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Reducing the Governance Gap for Corporate Complicity in International Crimes

Seunghyun Nam

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REDUCING THE GOVERNANCE GAP FOR CORPORATE COMPLICITY IN INTERNATIONAL CRIMES

*Seunghyun Nam**

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INTRODUCTION

On May 8, 2015, the Special Tribunal for Lebanon (STL) decided by a majority that the Tribunal has jurisdiction to hear cases against not only individuals but also legal persons or corporate entities.¹ The judges found that the term “person,” as set out within Rule 60 bis of the Statute of the Tribunal, includes both natural human beings and legal entities, guided by “interpretation that is consonant with the spirit of the statute” and other international and domestic legal principles.² This de-

1. The STL was established on January 23, 2007 by the United Nations (UN) and the Lebanese government to carry out the investigation and prosecution of those responsible for terrorist acts that occurred within Lebanon in 2005. With regard to this decision, the defense challenged the jurisdiction of the STL over legal persons, an argument which was accepted by the Contempt Judge but rejected by the Appeals Chamber. Thus, the case against both defendants was allowed to go to trial. *See* Prosecutor v. Al Jadeed S.A.L., STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Oct. 2, 2014), https://www.stl-tsl.org/crs/assets/Uploads/20141002_F0012_PUBLIC_AP_Dec_on_InteLoc_Appl_Jurisdic_Cont_Proceed_EN_AR_FR_Joomla.pdf.

2. The court found:

With respect to the object and purpose of Rule 60 bis to hold accountable those who interfere with the administration of justice [. . .] the Appeals Panel finds that this object would be impeded should legal entities be excluded from prosecution as a rule. Additionally, the Appeals Panel has examined evolving international standards on human rights and corporate accountability as well as trends in national laws.

cision represents a significant development in international criminal law because it recognizes that corporations, in addition to individuals, can be tried as entities by an international court. As such, it challenges the traditional notion that only crimes of men, and not those of abstract entities, can be responsible for gross human rights abuses amounting to international crimes.³

These developments come in light of recent discussions among scholars and practitioners about the possibility of recognizing corporate liability for international crimes, with reports of companies involved in forced labor, child labor, slavery, torture, extra-judicial killing, and the pillaging of natural resources, particularly in weak or failed states.⁴ In 2011, the UN

Current international standards on human rights support an interpretation that is consonant with imposing criminal liability on legal persons [. . .] With respect to the Lebanese Code of Criminal Procedure, the Appeals Panel considers it relevant that legal persons can be criminally liable under Lebanese criminal law.

Id.

3. *Cf.* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).

4. *See generally* Wolfgang Kaleck & Miriam Saage-Maa, *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, 8 J. INT'L CRIM. JUST. 699 (2010) (providing an overview of developments in case law); Normal Farrell, *Attributing Criminal Liability to Corporate Actors*, 8 J. INT'L CRIM. JUST. 873 (2010) (examining potential attribution of responsibility to corporations); DESISLAVA STOITCHKOVA, *TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW* (2010) (examining the possibility of regulating business enterprises through international criminal law); On corporate responsibility to respect human rights see Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001); 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, 912–13 (2003); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations and International Law*, 44 VA. J. INT'L. L. 931, 933 (2004); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L. L. 819, 819–20 (2007); for scholars arguing in favor of corporate criminal liability for international crimes, see James Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L. & POL. 121 (2014) (arguing that “corporate criminal liability for international crimes in national systems is the next obvious “discovery” in corporate responsibility”); Andrew Clapham, *Extending International Criminal Law Beyond the Individual to*

brought more attention to the accountability of corporations with its adoption of the Guiding Principles on Business and Human Rights (“UN Guiding Principles”), which affirms the duty of states under existing human rights principles to protect against human rights abuses committed by business enterprises within their territory or jurisdiction.⁵

While the decision of the STL has become an important precedent for other national and international courts in the international criminal justice system with regards to holding corporations accountable for international crimes, many practical obstacles and challenges remain. As is illustrated by examples in Burma (also internationally recognized as Myanmar) and the Democratic Republic of Congo (DRC),⁶ discussed in greater detail below, foreign companies in the mining and oil industry may be involved in serious human rights abuses in countries with weak governance, and various political, legal, and economic factors can discourage the host and the home state from in-

Corporations and Armed Opposition Groups, 6 J. INT'L CRIM. JUST. 899, 902 (2008) (arguing that “corporations have international obligations – particularly in the area of international criminal law”); Amol Mehra & Katie Shay, *Persisting Harm: Corporate Responsibility and Accountability for Modern Forms of Slavery*, 14 J. INT'L CRIM. JUST. 453 (2016) (arguing for enhanced domestic criminal law enforcement against companies as increased prosecution “would likely to have a positive influence on company behaviour”).

5. See John Ruggie (U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights), *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter U.N. Guiding Principles on Business and Human Rights] (declaring that states should consider recognizing liability for enterprises domiciled in their territory or jurisdiction where systematic gaps in dealing with gross human rights abuses have been identified, and that business enterprises should “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate”); see also JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 40–42 (2013).

6. Based on the view of the US and the UK, this paper will refer to the country as “Burma,” unless referencing a specific title. See, Andrew Selth & Adam Gallagher, *What’s in a Name: Burma or Myanmar? A Decision by the U.S. to Accept the Name Myanmar Seems Unlikely Any Time Soon*, U.S. INST. OF PEACE (June 21, 2018), <https://www.usip.org/blog/2018/06/whats-name-burma-or-myanmar>.

vestigating the alleged abuses.⁷ More specifically, complex corporate structures, the extraterritorial dimension of the crimes, competition among states and businesses, corruption, corporate influence over governments, lack of institutional capacity, and lack of interstate coordination often create disincentives for states to take action against business enterprises.⁸

Against this backdrop, this article provides a preliminary examination on how the UN and other international and regional institutions may be able to influence states to address these challenges in order to prevent business involvement in serious human rights abuses at home and abroad.

Part I of this article examines forced labor allegations in Burma and the DRC. Based on these case studies, Part II will analyze current limitations in the domestic and international system in preventing corporate complicity in serious human rights abuses that may amount to international crimes. Part III will examine possible ways to reduce the governance gap pertaining to these crimes based on current discussions at the

7. See e.g. EarthRights Int'l, *Energy Insecurity, How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma* (July 2010), <https://www.earthrights.org/sites/default/files/documents/energy-insecurity.pdf>; Amnesty Int'l, *Profits and Loss, Mining and Human Rights in Katanga, Democratic Republic of the Congo*, AFR 62/001/2013 (2013), <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr620012013en.pdf>.

8. Reports from the UN and nongovernmental organizations explain the legal, financial, and political obstacles. See generally Jennifer Zerk, OHCHR, *Corporate Liability for Gross Human Rights Abuses, Towards a Fairer and More Effective System Of Domestic Law Remedies* (Feb. 2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (explaining the "legal, financial, practical and procedural barriers" for domestic law responses to business involvement in gross human rights abuses); Mark B. Taylor, Robert C. Thompson & Anita Ramasastry, FAFO Research Foundation, Amnesty Int'l, Norwegian Peacebuilding Centre, *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses* 9 (2010), http://www.fafon.no/media/com_netsukii/20165.pdf (explaining the political, financial, and legal obstacles); Amnesty Int'l, *Injustice Incorporated, Corporate Abuses and the Human Right to Remedy*, AI Index POL 30/001/2014 (Mar. 7, 2014), <https://www.amnesty.org/download/Documents/8000/pol300012014en.pdf> (explaining how the issues of extraterritoriality, lack of information, and state-business nexus create legal challenges for pursuing corporate accountability).

UN, including the possible adoption of a treaty on business and human rights.

I. FORCED LABOR ALLEGATIONS IN BURMA AND THE DRC

Countries such as Burma and the DRC have faced some of the most serious forms of human rights abuses due to their long histories of military rule and conflict, exposing many foreign companies investing in these countries to serious human rights risks. The following case studies highlight some of these forced labor allegations against foreign companies to illustrate how forced labor can occur in business activities, as well as how it was addressed by the government and other relevant actors.

A. *Situation in Burma*

Burma has had a long history of human rights abuse, including systematic and egregious human rights abuses against its local people due to the long-standing military regime that held power from 1962 to 2011.⁹ The human rights situation in Burma was first addressed by the international community in 1991 when it was under the rule of the State Law and Order Restoration Council.¹⁰ Since then, the UN Commission on Human Rights and the International Labor Organization (ILO) Commission on Inquiry have affirmed forced labor as a serious issue in Burma.¹¹

9. See BERTIL LINTENER, *OUTRAGE: BURMA'S STRUGGLE FOR DEMOCRACY* 192–206 (1990); see also MATHEA FALCO, *COUNCIL ON FOREIGN REL., BURMA, TIME FOR CHANGE* 8 (2003), <http://www.cfr.org/burmamyanmar/burma-time-change/p6054>.

10. G.A. Res. 46/132, *Situation in Myanmar*, U.N. Doc. A/RES/46/132 (Dec. 17, 1991) (“*Noting with concern* substantive available information indicating a grave human rights situation in Myanmar”).

11. Commission on Human Rights Res., *Situation of Human Rights in Myanmar*, 1992/58, U.N. Doc. E/CN.4/RES/1992/58, ¶ 2 (Mar. 3, 1992). The International Labor Organization (ILO) has noted:

There is abundant evidence before the Commission showing the pervasive use of forced labor imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construc-

1. Reports of 'gross and systematic' human rights abuse in Burma

It was in 2010 when the UN Special Rapporteur on Human Rights in Myanmar, Tomas Ojea Quintana, pointed out that gross and systematic human rights violations were taking place, which may have amounted to crimes against humanity or war crimes under the terms of the Rome Statute of the International Criminal Court (ICC).¹² Following its long military rule, the government has made democratization efforts since Thein Sein became President of Burma in 2011, which led to the lifting of international economic sanctions and the establishment of diplomatic exchanges between the US and Burma.¹³ A joint commitment to implement the ILO action to elim-

tion and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks. . . .

Int'l Labor Org. [ILO], *Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labor Organization to Examine the Observance by Myanmar of the Forced Labor Convention, 1930 (No. 29)*, ¶ 528 (July 2, 1998), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>

12. For the UN's report addressing the possibility of international crimes occurring in Burma see Human Rights Council Res. 10/27, U.N. Doc. A/HRC/13/48, ¶ 121–22 (Mar. 10, 2010).

