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Analysis of the duty of the State to protect indigenous peoples affected by transnational corporations and other business enterprises

Summary

At its ninth session, the Permanent Forum appointed Paimaneh Hasteh,** a member of the Permanent Forum, to conduct an analysis of the duty of the State to protect indigenous peoples affected by transnational corporations and other business enterprises, to be submitted to the Forum at its eleventh session in 2012.

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** This paper has been prepared with the assistance of M. Barkeshli.



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I. Introduction

1. The present study examines the relationship between business corporations and indigenous peoples, the effects of the activities of corporations on indigenous peoples and the duty of the State to protect indigenous peoples against potential exploitation by corporations. The scale and scope of resource exploration and exploitation of indigenous peoples' lands and territories affects indigenous peoples and their communities. The number of transnational corporations engaging in resource exploitation is rising, and they have to begin implementing standards of social responsibility within their projects. At the same time, Governments also need to utilize international standards to guarantee the rights of indigenous peoples at a national level.

2. Large-scale industrial projects involving natural resource exploration, detrimental to economic development, are executed in nearly every State in the world. These projects inevitably affect indigenous peoples by reducing their traditional management systems, sacred places, pastures and hunting and fishing grounds, thereby undermining their economic, cultural and spiritual life and threatening their very existence.

3. The well-being and the future of indigenous peoples depend directly on the policies and practices of States and international institutions. They also depend on the realization of political and economic rights, the development of their human potential, the strengthening of traditional economies, environmental protection and the legal regulation of relations with corporations.

4. Unfortunately, the common practice of private corporations is to exploit the natural resources within indigenous territories. They do not take into account the rights of indigenous peoples and ignore and violate their individual and collective rights, divesting them of their lands and natural resources.

5. While a few cases of good practices can be found on the part of the corporations that comply with international and national norms, concerns remain largely on a systemic level. The current system in many parts of the world caters to codes of conduct designed to focus on the interests of the corporations, which use global normative frameworks to protect their interests and consolidate their rights within national legislation. Incentives are aligned so that States are inclined to protect the interests of corporations investing in their countries, rather than safeguarding the well-being of indigenous peoples.

6. At the international level there are instruments that protect indigenous peoples' rights to development. The United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organization (ILO) Convention No. 169 on indigenous and tribal peoples (1989) direct States to recognize the inherent rights of indigenous peoples to their lands, resources and self-government and do not limit these rights to the spheres of traditional economy and culture. These instruments recommend that States cooperate with indigenous peoples and that they undertake genuine consultations regarding any project affecting their ancestral lands, territories and resources.

7. It has become a generally accepted principle in international law that indigenous peoples should be consulted in any decisions affecting them. This norm is reflected in articles 6 and 7 of ILO Convention No. 169, and has been articulated

by United Nations treaty supervision bodies in country reviews and in examinations of cases concerning resource extraction on indigenous lands. The existence of a duty to consult indigenous peoples is also generally accepted by States in their discussions surrounding the draft declarations on indigenous peoples' rights, at the Organization of American States (OAS) and also during the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. States and the private sector must obtain the free, prior and informed consent of indigenous peoples in any planned projects, exercise good faith, and guarantee their full and effective participation and a share in the benefits arising from such projects. Problems arise, however, over the implementation of these standards, and the alignment of incentives within the national domain.

8. This widespread acceptance of the norm of consultation illustrates that it has become part of common international law. Ambiguity remains, however, as to the extent and content of the duty of consultation owed to indigenous peoples. In particular, there is much debate as to whether indigenous peoples' right to participation in decisions affecting them, extend to a veto power over State action. Logically, the extent of the duty and thus the level of consultation required is a function of the nature of the substantive rights at stake. Thus the more critical issue underlying the debate over the duty to consult is the nature of indigenous peoples' rights in lands and resources.

9. Indigenous peoples have consistently advanced plenary conceptions of their rights over lands and resources within their traditional territories. In asserting property rights, indigenous peoples seek protection of economic, jurisdictional and cultural interests, all of which are necessary for them to pursue their economic, social and cultural development. Indigenous peoples' rights over land stem not only from possession, but also from indigenous peoples' articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits. Furthermore, indigenous peoples have typically looked to a secure land and natural resource base to ensure the economic viability of their communities.

10. It is easy to understand that natural resources enable indigenous peoples to ensure a foundation for their well-being. Well-being is often interpreted in indigenous cultures as a full, integral life based on identity, dignity and wisdom in harmony with Nature and traditional knowledge systems. It is a balanced life based on a worldview of equality that incorporates humane, ethical and holistic dimensions of living in harmony with nature.

11. The historic relationship between indigenous peoples and corporations that operate on their lands and territories can best be described as one of conflict. Corporate entities have often violated and ignored the individual and collective rights of their indigenous counterparties, who have suffered the negative consequences of corporate practices, especially in the extractive and energy industries. Negotiations have been rare and limited in scope, and corporations have usually taken full advantage of their position of strength in negotiations.

