 28 U.S.C. § 1350 (2006).

acting on their own."[25] In *Kadic v. Karadz*,[26] the U.S. Court of Appeals for the Second Circuit recognized tort liability for torture, genocide, and war crimes committed by both state and non-state actors.[27] In *Doe I v. Unocal Corp*.,[28] the Ninth Circuit found that a corporation can be held liable for private acts of slavery and forced labor.[29] Similarly, in *Beanal v. Freeport-McMoRan*,[30] the U.S. 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."[31] In *Beanal*, private actors were viewed as state actors when they willfully participated in joint action with the state or its agents.[32] More forcefully, however, the Second Circuit held that "[u]nder the jurisprudence of this Circuit, corporations are liable in the same manner as natural persons for torts in violation of the law of nations."[33]

With regard to soft law sources for holding corporations accountable for their human rights violations, a number of rules have been identified including: declarations of principles by intergovernmental organizations setting their normative role; standards and guidelines developed by some intergovernmental organizations to enhance accountability for non-compliance by companies; and emerging multi-stakeholder principles designed to redress sources of corporate-related human rights violations.[34]

The first category includes instruments such as the International Labour Organization's (ILO) *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*[35] and the Organization for Economic Co-Operation and

25 CALPHAM, *supra* note 6, at 255.

26 70 F.3d 232 (2d Cir. 1995).

27 *See id.* at 239 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 702 (1987)).

28 395 F. 3d 932 (9th Cir. 2002), *vacated and reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *and dismissed en banc*, 403 F.3d 708 (9th Cir. 2005).

29 *Id.* at 946-47.

30 969 F. Supp. 362 (E.D. La. 1997).

31 Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 407 (2001) (citing *Beanal*, 969 F. Supp. at 372-73).

32 *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 27 (1980).

33 *In re* South African Apartheid Litigation, 617 F. Supp. 2d 228, 255 (2009).

34 *Implementation of G.A. Res. 60/251*, *supra* note 6, ¶ 46.

35 INT'L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING

Development's (OECD) *Guidelines for Multinational Enterprises* (*OECD Guidelines*).[36] The second category includes the OECD's June 2000 Council Decision, asking countries adhering 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.[37] Another example is the International Finance Corporation's (IFC) *Performance Standards on Social and Environmental Sustainability*, imposed on companies receiving IFC funds.[38] The last category includes, for example, the *Kimberly Process Certification Scheme*, which seeks to stem the flow of conflict diamonds—i.e., rough diamonds used by rebel movements to finance wars against legitimate governments.[39] The third category of self-regulation includes policies and practices that corporations may voluntarily adopt to observe human rights obligations. The SGSR conducted a survey of such policies in governments and Fortune Global 500 (FG 500) firms.[40] This survey found that almost all of the FG 500 firms claim to have policies or management practices in place relating to human rights.[41]

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

A. Legal Limitations and Challenges

1. The Duty to Protect

The duty to protect contains some loopholes that make it difficult to hold corporations accountable for their human rights violations. Even assuming that General Comment No. 31 [80]—

MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (4th ed. 2006), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

36 ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008), http://www.oecd.org/dataoecd/ 56/36/1922428.pdf.

37 *Id.* at 31.

38 INT'L FIN. CORP., PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (2006), http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf.

39 *See* KIMBERLY PROCESS CERTIFICATION SCHEME, http://www.kimberleyprocess.com (last visited Dec. 11, 2011).

40 *Implementation of G.A. Res. 60/251*, *supra* note 6.

41 *Id.* ¶ 66.

requiring states to protect their citizens "against acts committed by private persons or entities"[42]—may be binding,[43] recent developments in the relationship between corporations and governments reveal that a system in which the state is the sole bearer of international legal obligations may be insufficient to protect human rights for at least three reasons.[44] 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,[45] except in very limited cases.[46] 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.[47] Second, the increasing economic power of corporations—and the desperation of less developed states for foreign investment—has made multinational corporations increasingly independent from, and even beyond, government control.[48] Furthermore, because the majority of corporations' human rights violations (and the most harmful of such actions) usually occur in countries that are engaged in conflicts, ruled by corrupt governments, lacking in rule of law mechanisms, or suffering from extremely poverty,[49] it is absurd to expect citizens of those countries to rely on ineffective or non-existent means of protection from their governments. The

42 General Comment No. 31 [80], *supra* note 16, ¶ 8.

43 The question of the legal status of General Comments by U.N. bodies on human rights instruments is still controversial. *See* Philip Alston, *The Historical Origins of the Concept of 'General Comments' in Human Rights Law*, *in* THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 764 (Laurence Boisson De Charzournes & Vera Gowland-Debbas eds., 2001).

