

CORPORATE RESPONSIBILITY BEFORE INTERNATIONAL INSTITUTIONS

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I. INTRODUCTION

A. *The Need to Regulate Corporate Behavior at the International Level*

It is widely recognized that the activities of transnational corporations (TNCs) can have negative consequences amounting to international concern—serious environmental damage from polluting activities and gross negligence of human rights in developing countries being just two examples. Because of these negative consequences and because many states notoriously fail to control such corporations, regulating corporate behavior seems, intuitively, an obvious task of international law. Yet the examples of international regimes regulating TNC behavior remain relatively few, and the procedures for ensuring compliance with existing regulation are often weak. Despite a growing body of literature in the field, the potential role that international law can play and the merit of existing regulatory regimes remain poorly analyzed.

While state behavior and the resolution of interstate disputes by necessity must be regulated by international law, the need to regulate corporate behavior internationally arises only when national legal regimes, for some reason, prove inadequate or when there is a desire to harmonize rules between national systems. Any activity of a given corporation will fall under the jurisdiction of one or more states, but national systems cannot always be trusted and may prove inadequate for a variety of reasons. First, the judiciary of the host state might be too weak to effectively control a powerful corporation.¹ Where there is a weak or nonexistent judiciary, the corporation might join forces with powerful domestic nonstate actors exercising de facto control over the territory. Second, even if the

1. Charney notes: “[O]ne country usually cannot unilaterally regulate [corporate] power and behavior, even the western, developed countries have an interest in [regulating corporate behaviour internationally].” See Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 32 DUKE L.J. 748, 749 (1983); see, e.g., Menno Kammingo & Saman Zia-Zarifi, *Introduction to LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 1-2 (Menno Kammingo & Saman Zia-Zarifi eds., 2000).

host state has the necessary capacity, it might not wish to sanction the corporation as the host state might be corrupt or otherwise profit from or participate in the corporation's operations. Alternatively, in what is sometimes referred to as a "race to the bottom," the state might want to retain an "investor-friendly" environment with little public interference and lax regulation and enforcement in order to attract foreign investors.² Third, sanctioning extraterritorial corporate behavior might be a low-priority task in the home state. The negative consequences of the activity are typically felt abroad, while the home state might benefit economically from the activity and even be facilitating it.³ Fourth, even if the home state wants to interfere, interference might be difficult because the activity takes place in another state.⁴ Regulating corporations is inherently complex for any state, regardless of the state's relative power, because of distance and because the home state may not enforce investigative or other measures. Sometimes *forum non conveniens* findings prevent home states from seizing jurisdiction. Fifth, the home state might be reluctant to give its laws extraterritorial application due to the entailed risk of interstate friction.⁵

B. *Do Corporations Have International Legal Personality?*

Some scholars suggest that international law cannot impose obligations on corporations because corporations do not possess international legal personality.⁶ Rather than depending on an a priori

2. See also Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 48-49 (2003). See generally Michael E. Porter, *Competition in Global Industries: A Conceptual Framework*, in COMPETITION IN GLOBAL INDUSTRIES 15 (Michael E. Porter ed., 1986). This situation is often referred to as a "race to the bottom." See Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 931 (2005).

3. Vázquez notes the typical reluctance of a home state to "burden its own corporations for the benefit of people in other states." See Vázquez, *supra* note 2, at 931.

4. Ratner notes, indicating the need of international regulation, that transnational corporations "have headquarters in one state, shareholders in others, and operations worldwide." Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 463 (2001).

5. See Deva, *supra* note 2, at 49; see also PHILIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 168 (1993) (noting that "[i]n the case of multinational corporations with component corporations in several, if not many, countries, the use of enterprise principles by a nation invariably involves extraterritorial application of the doctrine to foreign affiliates, thereby frequently precipitating a clash with the national legal systems of the other countries in which the group operates").

6. Shaw notes that "the principal subjects of international law are nation-states." See MALCOLM N. SHAW, *INTERNATIONAL LAW* 1 (5th ed. 2003). Nevertheless, "[a]nother possible candidate for international personality is the transnational or multinational enter-

existence of a legal personality, however, any existence of rights and duties under international law implies that a holder of these rights and duties has international legal personality.⁷ Even though states are the sole *source of authority and law* in the international system, this does not lead to the conclusion that states are the only subjects of international law.⁸ International law—first and foremost, but not exclusively—regulates the rights and duties of states.⁹ Nevertheless, one cannot, for instance, deny the existence of certain rights and duties for individuals and international organizations. Conceptually, there is nothing preventing states from jointly regulating corporate behavior through international law, provided, of course, that the behavior falls within their respective jurisdictions at the outset.¹⁰ Nor would it be required that corporations take part in negotiating the treaties creating such obligations, although such participation might be desirable for various reasons. Rights and duties for corporations might also be established through international custom as a result of corresponding state practice.

prise,” but “[t]he question of the international personality of transnational corporations remains an open one.” *See id.* at 224-25.

7. Schwarzenberger notes: “International personality means capacity to be a bearer of rights and duties under international law.” *See* GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 42 (6th ed. 1976); DAVID A. IJALAYE, THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW 2-3 (1978).

8. It may be noted that even under the classical assertion that states are the sole subjects of international law, there is little doubt that non-state actors might incur international responsibility *for the state*. In reality, any act of a state consists of the act(s) of one or more individuals or, as the case might be, corporations, which, according to the secondary rules of international law, can be attributed to the state. *See, e.g.*, Int’l Law Comm’n, *Report of the International Law Commission on the Work of its Fifty-third Session*, 26, U.N. Doc. A/56/10 (2001) [hereinafter *ILC Report*] (specifically articles 5 and 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts contained therein).

9. It has since long been accepted that not only states are the subjects of international law. *See, e.g.*, *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11) (“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community.”). Further, insurgent or rebel groups in a civil war have certain obligations, *see, e.g.*, *Geneva Convention Relative to the Prisoners of War* art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. In *Autronic AG v. Switzerland*, the European Court on Human Rights noted that status as a limited company did not deprive the company of the protection of Article 10 (freedom of expression) as Article 10 “applies to ‘everyone’, whether natural or legal persons.” *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at 23 (1990).

10. After having reviewed various examples of international regulation of corporate activity, Ratner notes: “The cumulative impact of this lawmaking and application suggests a recognition by many decisionmakers that corporate behavior is a fitting subject for international regulation.” Ratner, *supra* note 4, at 488.

Whether and to what extent corporations are to enjoy rights and duties under international law appears to be solely a matter of political will. The issue of imposing international obligations on corporations often is framed as turning on sovereignty, but in reality, economical interests and political will are typically more important than classical sovereignty considerations.

At any rate, with the increasingly important role that corporations play internationally, the need for international regulation of corporate behavior is more conspicuous than ever. International law is, and is becoming increasingly more, dynamic. With the ever-increasing economic and social influence that corporations have internationally and, arguably, on the shaping of international law itself, it would be paradoxical if international law should not at some point begin to regulate corporate behavior. Whether and to what extent such international regulation already exists is part of what this Article is about.

Some commentators have argued that the mere fact that corporations are key “participants” in the international legal system *ipso facto* implies that they have international legal personality.¹¹ The largest corporations have greater power than some states to affect, *inter alia*, the realization of human rights, and, at least normatively, one might argue that “[w]ith power should come responsibility.”¹² One might argue further that because some states are notoriously unable or unwilling to hold corporations accountable, by implication, “there must be direct and uniform corporate responsibilities under international law.”¹³ Again, however, the test should not be made in the abstract but should build on empirical research as to

11. The U.N. special representative of the secretary-general has noted that corporations have become “participants” in the international legal system, and thus, by implication, have the capacity to bear some rights and duties under international law. The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ¶ 20, delivered to the Human Rights Council, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007); see also ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 46-48 (1994).

12. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901 (2003). Deva notes, pragmatically, that “[t]he notion that international law only governs inter-state relations requires modification, as it is inadequate to meet the demands of the present day when even states on occasion act through corporations.” Deva, *supra* note 2, at 51 (citing WOLFGANG GASTON FRIEDMAN, LAW IN A CHANGING SOCIETY 468-69 (2d ed. 1972)).

13. JOHN G. RUGGIE, CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, BUSINESS AND HUMAN RIGHTS: THE EVOLVING INTERNATIONAL AGENDA 8-9 (2007).

whether international law regimes actually establish rights and duties for corporations.

C. Regulation, Enforcement, and International Regulatory Regimes

The main discussion as to whether corporations have international legal personality is in the context of the direct regulation of corporations. International law also regulates the behavior of subjects indirectly, however. Direct regulation means that the subjects can be held responsible directly under international law. When the regulation is indirect, the obligation achieves its applicability vis-à-vis the relevant subjects through the domestic legal systems of states that have been entrusted with the task of implementation and enforcement. As a result, in the absence of such implementation and enforcement, indirect obligations remain without effect vis-à-vis the subjects concerned. In such cases, the only international sanction is to hold states responsible for having failed in their duty to implement international law.¹⁴ For corporations, the difference between direct and indirect responsibility is crucial. If international law imposes obligations on corporations only indirectly, the managers and directors need only concern themselves, as a matter of law, with the domestic law of the states in which they operate, alternatively in the home state, notably including domestic rules giving international law domestic legal force. When, on the other hand, the international obligation is direct, a corporation in noncompliance may be brought before an international mechanism already in existence or to be created at a later stage.¹⁵

Whether the regulation of corporations should be direct or indirect is up to states to decide through international agreements. In addition, the U.N. Security Council can, arguably, establish a regime imposing direct obligations on corporations, as it did for individuals when it created the two ad hoc tribunals for the former Yugoslavia and Rwanda.¹⁶ An interesting option, which will be

14. An example of such indirect regulation can be found in treaties regulating corruption. See, e.g., United Nations Convention Against Corruption arts. 12, 14, 15-42, Oct. 31, 2002, 43 I.L.M. 37 [hereinafter U.N. Convention Against Corruption].

15. See Vázquez, *supra* note 2, at 936-37. Note that Article 16 of the U.N. Norms provides, rather loosely, that “transnational corporations . . . shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created.” U.N. Comm. on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, ¶ 16, U.N. Doc. E/CN.4/Sub.2/12/Rev.2 (Aug. 26, 2003) [hereinafter *U.N. Norms*].

16. See S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994). It may be argued that this was possible only because the obliga-

explored below, is where a form of direct regulation is established by giving a corporation certain rights that are linked to an international monitoring mechanism with the authority to withdraw the rights in whole or in part if the corporation behaves contrary to international obligations.¹⁷

While the existence of an international enforcement mechanism implies the existence of a direct obligation, the opposite is not necessarily true.¹⁸ Generally, international law is characterized by a lack of international enforcement mechanisms, and both indirect and direct international obligations may exist without the possibility of international enforcement. The existence of such mechanisms "has never been the linchpin of the obligation itself."¹⁹

Thus, where international law places direct obligations on a subject without the existence of international enforcement mechanisms, such mechanisms might be created later by agreement between states or, arguably, by the U.N. Security Council. Such mechanisms might, depending on how its jurisdiction is defined, adjudicate behavior that has taken place before its creation as long as the obligation already existed.²⁰

D. *Further Structure of the Article*

This Article will analyze how states in different fields have established international corporate responsibility, with a main focus on areas of international law where international institutions currently exist to enforce it. It will analyze and evaluate the chosen regimes as well as the nature of the rules and the institutions and procedures to enforce them. Crucial questions are as follows: Is the regulation and enforcement direct or indirect? Who are responsible and, in case those responsible are not corporations, What is the legal relationship between corporations and those responsible? What are the procedures to be followed? How are international decisions enforced vis-à-vis those concerned? And what is the rela-

tions as such already existed under international law, and only an international enforcement mechanism was lacking.

17. See *infra* Part IV.

18. Vázquez, *supra* note 2, at 940; see NICOLA JÄGERS, 17 CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 256-57 (2002).

19. Ratner, *supra* note 4, at 476.

20. In a criminal law context, this would not violate the *nullum crimen sine lege praevis* principle that only requires that the regulation be in place when the alleged crime is committed. See Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege* in *International Criminal Law*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 733, 733-34, 751 (Antonio Cassese et al. eds., 2002).

tionship between rights and responsibilities of corporations? By raising and seeking to answer these questions, it is the overall aim of the Article to present and discuss fundamental challenges facing countries when such countries establish systems based in public international law for regulating corporate behavior.

In the following, we shall analyze a series of international regimes that are of particular interest to corporate responsibility. The regimes will be analyzed depending on the way in which corporate responsibility could occur, namely, criminal responsibility (Part II); civil responsibility (Part III); loss of rights and benefits (Part IV); findings of noncompliance with international law (Part V); and findings of noncompliance with nonbinding norms (Part VI). Our findings in relation to the regimes will thereafter be compared with a view to identify possible ways forward in the development of international corporate responsibility (Part VII).

II. CORPORATIONS AND INTERNATIONAL CRIMINAL LAW

A. *Corporate Involvement in International Crimes*

The commission of gross human rights violations typically presupposes the participation of various actors and logistics: it must be planned, administrated, funded, and carried out; arms and other equipment must be provided; and complex logistics must be arranged.²¹ This goes without saying for crimes against humanity that form part of widespread or systematic attacks against civilians, for genocide that requires concerted planning and action, and for large-scale commission of war crimes.²² Therefore, the commission of international crimes typically involves the abuse of a state apparatus, including the armed forces. Today, it is also widely recognized that private corporations increasingly play an ancillary role through various forms of contributions, including financial contributions.²³ Corporations provide so-called war outsourcing, or they

21. See, e.g., HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR (2005), available at <http://www.hrw.org/sites/default/files/reports/darfur1205webwcover.pdf> (documenting the various actors responsible for human rights abuses in Darfur).

22. See, e.g., Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 1 [hereinafter Rome Statute] (requiring that the attack be “pursuant to or in furtherance of a State or organizational policy to commit such attack”); *id.* art. 8 (focusing on crimes “committed as part of a plan or policy or as part of a large-scale commission of such crimes”).

23. See, e.g., INT’L PEACE ACAD. & FAFO, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW (2004).

provide more subtle contributions, such as financing a war by extracting valuable resources controlled by warlords who buy arms through funds generated by this activity.²⁴ In such scenarios—described as “militarized commerce”—private security forces increasingly control and protect land crucial to mining operations.²⁵ The World Bank Extractive Industries Group has acknowledged that the practice of human rights violations by military, police, and commercial mercenaries in the context of securing company control over a given territory and protecting their operations is not uncommon.²⁶ The private-security industry has been estimated at \$100 billion in annual global revenue²⁷ and presents its own particular problems arising from the apparently unregulated status of corporate entities under international criminal and humanitarian law.²⁸

If one accepts, conceptually, the idea that corporations can commit crimes, the corporations might do so directly—e.g., by using forced labor or enslavement (a crime against humanity), by pillage and plunder, by deployment of child soldiers, or by use of land mines (all war crimes).²⁹ In most cases, however, corporations are only complicit in the crimes by aiding or abetting crimes committed by governments or paramilitary groups,³⁰ as when the coffee companies in Rwanda hid the weapons used in the genocide or

24. See The Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2002/1300 (Nov. 26, 2002). The U.N. Security Council has adopted a number of resolutions related to such issues in relation to, *inter alia*: the situations in the Democratic Republic of the Congo, see S.C. Res. 1698, U.N. Doc. S/RES/1698 (July 31, 2006) and S.C. Res. 1457, U.N. Doc. S/RES/1457 (Jan. 24, 2003); Liberia, see S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003); and Côte d'Ivoire, see S.C. Res. 1643, U.N. Doc. S/RES/1643 (Dec. 15, 2005).

25. Craig Forcese, *Deterring “Militarized Commerce”: The Prospect of Liability for “Privatized” Human Rights Abuses*, 31 OTTAWA L. REV. 171, 173-5 (2000).

26. See, e.g., José Luis Gómez del Prado, President of the Working Group on the Use of Mercenaries as Means of Violating Human Rights and Impeding the Rights of Peoples to Self-Determination, Oral Statement at the Human Rights Council (March 10, 2008) (“Private security companies, to which the State has allocated the use of force, often . . . commit human rights violations.”).

27. P. W. Singer, *Warriors for Hire in Iraq*, BROOKINGS, Apr. 15, 2004, available at http://www.brookings.edu/articles/2004/0415defenseindustry_singer.aspx.

28. See, e.g., C. Kinsey, *Challenging International Law: A Dilemma of Private Security Companies*, 5 CONFLICT, SEC. & DEV. 269, 291-92 (2005).

29. INT'L PEACE ACAD. & FAFO, *supra* note 23, at 17-18.

30. In the *Tadic Case*, the International Criminal Tribunal for the former Yugoslavia (ICTY) describes complicity as requiring (1) that the crime be committed; (2) the accomplice contribute in a material (“direct and substantial”) way to the crime; and (3) there be an element of intent and/or knowledge, such that the accomplice intended that the crime be committed or have been reckless as to its commission. See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, ¶¶ 688-92 (May 7, 1997).

when the same companies called in police to disperse peacefully striking workers.³¹

Despite the above, the legal framework for holding corporations and their individual agents criminally responsible at the international level is poorly developed and, even more so, poorly enforced. Generally, two very different international law concepts are available for establishing responsibility for gross human rights violations: (1) state responsibility and (2) international criminal law. In the following, we shall look at the latter and study the possibilities for holding either individuals associated with the corporation or the corporation itself responsible for the commission of international crimes.

B. *The Nuremberg Trial and the Subsequent Military Trials*

1. The Notion of Corporate Crimes

The Nuremberg trial of German war criminals after the Second World War marked the beginning of increased focus on individual criminal responsibility, which was a departure from the view that only the state was responsible when gross human rights violations had been committed.³² In its judgment, the International Military Tribunal (IMT) succinctly noted the following:

That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.³³

Criminal responsibility for *legal entities* is a well-known concept in many national legal systems.³⁴ As an indication of the existence of such responsibility in international law, the Nuremberg Charter authorized the IMT to criminalize legal entities, such as the Gestapo, in order to punish individual membership.³⁵ The tribunal did not, however, use this authority. In *United States v. Krupp*,

31. Nicholas Howen, 'Responsibility and Complicity' from the Perspective of International Human Rights Law, in THE 2005 BUSINESS AND HUMAN RIGHTS SEMINAR REPORT: EXPLORING RESPONSIBILITY AND COMPLICITY 12, 14 (2005).

32. Recent studies of the trials and their implications can be found in PERSPECTIVES ON THE NUREMBERG TRIAL (Guénaél Mettraux ed., 2008).

33. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG: 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 465-66 (1948).

34. INT'L PEACE ACAD. & FAFO, *supra* note 23, at 22-23.

35. Article 9 of the Charter provided: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a

the U.S. military tribunal noted that “the initiative for the acquisition of properties, machines, and materials in the occupied countries was that of the Krupp firm and that it utilized the Reich government and Reich agencies whenever necessary to accomplish its purpose,” but the tribunal did not declare the Krupp Corporation a criminal organization as such.³⁶ In *United States v. Krauch*, officials of a chemical company were convicted of plunder and taking possession of industrial facilities in occupied territory and of slavery for exploiting concentration camp inmates in their factories.³⁷ The tribunal noted the following:

[T]he proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by *Farben*, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries as above described. . . . *The action of Farben* and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. . . . Such *action on the part of Farben* constituted a violation of the Hague Regulations.³⁸

2. Prosecution of Individuals Involved in Corporate Crimes

In the *Krupp Case*, individual corporate officials were convicted for their knowing participation in corporate criminal activities—i.e., for plunder and slave labor, for appropriating factories in France and the Netherlands, and for using the labor of prisoners of war.³⁹ In *United Kingdom v. Bruno Tesch*, Tesch, the owner of the company that supplied Zyklon B gas to concentration camps, was convicted, together with an official who had arranged shipment of the gas, according to a similar reasoning.⁴⁰ Importantly, the individuals in these cases were all punished for their individual participation and not as representatives of their respective corporations for corporate activities. As a stepping-stone to individual criminal

member was a criminal organization.” Charter of the International Military Tribunal art. 9, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

36. *United States v. Krupp*, reprinted in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1372 (1950), available at <http://www.mazal.org/archive/nmt/09/NMT09-C001.htm>.