12. The achievement of equitable and mutually beneficial relations between indigenous peoples and corporations is based on the recognition of indigenous peoples' rights to their lands, territories and natural resources. It also includes the acknowledgement of their right to self-determination, States' respect and protection for those rights as provided for in international law, and of course, the free, prior

and informed consent of indigenous peoples when considering the exploitation of resources.

13. The consequences of transnational corporate activities for indigenous peoples' lands and territories include non-recognition of indigenous peoples' property rights, eviction, displacement and forced migration. These violations not only impact their way of living, but also their culture and heritage. They also flout indigenous peoples' rights to use and exploit their natural resources and facilitate the destruction and the contamination of the environment and ecosystems. This includes soil erosion, the reduction of flora and fauna and loss of biodiversity in their lands and territories, the constant pressure over their territories, and the loss of natural resources for fishing, hunting, gathering, herding, and other agricultural activities.

14. In all cases, consultations must meet minimum procedural requirements, including ensuring that the indigenous peoples have adequate information on the proposed measures to meaningfully participate, and that the procedures for consultation are culturally appropriate. However, the content of that duty is a function of the extent of the substantive rights at issue. As a matter of international law, indigenous peoples have rights of property over land and natural resources arising out of their own customary systems. These property rights include collective ownership of their lands and attract all the protections attached to property generally. They are further reinforced by the cultural content of indigenous peoples' connection with their lands. Where property rights are indirectly but still significantly affected, for example, in the extraction of subsoil resources that are deemed to be under State ownership, the State's consultations with indigenous peoples must at least have the objective of achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward. If it proceeds, the State bears a heavy burden of justification to ensure the indigenous peoples share in the benefits of the project, and must take measures to mitigate its negative effects.

II. International law

15. Over the past two decades vital progress has been made in the development of legal normative frameworks in the international sphere with respect to the rights of indigenous peoples and their relationships with States. ILO Convention No. 169, which is binding on the countries that have ratified it, is a prime example. Today, 22 countries have ratified the Convention, 15 of which are from Latin America. The Convention recognizes indigenous peoples' right to their lands and territories, their social and religious values, the application of indigenous law, access to health services, equal opportunities for employment and training, non-discrimination and respect for cultures and ways of life. Importantly, the Convention recognizes indigenous peoples' right to apply their own models of development.

16. International legal instruments relevant to the rights of indigenous peoples include the International Convention on the Elimination of All Forms of Racial Discrimination,¹ the Convention on the Rights of the Child,² and the Convention on

¹ United Nations, *Treaty Series*, vol. 660, No. 9464.

² United Nations, *Treaty Series*, vol. 1577, No. 27531.

Biological Diversity.³ Paragraph 20 of the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993,⁴ is also relevant. Other international normative frameworks that also affirm the rights of indigenous peoples are numerous and they include the Universal Declaration of Human Rights (1948),⁵ the ILO Convention on Indigenous and Tribal Populations Convention of 1957 (No. 107), the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Economic, Social and Cultural Rights⁶ and the International Covenant on Civil and Political Rights,⁶ which entered into force in March 1976.

17. The United Nations Declaration on the Rights of Indigenous Peoples is a response to indigenous peoples' historical claim to a legal and political instrument that protects their human rights. The Declaration recognizes the political, the territorial, the economic, the social and the cultural rights of indigenous peoples and serves as a vital step towards the recognition, the promotion and the protection of indigenous peoples' rights and freedoms. The Declaration also acts as a minimalist framework of norms for indigenous peoples' survival, dignity and well-being.

18. There are other legal normative instruments that promote and safeguard the rights of indigenous peoples. The instruments include General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination, concerning indigenous peoples (fifty-first session, August 1997), which calls on State parties to not only recognize and respect the indigenous peoples' distinct culture, history, language and way of life as an enrichment of the State's cultural identity, but also to promote its preservation. The Second International Decade of the World's Indigenous People (2005-2015) calls upon Member States to increase their action and cooperation with indigenous peoples to achieve significant progress in the global improvement of their situation. The Universal Declaration on Cultural Diversity (2001) emphasizes the role of consolidating cultural diversity as an ethical imperative and reminds States of the position of indigenous peoples within that diversity. The working paper entitled "UNDP and indigenous peoples: a policy of engagement" (2001) establishes the United Nations Development Programme (UNDP) guidelines on this topic as well.

19. The report of the Expert Meeting on Positive Corporate Contributions to the Economic and Social Development of Host Developing Countries of December 2005 alludes to the sustainability of business operations that increasingly require and draw attention to their longer term outcomes. The report focuses on the relationship between corporations and the communities in which they operate, and points out the link between responsible business and corporate social responsibility.

