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ПООЩРЕНИЕ И ЗАЩИТА ВСЕХ ПРАВ ЧЕЛОВЕКА, ГРАЖДАНСКИХ, ПОЛИТИЧЕСКИХ, ЭКОНОМИЧЕСКИХ, СОЦИАЛЬНЫХ И КУЛЬТУРНЫХ ПРАВ, ВКЛЮЧАЯ ПРАВО НА РАЗВИТИЕ

Доклад Специального представителя Генерального секретаря по вопросу о правах человека и транснациональных корпорациях и других предприятиях Джона Ругги*

Добавление

Обязательства государств предоставлять доступ к средствам правовой защиты в связи с нарушениями прав человека, совершенными третьими сторонами, включая бизнес: обзор международных и региональных положений, комментарий и решения**

Резюме

Основные концептуальные и политические положения, предложенные Специальным представителем Генерального секретаря по вопросу о правах человека и транснациональных корпорациях и других предприятиях в 2008 году и единогласно одобренные Советом по правам человека, включают три фундаментальных принципа:

* Представлено с опозданием.

** Резюме настоящего доклада распространяется на всех официальных языках. См. доклад, содержащийся в приложении к настоящему документу, распространяется только на том языке, на котором он был представлен.

обязанность государств обеспечивать защиту от нарушений прав человека третьими сторонами, включая бизнес, посредством соответствующих стратегий, нормативного регулирования и юридической оценки; ответственность корпораций за соблюдением прав человека, в основном означающая обязанность не нарушать права других; и более широкий доступ потерпевших к эффективным средствам правовой защиты - как судебным, так и несудебным.

Обязанность государств обеспечивать защиту вытекает из норм международного права в области прав человека, которые предусматривают, что государства обязаны предпринимать надлежащие шаги как для предотвращения нарушений прав отдельных лиц, находящихся на их территории и/или под их юрисдикцией, которые связаны с деятельностью корпораций, так и проводить расследования, наказывать и обеспечивать возмещение ущерба в связи с такими нарушениями, когда они происходят, - иными словами, обеспечивать доступ к средствам правовой защиты. Эти средства правовой защиты конкретно предусмотрены в ряде основных международных и региональных договоров о правах человека; что же касается случаев, когда их не предусмотрено, то имеются отдельные полезные комментарии, составленные соответствующими комиссиями, судами и договорными органами Организации Объединенных Наций, занимающимися правами человека.

На основе материалов исследований, проведенных Специальным представителем ранее, в настоящем докладе рассматривается объем обязательств государств предоставлять доступ к средствам правовой защиты в связи с нарушениями прав третьими сторонами, включая бизнес, согласно следующим международным договорам о правах человека: Международному пакту о гражданских и политических правах, Международному пакту об экономических, социальных и культурных правах, Международной конвенции о ликвидации всех форм расовой дискриминации, Конвенции о ликвидации всех форм дискриминации в отношении женщин, Конвенции против пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания, Конвенции о правах ребенка, Международной конвенции о защите прав всех трудящихся-мигрантов и членов их семей и Конвенции о правах инвалидов[1]. В нем также обсуждается объем обязательств государств по основным региональным договорам о правах человека: Американской конвенции о правах человека, Европейской конвенции о защите прав человека и Африканской хартии прав человека и народов.

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[1] Настоящий доклад в значительной мере основан на серии материалов по вопросу об обязанности государств обеспечивать защиту согласно основным договорам Организации Объединенных Наций о правах человека, которые были подготовлены Специальным представителем ранее и резюмируются в документе A/HRC/8/5/Add.1.

Принципы обеспечения правовой защиты, лежащие в основе норм международного права в области прав человека, во многом навеяны правовыми нормами, касающимися ответственности государств, и в целом в них делается такой же акцент на справедливой компенсации - т.е. на создании для потерпевших такого положения, в котором они находились бы, если бы нарушения не было (или максимально приближенного к нему положения).

Что касается договорных органов Организации Объединенных Наций, то в их подходе к обязательствам государств предоставлять доступ к средствам правовой защиты в связи с нарушениями прав человека, совершенными как государственными, так и частными субъектами, можно обнаружить некоторые общие тенденции. Они подчеркивали важность:

- проведения незамедлительных, исчерпывающих и справедливых расследований;

- предоставления доступа к оперативным, эффективным и независимым механизмам правовой защиты, созданным на основе судебных, административных, законодательных и других соответствующих средств;

- введения соответствующих санкций, включая криминализацию поведения и возбуждение преследований в тех случаях, когда нарушения представляют собой международные преступления; и

- установления ряда форм надлежащего возмещения ущерба, таких как компенсация, реституция и реабилитация, и внесения изменений в соответствующие законы.

Ряд органов также подчеркивали необходимость уделения особого внимания группам "повышенного риска" или уязвимым группам - потенциально включающим женщин, детей, коренные народы и другие меньшинства - для обеспечения того, чтобы они имели доступ к эффективным средствам правовой защиты, должным образом отвечающим их потребностям. В случае коренных народов это дополняется другими международными договорами, конкретно касающимися их прав.

Хотя некоторые из более поздних международных договоров о правах человека четко предусматривают обязанность государств предпринимать шаги для ликвидации нарушений со стороны предприятий и даже устанавливают ответственность для

юридических лиц[2], остается неясно, какие шаги им следует предпринимать для обеспечения отчетности компаний. К числу конкретных аспектов, в которых было бы полезно внести дополнительную ясность, относятся вопросы о том, следует ли государствам возлагать ответственность не только на физических лиц, действующих от имени компаний, но и на сами компании; когда государствам надлежит предоставлять частным лицам гражданско-правовые основания для подачи исков против компаний (т.е. отдельные от уголовных санкций и выходящие за рамки механизмов административных жалоб); и следует ли государствам привлекать компании к ответственности в связи с предполагаемыми нарушениями, имевшими место за рубежом, и если да, то в какой степени.

Хотя экстерриториальный аспект вопроса об обязанности государств обеспечивать защиту согласно нормам международного права в области прав человека и остается неурегулированным, нынешние ориентиры предполагают, что от государств не требуется регулировать или юридически оценивать экстерриториальную деятельность предприятий, подпадающих под их юрисдикцию, но им в целом и не запрещается делать это, поскольку существует признанная юрисдикционная основа и соблюдено условие общей разумности. В рамках этих параметров Комитет по экономическим, социальным и культурным правам (КЭСКП) и Комитет по ликвидации расовой дискриминации (КЛРД) призывали государства предпринять шаги для предотвращения нарушений, совершаемых корпорациями, подпадающими под их юрисдикцию, за рубежом, и требовать от них отчетности за свои действия[3].

Региональные комиссии и суды по правам человека подробно занимались ключевыми аспектами обязательства государств предоставлять доступ к средствам правовой защиты в связи с нарушениями прав человека, включая значение понятия "справедливое судебное разбирательство" и случаи, когда практические элементы, например отсутствие надлежащей юридической помощи или представленности, могут составлять неприемлемые препятствия для получения средств правовой защиты. В отношении нарушений, связанных с деятельностью корпораций, обзор межамериканской системы, проведенный для Специального докладчика, показывает, что

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[2] В пункте 4 статьи 3 Факультативного протокола к Конвенции о правах ребенка, касающемся торговли детьми, детской проституции и детской порнографии, государствам конкретно предлагается устанавливать ответственность юридических лиц.

[3] См. Замечание общего порядка № 19, E/C.12/GC/19, пункт 54 (2008 год), в котором используются формулировки, аналогичные формулировкам более ранних замечаний общего порядка КЭСКП; КЛРД, Заключительные замечания по Канаде, CERD/C/CAN/CO/18, пункт 17; Заключительные замечания по Соединенным Штатам, CERD/C/USA/CO/6, пункт 30.

влияние предпринимательской деятельности учитывалось в ситуациях, связанных с нарушениями прав коренных народов, угрозами физической неприкосновенности частных лиц (в связи с экологическим ущербом), а также в случаях, когда затрагивались экономические и социальные права и права ребенка[4]. В настоящее время проводятся дальнейшие исследования по изучению характера отношения к нарушениям, связанным с деятельностью корпораций, в европейской и африканской системах.