37. See *United States v. Krauch*, reprinted in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081 (1953), available at <http://www.mazal.org/archive/nmt/08/NMT08-C001.htm>.

38. *Id.* at 1140 (emphasis added).

39. See *Krupp*, *supra* note 36, at 1372.

40. See *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, reprinted in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93 (1947).

responsibility, however, the tribunals concluded that the corporations had violated international law.⁴¹ Yet prosecutions of corporations as such were avoided altogether.

C. *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*

The Nuremberg tradition to focus on individual criminal responsibility, as opposed to corporate criminal responsibility, was upheld when the Security Council created the two ad hoc tribunals for the former Yugoslavia and Rwanda.⁴² The respective statutes of these two tribunals authorize the tribunals to prosecute individuals but not legal entities.⁴³ It should be noted that in the *Nahimana Case* before the International Criminal Tribunal for Rwanda, two directors of the RTLM Radio Station were convicted by the Tribunal for incitement to genocide committed as part of the corporate activity of the station.⁴⁴ The Tribunal held, inter alia, that the accused Nahimana had de jure control over the radio station and that he had “expressed no concern regarding RTLM broadcasts, although [he was] aware that such concern existed and was expressed by others.”⁴⁵ With regard to the ad hoc tribunals’ application of the joint-criminal-enterprise doctrine, reference is made

41. See, e.g., *Krauch*, supra note 37, at 1140.

42. In his report to the Security Council regarding the establishment of the ICTY, the U.N. secretary-general noted the following:

The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.

The Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 51, U.N. Doc. S/25704 (May 3, 1993).

43. Article 6 of the Statute of the ICTY provides: “The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.” Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 6 (2009) (originally adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), and amended by S.C. Res. 1877, U.N. Doc. S/RES/1877 (July 7, 2009)), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. Article 5 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) provides: “The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.” Statute of the International Tribunal for Rwanda art. 5, Aug. 11, 1994, 33 I.L.M. 1598 (originally adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (1994) (Nov. 8 1994), and amended by S.C. Res. 1878, U.N. Doc. S/RES/1878 (July 7, 2009)), available at <http://www.ictcr.org/legal.htm>.

44. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶¶ 99-101 (Dec. 3, 2003).

45. *Id.* ¶ 32.

to the *Tadic Case*, which explains when an individual can be held responsible for the criminal activity of a group.⁴⁶

D. *The International Criminal Court*

1. Prosecution of Legal Entities

As for the newly established International Criminal Court (ICC), the Rome Statute only authorizes the ICC to prosecute natural persons.⁴⁷ The negotiations on the ICC offered a new opportunity for the international community to establish an international mechanism for prosecuting corporations. Some states, most notably France, tried to convince delegations that the ICC ought to be vested with jurisdiction over legal entities, arguing inter alia that jurisdiction would facilitate restitution and compensation orders for victims.⁴⁸ Thus, France presented a proposal that would subject legal entities—with the exception of states—to the ICC's jurisdiction if "the crimes committed were committed on behalf of such legal persons or by their agents or representatives."⁴⁹ While the majority of states did not seem to have conceptual difficulties with the notion of corporate criminal responsibility, trying to cover such responsibility would further complicate the negotiations, and the negotiators were not in short supply of difficulties.⁵⁰ Moreover, not all states provided for such responsibility in their national legal

46. See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶¶ 196-220 (July 15, 1999) (discussing the notion of common design as a form of accomplice liability through international precedent); see also ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 181-89 (2003).

47. Article 25 provides: "The Court shall have jurisdiction over natural persons pursuant to this Statute." Rome Statute, *supra* note 22, art. 25.

48. For the drafting history of Article 25, see generally *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, annex II, 58-60, U.N. Doc. A/50/22 (1995); *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, ¶ 194, U.N. Doc. A/51/22 (1996); *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. II, 49-51, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998); *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, 20, U.N. Doc. A/AC.249/1997/L.5 (March 12, 1997); *Preparatory Committee on the Establishment of an International Criminal Court: Working Group on General Principles of Criminal Law and Penalties*, U.N. Doc. A/AC.249/1997/WG.2/CRP.1 (Feb. 13, 1997); *Preparatory Committee on the Establishment of an International Court: Report of the Inter-Sessional Meeting*, 52-53, U.N. Doc. A/AC.249/1998/L.13 (Feb. 4, 1998); *Proposal Submitted by France*, U.N. Doc. A/CONF.183/C.1/L.3 (June 16, 1998); *Working Group on General Principles of Criminal Law: Working Paper on Article 23, Paragraphs 5 and 6*, U.N. Doc. A/CONF.183/C.1/WGGP/L.5 (July 3, 1998); *Report of the Working Group on General Principles of Criminal Law*, 1, U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 (July 2, 1998).

49. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. II, *supra* note 48, at 49.

50. See William Schabas, *General Principles of Criminal Law*, 6 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 400 (1998).

systems,⁵¹ and this was seen as problematic in light of the complementarity principle, which makes a case inadmissible before the ICC only when the state concerned is unable or unwilling to deal genuinely with it.⁵² Further, it was feared that overwhelming evidentiary problems would entangle the ICC. Finally, it has also been suggested that it was “morally obtuse for States to insist on the criminal responsibility of all entities other than themselves.”⁵³

Importantly, the Security Council cannot, in a referral of a situation to the ICC under Article 13(b) of the Rome Statute, extend the jurisdiction to legal persons.⁵⁴ The confinement to natural persons is a fundamental characteristic of the ICC, and the ICC would not be bound, or even have the right, to extend its jurisdiction beyond natural persons. Nor can the Security Council instruct the ICC Prosecutor to target individuals involved in criminal corporate activities, as this would impinge on the prosecutorial discretion of the ICC Prosecutor.⁵⁵

2. Prosecution of Individuals Involved in Corporate Crimes

In a press release in 2003, the ICC prosecutor noted the following with regard to the situation in the Democratic Republic of the Congo (DRC):

Although the specific findings of these reports have not been confirmed, the Prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted. The Office of the Prosecutor is establishing whether investigations and prosecutions on the financial side of the alleged atrocities are being carried out in the relevant countries.⁵⁶

The ICC prosecutor has also noted, with regard to the diamond industry’s involvement in international crimes in the DRC, that

51. See also contributions in *EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT* (Albin Eser, B. Huber & K. Cornils eds., 1998).

52. Rome Statute, *supra* note 22, art. 17; see Per Saland, *International Criminal Law Principles, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 198, 199* (Roy Lee ed., 1999).

53. MODEL DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT BASED ON THE PREPARATORY COMMITTEE’S TEXT TO THE DIPLOMATIC CONFERENCE, ROME, JUNE 15-JULY 17, 1998, at 42 (Leila Sadat Wexler & M. Cherif Bassiouni eds., 1998).

54. See, e.g., Rome Statute, *supra* note 22, art. 13(b).

55. See *id.* art. 53.

56. Press Release, ICC Prosecutor, Communications Received by the Office of the Prosecutor of the ICC (May, 16 2003).

“[i]f [those in the industry] received diamonds and knew that the people delivering them were getting them because of genocide then they could well be part of the crime.”⁵⁷ As for the targeting of corporate representatives, the Rome Statute provides that a civilian superior can be held criminally responsible if crimes are committed “under his or her effective authority and control,” provided the superior “knew, or consciously disregarded information which clearly indicated” the commission of the crimes.⁵⁸ Further, a person who “orders, solicits or induces” the crime can be held responsible,⁵⁹ as well as a person who “for the purpose of facilitating the commission of [the crime], aids, abets or otherwise assists in its commission or attempted commission.”⁶⁰ As for the joint-criminal-enterprise doctrine, a person can be held responsible at the ICC if he or she “in any other way contributes to the commission or attempted commission of [the crime] by a group of persons acting with a common purpose” when the contribution is either made “with the aim of furthering the criminal activity or criminal purpose of the group” or “made in the knowledge of the intention of the group to commit the crime.”⁶¹ To date, the ICC prosecutor has not initiated a single case against a corporate official as such.

E. *The Case for International Corporate Criminal Responsibility*

1. Does International Corporate Criminal Responsibility Exist Today?

The attribution of criminal responsibility to legal persons is a well-entrenched principle in common-law systems as well as in several other countries, such as Japan.⁶² It is a newer and still somewhat less accepted concept for Western European continental countries, and it is just beginning to emerge in other countries, including Eastern European countries.⁶³ The classical Roman-German legal doctrine *societas delinquere non potest* is still influential in some civil-law systems, such as Spain, but an increasing number of

57. *Firms Face “Blood Diamonds” Probe*, BBC NEWS, Sept. 23, 2003, available at <http://news.bbc.co.uk/2/hi/business/3133108.stm> (quoting Prosecutor Ocampo).

58. See Rome Statute, *supra* note 22, art. 28(b).

59. *Id.* art. 25(3)(b).

60. *Id.* art. 25(3)(c).

61. *Id.* art. 25(3)(d).

62. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], CORRUPTION: A GLOSSARY OF INTERNATIONAL CRIMINAL STANDARDS 55 (2007) [hereinafter OECD, CORRUPTION]

63. See INT’L PEACE ACAD. & FAFO, *supra* note 23, at 22-23.

states are eliminating it, such as France and Portugal.⁶⁴ In many states, the rules on corporate criminal responsibility are rapidly evolving—even where such responsibility has existed for some time—in order to improve their effectiveness.⁶⁵

As noted, no international tribunal authorized to prosecute corporations exists or has existed. The existence of international corporate criminal responsibility is not, however, dependent on the existence of an international mechanism to enforce such responsibility.⁶⁶ The failure to provide for such responsibility when the various international criminal jurisdictions have been established indicates that a sufficiently strong consensus among states for such responsibility in international law is lacking. Treaty law and state practice do not seem to establish a sufficient basis for saying that international law today imposes criminal responsibility on states. That this is the current state of affairs is supported by the following note from the International Law Commission from one of its sessions on state responsibility:

The Special Rapporteur retained the firm conviction that, in the future, *the international system might develop a genuine form of corporate criminal liability for entities*, including States. Most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach which entailed developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the future international criminal court, acting in complementarity with State courts, on the one hand, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole, on the other.⁶⁷

The U.N. secretary-general's special representative for business and human rights John Ruggie appears to conclude similarly:

64. For a detailed survey of sixteen countries from a cross-section of regions and legal systems, see ANITA RAMASASTRY & ROBERT C. THOMPSON, *COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW* (2006). Of the sixteen, eleven were states parties to the ICC and nine had fully incorporated the Statute's three crimes; of these, six already provided for corporate criminal liability. *Id.* at 15.

65. See OECD, *CORRUPTION*, *supra* note 62, at 55.

66. Such an international tribunal could—once there is sufficient agreement that international criminal law regulates, or should regulate, corporations—be established on an ad hoc basis by the Security Council or permanently by multilateral agreement. Another way to achieve the latter would be to amend the Rome Statute, according to Article 123, so that the scope of the ICC's jurisdiction is expanded to legal entities. Rome Statute, *supra* note 22, art. 123.

67. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fiftieth Session*, 77, U.N. Doc. A/53/10 (1998) (emphasis added).

By far the most consequential legal development identified in my 2007 report is the growing potential for companies to be held liable for international crimes—with responsibility imposed under domestic law but reflecting international standards of individual responsibility, as codified by the international ad hoc criminal tribunals and, especially, by the ICC Statute.⁶⁸

In a longer perspective, however, it is probably only a matter of time before international criminal law regulates corporate behavior. As noted, the role of corporations in the commission of international crimes in conflict zones is widely recognized, and prosecuting corporations is increasingly recognized conceptually at the national level.⁶⁹

2. Some Reflections on the Developing Concept of International Corporate Criminal Responsibility

In one sense corporations are more prone to commit immoral acts than individuals because they have more power to do wrong and are less amenable to disgrace or punishment; they do not feel shame, remorse, gratitude, or good will. At the same time, the punishment typically applicable to corporations is economic sanctions, and that might appear totally inadequate compared to the harm caused by international crimes.

Penal sanctions might have insignificant preventive effect vis-à-vis powerful corporations, which may already factor in possible sanctions in their cost-benefit analyses. Therefore, new types of punishment might be called for, such as management intervention, community-service orders, and adverse publicity.⁷⁰ Of these alternatives, adverse publicity may well be the most effective deterrent as it affects both the corporation's prestige and financial success. One pertinent example is the "naming-and-shaming effect" of the reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.⁷¹

68. RUGGIE, *supra* note 13, at 17. Ruggie served as the U.N. secretary-general's special representative in February 2007 and authored the report cited *supra* note 11.

69. See *supra* Part II.C; see also *supra* notes 62-65 and accompanying text.

70. See Antonio Vercher, *Some Reflections on the Use of Criminal Law for the Protection of the Environment*, in SOCIAL DEFENCE AND CRIMINAL LAW FOR THE PROTECTION OF COMING GENERATIONS, IN VIEW OF THE NEW RISKS 103, 115 (Edmondo bruti Liberati et al. eds., 2002).

71. Panel of Experts on the Illegal Exploitation of Natural Res. & Other Forms of Wealth of the Democratic Republic of the Congo, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶¶ 219-242, U.N. Doc. S/2001/357 (Apr. 12, 2001) [hereinafter *DRC Report*]. Fisse calls adverse publicity "the quintessentially stigmatic corporate sanction." Brent Fisse, *Recon-*

When a corporation is held responsible, the net result is that the shareholders must pay. One might argue that if individuals can be put in jail for their complicity in what can be described as corporate crimes, why should it not be possible under international law to punish the corporation. As noted by Vázquez:

[L]aw recognizes the corporation as a separate legal person, answerable to the law as such, as the price for limiting the liability of shareholders. To unravel this bargain now by insisting that corporations are not persons for purposes of liability under international law norms that concededly apply to natural persons would appear detrimental to the interests of individuals who own the corporation and would be subject to individual liability on an agency theory if the veil were pierced.⁷²

With only individual responsibility available under international law, there is a risk of corporations creating scapegoats, whereas with corporate responsibility, there is a risk that corporate management will hide behind the corporation. At the same time, “it is often expedient to prosecute only the corporation because it [saves] investigating and prosecuting officials [from] the trouble of [searching] behind the corporate veil [to identify] the actual director, manager or employee responsible for the crime. [This] is particularly difficult in large and complex corporations.”⁷³ International corporate criminal responsibility might be construed so as not to require that the individual who carried out the criminal act be identified.

One general argument against corporate criminal responsibility as a measure for influencing corporate behavior is the following: if company directors are able to reallocate liability during pretrial

structing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. CAL. L. REV. 1141, 1229 (1983).

72. Vázquez, *supra* note 2, at 944.

73. Vercher, *supra* note 70, at 117. The problem can be illustrated by the obstruction of justice trial in *United States v. Arthur Andersen*, where the defense nearly succeeded with the following strategy: It told the jurors to ask themselves which particular individuals within the corporation had “corruptly persuaded” another person “with intent to cause or induce any person” to “alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding” (the elements of obstruction of justice). Andersen attorney Rusty Hardin repeatedly asked: “Who are the corrupt persuaders?” Clearly, it was highly unlikely that the prosecutor would manage to prove that a particular agent, among 28,000 employees, had acted corruptly, despite overwhelming circumstantial evidence that such crime had in fact transpired. This prompted the jury to pose an unprecedented question to the court: “If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it [necessary] for all of us to believe it was the same agent?” The judge answered, without explanation: No. See Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 461-62 (2004).

negotiations onto corporations, dispersing any penalty amongst the shareholders of the company, this not only diminishes the deterrent effect of the punishment⁷⁴ but ultimately may shift the punishment onto individuals who may be entirely innocent.⁷⁵ Again, it must be stressed, however, that corporate responsibility should not exclude individual responsibility and vice versa.

We have just suggested a few challenges that the development of corporate international criminal responsibility brings with it. The biggest challenge might be to achieve consensus on the secondary rules of corporate responsibility—general principles of international criminal law applicable to corporations—rather than on the primary rules—rules of international law that make certain acts committed by corporations criminal.

3. Internationalized Crimes: Transnational Corporate Crimes

During the last decades, states have adopted international instruments making transnational corporate crimes what we might call “internationalized crimes.”⁷⁶ An illustrating example is the international regulation of corruption, where states undertake to criminalize corrupt behavior, including that of corporations as far as their domestic penal systems conceptually recognize corporate criminal responsibility—e.g., the U.N. Convention against Corruption.⁷⁷ It is worth reflecting on the fact that some international anticorruption treaties declare certain corporate activity as criminal, while similar regulation has not found its way into the existing international criminal-law instruments.⁷⁸ The single most important reason is probably that the political incentive to criminalize human rights abuses by corporations internationally is weaker than in the case of corruption. In the latter case, influential Western states have an obvious interest in eliminating the competitive disadvantage of their corporations vis-à-vis those from states where corruption tends to be accepted.

F. *Concluding Remarks*

As of today international law does not impose criminal responsibility on corporations. There is still a focus on state responsibility

74. See, e.g., CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 135-38 (1993).

75. See Simon Chesterman, *Oil and Water: Regulating the Behaviour of Multinational Corporations through Law*, 36 INT'L L. & POL. 307, 326-27 (2004).

76. See also *infra* Part IV.B.3.

77. See, e.g., U.N. Convention Against Corruption, *supra* note 14, ch. 3.

78. See generally *id.* arts. 15-42.

and individual criminal responsibility as means for sanctioning human rights violations. At the same time, the need for international corporate criminal responsibility is more apparent than ever, and the concept of corporate criminal responsibility is increasingly recognized and refined in national legal systems. It seems, therefore, to be simply a matter of time before international law imposes such responsibility. The most complex issue seems to be agreement on proper secondary rules of such responsibility.

III. SANCTIONS IMPOSED BY THE U.N. SECURITY COUNCIL

A. Introduction

In this Part, we shall see that the Security Council may decide sanctions aimed at curbing corporate activity that poses a threat to peace and security. These sanctions are typically decided when corporations are involved in international crimes by complicity. The sanctions are not to be considered as part of international criminal law—i.e., they do not impose punishment as such on corporations.⁷⁹ These sanctions may still have penal elements, but they are imposed primarily in order to prevent corporations from acting contrary to certain rules or objectives.

Corporations increasingly play a significant role in the civil wars of developing countries—from Sierra Leone, Angola, and the DRC to Azerbaijan and Myanmar.⁸⁰ The abundance of resources, such as oil, diamonds, gold, and other minerals, combined with weak or corrupt governments, “offers significant financial opportunities and rewards to unscrupulous elements operating under the garb of various [g]overnments, businesses, mafias, individuals[,] etc.”⁸¹ In the typical scenario, local political and military elites gain access to and control over valuable resources and offer exploitation rights on favorable conditions to corporations, often combined with military protection. Thus, the corporate involvement motivates and fuels the conflict.⁸² This scenario benefits few in an impoverished

79. As noted in Part II, it can be argued that the Council would have the authority to establish an international criminal tribunal with jurisdiction over legal entities.

80. See *DRC Report*, *supra* note 71, ¶ 215.

81. See Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶ 145, U.N. Doc. S/2001/1072 (Nov. 13, 2001) [hereinafter *DRC Report Addendum*].