According to consistent reports, the possibility exists that some of these human rights violations may entail categories of crimes against humanity or war crimes under the terms of the Rome Statute of the International Criminal Court. . . . United Nations institutions may consider the possibility to establish a commission of inquiry with a specific fact-finding mandate to address the question of international crimes.

Id. See also LINTENER, *supra* note 9, at 192; see also FALCO, *supra* note 9, at 8.

13. Lionel Barber & Gwen Robinson, *Thein Sein Vows to Step Up Myanmar Reforms*, FINANCIAL TIMES (Apr. 4, 2013), <http://www.ft.com/intl/cms/s/0/b0fe31c8-9d07-11e2-88e9-00144feabdc0.html#axzz3GqIdI7q6>; see Publication of General Licenses Related to the Burma Sanction Program, 78 Fed. Reg. 69, 21497 (Apr. 10, 2013) (products of Burmese origin had been banned from entry into the US in the past, but on Nov. 16, 2012, the US Dept. of Treasury issued General License No. 18, which allows the import into the US of any article that is a product of Burma with certain limitations); see also Paul Eckert & Peter Cooney, *U.S. Lifts More Sanctions on Myanmar To Support Reforms*, REUTERS (May 2,

inate forced labor in Burma was also signed with President Obama in 2012, which helped lift ILO restrictions on Burma in June 2012.¹⁴

Nonetheless, reports about human rights abuses perpetrated by Burmese authorities continued. In 2013, the UN General Assembly expressed its concern over human rights violations occurring in Burma, “including arbitrary detention, forced displacement, land confiscation, rape and other forms of sexual violence, and torture and cruel, inhuman and degrading treatment,” and called upon the Burmese government “to take necessary measures to ensure accountability and end impunity, including by undertaking a full transparent and independent investigation into all reports.”¹⁵ Most recently, Burma was criticized by the international community for the Rohingya crisis, whereby the military regime led a crackdown in response to an attack by Muslim militants on Burmese police posts.¹⁶ In September 2017, the UN High Commissioner for Human Rights called the military operation in Rakhine “a textbook example of ethnic cleansing” by citing to satellite imagery and accounts of extrajudicial killings.¹⁷ As such, the human rights situation has not progressed despite Burma’s democratization movement, exposing more companies to serious human rights risks.

2013), <http://www.reuters.com/article/2013/05/02/us-myanmar-usa-sanctions-idUSBRE9411AR20130502>.

14. ILO, *US President in Myanmar: ILO Director-General Welcomes Joint Commitment to Implementation of ILO Plan to Eliminate Forced Labor* (Nov. 19 2012), http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_193629/lang-en/index.htm (The Myanmar government agreed to end forced labor in the country and allow the workers the right to set up trade unions freely); ILO, *ILO Lifts Restrictions on Myanmar* (June 13, 2012), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_183287/lang-en/index.htm.

15. G.A. Res. 67/233, *Situation of Human Rights in Myanmar*, U.N. Doc. A/RES/67/233, (Apr. 8, 2013).

16. *See Two Years on, a Look at the Rohingya Crisis*, REUTERS (Aug. 23, 2019), <https://www.reuters.com/article/us-myanmar-rohingya-timeline/two-years-on-a-look-at-the-rohingya-crisis-idUSKCN1VD044>.

17. U. N. Off. of the High Comm’r for Human Rights [OHCHR], *Opening Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights, Human Rights Council 36th Session, Sept. 11, 2017, available at* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E>.

2. Alleged Human Rights Abuses in Connection with the Shwe Gas Projects

The Shwe Gas Project began in 2000 when the Korean company Daewoo International (“Daewoo”), which is now a part of a Korean conglomerate, POSCO,¹⁸ signed a production-sharing contract with Myanma Oil and Gas Enterprise (MOGE) to kick off its overseas development operations.¹⁹ When Daewoo discovered huge gas reserves in the Shwe gas field in 2004, many other developers began to join the project, such as the state-controlled Korean Gas Corporation (“KOGAS”) and other Indian developers like ONGC Videsh Limited and GAIL Limited, forming the “Shwe Consortium.”²⁰ The Consortium also signed a \$1.4 billion contract with South Korea’s Hyundai Heavy Industries to construct an undersea pipeline and other offshore natural gas production facilities.²¹

The onshore gas pipeline, constructed by the South-East Asia Pipeline Company Limited (SEAP), a Hong Kong registered entity created by the China National Petroleum Corporation (CNPC) and other Shwe Consortium members, extends 771km to the border of China’s Yunnan province in Southwest China.²²

18. Se Young Lee, *Posco to Buy 68% Stake in Daewoo International*, WALL ST. J. (Aug. 30, 2010), <http://online.wsj.com/article/SB10001424052748703369704575460860690937610.html>.

19. DAEWOO INTERNATIONAL, A COMPREHENSIVE REPORT TO BETTER UNDERSTAND THE SHWE PROJECT, PROJECT OVERVIEW 4 (2011), <http://www.business-humanrights.org/Links/Repository/1010226>.

20. Bae Hyun-Jung, *Daewoo International Kick-starts Gas Operation in Myanmar*, KOREA HERALD (July 21, 2013), <http://www.koreaherald.com/view.php?ud=20130721000164>; EarthRights Int’l, Situation Briefing No. 1, *The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy* 3 (March 2011), <https://earthrights.org/wp-content/uploads/the-burma-china-pipelines.pdf> (According to EarthRights Int’l, Daewoo owns 51% of the Shwe Consortium, Gail 9%, KOGAS 8%, MOGE 15%, ONGC Videsh Ltd. 17%, respectively).

21. Hyundai Heavy Industries Co., Ltd., *Hyundai Heavy Signs \$1.4 Billion Myanmar Gas Plant Deal* (Feb. 23, 2010), <http://english.hhi.co.kr/news/view?idx=367>.

22. China National Petroleum Corporation (CNPC), *Myanmar-China Crude Pipeline officially put into operation* (Apr. 11, 2017), <https://www.cnpc.com.cn/en/nr2017/201704/fb3ec32752134be884529e5523c0e80d.shtml>; DAEWOO INTERNATIONAL, *supra* note 19 ; Sudha Ramachandran, *China Secures Myanmar Energy Route*, ASIA TIMES (April 3, 2009),

The Myanmar China Gas Pipeline Project is based on an agreement between Burma's Ministry of Energy and CNPC for the construction, operation, and management of the Myanmar-China Crude Pipeline.²³ On July 21, 2013, it was reported that the gas pipeline project had been completed.²⁴

The project is regarded as a success for its gas reserves discovery, but the operation has also spurred concerns over its human rights policies in the last decade. Civil society and other non-profit organizations have accused companies involved in the pipeline project of failing to meet international standards for environmental and human rights protection, based on the project's destruction of villages, forced labor of local people due to the presence of security forces around the pipelines, underage military recruitment, and forced displacement.²⁵ More specifically, civil society organizations have found that Burmese Army battalions are stationed around the Burma-China pipelines, and soldiers will force civilians to join the local militia and work on various projects around the pipelines.²⁶

B. Situation in the DRC

The DRC has faced some of the worst forms of human rights abuse due to its history of armed conflict and rich mineral resources. As a result, many companies were alleged to be involved in human rights abuse, particularly forced labor, in the

http://www.atimes.com/atimes/South_Asia/KD03Df03.html (CNPC holds 50.9% of shares, with the rest owned by MOGE).

23. China National Petroleum Corporation (CNPC), *CNPC in Myanmar, Major Events* https://www.cnpc.com.cn/en/Myanmar/country_index.shtml (last visited Oct. 27, 2019).

24. Hyun-Jung, *supra* note 20; *Myanmar-China Gas Pipeline Starts to Deliver Gas to China*, CHINA DAILY USA (July 29, 2013), http://usa.chinadaily.com.cn/business/2013-07/28/content_16844673.htm.

25. *See generally* Shwe Gas Movement, *Good Governance and the Extractive Industry in Burma* (July 16, 2013), <http://www.shwe.org/good-governance-and-the-extractive-industry-in-burma/>; Shwe Gas Movement, *Sold Out, Launch of China Pipeline Project Unleashes Abuse Across Burma* (Sept. 5, 2011), <http://www.shwe.org/campaign-update/sold-out-new-report/>; Earth Rights Int'l, *supra* note 20, at 5 (reporting that "there are at least twenty-eight Burmese Army battalions stationed in the area of the Burma-China pipelines").

26. Earth Rights Int'l, *supra* note 20, at 11. (reporting that soldiers around the pipelines "forced villagers to join the local fire brigade and a local militia[, and] to work on the construction of a health clinic that is part of [a company's] socio-economic program").

DRC. This case study will highlight some of the allegations that were made towards companies from China.

1. History of Armed Conflict in the DRC

Conflict in the DRC can be described in terms of two wars. The first war began in 1996 when the Rwandan army invaded eastern DRC, backing the rebel leader Laurent-Désiré Kabila, who toppled President Mobutu Sese Seko.²⁷ The second war, known as the Second Congolese War, began in August 1998 when Kabila broke with his Rwandan allies who, in turn, backed a new rebel group, the Rassemblement Congolais pour la Démocratie (RC), in an attempt to overthrow Kabila.²⁸ This second war cost over three million lives, resulting in the most devastating conflict since World War II.²⁹

The DRC did, however, make some progress toward promoting peace and democracy after the war. The 2002 Agreement at Sun City, South Africa between the main Congolese warring groups and the DRC government—along with other separate agreements with Rwanda and Uganda—marked the end of the Second Congolese War.³⁰ In 2003, a transitional government was appointed with an interim Constitution.³¹ Elections were held in 2005, and a newly approved Constitution came into effect in 2006, providing the institutional framework for the transition.³²

27. For comprehensive historical background, see generally OHCHR, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, ¶ 19 (Aug. 2010), http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf [hereinafter U.N. Report of the Mapping Exercise].

28. *Id.*

29. Int'l Rescue Committee, *Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey* (July 2004), https://www.rescue.org/sites/default/files/migrated/resources/DRC_MortalitySurvey2004_RB_8Dec04.pdf.

30. See U.N. Report of the Mapping Exercise, *supra* note 27, ¶ 19.

31. See generally Kai Peter Ziegler, *Democratic Republic of the Congo: The Transitional Constitution of April 1, 2003*, 3 INT'L J. CONST. L. 662 (2005).