44 *See* Ratner, *supra* note 6.

45 *See, e.g.*, Tania Schriwer, *Establishing an Affirmative Governmental Duty to Protect Children's Rights: The European Court of Human Rights as a Model for the United States Supreme Court*, 34 U.S.F. L. REV. 379 (2000).

46 *See* Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997).

47 ON THE MARGINS OF PROFIT, *supra* note 13.

48 *See* Ratner, *supra* note 6, at 462-63.

49 *See* John G. Ruggie, U.N. Special Representative for Business and Human Rights, Address at the Royal Institute of International Affairs, Chatham House, London, U.K.: Next Steps in Business and Human Rights (May 22, 2008), *available at* http://www.reports-and-materials.org/Ruggie-speech-Chatham-House-22-May-2008.pdf; *see also* Nicola Jagers, *The Legal Status of the Multinational Corporation under International Law*, *in* HUMAN RIGHTS STANDARDS AND RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 260 (Michael K. Addo ed., 1999); Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 342-49 (2001).

U.N. Secretary-General shared this view, stating that an issue of international concern is raised when a non-state actor engages in human rights violations, especially in "countries where the Government has lost the ability to apprehend and punish those who commit such acts."[50]

International human rights treaties were adopted not only to protect citizens from their government's abuses, but also to protect citizens against their government's inaction in cases of abuse by other parties/entities. This is why regional human rights treaties allow citizens recourse to regional remedies when local remedies are unavailable, ineffective, or insufficient.[51] Article 17 of the Rome Statute of the ICC strengthens this protection 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.[52] Thus, if international criminal law and institutions such as the ICC were developed not to deny, but to complement the state's duty to protect, then why should this argument be relevant in international criminal law but

50 U.N. S.C. Rep. of the Subcomm. on Prevention of Discrimination and Prot. of Minorities, *Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Right Resolution 1997/21*, ¶ 64, U.N. Doc. E/CN.4/1998/87 (Jan. 5, 1998).

51 *See* Sir Dawda K. Jawara v. The Gambia, Comm. Nos. 147/95 & 149/96, ¶ 32, Afr. Comm'n on Human & Peoples' Rights (2000), *available at* http://www.achpr.org/english/Decison_Communication/Gambia/Comm.%20147-95.pdf ("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 Rodriguez, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 63 (July 29, 1988) ("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).").

52 Rome Statute of the International Criminal Court, *supra* note 21, 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.

less relevant in international human rights law?

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

2. International Criminal Law

Using international criminal law to make corporations accountable is a mechanism that is not without limitations. In practice, international criminal law applies only to individuals, deals only with those human rights violations that have been qualified as international crimes, and narrows its field to only the most serious crimes (e.g., genocide, crimes against humanity, and war crimes). Such limitations make it difficult to use international criminal law to hold 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"[53]—renders it difficult to use criminal law to create and enforce corporate responsibility for human rights violations. Studies, however, have demonstrated that arguments such as individualism, deterrence, and retribution, long used to support the limitation of criminal responsibility to individuals, can also be used to justify corporate criminal responsibility.[54] Yet, the practice has remained the same: under current international law, only individuals may be held responsible for crimes.[55]

Individual responsibility under international criminal law has been limited to only those human rights violations that qualify as gross human rights violations. Even within this category, however, only crimes such as genocide, crimes against humanity, war crimes,

53 *See* EDGAR BODENHEIMER, PHILOSOPHY OF RESPONSIBILITY 117 (1980).

54 *See* Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988).

55 *See* LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 44 (2002).

and torture can be prosecuted by international criminal courts.[56] Although laws and cases (such as those discussed above regarding ATCA) 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 upon 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 corporations accountable.