Хотя обязанность государств обеспечивать защиту, включая обязательство предоставлять доступ к средствам правовой защиты, распространяется на все признанные права, которые могут быть ущемлены частными субъектами, и на все предприятия, некоторые типы компаний, группы прав и категории потерпевших упоминались более часто. Например, договорные органы Организации Объединенных Наций подчеркивали, что государствам следует:

- защищать права работников, занятых как в государственных, так и в частных структурах, и создавать эффективные механизмы рассмотрения жалоб в сфере трудовых отношений;

- сводить к минимуму потенциальную способность горнодобывающих компаний ограничивать возможности общин, затрагиваемых их деятельностью, особенно коренных народов, в плане получения доступа к механизмам правовой защиты; и

- в ситуациях, когда "функции государства" переходят в частный сектор, обеспечить наличие эффективных систем для возмещения ущерба в связи с любым нарушением, совершенным соответствующими частными компаниями.

Это обязательство государств предоставлять доступ к средствам правовой защиты отличается от индивидуального права на получение средств правовой защиты, признанного в ряде международных и региональных договоров. Если обязательство государств применяется к нарушениям всех применимых прав третьими сторонами, включая бизнес, то в отношении индивидуального права на получение средств правовой защиты нет ясности в том, в какой степени оно распространяется на нарушения, совершенные негосударственными субъектами. Вместе с тем применительно к актам, охватываемым Основными принципами и руководящими положениями, касающимися права на правовую защиту и возмещение ущерба для жертв грубых нарушений международных норм в области прав человека и серьезных нарушений международного

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[4] http://www.reports-and-materials.org/State-Responsibilities-under-Inter-American-System-Apr-2008.pdf.

гуманитарного права, индивидуальное право на средства правовой защиты было провозглашено как действующее "независимо от того, на ком в конечном счете может лежать ответственность за нарушение[5]".

Основные принципы Организации Объединенных Наций разрабатывались в качестве подтверждения существующих обязательств государств. Они свидетельствуют о повышенной заинтересованности международного сообщества в обеспечении доступа к правовой защите в случаях, связанных с грубыми нарушениями, и, вероятно, отражают рост стремления к обеспечению того, чтобы частные лица имели возможность обращаться в национальные суды для защиты своих прав, закрепленных в договорах, в таких ситуациях. В этих Принципах также определены три основных аспекта индивидуального права на правовую защиту в отношении грубых нарушений: право на равноправный и эффективный доступ к правосудию; право на адекватное, реальное и быстрое возмещение понесенного ущерба; и право на доступ к соответствующей информации о нарушениях прав и механизмов возмещения ущерба[6]. Они предполагают, что в ситуациях, когда речь идет о таком индивидуальном праве, к государствам могут предъявляться более широкие требования и они могут обладать более ограниченными дискреционными полномочиями. Их принятие заставляет вновь обратить внимание на существующие обязательства государств предоставлять доступ к средствам правовой защиты в связи с грубыми нарушениями, совершенными частными субъектами, и на юридические и практические последствия индивидуального права на правовую защиту в случаях, связанных с деятельностью корпораций.

Специальный представитель будет и далее следить за изменениями в этих областях и консультироваться с соответствующими заинтересованными сторонами в процессе изучения соответствующих последствий для целей практической реализации трех взаимодополняющих фундаментальных принципов "защищать, соблюдать и восстанавливать в правах".

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[5] Резолюция 60/147 Генеральной Ассамблеи, приложение, Принцип 3 c).

[6] Принцип 11.

Annex

STATE OBLIGATIONS TO PROVIDE ACCESS TO REMEDY FOR HUMAN RIGHTS ABUSES BY THIRD PARTIES, INCLUDING BUSINESS: AN OVERVIEW OF INTERNATIONAL AND REGIONAL PROVISIONS, COMMENTARY AND DECISIONS

CONTENTS

CONTENTS (continued)

I. INTRODUCTION

1. The conceptual and policy framework proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises in his report (A/HRC/8/5), and unanimously endorsed by the Human Rights Council, comprises three core principles: the State duty to protect against human rights abuses by third parties, including business through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, meaning essentially not to infringe on the rights of others; and greater access by victims to effective remedy, both judicial and non-judicial. Access to remedy is central to both the State duty to protect and the corporate responsibility to respect. This overview report addresses its relationship with the former.

2. The State duty to protect is grounded in international human rights law. Guidance from international human rights bodies suggests that the duty applies to all recognized rights that private parties are capable of impairing and to all types of business enterprises.[7] As part of the duty, States are obliged to take appropriate steps both to prevent corporate-related abuse of the rights of individuals within their territory and/or jurisdiction and to investigate, punish and redress such abuse when it does occur - in other words, to provide access to remedy. Several of the core international and regional human rights treaties explicitly provide for these elements of remedy; and where they do not, there has been some useful commentary from the relevant human rights commission, courts and United Nations treaty bodies.

3. This report summarizes the most relevant provisions, commentary and decisions dealing with State obligations to provide access to remedy under the international and regional human rights systems. It builds upon, and will be further complemented by, detailed research undertaken in support of the Special Representative's work exploring the treatment of the State duty to protect in relation to corporate-related abuse by the United Nations treaty bodies and by the regional systems.

4. The State obligation to provide access to remedy is distinct from the individual right to remedy recognized in a number of the international and regional treaties. As noted above, while the State obligation applies to abuse of all applicable rights by third parties, including business, it is unclear how far the individual right to remedy extends to abuses by non-State actors. However, an individual right to remedy has been affirmed for the category of acts covered by the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, "irrespective of who may ultimately be the bearer of

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[7] See A/HRC/8/5/Add.1 for a summary of the Special Representative's earlier research papers on the State duty to protect under the core United Nations human rights treaties.

responsibility for the violation". Accordingly, this report also considers the provisions of the United Nations Basic Principles and their possible implications in this area.

5. The report begins by briefly outlining the relevance of general remedial principles in the law of State responsibility to State obligations to provide access to remedy in the human rights field (section I). It then considers relevant provisions of the main international human rights treaties, and their interpretation by the respective United Nations treaty bodies (section II). The discussion focuses on States' obligations to take appropriate steps to investigate, punish and redress third party abuse and draws on the series of papers prepared for the Special Representative on the work of the treaty bodies to highlight any business-specific references in the treaties and in the comments made by the relevant treaty bodies. This section also briefly considers other international instruments pertaining to indigenous peoples. The report then discusses the main regional human rights treaties in a similar manner, bearing in mind that further research is being undertaken for the Special Representative on the European and African systems (section III).[8] It concludes with a discussion of the individual right to remedy under the United Nations Basic Principles (section IV).

II. GENERAL REMEDIAL PRINCIPLES IN THE LAW OF STATE RESPONSIBILITY

6. The classic formulation of the State obligation to provide remedy under international law is found in the 1928 decision of the Permanent Court of International Justice (PCIJ) in the Chorzów Factory case, in the context of a claim between States: "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[9] The Court continued:

> "The essential principle ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ..."[10]

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[8] Detailed research has already been conducted on the Inter-American system. See Cecilia Anicama, "State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System", paper prepared for the Special Representative, April 2008, available at http://www.reports-and-materials.org/State-Responsibilities-under-Inter-American-System-Apr-2008.pdf.

[9] (1928) PCIJ (ser. A) No. 17, p. 29.

[10] Ibid., p. 47.

7. The International Law Commission's draft articles on State responsibility for internationally wrongful acts,[11] which are highly influential but not legally binding, provide that States which are in violation of their international obligations are required not only to cease the offending conduct but also to "make full reparation" for "any damage, whether material or moral"; this may entail individual forms of reparation (such as compensation, restitution, satisfaction) or a combination of forms.[12] The commentary on the draft articles explains that they codify the Chorzów Factory rule.[13] These principles have been reiterated by the International Court of Justice (ICJ) in a number of cases, and the Chorzów Factory decision has been described as "the cornerstone of international claims for reparations, whether presented by states or other litigants".[14]

8. The draft articles, like the Chorzów Factory case before them, adopt a compensatory approach, and avoid sanctions or penalties like punitive damages; the purpose of a remedy is to place an aggrieved party in the same position they would have been in had the wrongful act not occurred. This remedial approach in the area of State responsibility has heavily influenced conceptions of remedy in international human rights law.

9. However, particularly in situations involving international crimes, international human rights law imposes clear obligations on States to prosecute and punish those who commit abuses. In other cases as well, as discussed below, the international and regional human rights institutions have stressed the importance of sanctions, including criminalizing violations of certain rights, and of adequate investigations. This report now considers the international human rights treaties and the State obligations arising under them directly.

III. STATE OBLIGATIONS TO PROVIDE ACCESS TO REMEDY UNDER THE CORE INTERNATIONAL HUMAN RIGHTS TREATIES

10. This section considers the following international human rights treaties and relevant commentaries by the respective bodies charged with monitoring their implementation: the

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[11] General Assembly resolution 56/83, Annex.