32. U.N. Report of the Mapping Exercise, *supra* note 27, ¶ 805.

Despite these efforts, however, armed conflict and political unrest continues in certain parts of the country to this day.³³ These crises are exacerbated by the fact that much of the population in the DRC lives in extreme poverty. According to the 2015 Human Development Report, the DRC was ranked 176 on the Human Development Index out of 188 countries.³⁴ Nevertheless, foreign companies continue to invest in the DRC due to its rich mineral resources, regardless of the lack of safeguards in place to prevent corporate complicity in human rights abuses.

2. Artisanal Mining and Alleged Human Rights Abuses in the Katanga Region

Significant deposits of minerals and metals can be found in the DRC today, including the world's largest reserve of cobalt. The DRC provides half of the world's cobalt every year.³⁵ As a result, the country heavily relies on the mining industry for development. Mining is also reported to have fueled much of the conflict in the region. In 2001, a panel of experts established under the UN Security Council found that extraction of the DRC's resources has financed and contributed to the conflict in the DRC.³⁶ These minerals are therefore often referred

33. See *DR Congo: Ban says Recommitment to Peace Framework Critical to Addressing Root Cause of Conflict*, U.N. NEWS CENTRE (Sept. 22, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48784>; see OHCHR, *Situation of Human Rights and the Activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo*, U.N. Doc. A/HRC/30/32 (July 27, 2015).

34. U.N. Dev. Programme, *Human Development Report 2015: Work for Human Development* (2015), http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf.

35. Katrina Manson, *DRC: Land of Wasted Opportunity Slips Further*, FINANCIAL TIMES (Feb. 8, 2012), <http://www.ft.com/intl/cms/s/0/17c40540-4e8a-11e1-ada2-00144feabdc0.html#axzz3EJLKivzv> ("It is also the second biggest copper-rich region, with 70m tonnes in reserves").

36. U.N. Group of Experts on the Democratic Republic of the Congo, transmitted by letter dated 12 April 2001 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2001/357, ¶ 109 (Apr. 12, 2001) ("The panel finds a link between the exploitation of the natural resources of the Democratic Republic of the Congo and the continuation of the conflict." In ¶ 148, the panel concluded that "[t]he [DRC] relied on its minerals and mining industries to finance the war").

to as “conflict minerals,” as provided under the Dodd-Frank Act.³⁷

There continue to be widespread reports that the Congolese national army and armed groups in various regions take control over mine sites to seize economic, political, and military power.³⁸ Although mining in the DRC is often carried out by artisanal miners, industrial mining involving foreign companies is also on the rise.³⁹ Artisanal miners are therefore particularly vulnerable to both state officials and private actors who have actual control over the mine sites.⁴⁰

Mineral extraction is particularly widespread in the Katanga region, where much of the mining operation is conducted through artisanal mining.⁴¹ Miners in this region often work in poor conditions, and an increasing number of companies—particularly companies from China—are allegedly involved in serious forms of human rights abuses.⁴² In 2008, out of seventy-five processing companies in Katanga, sixty were Chinese-owned and over ninety percent of the province’s minerals were

37. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. § 78m (2012) [hereinafter Dodd-Frank Act § 1502] (Congress enacted Section 1502 of the Act because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance the conflict in the DRC region).

38. Global Witness, *Faced With a Gun, What Can You Do? War and the Militarisation of Mining In Eastern Congo* (July 21, 2009), https://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf (explaining how companies are buying from suppliers who trade in minerals from the warring parties).

39. WORLD BANK, *Democratic Republic of Congo Growth with Governance in the Mining Sector*, 56 (May 2008), <http://www.worldbank.org/projects/P106982/drc-growth-governance-mineral-sector?lang=en>.

40. Amnesty Int’l, *supra* note 7, at 7 (stating that artisanal miners, who are miners not officially employed by a mining company and instead work independently, are “often forced to sell minerals to specific individuals or companies under threat of being denied access to the mining site in the future, affecting their ability to make a living”); *see also* Global Witness, *Digging in Corruption: Fraud, Abuse and Exploitation in Katanga’s Copper and Cobalt Mines* (2006), <http://www.globalwitness.org/sites/default/files/import/kat-doc-english-lowres.pdf>.

41. Amnesty Int’l, *supra* note 7, at 4–5.

42. *Id.* at 4–6.

sent to China.⁴³ This is a result of the \$6 billion resources-for-infrastructure deal that was initially signed by the Chinese State construction companies and the DRC's state-owned copper company, Gécamines, in September 2007, followed by a more detailed agreement in April 2008.⁴⁴ This Sino-Congolese joint venture created Sino-Congolaise des Mines (SICOMINES).⁴⁵

Numerous civil society groups have alleged that in these operations, Chinese companies and their supply chains are involved in forced labor and forced eviction of Congolese miners.⁴⁶ At the Tilwezembe mine, in particular, conditions for artisanal miners are reported to be difficult and dangerous.⁴⁷ Amnesty International provided that "several sources confirmed that there are frequent injuries and some fatal accidents as a result of landslides, falling boulders, or asphyxiation due to a lack of adequate ventilation."⁴⁸ After conducting various surveys, civil society groups further reported that Chinese companies have little or no understanding of international labor standards, and minerals sold to trading houses are illegally mined using child

43. See Rights & Accountability in Development, *Chinese Mining Operations in Katanga, Democratic Republic of the Congo* 2 (Sept. 2009), <http://www.raid-uk.org/sites/default/files/drc-china-report.pdf>.

44. Global Witness, *China and Congo: Friends in Need, A Report by Global Witness On The Democratic Republic of Congo* (Mar. 2011), http://www.globalwitness.org/sites/default/files/library/friends_in_need_en_lr.pdf (explaining background and details of the agreement and further stating that the infrastructure component was revised from 6 billion to 3 billion dollars in 2009); see also Lee Spears, *China Railway Group Raises Investment in Congo Mining Project*, BLOOMBERG, Sept. 11, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=auhWWOCGioFM>.

45. Michael J. Kavanagh, *Sicomines to Begin Copper Output in 2015 as Reserve Estimate Cut*, BLOOMBERG (May 24, 2013), <http://www.bloomberg.com/news/2013-05-24/sicomines-to-begin-copper-output-in-2015-as-reserve-estimate-cut.html> (explaining that "[t]he Chinese companies, including the state-owned China Railway Construction Corp. and Sinohydro Corp., hold sixty-eight percent of Sicomines, while Gécamines and another state-run Congolese company owns the rest").

46. See Rights & Accountability in Development, *Chinese Mining Operations in Katanga, DRC*, *supra* note 43; Amnesty Int'l, *supra* note 7, at 5.

47. See Amnesty Int'l, *supra* note 7, at 13.

48. *Id.* (reporting based on interviews with artisanal miners at Mwangeji Hospital in Kolwezi, and at Tilwezembe and Kawama mining townships).

labor.⁴⁹ Despite this, DRC authorities allow these Chinese companies to exercise significant control over the mining sites with their state authorities often present at these site.⁵⁰ Forced evictions have also taken place in the settlement of Luisha, which is frequently taken over by companies with ties to the political elite.⁵¹ In 2012, Glencore, a Swiss-based commodities giant, was also accused of child labor in the DRC.⁵²

C. Corporate Complicity in Gas and Mining Projects

Based on the case studies of Burma and the DRC, this section aims to explain the legal implications of these two examples on both the domestic and international level. The first part of this section examines whether these serious human rights abuses amount to international crimes under international law. The second part aims to determine whether these business activities caused the abuses and explores the possibility of pursuing corporate accountability.

49. See Rights & Accountability in Development, *Chinese Mining Operations in Katanga, DRC*, *supra* note 43, at iv, 17–19 (“There were an estimated one million artisanal miners, 20,000 of whom were children in Katanga as of August 2008”); see also Frank Piasecki Poulsen, *Children of the Congo Who Risk Their Lives to Supply Our Mobile Phones*, *GUARDIAN* (Dec. 7, 2012), <http://www.theguardian.com/sustainable-business/blog/congo-child-labour-mobile-minerals> (reporting that “children are working to extract minerals essential for the electronics industry.”).

50. Amnesty Int’l, *supra* note 7, at 17; see also Tracy Fehr, *The Congo Connection between Slavery and Conflict Minerals*, *ENOUGH PROJECT* (July 7, 2011), <http://www.enoughproject.org/blogs/congo-connection-between-slavery-and-conflict-minerals> (reporting that “slaves in and around the mines in eastern DRC serve as free and/or cheap labor for armed groups, enabling them to continue their trade in conflict minerals.”).

51. Amnesty Int’l, *supra* note 7, at 22 (reporting based on interviews by Amnesty International with artisanal miners in Luisha in October 2011).

52. Tim Worstall, *Glencore in Child Labour Allegations*, *FORBES* (Apr. 15, 2012, 5:51 AM), <http://www.forbes.com/sites/timworstall/2012/04/15/glencore-in-child-labour-allegations/>; Nathalie Thomas, *Glencore Accused of ‘Child Labor’ in the Democratic Republic of Congo*, *TELEGRAPH* (Sept. 8, 2014, 5:45 AM GMT), <http://www.telegraph.co.uk/finance/commodities/9205869/Glencore-accused-of-child-labour-in-Democratic-Republic-of-Congo.html> (reporting based on investigation by the BBC’s Panorama, Glencore is accused of forcing children as young as 10 to work in the Tilwezembe mine).

1. Serious Human Rights Abuses Amounting to International Crimes

The most serious forms of human rights abuses addressed by civil society organizations concerning the gas and mining projects include torture, forced labor, and forced displacement. Under Article 7 of the Rome Statute of the ICC, these offenses can be prosecuted as crimes against humanity when committed as part of a “widespread or systematic attack against [a] civilian population.”⁵³ Forced labor constitutes the offense of enslavement under Article 7(2)(c) of the Rome Statute, which is based on the definition of enslavement under the 1926 Slavery Convention.⁵⁴ Further, the judgment in *Prosecutor v. Krnojelac* identified forced labor as an indicator of enslavement and observed that involuntariness is the fundamental definitional feature of the abuse.⁵⁵ With regard to forced displacement of

53. The crimes of torture, forced displacement, and forced labor are offenses under Articles 7(2)(c), 7(2)(d), and 7(2)(f) of the Rome Statute, respectively. If these offenses were perpetrated in the context of an armed conflict, they may constitute a war crime under Article 8 of the Rome Statute. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 353–56 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (confirming that slavery is expressly prohibited under Additional Protocol II of 1977).