3. Soft Law

The problem with soft law and self-regulation lies in their very nature as voluntary mechanisms, which lack 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 complementary to it, because they see legally binding mechanisms as inappropriate tools to address human rights violations by corporations.[57] 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 complemented by hard law.[58] This includes self-regulation and codes of conduct voluntarily adopted by corporations, as soft law. Many commentators who have evaluated the utility of such regulations have found that their deficiency results from a "lack of enforceable standards, lacunae in the human rights which are included, and the way these are articulated . . . ."[59] The experience of the ILO, an organization that for a very long time has relied on soft law and codes of conduct in the compliance of labor laws, should serve as a lesson to those who believe that such rules could play a key role in the future development of defining corporate

56 *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 116-17 (2003) (listing the types of crimes considered to be gross human rights violations).

57 *Implementation of G.A. Res. 60/251*, *supra* note 6, ¶ 45.

58 Dinah Shelton, Commentary and Conclusions, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449 (Dinah Shelton ed., 2000).

59 *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).

responsibility for human rights.[60] As Westfield has concluded in her study on corporate codes of conduct in the twenty-first century, "the continuous reports of labor rights violations in the ubiquitous global marketplace . . . raise[] the question of whether the private, voluntary, self-regulated codes of conduct can remain the approach for contending with labor rights violations."[61]

With recent problems in the world economy, even the most fervent believers in self-regulations are changing their minds. As Alan Greenspan, the former U.S. Federal Reserve Chairman, 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."[62] The argument that in pursuing their self-interests, corporations still need binding regulations to uphold and protect shareholder interests challenges the views of some scholars (such as Richard Falk), who believe that companies can be trusted to uphold and protect human rights as a matter of self-interest.[63] If self-interest and self-regulation are insufficient to protect their own shareholders, what hope is there that corporations will protect citizens of compromised states from being exploited?

B. Political Limitations and Challenges

The question of whether 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 as a legal problem. This is illustrated by comparing the method, support, and objectives of the *Norms on the Responsibilities of Transnational Corporations and Other*

60 *See Implementation of G.A. Res. 60/251*, *supra* note 6, ¶ 44 (stressing this point).

61 Elisa Westfield, Note, *Globalization, Governance and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1098-99 (2002).

62 *See* Martin Crutsinger, *Greenspan Says Flaw in Market System*, USA TODAY, Oct. 23, 2008, http://www.usatoday.com/money/economy/2008-10-23-879659005_x.htm.

63 *See* Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 22 (Philip Alston ed., 2005) ("[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 efforts 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' . . . ." (quoting Richard Falk, *Human Rights*, FOREIGN POL'Y, Mar.–Apr. 2004, at 18, 20, 21)).

Business Enterprises with Regard to Human Rights (*2003 Norms*)[64] with the work of the SRSG.[65]

The Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) that drafted the *2003 Norms* was the main subsidiary body of the then U.N. Commission on Human Rights (UNCHR).[66] Unlike the UNCHR, a political body composed by representatives of states, the Sub-Commission consisted of independent human rights experts acting in their personal capacity.[67] Although it had initially accepted the Sub-Commission's primary procedural recommendation,[68] the UNCHR subsequently argued that the *2003 Norms* were not "requested by the Commission," and that as a draft proposal they had "no legal standing."[69] It thus moved this issue from the Sub-Commission to more political organs, such as the High Commissioner for Human Rights (HCHR)[70] and the U.N. Secretary-General.

In its report to the UNCHR, the HCHR recommended that the Commission "maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration."[71] Yet, in its subsequent work, the UNCHR ignored the *2003 Norms*, and instead called on the U.N.

64 *2003 Norms*, *supra* note 6.

65 *See Interim Report: Promotion and Protection*, *supra* note 6; *Implementation of G.A. Res. 60/251*, *supra* note 6; *Protect, Respect and Remedy*, *supra* note 6.

66 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. *See* H.R.C. Res. 5/1, U.N. Doc. HRC/RES/5/1 (June 18, 2007).

67 *See* David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 68 (2005).

68 *Id.*

69 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), *available at* http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc ("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.").