[12] Art. 31.

[13] See James Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002), pp. 211-214.

[14] Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* vol. 96 (2002), p. 836. For example, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, the ICJ held that all natural and legal persons affected by the relevant breaches of international human rights and humanitarian law were entitled to reparation: Advisory Opinion of 9 July 2004, paras. 152-153.

International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), and the Convention on the Rights of Persons with Disabilities (CRPD).[15]

11. In each case, provisions and commentary that deal with States' obligations to provide access to remedy in general are considered, with business-specific references noted at the end of each discussion.

A. International Covenant on Civil and Political Rights

General principles

12. Article 2 (3) of the ICCPR provides that States parties are required to ensure that "any person" whose Convention rights or freedoms are violated "shall have an effective remedy".[16] The French and Spanish versions of article 2 (3) would not automatically entail the substantive (as opposed to procedural) aspects of remedy, but in general comment No. 31 (2004) the Human Rights Committee interpreted an "effective remedy" as requiring reparation where appropriate.[17]

13. A person seeking such a remedy is entitled to have their claim "determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State",[18] and to have a decision in their favour enforced. As the Special Representative's work on the ICCPR shows, "general comment No. 31 highlights that the HRC views access to such competent authorities as pivotal to States Parties' obligations

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[15] This section draws primarily on the Special Representative's 2007 series of papers on the United Nations human rights treaties and commentaries by the treaty bodies, but also includes relevant developments since those papers were published.

[16] Article 2 (3) can be contrasted with the approach taken in the Universal Declaration of Human Rights, article 8 of which provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", but which does not specifically refer to rights under the Declaration.

[17] CCPR/C/21/Rev.1/Add.13, para. 16. "Remedy" has no exact equivalent in French and Spanish; the terms *recours* and *recurso* are commonly used to refer only to the procedural aspects of remedy.

[18] Art. 2 (b).

under the Covenant. It says that it 'attaches importance to States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law'. The HRC's commentaries consistently encourage States to make greater efforts to provide forums for claims regarding public and private human rights abuses." [19]

14. States are also specifically required to "develop the possibilities of judicial remedy" under article (3) (b). The Human Rights Committee has encouraged this by outlining "the different ways in which the judiciary may effectively assure rights, including through 'direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.' Further, in Concluding Observations, the HRC has expressed regret at situations where the Covenant 'has not yet been invoked in the courts or before the administrative authorities (article 2 of the Covenant).'" [20]

15. As Nowak comments, whether a remedy is effective "may ultimately be determined only on the basis of concrete cases, taking into consideration all relevant circumstances, the respective national legal system and the special features of the substantive right concerned".[21] However, the Human Rights Committee has offered some guidance.

16. The Committee has emphasized the centrality of prompt, thorough and effective investigations into allegations of abuse (particularly where they involve threats against the security of the person) by independent and impartial bodies. Indeed, it has said that the failure to establish appropriate procedures to carry out such investigations may constitute a separate breach of the Covenant.[22] Where an investigation reveals that an abuse has occurred, the Committee has recommended that a State should ensure that those responsible are brought to justice; again, failure to do so may constitute a breach of the Covenant in its own right, particularly where those violations are recognized as criminal under international law, such as torture and other cruel, inhuman or degrading treatment or punishment.[23]

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[19] "State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties: Individual Report on the International Covenant on Civil and Political Rights", prepared for the Special Representative, June 2007, para. 65, available at http://www.reports-and-materials.org/Ruggie-ICCPR-Jun-2007.pdf.

[20] Ibid., para. 68.

[21] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. ed., 2005), p. 65.

[22] General comment No. 31, para. 15.

[23] Ibid., para. 18.

17. While generally giving States latitude in determining what constitutes an effective remedy, the Committee has said that in cases of "particularly serious" human rights abuses, notably in cases involving violations of the right to life, "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2 (3)".[24] Barriers to the establishment of legal responsibility in such serious cases - including doctrines like immunity of a State's officials, the defence of superior orders, and unreasonably short statutory limitation periods - should be "removed" and States parties should assist each other in bringing such perpetrators to justice.

18. In its general comment No. 32 (2007), the Human Rights Committee has stressed that the right to a fair and public hearing by a competent, independent and impartial tribunal established by law in article 14 (1) of the ICCPR is broad in its scope, applying not only to criminal trials but also to the determination of rights and obligations in a "suit of law" - meaning judicial or administrative proceedings "aimed at determining rights and obligations" and including, for example, civil claims in the areas of contract, tort and property law, and decisions or proceedings involving public officials that affect their private entitlements, such as social security assessments or decisions about pension benefits (para. 16). Whenever such rights and obligations are being determined, this must be done "at least at one stage of the proceedings" by a competent tribunal:

> "The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right."(para. 18).

19. The Human Rights Committee suggests that a legal cause of action must actually exist for the right to a fair hearing to apply. In other words, while article 14 (1) protects against obstacles to access in relation to existing civil causes of action, it does not appear to support the creation of a new cause of action where none currently exists.

20. General comment No. 32 also notes some key features of a fair hearing, which include the avoidance of undue delay, the transparency of the proceedings (which should in principle be conducted orally and publicly), and the right to review by a higher tribunal (in the case of criminal proceedings).

21. The Human Rights Committee has stated that "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public

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[24] *Bautista v. Colombia*, communication No. 563/1993, para. 8.2.

memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations".[25] While there is no duty to provide it, the Committee considers that "the Covenant generally entails appropriate compensation". It has often recommended changes in States parties' laws or practices beyond the specific remedy for the victim in the case at hand, in order to prevent recurrences. The Human Rights Committee has also emphasized that effective remedies must be "appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children".[26]

Business-specific references

22. The Human Rights Committee has made clear its view that States parties are required under the Covenant to legislate against abuse of the rights of individuals within their territory and/or jurisdiction by private actors, to impose adequate sanctions, and to ensure the existence of appropriate complaints mechanisms, and it has specifically discussed employers in this regard.[27] With respect to particular sectors, the Committee has expressed concern about adverse effects on indigenous peoples and minorities caused by extractive and land development activities, and has recommended that States parties take steps to regulate and adjudicate activities capable of jeopardizing rights in such situations, including activities affecting access to justice.[28]

B. International Covenant on Economic, Social and Cultural Rights

General principles

23. The ICESCR does not contain a specific provision dealing with the State obligation to provide access to remedy for abuses of Covenant rights. However, the general requirement in article 2 (1) providing for the progressive realization of all rights contained in the Covenant "by all appropriate means" has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) as implying such an obligation.

24. Although the Committee has discussed and indicated support for a wide range of remedies, it has put particular emphasis on judicial remedies: "the Committee considers that, in many cases, the other 'means' used could be rendered ineffective if they are not reinforced or

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[25] General comment No. 31. para. 16.

[26] Ibid., para. 15.

[27] "State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties: Individual Report on the International Covenant on Civil and Political Rights", op. cit., paras. 96-100.

[28] Ibid., paras. 107-128.

complemented by judicial remedies".[29] Administrative remedies may thus be "adequate", provided there is an opportunity for judicial review.[30] Whatever remedy is provided, the Committee has stressed that it should be provided in an accessible, affordable, timely, and effective manner.

25. With respect to some rights, particularly non-discrimination, the Committee has stated that protection through judicial means is "indispensable", whether the abuse is committed by public or private actors.[31] The Committee has been at pains to stress that "there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions ... The adoption of a rigid classification of [economic, social and cultural] rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent".[32] It seems reasonable to conclude that this concern has influenced some of its strong pronouncements in support of judicial remedies.

26. In relation to State obligations to provide access to remedy where there has been a violation of article 2 (2) - which provides for the non-discriminatory exercise of Covenant rights - the Committee has stated in a draft general comment that:[33]

> "National policies and strategies should provide for the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudsmen, national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 2 (2), including actions by private actors. They should be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes.
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> "... States parties are obliged to monitor effectively the implementation of laws and policies to comply with article 2 (2). This includes establishing the necessary monitoring institutions and encouraging other actors such as civil society and the private sector to carry out such a function."

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[29] General comment No. 9 (1999), para. 3.

[30] Ibid., para. 9.

[31] Ibid.

[32] Ibid., para. 10.

[33] Draft general comment No. 20, paras. 36-37 (emphasisis added).