20. In his third annual report to the Human Rights Council⁷ the Special Rapporteur on the rights of indigenous peoples made reference to the issue of corporate responsibility with respect to indigenous peoples' rights within the framework of international standards and the expectations generated in the international community concerning that matter. He noted that there was a lack of awareness of indigenous peoples' rights that has led to dispossession, environmental

³ United Nations, *Treaty Series*, vol. 1760, No. 30619.

⁴ A/CONF.157/24 (Part I), chap. III.

⁵ Resolution 217 A (III)

⁶ See resolution 2200 A (XXI), annex.

⁷ A/HRC/15/37.

contamination, forced displacement and permanent damage to their culture, spirituality and traditional knowledge.

21. Corporate activities in indigenous territories are becoming increasingly frequent, and are causing serious social conflicts that spark circles of violence and in turn result in new human rights violations. It is worth pointing out that indigenous peoples are not the only victims of this cycle: social conflicts related to corporate activities in indigenous territories have had a negative impact on the economic interests and on the public image of the corporations themselves. It is also important to note that these same conflicts tarnish the image and the interests of the Governments concerned, raising the possibility of a shift in incentive functions on the part of the States in case conflicts continue. It has been the duty of corporations to respect human rights and the concept of due diligence as reflected in the United Nations Global Compact. The Compact is the most important international initiative undertaken to date that guarantees the adoption of social responsibility by businesses.

22. Within the inter-American system, the work of the Inter-American Commission on Human Rights on the promotion, the fostering and the defence of the human rights of indigenous peoples is worth noting. In 1971, the Commission established that indigenous peoples had the right to special legal protection to counteract severe discrimination. It called on the members of OAS to implement and respect article 39 of the Inter-American Charter of Social Guarantees, adopted by the OAS General Assembly in 1948. In 1972, it issued the resolution entitled “Special protection for indigenous populations: action to combat racism and racial discrimination”, which called on Member States to act with the greatest zeal to defend the human rights of indigenous peoples.⁸

23. The human rights organs of the inter-American system (the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights) play important roles in resolving cases of indigenous rights violations. Their decisions are binding on States members of OAS. Symbolic cases resolved by the Court include the case of the *Mayagna (Sumo) Awas Tingni Community versus the State of Nicaragua*, concerning the indigenous community’s rights to their ancestral lands, and the case of *Yakye Axa Indigenous Community versus the State of Paraguay*. In both cases, the Court established that the States were obligated to provide effective protection that took into account the particularities, the economic and social characteristics and the special situation of vulnerability of indigenous communities, as well as their common law, values and customs.

24. To minimize charges of bias against globalization and the transnational corporations that are its most visible embodiment, the normative United Nations instruments have come to include other business enterprises, not only transnationals, within their remit. But they have often exempted nationally operating businesses if they had no connections to transnational corporations, if the impact of their activities was only local and if their activities included no violations of the right to the security of the person.

⁸ Inter-American Commission on Human Rights, “The Human Rights of the Indigenous People in the Americas”, chap. 1 (Organization of American States, 2000).

25. According to the most recent figures, 77,000 transnational firms span the global economy today, with some 770,000 subsidiaries and millions of suppliers.⁹ Transnational corporations lead operations in more States than ever before, and increasingly in socio-political contexts that pose entirely new human rights issues for them. In addition, for many corporations, going global has translated into adopting network-based operation models involving multiple corporate entities spread across and within different territories and countries.

26. Networks, by definition, involve divesting a certain amount of direct control over significant aspects of operation, substituting negotiated relationships for hierarchical systems. This style of organization has improved the economic efficiency of corporations. But it has also increased risk and challenges for the companies with respect to managing their global value chains, which constitute the full range of activities required to bring a good or service from conception to end sale.¹⁰ As the number of participating units in value chains skyrocket, so does the vulnerability any particular link in the global chain presents to the global enterprise as a whole. These distribution networks have also increased the available entry points from which civil society activists can seek to leverage a company's brand and resources in the hope of improving not only the company's performance, but also the setting in which it functions.

27. Transnational corporate networks pose a regulatory challenge to both the domestic and international legal systems. In legal terms purchasing goods and services from unrelated suppliers generally is considered an arms-length market exchange, not an intra-firm transaction. Among related parties, a parent company and its subsidiaries are distinct legal entities, and even large scale projects may be incorporated separately. Any one of them may be engaged in joint ventures with other firms or government actors. The doctrine of limited liability dictates that a parent corporation is not legally liable for wrongs committed by a subsidiary even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent. Each legally distinct entity is subject to the laws of the countries and territories in which it operates, but the transnational corporate group or network is not subjected directly to international law. It is this foundational fact that the move to establish global legal standards for transnational corporations seeks to alter. Though standards have begun to change, this same foundational challenge stresses the importance of country-level legislations and regulations, and duty of the State to protect indigenous peoples regardless of the international imperative.