70 *Id.* ¶ (b).

71 U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regards to Human Rights*, ¶ 52(d), U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) [hereinafter *Report of the High Commissioner*].

Secretary-General to appoint the SRSG.[72] In the early phase of his mandate, the SRSG quickly declared that "in any case, the Norms are dead."[73] Douglass Cassel and Sean O'Brien warned in response that if the SRSG "is to bury the Norms, he should take care not to dig the grave too deep, as there remain existing sources and legitimate roles for international human rights law to play in sanctioning the misdeeds of transnational corporations . . . ."[74] Despite this and other warnings, however, the SRSG buried the *2003 Norms* and shifted his focus to consensus and co-cooperation with corporations.[75]

More revealing than John Ruggie's rejection of the draft *2003 Norms* and his emphasis on political consensus, however, is his blanket opposition to any initiative leading to the future adoption of a human rights treaty concerning corporations. Despite criticisms of his 2008 and 2010 reports by the majority of human rights organizations and their call for "clear global standards adopted by governments,"[76] the SRSG's view 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

72 JENS MARTENS, GLOBAL POLICY FORUM, PROBLEMATIC PRAGMATISM, THE RUGGIE REPORT 2008: BACKGROUND, ANALYSIS AND PERSPECTIVES (Elisabeth Strohscheidt, Miseror, ed., 2008), http://www.globalpolicy.org/images/pdfs/0601pragmatism.pdf [hereinafter PROBLEMATIC PRAGMATISM].

73 *See* John G. Ruggie, U.N. Special Representative for Business and Human Rights, Address at the Forum on Corporate Social Responsibility, Bamberg, Germany 2 (June 14, 2006), *available at* http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf.

74 Douglass Cassel & Sean O'Brien, *Transnational Corporate Accountability and the Rule of Law*, *in* PEACE THROUGH COMMERCE: RESPONSIBLE CORPORATE CITIZENSHIP AND THE IDEALS OF THE UNITED NATIONS GLOBAL COMPACT 77 (Oliver F. Williams ed., 2008).

75 For example, in his first report, Ruggie wrote: "[T]he Norms exercise became engulfed by its own doctrinal excess[]. . . . [I]ts exaggerated legal claims and conceptual ambiguities created confusion and doubt . . . ." *Interim Report: Promotion and Protection*, *supra* note 6, ¶ 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." *Implementation of G.A. Res. 60/251*, *supra* note 6, ¶ 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. . . . [T]he Special Representative has not adopted this formula." *Protect, Respect and Remedy*, *supra* note 6, ¶ 6.

76 *See Joint NGO Statement to the Eighth Session of the Human Rights Council*, HUM. RTS. WATCH (May 19, 2008), http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council [hereinafter *Joint NGO Statement*]. For critics of Ruggie's 2010 Report, see, for example, *ESCR-Net/HRW Joint Statement*, *supra* note 7.

leave us worse off than we are today."[77] His argument includes points that the treaty-making process risks being painfully slow, would undermine effective short-term measures to raise business standards, and would be difficult to enforce.[78] Most of these points, however, have been rejected as unconvincing arguments against global regulations for companies.[79]

While Ruggie's arguments are understandable, they remain part and parcel of the political realities of international law. The U.N. 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 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 corporations and 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 agreed that there is no "single silver bullet solution" to the problem of human rights violations by business corporations.[80] As it looks today, his conclusions are just as unlikely to be the single silver bullet. There is still, therefore, some room to continue investigating additional or alternative legal solutions—and an ICJ advisory opinion on this issue remains among the potential options.

IV. THE NEED FOR AN ICJ ADVISORY OPINION

The ICJ's power to give an advisory opinion on "any legal question" is recognized and organized in Article 96 of the U.N. Charter and Article 65 of the ICJ Statute.[81] But the mere fact that the ICJ has this power does not mean that it is an appropriate tool in this case. To demonstrate its aptness, three questions must be

77 Ruggie, *Treaty Road Not Traveled*, *supra* note 11, at 42.

78 *Id.*

79 PROBLEMATIC PRAGMATISM, *supra* note 72, at 9-14.

80 *See Protect, Respect and Remedy*, *supra* note 6, ¶ 7.