Business-specific references

27. Given the number of economic and social rights that relate to the employment setting, it is perhaps not surprising that the Committee has emphasized State obligations to regulate employers with respect to issues including forced and child labour, discrimination-related abuse, safe working conditions, and the right to form and join trade unions.[34] The Committee "clearly considers that States parties have a duty to protect employees from abuse of Covenant rights by State and non-State employers, including business enterprises. It highlights that States must play a central role in regulating and adjudicating employers' behaviour, including through enacting and/or enforcing legislation (in some cases criminal) to ensure protection."[35]

28. CESCR has specifically mentioned the importance of States regulating the activities of private providers of social security and other core State functions.[36] It has also discussed the importance of remedial measures in the context of extractive and other major infrastructure projects and their impact on indigenous peoples, and has emphasized the importance of providing adequate compensation as well as alternative land to displaced groups.

29. On the issue of compensation, it is not entirely clear whether the Committee expects States to ensure that this is paid directly by the private actor(s) involved.[37] While general comment No. 17 (2005) seems to indicate this in the context of infringements of intellectual property rights, in concluding observations dealing with individual States parties, the Committee has indicated that it expects States to ensure compensation is provided, but they then seem to have discretion as to whether to require third parties to contribute directly.

30. Notably, CESCR has commented on the importance of States seeking to prevent negative impacts by "their own citizens and companies" operating overseas, and to "take steps to influence other third parties" to respect rights "through legal or political means", in accordance with international law.[38] Further, in general comment No. 19 on the right to adequate social security, CESCR recommended that "States parties should extraterritorially protect the right to

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[34] "State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations core Human Rights Treaties: Individual Report on the International Covenant on Economic, Social and Cultural Rights", prepared for the Special Representative, May 2007, para. 91, available at http://www.reports-and-materials.org/ Ruggie-report-ICESCR-May-2007.pdf.

[35] Ibid., para. 113.

[36] Ibid., paras. 140-143.

[37] Ibid., paras. 72-74.

[38] General comment No. 15 (2002), para. 33.

social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law" (para. 54).

C. International Convention on the Elimination of All Forms of Racial Discrimination

General principles

31. Like the ICCPR, ICERD sets out State obligations to provide access to remedy for violations of Convention rights and freedoms. Article 6 ensures both the procedural and substantive aspects of remedy in providing that:

"States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

32. Article 6 contemplates both injunctive relief to prevent abuse (in the reference to "protection") as well as adequate reparation where abuse actually occurs. In discussing the regulatory measures States should take, the Committee on the Elimination of Racial Discrimination (CERD) has recommended various steps involving the inclusion of certain provisions in national criminal law as well as the amendment of various procedural standards, like the burden of proof, in racial discrimination-related cases.[39] The Committee has stated that the obligation that such provisions be "'effectively implemented by the competent national tribunals and other State institutions' is implicit in article 4 of the Convention, under which State parties 'undertake to adopt immediate and positive measures'".[40]

33. To comply with article 6, investigations should be thorough, proper, impartial and effective.[41] This applies to all relevant institutions (including the police, public prosecutors and

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[39] "Mapping State Obligations for Corporate Acts: An Examination of the UN Human Rights Treaty System - Individual Report on the International Convention on the Elimination of All Forms of Racial Discrimination", prepared for the Special Representative, December 2006, paras. 30-33, available at http://www.business-humanrights.org/ Documents/State-Obligations-Corporate-Acts-CERD-18-Dec-2006.pdf.

[40] Ibid., para. 34.

[41] Ibid., para. 36.

the courts). Both civil and criminal proceedings may be relevant but the Committee has made clear its view that the Convention does not require a system of "sequential remedies", which must be followed in all cases. Rather, it has recommended that remedies must be provided within a reasonable time.[42]

34. Articles 1 (4) and 2 (2) require States to take special measures to ensure the full and equal enjoyment of human rights for particular groups, and CERD has been especially concerned about remedies for "at-risk" or vulnerable groups such as indigenous peoples, migrant workers and minorities such as Roma. In relation to indigenous peoples, CERD has made clear its view that when they are deprived of their lands without their free, prior and informed consent, States are required to provide effective remedies, including the return of such lands. In particular, it has recommended that States ensure that indigenous peoples have equal access to justice by "establishing adequate procedures, and defining clear and just criteria to resolve land claims by indigenous communities. They should do so within the domestic judicial system, while taking due account of relevant indigenous customary laws, and providing interpreters and bilingual counsel for court proceedings".[43]

Business-specific references

35. The Committee has specifically addressed measures States should take to redress harm (including indirect harm) caused to indigenous peoples by extractive and forestry companies.[44] Significantly, and like CESCR, CERD in recent concluding observations on the reports of individual States parties has encouraged them to take appropriate legislative or administrative measures to prevent "adverse impacts" on the rights of indigenous peoples in other countries from the activities of corporations registered in that State, and has recommended that States parties explore ways to hold such transnational corporations "accountable".[45]

D. Convention on the Elimination of All Forms of Discrimination against Women

General principles

36. CEDAW does not contain a general provision equivalent to those in the ICCPR and ICERD requiring States to provide "effective remedy" for individuals whose rights are violated. However, article 2 (a) of the Convention obliges States "to ensure, through law and other

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[42] Ibid., para. 46.

[43] Ibid., para. 47.

[44] Ibid., para. 60.

[45] See concluding observations for Canada, CERD/C/CAN/CO/18, para. 17, and concluding observations for the United States, CERD/C/USA/CO/6, para. 30 .

appropriate means, the practical realization" of the principle of non-discrimination between men and women, article 2 (c) requires States "to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination", and article 2 (b) deals with sanctions against perpetrators. The Convention also specifically refers to business in article 2 (e), under which States parties commit "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".

37. As the Special Representative's work on the Convention has shown:

> "the Convention clearly contemplates adjudication of public and private actors to eliminate discrimination and the Committee has spoken of the importance of effective complaints procedures, as well as judicial action in some situations, to protect rights.
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> "The Committee discusses the use of 'legal measures' to provide 'effective protection', including complaints mechanisms, penal sanctions, civil remedies and compensatory provisions. It expects States parties to take steps not only to prevent abuse by third parties but also to punish and redress abuse. 'Protective measures' for victims (including rehabilitation and support services) are also considered important." [46]

38. The Committee has stressed the importance of access by women to effective complaints mechanisms and reparation, including compensation where appropriate, in relation to workplace discrimination, sexual harassment, and especially in situations of public or private violence. It has also stressed the importance of legal aid in ensuring such access is meaningful. The Committee's recommendations apply to all women but they indicate that special attention may need to be given to certain groups, including girls and indigenous women.

Business-specific references

39. Beyond article 2 (e) noted above, other Convention provisions do not explicitly mention business but address contexts that are very likely to involve business, including employment, and the provision of health care and financial services. The Committee regularly refers to the need for States parties to combat abuse in the labour market and to regulate a wide range of employers, including small businesses as well as major publicly listed companies, using an array of different regulatory tools. It has also made particular mention of certain industries including health, tourism, apparel, agriculture and the financial services sector.

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[46] "State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations core Human Rights Treaties: Individual Report on the Convention on the Elimination of All Forms of Discrimination against Women", prepared for the Special Representative, September 2007, paras. 78-79, available at http://www.business-humanrights.org/Documents/Ruggie-report-CEDAW-Sep-2007.pdf.

40. The Committee has stressed the particular vulnerabilities of female migrant workers, including with respect to abuse by non-State actors, and recently observed that "States parties should take active measures to prevent, prosecute and punish all migration-related human rights violations that occur under their jurisdiction, whether perpetrated by public authorities or private actors." [47]

E. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

41. Taken together, articles 2 (1) and 16 (1) of the Convention oblige States parties to take action through legislative, administrative, judicial, and other means to effectively prevent torture and other cruel, inhuman or degrading treatment or punishment. Article 4 requires States parties to criminalize all acts, including attempted acts of, and complicity or participation in, torture (as defined in article 1). It requires them to punish torture by State actors or others acting in an official capacity, including private persons acting with official sanction, and officials who know or have reasonable grounds to believe that such abuses are being carried out by private parties and fail to take appropriate steps to prevent, investigate or punish such abuses. It is not clear whether States are obliged to prosecute legal persons, including corporations, as well as individuals in cases where the accused is a private person acting with official sanction.

42. Article 13 deals with the procedural aspects of remedy in requiring that any individual who claims he or she has been subjected to torture in any territory under the jurisdiction of a State party "has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities".[48] Article 12 provides for prompt and impartial investigations. Article 4 provides that penalties must be appropriately severe in order to reflect the grave nature of the crime. In addition, article 14 provides that each State party "shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".