82. The military expenditures in the DRC conflict exceed by far the official military budgets of the states involved, and the conflict has been labeled as a “self-financing war.” See *DRC Report*, *supra* note 71, ¶ 114 (citing President Kagame of Rwanda). Paragraph 119

population, thus magnifying political and social grievances and, in turn, accentuating the conflict.⁸³

B. *The Case for Direct Sanctions Against Corporations*

In order to maintain or restore peace and security, the U.N. Security Council has increasingly imposed economic sanctions aimed at curbing corporate activity that poses a threat to peace and security.⁸⁴ By their terms, however, these sanctions are directed at states.⁸⁵ Indeed, Article 25 of the U.N. Charter decides that “[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”⁸⁶ Yet it is a fact that the implementation of such sanctions sometimes requires the cooperation of corporations, and thus the obligations effectively are placed on these corporations.

In 1991, the Security Council endorsed a plan by the General Assembly placing strict requirements on corporations regarding their purchase of oil from Iraq as part of the sanctions regime after the 1991 Gulf War.⁸⁷ In 2000, the Security Council addressed private corporations potentially involved in illicit diamond trading, although it did not explicitly oblige corporations to comply with the resolution.⁸⁸

of the Report implies the involvement inter alia of Chinese and Eastern-European corporations. *Id.* ¶ 119. See also *DRC Report Addendum*, *supra* note 81, ¶ 151, which states:

The actual sources for financing the war effort by all parties in the conflict, including the Democratic Republic of the Congo, remain shrouded in mystery. No clear answer was given by anyone the Panel questioned and it was evident that there was much to conceal and not make public. The official defence budgets of countries engaged in the hostilities, in those cases where selected information was provided, clearly indicate that these countries could not afford the cost of their involvement in the Democratic Republic of the Congo. It is evident that in such cases the war effort was financed from extrabudgetary sources, giving rise to much suspicion and misgivings.

83. See Luke A. Patey, *State Rules: Oil Companies and Armed Conflicts in Sudan*, 28 *THIRD WORLD Q.* 997, 997 (2007).

84. See, e.g., S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1995); S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000).

85. See U.N. Charter art. 25.

86. *Id.* (emphasis added).

87. See S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1995) (approving a report of the secretary-general requiring private purchasers of oil from Iraq to follow certain procedures, including depositing proceeds in an escrow account); The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 706 (1991)*, ¶ 56, U.N. Doc. S/3006 (Sept. 4, 1991).

88. S.C. Res. 1306, ¶ 10, U.N. Doc. S/RES/1306 (July 5, 2000) (“Encourages the International Diamond Manufacturers Association . . . and all other representatives of the diamond industry to work with the Government of Sierra Leone and the Committee . . . to facilitate the effective implementation of this resolution[.]”). Ratner notes that the con-

It has been argued that the Security Council has the power to impose direct sanctions on corporations operating in conflict zones because it has “the authority to intervene, even in internal armed conflicts, to prevent further humanitarian crises.”⁸⁹ One scholar has, in that context, noted as follows:

The wording of Article 39 makes the application of the enforcement measures in Chapter VII dependent upon the existence of “any threat to the peace, breach of the peace or act of aggression.” The peace referred to in this passage need not, however, only be between States. The Security Council may take enforcement measures in relation to a conflict occurring either within a State, between two groups of the population, or between a State and a group of the population of this State. That is, the Security Council can order enforcement action to be directed against a non-State entity. Accordingly, the Council can . . . delegate its military enforcement powers to Member States to take action against non-State entities within a country.⁹⁰

Whether this means that sanctions can truly be said to place direct obligations on nonstate entities is doubtful. In 2004 the president of the Security Council noted that the Security Council had on some occasions addressed the role of corporations in conflict zones and that

[it] had imposed targeted sanctions; it had supported the Kimberley process, which had reduced the trade in conflict diamonds; . . . and it had authorized some peacekeeping missions to assist in the monitoring of economic sanctions and arms embargoes, and to re-establish national authority over natural resources.⁹¹

servative wording might be due to “a belief that the Council cannot place obligations on [corporations].” See Ratner, *supra* note 4, at 488 n.189.

89. See Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 222 (2005).

90. DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION OF THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS 168 (1999) (footnotes omitted). See also Brandon Prosansky, *Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo*, 5 NW. J. INT'L HUM. RTS. 236, 271 (2007). The practice of the Council is rich with cases of civil war or internal strife classified as a “threat to the peace” according to Article 39, such as the Congo crisis at the beginning of the 1960s and, later, Liberia and Somalia. See also S.C. Res. 827, *supra* note 16, and S.C. Res. 955, *supra* note 16, establishing the ad hoc tribunals for the former Yugoslavia and Rwanda. See also Prosecutor v. Tadic, Case No. IT-94-I-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 30 (Oct. 20, 1995).

91. Press Release, Security Council, Security Council Discusses Role of Business in Conflict Prevention, Peacekeeping, Post-Conflict Peace-Building, U.N. Doc. SC/8058 (Apr. 15, 2004).

Again, however, the measures decided by the Council are addressed to states, although their implementation certainly affects the rights and duties of corporations. It may further be noted that in Resolutions 1267, 1333, and 1390, enacted between the years 1999 and 2002, the Security Council found that acts of terrorism pose a threat to international peace and security⁹² and that in order to face this threat certain action was necessary against a list of individuals and entities. Again, the implementation of the measures was left to states.

The 1993 Security Council resolutions establishing a sanctions regime in Angola against the National Union for the Total Independence of Angola (UNITA) also appear to be of interest in the present context.⁹³ Here, the Council imposed an oil and arms embargo against a nonstate entity—i.e., a rebel group.⁹⁴ In the same resolution, the Council called upon states “to bring proceedings against persons *and entities* violating the measures imposed by this resolution and to impose appropriate penalties.”⁹⁵ Also, those resolutions are, by their terms, directed at states.⁹⁶ When the Council addresses UNITA, it is not acting under Chapter VII and the language is not compulsive.⁹⁷

In light of the above, despite a few indications to the contrary, there does not seem to be a sufficient basis for claiming that the Security Council can impose sanctions directly on corporations—i.e., adopt resolutions that are directly binding on corporations. Instead, the Council must call on states to impose sanctions on corporations. Such instructions can be very specific, both as to which corporations should be sanctioned and how they should be sanctioned. The difference to the corporations concerned between direct and indirect sanctions may therefore appear subtle.

C. *Findings by the Security Council Regarding Corporate Activity*

Prior to instructing states to implement sanctions against corporations, the Security Council has to make a two-fold finding: first, it must find that peace and security are threatened according to Arti-

92. See S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

93. See S.C. Res. 864, ¶ 19, U.N. Doc. S/RES/864 (Sept. 15, 1993).

94. *Id.*

95. *Id.* ¶ 21 (emphasis added).

96. *Id.* ¶¶ 19-25.

97. *Id.* ¶ 16 (the Council “[d]emands that UNITA proceed immediately to the release of all foreign citizens held against their will and to abstain from any action which might cause damage to foreign property.”).

cle 39 of the U.N. Charter;⁹⁸ second, it must find that the corporation(s) concerned contribute(s) to the threat in a way and a degree that justifies the sanction in question, i.e., which makes imposing such sanctions a suitable measure for maintaining or restoring peace and security. For this purpose, the Council may resort to a variety of sources, including expert panels established by the Council. The findings of such panels may thus form the bases of subsequent resolutions under Chapter VII adopted by the Council.⁹⁹ Thus, when the Council established the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, it requested that the Expert Panel “revert to the Council with recommendations,”¹⁰⁰ and in its report, the Expert Panel recommended, inter alia, that the Council “strongly urge all Member States to freeze the financial assets of the companies or individuals who continue to participate in the illegal exploitation.”¹⁰¹

D. *Some Inherent Weaknesses of Security Council Resolutions Addressing Corporate Activities*

The fact that the Security Council—a political institution and not a judicial institution—adopts resolutions that effectively sanction corporations raises the following problem: one can argue that the Council’s proceedings under the U.N. Charter do not grant the corporations concerned sufficient fairness in terms of due-process guarantees usually associated with the imposition of sanctions. When the U.N. Charter was drafted, the idea that the Council would sanction corporations, albeit in an indirect sense, was not thought of. The procedures governing the Council’s activities leave no room for corporations to meet before the Council. The right to be heard is a privilege reserved for states, and the Council uses states as intermediaries.¹⁰² It might therefore be questioned whether corporations could bring human rights cases before states when they implement such resolutions, arguing that the implementations would entail human rights violations. This raises the question whether states have human rights obligations vis-à-vis cor-

98. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression.”).

99. *See id.* art. 29.

100. President of the Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2000/20 (June 2, 2000).

101. *DRC Report*, *supra* note 71, ¶ 223. *See infra* Part V.B.

102. *See* U.N. Charter arts. 28-32 (identifying how states may participate in discussion of the Security Council).

porations,¹⁰³ and, if so, whether any of these obligations prevail over obligations under a Security Council resolution. Elaborating further on those questions would, however, fall outside the intended scope of the present Article.

Another weakness of Security Council sanctions—which is highly relevant in the present context—is the poor control of their implementation. This task of control is left to sanctions committees established on an ad hoc basis, but the mandates of these committees are simply to review reports from states as to how sanctions are implemented.¹⁰⁴ It is inherently difficult to determine whether such reports are reliable, and the committees are staffed with part-time officials and often have inadequate resources.¹⁰⁵ Given the political power of corporations, the money involved, and the almost inherent lack of ability or will to implement the sanctions, the lack of a more effective control mechanism is problematic. The result might be that focus is shifted away from more effective measures and that the Council ultimately loses some credibility. When states fail to implement sanctions vis-à-vis corporations, the states should be sanctioned for the failure, but the committees often fail to impose such secondary sanctions.¹⁰⁶

E. *Concluding Remarks*

The discussion above has shown that the Security Council, acting under Chapter VII of the U.N. Charter, can impose indirect sanctions on corporations when their activities threaten peace and security. The implementation of such sanctions is left to states, as only states are obliged to comply with the Council's resolutions. Effectively, such indirect sanctions may be viewed as reactions to corporations' failure to comply with rules of international law aimed at ensuring peace and security, most notably humanitarian law. The parallel to international criminal law is obvious. With no international criminal court authorized to prosecute corporations,

103. See MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* 1-2 (2006).

104. The mandates of the sanctions committees are available at the website of the U.N. Security Council Sanctions Committee. United Nations Security Council Sanctions Committee, <http://www.un.org/sc/committees> (last visited Nov. 22, 2009) [hereinafter U.N. Security Council Sanctions Committee].

105. GLOBAL WITNESS, *THE SINEWS OF WAR: ELIMINATING THE TRADE IN CONFLICT RESOURCES* 13 (2006), available at http://www.globalwitness.org/media_library_detail.php/480/en/the_sinews_of_war.

106. For more information on the mandate and work of the Security Council Sanctions Committees, see U.N. Security Council Sanctions Committee, *supra* note 104. See also GLOBAL WITNESS, *supra* note 105, at 13.

such indirect sanctions may offer a viable alternative for holding corporations responsible and influencing their behavior, although they are currently accompanied by certain weaknesses.

IV. LOSS OF PROTECTION

A. *Introduction*

Above, we have addressed cases where the sanctions imposed on corporations are in general unrelated to the interests of corporations protected under international law. In this Part, our focus turns to situations in which acts or omissions of corporations lead to loss of such protection. There is a long tradition for protecting rights and benefits of corporations through international law. Traditionally, the interests of corporations have been protected through rules applicable to international business activities and transborder investment, and the protection has been realized through diplomatic protection.¹⁰⁷

More recently, in particular after the Second World War, international law protection of the interests of corporations has become increasingly independent of the home states' political will. This development has in particular taken place in the context of international investment law, international human rights law, and international maritime law. In the following, we shall not examine the extent to which such protection occurs, but rather under what circumstances a corporation may lose the international law protection of its interests. We will also explore whether lost opportunities exist in this vein—i.e., whether there exist international regimes that offer corporations protection without allowing for the removal of that protection when corporations fail to comply with obligations under international law.

The topic to be addressed is the extent to which loss of protection under relevant regimes are consequences of conclusions that corporations have engaged in unlawful or illegitimate activities and, alternatively, whether opportunities exist for such loss of protection that currently are not provided for. Such a topic can be addressed from two main perspectives. The first is to take as a starting point that the international law protection of corporations is conditional and ask whether corporations' loss of protection should be seen as results of nonfulfillment of relevant conditions. The second perspective is the one taken in this Article, namely

107. See, e.g., IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* (1987).

whether the loss of protection can be seen as a way of imposing responsibility on corporations under international law. There is no clear-cut distinction between these two perspectives. They can each be seen as two extremes on a continuum. On the one end are explicit conditions that in substance are closely related to the interests protected under relevant rules of international law. On the other end are situations in which corporations lose protection as penal sanctions for acts or omissions that are unrelated to the protected interests.

Against this background, topics of particular interest in the following are the extent to which there are formal, explicit, or substantive links between the international law protection of corporations' interests and the acts or omissions that lead to loss of the protection. We shall address three main areas in which corporations enjoy protection, namely international investment law, international human rights law, and international maritime law.

It is worth noting, at the outset, that there are few "primary rules"¹⁰⁸ of international law that address issues concerning responsibility. This is one reason why the International Law Commission produced the Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹⁰⁹ A similar situation seems to occur where states establish rules protecting the interests of corporations. Hence, the analysis below can serve to indicate whether there is an embryo in international law of norms parallel to those developed under the heading "state responsibility for wrongful acts" in the context of corporations—for example, whether acts or omissions of a corporation can be seen as a "circumstance precluding the wrongfulness" of a wrongful act of a state or whether some kinds of "countermeasures" can be available to states vis-à-vis corporations.¹¹⁰ An extensive discussion of these issues, however, goes beyond the scope of this Article.

108. The term "primary rules" is used in the sense that it was used by the ILC. See, e.g., *ILC Report*, *supra* note 8, at 31-32.

109. See *ILC Report*, *supra* note 8, at 26-30.

110. *Id.* at 27-28, 30 (articles 20-27 and 49-54, respectively).

B. Investment Agreements

1. Introduction

States have established a web of more than 2500 bilateral investment treaties (BITs).¹¹¹ In recent years, separate chapters in comprehensive bilateral trade and economic cooperation agreements and in some multilateral agreements, including the Energy Charter Treaty (1994) and the North American Free Trade Agreement (1992), have also included rules on investment.¹¹² Most of these agreements share a number of features, including rules on investor-state dispute settlement. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) establishes a main framework for these agreements because the agreements frequently refer disputes to the International Centre for the Settlement of Investment Disputes established by the ICSID Convention.¹¹³

This Section focuses on the extent to which the tribunals under investment agreements have been or could be used to address the responsibility of private investors.¹¹⁴ There are two main situations in which an arbitration tribunal may address the responsibility of investors. The first is where a state raises a claim against an investor arguing that the investor has acted in violation of an investment agreement.¹¹⁵ The main question that arises in this context is to what extent investment agreements contain substantive obligations that can be invoked against investors. The second is where an investor has raised a case against a host state, claiming that the state has violated the investor's rights under an investment agreement.¹¹⁶ In these cases, the main question is whether acts or omissions of the investor can be invoked as a ground for denying the investor rights that it otherwise would be entitled to under the

111. UNCTAD had identified 2608 such agreements by the end of 2007. U.N. Conference on Trade & Dev. [UNCTAD], *Recent Developments in International Investment Agreements (2007 – June 2008)*, 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2008/1 (2008).

112. For an examination of the use of investment clauses in economic integration agreements, see U.N. Conference on Trade & Dev. [UNCTAD], *Investment Provisions in Economic Integration Agreements*, U.N. Doc. UNCTAD/ITE/IIT/2005/10 (2006).

113. See U.N. Conference on Trade & Dev. [UNCTAD], *Dispute Settlement: Investor–State*, 37-44, U.N. Doc. UNCTAD/ITE/IIT/30 (2003).

114. For the purpose of this Section, the term “investors” is in most cases equivalent with the term “corporation” as used elsewhere in this Article.

115. INT'L BANK FOR RECONSTRUCTION & DEV., REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES ¶ 13 (1965), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

116. *Id.*

agreement. It is the latter cases that are the primary focus here, but initially we shall briefly address the possibility of holding corporations responsible under investment agreements.

2. Corporate Responsibility Under Investment Agreements

Those investment agreements that contain rules on investor-state dispute settlement are in general neutral with regard to the question of whether it is the investor or the state that can initiate the case. Indeed, when states adopted the ICSID Convention, the Executive Directors of the World Bank stated the following:

[T]he provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.¹¹⁷

While there are numerous cases where investors have initiated cases against host states, there are very few instances where states have raised claims against investors. Those claims that have been brought forward have been based on the contractual relationship between the host state and the investor and not on provisions of investment agreements.¹¹⁸

This practice of investment tribunals reflects the fact that provisions setting out obligations of investors are virtually nonexistent in investment agreements. The way in which so-called umbrella clauses are formulated in investment agreements may serve to illustrate the lack of reciprocity between investors and host states in such agreements. While one could easily envisage umbrella clauses as reciprocal in the sense that both the state and the investor have an obligation under the agreement to observe obligations undertaken in contracts, such clauses are generally formulated as obligations solely on a host state to “observe any obligation it has assumed” vis-à-vis the investment or investor.¹¹⁹ The possibility of including provisions setting out obligations of investors has been discussed most frequently in relation to environmental protec-

117. *Id.*

118. See, e.g., *Tanzania Elec. Supply Co. v. Ind. Power Tanzania Ltd.*, ICSID (W. Bank) Case No. ARB/98/8 (2001); *Alex Genin & Others v. Republic of Estonia*, ICSID (W. Bank) Case No. ARB/99/2 (2001); See also *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID (W. Bank) Case No. ARB/02/6 (2004).

119. See Org. for Econ. Co-operation & Dev. [OECD], *Interpretation of the Umbrella Clause in Investment Agreements* 3 (Working Paper on Int'l Inv. No. 2006/3, 2006).

tion.¹²⁰ So far, however, little has been achieved in practice.¹²¹ Against this background, it can be observed that investment agreements in general do not provide any explicit legal basis for corporate responsibility under international law.

3. Loss of Rights Under Investment Agreements

The next question is to what extent investors may risk losing their protection under investment agreements as a consequence of their acts or omissions. Investment agreements in general do not contain specific clauses that prevent investors from enjoying rights under the agreements on the basis of their conduct. Nevertheless, investment tribunals have occasionally declared that investors have lost their rights under investment agreements due to their acts or omissions.¹²² The tribunals have made use of two lines of reasoning in this respect. One is based on phrases such as “in accordance with domestic law” in the agreements.¹²³ The other is a reference to customary international law or general principles of law.¹²⁴

The phrase “in accordance with domestic law” or similar phrases are most relevant for the rights of investors where they require that investments be made in accordance with domestic law.¹²⁵ Such clauses can be invoked in cases where corruption or other unlawful practices have been involved during the establishment or expansion of the investment. In one case, the tribunal stated the following:

[T]he inclusion of the clause “‘in accordance with law” in various BIT provisions is a clear manifestation of said international public policy, which demonstrates the clear and obvious intent of the signatory States to exclude from its protection investments made in violation of the internal laws of each of them.¹²⁶

It can also be argued that the use of similar wording in other provisions implies that unlawful practices of the investor might be regarded as a reason for denying benefits under the provisions in

120. See, e.g., Ole Kristian Fauchald, *International Investment Law and Environmental Protection*, in YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 3, 47 (Ole Kristian Fauchald & David Hunter eds., 2006).