28. Further challenges surround the effort to subject transnational corporations to international legal structures. If international human rights obligations are to be attributed to transnational corporations, on what basis shall this be done? It seems clear that long-standing arguments over whether such companies could be subjects of international law are yielding to new realities on the ground. For example, corporations have acquired significant rights under various types of bilateral

⁹ United Nations Conference on Trade and Development, *World Investment Report 2006* (United Nations publication, Sales No. E.06.II.D.11). Available from www.unctad.org/en/docs/wir2006_en.pdf.

¹⁰ Beth Kytte and John Gerard Ruggie, "Corporate Social Responsibility as Risk Management: A Model for Multinationals", Working Paper No. 10 (Harvard University, John F. Kennedy School of Government, March 2005). Available from www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_10_kytte_ruggie.pdf.

investment agreements and host government treaties, they set international standards in several industries, and certain corporate acts are directly prohibited in a number of civil liability conventions dealing with environmental pollution.¹¹ Thus, transnational corporations have become, at the very least, participants in the international legal system with the capacity to bear some responsibilities and duties under international law.¹²

29. The argument made for the promotion of international normative legal frameworks often begins by claiming that every individual and every organ of society shall strive to promote respect for the rights and freedoms of indigenous peoples. Transnational corporations have greater power than some Governments to affect the realization and the protection of rights, the argument continues, and “with power should come responsibility”.⁵ Therefore, these firms must bear responsibility for the rights they may impact. Because some States are unable or unwilling to make them do so under domestic law, there must be direct and uniform corporate responsibilities under international law.

30. The list of rights that appear particularly relevant to business include rights that States have not recognized or are still debating at the global level, including consumer protection, the precautionary principle for environmental management, and the principle of free, prior and informed consent of indigenous peoples. This poses a challenge, but a far more serious problem concerns the international normative legal structures’ proposed formulas for attributing human rights duties to corporations. After recognizing that States are the primary duty bearers, the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, in section A, paragraph 1, adds: “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect” nationally and internationally recognized human rights. That is to say, within corporations’ spheres of influence they would have exactly the same range of duties as States — from respecting to fulfilling rights — the only difference being that States’ duties would be primary and corporations’ duties secondary. According to John Ruggie, the former Special Representative for Business and Human Rights of the Secretary-General, the concept of corporate spheres of influence, though useful as an analytical tool, seems to have no legal pedigree.¹³ Therefore, Ruggie believes, the boundaries within which corporations’ secondary duties would take effect remain unknown. This situation paves the way for the likelihood that the attribution of corporate duties in

¹¹ See A/HRC/4/35, para. 20; see also Steven R. Ratner, “Business”, *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007).

¹² As early as 1949, the International Court of Justice stated: “The subjects of law in any legal system are not necessarily identical in nature or in the extent of their rights, and their nature depends on the needs of the community”; see “Reparations for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949”, *I.C.J. Reports 1949*.

¹³ Two law firms conducted a search of 10 jurisdictions for the mandate and did not find the term “spheres of influence” used in legal contexts. It was introduced into corporate social responsibility discourse by the Global Compact, and has proven to be useful as a tool in corporate policymaking. It assists companies to scan their operating environments for possible sources of risk and opportunities that could affect their social licence to operate. See, e.g., Business Leaders Initiative on Human Rights, United Nations Global Compact, and Office of the United Nations High Commissioner for Human Rights, “A Guide for Integrating Human Rights into Business Management”. Available from www.blihr.org.

practice would come to hinge on the respective capacities of States and corporations in particular situations. Where States were unable or unwilling to assume their duties, the pressure would be on companies to engage. This may be desirable in special circumstances, but as a general proposition it is deeply troubling on several grounds.

31. Imposing the full range of duties on transnational corporations directly under international law by definition reduces individual Governments' discretionary space within the scope of those duties. The international human rights regime recognizes the legitimate need of Governments to exercise discretion for making trade-offs and balancing decisions, and especially for determining how best to secure the fulfilment of economic, social and cultural rights on which corporations may have greatest influence. International legal structures attempt to square the circle by requiring companies to follow national laws and policy priorities. This, of course, merely adds layers of conflicting prescriptions for corporations to follow. In addition, where governance is weak to begin with, shifting obligations onto corporations to protect and fulfil rights beyond a carefully circumscribed set of limits may undermine national capacity and domestic incentives to make Governments more responsible to their own populations, which surely is the most effective way to realize rights.