54. According to the 1926 Slavery Convention, slavery is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,” see Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; see also International Criminal Court, *Elements of Crimes*, art. 7(1)(c), U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter *Elements of Crimes*] (providing that “the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.” A footnote under the *Elements of Crimes* further explains that “deprivation of liberty may, in some circumstances, include exacting forced [labor] or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956”). *Id.*

55. *Prosecutor v. Krnojelac*, ¶ 359 (deciding that, “[this is] a factual question which has to be considered in light of all the relevant circumstances on a case by case basis. . . . What must be established is that the relevant persons had no real choice as to whether they would work”); The Trial Chamber considered the following factors to be relevant in determining whether an individual had a choice to work: 1) “the substantially uncompensated aspect of the labor performed;” 2) the vulnerable situation of the detainees; 3) allega-

Burmese and Congolese victims, these acts may constitute “deportation or forcible transfer of population” under Article 7(2)(d) of the Rome Statute, as well as torture under Article 7(2)(e).⁵⁶ Torture is defined as “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.”⁵⁷

Torture, forced labor, and forced displacement may be recognized as crimes against humanity under Article 7 of the Rome Statute if they meet the following criteria: 1) the act must be perpetrated in a “widespread or systematic” manner; 2) the act must be in pursuance or “in furtherance of a [s]tate or organizational policy”; and 3) the act must be perpetrated “with the knowledge of the attack.”⁵⁸ As for the elements of the criteria, the jurisprudence of international criminal tribunals has interpreted the term “widespread” to mean the large-scale nature of the attack against civilians and the number of its victims, and the concept of “systematic” to indicate “the organized nature of the acts of violence.”⁵⁹

Regarding the situation in Burma and the DRC, the question of whether these abuses fall into the category of crimes against humanity will have to be decided based on the jurisprudence of these international tribunals. There is, however, evidence that authorities have been involved in international crimes throughout both countries. In March 2010, Special Rapporteur Quintana pointed out in March 2010 that gross and systematic human rights violations, which may amount to international crimes, were taking place in Burma as a result of Burma’s state policy.⁶⁰ As for the DRC, the UN recently reported in May

tions that unwilling detainees “were either forced to [work] or placed in solitary confinement;” 4) inhumane conditions in the detention camp. *Id.* ¶ 373.

56. See Rome Statute, *supra* note 53, arts. 7(2)(d), 7(2)(e).

57. *Id.*

58. See Rome Statute, *supra* note 53, art. 7.

59. Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment, ¶ 648 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); and Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 580 (Sept. 2 1998).

60. See H.R.C. Res. 13/48, *supra* note 12, ¶ 121–22 (“United Nations institutions may consider the possibility to establish a commission of inquiry with a specific fact-finding mandate to address the question of international crimes”) (“United Nations institutions may consider the possibility to establish a commission of inquiry with a specific fact-finding mandate to address

2015 that Congo rebels continue to be involved in abuses that may amount to crimes against humanity and war crimes in certain parts of the DRC region.⁶¹

2. Causal Link between Project Operations and Human Rights Abuse

Various UN bodies have recognized the potential connection between human rights abuses and corporations operating in Burma and the DRC. With regard to the situation in Burma, the 1998 Commission on Inquiry first recognized the link between corporations and human rights abuses by stating that there is “a pervasive use of forced labor” by Burmese authorities and the military for various construction and production projects, including infrastructure work in support of the military.⁶² In 2010, Special Rapporteur Quintana recognized in his

the question of international crimes”); *see also* INT'L HUMAN RIGHTS CLINIC AT HARVARD LAW SCHOOL, CRIMES IN BURMA 74, 91 (2009), <http://97.97.254.70/hrharvard/wp-content/uploads/2013/02/Crimes-in-Burma.pdf> (evaluating Burma's breaches, such as forced displacement, sexual violence, extrajudicial killings, and torture, in light of the Rome Statute. According to the report, UN actors have repeatedly claimed that these violations are both “widespread” and “systematic,” as well as part of a “policy”).

61. *See generally* Rep. of the U.N. Joint Human Rights Office On Int'l Humanitarian Law Violations Committed by Allied Democratic Forces (ADF) Combatants in the Territory of Beni, North Kivu Province, Between 1 October and 31 December 2014 (May 2015), http://www.ohchr.org/Documents/Countries/CD/ReportMonusco_OHC_HR_May2015_EN.pdf; *see also* Tom Miles, *Congo Rebels May Have Committed Crimes Against Humanity: U.N.*, REUTERS (May 13, 2015), <http://www.reuters.com/article/us-congodemocratic-un-idUSKBN0NY16A20150513>.

62. ILO, *Forced Labor in Myanmar (Burma)*, *supra* note 11, ¶ 528. ILO found in Part V that

[T]here is abundant evidence before the Commission showing the pervasive use of forced labor imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks.

progress report to the UN Human Rights Council that there were multiple reports of human rights abuses associated with natural gas projects in Burma, including the Shwe gas pipeline project.⁶³ Special Rapporteur Quintana further recognized that the oil companies rely on the Burmese military to provide security for their projects, and that “rampant use of forced labor” is reported in the Yadana pipeline and the Shwe gas pipeline projects.⁶⁴

The US State Department’s 2013 Human Trafficking Report similarly acknowledged the link between corporations and human rights abuses, stating that “military and civilian officials have systematically forced men, women, and children into working for the development of infrastructure, in state-run agricultural and commercial ventures, and as porters for the military,” and that “various forms of coercion, including threats of financial and physical harm, to compel households to provide forced labor” have been used.⁶⁵ Both 2013 and 2014 versions of the report additionally recognized that forced labor was perpetrated by both military officials and entities in the private sector.⁶⁶ With regard to forced displacement and land confiscations, in 2013, the UN Special Rapporteur recognized that, although there is no clear data, confiscations have been increasing since 2012 as a result of infrastructure projects and the exploitation of natural resources with the involvement of security forces, local government officials, and private businesses.⁶⁷

Id.

63. H.R.C. Res. 13/48, *supra* note 12, ¶ 112.

64. *Id.*

65. U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 111 (2013) [hereinafter 2013 U.S. Human Trafficking Report].

66. *Id.*, at 111–12; *see also* U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 114 (2014) [hereinafter 2014 U.S. Human Trafficking Report]; U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 105 (2015) [hereinafter 2015 U.S. Human Trafficking Report] (similarly reporting that the Burmese military, and to a lesser extent civilian officials as well as some ethnic armed groups, use various forms of coercion, “including threats of financial and physical harm, to compel households to provide forced labor”).

67. Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar, ¶ 35, U.N. Doc. A/HRC/22/58 (Apr. 17, 2013) (recommending that the Government should “ensure the protection of land and housing rights through impact assessments prior to development projects, consultation with affected individuals and communities, the provision of adequate restitution and compensation, and the conferment of legal security of tenure” *Id.* at ¶ 91;

Concerning the DRC, various UN reports had already recognized the link between corporations and human rights abuses. In 2001, a panel of experts established under the UN Security Council found that the extraction of resources had financed and fueled the conflict in that country.⁶⁸ In the panel's final report, produced in 2002, it listed twenty-nine companies and fifty-four individuals for whom it recommended the imposition of financial restrictions and travel bans.⁶⁹ The UN panel further reported that many of the mine sites were controlled by high-ranking political figures from government and armed groups.⁷⁰

Similarly, the 2014 US Human Trafficking Report stated that a significant number of Congolese artisanal miners were being "exploited in situations of debt bondage by business people and supply dealers."⁷¹ The report also found that mines in the DRC, including the Katanga region, are often controlled by armed groups, such as the Democratic Forces for the Liberation of Rwanda (FDLR), Mai Mai Kata Katanga and Mai Mai Morgan, and the March 23 Movement (M23), as well as groups under the auspices of the Congolese national army (FARDC).⁷² These groups often use threats and coercion to force men and children to mine for minerals, and these miners are then forced to con-

parliament established a commission to deal with land confiscations, and the Special Rapporteur recommended making the results public).

68. U.N. Group of Experts on the Democratic Republic of the Congo, *supra* note 36, ¶ 109 (Apr. 12, 2001) ("The panel finds a link between the exploitation of the natural resources of the Democratic Republic of the Congo and the continuation of the conflict." In ¶ 148, the panel concluded that the DRC relies on its minerals and mining industries to finance the war).

69. *See* U.N. Group of Experts on the Democratic Republic of the Congo, transmitted by letter dated 15 October 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/1146 (Oct. 16 2002) (including an annex (Annex III) of eighty-five other companies, which it declared to be in violation of the OECD Guidelines for Multinational Enterprises).

70. Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo, Letter dated 12 April 2001 from the Secretary-General to the President of the Security Council, S/2001/357, ¶ 195 (Apr. 12, 2001) ("Presidents and other decision makers often tolerate, organize or put in place the framework and conditions to maintain the status quo of exploitation and war"); *see also* Global Witness, *Digging in Corruption*, *supra* note 40.

71. 2014 U.S. Human Trafficking Report, *supra* note 66, at 139 (Democratic Republic of the Congo).

72. *Id.*

tinue working to pay off their constantly accumulating debts that are impossible to repay.⁷³ The report further recognized that “a significant number of children in Katanga, Eastern Kasai, Western Kasai, North Kivu, South Kivu, and Orientale are exploited in artisanal mining.”⁷⁴ Another report published by the US Department of Labor in 2012 recognized the prevalence of the worst forms of child labor in the DRC, in areas including mining, agriculture, and conscription as child soldiers.⁷⁵ As such, there is a possible link between the operation of the development projects and the forced labor, forced displacement, and torture in the country, all of which may constitute corporate complicity in international crimes.