81 U.N. Charter art. 96, para. a; Statute of the International Court of Justice art. 65, June 26, 1945, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

addressed: First, why call for the ICJ's opinion now? Second, who could submit this question to the ICJ? And third, what difference could an ICJ advisory opinion make in this very specific case?

A. Why an Advisory Opinion of the ICJ?

At least four reasons justify the necessity of an ICJ advisory opinion. First, it is well recognized that corporations violate human rights and an accountability mechanism is needed to provide victims with a remedy for such violations. Second, there are serious loopholes in existing approaches to corporate accountability. This situation is exacerbated 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 corporations. And fourth, recent ICJ jurisprudence on non-state actors in international law and human rights can significantly assist in answering this question.

1. Need for Accountability

Corporations do, in fact, violate human rights, and therefore victims need a remedy against such violations. Corporate human rights violations have been documented in Iraq,[82] Bosnia Herzegovina,[83] Burma,[84] South Africa,[85] the Democratic Republic of the Congo,[86] China,[87] Nigeria,[88] India,[89] the United States,[90]

82 *See, e.g.*, *Current Cases*, CENTER FOR CONST. RTS., http://ccrjustice.org/current-cases (last visited Nov. 20, 2011) (listing cases of human rights violations in Iraq).

83 *See* AMNESTY INT'L, BOSNIA AND HERZEGOVINA BEHIND CLOSED GATES: ETHNIC DISCRIMINATION IN EMPLOYMENT (Jan. 2006), http://www.amnesty.org/en/library/asset/EUR63/001/2006/en/3ffdf870-d46f-11dd-8743-d305bea2b2c7/eur630012006en.pdf.

84 *See* Doe I v. Unocal Corp., 395 F. 3d 932 (9th Cir. 2002).

85 *See Report of the Reparation and Rehabilitation Committee: Reparations and the Business Sector*, *in* 6 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 140 (2003), http://www.info.gov.za/otherdocs/2003/trc/2_5.pdf.

86 *See* HUMAN RIGHTS WATCH, THE CURSE OF GOLD (2005),http://www.hrw.org/en/reports/2005/06/01/curse-gold; *see also* U.N. Secretary-General, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2001/357 (Apr. 12, 2001).

87 *See* AMNESTY INT'L, UNDERMINING FREEDOM OF EXPRESSION IN CHINA: THE

Sudan,[91] and the Niger Delta region,[92] to name a few. Even the SRSG, while doubting whether human rights violations have been increasing or decreasing over time, does not question the occurrence of such violations.[93] The U.N. Security Council has even endorsed a number of reports on human rights violations by corporations.[94]

For victims of human rights violations, merely recognizing their status as victims is not enough. They require legal protection and remedies as a matter of right, not as a matter of charity.[95] One weakness in the methodology of identifying and clarifying human rights standards of corporate responsibility and accountability for transnational corporations and other business enterprises is that it has been more about seeking a consensual commitment by corporations than protecting victims of the abuses.[96] Such an approach ignores that "some companies are implicated in human rights abuses and violations because of their deliberate or

ROLE OF YAHOO!, MICROSOFT AND GOOGLE (2006), http://www.amnesty.org/en/library/asset/POL30/026/2006/en/1ce1ac2d-d41b-11dd-8743-d305bea2b2c7/pol300262006en.pdf.

88 *See* HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES (1999), http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf.

89 *See* HUMAN RIGHTS WATCH, THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS (1999), http://www.hrw.org/reports/1999/01/01/enron-corporation.

90 *See* HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART'S VIOLATION OF US WORKERS' RIGHTS TO FREEDOM OF ASSOCIATION (2007), http://www.hrw.org/sites/default/files/reports/us0507webwcover.pdf.

91 *See* HUMAN RIGHTS WATCH, SUDAN, OIL, AND HUMAN RIGHTS (Nov. 24, 2003), http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf.

92 *See* Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004). See also *Bowoto v. Chevron*, CENTER FOR CONST. RTS., http://ccrjustice.org/ ourcases/current-cases/bowoto-v.-chevron (last visited Nov. 20, 2011), for a synopsis, description, timeline of, and documents related to the case.