121. See *id.* at 47.

122. See, e.g., *infra* notes 127-132 and accompanying text.

123. See *infra* note 125 and accompanying text.

124. See Statute of the International Court of Justice arts. 38(1)(b)-(c), June 26, 1945, 59 Stat. 1031, T.S. No. 993.

125. See, e.g., definitions of “investment” provided in ORG. FOR ECON. CO-OPERATION & DEV. [OECD], INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008).

126. *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID (W. Bank), ¶ 246, Case No. ARB/03/26 (2006).

question. The inclusion of such language in provisions protecting the interests of investors could, however, serve a variety of purposes depending on the context. In particular, it could serve to specify that the standard of treatment promised in the provision does not exceed the standard set out in domestic legislation.

It can be argued that provisions of investment agreements must be read in light of general principles of law and customary international law, and that such rules are relevant when determining whether acts or omissions of private parties justify a denial of rights under investment treaties.¹²⁷ Tribunals in relation to corruption,¹²⁸ fraud,¹²⁹ acts carried out in bad faith,¹³⁰ unlawful enrichment¹³¹ and mitigation of damages¹³² have discussed such arguments. The concept of “international public policy”—which is distinguished from national concepts of “public policy” (“*ordre public*”)—is one concept that has been discussed in this context.¹³³ One tribunal stated that there exists a “meta-positive provision that prohibits attributing effects to an act done illegally.”¹³⁴

One main area of “international public policy” is crimes that are increasingly subject to international regulation. The development of common rules for transnational criminal acts is a recent phenomenon.¹³⁵ In 2000, the U.N. Transnational Organized Crime Convention was adopted.¹³⁶ It was followed up in 2003 by the adoption of the U.N. Convention against Corruption,¹³⁷ obliging member states (1) to criminalize both passive and active corruption, including in the private sector,¹³⁸ by corporations when the domestic system otherwise establishes criminal responsibility for corporations;¹³⁹ and (2) to provide for investigative and enforce-

127. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42, Mar. 18, 1965, 575 U.N.T.S. 515.

128. See *World Duty Free Co. v. Republic of Kenya*, ICSID (W. Bank), ¶¶ 138-57, 179-81, Case No. ARB/00/7 (2006).

129. See *Inceysa Vallisoletana, S.L.*, *supra* note 126, ¶¶ 240-52.

130. See *id.* ¶¶ 230-39.

131. See *id.* ¶¶ 253-57.

132. See *Middle East Cement Shipping & Handling Co. SA v. Arab Republic of Egypt*, ICSID (W. Bank), ¶ 167, Case No. ARB/99/6 (2002).

133. See, e.g., *Inceysa Vallisoletana, S.L.*, *supra* note 126, ¶¶ 245-52. See also *World Duty Free Co.*, *supra* note 128, ¶ 138.

134. *Inceysa Vallisoletana, S.L.*, *supra* note 126, ¶ 248.

135. See, e.g., Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity*, 4 J. INT'L CRIM. JUST. 466, 466-67 (2006) (citing corruption).

136. United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25 Annex 1, U.N. Doc. A/RES/55/25/Annex 1 (Jan. 8, 2001).

137. See U.N. Convention Against Corruption, *supra* note 14.

138. *Id.* arts. 15-42.

139. *Id.* art. 26.

ment measures.¹⁴⁰ Though it is generally up to home and host states to punish instances of transnational crimes, these states often fail to act. Host states are either unable or unwilling to react, and they might be “forced to compete in offering favorable regulatory regimes,”—e.g., through weak legislation on corrupt activities.¹⁴¹ Home states often are uninterested in investigating and prosecuting their own corporations’ acts abroad.

While there are few cases where tribunals have denied investors’ rights under investment agreements on the basis of acts that are contrary to “international public policy” or other similar norms, this should not be regarded necessarily as a sign that such denial of rights is controversial. It can be assumed that where investors have acted in violation of “international public policy,” they are not prepared to risk the costs and publicity that claims under investment agreements are likely to generate. Against this background, it can be concluded that investment tribunals have broad opportunities for holding enterprises responsible for acts or omissions through denial of benefits under investment agreements. A similar conclusion might be drawn in relation to rights and obligations of investors under contracts with host states.

C. *Human Rights Protection of Corporations*

Contrary to what can be found in the global regime for protection of human rights and other regional regimes, the European Convention on Human Rights (ECHR) includes corporations among those enjoying protection under the Convention and its Protocols.¹⁴² This is explicitly set out in Article 1 of the First Protocol to the Convention, which states that every “natural or legal person” shall enjoy the right to property.¹⁴³ Following the first case where a corporation invoked rights under the Convention, the *Sunday Times Case*,¹⁴⁴ numerous cases have been brought before

140. *Id.* arts. 30-42.

141. Lawrence Tshuma, *Hierarchies and Government Versus Networks and Governance: Competing Regulatory Paradigms in Global Economic Regulation*, 9(1) SOC. & LEGAL STUD. 115, 128 (2000).

142. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter First Protocol to the European Convention on Human Rights].

143. First Protocol to the European Convention on Human Rights, *supra* note 142, art. 1.

144. *Sunday Times v. the United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 27 (1979).

the court invoking a variety of rights under the Convention and its Protocols.¹⁴⁵

The question is whether and to what extent the European Court of Human Rights (ECtHR) may allow states to suspend rights on the basis of acts or omissions of corporations. We may distinguish between three groups of rights under the ECHR: (1) rights that are nonderogable, i.e., from which no exceptions can be made in accordance with Article 15(2) of the Convention; (2) rights from which states are allowed to derogate when there is a state of urgency in accordance with Article 15; and (3) rights that states are allowed to derogate from when it is "necessary" in order to achieve legitimate purposes in a "democratic society."¹⁴⁶ All three groups of rights, including those that are nonderogable, in particular Article 7, may be relevant to corporations.¹⁴⁷

According to the wording of the third group of rights, states enjoy a broad margin of appreciation to suspend the rights of corporations. One question is to what extent states claiming that acts or omissions of corporations justify the suspension of such rights must demonstrate a link between the acts or omissions and the

145. Such rights include safeguards in criminal cases under Articles 5 and 6 of the European Convention on Human Rights (ECHR) and Articles 2, 3 and 4 of the Seventh Protocol; the right to a fair trial under Article 6 of the ECHR; the right to respect for business premises under Article 8; freedom of religion under Article 9; freedom to communicate under Article 10; freedom of assembly and association under Article 11; and the right to enjoy property under Article 1 of the First Protocol. *See* European Convention on Human Rights, *supra* note 142, arts. 2-4, 6, 9, 10-11; First Protocol to the European Convention on Human Rights, *supra* note 142, art. 1; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, 1525 U.N.T.S. 195.

146. Articles 15(1) and (2) of the ECHR state the following:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

European Convention on Human Rights, *supra* note 142, art. 15(1)-(2). Provisions providing for necessity-based exceptions can be found in articles 8-11. *See, e.g., id.* art. 10(2) (permitting restrictions on the freedom of expression guaranteed in article 10(1) where they are "prescribed by law and . . . necessary in a democratic society" in pursuit of certain interests).

147. Article 7(1) of the ECHR states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Id. art 7(1).

rights in question. Where there is no such link, it can be assumed that suspension of rights as a “punishment” for bad behavior will not be acceptable. Nevertheless, case law indicates,¹⁴⁸ and literature broadly recognizes, that the ECtHR will apply a “lenient standard of review” in cases involving the rights of corporations within the third group, in particular under Articles 8 and 10 of the ECHR.¹⁴⁹ In the context of Article 10(2), it has even been suggested that the ECtHR could limit its review to a formal control of “whether the proportionality assessment under the ‘necessity’ criterion has in fact been undertaken at the national level.”¹⁵⁰ The extent of leniency in the Court’s review, however, has not been clearly established for all provisions, and it may differ significantly according to the facts of the case in question.

The states’ margin of appreciation is much more limited with regard to the first two groups of rights. It is also unclear whether the ECtHR would apply any “lenient standard of review” in cases involving the rights of corporations belonging to these groups.¹⁵¹ Hence, states’ ability to invoke acts or omissions of corporations as a reason for suspending these rights will be much more limited.

We have not been able, within the framework of this Article, to carry out any thorough study of the case law of the ECtHR with a view to identify the extent to which states have invoked and the Court has accepted suspension of rights of corporations under the ECHR on the basis of acts or omissions of corporations. Nevertheless, based on the general findings above, it can be assumed that the ECtHR, depending on the facts of the case and the right in question, might accept such suspension when the corporations’ acts or omissions represent violations of recognized norms of international law. In such cases it can be argued that suspension of rights might be “necessary in a democratic society” in order to pursue a legitimate aim. One basic condition in this context might be that there must be a sufficient link between the relevant act or omission and the right to be suspended.

148. See *Markt Intern Verlag GmbH & Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) at 19-20 (1989) (“Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. . . . The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.” See also *Niemietz v. Germany*, 251 Eur. Ct. H.R. (ser. A) at 34 (1992) (employing an interpretation that “would not unduly hamper the Contracting States”).

149. *EMBERLAND*, *supra* note 103, at 165-70, 172-7, 192-3.

150. *Id.* at 167.

151. *Id.* at 155-96.

D. *Two Lost Opportunities for Imposing Responsibility*

1. Shipping of Hazardous and Noxious Substances

Another international regime that offers corporations a form of protection is the Hazardous and Noxious Substances Fund (HNS Fund) of the International Maritime Organization (IMO), available for victims of pollution damage caused by shipping activities.¹⁵² When the HNS Fund, in lieu of the shipowner, compensates damage, the Fund effectively relieves the shipowner of the duty to compensate that would otherwise exist. If such protection of the shipowner were contingent on the adherence to certain international minimum standards for the activity, it would be possible to hold responsible the actors that had actually caused the damage. A finding by the Fund that a shipowner had violated relevant international rules with a sufficient degree of fault would have allowed the Fund to seek recourse after it had compensated the victims' damage. There is, however, no such recourse mechanism available to the Fund. This is so even if the responsible party intentionally disregarded relevant rules of international law.

The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) establishes a two-tiered system to compensate victims of accidents involving hazardous and noxious substances.¹⁵³ As a first tier, there is strict liability for the shipowner and a system of compulsory insurance.¹⁵⁴ The shipowner's total liability is limited to SDR 100 million (US\$128 million).¹⁵⁵ As a second tier, the HNS Fund becomes involved when (1) no liability for the damage arises for the shipowner (e.g., the shipowner was not informed that a shipment contained HNS or the accident resulted from an act of war); (2) the shipowner is financially incapable of compensating the damage in full, and any financial security that may be provided is insufficient; and (3) the damage exceeds the shipowner's liability limits established in the HNS Convention.¹⁵⁶ Cargo interests—i.e., persons in the Contracting Parties who receive a certain minimum quantity of

152. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea arts. 13-36, May 3, 1996, 35 I.L.M. 1406 [hereinafter HNS Convention].

153. *See id.*

154. *See id.* art. 12.

155. *See id.* art. 9.

156. *See id.* arts. 7, 14.

HNS cargo during a calendar year—finance the HNS Fund.¹⁵⁷ The maximum compensation from the Fund is SDR 250 million (US\$320 million), which includes compensation paid under the first tier.¹⁵⁸ The bottom line in the present context is that the Fund will offer a shipowner protection in the sense that the shipowner cannot be held responsible for damage that exceeds that party's economic capacity or the SDR 100 million limit.

The fact that the cargo owners finance the HNS Fund through contributions is noteworthy. Cargo owners are the natural or legal persons whose economic activity is seen to put the environment at risk, but they are not the persons that usually are to blame for a given damage. It may be noted that the HNS Convention does not prejudice any rights of recourse of the HNS Fund against persons other than the shipowner.¹⁵⁹

A recourse mechanism vis-à-vis shipowners that was contingent on that party's sufficient fault would have offered an opportunity to sanction the shipowner. A right of the Fund to seek recourse would have ensured a main purpose of a sanctioning mechanism in addition to compensation, namely prevention. The system would have ensured compensation to the victims while retaining some preventive effect vis-à-vis ship-owning corporations. In order to enjoy the protection offered by the HNS Fund under the HNS Convention, corporations concerned would have to observe certain minimum standards regulating their activities. A finding by the Fund that a corporation had not adhered to this standard would incur economic responsibility for the corporation when the failure had caused damage regulated by the Convention.

The formulation of the HNS Convention is perhaps indicative of a tendency to prioritize the compensation of the victims of the damage rather than to ensure a preventive effect vis-à-vis the responsible party. One scholar has noted that international maritime law regarding maritime liability and compensation "is not a strong deterrent given that its primary focus is placed on providing compensation, rather than punishing/detering the polluter."¹⁶⁰ Yet allowing the HNS Fund to seek recourse with the liable shipowner arguably would have been consistent with a general legal principle that the loss eventually should be placed where it most

157. *See id.* arts. 16-20.

158. *See id.* art. 14.

159. *Id.* art. 41(2).

160. Ivana Zovko, *Effectiveness of International Instruments of Liability and Compensation for Vessel-Sourced Pollution: Case Study of the Southern Ocean*, 56 ZBORNIC PFZ 1143, 1183 (2006).

properly belongs. In a comment to its draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the International Law Commission noted—albeit with regard to compensation paid by states and national agencies—that a party that has compensated the damage “may recover the costs later for such operations from the operator.”¹⁶¹ The term “operator” is defined broadly so as to include, under the circumstances, the shipowner.¹⁶²

2. Marine Scientific Research in the International Seabed

Yet another international maritime regime where an opportunity for holding corporations responsible for violations of international law appears to be lost is the International Seabed Authority's Endowment Fund (the ISA Fund).¹⁶³ The ISA Fund promotes the conduct of collaborative marine scientific research in the international seabed by providing various forms of funding.¹⁶⁴ Corporations that receive such funding shall report to the Fund “on the use of the funds provided, the outcomes of the assistance provided and . . . on the results obtained,”¹⁶⁵ and the Fund's secretariat shall “disseminate information on the outcomes . . . for the benefit of the members of the [International Seabed] Authority.”¹⁶⁶ There is, however, no mechanism for disseminating such information to the greater public or for sanctioning a corporation when it has failed to comply with international obligations regarding marine research, such as those reflected in Part XI of the Convention on the Law of the Sea.¹⁶⁷ One possibility, which has similarities to the one suggested for the HNS Fund, would have been to make the

161. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-eighth Session*, 138, 144-45, U.N. Doc. A/61/10 (2006) (containing ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities with commentary).

162. *See id.* at 144-45.

163. The ISA Fund was established by the International Seabed Authority. *See* United Nations Convention on the Law of the Sea arts. 133-91, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *Convention on the Law of the Sea*]; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 19, U.N. Doc. A/RES/48/263 (Aug. 20, 1994) (specifically section 7 on economic assistance).

164. *See* INT'L SEABED AUTH., TERMS OF REFERENCE, GUIDELINES AND PROCEDURES FOR THE INTERNATIONAL SEABED AUTHORITY ENDOWMENT FUND, *available at* <http://www.isa.org/jm/files/documents/EN/Regs/E-Fund.pdf> (last visited Nov. 22, 2009).

165. *Id.* ¶ 19.

166. *Id.* ¶ 20.

167. By their terms, the obligations under the Law of the Sea Convention are imposed on the states parties. *See* Convention on the Law of the Sea, *supra* note 163, arts. 1(2), 305.

funding contingent on the applicant's adherence to certain international rules regulating the activity in question. When a corporation concerned violates such rules with sufficient fault on its part, the Fund could be authorized to demand the reimbursement, in whole or in part, of its contribution. Thus, the corporations concerned would have accepted that the violation of those rules could entail such loss. This would have a preventive effect beyond the mere undertaking of the obligations as it could also represent a sanction.

E. *Concluding Remarks*

This Part has examined the extent to which corporations may lose rights or benefits under international law as a consequence of their acts or omissions. Such loss of rights or benefits may be seen as a consequence of a failure to fulfill relevant conditions for enjoyment of the rights or benefits, or it may be seen as a way of imposing responsibility on corporations under international law for their acts or omissions. The findings above indicate that one cannot draw a clear distinction between these two perspectives. The recognition in certain cases of an "international public policy," the violation of which justifies loss of rights or benefits, taken together with an increasing consensus among states concerning criminalization of certain acts or omissions of relevance to corporations, indicates that possibilities of holding corporations responsible through loss of rights and benefits are on the rise.

As interests of corporations are increasingly protected through international rules or norms, the opportunities for linking such protection to the conduct of corporations are expanding. States, however, do not seem to address these opportunities in any systematic way in relevant instruments. This raises the question whether there is a need for "secondary rules," along the lines of those set out in the 2001 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, in the context of corporations.¹⁶⁸ One element of such rules could be based on the concept of "international public policy."

The emerging debate comparing the international law protection of the interests of corporations with the protection of individuals indicates that there may be an emerging legal basis for distinguishing between these subjects of international law. The trend seems to be to accept a broader range of reasons for sus-

168. See *supra* note 108 and accompanying text.

pending rights of corporations than for suspending rights of individuals. The extent to which such a trend can be identified, however, remains controversial and may differ according to the field of law.

V. FINDINGS OF NONCOMPLIANCE WITH INTERNATIONAL NORMS

A. *Introduction*

In some situations, there are three or more parties involved in a case, and the case in question is raised between two parties but the decision in the case depends on the conduct of a third party. This may typically be the case where the two parties to a case are an international institution and a state, and the third party is a corporation. In such cases, the legal relationship in terms of international law exists between the international institution and the state. In addition, there is a legal relationship in terms of national law between the state and the corporation.

The cases to be addressed in this Part are those where an international institution decides a case on the basis of the legal relationship between the international institution and the state, but it makes the decision based on the conduct of a corporation. In formal legal terms, such cases do not directly concern the responsibility of corporations under international law. Nevertheless, the international institutions do assess the compliance of corporations with international norms, and their findings may have indirect legal consequences for the corporations.

The issues to be addressed are (1) to what extent do cases exist in which international institutions make findings concerning the compliance of corporations with international norms and (2) what legal consequences such findings may have for the corporations. The common element in the three regimes to be addressed is that international institutions make detailed assessments of the compliance of corporations with international norms. The U.N. Security Council panels may examine acts or omissions of corporations and direct their decisions to relevant states in accordance with Article 25 of the Charter of the United Nations.¹⁶⁹ The World Bank Inspection Panel frequently examines whether corporations have complied with the operational policies and procedures of the bank and directs its report to the Board of Governors and the Management of the World Bank; the findings, therefore, may have serious

169. See *supra* Part III.

consequences for projects carried out by corporations.¹⁷⁰ Finally, the International Labour Organisation (ILO) is well known for its “tri-partite” structure.¹⁷¹ In many cases, the decisions of bodies of the ILO depend on compliance of corporations with rules of the ILO. The member states are responsible for ensuring compliance with the decisions.¹⁷²

B. *The Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*

1. The Work and Findings of the Panel

In June 2000 the Security Council requested the U.N. secretary-general to establish the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.¹⁷³ The Panel’s mandate was to “follow up on reports and collect information on all activities of illegal exploitation,” to “research and analyse the links between the exploitation . . . and the continuation of the conflict,” and to “revert to the Council with recommendations.”¹⁷⁴

In its first report the Panel concluded the following:

A number of companies have been involved and have fuelled the war directly, trading arms for natural resources. Others have facilitated access to financial resources, which are used to purchase weapons. Companies trading minerals, which the Panel considered to be “the engine of the conflict in the [DRC],” have prepared the field for illegal mining activities in the country.¹⁷⁵

The Panel recommended that the Council declare a temporary embargo on the import and export of some specified resources from and to Burundi, Rwanda, and Uganda “until those countries’ involvement in the exploitation of the natural resources in the [DRC] is made clear and declared so by the Security Council.”¹⁷⁶ It recommended that “[g]overnments should take the measures necessary to ensure that companies registered in their territory and individuals breaking the embargo are punished.”¹⁷⁷ The Panel also

170. *See infra* Part V.C.