II. LIMITATIONS IN THE CURRENT INTERNATIONAL AND DOMESTIC SYSTEM

There are four forums through which legal action can be taken to address corporate complicity in international crimes. The primary responsibility lies with the host government to prevent all forms of *jus cogens* crimes occurring in its territory.⁷⁶ Second, the home government may be able to exercise jurisdiction over corporate officials and the company for extraterritorial activities if the corporation is registered in the territory of the home state. Third, a government may be able to exercise universal jurisdiction against a foreign company and its corporate officials for alleged international crimes that occurred in foreign territory.⁷⁷ As a last resort, in the event that states are unwilling or unable to act, the ICC may be able to initiate in-

73. *Id.*

74. *Id.*

75. U. S. DEP'T OF LABOR, FINDINGS ON THE WORST FORMS OF CHILD LABOR, DEMOCRATIC REPUBLIC OF THE CONGO (2012), http://www.dol.gov/ilab/reports/child-labor/congo_democratic_republic.htm.

76. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67 (1996) (explaining the concept of *jus cogens* as “the compelling law’ [which] holds the highest hierarchical position among all other norms and principles”).

77. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice* 42 VA. J. INT'L L. 81, 88 (2002) (explaining that a state may exercise universal jurisdiction “without any jurisdictional connection or link between the place of commission, the perpetrator’s nationality, the victim’s nationality, and the enforcing state. . . .” Instead, a state may rely “exclusively [o]n the nature of the crime” for its jurisdictional basis.).

vestigations into corporate officials. The next section will examine some of the possibilities and limitations of these four approaches.

A. Measures by the Host Government

The host government has the responsibility to provide an investment environment conducive to the protection of rights, including property rights, basic services such as law enforcement and prudential surveillance, and “efficient and effective” management of the public sector.⁷⁸ Yet, in most instances, the host government is not able to provide an adequate environment for protecting the rights of individuals and reducing human rights risks due to lack of effective control. This will be examined in more detail for the case studies of Burma and the DRC.

1. Burmese Government

While the Burmese government is not a party to the Rome Statute, the UN Special Rapporteur has pointed out that “the mere existence of this possibility [of international crimes] obliges the Government of Myanmar to take prompt and effective measures to investigate” the facts concerning alleged perpetration of international crimes.⁷⁹ Nevertheless, the Burmese legal system is limited in its ability to investigate and prevent such crimes.

Forced labor is criminalized in Burma under the new Wards and Village Tracts Administration Act, passed in March 2012, and Penal Code Section 374.⁸⁰ Forced labor is also prohibited under Section 359 of the Constitution of Burma, which was en-

78. Org. for Econ. Cooperation and Dev. [OECD], *Introduction of OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006), <http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>.

79. H.R.C. Res. 13/48, *supra* note 12, ¶ 121–22.

80. 2013 U.S. Human Trafficking Report, *supra* note 65, at 112; see THE REPUBLIC OF THE UNION OF MYANMAR MINISTRY OF HOME AFFAIRS, THE WARD OR VILLAGE TRACT ADMINISTRATION LAW, http://www.burmalibrary.org/docs15/2012-Ward_or_Village_Tract_Administration_Bill-2012-02-24-en.pdf; see also Penal Code (Myan.), § 374, available at <http://hrlibrary.umn.edu/research/myanmar/Annex%20K%20-%20Myanmar%20Penal%20Code.pdf>.

acted in 2008.⁸¹ As a member of the ILO, moreover, Burma is obliged to uphold the ILO's eight conventions, including the Abolition of Forced Labor Convention (ILO No. 105), which prevents the use of forced labor "as a method of mobilizing and using labor for purposes of economic development."⁸²

According to multiple US State Department Human Trafficking Reports, however, the Burmese government is not effectively enforcing these laws. First, the Burmese military and insurgents continue to be involved in forced labor. The 2013 report found that "military personnel and insurgent militia engage in the unlawful conscription of child soldiers and continue to be the leading perpetrators of forced labor inside the country, particularly in conflict-prone ethnic areas."⁸³ The 2015 report similarly acknowledged that the Burmese military, civilian officials, and some ethnic armed groups use various forms of coercion to compel victims to provide forced labor.⁸⁴

Second, the Burmese courts lack transparency and independence.⁸⁵ International organizations and non-governmental organizations are often unable to verify court statistics provided by the government, and Burma lacks local-level coordination between police and social welfare officials.⁸⁶ As a result, the US State Department has identified the government of Burma as

81. 2013 U.S. Human Trafficking Report, *supra* note 65, at 112; *see also* CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR (2008), *available at* <https://www.wipo.int/edocs/lexdocs/laws/en/mm/mm009en.pdf>.

82. ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, ¶ 2, 86th Session, Geneva (June 1998), <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> ILO further stated:

[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely . . . the elimination of all forms of forced or compulsory labor.

Id.

83. 2013 U.S. Human Trafficking Report, *supra* note 65, at 112 (Burma has been identified to be on the Tier 2 Watch List); *see also* 2014 U.S. Human Trafficking Report, *supra* note 66, at 114.

84. 2015 U.S. Human Trafficking Report, *supra* note 66, at 105.

85. 2013 U.S. Human Trafficking Report, *supra* note 65, at 112.

86. *Id.*

not fully compliant with the minimum standards for prohibiting human trafficking and forced labor.⁸⁷ The US State Department does recognize that significant efforts have been made since the recent change in regime, but the climate of impunity and oppression created by the previous government continues to sustain a lack of accountability within military ranks for the perpetration of forced labor.⁸⁸

Land confiscations also continue, and villagers are often not compensated for confiscated land. Corruption persists in the regulatory procedures governing land compensation, particularly with regard to the MOGE.⁸⁹ There are reports that MOGE has retained up to fifty percent of land compensation payments made by construction companies.⁹⁰ As such, in a speech made to the ILO in Geneva on June 14, 2012, pro-democracy leader Aung San Suu Kyi urged other countries to prohibit their companies from partnering with MOGE unless there existed mechanisms for transparency and accountability.⁹¹

The Burmese government seems to be aware of these alleged abuses, but the gas development projects have become a lifeline for the Burmese authorities. According to the Ministry of Energy in Burma, the government has already earned more than \$16 billion in total from the gas projects in Burma.⁹² More spe-

87. *Id.*; see also 2015 U.S. Human Trafficking Report, *supra* note 66, at 105 (“The Government of Burma does not fully comply with the minimum standards for the elimination of trafficking”).

88. *Id.* at 105–06.

89. EarthRights Int'l, *There is No Benefit, They Destroyed Our Farmland* (Apr. 2013), <http://www.earthrights.org/publication/there-no-benefit-they-destroyed-our-farmland> (reporting based on interviews with Burmese villagers).

90. Marco Simons, *Testimony in front of the Tom Lantos Human Rights Commission: Business and Human Rights in Burma (Myanmar)* (Feb. 28, 2013), [http://tlhrc.house.gov/docs/transcripts/2013_02_28_Burma/FINAL%20Testimony%20of%20Marco%20Simons%20-%20Lantos%20Commission%20-%20Business%20and%20Human%20Rights%20in%20Myanmar%20-%202026%2013%20\(3\).pdf](http://tlhrc.house.gov/docs/transcripts/2013_02_28_Burma/FINAL%20Testimony%20of%20Marco%20Simons%20-%20Lantos%20Commission%20-%20Business%20and%20Human%20Rights%20in%20Myanmar%20-%202026%2013%20(3).pdf).

91. Stephanie Nebhay & Tom Miles, *Suu Kyi Warns Investors Off Myanmar's State Oil & Gas Firm*, REUTERS (June 14, 2012), <http://www.reuters.com/article/2012/06/14/oukwd-uk-myanmar-suukyi-idAFBRE85D0KA20120614>.

92. *Ministry Reveals Gas Revenue for First Time*, NATION (July 18, 2012), <http://www.nationmultimedia.com/aec/Ministry-reveals-gas-revenue-for-first-time-30186368.html> (“[Burma]’s Energy Ministry, for the first time, unveiled

cifically, it earned more than \$2 billion in 2006–2007, \$2.4 billion in 2007–2008, \$2.8 billion in 2008–2009, \$2.6 billion in 2009–2010, \$2.9 billion in 2010–2011, and \$2.6 billion in 2011–2012.⁹³ The ministry claims that the earnings from the projects were spent on building infrastructure for development within the country, but certain civil society groups argue that these earnings are contributing to “high-level corruption and authoritarianism”, and ultimately “propping up Burma’s military government.”⁹⁴

2. The Congolese Government

The situation in the DRC is largely similar to that in Burma. In July 2006, the government enacted the Sexual Violence Statute, which prohibits sexual slavery, sex trafficking, child prostitution, and forced prostitution.⁹⁵ Adult forced labor is not criminalized in the DRC and only child labor is prohibited under the Child Protection Code.⁹⁶ Yet, even here, according to the US Human Trafficking Report, law and enforcement authorities often do not have sufficient training and resources to conduct investigations and litigate cases.⁹⁷ The report further noted that “impunity for trafficking crimes by the security fore-

to the public its revenue from the Yadanda and Yedagun projects . . . [to show transparency in administration.”).

93. *Id.*

94. *Gas Firms ‘Prop up Burma’s Junta,’* BBC NEWS (Sept. 10, 2009), <http://news.bbc.co.uk/2/hi/8249374.stm> (reporting that energy giants Total and Chevron are accused of “propping up Burma’s military government through their ongoing gas projects in the country”); Earthrights Int’l, *Total Impact: The Human Rights, Environmental and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Ruled Burma (Myanmar)* 43 (Sept. 2009), <https://www.earthrights.org/sites/default/files/publications/total-impact.pdf>.

95. 2014 U.S. Human Trafficking Report, *supra* note 66, at 140 (reporting that “penalties for these offences range from three months to twenty years’ imprisonment”).

96. *Id.* at 143 (reporting that penalties for forced child labor, debt bondage, and child commercial sexual exploitation are not “sufficiently stringent” for the serious nature of the crime); *see also* 2015 U.S. Human Trafficking Report, *supra* note 65, at 129 (reporting that “the government did not enact draft anti-trafficking legislation finalized in the previous reporting year, and knowledge of the country’s existing anti-trafficking laws was uneven across the government”).