93 *See Protect, Respect and Remedy*, *supra* note 6.

94 In 2003, Security Council Resolution 1457, after taking note of the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo, which also showed how vital private companies were in this exploitation, "condemned the illegal exploitation of natural resources and wealth of the Democratic Republic of the Congo and expressed serious concern at those economic activities fuelling the conflict in that country." Press Release, Security Council, Security Council Condemns Illegal Exploration of Democratic Republic of Congo's Natural Resources, U.N. Press Release SC/7057 (Mar. 5, 2001).

95 *See* Howen, *supra* note 6.

96 Some have accused John Ruggie of being 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* PROBLEMATIC PRAGMATISM, *supra* note 72, at 3.

negligent actions and inactions, and because they believe they can act with impunity."[97]

John Ruggie has repeatedly stressed that he listened to voices of victims in his work.[98] Yet, human rights organizations almost unanimously agree that his Report failed to emphasize what victims would have most wished to see: greater attention to accountability, including appropriate sanctions.[99] This criticism begs the question of the extent to which victims' voices are truly reflected in his Reports. As the Joint NGO Statement to the Eighth Session of the Human Rights Council, responding to the SRSG's third Report, stated: "[F]or victims of human rights violations, justice and accountability can be as important as remedial measures."[100] As another joint statement to his 2010 Report correctly put it: "[V]ictims of human rights abuses by, or involving, companies deserve the same level of protection and voice in the international system as victims of other types of violations."[101]

2. Gaps in Legal Protection

Large gaps exist in legal protection 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 of prior corporate human rights violations,[102] the SRSG found twenty-seven countries where such violations occurred, most of which were low-income or on the low side of the middle-income category.[103] Nearly two-thirds of those countries either recently emerged from a conflict or

97 AMNESTY INT'L, AMNESTY INTERNATIONAL SUBMISSION TO THE UN SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 9 (2008) [hereinafter AMNESTY INT'L SUBMISSION (2008)], *available at* http://www.amnesty.org/en/library/asset/IOR40/018/2008/en/fab7f461-6ad9-11dd-8e5e-43ea85d15a69/ior400182008en.pdf.

98 *See, e.g.*, John Ruggie, Remarks at the American Society of International Law's 103rd Annual Meeting: The Future of Corporate Accountability for Violations of Human Rights (Mar. 27, 2009) (attended by the author).

99 *See* AMNESTY INT'L SUBMISSION (2008), *supra* note 97, at 8.

100 *See Joint NGO Statement*, *supra* note 76.

101 *ESCR-Net/HRW Joint Statement*, *supra* note 7.

102 *See Interim Report: Promotion and Protection*, *supra* note 6, ¶ 27.

103 *Id.*

still were in one.[104] Those countries were also characterized by "weak governance."[105] 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 "0" labeled as "highly corrupt" and "10" as "most clean").[106] On the Freedom House index of political systems, their average was 1.9 (with "not free" ranked as 1, "partially free" as 2, and "free" as 3).[107]

In a conclusion likely arrived at after reviewing the situations discussed above, the SRSG acknowledged in his first interim Report that:

> [T]here 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 rights regime, therefore, cannot possibly be expected to function as intended.[108]

Loopholes in the state duty to protect were again highlighted by another survey concluded by the SRSG in June 2010, which revealed that the majority of states surveyed "have been slow to address the more systemic challenge of fostering rights-respecting corporate cultures and practices,"[109] and that "[i]n fact, overall State practices exhibit substantial legal and policy incoherence as well as gaps, often with significant consequences for victims, companies and States themselves."[110]

The consistency between the results of the study highlighted in the SRSG's 2006 Interim Report and those of his 2010 survey

104 *Id.*

105 The Organisation for Economic Cooperation and Development (OECD) defines weak governance as "governments that are either unwilling or unable to assume their responsibilities." ORG. FOR ECON. CO-OPERATION & DEV., OECD RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES 3 (2006), http://www.oecd.org/dataoecd/26/21/36885821.pdf.