32. Finally, attributing the same range of duties to companies and firms that also apply to States, differentiated only in degree within undefined corporate spheres of influence, would generate endless strategic gaming and legal battles on the part of Governments and corporations alike. This is illustrated by several recent cases where usually a corporation and a government authority contest who reneged on their legally defined obligations to provide support and protection for indigenous peoples.¹⁴

33. While it may be wise to think of corporations as organs of society, it is vital to note that they are specialized organs, performing specialized operations. The range of their responsibilities should reflect that fact. In a 1949 advisory opinion, the International Court of Justice explained that an international person is not the same thing as a State, and that its rights and duties are not the same as those of a State. Imposing on corporations the same range of responsibilities as States for all rights

¹⁴ After members of surrounding indigenous communities occupied mining sites of Companhia Vale do Rio Doce (CVRD) in protest of what they regarded as insufficient provision of funds and services by the company, CVRD refused to continue making any payments to the communities through the National Indian Foundation, with which it had an agreement to do so, on the grounds that the communities were using illegal means to force the company to fulfil their demands. CVRD reported the events to the Organization of American States, seeking clarification of State duties regarding indigenous peoples. The Foundation sought an injunction from Brazil's domestic courts, which was granted, ordering CVRD to resume payments. The Foundation is also seeking a declaration from the Brazilian Federal Court attributing legal responsibility to CVRD for social impacts caused by its mining activities; see CVRD and the Foundation's press releases on this issue. Available from www.cvrd.com.br/saladeimprensa/en/releases/release.asp?id=16724 and www.funai.gov.br/ultimas/noticias/1_semestre_2007/janeiro/un0131_001.htm.

they may impact may cause conflict between the two spheres and renders international and domestic rulemaking itself highly problematic.¹⁵

III. State duty

34. Despite the challenges stated above, the State is the primary duty bearer in relation to human rights, and certainly with respect to the rights of indigenous peoples. But the State's duty to protect against third party abuses of rights, including by business entities, has received relatively little attention in the debate surrounding the international normative and legal structures. This is surprising since international law firmly establishes that Governments have such a duty within their jurisdiction.¹⁶ Indeed, the United Nations and regional human rights mechanisms have addressed it with increasing frequency. Earlier United Nations human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, do not specifically address State duties regarding business. They impose generalized obligations to ensure the enjoyment of rights and prevent non-State abuse. Thus, the International Convention on the Elimination of All Forms of Racial Discrimination requires each Government to stop racial discrimination by "any persons, group or organization" (art. 2.1 (d)). And some of the treaties acknowledge rights that are particularly relevant in business contexts, including rights related to employment, health and indigenous communities.

35. Beginning with the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, and including the Convention on the Rights of the Child and the recently adopted Convention on the Rights of Persons with Disabilities, business is addressed more directly and in greater detail. The Convention on the Elimination of All Forms of Discrimination against Women, for example, requires Governments to take all appropriate measures to eliminate discrimination against women by any "enterprise" (art. 2 (e)), and within such specific contexts as "bank loans, mortgages and other forms of financial credit" (art. 13 (b)). The treaties generally give States discretion regarding the modalities for regulating and adjudicating non-State abuses. The treaty bodies elaborate upon the duty to protect such rights.

36. General Comment 31 of the Human Rights Committee confirms that under the International Covenant on Civil and Political Rights "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

¹⁵ For an attempt to sketch out an analytical foundation for corporate duties that does recognize the respective social roles of States and corporations, see Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal*, vol. 111 (2001).

¹⁶ States also have duties to respect, promote and fulfil rights, but the most business-relevant is the duty to protect because it is directed at third party abuse. Beyond the national territory, the scope of the duty will vary depending on the State's degree of control. The United Nations human rights treaty bodies generally view States parties' obligations as applying to areas within their "power or effective control". Note that where corporations perform public functions or are state-controlled, their acts may be attributed to the State under international law; see General Assembly resolution 56/83.

agents, but also against acts committed by private persons or entities”.¹⁷ It further explains that States could breach Covenant obligations where they permit or fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”. The Committees express concern about State failure to protect against business abuse most frequently with respect to the right to non-discrimination, indigenous peoples’ rights, and labour and health-related rights. But they indicate that the duty to protect applies to all substantive rights recognized by the treaties that private parties are capable of abusing.

37. The Committees tend not to specify the precise content of required State action, but generally recommend regulation through legislation and adjudication through judicial remedies, including compensation where appropriate. The Committees have not expressly interpreted the treaties as requiring States to exercise extraterritorial jurisdiction over abuses committed abroad by corporations domiciled in their territory.¹⁸ But nor do they seem to regard the treaties as prohibiting such action, and in some situations they have encouraged it. For example, the Committee on Economic, Social and Cultural Rights has suggested that States parties take steps to “prevent their own citizens and companies” from violating rights in other countries.¹⁹ The Committee on the Elimination of Racial Discrimination recently noted “with concern” reports of adverse impacts on the rights of indigenous peoples in other countries from the activities of corporations registered with a State actor. The Committee encouraged that State to “take appropriate legislative or administrative measures” to prevent such acts, recommended that the State explore ways to hold such corporations “accountable”, and asked that the State provide information on measures taken in its next periodic report.²⁰

38. In general, international law permits a State to exercise extraterritorial jurisdiction provided there is a recognized basis: where the actor or victim is a national, where the acts have substantial adverse effects on the State, or where specific international crimes are involved.²¹ Extraterritorial jurisdiction must also meet an overall reasonableness test, which includes non-intervention in other States’ internal affairs.²²

39. Debate continues over precisely when the protection of human rights justifies extraterritorial jurisdiction. The regional human rights systems also affirm the State

¹⁷ Human Rights Committee, General Comment 31, HRI/GEN/1/Rev.8 and Add.1.