97. 2014 U.S. Human Trafficking Report, *supra* note 66, at 143.

es remained acute.”⁹⁸ The National Ministry of Labor was responsible for inspecting worksites for child labor, yet the ministry did not identify any cases of forced child labor in 2013.⁹⁹

The DRC, however, is one of very few countries that have made efforts in the past to hold corporate officials accountable for international crimes. In 2007, the Congolese local court tried three individual company members for complicity in war crimes related to the Kilwa incident of 2004.¹⁰⁰ In that incident, foreign employees of a multinational company—one Canadian and two South African employees of Anvil Mining—were alleged to have provided logistical support for a military counter-offensive.¹⁰¹ The employees were acquitted, however, because the charges were deemed to be “unfounded”.¹⁰² Certain human rights organizations have claimed that these individuals were acquitted due to corruption, lack of judicial capacity, and political interference in the justice system of the DRC.¹⁰³ The UN Mapping Report also concluded that the judicial decisions made during the Kilwa case illustrated a lack of impartiality and independence within the military justice system of the DRC.¹⁰⁴

98. *Id.* at 141.

99. *Id.* at 142.

100. See UN/MONUC Rep. on the Conclusion of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Katanga Province) (Oct. 15 2004), available at http://raid-uk.org/docs/Kilwa_Trial/MONUC_report_oct05_eng_translated_by_RAID.pdf; Adam McBeth, *Crush by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L. J. 143–47 (2008). UN Report of the Mapping Exercise, *supra* note 27, ¶ 778.

101. Global Witness, *Victims of Kilwa massacre Denied Justice by Congolese Military Court* (July 17, 2007), <http://www.globalwitness.org/library/victims-kilwa-massacre-denied-justice-congolese-military-court> (several human rights organizations released the report calling for action from governments).

102. Joe Bavier, *Congo Court Clears Former Anvil Staff of War Crimes*, REUTERS (June 28, 2007), <http://www.reuters.com/article/2007/06/28/idUSL28846669>.

103. Int'l Comm'n of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations, Democratic Republic of Congo* 39 (2012), <https://www.icj.org/wp-content/uploads/2012/06/Democratic-Republic-of-Congo-rights-abuses-corporations-publication-2012.pdf>.

104. The report concluded that the Kilwa case demonstrated:

political interference and a lack of impartiality are all the more striking when economic interests are at stake. The case could have set an important precedent in terms of cor-

In addition, considering the economic benefits incurred from the massive investments surrounding mining operations in Katanga, the DRC government would need strong incentives to pursue corporate accountability. The resources-for-infrastructure deal signed by Chinese state construction companies and Gécamines in April 2008 amounts to \$3 billion.¹⁰⁵ According to a World Bank report, the DRC's "superb mineral resource" can bring in revenues equivalent to about twenty percent of the GDP by 2020.¹⁰⁶

In sum, the direct economic link between corporate projects and the host governments, as well as the heavy involvement of Burmese and Congolese authorities in related economic activities, forced labor, and land confiscations, discourage the government from initiating any investigations. Furthermore, the lack of transparency and independence characterizing judicial courts in Burma and the DRC, as well as weak public institutions, hinder the process of promoting effective governance.

B. Measures by the Home Government

In response to such abuses, home governments may be able to reach out to their corporations to prevent alleged international crimes. According to the UN Guiding Principles, under current international human rights law, home states are not necessarily obliged to regulate "the extraterritorial activities of businesses domiciled in their territory [or] jurisdiction," but are also not prohibited from doing so.¹⁰⁷ These UN Guiding Princi-

porate accountability. Instead, all the defendants were acquitted of the charges relating to the events in Kilwa, in a trial by a military court that the UN regarded as a failure to meet international standards of fairness.

U.N. Report of the Mapping Exercise, *supra* note 27, ¶ 411–43.

105. See Global Witness, *China and Congo*, *supra* note 44 (explaining background and details of the agreement); see also Spears, *supra* note 44.

106. Manson, *supra* note 35; World Bank, *Project Information Document Appraisal Stage, DRC-Growth with Governance in the Mineral Sector*, Report No. AB5302 (2009), http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2010/04/19/000262044_20100420091223/Rendered/PDF/PID0appraisal0april016.pdf.

107. U.N. Guiding Principles on Business and Human Rights, *supra* note 5, at 11; Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, transmitted by note from Secretary General to the General Assembly, *Human Rights and Trans-*

ples do state, however, that with regard to abuses occurring in conflict-affected areas “where transnational corporations are involved, their ‘home’ [s]tates thereof have roles to play in assisting both those corporations and host [s]tates to ensure that businesses are not involved with human rights abuse,” given that the host state may lack effective control.¹⁰⁸ The Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises also state that member states should encourage enterprises operating within their territories to observe the Guidelines “wherever they operate,” taking into account the particular circumstances of each country.¹⁰⁹ Some scholars and practitioners have even adopted new principles, such as the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, which recognize that the “extraterritorial obligations” of states exist to “respect, protect and fulfill economic, social and cultural rights.”¹¹⁰

In line with such trends, countries such as the US and UK have begun to implement Responsible Investment Reporting Requirements for companies that may face risks of extraterritorial human rights abuse. With respect to the investments in Burma, the US government requires all US companies investing in Burma to release detailed public reports showing their efforts taken to respect human and labor rights and prevent

national Corporations and Other Business Enterprises, ¶ 14, UN Doc. A/68/279 (Aug. 7, 2013).

108. Commentary to Principle 7, U.N. Guiding Principles on Business and Human Rights, *supra* note 5 (recognizing that the host state may not be able to protect human rights adequately due to a lack of effective control).

109. See OECD, *The OECD Guidelines For Multinational Enterprises, Text and Commentary*, at 17 (2011), <http://dx.doi.org/10.1787/9789264115415-en>.

110. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted at a gathering convened by Maastricht University and the International Commission of Jurists on September 28, 2011 (Feb. 29, 2012), http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf; Olivier de Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, (working paper, Dec. 2006) *available at* <https://crdho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf>.

corruption.¹¹¹ The US further requires companies to disclose their use of conflict minerals in the products they manufactured under the Dodd-Frank Act.¹¹² On December 16, 2016, the US State Department released the US National Action Plan on Responsible Business Conduct, following other countries, such as the UK.¹¹³ In addition, the UK government made recent changes to the Companies Act in October 2013 by requiring certain commercial organizations to report non-financial information, including disclosures on human rights, and further en-

111. U.S. DEP'T OF STATE, BURMA RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS (2013) [hereinafter US Burma Reporting Requirements] (requiring any US person, individual, or entity, to notify the Department of State of due diligence policies and procedures in which the individual or entity is taking revenue for a new investment in Burma); Steven Lee Myers, *U.S. Companies Investing in Myanmar Must Show Steps to Respect Human Rights*, N. Y. TIMES (June 30, 2013), <http://www.nytimes.com/2013/07/01/world/asia/us-companies-investing-in-myanmar-must-show-steps-to-respect-human-rights.html>.

112. See Dodd-Frank Act § 1502.

113. See U.S. STATE DEPARTMENT, RESPONSIBLE BUSINESS CONDUCT, FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (Dec. 16, 2016), <http://www.state.gov/documents/organization/265918.pdf> (explaining that the National Action Plan focuses on a broad range of issues including “human rights, the rights of indigenous peoples, labor rights, land tenure and property rights, anti-corruption, and transparency.”); see also White House, *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct* (Nov. 20, 2014), <https://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business-> (“On September 24, 2014, the President announced plans to develop a National Action Plan to promote responsible business conduct abroad, consistent with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises”).

acted the UK Modern Slavery Act in 2015.¹¹⁴ Today, more than twenty countries have followed similar measures.¹¹⁵

For serious human rights abuses amounting to international crimes, states also have the option to prosecute corporate officials for involvement in the crime. For example, Dutch courts prosecuted Dutch corporate officials in 2005 for selling chemicals to the Iraqi government for the production of mustard gas, which was used in the massacres against Kurdish minorities in Iraq.¹¹⁶ Such practices may be a step forward, but criminal law scholars have found that individual criminal responsibility has less of an impact in incentivizing companies to adopt effective compliance measures within their organizational structures than placing direct liability on the organization itself.¹¹⁷ On the

114. See SEC'Y OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS BY COMMAND OF HM, *Good Business: Guiding Principles on Business and Human Rights*, 2013, Cm. 8695, at 13 (UK) (setting out obligations to protect against human rights abuse within UK jurisdiction involving business enterprises); see also Modern Slavery Act, 2015, C. 30 (Eng.), <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted/data.ht>; HOME OFFICE, GUIDANCE, PUBLISH AN ANNUAL MODERN SLAVERY STATEMENT (Mar. 12, 2019), <https://www.gov.uk/guidance/publish-an-annual-modern-slavery-statement> (requiring all commercial organizations that operate in the UK with an annual turnover of 36 million pounds or more to prepare a Slavery and Human Trafficking Statement each financial year).

115. The UN Working Group strongly encouraged all states to develop, enact and update a National Action Plan as part of their state responsibility. See OHCHR, State National Action Plans, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Oct. 19, 2019).

116. Kaleck, *supra* note 4; Rb. Gravenhage [District Court of The Hague], Dec. 23, 2005, AU8685 2005, m.nt. (Public Prosecutor / Van Anraat) (Neth.), Hof-Gravenhage [Court of Appeals, The Hague], Jul. 8, 2007, NJFS 2007, 183 m.nt. (Public Prosecutor / Van Anraat) (Neth.), http://zoeken.rechtspraak.nl/resultpage.aspx?Snelzoeken=true&searchtype=ljn&ljn=BA6734&u_ljn=BA6734.

117. See generally CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001) (explaining the debates surrounding the consideration of corporate criminal liability in courts, legislatures, and international organizations); BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY (1993) (explaining why accountability for corporate crime is necessary, and examining theories and strategies to hold corporations accountable); John C. Coffee, Jr. "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 387 (1981) (examining the different perspectives for corporate punishment and arguing that "law enforcement officials cannot afford to

other hand, home governments may be able to exercise jurisdiction over the parent company for the conduct of its subsidiaries under existing national laws. One recent case, in which Swiss authorities opened an investigation against a Swiss refiner for pillaging gold from the DRC, is a major example.¹¹⁸

The challenge lies in the fact that business communities in general have shown strong opposition to greater regulation of private investment activities abroad because of the negative impact such regulations may have on their competitiveness. US companies, in particular, have expressed opposition to the reporting requirements issued by the US government for investments in Burma, as well as under the Dodd-Frank Act for conflict minerals.¹¹⁹ As a result, state authorities are reluctant to punish the extraterritorial activities of companies and company officials, particularly when large economic costs and benefits are at stake. The estimated investment by the Chinese company CNPC for its gas pipeline project in Burma totals around \$2.54 billion, and the pipeline is expected to significantly reduce China's energy import costs.¹²⁰

Nonetheless, there have been certain avenues for victims to seek legal redress through civil action in the US, such as the *Unocal* case under the unique mechanism of the Alien Tort Claims Act (ATS).¹²¹ The recent decision of the Supreme Court

ignore either the individual or the firm in choosing their targets, but can realize important economies of scale by simultaneously pursuing both”).