43. In its general comment No. 2 (2008), the Committee stated:

> "Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and

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[47] General recommendation No. 26, para. 25.

[48] This differs from the references to individual vindication of treaty rights found in the ICCPR and ICERD.

> to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment."[49]

44. The Committee has expressed concern at the lack of effective State policy to prevent and punish violence against "at-risk" or vulnerable groups like women, children and ethnic and other minorities, including when it is committed by private actors.[50] The State action requirement in the Convention means that the Committee has not focused on abuse by private business actors to the same extent as the other treaty bodies. However, it has observed that States are responsible for ensuring that all detention facilities comply with the Convention's guarantees, which by implication must encompass facilities that have been outsourced by the State and are privately run. The Committee noted that:

> "each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm."[51]

45. The Convention does not, of course, limit the international responsibility that States or individuals can incur for perpetrating torture and other related crimes under international customary law or other treaties - notably the Rome Statute of the International Criminal Court.

F. Convention on the Rights of the Child

General principles

46. The CRC does not contain a general provision dealing with the State obligation to provide access to remedy. However, it contains various provisions addressing specific aspects of access to remedy, particularly judicial remedy, including in article 9 (2) (the opportunity for an affected child to participate in separation proceedings), article 12 (the opportunity for a child to be heard

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[49] CAT/C/GC/2, para. 13.

[50] "Mapping State Obligations for Corporate Acts: An Examination of the UN Human Rights Treaty System - Individual Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", prepared for the Special Representative, December 2007, pp. 7-9, available at http://www.reports-and-materials.org/Ruggie-report-Convention- against-Torture-Dec-2007.pdf.

[51] General comment No. 2, para. 15.

in any judicial proceedings that are held), article 19 (2) (judicial involvement in cases of violence against children), article 37 (d) (the opportunity for prompt access to a court to challenge any detention order), and article 40 (2) (b) (iii) (the opportunity for prompt penal proceedings).

47. In general comment No. 5 (2003), the Committee on the Rights of the Child stated that "for rights to have meaning, effective remedies must be available to redress violations", and that the right to an effective remedy is implicit in the Convention.[52] The Committee considers that States parties must "give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives" and that such procedures should include "access to independent complaints procedures and to the courts with necessary legal and other assistance". (These concerns recur in general comments Nos. 8 and 9.) Where a violation of a Convention right is found, "there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration". Relevantly, general comment No. 5 also stresses incorporation of the Convention into domestic law.

48. The Optional Protocol on the sale of children, child prostitution and child pornography contains detailed provisions requiring changes to national criminal law, and refers to compensation for victims as well as penalties for perpetrators. The Committee has expressed concern at reducing penalties where compensation is available and has called for separation between reparation and penalties to ensure perpetrators are held to account.[53] The Optional Protocol also requires States parties to adopt measures to ensure recovery and reintegration for victims.

Business-specific references

49. According to the Special Representative's work on the CRC, the Committee's commentaries imply that access to remedial mechanisms and appropriate reparation should follow abuses by State and non-State actors alike, including business enterprises. With respect to criminal sanctions, in accordance with article 32 of the Convention, the Committee has called for prosecution and punishment of private actors engaged in economic exploitation or discrimination, trafficking or violence against children, and has said that punishments should be well publicized so as to act as a deterrent.

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[52] CRC/GC/2003/5, para. 24.

[53] See "State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations core Human Rights Treaties: Individual Report on the UN Convention on the Rights of the Child and its Optional Protocols", prepared for the Special Representative, July 2007, para. 131, available at http://www.business-humanrights.org/Documents/Ruggie-report-Convention-on-Rights-of-Child-Jul-2007.pdf.

50. The Committee has focused on the issue of businesses carrying out "State functions", and has stressed that States must ensure that non-State service providers, including business, act in accordance with the Convention.[54] The Committee has also discussed the importance of regulating media and Internet companies, and various types of employers, in ensuring the effective implementation of Convention rights.

51. The Optional Protocol on the sale of children requires States parties to ensure that complainants have access to adequate procedures to seek compensation from those "legally responsible" under article 9. The Committee has encouraged States parties to extend liability under the Optional Protocol to legal persons, pursuant to article 3 (4), which provides that "subject to the provisions of its national law, each State party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State party, such liability of legal persons may be criminal, civil or administrative".

G. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

General principles

52. Article 83 of the ICRMW sets out States parties' obligations in exactly the same terms as article 2 (3) of the ICCPR, that is, by requiring States to ensure that "any person" whose Convention rights or freedoms are violated "shall have an effective remedy". Recognizing that migrant workers face particular problems in enforcing their rights as they may not be allowed to stay in a host State's territory once their contract of employment expires, the Committee on Migrant Workers (CMW) has recommended that migrant workers be allowed "to stay in the country [of employment] for the time necessary to seek remedies for unpaid wages and benefits". The Committee also recommended that States "should consider offering legal services to migrant workers in legal proceedings related to employment and migration". The Committee further recommended that States "establish effective and accessible channels which would allow all migrant workers to lodge complaints of violations of their rights without fear of retaliation on the grounds that they may be in an irregular situation".[55]

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[54] See general comment No. 5, op. cit., paras. 42-43. The general comment draws States parties' attention to the recommendations from the 2002 day of general discussion on the private sector as service providers.

[55] A/61/120, paras. 17 and 15 (f). See also "Mapping State Obligations for Corporate Acts: An Examination of the UN Human Rights Treaty System - Individual Report on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", prepared for the Special Representative, January 2007, paras. 45-46, available at http://www.business-humanrights.org/Documents/SRSG-report-migrant-workers-Jan-2007.pdf.

53. Article 18 of the Convention provides that "migrant workers ... shall have the right to equality with nationals of the State concerned before the courts and tribunals". According to the Committee, "Article 18 does not apply only to a situation where migrant workers seek a remedy for violations under the Convention, but rather to any situation before courts and tribunals".[56]

54. The CMW has recommended special attention be given to protect the rights of migrant women, particularly domestic workers.[57] Similarly, OHCHR has highlighted the plight of unaccompanied migrant children, arguing that States should ensure that such children, and the children of migrant workers, are given equal opportunities to exercise their rights. OHCHR's comments apparently contemplate States regulating private as well as public employers in order to ensure the full enjoyment of the rights of migrant children.[58]

Business-specific references

55. Article 68 of the Convention specifically provides for the imposition of effective sanctions on persons, groups or entities that organize, operate, or assist in organizing or operating illegal movements of migrant workers, or that use violence, threats or intimidation against migrant workers. This obligation appears to extend to activities by business enterprises engaged in trafficking or employing trafficked migrant workers.[59] With respect to specific businesses, the Committee has emphasized the importance of adequate regulation, including licensing, of recruitment agencies; it has also noted the importance of regular monitoring and inspection of workplaces, particularly in the domestic and agricultural sectors. In the case of domestic workers, the CMW has recommended in concluding observations that a State party should ensure that such workers have access to a mechanism to report alleged abuse by their employers, and that all cases of abuse be investigated and the perpetrators sanctioned.[60]

H. Convention on the Rights of Persons with Disabilities

56. As one of the most recent international human rights treaties, the CRPD explicitly mentions business in article 4 (1) (e), which requires States parties to "take all appropriate

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[56] "Mapping State Obligations for Corporate Acts: An Examination of the UN Human Rights Treaty System - Individual Report on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", para. 49.

[57] Ibid, para. 52.

[58] Office of the United Nations High Commissioner for Human Rights, "High-Level Dialogue on International Migration and Development - Key OHCHR Messages", August 2006.

[59] Ibid., para. 41.

[60] Concluding observations for Mexico, CMW/C/MEX/CO/1, para. 35.

measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise."

57. The CRPD requires States parties to make provision for effective access to justice for persons with disabilities (which is distinct from a general obligation to provide access to remedy for violations of Convention rights). Article 13 provides that:

> "1. States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> "2. In order to help to ensure effective access to justice for persons with disabilities, States parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

58. The Convention also details the rights of persons with disabilities in the context of employment, referring in article 27 (1) (b) to the State obligation to "Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including ... the redress of grievances".

59. It remains to be seen what views the newly established Committee on the Rights of Persons with Disabilities will offer with respect to State obligations to provide access to remedy for business-related abuse.

I. International instruments pertaining to the rights of indigenous peoples

60. In discussing corporate-related abuse, the treaty bodies often pay particular attention to the special protections that may need to be afforded to indigenous peoples under the main international human rights treaties. More detailed provisions elaborating on indigenous peoples' human rights can be found in two other key international instruments.