106 JOHANN GRAF LAMBSDORFF, THE METHODOLOGY OF THE CORRUPTION PERCEPTIONS INDEX 2008, at 11 fig.3 (2008), *available at* http://www.icgg.org/downloads/Methodology_2008.pdf.

107 *See Methodology*, FREEDOM HOUSE (2010 ed.), http://www.freedomhouse.org/template.cfm?page=351&ana_page=363&year=2010.

108 *Interim Report: Promotion and Protection*, *supra* note 6, ¶ 65.

109 Special Rep. of the Secretary-General, *Survey of State Corporate Social Responsibility Policies: Summary of Key Trends* 2 (June 2010) (by John Ruggie), *available at* http://198.170.85.29/Ruggie-state-CSR-policies-survey-Jun-2010.pdf.

110 *Id.*

should have 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 . . . ."[111] 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.[112]

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

3. Lack of Consensus

Consensus is lacking on the question of whether existing international human rights treaties are binding on corporations. The SRSG's conclusion 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, corporations are not and cannot be subjects of international obligations;[113] and second, that human rights law purports to govern the relations between the government representing the state and the governed, not those between private entities.[114] These traditional views, however, have been opposed by a significant number of scholars and appear to be contradictory to 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

111 *Interim Report: Promotion and Protection*, *supra* note 6, ¶ 65.

112 *See supra* notes 10-11.

113 *See* IAN BROWNLIE, 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).

114 *See* ZEGVELD, *supra* note 55, 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 6, at 33, 58.

outset."[115] 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."[116]

It has been well articulated that a treaty entered into by states can create international duties for, and even between, non-state actors.[117] A number of scholars agree that "[t]he rule that any obligation requires the consent of the party concerned has long been abandoned,"[118] and that the assumption that human rights are rights that people hold against the state only is no longer valid.[119] 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."[120]

A number of state practices and some jurisprudence have also challenged the traditional view that international human rights law does not impose legal obligations on corporations. Examples 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."[121]

Agreement is lacking between the approaches and recommendations of the SRSG on the one hand, and those

115 CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 320 (2003).

116 Alston, *supra* note 63, at 21.

117 *See* Antonio Cassesse, *The Status of Rebels 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 THE PRIVATE SPHERE 89-133 (1996).

118 *See* Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, *in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ: CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 573, 587 (Horst Fischer et al. eds., 2004).

119 *See* ZEGVELD, *supra* note 55, at 53 ("The main feature of human rights is that these are rights that people hold against the state only."); Andrew Clapham, *Human Rigths Obligations of Non-State Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491, 503 (2006) (arguing that this criticism is no longer valid).

120 Theo C. Van Boven, *Non-State Actors: Introductory Comments [1997]*, *in* HUMAN RIGHTS FROM EXCLUSION TO INCLUSION: PRINCIPLES AND PRACTICE: AN ANTHOLOGY FROM THE WORK OF THEO VAN BOVEN 363, 369 (Fons Coomans et al. eds., 2000).

121 *In re* South African Apartheid Litigation, 617 F. Supp. 2d 228, 255 (2009).

contained in the *2003 Norms* (supported by the majority of human rights NGOs and academics), on the other.[122] This disagreement also helps to justify the need for the United Nations to seek an ICJ advisory opinion. Additionally, an ICJ advisory opinion could help those seeking the best methods for holding corporations accountable through binding human rights rules. A consensus on whether energy should be focused on using existing human rights instruments or on creating new instruments that explicitly address this issue is needed. If the ICJ were to close the door to the option of using existing international human rights instruments, then all efforts could be directed toward adopting a new human rights instrument.

4. Existing Jurisprudence

Jurisprudence from the ICJ and other international courts regarding non-state actors and international law and human rights could be useful in answering the question of corporate responsibility for human rights violations. In *Reparation for Injuries Suffered in the Service of the United Nations*,[123] the ICJ advisory opinion held that "[t]hroughout 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."[124] The ICJ then concluded that "to achieve these ends the attribution of international personality is indispensable."[125] Thus, the ICJ did not exclude the possibility that non-state actors could 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 the specific entity's "purposes and functions as specified or implied in its constituent documents and developed in practice."[126]

122 *See, e.g.*, *Report of the High Commissioner*, *supra* note 71, ¶ 19 ("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.").