118. James G. Stewart, Opinion, *Punish Companies That Pillage*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/opinion/punish-companies-that-pillage.html>.

119. With regard to the Dodd-Frank Act, some argue that the law is “adversely affecting innocent bystanders,” since it is resulting in a “de facto embargo of minerals,” see Ben Goad, *Wall Street Reform Rule Said to Increase Violence in Congo*, HILL (May 21, 2013), <http://thehill.com/regulation/business/301075-wall-street-reform-rule-said-to-have-increased-congolese-violence> (Republican Bill Huizenga stated that it “has only led to more violence in the region”); there has also been resistance from U.S. Chamber of Commerce on US Burma Reporting Requirements. See Lee Myers, *supra* note 111. (John Goyer, the chamber’s senior director for the region, argued that American investment in Burma “should be encouraged, not hindered”).

120. *Myanmar-China Pipelines*, HYDROCARBONS TECHNOLOGY, <http://www.hydrocarbons-technology.com/projects/-myanmar-china-pipelines/> (last visited Oct. 19, 2019).

121. See *Doe I v. Unocal Corp.*, 395 F.3d 932, 943 (9th Cir. 2002) (brought against *Unocal* in the US under the ATS in September 1996, alleging that the

of the United States in the *Kiobel* case, however, is likely to reduce this impact.¹²² First, it will be more difficult to hold foreign companies liable using the sufficient territorial nexus requirement.¹²³ Second, there continues to be a debate over corporate liability under the ATS following the decision of the Second Circuit in *Kiobel*, which reversed previous judgments by ruling that the ATS does not reach corporate entities.¹²⁴ There are also certain limits to civil litigation when it comes to deterring corporate abuses in most countries.¹²⁵ The US is unique in allowing civil courts to exercise jurisdiction over parent companies for extraterritorial acts. Most countries in Europe and Asia do not provide such wide extraterritorial scope.¹²⁶

C. Universal Jurisdiction by a Third Government

In addition to the host and home governments, a third country may claim universal jurisdiction over a foreign company for alleged international crimes perpetrated in a foreign territory. In fact, such an attempt was made on April 25, 2002 when Burmese refugees filed suit in Belgium against Total, its chairman, and the former president of its affiliate in Burma.¹²⁷ The refugees alleged that the company's "complicity in crimes against humanity" under Belgium's Universal Jurisdiction Act

company was complicit in the abuse of villagers by the Burmese government. This was a revolutionary case because the US Court of Appeals for the Ninth Circuit recognized corporate liability for forced labor based on the complicity standard that *Unocal* "knowingly" assisted the military in perpetrating the abuses).

122. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 109 (2013).

123. *Id.*

124. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 565 U.S. 961 (2011) (mem.); *but see Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated*, 133 S. Ct. 1995 (2013) (mem.); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

125. See James Stewart, *The Turn to Corporate Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121 (2014).

126. See Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT'L L. 846, 849 (2013) (explaining that the absence of civil suits for human rights violations by corporations in European civil law countries is "largely because such civil actions are unusual and because the benefits of the legal cost structure available in the United States do not exist in European civil law states").

127. See EUROPEAN LAWYER REFERENCE SERIES, GLOBAL BUSINESS & HUMAN RIGHTS: JURISDICTIONAL COMPARISONS 107-109 (2011).

of June 16, 1993 constituted serious violations of international human rights.¹²⁸ The lawsuit against Total in Belgium was the first-ever attempt to hold a company criminally liable for international crimes in a national court based on universal jurisdiction.¹²⁹ The Belgian Cour de Cassation, however, subsequently dismissed the case in 2005, after the Belgian law providing for universal jurisdiction was repealed.¹³⁰

As such, with the retreat of universal jurisdiction, states are generally not incentivized to exercise universal jurisdiction over foreign corporations or individuals.¹³¹ Other countries may exercise universal civil jurisdiction, with the US ATS serving as a unique example. The recent *Kiobel* decision, however, demonstrates that states are largely reluctant to recognize “foreign cubed” cases in which there is a foreign plaintiff suing a foreign defendant for acts committed on foreign soil.¹³²

D. Enforcement through the International Criminal Court

In instances where a state is unable or unwilling to take action as provided under Article 17 of the Rome Statute, the ICC may be able to act as a last resort for investigating alleged international crimes that were authorized or directed by a corporate official.¹³³ In the case study of Burma, Korea and France are parties to the Rome Statute and, therefore, the ICC may be able to exercise jurisdiction over corporate officials who are nationals of those two countries for directing and authorizing the

128. *Id.*

129. See also Bus. & Human Rights Res. Ctr., *Total Lawsuit in Belgium (re Myanmar)*, <http://business-humanrights.org/en/total-lawsuit-in-belgium-re-myanmar#c9336> (last visited Oct. 19, 2019).

130. *Id.* (“In October 2007, based on the universal jurisdiction law as modified by the Constitutional Court, the Belgian federal prosecutor’s office opened a new investigation into this case. The Belgian authorities declared the ‘case closed’ in March 2008, dropping the case against Total”).

131. See also Maximo Langer, *The Diplomacy of Universal Jurisdiction*, 105 AM. J. INT’L. L. 1 (2011) (arguing that there is a tendency for “universal jurisdiction [to concentrate] on defendants who impose little or no cost on prosecuting states”).

132. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. at 108.

133. Rome Statute, *supra* note 53, art. 17; see Reinhold Gallmetzer, *Prosecuting Persons Doing Business with Armed Groups in Conflict Areas*, 8 J. INT’L. CRIM. JUST. 947 (2010) (explaining how the Office of the Prosecutor of the ICC investigates and prosecutes those who finance or assist armed groups in conflict areas).

alleged crimes in Burma. The UN and other international organizations, such as the ILO, have also considered the possibility of taking the situation in Burma to the ICC through the UN Security Council.¹³⁴

The ICC, however, has certain limitations. First, the ICC only exercises jurisdiction over cases that are the “most serious crimes of concern to the international community as a whole” under Article 5 of the Rome Statute.¹³⁵ Article 17 further states that the case must have “sufficient gravity” for the ICC to “justify further action by the Court.”¹³⁶ Moreover, the ICC has not investigated leaders of the Burmese military regime, and under such circumstances, it is unlikely that the ICC will investigate corporate officials who are allegedly facilitating or encouraging crimes committed by the regime.¹³⁷ Second, even if the ICC does pursue individual criminal responsibility of a corporate official, the Rome Statute does not cover all crimes concerning commercial activity. For example, trafficking in conflict goods, a common crime in conflict regions, is not covered under the Rome Statute.¹³⁸ Furthermore, in order to effectively deter abuses and change the behavior of corporations, corporate liability needs to be recognized.¹³⁹ However, these strategies, though already adopted in many national legal systems, have not been established under the ICC regime since the ICC was designed to focus on individuals. As such, more sophisticated strategies are necessary to effectively regulate corporations.

134. Int'l Labor Office, Governing Body, *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labor Convention, 1930 (No. 29), Legal Aspects Arising out of the 95th Session of the International Labor Conference*, GB.297/8/2 (Nov. 2006), <http://www.ilo.org/public/english/standards/relm/gb/refs/pdf/pv297.pdf> (finding that widespread use of forced labor would be “relevant points of departure” for any investigation by the Prosecutor of the ICC); *See also* H.R.C. Res. 13/48, *supra* note 12, ¶ 121–22 (“United Nations institutions may consider the possibility to establish a commission of inquiry with a specific fact-finding mandate to address the question of international crimes”).

135. Rome Statute, *supra* note 53, art. 5.

136. Rome Statute, *supra* note 53, art. 17(1)(d).

137. *See* Gallmetzer, *supra* note 133, at 951 (“The fact that the ICC can only prosecute a limited number of crimes will necessarily leave an impunity gap. This gap will often include persons providing armed groups with finances, weapons and ammunition.”).

138. *See id.*

139. Stewart, *supra* note 125.

III. REDUCING THE GOVERNANCE GAP

The case studies of Burma and the DRC illustrate that there are limitations on inducing states to take action against corporations for complicity in international crimes. In this regard, there is clearly a need for new international norms and mechanisms to guide and help states take more action against corporate complicity in gross human rights abuses that may amount to international crimes. In this context, the next part of this article will examine developing norms in the area of business and human rights and assess whether these norms can be effective in reducing the governance gap in the system.

A. Current Norms and Discussions for Future Norms on Business and Human Rights

In the area of business and human rights, there are two types of norms. The most authoritative text to date is the UN Guiding Principles, which was adopted unanimously by the UN Human Rights Council.¹⁴⁰ The Guiding Principles are based on existing duties of states under international human rights treaties, including the Universal Declaration of Human Rights, and the two UN Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR).¹⁴¹ Although these human rights treaties do not directly address states' duties regarding business, they do impose obligations on states to protect human rights, including abuses arising from non-state parties within their jurisdictional boundaries.¹⁴² This includes the duty of states to protect their own citizens against harmful business activities. Therefore, if states fail to take appropriate steps to "prevent, investigate, punish, and redress private actors' abuse," they may be in breach of their international human rights law obligations.¹⁴³

140. See U.N. Guiding Principles on Business and Human Rights, *supra* note 5, at 3.

141. RUGGIE, *JUST BUSINESS*, *supra* note 5, at 40–42; G.A. Res. 217A (III), Universal Declaration of Human Rights, U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978).

142. RUGGIE, *JUST BUSINESS*, *supra* note 5, at 40–42.

143. See U.N. Guiding Principles on Business and Human Rights, Commentary, *supra* note 5, at 3.

On the other hand, since July 2015, there have been discussions of a new treaty on business and human rights, based on the resolution proposed by representatives from Ecuador and South Africa at the twenty-sixth session of the UN Human Rights Council.¹⁴⁴ It is still unclear when, or even whether, such a treaty will be adopted; many debates have ensued among scholars, practitioners, and human rights activists over whether a treaty is necessary and what it might look like.¹⁴⁵

Various reasons for adopting the treaty have been suggested. Some human rights groups argue that not much has improved on the ground since the adoption of the UN Guiding Princi-

144. See U.N. Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, ¶ 1, Res. A/HRC/RES/26/9 (July 14, 2014) (directing the UN “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises”); The first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was held from July 6–10, 2015, at the Palais des Nations, Geneva, see United Human Rights Council, *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx> (last visited Oct. 19, 2019); Some six hundred non-governmental organizations that have signed on in support through a treaty alliance, see Treaty Alliance, Global Movement for a Binding Treaty, <http://www.treatymovement.com/> (last visited Oct. 19, 2019).