171. *See infra* Part V.D.

172. *See id.*

173. Statement by the President of the Security Council, *supra* note 100.

174. *Id.*

175. *DRC Report, supra* note 71, ¶ 215.

176. *Id.* ¶ 221.

177. *Id.* ¶ 221.

recommended that the Council “strongly urge all Member States to freeze the financial assets of the companies or individuals who continue to participate in the illegal exploitation,”¹⁷⁸ and that the Council “call upon the [DRC] to take the necessary steps to curb the flow of illicit diamonds by liberalizing the diamond trade. . . . A clear signal in this regard should be sent to all companies that resist and obstruct the liberalization of the mineral markets.”¹⁷⁹ Further, “[a]ll diamond dealers operating in the territories occupied by foreign forces should immediately stop doing business with rebels and Burundi, Rwanda and Uganda.”¹⁸⁰ The Panel recommended that a certification scheme be required of all diamond-exporting countries in the region and that a recording and public documentation system that clearly designates countries of origin and provenance of diamonds be established.¹⁸¹ Importantly, in an annex the Panel listed “samples” of companies that “were ready to do business regardless of elements of lawfulness and irregularities.”¹⁸²

In its subsequent First Final Report, the Panel named eighty-five corporations that the Panel considered in breach of the Organisation for Economic Co-operation and Development’s Guidelines for Multinational Enterprises (OECD Guidelines).¹⁸³ The Panel raised specific allegations against some corporations, while other corporations were just listed as being in violation of the OECD Guidelines.¹⁸⁴ In no case did the Panel specify which provisions had been violated.

After intense lobbying by corporations, their governments, and the Security Council, the Panel chose to provide detailed information to the Council in a nontransparent manner—i.e., only to the members of the Council.¹⁸⁵ The Council thereafter condemned the illegal exploitation of the natural resources of the DRC,¹⁸⁶

178. *Id.* ¶ 223.

179. *Id.* ¶ 229.

180. *DRC Report*, *supra* note 71, ¶ 230.

181. *Id.* ¶ 231.

182. *Id.* ¶ 184, annex I.

183. See Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶¶ 170-78, annex III, U.N. Doc. S/2002/1146 (Oct. 16, 2002) [hereinafter *First Final Report*]. For more information concerning the OECD Guidelines, see *infra* Part VI.

184. See *First Final Report*, *supra* note 183, annex III.

185. See *DRC Report Addendum*, *supra* note 81.

186. S.C. Res. 1457, *supra* note 24, ¶ 2.

while at the same time inviting the corporations that had been listed in the Panel's report to submit, "with due regard to commercial confidentiality," their reactions, which were to be published upon the corporations' request.¹⁸⁷ The Council renewed the Panel's mandate,¹⁸⁸ and under the new mandate the Panel invited the corporations listed in the First Final Report "to meet with it."¹⁸⁹ The stated purpose was "to look forward instead of focusing on the past . . . [and] to raise the standard of corporate behaviour."¹⁹⁰ This indicated a shift away from holding corporations responsible and toward preventing future human rights abuses.

In its Second Final Report, the Panel grouped corporations into five categories: (1) those for which a solution was reached and which should consequently no longer be listed; (2) those for which a provisional resolution had been reached and for which compliance would depend on the enterprises complying with the commitments; (3) those where the Panel was unable to reach a resolution and where it consequently referred specific instances to National Contact Points; (4) those that were referred to governments for further investigation; and (5) those that the Panel had been unable to investigate.¹⁹¹ The Panel then left the follow-up to states, not the Security Council.

In order to establish an improved general framework for managing the natural resources of the DRC, the Security Council requested that the secretary-general establish the Group of Experts on the DRC.¹⁹² The Group recommended that the Council help in this process "by imposing financial and travel sanctions against those actors who violate Congolese laws."¹⁹³ Hence, the Group

187. *Id.* ¶ 11.

188. *Id.* ¶ 8.

189. See Panel of Experts on the Illegal Exploitation of Natural Res. & Other Forms of Wealth of the Democratic Republic of the Congo, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶ 17, U.N. Doc. S/2003/1027 (Oct. 23, 2003) [hereinafter *Second Final Report*].

190. *Id.* ¶ 18.

191. See *id.* ¶¶ 23–32.

192. S.C. Res. 1533, ¶ 10, U.N. Doc. S/RES/1533 (Mar. 12, 2004).

193. See Sec. Council Comm. Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo, *Interim Report of the Group of Experts on the Democratic Republic of the Congo, Pursuant to Security Council Resolution 1698 (2006)*, ¶ 17, U.N. Doc. S/2007/40 (Jan. 31, 2007). See also *id.* ¶¶ 47–48. In paragraph 52 the Group of Experts recommends:

[T]hat the existing laws of the Democratic Republic of the Congo, particularly the regulations governing natural resources and their orderly exploitation, be used as a baseline for a new sanctions regime. Violations of these laws would be considered sanctionable, and the Group of Experts, strengthened with appropriate legal expertise, would be mandated to investigate relevant acts. Violators

indicated that the U.N. Security Council might contribute where illegal exploitation of natural resources is related to a threat to international peace or security and where this threat is linked to a country's need for assistance to enforce its domestic legislation and policy. In a 2005 resolution, the Security Council reaffirmed "its determination to take action against illegal exploitation and trafficking of natural resources and high-value commodities in areas where [they] contribute[] to the outbreak, escalation or continuation of armed conflict."¹⁹⁴ In a 2006 resolution, the Security Council "[c]all[ed] upon the countries of the region . . . to combat cross-border trafficking of . . . illicit natural resources."¹⁹⁵

2. The Consequences for the Corporations Concerned

The listing in the Panel's First Final Report prompted "strong reactions by entities named therein" because of, first of all, the "naming-and-shaming effect."¹⁹⁶ As a more subtle effect, the Panel also noted that "[t]here have been some accounts that part of the decrease in demand [for tantalum] resulted from manufacturers' desire to disassociate themselves with what became known, following release of the report, as 'blood tantalum.'"¹⁹⁷ The reactions were also due to the fact that the Panel had recommended that the Security Council impose sanctions.¹⁹⁸ The reactions, however, manifested very differently; some corporations chose to disengage from the region, others sought to adjust their activities to international law, yet others started lobbying powerful actors and thus influenced the Panel's subsequent work to their advantage.¹⁹⁹

The work of the Panel illustrates how the Security Council might indirectly apply the OECD Guidelines and similar norms against corporations when such corporations' activity threatens peace and security. The Council left, however, the specific follow-up of the individual cases to National Contact Points (NCPs) and the proce-

could be added to the list of individuals and entities subject to the measures imposed by paragraphs 13 and 15 of Security Council resolution 1596 (2005). Since the core violation would be the infraction of current Congolese law, due process would be automatically built into the sanctions regime. Should the evidence against violators not prevail in orderly Congolese courts of laws, the listing under paragraphs 13 and 15 of resolution 1596 (2005) would be removed.

194. S.C. Res. 1625, ¶ 6, U.N. Doc. S/RES/1625 (Sept. 14, 2005).

195. S.C. Res. 1653, ¶16, U.N. Doc. S/RES/1653 (Jan. 27, 2006).

196. See *Second Final Report*, *supra* note 189, ¶ 9.

197. *DRC Report Addendum*, *supra* note 81, ¶ 17.

198. *First Final Report*, *supra* note 183, ¶ 176.

199. See RIGHTS & ACCOUNTABILITY IN DEV., UNANSWERED QUESTIONS: COMPANIES, CONFLICT AND THE DEMOCRATIC REPUBLIC OF CONGO 4 (2004), available at http://www.miningwatch.ca/updir/DRC_unanswered_questions.pdf.

ture set up under the OECD Guidelines, limiting its follow-up of specific cases to those where there was a very close and direct link between the illegal resource exploitation and illegal import of arms into the DRC.²⁰⁰ Thus, the Council brought a particular problem to states' attention by letting the Panel act as a fact-finding body and make recommendations to states.

By establishing the Panel, the Security Council has demonstrated its will to work creatively vis-à-vis nonstate actors that profit from and fuel conflicts. The process has confirmed that the Council has the authority to adopt resolutions under Chapter VII, which, albeit indirectly, places restrictions on corporate activities. The Council has also recognized and made use of the inherent naming-and-shaming effect of the exposure of corporate failure to comply with international obligations.

3. Other Effects of the Panel's Findings

The work of the Panel has given the international community—in addition to the DRC—a deeper understanding of the self-perpetuating cycle of conflict and corporate resource exploitation.²⁰¹ In turn, this might influence states' will to create international regimes curbing such damaging activity.

As an interesting cross-fertilizing effect, the Panel has “breathed life into the OECD Guidelines for Multinational Enterprises and drawn attention to their applicability in developing countries and,

200. See S.C. Res. 1533, *supra* note 192, ¶ 8 (stating, “Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all members of the Council (the Committee), to undertake the following tasks: . . . (b) To examine, and to take appropriate action on, information concerning alleged violations of the measures imposed by paragraph 20 of resolution 1493 and information on alleged arms flows highlighted in the reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo, identifying where possible individual and legal entities reported to be engaged in such violations, as well as aircraft or other vehicles used”).

For a list of the measures taken by the committee, see Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo, Annual Reports Pursuant to Resolution 1533, <http://www.un.org/sc/committees/1533/index.shtml> (last visited Nov. 22, 2009). As of April 2007, the list only contained six enterprises of which three were not Congolese (two from Uganda and one from Rwanda). *Id.* No enterprise covered by the guidelines was listed.

201. See *Second Final Report*, *supra* note 189, ¶¶ 67-68; see also Asimina-Manto Papaioanou, *The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses*, (Global Working Paper No. 01/05, 2005); GLOBAL WITNESS, SAME OLD STORY: A BACKGROUND STUDY ON NATURAL RESOURCES IN THE DEMOCRATIC REPUBLIC OF CONGO, (2004), available at http://www.globalwitness.org/media_library_detail.php/118/en/same_old_story; RIGHTS & ACCOUNTABILITY IN DEVELOPMENT, *supra* note 199, at 3.

especially, in conflict areas.”²⁰² Importantly, the Panel found that corporations from states that did not adhere to the Guidelines violated them, thus applying the Guidelines as a global standard.²⁰³ Before submitting its Second Final Report to the Security Council, the Panel had a dialogue with the OECD Investment Committee, which is responsible for monitoring compliance with the Guidelines.²⁰⁴ On this point, the Panel noted that there was “general agreement that the OECD Guidelines . . . should be applicable across the world, from the most industrialized countries to the least developed,” but that “[p]rior to the Panel’s contact with the OECD, only one case in Africa had been referred to an NCP.”²⁰⁵ The dialogue “would be seen as a wake-up call for [the OECD Investment Committee] and NCPs.”²⁰⁶ The Panel’s work has also “spurred Governments, NGOs and other organizations or associations to pursue their own investigations into the plundering of resources.”²⁰⁷

4. Critique of the Panel’s Structure and Work

The work and final conclusions of the Panel have not escaped criticism. It has been claimed that the Panel yielded to pressure from corporations, governments, and the Security Council.²⁰⁸ As noted above, the Panel failed to relate the violations to specific provisions in the OECD Guidelines and to explain satisfactorily why most of the corporations finally were placed in the “resolved” category.²⁰⁹ According to the Panel, the issues that originally led to the corporations’ being listed had “been worked out to the satisfaction of both the Panel and the companies and individuals concerned.”²¹⁰ The Panel failed, however, to explain just how the issues were worked out. Vaguely, the Panel noted that the most straightforward resolution had been where “a party acknowledges that the issue cited by the Panel entails instances of business behaviour that are inappropriate [and has] either taken action to rem-

202. *Second Final Report, supra* note 189, ¶¶ 70.

203. There were corporations from Bermuda, British Virgin Islands, China, the DRC, Ghana, Hong Kong, Kazakhstan, Malaysia, Rwanda, Saint Kitts, South Africa, Thailand, Uganda, United Arab Emirates and Zimbabwe. *See id.* annex I.

204. *See Second Final Report, supra* note 189, ¶¶ 20-22.

205. *Id.* ¶ 21.

206. *Id.*

207. *Id.* ¶ 71.

208. *See RIGHTS & ACCOUNTABILITY IN DEV., supra* note 199, at 4.

209. *See Second Final Report, supra* note 189, ¶¶ 23-28.

210. *Id.* ¶ 23.

edy them or given firm, time-bound commitments to do so.”²¹¹ Adding to the confusion, the Panel noted that the categorization of issues as resolved “should not be seen as invalidating the Panel’s earlier findings.”²¹² The Panel also failed to explain why some cases were referred to NCPs while others were referred to governments for further examination, even though some of the latter pertained to corporations operating in countries subscribing to the OECD Guidelines and thus already had established NCPs.²¹³

Some of the Panel’s shortcomings can be attributed to its confined mandate and the restraints within which it had to operate. A fact-finding body with no judicial powers, the Panel did not have the authority to issue subpoenas when confronted with uncooperative corporations. The naming-and-shaming effect of the list and the possibility of an effective follow-up by the Security Council nevertheless gave corporations a strong incentive to cooperate. Another restraint was that the Panel, working in a conflict zone, continuously had to assess the possible impact of its operation on the ongoing peace process in the region. The Panel noted that “[t]hroughout its consultations and work, [it] was mindful of the progress being achieved in the ongoing peace process in [the DRC].”²¹⁴

The most serious shortcoming is perhaps the lack of transparency that made it almost impossible for states, civil society, and NGOs to qualify and quantify the effects of the Panel’s work.²¹⁵ A more detailed and coherent set of procedures, including rules on transparency, could have eliminated some of the shortcomings. Also, the fact that such panels are established on an ad hoc basis means a lack of continuity and progress in how the panels work—in addition to making the panels costly and time consuming.²¹⁶ A

211. *Id.* ¶ 24.

212. *Id.* ¶ 23.

213. Papaioannou, *supra* note 201, n.101 and accompanying text.

214. *DRC Report Addendum*, *supra* note 81, ¶ 8. In another report, the Panel noted *inter alia* that it “had intended to visit South Africa in order to meet with representatives of the various sectors participating in the inter-Congolese dialogue at Sun City” but that it decided not to, as “the Panel’s presence might have a detrimental impact [on the peace process].” Panel of Experts on the Illegal Exploitation of Natural Res. & Other Forms of Wealth of the Democratic Republic of the Congo, *Interim Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶ 13, U.N. Doc. S/2002/565 (May 22, 2002).

215. See RIGHTS & ACCOUNTABILITY IN DEV., *supra* note 199, at 4-5; Papaioannou, *supra* note 201, n.97 and accompanying text.

216. This is in some contrast to the more structured approach taken to sanctions committees. See U.N. Security Council Sanctions Committee, <http://www.un.org/sc/committees> (last visited Nov. 22, 2009).

better solution would be to create a Permanent Panel of Experts, possibly merged with a Permanent Sanctions Committee, served by a full-time staff.²¹⁷ This would ensure some continuity and development of institutional knowledge. Also, a permanent body arguably would appear more credible and be more independent and less vulnerable to external pressure. As noted by the DRC Panel,

[t]o be effective, monitoring activities concerning arms and revenue flows in conflict situations should be institutionalized and cover longer periods. That would require high level of expertise, flexibility in conducting fieldwork and adequate support of the relevant United Nations bodies and Secretariat.²¹⁸

With regard to due-process guarantees vis-à-vis the listed corporations, the Panel remarked that it was not a judicial body but an “independent fact-finding body” and that it had used the OECD Guidelines “as appropriate benchmarks” applying “a standard of proof based on ‘reasonableness’ and ‘sufficient cause.’”²¹⁹ It also noted that “[t]he nature of the Panel and the various mandates that it has been given preclude it from determining the guilt or innocence of parties.”²²⁰ Considering that criminal law is not applied here, this seems reasonable. Again, however, the lack of transparency makes it impossible to determine whether any given finding of the Panel has been based on a fair process.

On the part of the Security Council, one could perhaps envisage a more activist attitude. For instance, the Security Council could have instructed states explicitly to act upon and according to the Panel’s findings.²²¹ Its resolutions regarding the situation in the DRC, following up the Panel’s findings, could, arguably, have been more effective. The Council did decide, however, that states

immediately freeze the funds, other financial assets and economic resources which are on their territories . . . which are owned or controlled, directly or indirectly, by persons designated by the Committee . . . or that are *held by entities* owned or controlled, directly or indirectly, by any persons acting on their behalf or at their direction, as designated by the Committee, and . . . ensure that no funds, financial assets or economic

217. See GLOBAL WITNESS, *supra* note 105, at 15.

218. *Second Final Report*, *supra* note 189, ¶ 76.

219. *Id.* ¶ 15.

220. *Id.* ¶ 16.

221. Yet, the Security Council requested the Panel to “help [states] take the necessary investigative action” and urged all states “to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel,” S.C. Res. 1457, *supra* note 24, ¶¶ 12, 15. The call for appropriate action was reiterated in Security Council Resolution 1499. S.C. Res. 1499, ¶ 3, U.N. Doc. S/RES/1499 (Aug. 13, 2003).

resources are made available by their nationals or by any persons within their territories, to or for the benefit of such persons or entities.²²²

C. *The World Bank Inspection Panel*

1. Introduction

In 1993 the World Bank established an Inspection Panel to receive complaints concerning projects funded by the Bank.²²³ The Inspection Panel's establishment has been regarded as an important event under the law of international organizations for substantive areas of international law, such as international environmental law, and for the development of international administrative law.²²⁴ There are in general four parties that might have a particular interest in cases brought before the Panel, namely (1) those bringing the case forward,²²⁵ (2) the Management and Executive Directors of the World Bank, (3) the state(s) borrowing from the World Bank and acting as host(s) to the project in question (the host states), and (4) potential private parties,²²⁶ including cor-

222. S.C. Res. 1596, ¶ 15, U.N. Doc. S/RES/1596 (Apr. 18, 2005) (emphasis added). The "Committee" referenced was established by Security Council Resolution 1533. See S.C. Res. 1533, *supra* note 192, ¶ 8.

223. Int'l Bank for Reconstruction & Dev. [IBRD], *The World Bank Inspection Panel*, Res. No. IBRD 93-10 (Sept. 22, 1993) [hereinafter Res. No. IBRD 93-10].

224. Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 601 (1994).

225. The requester may be as follows:

[A]n affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals), or by the local representative of such party or by another representative in the exceptional cases where the party submitting the request contends that appropriate representation is not locally available and the Executive Directors so agree at the time they consider the request for inspection. . . . The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.

Res. No. IBRD 93-10, *supra* note 223, ¶ 12. In addition, a case may be brought by an Executive Director or by the Executive Directors acting collectively. *Id.*

226. Such actors may range from ordinary corporations to more or less independent entities set up by the borrowing state(s) for conducting the project. For an example of the latter, see The Inspection Panel, *Investigation Report: Paraguay – Reform Project for the Water and Telecommunications Sector; Argentina – SEGBA V Power Distribution Project*, ix, Rep. No. 27995 (Feb. 24, 2004) [hereinafter *Investigation Report: Paraguay/Argentina*]. See also The Inspection Panel, *Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project*, ¶ 8, Rep. No. 32034-CO (June 24, 2005) [hereinafter *Investigation Report: Columbia*].

porations, which have tasks related to the project in question. This Section shall focus on the implications of the work of the Inspection Panel for corporations involved in relevant projects.