¹⁸ Note that both the Convention against Torture and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography require States parties to establish jurisdiction over certain offences where the victim or alleged offender is a national, or when the alleged offender is present in their territory and there is no extradition. Neither the Committee against Torture nor the Committee on the Rights of the Child have discussed these provisions in relation to corporations.

¹⁹ See Committee on Economic, Social and Cultural Rights, General Comment 15, HRI/GEN/1/Rev.8 and Add.1.

²⁰ See CERD/C/CAN/CO/18 and Add.1.

²¹ Under the principle of “universal jurisdiction” States may be obliged to exercise jurisdiction over individuals within their territory who allegedly committed certain international crimes. It is unclear whether and how such obligations extend jurisdiction over juridical persons, including corporations.

²² Of course, the entire human rights regime may be seen to challenge the classical view of non-intervention. The debate here hinges on what is considered coercive.

duty to protect against non-State abuse and establish similar correlative State requirements to regulate and adjudicate corporate acts. The increasing focus on protection against corporate abuse by the United Nations treaty bodies and regional mechanisms indicates a growing concern that States either do not fully understand or are not always able or willing to fulfil this duty. This concern is reinforced by the results of a questionnaire survey of States that the Special Representative for Business and Human Rights has conducted, asking them to identify policies and practices by which they regulate, adjudicate and otherwise influence corporate actions in relation to human rights.²³ Of those States responding, very few report having policies, programmes or tools designed specifically to deal with corporate human rights challenges. A larger number say they rely on the broader framework of corporate responsibility initiatives, including such soft law instruments as the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises or voluntary initiatives like the Global Compact. Very few explicitly consider human rights criteria in their export credit and investment promotion policies, or in bilateral trade and investment treaties, points at which Government policies and global business operations most closely intersect.

IV. National legislation

40. State laws that implement international conventions and laws on indigenous peoples differ from country to country. For example, indigenous peoples' rights in the Russian Federation are outlined in different laws, including Federal Law No. 82-FZ on guarantees of the rights of numerically small indigenous peoples of the Russian Federation adopted in April 1999, Federal Law No. 104-FZ on the general principles of organizing communities of numerically small indigenous peoples of the north adopted in July 2000, and Federal Law No. 49-FZ on the territories of traditional natural resource use of numerically small indigenous peoples of the north, Siberia and far east of the Russian Federation adopted in May 2001. Legislation regarding the rights of Russian indigenous peoples was developed within the framework of the country's political and economic reforms, which were in themselves influenced by preferences and policies of Russia's foreign investors.

41. On the American continent, constitutional reforms in the last decade have acknowledged the political, the economic, the social, and the cultural rights of indigenous peoples. Countries such as the Plurinational State of Bolivia and Ecuador have promoted novel constitutional frameworks that acknowledge and guarantee the rights of indigenous peoples. Article 2 of the Constitution of the Plurinational State of Bolivia guarantees indigenous peoples' self-determination, acknowledging their rights to autonomy, self-government and culture, while recognizing their institutions and their territories. The new Constitution of Ecuador also guarantees the existence of indigenous peoples and their collective rights to their identity and to the ownership of their communal lands. It guarantees indigenous peoples the right to participate in the use, the exploitation, the administration and the conservation of the renewable natural resources found on their lands. It also recognizes their right to free, prior and informed consultation and a share in the profits that these projects generate. Furthermore, it also guarantees them compensation for social, cultural and environmental damages caused.

²³ See A/HRC/4/35/Add.1.

42. In Nicaragua, in addition to the constitutional changes of 1987, a regime of autonomy has been established for the indigenous peoples of the Caribbean coast through the implementation of the Autonomy Statute for the Atlantic Coastal Regions of Nicaragua, Law No. 28, and its corresponding bylaws. This process of autonomy has been strengthened over a 20-year period. Other pieces of legislation have recently been proposed to complement certain aspects of the Statute, including the Law on the communal property regime of the indigenous peoples and ethnic communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and the Coco, Bocay, Indio and Maiz Rivers (Law No. 445). Approved in December 2002, this law provides for the organization of indigenous authorities in their territories and assigns them competencies in respect of the territorial administration and management of natural resources.