61. International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries provides in article 4 that special measures "shall be adopted as appropriate" by States parties to safeguard the rights of indigenous and tribal peoples. In terms of the substantive aspects of remedy, it contains, in articles 15 and 16, several provisions relating to compensation for harm suffered through exploration, or use of resources, on indigenous and tribal peoples' lands, and for their removal from such lands where return is not possible. Under article 20, States parties are required to ensure that the rights of indigenous employees are effectively protected, including ensuring "that they are fully informed of their rights under labour legislation and of the means of redress available to them".

62. While ILO Convention No. 169 has only a small number of parties, there has been much broader support among the international community for the recent, in itself non-binding, United Nations Declaration on the Rights of Indigenous Peoples. The Declaration goes into more detail than the Convention with respect to the appropriate substantive remedies for the loss of indigenous peoples' lands or resources, or harm suffered through the use of such lands and resources, without their free, prior and informed consent in articles 10, 28 and 32. Under article 8, States are expected to provide effective mechanisms to prevent and provide redress for actions that violate the right of indigenous peoples not to be subjected to forced assimilation or destruction of their culture. Under article 11, States are also expected to provide redress where indigenous cultural property is appropriated without the free, prior and informed consent of the peoples involved.

63. The Declaration contains an overarching provision dealing with access to remedy, stating in article 40 that:

> "Indigenous peoples have the right to access to, and prompt decision through, just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

J. Summary

64. Various procedural and substantive aspects of States' obligations to provide access to remedy for human rights abuses are addressed in the main international human rights treaties. Some treaties explicitly require States to provide remedy for abuse, although States generally have discretion in how to fulfil this obligation; in other cases, the treaty bodies have provided some useful guidance about what individual treaties appears to contemplate in this regard.

65. There are some common strands in the approaches of the various treaty bodies to State obligations to provide access to remedy for human rights abuses - whether committed by public or private actors. A number have emphasized the importance of:

- Conducting prompt, thorough and fair investigations
- Providing access to prompt, effective and independent remedial mechanisms, established through judicial, administrative, legislative and other appropriate means
- Imposing appropriate sanctions, including criminalizing conduct and pursuing prosecutions where abuses amount to international crimes
- Providing a range of forms of appropriate reparation, such as compensation, restitution, rehabilitation and changes in relevant laws

66. Several treaty bodies have also stressed the need for special attention to be paid to "at-risk" or vulnerable groups - potentially including women, children, indigenous peoples and other minorities - to ensure that they have access to effective remedies that are appropriately tailored to their needs. This is complemented in the case of indigenous peoples by other international instruments dealing specifically with their rights.

67. Although some of the newer treaties expressly contemplate States taking steps to eliminate abuse by business enterprises, and even establishing liability for legal persons,[61] there remains a lack of clarity as to the steps States should take to hold companies accountable. Particular areas that would benefit from greater clarity include whether States should impose liability on companies themselves, in addition to natural persons acting on the entity's behalf; when States are expected to provide individuals with civil causes of action against companies (i.e. separate from criminal sanctions and going beyond administrative complaints mechanisms); and whether and to what extent States should hold companies liable for alleged abuses occurring overseas. The comments by CESCR and CERD in this respect offer some guidance, although a number of points remain unclear.

68. Some types of companies, rights, and victims have been referred to more frequently than others by the treaty bodies. For example, several of them have emphasized that States should:

- Protect employees' rights in both public and private settings and establish effective complaints mechanisms for employment-related grievances
- Minimize the potential for extractive companies to impair the ability of communities affected by their activities, especially indigenous peoples, to access remedial mechanisms
- In situations where "State functions" have been privatized, ensure that effective systems are in place to remedy any abuse by the relevant private companies involved

69. These and other implications of the State obligation to provide access to remedy for corporate-related abuse under the core international human rights treaties would benefit from further attention and elaboration.

IV. STATE OBLIGATIONS TO PROVIDE ACCESS TO REMEDY UNDER REGIONAL HUMAN RIGHTS INSTRUMENTS

70. This section surveys the situation under the main regional human rights treaties, namely the American Convention on Human Rights, European Convention on Human Rights and the African Charter on Human and Peoples' Rights.

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[61] See para. 51 above.

71. The discussion of the Inter-American system draws on an analysis of the State duty to protect against human rights abuses by business under that system previously prepared for the Special Representative. Similar research is currently being conducted in support of the Special Representative's work into the European and African regional human rights systems, including States' obligations to provide access to remedy. This section therefore deals first with the Inter-American system, and then discusses some of the general principles underlying the remedial approaches in the European and African systems.

A. American Convention on Human Rights

General principles

72. Under article 1 (1) of the American Convention on Human Rights, States parties are required to undertake to "respect" and "ensure" the rights contained in the Convention with respect to all persons subject to their jurisdiction.[62] In its judgement in its first contentious case, Velásquez Rodriguez, the Inter-American Court of Human Rights analysed what the obligation to "ensure" rights means:

> "This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.
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> …
>
> "This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State party. " [63]

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[62] The Convention is one of the two main human rights instruments adopted by the Organization of American States (OAS). The other is the non-binding American Declaration of the Rights and Duties of Man, which applies to all OAS member States, including those which have not ratified the American Convention on Human Rights.

[63] (1988) 1 Inter-Am Ct HR (ser. C) No. 4, paras. 166, 177.

73. While the case concerned violations by State-sponsored forces, the judgement also noted that States have similar obligations to prevent or respond to private acts that are not directly attributable to the State.

74. Article 25 (1) of the American Convention on Human Rights guarantees the right of amparo - a procedure for obtaining judicial review of an executive act affecting an individual that allegedly violates domestic legal norms, similar to the common law habeas corpus action - and extends its reach to alleged breaches of the Convention.[64] It provides that:

> "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

75. The Inter-American Commission on Human Rights has emphasized that article 25 requires access to effective judicial remedy for the protection of fundamental rights, meaning that the tribunal must reach a reasoned conclusion on the merits of the claim.[65] Under article 25, States parties are also required to undertake to develop the possibility of judicial remedies, and to ensure that the competent authorities shall enforce such remedies when granted. Neither the Court nor the Commission has interpreted article 25 (1) as creating an individual right to establish the criminal or civil liability of alleged human rights abusers.

76. Article 8 (1) contains a general guarantee of the right to a fair hearing in both civil and criminal cases:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the

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[64] The American Declaration also speaks about the right to access national courts in article XVIII, as well as providing for the right of *amparo*: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Note that article 8 of the UDHR resulted from a proposal put by Mexico during the drafting of the Declaration that *amparo* should be protected by its provisions. Mary Ann Glendon, "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea", *Harvard Human Rights Journal,* vol. 16 (2003), p. 38.

[65] The Commission processes individual petitions from victims of human rights abuses and, where it finds an abuse has occurred, issues recommendations to the relevant State about measures to redress the abuse and prevent future violations. Where a State fails to implement those recommendations, and where it has submitted to the contentious jurisdiction of the Court, the Commission may refer the case to the Court for a binding judgement.

substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature."

77. Article 63 provides that if the Court finds that there has been a violation of the Convention, it shall rule, if appropriate, that fair compensation be paid to the victim. The Court may also adopt provisional measures. With respect to the exhaustion of domestic remedies, the Commission has stressed that it is not a "court of fourth instance", but it has also recognized a number of exceptions to the rule, including where domestic legislation does not provide adequate protection, where access to remedy has been denied, or where there has been unwarranted delay. As in the European system, these exceptions can be proven through evidence of a pattern of gross violations that have gone unremedied. The Court has stated that lack of legal representation can also constitute an exception in certain circumstances.

78. The Commission has developed a body of decisions upholding the right of the individual victim to know the truth about violations of their human rights, including the identity of those who committed them. The Court's emphasis on investigation and access to information in its decisions is not surprising given that the majority of the contentious cases brought before it have involved disappearances, torture and extrajudicial killings in situations where many of the States involved had granted amnesties to the perpetrators of these abuses.[66]

Business-specific references

79. As noted above, the Court has clearly held that the State duty to protect under the Convention extends to investigating, punishing and redressing abuse by "third parties" or "private persons", and has referred to the duty in situations likely to involve businesses.[67] The Commission has made clear that the Convention can be relied on by individuals in relation to State failures to adequately prevent, investigate, punish or redress abuse by private actors, specifically including corporations. It has considered the impact of business operations in situations involving violations of indigenous peoples' rights, threats to an individual's physical integrity, including where this arises as a result of environmental harm, and, increasingly, in situations implicating economic and social rights and the rights of the child. The Commission has also moved from ordering precautionary measures focused on the suspension or cancellation of licences by the State to include measures that require the continued involvement of the relevant corporation in monitoring and mitigating its impacts.