123 Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

124 *Id.* at 178.

125 *Id.*

126 *Id.* at 180.

With globalization, transnational corporations (TNCs) have been defined as corporations "that cross[] a national border, carrying with [them] a package of business attributes, including capital but also products, processes, marketing methods, trade names, skills, technology and management."[127] TNCs 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, TNCs no longer engage solely in external arm's-length transactions that governments can effectively buffer at the border by point-of-entry measures like tariffs, non-tariff barriers, exchange rates, and capital controls.[128] 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.[129]

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

Cases in which the ICJ and other international courts have held that non-state entities are bound by international humanitarian law could also assist in answering the question of whether non-state entities, including corporations, can be subjects of international human rights obligations. In *Nicaragua v. United States*,[130] for instance, the ICJ held that "[t]he acts of the contras towards the Nicaraguan Government are . . . governed by the law applicable to conflicts of that character . . . ."[131] 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 . . . ."[132]

127 Richard Kozul-Wright & Robert Rowthorn, *Introduction* to TRANSNATIONAL CORPORATIONS AND THE GLOBAL ECONOMY 6 (Richard Kozul-Wright & Robert Rowthorn eds., 1998).

128 *See Interim Report: Promotion and Protection*, *supra* note 6, ¶ 11.

129 *Id.* ¶ 12.

130 Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

131 *Id.* ¶ 219.

132 Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004–14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22, (Special Ct.

B. Who Could Submit this Question and What Difference an Advisory Opinion Could Make?

> Article 96 of the U.N. Charter provides:
>
> a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> b. 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.[133]

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.[134] The U.N. Human Rights Council—which is in charge of making recommendations to the General Assembly for the further development of international law in the field of human rights, and particularly with regard to the promotion and protection of human rights[135]—could, however, be more technically prepared to submit such a request, if authorized by the General Assembly as provided in Article 96 of the U.N. Charter.

Although an ICJ 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."[136] As to the value of an ICJ advisory opinion, Professor Mary Ellen 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 the conduct of states.[137] She agrees that "[i]t is

Sierra Leone 2004), *available at* http://www.unhcr.org/refworld/docid/49abc0a22.html.

133 U.N. Charter art. 96, paras. a-b.

134 *See* SHABATAI ROSENNE, THE LAW AND PRACTICE OF INTERNATIONAL COURT 661-66 (1985) (discussing the U.N. General Assembly's experience as the principal organ to initiate advisory proceedings).

135 *See* G.A. Res. 60/251, ¶ 5(c), (i), U.N. Doc. A/RES/60/251 (Apr. 3, 2006) (creating the Human Rights Council).

136 *Id.* at 746.

137 *O'Connell: ICJ has Clear Case Against Severing Kosovo from Serbia*, DE[CONSTRUCT].NET (Apr. 18, 2009), http://de-construct.net/e-zine/?p=5514 (quoting an

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 . . . ."[138]

An ICJ advisory opinion on the question of whether international human rights law imposes legal obligations on corporations has the advantages of unifying different views existing at the U.N. level. It could also unify different views among academics, international lawyers, and human rights organizations. Moreover, it could help in deciding whether a new human rights treaty that would bind non-state actors, such as corporations, is necessary. Above all, however, it would define the ICJ's stance on this question and provide victims of corporations' human rights violations with a more precise measurement of corporate accountability for the harms suffered.

V. CONCLUSION

Neither the *2003 Norms*, nor the SRSG's Reports, seem to have been successful in building consensus among international lawyers and institutions on how to deal with corporations' violations of human rights. The primary reason for this failure has been that neither side has managed to answer, in a more complete or authoritative manner, the question of whether international human rights instruments create legal obligations on corporations. An ICJ advisory opinion on this question would serve as an important guidepost in the path to developing the consensus sought on how international human rights law may effectively prevent worse corporate abuses. Additionally, an advisory opinion would help in deciding whether efforts to deal with corporations' human rights violations should be addressed by using existing human rights instruments, adopting new ones, or relying only on consensus approaches and co-cooperation with the corporations themselves.

interview with Mary Ellen O'Connell by a reporter from the Serbian edition of the BBC).

138 *Id.*