The number of cases brought before the Panel has increased.²²⁷ Many cases concern the establishment of basic infrastructure, reform of industry or services sectors, or exploration for or exploitation of significant natural resources.²²⁸ Such projects frequently necessitate involvement of the private sector, mostly government-related enterprises, but in some cases transnational corporations. The involvement of corporations has been significant in a number of the projects that have been brought before the Panel.

The functions of the Inspection Panel can be compared to those of an ombudsman.²²⁹ The rules on the composition of the Panel show the significance attributed to ensuring the Panel's independence from the World Bank.²³⁰ The main task of the Panel is to determine "whether the Bank has complied with all relevant Bank policies and procedures."²³¹ The reports of the Inspection Panel may potentially result in a broad range of measures aimed at ensuring compliance with the policies and procedures.²³² While there have been diverging opinions concerning the legal status of the

The latter phenomenon is related to the policy of the World Bank and the International Monetary Fund to promote privatization of public services.

227. See The Inspection Panel, *Annual Report July 1, 2006 to June 30, 2007*, at 13, Rep. No. 41602 (2007) [hereinafter *Inspection Panel 2007 Annual Report*].

228. See The Inspection Panel, *Summary of Inspection Panel Cases* (June 30, 2007), available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Summary_of_Inspection_Panel_Cases_%5Bupdated%5D.pdf.

229. See Bradlow, *supra* note 224, at 568-71.

230. See Res. No. IBRD 93-10, *supra* note 223, ¶¶ 3-11. See also WORLD BANK, 1999 CLARIFICATION OF THE BOARD'S SECOND REVIEW OF THE INSPECTION PANEL ¶ 9 (Apr. 20, 1999), reprinted in 39 I.L.M. 249 (2000) [hereinafter *1999 Clarification*], which elaborates on the relationship between the Panel, Management and Board of Executive Directors in the process before a decision to inspect is taken: "the Board will authorize an investigation without making a judgment on the merits of the claimants' request, and without discussion except with respect to the following technical eligibility criteria." In its Annual Report of 2007, the Panel states: "Since 1999, the Board has approved all of the Panel recommendations regarding the eligibility of a Request for Inspection for an investigation. The Board has consistently supported the Panel in its investigations and follow-up activities." *Inspection Panel 2007 Annual Report*, *supra* note 227, at 16.

231. Res. No. IBRD 93-10, *supra* note 223, ¶ 22.

232. See *id.* ¶ 12 ("For purposes of this Resolution, 'operational policies and procedures' consist of the Bank's Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started, and does not include Guidelines and Best Practices and similar documents or statements.").

policies and procedures, the Panel has made clear that it regards them as binding.²³³

The function of the Inspection Panel has been described as mainly fact-finding.²³⁴ Nevertheless, the Panel determines whether specific acts or omissions are in compliance with operational policies and procedures with a view to secure compliance with and to prevent future violations of the norms. Moreover, it recommends measures to be taken by relevant actors to rectify acts or omissions that are in violation of the norms.

In the following, we shall examine the extent to which the findings of the Inspection Panel have been or could be based on or take into account acts or omissions of corporations. Moreover, we shall examine the extent to which subsequent decisions by the Management or the Executive Directors of the World Bank have had or could have implications for rights and obligations of corporations.

Loans issued by the World Bank are based on agreements between the World Bank and host states. The projects thus funded may be carried out by a variety of actors, including corporations.²³⁵

233. For a Panel discussion of these issues, see The Inspection Panel, *Investigation Report: The Qinghai Project: A Component of the China: Western Poverty Reduction Project*, ch. 3, Rep. No. INSP/R2000-4 (Apr. 28, 2000) [hereinafter *Investigation Report: The Qinghai Project*]. The Panel emphasized: "Read in their entirety, the Panel feels that the directives cannot possibly be taken to authorize a level of 'interpretation' and 'flexibility' that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding." *Id.* ¶ 37. The Panel went on to state that it "has failed to find any grounds for the view that precedents in a country, or a country's 'political and social systems,' can in any way determine what is required by the policies." *Id.* ¶ 43. See also The Inspection Panel, *Review of Problems and Assessment of Action Plans: Argentina/Paraguay: Yacretá Hydroelectric Project*, ¶ 248, Rep. No. IPN Request RQ96/2 (Sept. 16, 1997) [hereinafter *Review of Problems: Argentina/Paraguay*] for an illustration of how the Panel has developed its thinking concerning the legal nature of the operational policies and procedures: "The Panel decided to highlight the major areas where staff performance could or should have better followed operational statements rather than prepare an encyclopedic review of all possible violations." The Panel has also concluded that Management failed to comply with the "intent and spirit" of operational policies and procedures. See The Inspection Panel, *Investigation Report: India: Mumbai Urban Transport Project*, ¶ 640, Rep. No. 34725 (Dec. 21, 2005) [hereinafter *Investigation Report: India*]; see also The Inspection Panel: *Investigation Report: Cambodia: Forest Concession Management and Control Pilot Project*, ¶¶ 243, 313, Rep. No. 35556 (Mar. 30, 2006) [hereinafter *Investigative Report: Cambodia*].

234. *The Inspection Panel Annual Report 2007*, *supra* note 227, at 13 ("The Panel provides a forum to which affected people can complain if they believe they have suffered or may suffer harm, because the World Bank has not followed its policies and procedures. It functions as a fact-finding body.")

235. See, e.g., The Inspection Panel: *Investigation Report: Uganda: Third Power Project, Fourth Power Project, and Bujugali Hydropower Project*, ¶ 8, Rep. No. 23998 (May 23, 2002). In Chad and Cameroon, the Consortium carrying out the petroleum pipeline project was owned by ExxonMobil (40%), Petronas (25%), and Chevron (35%). See The Inspection

The extent of involvement of corporations is up to host states and is, in general, determined in agreements between the host state and relevant corporations. There is thus formally no direct contractual link between the World Bank and relevant corporations.²³⁶ Hence, there is a line to be drawn between the sovereignty of host states when they govern projects and the role of the World Bank as a source for funding of projects initiated by host states.²³⁷ This is to some extent underlined in the Resolution establishing the Panel, as the Resolution sets out the following in Paragraph 14:

[T]he following requests shall not be heard by the Panel: (a) Complaints with respect to actions which are the responsibility of other parties, such as a borrower, or potential borrower, and which do not involve any action or omission on the part of the Bank. (b) Complaints against procurement decisions by Bank borrowers from suppliers of goods and services financed or expected to be financed by the Bank under a loan agreement, or from losing tenderers for the supply of any such goods and services, which will continue to be addressed by staff under existing procedures.²³⁸

Moreover, the 1999 Clarification states the following in Paragraph 13:

The Panel will discuss in its written report only those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies and procedures. If the request alleges a material adverse effect and the Panel finds that it is not totally or partially caused by Bank failure, the Panel's report will so state without

Panel, *Investigation Report: Chad-Cameroon Petroleum and Pipeline Project; Petroleum Sector Management Capacity Building Project; and Management of the Petroleum Economy*, ¶ 1, n.4 [hereinafter *Investigation Report: Chad-Cameroon*]. A third example is the Yacyretá Hydroelectric Project in which the project started out on the basis of a treaty between Argentina and Paraguay which created an autonomous bi-national entity which was to be privatized. See *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶ 24 (executive summary).

236. See Bradlow, *supra* note 224, at 559-60 (“[T]he Bank has sought to respect the sovereignty of its member countries by ensuring that all substantive decisions are formally made by the borrower. Consequently, under the terms of all Bank loan agreements, the borrower remains legally responsible for the implementation of Bank-funded projects or adjustment programs.” (footnote omitted)). See also *id.* at 605, stating:

[E]ven though decisions within this category are reached jointly by the Bank and the borrower country, the borrower state assumes legal responsibility for the decision. This principle is implemented through various covenants and conditions in Bank loan agreements that explicitly make the borrower and/or guarantor responsible for the implementation of these decisions. Consequently, private actors must look to member states for redress for any harm caused by these decisions.

(footnote omitted).

237. See *id.* at 566-67 (describing a proposal to establish a Panel with broader powers, which was not accepted). See also *id.* at 607-08.

238. Res. No. IBRD 93-10, *supra* note 223, ¶ 14.

entering into analysis of the material adverse effect itself or its causes.²³⁹

Nevertheless, corporations may in practice carry out tasks that are directly relevant to the extent that World Bank Management complies with its operational policies and procedures. In such situations, the Management remains responsible for ensuring that the acts comply with the policies and procedures. Hence, because acts or omissions of corporations might be decisive for Management's compliance,²⁴⁰ the Inspection Panel's reports and related decisions by the executive directors might have clear implications for how corporations must carry out their obligations under contracts with the host state.²⁴¹ In cases where corporations have important responsibilities related to compliance with operational policies and procedures, the Management of the World Bank has clear incentives to maintain close contact directly with the corporations, and it is likely to do so in practice.²⁴² Against this background, it can be asked whether corporations might indirectly and in practice be held responsible for acts or omissions through the operation of the Inspection Panel.

2. Which Operational Policies and Procedures Are Relevant?

The operational policies and procedures of the World Bank cover a broad range of activities carried out by private parties.²⁴³ The policies and procedures have been subject to gradual and significant reform since the establishment of the Panel. As set out in a Panel report,

[i]n the early 1990s the Bank began a process of converting Operational Directives, Memoranda, Notes etc. into a new format that distinguished between policies, procedures and prac-

239. 1999 Clarification, *supra* note 230, ¶ 13.

240. See, e.g., The Inspection Panel, *Investigation Report: Kenya: Lake Victoria Environmental Management Project*, ¶¶ 54-55, Rep. No. IPN Request RQ99/6 (Dec. 15, 2000); The Inspection Panel, *Investigation Report: India: Coal Sector Environmental and Social Mitigation Project*, ¶¶ 45-49, 110, Rep. No. 24000 (Nov. 25, 2002) [hereinafter *Investigation Report: India: Coal Sector*].

241. See, e.g., *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 92, 99.

242. See, e.g., The Inspection Panel, *Request for Inspection: India: NTPC Power Generation Project: Report on Investigation*, ¶ 44, Rep. No. 28458 (Dec. 22, 1997) [hereinafter *Investigation Report: India: NTPC*]. Concerning such links to private parties, see also Ellen Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law*, 2 HOFSTRA L. & POL'Y SYMP. 61, 68-69 (1997); and Bradlow, *supra* note 224, at 576.

243. See generally, WORLD BANK, WORLD BANK OPERATIONS MANUAL (2004), available at <http://siteresources.worldbank.org/OPSMANUAL/Resources/EntireOpManualExternal.pdf> [hereinafter WORLD BANK OPERATIONS MANUAL] (containing both the Operational Policies and Bank Procedures).

tices. According to Management, this development did not signify a change of Bank policy. Rather, it was designed to clarify what are Bank policies (OPs), what is Bank "procedure" (BPs), both mandatory "rules," and what is international best practice (GPs).²⁴⁴

We may distinguish between three main groups of operational policies and procedures of relevance to the responsibility of corporations: those that concern (1) procedural issues, (2) social issues, and (3) environmental issues. Among the operational policies and procedures on procedural issues is the obligation to supervise and monitor projects. There are two situations of primary interest, namely those where the World Bank supervises the conduct of corporations and those where the World Bank has relied on corporations to do the supervision. As to the first situation, World Bank Management has an obligation to supervise projects regardless of the extent to which corporations carry out the project. Management cannot rely on host countries to conduct the supervision. If activities of corporations have not been properly supervised, Management cannot be excused by referring to a failure by the host country to supervise properly. Hence, corporations have in practice been subject to the same supervision as host countries.²⁴⁵ Management, therefore, has an obligation to supervise projects with a view to ensure that corporations comply with operational policies and procedures.

As to the second situation, there are examples where Management has relied on corporations to supervise projects.²⁴⁶ The Inspection Panel conceivably could accept such an approach. Management, of course, remains responsible for ensuring that the private parties carrying out the supervision are qualified for the tasks and for the quality of the supervision.²⁴⁷

Another procedural requirement of interest is the obligation to ensure that nongovernmental actors have opportunities to obtain

244. *Investigation Report: The Qinghai Project*, *supra* note 233, ¶ 30.

245. *See, e.g., Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 449-82 (specifically the serious criticism expressed in paragraph 478); *see also Investigation Report: Paraguay/Argentina*, *supra* note 226, ¶¶ 373-420.

246. *See, e.g., Investigation Report: India: NTPC*, *supra* note 242, ¶ 121, stating:

The files show that on the ground site "missions" by Bank experts to supervise R&R implementation amounted to a few days each year and were sporadic and insufficient. As a result, the Bank relied heavily on NTPC staff—who might obviously have conflicts of interest—for information it required for supervision when NTPC itself admits that this was a new area in which it had no expertise. NTPC hired sociologists but whether and the extent to which Bank experts provided guidance and supervision cannot be established.

247. *Id.*

relevant information concerning the project and to participate in the design and implementation of the project. Regardless of the extent to which private parties carry out the project, World Bank Management has an obligation to ensure that stakeholders are consulted in accordance with the operational policies and procedures. The Inspection Panel will regard Management as responsible for the failure of a corporation to comply with these parts of the operational policies and procedures.²⁴⁸

In addition, practice of the Panel indicates that World Bank Management can be held responsible for ensuring that loan disbursement and contractual management of the host state comply with relevant operational policies and procedures.²⁴⁹ This may be the case both for the host state's disbursement of loans to corporations and for ensuring that contractual arrangements between host countries and corporations comply with the operational policies and procedures. The Panel has also examined Management's reliance on cost-benefit analyses provided by consultants.²⁵⁰

A number of social issues regulated by the operational policies and procedures are of relevance when considering the relationship between the Inspection Panel and corporations carrying out projects. The operational policies and procedures and related Panel reports cover issues concerning health consequences of projects,²⁵¹ treatment of involuntary resettled communities, including issues of restitution,²⁵² payment of compensation to those negatively affected by projects,²⁵³ distribution of benefits generated by

248. See, e.g., *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶ 249; *Investigation Report: India: NTPC*, *supra* note 242, ¶ 65; *Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 424-25, 429-30, 433, 446-48.

249. See, e.g., *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 52, 232-36, 246; *Investigation Report: Columbia*, *supra* note 226, ¶¶ 374-76, 387-401; *Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 234-50, 262-64, 608-09, 703-09.

250. See *Investigation Report: Columbia*, *supra* note 226, ¶¶ 249-307.

251. See *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶¶ 115-131; see also *Investigation Report: Cameroon*, *supra* note 226, ¶¶ 136-8 (concerning occupational health and safety).

252. See, e.g., *Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 49, 56-57, 110; *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶¶ 62-67; *Investigation Report: India: NTPC*, *supra* note 242, ¶ 81. See also Bradlow, *supra* note 224, at 578, stating:

Because resettlement is the borrower's responsibility, the borrower retains responsibility for designing a plan that addresses each of these issues. In a case where the resettlement plan does not include an adequate response to each of the factors listed in the Directive, it may be possible to draft a complaint alleging that, given the deficiencies of the resettlement plan, the Bank, in its assessment of the plan, could not have adequately considered each of the factors specified in the Operational Directive.

253. See, e.g., *Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 175-76; *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 157-62, 174-78, 181-83, 190-93.

projects,²⁵⁴ and the treatment of indigenous peoples.²⁵⁵ The Panel has addressed acts and omissions of corporations in these areas, and it has on several occasions commented on their compliance with requirements set out in operational policies and procedures. While the Panel has commented on issues concerning respect for human rights,²⁵⁶ it has not related its comments to acts or omissions of corporations.

Most of the Panel reports address environmental issues.²⁵⁷ Many of the projects have significant environmental ramifications, and the operational policies and procedures contain a number of detailed requirements concerning such projects.²⁵⁸ The basic procedural requirement is the obligation to carry out environmental impact assessments.²⁵⁹ Such assessments are in general carried out by corporations, including those responsible for carrying out the project or external consultants hired to conduct the assessment or parts of it.²⁶⁰ The Panel has on several occasions examined whether environmental impact assessments have been carried out in accordance with the operational policies and procedures.²⁶¹

Projects may have a variety of harmful environmental effects, ranging from reduction of biodiversity to harm to cultural heritage.²⁶² The Panel has examined corporations' implementation of requirements under operational policies and procedures to mitigate harmful consequences, in particular through the design and

254. See *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶ 232.

255. See, e.g., *Investigation Report: India: Coal Sector*, *supra* note 240, ¶¶ 299, 316.

256. See *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 215-17; see also The Inspection Panel, *Investigation Report: Honduras: Land Administration Project*, ¶¶ 243-58, Rep. No. 39933-HN (June 12, 2007).

257. See, e.g., *Investigation Report: Paraguay/Argentina*, *supra* note 226, at ix ("The Requesters claim that the [project] has had severe environmental impacts.").

258. See WORLD BANK OPERATIONS MANUAL, *supra* note 243, OP4.01-OP4.09.

259. See *id.* OP4.01.

260. See *Investigation Report: Paraguay/Argentina*, *supra* note 226, ¶¶ 115-7.

261. See *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 25-39, 65-66, 69-70, 82-83; *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶¶ 162-63, 249-50; The Inspection Panel, *Investigation Report: Ecuador: Mining Development and Environmental Control Technical Assistance Project*, ¶¶ 46-108, Rep. No. 21870 (Feb. 23, 2001); The Inspection Panel, *Investigation Report: Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project*, ¶¶ 47-180, Rep. No. 32034-CO (June 24, 2005); *Investigation Report: Paraguay/Argentina*, *supra* note 226, ¶¶ 104-60; *Investigation Report: Cameroon*, *supra* note 226, ¶¶ 43-45, 51-56, 72-76; *Investigative Report: Cambodia*, *supra* note 233, ¶¶ 308-37.

262. Concerning cultural heritage, see *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 203-09; and *Investigative Report: Cambodia*, *supra* note 233, ¶¶ 267-79.

implementation of project-related plans,²⁶³ and to take measures to restore environmental goods.²⁶⁴ While the Panel has commented on issues concerning respect for multilateral environmental treaties,²⁶⁵ it has not related its comments to acts or omissions of private parties.

3. The Link Between Management and Corporations

As indicated above, the primary relationship is between the World Bank and the host state.²⁶⁶ The question to be addressed here is the extent to which practice of the Panel indicates that there are links between the World Bank Management and corporations. Such links would depend, to a significant extent, on how the Panel regards the relationship between Management and the contractual arrangement between host countries and corporations.²⁶⁷ As indicated above, in practice the Panel accepts the view that Management's responsibilities involve the conduct of corporations despite Management not being party to the contract between the host state and the corporation.²⁶⁸

On the one hand, it can be argued that establishing a legal link between the World Bank and corporations carrying out projects on behalf of host states would be contrary to the underlying legal arrangements because a clear distinction must be drawn between the loan agreement involving the World Bank and host states and with contractual relationships between host states and corporations. On the other hand, practice of the Panel indicates that there are situations in which links between these elements may exist. As indicated above, the Panel has concluded in several cases that Management has an obligation to take measures to ensure that corporations comply with the operational policies and procedures.²⁶⁹ The Panel has also indicated that Management might be

263. See *Investigation Report: India: Coal Sector*, *supra* note 240, ¶¶ 378-84; *Investigation Report: Chad-Cameroon*, *supra* note 235, ¶¶ 84-108; *Investigative Report: Cambodia*, *supra* note 233, ¶¶ 228-43.

264. See, e.g., *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶¶ 132-63; *Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 367-77.