43. Many States have carried out constitutional reforms or adopted legislation that recognizes indigenous peoples' individual and collective rights, including Argentina, the Bolivarian Republic of Venezuela, Brazil, Colombia, Guatemala, Mexico, Panama, Paraguay and Peru. Legislative reforms address such diverse aspects of the issue as property rights, autonomy, self-government and the recognition of their common law in the regulation of internal relations. These reforms recognize the jurisdiction of indigenous authorities in line with their own law. In Cambodia, there are laws that recognize indigenous peoples' rights with respect to their lands and forest management. In 1954, Malaysia adopted the Aboriginal Peoples Act on the protection of indigenous groups known as "Orang Asli", and in the Philippines, the Indigenous Peoples' Rights Act of 1997 recognizes various rights, including the right to ancestral lands and territories.

44. On the African continent, only a handful of States have recognized the existence of indigenous peoples. The Constitution of Ethiopia protects the unconditional right to self-determination of each nation and peoples. The laws of Cameroon, the Republic of Congo and Uganda protect the rights of indigenous peoples. In Algeria, the 1996 Constitution recognizes the Amazigh dimension of the Algerian culture. The Constitution of Namibia recognizes the indigenous Nama language. In South Africa, while indigenous peoples are not recognized as such, the Khoe and San peoples are mentioned in the 1996 Constitution, which protects the usage of indigenous languages.

45. In the United States of America, American Indian law includes treaties and federal Indian law. Native American recognition refers to the process of recognition of a tribe by the United States Federal Government or of a person being granted membership in a federally recognized tribe. There are 561 federally recognized tribal governments. The United States recognizes the right of these tribes to self-government and supports their tribal sovereignty and self-determination. The tribes possess the right to establish the legal requirements for membership, form their own governments, enforce laws (both civil and criminal), tax, license and regulate activities, zone and exclude persons entry and residence on tribal territories.

46. The Australian legal framework has recognized indigenous peoples' rights to land on the basis of traditional occupancy. During the 1970s, the Commonwealth and State Governments initiated legislation in order to return lands to indigenous communities and to allow their claims to other lands. In 1992, the High Court handed down the landmark *Mabo* decision, which rejected the discriminatory doctrine of *terra nullius* (vacant land). In response to the historic High Court

decision, the Australian Government enacted the Native Title Act in 1993. There is no provision in the Act for native titleholders to veto mining on their land, although it does provide for the right to negotiate under certain circumstances. The Act also allows for future activities that will have minimal effect on native title to be excluded from the arrangements that give negotiation rights to native titleholders. This will be of special relevance and value in mineral exploration. Existing covenants and conditions in the pastoral lease will continue to apply and prevail over native rights. Valid pastoral leases can be renewed even if native title has survived the lease and the use of the land. The Act ensures that the existing rights of pastoral leaseholders are protected. Should any invalidity be found because of native title, the lease will be validated.

47. With respect to mining and other resource exploitation on lands subject to native title claims, indigenous representative bodies have negotiated agreements that provide benefits for indigenous owners. It's worth noting that indigenous rights are often inadvertently undermined because either the terms of such agreements are kept secret, or indigenous peoples have limited time to negotiate, or due to inadequate legal representation. In contrast to the 1993 Act, the 1998 Native Title Act Amendment Bill was drawn up without the consent of, or consultation with, indigenous people. The amendment wound back indigenous rights and, in some instances, resulted in the outright extinguishment of native title. At the same time, non-indigenous land interests secured windfall gains.

48. The relationship between Māori and the New Zealand Government is grounded in the Treaty of Waitangi, which, despite the ongoing debate in New Zealand, does hold an important place in the country's legal framework. The Treaty establishes partnerships between Māori and the Government. For example, separate seats have been reserved for Māori in the country's Parliament. This guarantees their representation and enables them to influence decision-making at the national level. The responsibility to consult Māori people on issues that affect them is inherent in the Treaty, though it is not regarded absolutely. Even when consultations do take place, they are often not in accordance with traditional Māori decision-making processes.

49. In 1979, Greenland was granted Home Rule from Denmark and in 2008, Greenland voted to transfer more power from the Danish Royal Government to the local Greenlandic government. In June 2009, Greenland assumed self-determination with responsibility for self-governance in judicial affairs, policing and issues pertaining to natural resources. Also, Greenlanders were recognized as a separate people under international law. Denmark maintains control of foreign affairs and defence matters. It upholds the annual block grant of 3.2 billion Danish kroner, but, as Greenland begins to collect revenues from its natural resources, the grant will gradually diminish.