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[66] The Court has begun to expand its consideration of social and economic rights under article 26 of the Convention and under the 1988 Additional Protocol in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

[67] The following discussion draws on Anicama, op. cit., pp. 10-12. The Court has not explicitly used the term "companies", with the exception of Judge Antônio Cançado Trindade in a separate opinion in a case involving provisional measures ordered against Ecuador.

80. The Commission has emphasized the importance of protecting indigenous peoples' interests in their lands and natural resources - indeed, this is the main context in which it has discussed State responsibilities with respect to corporate-related human rights abuse. The Commission has stressed that States should ensure, where business operations affect indigenous lands or peoples, that the relevant lands are appropriately identified and demarcated, that the indigenous peoples involved are consulted in all matters affecting their interests (including through the provision of adequate translation services where necessary), and that irreparable harm is not caused to their identity or rights.

81. The Court has ordered provisional measures in cases where the State has failed to adequately protect indigenous peoples' rights, including against the effects of third parties' commercial operations. The Court has stressed the importance of environmental and social impact assessments in the context of major resource and extractive projects, and the responsibility of States to ensure that such assessments are carried out in accordance with relevant international standards and best practices, while also taking into account cultural considerations.[68] Such assessments should be carried out in advance of any rights to land being granted and should consider the cumulative impact of proposed projects on affected communities.

B. European Convention on Human Rights

82. Article 13 of the European Convention on Human Rights provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Summarizing the views of the European Court of Human Rights, Shelton explains that: "the attributes of an effective remedy include institutional independence of the remedial body from the authority responsible for the violation, ability to invoke the Convention guarantees in question, capability of the remedial body of affording redress, and effectiveness in fact." [69]

83. The broad guarantee in article 13 is linked to the more specific requirements relating to habeas corpus actions in article 5 (4), compensation for unlawful arrest in article 5 (5), and access to justice, which the European Court of Human Rights has inferred from the fair hearing guarantee in article 6 (1), which article provides: "In the determination of his civil rights and

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[68] *Saramaka People v. Suriname*, Preliminary Objection, Merits, Reparations and Costs, Judgement of 28 November 2007, (ser. C) No. 172, para. 129; Interpretation of the Judgement of Preliminary Objections, Merits, Reparations and Costs, Judgement of 12 August 2008, (ser. C) No. 185, paras. 15-22.

[69] Dinah Shelton, *Remedies in International Human Rights Law* (2nd ed., 2005), p. 123. The following discussion of the European system draws significantly on Shelton.

obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

84. The Court has held that a complainant must have a "bona fide" opportunity to have their case heard and, where appropriate, to have reparations assessed. States are entitled to impose reasonable restrictions on access to the courts to ensure a functioning system of justice (for example, through statutes of limitations, or the requirement of legal representation), but they must not impair the fundamental essence of the right to a fair hearing. The Court has held that where legal representation is required by law, or where the law is so complicated as to make legal advice essential, then the State must provide it.[70] For example, in a case involving two campaigners from Greenpeace who were successfully sued by McDonalds, the Court held that the failure of the United Kingdom to provide them with legal aid "had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms" in contravention of article 6 (1).[71]

85. Article 6 (1) does not mandate judicial consideration: at least where civil rights or obligations are at issue, an initial determination may be made by an administrative body, provided that that body complies with article 6 (1) requirements, or by a private body, provided there exists a right of appeal to a body complying with article 6 (1).[72] Thus the remedy provided by a State may also be administrative or legislative, but it must be effective. In a series of cases in the 1990s against Turkey, the Court found violations of the broad guarantee in article 13 in the consistent absence of an effective remedy at the national level - including the State's failure to investigate alleged abuses, its failure to prosecute alleged offenders and its failure to provide compensation.

86. In other cases, the Court has concluded that, for the purposes of article 13, the nature of the right at issue will have implications for the nature of the remedy that must be provided. For example, where a case involves the protection of the right to life, or the prohibition on torture and other cruel, inhuman or degrading treatment or punishment, then the State must ensure an effective investigation that is capable of leading to the identification, prosecution and punishment of those responsible.[73]

87. While parties before the European Court of Human Rights are expected to have exhausted national remedies, there is no obligation to have recourse to remedies that are inadequate or

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[70] *Airey v. Ireland*, (1979-80) 2 EHRR 214.

[71] Quoted in Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) p. 385.

[72] Ibid., p. 384.

[73] Shelton, *Remedies in International Human Rights Law*, op. cit., pp. 128-130.

ineffective, or where there are "special circumstances" like the routine passivity of national authorities in the face of serious allegations.[74] The Court has said that due allowance must be made for the fact that the exhaustion of domestic remedies rule is being applied in human rights proceedings, meaning it should be applied in a flexible manner and "without excessive formalism".

88. It should be noted that article 47 of the European Charter of Fundamental Rights, which is currently not legally binding but is contained in Part II of the draft European Union Constitution, incorporates the requirements of both articles 6 (1) and 13, as well as specifically providing for legal aid where that is "necessary to ensure effective access to justice".

C. African Charter on Human and Peoples' Rights

89. Article 7 of the African Charter states that:

> "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force …"

90. This provision appears to take the obligation on States parties to provide access to "competent national organs" for individuals to vindicate their rights and to extend it beyond the African Charter to other treaties dealing with fundamental rights and freedoms.[75]

91. Article 26 requires States parties to guarantee the independence of their courts and to allow "the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter". The African Commission has emphasized that States are expected to conduct effective investigations into alleged violations, and ensure the provision of a fair trial.[76]

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[74] Ibid., pp. 124-130.

[75] In comparison, article 9 of the Arab Charter on Human Rights provides that "everyone within the territory of the State has a guaranteed right to a legal remedy", but it is not clear that this extends beyond violations of existing national laws. The Charter entered into force in March 2008 and has been controversial in parts. Note also that the Inter-American Court may consider any human rights treaty that is applicable to the American States in its advisory jurisdiction.

[76] Shelton, *Remedies in International Human Rights Law*, op. cit., p. 142. The African Court on Human and Peoples' Rights has recently begun hearing its first contentious case. Under the 2008 Protocol on the Statute of the African Court of Justice and Human Rights, the African Court on Human and Peoples' Rights will merge with the AU Court of Justice to form a new institution, which will assume jurisdiction over any human rights cases currently under consideration by the African Court.

92. The procedural exhaustion requirement in articles 50 and 56 (5) of the Charter is "the one condition most frequently invoked and contested by the parties before the African Commission".[77] The Commission has stated that national remedies must be "available, effective and sufficient" to be considered.[78] To be available, the remedy must be evident and a claimant must be able to pursue it without impediments; to be effective, the substantive right must be adequately provided for in national law; and to be sufficient, the remedy must offer at least the prospect of success. Again, a pattern of persistent violations that have not been redressed can constitute evidence of inadequate domestic remedies.

93. The Commission has made clear that States have positive obligations under the Charter to prevent and sanction third party abuses of human rights. It has held that the decision of the Inter-American Court in Velásquez Rodriguez is of direct relevance in the African context, specifically, in interpreting article 1 of the Charter, which requires States parties to "recognize the rights, duties and freedoms enshrined in the Charter and … undertake to adopt legislative and other measures to give effect to them".[79] A State may breach its obligations where it fails to exercise the necessary care to prevent abuse by private actors, or fails to take the necessary steps to investigate, punish and redress abuses where they occur - including restoring the right that has been violated and providing compensation.[80]

94. The best known application of these principles in the context of corporate-related abuse is the decision by the Commission on a communication concerning Nigeria's alleged failure to protect against abuse by an oil consortium comprised of State-owned and private enterprises.[81] The Commission found that the State had failed in its duty to protect the affected individuals from abuse by non-State actors. It said that the duty requires States to create and maintain an appropriate legal and regulatory framework enabling individuals to freely realize their rights, including by ensuring that they have access to remedy. Among other measures, the Commission recommended more effective and independent oversight of the petroleum industry.

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[77] Nsongurua Udombana, "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights", *American Journal of International Law*, vol. 97 (2003), p. 2.

[78] Shelton, *Remedies in International Human Rights Law*, op. cit., p. 142. According to at least one commentator, the Commission has not applied the rule as consistently as might be hoped. See Udombana, op. cit.

[79] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002 (May 2006), para. 144.

[80] Ibid., para. 146.

[81] *SERAC v. Nigeria*, Communication No. 155/96 (October 2001).