265. See The Inspection Panel, *Investigation Report: Democratic Republic of Congo: Transitional Support for Economic Recovery Grant and Emergency Economic and Social Reunification Support Project*, ¶¶ 386-94, Rep. No. 40746-ZR (Aug. 31, 2007).

266. For an example where this relationship is emphasized, see *Investigation Report: India: NTPC*, *supra* note 242, ¶ 17.

267. In some cases, the project establishes a direct link between the World Bank and private parties, see, e.g., *Investigation Report: India: NTPC*, *supra* note 242, ¶ 44.

268. See *supra* Part V.C.2.

269. *Id.*

under an obligation to ensure that corporations comply with operational policies and procedures—i.e., that Management has what can be labeled “obligations of result.”²⁷⁰ One implication of having obligations of result is that Management would be regarded as responsible for failures to comply with the operational policies and procedures regardless of whether it has done what could reasonably be expected to ensure that corporations comply with the norms. A second implication is that Management has such an obligation regardless of whether the corporation is under any obligation, according to national legislation or a contract, to carry out the activities in the required manner.²⁷¹

Another way that the Panel has drawn a link between World Bank Management and corporations is by indicating that corporations can be regarded as implementing agents on behalf of the Management. To the extent that such an approach is accepted, Management might have extensive obligations to ensure that corporations have the ability to comply with operational policies and procedures and that corporations carry out their tasks in accordance with relevant requirements.²⁷² In such situations, the Panel has indicated that Management might have an “obligation to have significant involvement in project preparation.”²⁷³

It is clear from the practice of the Panel that, when it comes to the obligation of World Bank Management to supervise projects, the Panel does not draw any general distinction between acts or omissions of the host state and acts or omissions of corporations.²⁷⁴

270. See *Investigation Report: India: Coal Sector*, *supra* note 240, ¶¶ 45-49, 210-12. The Panel stated:

In spite of significant efforts on the part of various Bank officials and others involved during implementation, these objectives have not been achieved in Parej East and, as a result, PAPs have been harmed and continue to suffer harm. While it is absolutely essential for the Bank to support these difficult challenges, the Panel would caution that unless they are matched by time, the early planning required by OD 4.30, the resources and realism needed to achieve them, the poorest and most vulnerable of the people affected by the project may end up carrying a disproportionately heavy burden. In light of the above, the Panel finds that, as Management itself recognizes, it is not in compliance with paragraphs 3(b)(iii) of OD 4.30 since, according to the April 2002 Management Response, the income of at least 21 percent of EPAPs in the Parej East subproject had not been improved, still less, restored.

Id. ¶¶ 210-12.

271. See *Investigation Report: India: Coal Sector*, *supra* note 240, ¶ 266-67 (finding a major planning flaw on behalf of the Bank in not considering the corporation’s limitations).

272. See *Investigation Report: India: Coal Sector*, *supra* note 235, ¶¶ 235, 266; *Investigation Report: India: NTPC*, *supra* note 242, ¶¶ 90, 92; *Investigative Report: Cambodia*, *supra* note 233, ¶¶ 338-47.

273. See *Investigation Report: Chad-Cameroon*, *supra* note 240, ¶ 52.

274. See *Review of Problems: Argentina/Paraguay*, *supra* note 233, ¶ 250.

Moreover, where appropriate, the Panel has examined acts or omissions of corporations in light of the requirements set out in the operational policies and procedures.²⁷⁵ Against this background, it can be concluded that, depending on the case in question, the Panel may base its findings on a direct link between the acts or omissions of corporations and the operational policies and procedures of the World Bank.

4. Consequences for Corporations

The next question is, given that the Panel examines the compatibility of acts or omissions of corporations with the operational policies and procedures, what consequences may a finding of noncompliance have for corporations? The starting point is set out in Paragraph 23 of the resolution establishing the Panel, which states, “Within six weeks from receiving the Panel’s findings, Management will submit to the Executive Directors for their consideration a report indicating its recommendations in response to such findings.”²⁷⁶ This starting point is further elaborated in Paragraph 15 of the 1999 Clarification as follows:

A distinction has to be made between Management’s report to the Board (Resolution [Paragraph] 23), which addresses Bank failure and possible Bank remedial efforts and “action plans,” agreed between the borrower and the Bank, in consultation with the requesters, that seek to improve project implementation. The latter “action plans” are outside the purview of the Resolution, its 1996 clarification, and these clarifications. In the event of agreement by the Bank and borrower on an action plan for the project, Management will communicate to the Panel the nature and outcomes of consultations with affected parties on the action plan. Such an action plan, if warranted, will normally be considered by the Board in conjunction with the Management’s report, submitted under Resolution [Paragraph] 23.²⁷⁷

The report from the Management to the Board of Executive Directors thus may contain recommendations in relation to the loan arrangement. The objective of the report and recommendations may be to correct negative consequences of the failure to comply with the operational policies and procedures and to ensure future compliance.

A main question is to what extent Management’s reports and action plans address measures to correct negative consequences of

275. See *Investigation Report: India: NTPC*, *supra* note 242, ¶¶ 84, 90, 92.

276. Res. No. IBRD 93-10, *supra* note 223, ¶ 23.

277. *1999 Clarification*, *supra* note 230, ¶ 15.

the failure to comply with the operational policies and procedures. To the extent that the Panel's reports go into detail concerning measures to be taken, it would be inappropriate for the Management's reports and action plans not to address such issues. This assumption is reinforced by the obligation of Management, according to Paragraph 15 of the 1999 Clarification, to "communicate to the Panel the nature and outcomes of consultations with affected parties on the action plan," and by the fact that the Panel has been involved in assessing the implementation of action plans.²⁷⁸ There are numerous references in Panel reports to the need to take measures to correct negative consequences of noncompliance with operational policies and procedures.²⁷⁹

One way of ensuring compliance with the findings of the Panel would be to suspend future disbursement of loans until measures have been taken to secure compliance with recommendations and action plans.²⁸⁰ Such measures have been taken in exceptional cases, as in the *India: Mumbai Urban Transport Project* case:

The Bank suspended disbursement of the road and resettlement component of the Project on March 1, 2006, and the State of Maharashtra agreed to a ten condition strategy for lifting the suspension of disbursements. . . . On June 29, 2006, the Bank lifted the suspension of disbursement based on the fact that the State of Maharashtra had substantially met the conditions set by IBRD/IDA for lifting the suspension.²⁸¹

The possibility of suspending disbursement must be considered in light of Paragraph 14(c) of Resolution 93-10, which sets out that requests for inspection shall not be approved "after the loan financing the project has been substantially disbursed," meaning, according to a footnote, when more than 95 percent of the loan has been disbursed.²⁸² While it would be up to World Bank Management to consider whether suspension of disbursement of the loan should be called for, the Panel can be expected to review the effectiveness of the approach chosen by Management.²⁸³ Moreover, the provision indicates that the Panel can recommend that

278. *See id.*

279. *See, e.g., Investigation Report: India: Coal Sector, supra* note 240, ¶¶ 717-33.

280. *See* WORLD BANK OPERATIONS MANUAL, *supra* note 243, OP 13.40, ¶ 2.

281. *Inspection Panel 2007 Annual Report, supra* note 227, at 76-77; The Inspection Panel, *Inspection Panel Progress Report: India: Mumbai Urban Transport Project*, ¶¶ 10, 12, Rep. No. 39944 (June 5, 2007); *see also* The Inspection Panel, *Eligibility Report: Brazil: Itaparica Resettlement and Irrigation Project*, ¶ 30, Rep., No. 28464 (1997); *Investigation Report: India: NTPC, supra* note 242, ¶¶ 139, 141.

282. Res. No. IBRD 93-10, *supra* note 223, ¶ 14(c).

283. *See Investigation Report: India: NTPC, supra* note 242, ¶ 141; *see also Investigation Report: Paraguay/Argentina, supra* note 226; The Inspection Panel, *Inspection Panel Review of*

the project or parts of it be postponed until compliance has been established.²⁸⁴ Finally, the Board of Executive Directors previously has decided to suspend disbursement “until the Board decides on the results of any review by the independent Inspection Panel.”²⁸⁵

The Management may also decide cancellation of the loan or parts of it.²⁸⁶ In addition to a general possibility to cancel those parts of the loan that have been suspended for disbursement for more than thirty days, it is explicitly set out that a reason for cancellation may be that “the Bank has determined that . . . a beneficiary of the loan has engaged in corrupt or fraudulent practices during the procurement of a contract to be financed out of the proceeds of the loan, and that the borrower has failed to take action acceptable to the Bank to remedy the situation.”²⁸⁷

Suspension or cancellation of the loan does address primarily the relationship between the World Bank and its borrowers. Nevertheless, such measures are in many cases likely to be effective means for securing compliance by all relevant actors, including corporations, with the operational policies and procedures. Moreover, restrictions on funding may be passed on from the borrowing state to those involved in carrying out the project, including corporations.

D. *The International Labour Organization*

1. Introduction

Among the core tasks of the International Labour Organization (ILO) is the establishment and application of international labor standards through conventions and recommendations.²⁸⁸ The ILO is an organization that provides for active involvement of representatives of workers and employers in its work.²⁸⁹ It has set up an elaborate system for ensuring compliance with international labor standards. Given the degree of involvement of private parties

Management Progress Report on Implementation of the Management Recommendations and Action Plan, and Additional Implementation Measures, ¶ 20, Rep. No. 31521 (Feb. 7, 2005).

284. See WORLD BANK OPERATIONS MANUAL, *supra* note 243, OP 13.40, ¶ 2.

285. *Investigation Report: The Qinghai Project*, *supra* note 233, ¶ 11 (emphasis in original omitted).

286. See WORLD BANK OPERATIONS MANUAL, *supra* note 243, OP 13.50, ¶ 3.

287. *Id.*

288. See, e.g., Int'l Labour Org. [ILO], *Declaration Concerning the Aims and Purposes of the International Labour Organization* (May 10, 1944), available at http://www.ilo.org/public/libdoc/ilo/1944/44B09_10_e_f.pdf (Annex III to the Constitution of the International Labour Organization).

289. See INT'L LABOUR ORG. [ILO] CONST. art. 7, available at <http://www.ilo.org/ilo/lex/english/iloconst.htm> [hereinafter ILO CONST.].

in the ILO and the nature of obligations under ILO conventions, one might expect the compliance mechanisms under the ILO to address the responsibility of corporations.

We may identify three compliance mechanisms of interest within the ILO, namely (1) the ILO commissions of inquiry, (2) the ILO Committee on Freedom of Association, and (3) the Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by Means of Interpretation of Its Provisions.²⁹⁰ While the two former mechanisms will be addressed here, the latter will be addressed in Part VI below.

2. Commissions of Inquiry

The constitution of the ILO provides the ILO Governing Body with the possibility of establishing commissions of inquiry to deal with complaints concerning compliance with obligations under ILO conventions.²⁹¹ Complaints can be brought forward by members of the ILO or by delegates to the General Conference, including representatives of employers and workers.²⁹² The task of commissions of inquiry is, according to Article 28 of the ILO constitution, to

prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.²⁹³

Hence, while the emphasis on the fact-finding function of the commissions is noteworthy, commissions must determine the content of relevant obligations in order to identify acts to be taken to ensure compliance. Moreover, Article 33 sets out that “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance” with the recommendations of commissions.²⁹⁴

In practice, commissions of inquiry are set up only in exceptional cases of serious and persistent noncompliance with conven-

290. See *infra* Part V.D.2-3.

291. INT'L LABOUR ORG. CONST., *supra* note 289, arts. 26-29.

292. Associations of workers and employers, according to Articles 24 and 25 of the ILO Constitution, may bring forward representations against Members. Such representations may be followed by formal complaints, according to Article 26 and subsequently by the establishment of a Commission of Inquiry. See *id.* arts. 24-26.

293. *Id.* art. 28.

294. *Id.* art. 33.

tions. So far, eleven commissions have been established.²⁹⁵ The most famous case concerned violations by Myanmar of the Forced Labour Convention, ILO Convention Number 29.²⁹⁶ The report of the commission led to the adoption of a resolution by the International Labour Conference under Article 33 of the ILO constitution. The resolution recommended

to the Organization's constituents as a whole—governments, employers and workers—that they: (i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body.²⁹⁷

While the resolution does not impose legal obligations upon corporations, it does indicate that corporations may share responsibility for contributing to secure compliance with ILO conventions. Moreover, it indicates that it is legitimate for compliance mechanisms set up by the ILO to examine and comment upon acts or omissions of corporations and to formulate recommendations dealing with future acts or omissions.

3. The Committee on Freedom of Association

The Governing Body of the ILO established the Committee on Freedom of Association to consider specific complaints raised by governments, trade unions, and employers' organizations.²⁹⁸ The membership of the Committee reflects the tripartite character of the ILO. The nine members, representing the governments, employers and worker groups, serve in their personal capacities.

295. See Int'l Labour Org., Complaints – Applying and Promoting International Labour Standards, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Complaints/lang—en/index.htm (last visited Nov. 22, 2009).

296. See Int'l Labour Org. [ILO], *Report of the Commission of Inquiry Appointed to Examine the Observance by Myanmar of the Forced Labour Convention*, Doc. No. GB.267/16/2 (1996).

297. Int'l Labour Org. [ILO], *Resolution Concerning the Measures Recommended by the Governing Body under Article 33 of the ILO Constitution on the Subject of Myanmar* (June 14, 2000). For an updated report on the status of the case, see International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 229-34, Rep. No. ILC 98: Report III(1A) (Mar. 6, 2009).

298. INT'L LABOUR ORG. [ILO], FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE 1-2 (5th rev. ed. 2006) [hereinafter FREEDOM OF ASSOCIATION].

The Committee examines the facts of cases, draws up conclusions concerning compliance with relevant rules concerning freedom of association, and makes, where appropriate, draft recommendations directed to states.²⁹⁹ The recommendations are subsequently submitted to the Governing Body for approval.³⁰⁰

The main focus of the Committee is on the compliance of states with obligations under the 1948 Freedom of Association and Protection of the Right to Organise Convention—ILO Convention Number 87—and the 1949 Right to Organise and Collective Bargaining Convention—ILO Convention Number 98.³⁰¹ The Committee does not, however, focus exclusively on acts or omissions of states. Its procedures set out the following:

The usual practice of the Committee has been not to make any distinction between allegations levelled against governments and those levelled against persons accused of infringing freedom of association, but to consider whether or not, in each particular case a government has ensured within its territory the free exercise of trade union rights.³⁰²

The Committee has considered more than 2,500 cases, and it has addressed a number of issues related to acts or omissions of corporations.³⁰³ Based on a review of the opinions of the Committee, as set out in the *Digest of Decisions and Principles of the Freedom of Association Committee*, we may distinguish between four main categories of opinions expressed by the Committee.³⁰⁴

The first category of opinions consists of those in which the Committee clearly indicates that corporations in specific situations have acted in violation of obligations under the conventions or other relevant rules.³⁰⁵ The following statement is an illustrative example:

By threatening retaliatory measures against workers who had merely expressed their intention to hold a sit-in in pursuance of their legitimate economic and social interests, the employer interfered in the workers' basic right to organize their adminis-

299. See *id.* ¶¶ 6, 9-11.

300. See *id.* annex I, ¶¶ 19, 70-74.

301. In addition to these Conventions and other ILO Conventions that may be relevant in individual cases, the Committee on Freedom of Association refers to ILO's Recommendations and Declarations, see *id.* ¶¶ 20, 243, 261, 266, 830, 832-23, 1101, 1110, 1112.

302. INT'L LABOUR ORG. [ILO], PROCEDURES OF THE FACT-FINDING AND CONCILIATION COMMISSION AND THE COMMITTEE ON FREEDOM OF ASSOCIATION FOR THE EXAMINATION OF COMPLAINTS ALLEGING VIOLATIONS OF THE FREEDOM OF ASSOCIATION, annex II, ¶ 25 (2006) [hereinafter ILO PROCEDURES].

303. See FREEDOM OF ASSOCIATION, *supra* note 298, at 3.

304. See generally *id.*

305. See, e.g., *id.* ¶¶ 163, 478, 514, 794, 806, 808, 810, 851, 857, 858, 1054, 1058.

tration and activities and to formulate their programmes, contrary to Article 3 of Convention No. 87.³⁰⁶

Such statements from the Committee indicate that it regards employers as bound by relevant provisions under the conventions, and that the Committee is ready to conclude on their compliance with the provisions. The recommendations formulated by the Committee in these cases are almost exclusively directed, however, to the relevant governments.³⁰⁷ The governments are asked to ensure compliance with the recommendations and provide information on the development of the cases.³⁰⁸ Hence, the Committee and the Governing Body would generally depend on governments to ensure that corporations comply with their recommendations.

The second category of opinions consists of those where the Committee specifies obligations of corporations without referring to specific acts of violation. Some such statements are directed to corporations,³⁰⁹ others are more general but clearly address issues of relevance to acts of corporations,³¹⁰ and yet others only indirectly indicate that corporations may be held responsible for relevant acts.³¹¹ While some of these statements are set out in

306. *Id.* ¶ 514.

307. One possible exception can be found in Case No. 2299 where the Committee stated: "In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations: . . . (b) The Committee considers that the trade union official, José Alirio Pérez Cañenguez, should be reinstated in his post without loss of pay and be authorized to exercise his trade union activities." See Int'l Labour Org. Comm. of Freedom of Ass'n, *Case No. 2299 (El Salvador)*, in *333rd Report of the Committee on Freedom of Association*, ¶ 564, Doc. No. GB.289/9(Part 1) (2004).

308. See FREEDOM OF ASSOCIATION, *supra* note 298, ¶¶ 163, 478, 514, 794, 806, 808, 810, 851, 857, 858, 1054, 1058.

309. See, e.g., FREEDOM OF ASSOCIATION, *supra* note 298, ¶¶ 259, 315, 343, 633, 663, 856, 859, 868, 940-41, 1059, 1107. An illustrative example can be found in paragraph 343, which states: "[E]mployers should refrain from any discrimination between trade union organizations, especially as regards recognition of their leaders who seek to perform legitimate trade union activities." *Id.* ¶ 343.

310. See, e.g., *id.* ¶¶ 156, 161-62, 175, 178, 212-13, 255, 257, 310, 335, 338, 368, 389, 508, 527, 529, 531, 595, 632, 637, 657, 661, 662, 666, 675, 770, 776, 785, 786, 787, 789, 790, 793, 796, 797, 802, 837, 849, 863, 943, 955, 981, 986. An illustrative example can be found in paragraph 632: "The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association." *Id.* ¶ 632.

311. See, e.g., *id.* ¶¶ 263, 634, 636, 779, 811, 866, 948. An illustrative example can be found in paragraph 779: "The Committee is not called upon to pronounce upon the question of the breaking of a contract of employment by dismissal except in cases in which the provisions on dismissal imply anti-union discrimination." *Id.* ¶ 779.

mandatory language, most of them use hortatory terms such as "should."³¹²

The third category of opinions includes statements in which the Committee emphasizes the responsibility of the government or public authorities to ensure that corporations comply with relevant obligations.³¹³ Some statements go into detail concerning the obligation to ensure that domestic tribunals function properly.³¹⁴ Common to all these statements is that they indicate potential responsibilities of corporations even if the primary responsibility rests with the government or other public authorities. This group of opinions reflects the ways in which recommendations of the Committee are formulated—from general statements concerning the need to protect against acts of corporations to detailed instructions concerning specific measures to be taken.