50. In Norway, Sweden, Finland and the Russian Kola Peninsula, the Sami people are divided by the formal boundaries of the four States. However, they continue to exist as one people united by cultural and linguistic bonds and a common identity. They have traditionally inhabited a territory called Sápmi, which spans the northern parts of these countries. The Sami Parliamentary Council, formed in 2000, is composed of the Sami Parliaments of Norway, Sweden and Finland and includes the permanent participation of Sami from the Russian Federation. The Council is authorized to deal with cross-border issues affecting the Sami people, including

language, education, research and economic development. The Sami Parliaments are the principle vehicles for Sami self-determination in Norway, Sweden and Finland, and they represent a vital model for indigenous self-governance and participation in decision-making. Also, the Nordic States have gradually developed some protection for Sami lands and their reindeer-herding activities. Significant tracts of land are continuously used for reindeer herding.

51. Development projects that exploit the natural resources on indigenous peoples' lands and territories often produce conflicting positions. This situation exists even in cases where indigenous peoples participate, and can often divide communities between those who support the projects and those who oppose them. Indigenous peoples are conscious of their disadvantaged position when dealing with the interests of States and corporations. They are often ignored because their aspirations, their rights and their interests are not taken into account, and they are denied their right to effective participation in the political, social, economic, cultural and environmental issues that concern them.

52. In the past few decades, indigenous peoples have developed their own agendas in response to their own realities by identifying programme areas, lines of action and minimal collaboration and coordination schemes. These lines of action refer to issues such as defending territories against mega-projects, protecting important sites, dealing with climate change, considering the application, the monitoring and the reforms of international and State-level legal frameworks, cultural revitalization, defending cultural and intellectual heritage, and striving for self-determination. Indigenous peoples have also developed different forms of protest against policies formulated and implemented by States, changes in the legal frameworks that affect their relationship with governments, and implementation of mega-projects that affect their interests, resources, culture, and lives.

V. Conclusions and recommendations

53. Increasing the effectiveness of the international human rights regime to deal with the challenges posed by the rise of transnational corporate activity around the world is a long-term aim. First, any "grand strategy" needs to strengthen and expand from the existing capacity of States and the States system to regulate and adjudicate harmful actions by corporations, not undermine it. Currently, at the domestic level some Governments may be unable to take effective action on their own, whether or not the will to do so is present. In the international arena, States may compete for access to markets and investments, as a result of which collective action problems may restrict or impede their position as the international community's public authority. This observation drives the desire to impose direct obligations on corporations under international law. But doing so can have adverse effects on governance capacities, as we have seen, leaving aside the question of any such proposals' current political feasibility and legal enforceability.

54. It seems more promising to expand the international regime horizontally, by seeking to further clarify and progressively codify the duties of States to protect human rights against corporate violations: individually, as host and home States, as well as collectively through the international cooperation requirement of several United Nations human rights treaties. This will also establish greater clarity regarding corporate responsibility and accountability, and create a broader

understanding among States about where the current regime cannot be expected to function as intended, and its vertical extension, therefore, is essential. International instruments may well have a significant role to play in this process, as carefully crafted precision tools complementing and augmenting existing institutional capacities.

55. Second, the focal point in the business and human rights debate needs to expand beyond individual corporate liability for wrongdoing. This is a critical element that must be addressed in its own right. An individual liability model alone cannot fix larger systemic imbalances in the global system of governance. As the political philosopher Iris Marion Young stated in an important discussion of labour abuses in global supply chains: “because the injustices that call for redress are the product of the mediated actions of many ... they can only be rectified through collective action”.²⁴ And that, she continued, required a broader construction of “political” or “shared responsibility”. Its aim, Young explained, was not to assign blame for discrete acts through backward-looking judgments, but “to change structural processes by reforming institutions or creating new ones that will better regulate the process to prevent harmful outcomes”.

56. Soft law hybrid arrangements like the Kimberley Process represent an important innovation by embodying such a concept: combining importing and exporting States, companies and civil society actors, as well as integrating voluntary with mandatory elements. They deserve attention, support and emulation in other domains. Finally, many elements of an overall strategy lie beyond the legal sphere altogether. Consequently, the interplay between systems of legal compliance and the broader social dynamics that can contribute to positive change needs to be carefully calibrated.

57. Any successful regime needs to motivate, activate and benefit from all of the moral, social and economic rationales that can affect the behaviour of corporations. This requires providing incentives as well as punishments, identifying opportunities as well as risks, and building social movements and political coalitions that involve representation from all relevant sectors of society, including business, much as has been occurring in the environmental field. The human rights community has long urged a move “beyond voluntarism” in the area of business and human rights.²⁵ In sum, international law has an important role to play in constructing a global regime to govern business and human rights. The effectiveness of its contributions will be maximized if it is embedded within, and deployed in support of an overall strategy of increasing governance capacity in the face of enormously complex and ever changing forces of globalization.

²⁴ Iris Marion Young, “Responsibility and Global Labor Justice”, *Journal of Political Philosophy*, vol. 12, No. 4, pp. 365 and 387 (2004).

²⁵ International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (2002). Available from www.ichrp.org/paper_files/107_p_01.pdf.