D. Summary

95. In considering States' general obligations to provide access to remedy for human rights abuses, the regional human rights commissions and courts have focused on a number of key issues, including the meaning of a "fair hearing" and when practical matters, like inadequate legal aid or representation, may constitute unacceptable barriers to remedy. In applying the rule requiring exhaustion of domestic remedies to proceedings before them, they have also gone into some detail about when, and what kind of, failures at the national level will vitiate this requirement - including ongoing State passivity in the face of persistent allegations.

96. With respect to corporate-related abuse, as noted above, further research is being carried out into the European and African systems. But as the study on the Inter-American system conducted for the Special Representative shows, some consideration has been given to steps that States should take to prevent, and also to investigate, punish and redress abuse by private actors. For example, the Inter-American Commission has considered the impact of business operations in situations involving violations of indigenous peoples' rights, threats to an individual's physical integrity (including where this arises as a result of environmental harm), and, increasingly, in situations implicating economic and social rights and the rights of the child.

97. The Inter-American Court has also dealt with State responsibility for third party abuse in the context of violations of indigenous peoples' rights, and has emphasized the importance of consultation and the carrying out of environmental and social impact assessments prior to project approval being granted. However, these and other issues concerning States' obligations to provide access to remedy for corporate-related abuse would benefit from further consideration and guidance by the regional human rights commissions and courts.

V. THE INDIVIDUAL RIGHT TO REMEDY IN SITUATIONS OF GROSS HUMAN RIGHTS VIOLATIONS

98. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law were adopted in 2005, first by the Commission on Human Rights, and subsequently in a resolution of the General Assembly, giving them an authoritative, if not legally binding, force.[82] The preamble indicates that they are intended to reiterate States' existing obligations under the main international and regional human rights treaties, international humanitarian law conventions, and other relevant sources of international law, to provide access to remedy for gross human rights violations and serious violations of

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[82] An important precursor was the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985 (resolution 40/34, annex), which focused on remedies for victims of crimes committed by non-State actors under national law and on governmental abuse of power.

international humanitarian law.[83] The Basic Principles also provide for an individual right to remedy in such cases, "irrespective of who may ultimately be the bearer of responsibility for the violation",[84] and thus extend to third party, including corporate-related, abuses.

99. This section outlines the understanding of "gross violations" that shaped the drafting of the Basic Principles, and then discusses their key provisions and notes their potential implications for situations involving corporate-related abuse.

A. Gross violations

100. In his progress report in 1993, when the draft principles applied only to gross violations of international human rights law, the initial drafter, Theodor van Boven, explained that:

"While under a number of international instruments any violation of provisions of these instruments may entail a right to an appropriate remedy, the present study focuses on gross violations of human rights as distinct from other violations. No agreed definition exists of the term 'gross violations of human rights'. It appears that the word 'gross' qualifies the term 'violations' and indicates the serious character of the violations but that the word "gross" is also related to the type of human right that is being violated."[85]

101. After reviewing relevant sources, he concluded that the types of acts that would almost always constitute "gross violations" included "at least the following: genocide; slavery and slave-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender". However, as the inclusion of "systematic discrimination" indicates, gross violations may also arise from large-scale and systematic violations of other rights. Thus, there is no

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[83] See, generally, International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide* (2006).

[84] Principle 3 (c). With respect to human rights abuses committed by third parties that do not amount to gross violations, however, the content of the right to remedy is less clear, and it will be necessary to look to the relevant source of the State obligation (usually the relevant treaty provision).

[85] E/CN.4/Sub.2/1993/8, para. 8.

accepted list of what can constitute gross violations, and later drafts of the Basic Principles did not attempt to define them.[86]

B. State obligations and individual rights

102. The Basic Principles stress States' core obligations to respect, protect, and ensure all international human rights and international humanitarian law, which obviously goes beyond the issue of providing access to remedy (Principles 1-3). They also reiterate the obligation on States to investigate, prosecute and punish violations of international human rights law and international humanitarian law, where the latter amount to international crimes, and to cooperate with other States in bringing perpetrators to account (Principles 4-5).

103. Principle 8 defines who can be considered a "victim", including who may be considered an "indirect victim":

> "Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

104. This definition goes beyond what is stated or assumed in many of the core international human rights law treaties - namely, that a victim typically is an individual who is the direct "target" of a violation. But the definition in the Basic Principles reflects international jurisprudence, particularly with respect to cases involving killings and disappearances.[87]

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[86] Similarly, with respect to "serious violations of international humanitarian law" there is no accepted list but they would certainly include the following: grave breaches of the Geneva Conventions; war crimes (as provided for in the Additional Protocols to the Conventions); breaches of a number of other related treaties, like those on the protection of cultural property and on land mines; and other relevant principles of customary international law. While still a large field, there is greater codification of what might constitute serious violations of international humanitarian law than is possible in respect of gross violations of international human rights law, where potentially all rights might be implicated if the harm is large-scale and systematic enough.

[87] See International Commission of Jurists, op. cit., pp. 33-42.

105. Principle 11 sets out the three core remedial rights of victims "as provided for under international law":[88]

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered; and

(c) Access to relevant information concerning violations and reparation mechanisms.

106. In defining "access to justice", Principle 12 provides that victims "shall have equal access to an effective judicial remedy as provided for under international law", as well as referring to administrative and other relevant domestic mechanisms. States should "provide proper assistance to victims" and, in addition to individual justice, should endeavour to develop procedures for group claims and access to international mechanisms as appropriate (Principles 12-14).

107. The Basic Principles state that victims should be provided with "adequate, effective and prompt reparation" that is proportional to the harm suffered, which may include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition (Principles 15-23).[89] With respect to where the responsibility for providing reparation lies, Principle 15 provides that "in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim." States are expected to ensure that reparation decisions are enforced, including in cases involving foreign judgements (Principle 17).

108. The qualification noted above that under Principles 11 and 12 victims are entitled to remedy "as provided for under international law" may reflect a desire on the part of some States to emphasize that the Basic Principles do not expand the existing scope of State obligations to provide access to remedy for gross violations of international human rights law and serious violations of international humanitarian law. However, they are certainly indicative of an enhanced concern on the part of the international community to ensure access to remedy for

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[88] While access to information has usually been treated as an aspect of access to justice, or indeed as a substantive violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment, it is included here as a stand-alone right. It evolved out of international humanitarian law requirements regarding the recording and passing on of information about the wounded, sick and dead. Cases concerning enforced disappearances have also stressed the importance of the victim's right to information about the violation, particularly where the claimant is not the direct victim but is closely linked to them. See International Commission of Jurists, op. cit., Ch. 5.

[89] Guarantees of non-repetition are often considered as an aspect of satisfaction; they are intimately related to the State obligation to prevent violations and so the primary obligation (to prevent) overlaps with the secondary obligation (to guarantee non-repetition where a violation has occurred).

victims of gross human rights violations, and may reflect increased expectations that individuals should be able to resort to national courts to vindicate their treaty rights where those rights are the subject of gross violations.

109. The Basic Principles suggest that States may be required to do more, and be afforded less discretion, where gross violations occur and the individual right to remedy applies. For example, in order to ensure the individual right to access to justice (defined as "an effective judicial remedy") States may need to go beyond showing that they have taken appropriate steps to provide access to judicial remedy, and in fact ensure that in cases involving gross violations, including those committed by private parties, legal and practical barriers to accessing justice have been adequately addressed so as to enable the individual right to be effective.

110. Their adoption clearly invites a renewed focus on existing State obligations to provide access to remedy for gross violations committed by private actors, and on the legal and practical implications of the individual right to remedy in cases that involve corporate-related abuse.

VI. GOING FORWARD

111. The Special Representative will continue to follow developments in the areas discussed in this report, including the interpretation and application of State obligations to provide access to remedy for corporate-related human rights abuses under the main international and regional human rights systems, and expectations arising from the individual right to a remedy in cases involving gross violations, as reflected in the Basic Principles. He will explore the implications of these developments as he works to operationalize the three complementary pillars of the "protect, respect and remedy" framework - in particular, in developing recommendations to States about steps they could take to provide access to remedy for corporate-related abuse, through both judicial and non-judicial mechanisms.

112. To this end, he looks forward to continued dialogue with the United Nations treaty bodies, as well as with the regional human rights commissions and courts. Following his usual work practices, the Special Representative will consult widely with other relevant stakeholders as well, including, importantly, those seeking remedy for corporate-related abuses, as he examines existing barriers to accessing such remedy and how States can best address them.