Finally, the fourth category of opinions concerns those in which the Committee formulates recommendations or advice rather than obligations.³¹⁵ Such statements may be based on or indicate the existence of obligations for corporations.³¹⁶

The practice of the Committee illustrates some of the fundamental challenges facing attempts to hold corporations responsible under international law. While the primary rules as applied by the Committee contain obligations that are applicable to corporations, the Committee has no other option than to rely on governments or

312. See, e.g., *id.* ¶ 315 (an example of mandatory language); *id.* ¶ 259 (example of a hortatory statement).

313. See, e.g., *id.* ¶¶ 44, 46-47, 184, 191, 524, 682, 771-73, 780-81, 788, 791, 798-800, 803-04, 807, 812-13, 824, 830-31, 838-53, 865, 873, 1119. An illustrative example can be found in paragraph 682:

In a case in which it concluded that the reduction in the number of union members to below the legal minimum of 25 was the consequence of anti-trade union dismissals or threats, the Committee requested the government, should it be concluded that these were anti-trade union dismissals and that the withdrawal from union membership of trade union leaders resulted from pressure or threats from the employer, to impose the penalties provided by the legislation, reinstate the dismissed workers in their jobs and permit the dissolved trade union to be reconstituted.

Id. ¶ 682.

314. See, e.g., *id.* ¶¶ 778, 809, 827 (on the failure to provide sufficient protection against unreasonable delays in court decisions).

315. See, e.g., FREEDOM OF ASSOCIATION, *supra* note 298, ¶¶ 655, 782, 832, 833, 934-38, 954, 976, 1082-83, 1104-6. An illustrative example can be found in paragraph 935: "It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties." *Id.* ¶ 935.

316. See *id.* ¶ 1106 (containing a reference to "the right to organize"); *id.* ¶ 1105 (containing no explicit reference to rules).

other public authorities to ensure compliance with the primary rules. Furthermore, corporations are involved only to a limited extent in the procedure before the Committee; the main parties to the procedure are the complainants and governments.³¹⁷ The main object of the procedure, however, is “not to blame or punish anyone, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and practice.”³¹⁸ Thus, while the Committee, when compared to other international institutions, goes far in indicating corporate responsibility, the practice of the Committee shows that there are likely to be limits on the extent to which corporations can be held responsible within the existing regime.

E. *Concluding Remarks*

This Part has analyzed cases addressing whether acts or omissions of corporations comply with international rules. While questions concerning compliance with international rules must be regarded as an essential element of corporate responsibility under international law, it is not necessarily sufficient to conclude that the above cases constitute examples of corporate responsibility. As no authoritative definition of “responsibility” exists in international law, it cannot be concluded whether the above cases can be seen as cases concerning the responsibility of corporations under international law. Nevertheless, it can be assumed that findings concerning compliance with international rules constitute an essential element in what could be or become instances of corporate responsibility under international law. In this context, it is worth noting that most areas of international law lack effective enforcement mechanisms. Therefore, it is not unexpected that the contribution of states to implementation and enforcement of decisions of international institutions is the preferred option in the cases examined above. Such dependence on the contribution of states is common in most areas of international law.

It is our view that the three groups of cases analyzed above, in themselves, do not constitute examples of corporate responsibility under international law. Nevertheless, the cases seem to represent trends in international law in the direction of increased willingness to directly consider acts or omissions of corporations when determining the responsibility of states or international institutions.

317. See ILO PROCEDURES, *supra* note 302, ¶¶ 49-51.

318. FREEDOM OF ASSOCIATION, *supra* note 298, ¶ 4.

Moreover, it can be asked whether this increased willingness also represents an embryo of regimes to come wherein acts or omissions of corporations could be the basis for some form of direct corporate responsibility under international law.

VI. COMPLIANCE WITH NONBINDING INTERNATIONAL NORMS

This Part will move beyond legally binding rules and consider mechanisms for corporate compliance with international norms that are not legally binding in a strict juridical sense. The regimes to be studied are limited to those in which intergovernmental institutions are involved in determining the compliance with the norms. This means that a number of international initiatives are omitted here, including the U.N. Global Compact.³¹⁹ In the following, we shall take a quick look at three regimes, namely the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the Institutional Integrity Department of the World Bank.³²⁰

The OECD Guidelines for Multinational Enterprises, originally adopted in 1976, are “recommendations addressed by governments to multinational enterprises.”³²¹ “They provide “voluntary principles and standards for responsible business conduct consistent with applicable laws.”³²²

The main instrument set up to promote implementation of and compliance with the Guidelines is National Contact Points (NCPs), which handle inquiries on all matters covered by the Guidelines with a view to contribute to the solution of problems that may arise.³²³ NCPs may address the implementation of the Guidelines in “Specific Instances.”³²⁴ If the issue cannot be resolved, NCPs

319. The United Nations Global Compact is “a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the area of human rights, labour, environment and anti-corruption.” See generally United Nations Global Compact, <http://www.unglobalcompact.org> (last visited Nov. 22, 2009).

320. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REVISION 2000 (2000) [hereinafter OECD GUIDELINES]; INT'L LABOUR ORG. [ILO], PROCEDURE FOR THE EXAMINATION OF DISPUTES CONCERNING THE APPLICATION OF THE TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (2001) [hereinafter ILO PROCEDURE FOR TRIPARTITE DECLARATION]; The World Bank Group, *Improving Development Outcomes: Annual Integrity Report*, i, Rep. No. 41901 (2007) [hereinafter *World Bank Integrity Report: FY 2007*].

321. See OECD GUIDELINES, *supra* note 320, at 1.

322. *Id.*

323. See *id.* at 18.

324. *Id.* at 36.

may issue statements and make recommendations on the implementation of the Guidelines.³²⁵

Of relevance here is the relationship between the NCPs and the OECD Investment Committee. While the NCPs address the “Specific Instances,”³²⁶ the Investment Committee

shall be responsible for clarification of the Guidelines. Clarification will be provided as required. If it so wishes, an individual enterprise will be given the opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interests. The Committee shall not reach conclusions on the conduct of individual enterprises.³²⁷

The OECD Guidelines thus set up a system where issues concerning specific compliance with the Guidelines are determined in each country by the NCP, and general issues concerning interpretation of the Guidelines are brought before the Investment Committee. Hence, the regime does not qualify as one in which corporations are held responsible before an international institution. Nevertheless, as the interpretations provided by the Investment Committee are related to specific cases and may be instrumental for solving individual questions concerning compliance, it may be difficult to draw clear distinctions between the roles of NCPs and the Investment Committee in specific cases.

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, which was originally adopted in 1977, was followed up by the creation of a procedure for the examination of disputes concerning the application of the Declaration by means of interpretation of its provisions.³²⁸ According to an interpretation adopted by the Committee on Multinational Enterprises, “[t]here must be an actual dispute, arising out of a factual situation, between the parties for an interpretation to be necessary. Therefore, requests for interpretation must be supported by factual evidence to show that there is a dispute.”³²⁹

Even if the party bringing the case before the Committee must demonstrate that there is an actual dispute, the role of the Committee is limited to resolving a disagreement on the meaning of

325. *Id.* at 36. So far, more than 130 specific instances have been addressed by NCPs. Updated information on specific instances is available at OECD Watch, <http://www.oecdwatch.org> (last visited Nov. 22, 2009) (cases initiated by non-governmental organizations) and Trade Union Advisory Committee to the OECD, <http://www.tuac.org> (last visited Nov. 22, 2009) (cases initiated by trade unions).

326. See OECD GUIDELINES, *supra* note 320, at 36.

327. OECD GUIDELINES, *supra* note 320, at 26.

328. See ILO PROCEDURE FOR TRIPARTITE DECLARATION, *supra* note 320.

329. The BIFU Case (1984-5), app. ¶ 13, ILO Doc. GB.229/13/13.

provisions of the Declaration.³³⁰ Hence, the Committee is not called upon to make a finding concerning compliance with the Declaration in the specific case. The role of the procedure as an interpretative procedure is underlined by the rule that national or international organizations of employers or workers can only submit requests if governments have declined to submit a request or have not replied to a communication asking it to make a request.³³¹

So far, the Committee on Multinational Enterprises has dealt with only five requests for interpretation.³³² The statements of the Committee vary from addressing general issues of interpretation³³³ to specific issues of particular relevance to the case in question.³³⁴ Even if some of the statements of the Committee are quite specific, the Committee's practice confirms a conclusion that the role of the procedure for examination of disputes is to clarify the content of the norms set out in the Declaration and not to make findings concerning compliance with the rules of the Declaration in specific cases.

The World Bank's corruption efforts have focused on improving the procurement processes related to projects funded by the Bank. The Procurement Guidelines of the World Bank, Paragraph 1.14, defines corruption and states that the Bank

(b) will reject a proposal for award if it determines that the bidder recommended for award has . . . engaged in corrupt . . . practices in competing for the contract in question;

(c) will cancel the portion of the loan allocated to a contract if it determines at any time that representatives of the Borrower or of a beneficiary of the loan engaged in corrupt . . . practices during the procurement or the execution of that contract, without the Borrower having taken timely and appropriate action satisfactory to the Bank to address such practices when they occur;

(d) will sanction a firm or individual, including declaring ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract if it at any time determines that the firm has, directly or through an agent, engaged in cor-

330. See ILO PROCEDURE FOR TRIPARTITE DECLARATION, *supra* note 320, ¶ 1.

331. See *id.* ¶ 6.

332. Of these five requests, one was rejected, and one was left unresolved as no agreement on the interpretation could be achieved. For a summary of the cases, see International Labour Organization, Multinational Enterprises (EMP/MULTI), <http://www.ilo.org/public/english/employment/multi/tripartite/cases.htm> (last visited Nov. 22, 2009).

333. See, e.g., *id.* (the Belgian Case No. 1).

334. See, e.g., *id.* (the Belgian Case No. 2).

rupt . . . practices in competing for, or in executing, a Bank-financed contract; and

(e) will have the right to require that a provision be included in bidding documents and in contracts financed by a Bank loan, a provision be included requiring bidders, suppliers and contractors to permit the Bank to inspect their accounts and records and other documents relating to the bid submission and contract performance and to have them audited by auditors appointed by the Bank.³³⁵

Further, the Procurement Guidelines provide that “[w]ith the specific agreement of the Bank, a Borrower may introduce, into bid forms for large contracts financed by the Bank, an undertaking of the bidder to observe, in competing for and executing a contract, the country’s laws against fraud and corruption (including bribery), as listed in the bidding documents.”³³⁶

In 2001 the World Bank established the Department of Institutional Integrity (INT) to act as the independent investigative arm of the Bank, reporting directly to the World Bank president.³³⁷ The INT investigates allegations of fraud and corruption in Bank-financed projects and refers its findings to an evaluation and suspension officer who decides on whether a sanction should be imposed on the private party.³³⁸ The officer’s decision may subsequently be brought before a sanctions board.³³⁹ As a result of such investigations, in 2004 the World Bank Sanctions Committee debarred 55 firms, and in 2005 it debarred 54 firms.³⁴⁰

The INT has developed the Detailed Implementation Review (DIR), which is a broad-based examination of the contracts within selected projects of the borrower country, with a view to evaluating a country’s contracting process for the potential existence of fraud, corruption, and mismanagement.³⁴¹ The DIR is conducted in three stages: first, there is a physical collection of procurement and financial management data from selected Bank-financed projects,

335. THE INT’L BANK FOR RECONSTRUCTION & DEV. [IBRD], GUIDELINES PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS ¶ 1.14 (2006).

336. *Id.* ¶ 1.15.

337. *See World Bank Integrity Report: FY 2007, supra* note 320, at i.

338. *See id.* at iv.

339. *See id.* at vi.

340. *See* THE WORLD BANK GROUP, ANNUAL INTEGRITY REPORT: FISCAL YEARS 2005-2006, at 12-13 (2006) [hereinafter WORLD BANK INTEGRITY REPORT: FY 2005-2006]. The numbers from the annual report of 2007 are not representative due to the reform of the Sanctions Committee. Hence, the numbers from the 2005–2006 report are considered to give a more appropriate picture of the activities of the mechanism. *See World Bank Integrity Report: FY 2007, supra* note 320, at 17-19.

341. *See World Bank Integrity Report: FY 2007, supra* note 320, at 21.

with a view to identifying the contracts under the projects that need more detailed review; second, the selected contracts are subjected to closer examination in order to determine the veracity of the indicators and to collect specific evidence of fraud and corruption; and third, there is a substantiation of the indicators of fraud and corruption and a verification of the quality of implementation.³⁴² In order to carry out these stages successfully, a close partnership between the relevant national government, the Bank's country management, and the INT is necessary.³⁴³ So far, the DIR procedure has led to the debarment of 140 firms and individuals by the Bank Group.³⁴⁴

Undoubtedly effective, this regime also leads to a paradox: due to the pressure in developing countries to pay bribes in order to win contracts, consulting companies, particularly those headquartered in richer countries adhering to higher standards, have begun to lose interest in tendering for Bank-financed contracts in certain countries. This leaves "less competent and unscrupulous firms as the only ones tendering for [these] contracts."³⁴⁵ Thus, "a few corrupt officials and business people end up enriching themselves at the expense of the needy [who] are supposed to benefit from the Bank-financed projects."³⁴⁶

Against this background, it can be concluded that there are few effective intergovernmental institutions that set up effective regimes for determining compliance of corporations with non-binding norms. The INT of the World Bank is an exception that could serve as a model for other intergovernmental institutions. As the example indicates, however, one would need to pay sufficient attention to possible unintended side effects when designing such systems.

VII. CONCLUSIONS

As there exists no authoritative definition of "responsibility" in international law, there can be no authoritative conclusion on whether corporations are subjects to whom responsibility is or can be applied under international law. Nevertheless, this Article seeks to identify those elements that would constitute essential characteristics of responsibility under international law and makes a

342. *See id.* at 21-22.

343. *See id.* at 22.

344. *See id.* at 21.

345. WORLD BANK INTEGRITY REPORT: FY 2005-2006, *supra* note 340, at 37.

346. *Id.*

stocktaking of how these elements are currently applied in relevant intergovernmental institutions. The institutions addressed in this Article are those that we have found to be of particular interest. They do not represent an exhaustive overview.

This Article takes as its starting point the need for international regulation and enforcement vis-à-vis transnational corporations in most of the fields in which they operate. Corporations are almost exclusively motivated by their shareholders' expectation of profit, and, without effective regulatory regimes, corporations may lack sufficient incentives to comply with norms. Effective enforcement regimes translate noncompliance into economic costs for shareholders, and effective enforcement regimes will thus give the boards and management of corporations a stronger incentive to ensure compliance.

Another starting point for this Article is that states often fail to regulate activities of transnational corporations and to enforce the regulations that exist. The number of international law regimes regulating corporations' behavior and providing for enforcement mechanisms is increasing. International compliance and enforcement mechanisms have typically been established on an ad hoc basis. Each mechanism seems to be constructed from the ground without coordination with existing or future mechanisms. It is also remarkable how the mechanisms vary with regard to their involvement of states. While some mechanisms effectively bypass national legal systems, such as the Institutional Integrity Department of the World Bank, other mechanisms are dependent on the interaction with domestic legal systems, such as the ILO Committee on Freedom of Association.

Potential compliance and enforcement mechanisms vary significantly between the regimes examined. While the Article argues that penal sanctions applicable to corporations could be developed in the field of international criminal law, we have not identified cases where such sanctions have been applied. Nevertheless, there are important signs that such sanctions may be developed—at least within certain areas of international criminal law—in the foreseeable future.

With the possible exception of the U.N. Security Council, civil sanctions against corporations would depend on the extent to which there can be established a link between the sanction and rights or benefits enjoyed by corporations under international regimes. In some regimes, there is potentially a close link between rights or benefits and potential sanctions, such as in the regimes

under investment treaties, human rights treaties, the World Bank, and the IMO. In such cases, it would be easy to establish effective compliance and enforcement mechanisms.

In other instances, there is a much weaker link between rights or benefits of corporations and potential sanctions. Here, one is likely to depend on techniques such as the exposure of corporate noncompliance with significant rules, otherwise known as "naming and shaming." This includes regimes that increasingly undertake direct assessments of the compliance of corporations with international norms. The effectiveness of such techniques should not be underestimated. The experiences of the Expert Panel under the U.N. Security Council, the World Bank Inspection Panel and the ILO Committee on Freedom of Association indicate that such approaches may achieve significant results. Moreover, as in many other areas of international law one will have to rely on actions taken by states in order to secure compliance with the rules and to effectuate enforcement of sanctions in these cases.

States have established few intergovernmental mechanisms to ensure compliance with and enforcement of international non-binding norms. This is remarkable in light of the long history of the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. One main reason seems to be that corporations, and thus also most states, so far prefer to leave questions concerning compliance and enforcement to states or to international business and industry associations. Depending on the effectiveness of such regimes, one might possibly expect an increasing focus on intergovernmental mechanisms in the future.

Generally, all mechanisms that we have studied are relatively weak. This is not surprising, as the need to establish an international mechanism results from national underregulation of and underenforcement of sanctions vis-à-vis corporate behavior. The same states cannot be expected to have a keen interest in creating effective international mechanisms to achieve what they themselves are reluctant to achieve. It also seems that many countries have a weak interest in contributing to the effectiveness of intergovernmental regimes through effective implementation of relevant mechanisms in domestic legal systems.

Based on the Article's findings, we believe that the following characteristics of international regulatory regimes will tend to make enforcement more effective. First, a direct international enforcement mechanism would be preferable from a law-enforce-

ment perspective. When a regime is enforced indirectly through domestic legal systems, the national reluctance that necessitated the international regulation in the first place may lead to failure of states to secure effective compliance with international obligations. An effective regime for holding states responsible for such failure could remedy, to some extent, this problem, but the history of international law is characterized by a reluctance of states and international institutions to hold states responsible.

While international enforcement mechanisms should be direct, they should not necessarily be exclusive or primary. Generally, to the extent that national legal systems are able to handle problems that transnational corporate activity raises, states should retain their authority to regulate and enforce, and their efforts in these respects should have priority over initiatives within intergovernmental regimes. International interference should be contingent on national failure *in casu* in the same way as intergovernmental regimes are established due to failures of states to secure compliance with norms. This is how the jurisdiction of the International Criminal Court is exercised.³⁴⁷ Regardless of the allocation of roles between national and intergovernmental mechanisms, however, the latter should remain the final arbiter as to when the international jurisdiction needs to interfere.³⁴⁸ Hence, states should not be able to circumvent a review of compliance and enforcement by the intergovernmental institution.

Establishing effective intergovernmental institutions for compliance and enforcement vis-à-vis transnational corporations is not wholly unproblematic from a more general international law perspective. While an international regime without effective compliance and enforcement mechanisms might undermine the credibility of international law, a too effective regime might arguably “represent a significant disempowering of states.”³⁴⁹ As long as there are no effective international compliance or enforcement mechanisms, states are ultimately left with the final discretion as to when responsibility for violations of the norms should be imposed, and the risk of being sanctioned according to the doctrine of state responsibility is minimal. If effective international mechanisms are created, however, states lose this measure of control. The loss of sovereignty that comes with any international obligation that a

347. See Rome Statute, *supra* note 22, art. 17, which makes the jurisdiction of the ICC complementary to States’ jurisdiction.

348. *Id.* arts. 19, 119.

349. See Vázquez, *supra* note 2, at 950.

state undertakes is in reality multiplied when effective international mechanisms are established to monitor and sanction non-compliance. Therefore, states might insist on retaining margins of appreciation in certain fields in order to allow noncompliance of corporations with international law in situations where they, for some reason, find this justified. In this sense, the proliferation of international tribunals and their improved effectiveness represent significant developments. Against this background, we may expect that the development of intergovernmental regimes to secure compliance and enforcement of corporations with international norms will continue to be slow and ad hoc. Nevertheless, it is to be expected that the coordination and consistency of various regimes can be significantly improved.