145. See John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, COMMENTARY, INST. FOR HUM. RTS. AND BUS. (July 8, 2014), http://www.ihrb.org/commentary/commentary/past-as-prologue.html#_edn4 (explaining the difficulties of adopting a treaty, particularly due to opposition from home countries of most transnational corporations); see also David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUS. & HUM. RTS. J. 203 (2016), (explaining the need for a treaty on business and human rights to cure the “lacunae and ambiguities” in international law in this field); Shane Darcy, *Key Issues in the Debate on a Binding Business and Human Rights Instrument*, BUS. & HUM. RTS. IN IRELAND (Apr. 13, 2015), <https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/> (discussing issues surrounding the treaty on business and human rights).

ples.¹⁴⁶ A number of organizations further argue that a treaty would be necessary for international standard-setting, particularly when it comes to the “definition or application of standards relating to the extraterritorial dimension of the [s]tate duty to protect” and “standards on gross human rights violations [that are] applicable to business enterprises.”¹⁴⁷ Proponents also argue that there is a need for a more “formal and robust” system of international monitoring and supervision, and new ways to enhance international cooperation surrounding effective investigation and adjudication.¹⁴⁸ As a result, hundreds of human rights organizations have initiated a global call to support an inter-governmental process seeking a legally binding instrument on the issue of business and human rights.¹⁴⁹

John Ruggie, the Special Rapporteur who is the author of the UN Guiding Principles, initially did not suggest adopting a new treaty, believing it would be difficult to garner support from the home countries of most multinational corporations.¹⁵⁰ There had been similar attempts in the past, for example when the UN Commission on Human Rights proposed a treaty-like text entitled “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” in 2003,¹⁵¹ which failed due to resistance from states and businesses.¹⁵² Also, given the many complexities

146. See e.g., Audrey Gaughran, *Closing Remarks at 2014 UN Forum on Business and Human Rights* (Dec. 3, 2014), <http://webtv.un.org/meetings-events/human-rights-council/forum-on-business-and-human-%20rights/watch/closing-conversation-strategic-paths-forward-forum-on-business-and-human-%20rights-2014/3925402001001>.

147. Int’l Comm’n of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights* 15 (June 2014), <http://www.icj.org/business-and-human-rights-need-international-legally-binding-instruments-icj-report/>.

148. *Id.*

149. See e.g. Treaty Alliance, *supra* note 144

150. See John Ruggie, *supra* note 145.

151. U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4 (Aug. 26, 2003).

152. See also Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations*, (Jun. 2014) (unpublished manuscript),

https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf. See also *Corporate Influence on the Business and Human Rights Agenda of the United Nations*, 5 (working paper, Jun. 2014), available at https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_Influence_on

surrounding national and international law, a single treaty might not be capable of addressing the full range of human rights issues.¹⁵³

There are signs, however, that attitudes towards business and human rights have changed in the last two decades. Recent polls by the UN Global Compact and the Economist Intelligence Unit show that a large majority of corporate executives recognize that human rights matter for businesses.¹⁵⁴ They also perceive that more global regulation can be effective in creating a level playing field.¹⁵⁵

Ruggie has also not completely dismissed the possibility of adopting a treaty, emphasizing that it should be based on sufficient consensus and precise standards.¹⁵⁶ He even suggests that it may be possible adopt a treaty focusing on the “worst of the worst,” as in gross human rights abuses that may amount to international crimes.¹⁵⁷ Such an approach would be more feasible because broad consensus already exists among states on the underlying prohibitions and greater extraterritorial ap-

_the_Business_and_Human_Rights_Agenda.pdf (“All these efforts met with vigorous opposition from TNCs and their business associations, and they ultimately failed.”).

153. *Id.*

154. *See generally* The UN Global Compact- Accenture CEO Study on Sustainability 2013, Architects of a Better World (Sept. 2013), https://acnprod.accenture.com/~media/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Strategy_5/Accenture-UN-Global-Compact-Acn-CEO-Study-Sustainability-2013.pdf (More than one thousand top executives from twenty-seven industries in 103 countries participated in the study); The Economist Intelligence Unit, *The Road From Principles To Practice, Today's Challenges for Business In Respecting Human Rights* (2015), <https://www.universal-rights.org/urg-policy-reports/the-road-from-principles-to-practice-todays-challenges-for-business-in-respecting-human-rights/>.

155. *Id.*

156. John G. Ruggie, *A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie, Harvard Kennedy School, John F. Kennedy School of Government* (Jan. 28, 2014), <http://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>; *see also* John Ruggie, *Life In the Global Public Domain: Response To Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, 5 (Jan. 23, 2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726 (emphasizing that in order for the treaty to be successful, it should contain “carefully constructed precision tools”).

157. *Id.*

plication for these abuses.¹⁵⁸ With this in mind, as a follow-up to his mandate, Ruggie called for a multilateral process to address gross human rights violations or abuses in relation to the conduct of business enterprises in 2011.¹⁵⁹ He stated that “greater consistency in legal protection is highly desirable, and that it could be best advanced through a multilateral approach.”¹⁶⁰ Moreover, Ruggie pointed out that there needs to be more certainty in terms of standards concerning the investigation, punishment, and redress of businesses, as well as the appropriate basis and extent for exercising jurisdiction abroad.¹⁶¹ Ruggie further suggested that the UN Convention against Corruption could serve as a model since it also concerns ethical business practices and require similar regulations on a domestic level.¹⁶²

If such a treaty is adopted, it could be an effective way for states to enact necessary legislation and domesticate international obligations, provided they ratify it.¹⁶³ For example, the treaty may “specify certain internationally recognized crimes,” requiring states to establish corporate liability for these crimes.¹⁶⁴ Similar provisions have been found in other international conventions, imposing a duty on the state to establish “liability of legal persons” by placing an indirect legal obliga-

158. *Id.*; see also Jenny S. Martinez, *A First Step is Better than No Step at All*, <http://jamesgstewart.com/a-first-step-is-better-than-no-step-at-all/> (last visited Feb. 4, 2019).

159. John G. Ruggie, *Recommendations on Follow Up To the Mandate, United Nations, Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (Feb. 11, 2011), <http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>.

160. *Id.*

161. *Id.* (Ruggie suggested that as an option, an “intergovernmental process of drafting a new international legal instrument to address the specific challenges posed by this protection gap” could be considered).

162. *Id.*; See also JOHN RUGGIE, *JUST BUSINESS*, *supra* note 5, at 200.

163. Darcy, *supra* note 145.

164. See DOUGLASS CASSEL & ANITA RAMASASTRY, *WHITE PAPER: OPTIONS FOR A TREATY ON BUSINESS AND HUMAN RIGHTS* (2015), <http://business-humanrights.org/sites/default/files/documents/whitepaperfinal%20ABA%20LS%206%2022%2015.pdf>.

(discussing possible substance and formation of the treaty).

tion on the corporation.¹⁶⁵ The OECD Convention on Bribery of Foreign Officials requires that states establish corporate criminal liability; in the event that a certain state does not recognize such liability, non-criminal sanctions may then be pursued against the corporate entity.¹⁶⁶ A treaty could also specify a standard of due diligence as a measure of defense or mitigation for companies.¹⁶⁷

Nevertheless, many difficulties remain in reaching a consensus among all stakeholders. The first session of the UN Intergovernmental Working Group was convened from July 6–10, 2015 to draft a treaty on business and human rights, with the participation of civil society groups and business organizations.¹⁶⁸ This forum garnered much attention but, reportedly, many key home states of transnational corporations did not fully participate in the discussions.¹⁶⁹ For example, the US has

165. See OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 3(1), Dec. 17, 1997, 37 I.L.M. 1. [hereinafter OECD Anti-Bribery Convention]; United Nations Convention Against Corruption, Dec. 9, 2003, 2349 U.N.T.S. 42 [hereinafter U.N. Convention against Corruption]; United Nations Convention on Transnational Organized Crime, art.10, Dec. 15 2000, 2225 U.N.T.S. 209, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2002), and the United Nations Convention for the Suppression of the Financing of Terrorism, art. 5, Jan. 10, 2000, 2178 U.N.T.S. 197. (All these conventions include a provision on “liability of legal persons” requiring states to place “effective, proportionate and dissuasive criminal penalties” on both natural and legal persons); Since not all states recognize the concept of corporate criminal responsibility, it could also include a provision on non-criminal sanctions, such as civil remedies and administrative sanctions, as in many other treaties regulating the liability of legal persons.

166. See OECD Anti-Bribery Convention, *supra* note 165, art. 3(2).

167. CASSEL & RAMASASTRY, *supra* note 164, at ES-2.

168. U.N. Human Rights Council, *First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, U.N. Doc. A/HRC/31/50 (Feb. 5, 2016); see also María Fernanda (Chairperson-Rapporteur Amb.), *Report of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Draft)* (Jul. 10, 2015), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf>; Carlos Lopez & Ben Shea, *Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session*, 1 BUS. AND HUM. RTS. J. 111, 111–16 (2015).

169. Doug Cassel, *Treaty Process Gets Underway: Whoever Said It would be Easy?* BUS. & HUM. RTS. RESOURCE CENTRE BLOG (July 12, 2015), <http://business-humanrights.org/en/treaty-process-gets-underway-whoever->

already begun to boycott the intergovernmental process.¹⁷⁰ It argues that the UN Guiding Principles were a success and that a new treaty could undermine this effort. The US also argues that a one-size-fits-all instrument is not the appropriate method for regulating the complexities of business.¹⁷¹ Another problem is that states are not able to agree on the scope and substance of the treaty, particularly with regard to the scope and size of companies that would be regulated.¹⁷²

Despite all of the challenges, there is still strong momentum to establish a new treaty on business and human rights due to a desire for a more binding instrument.¹⁷³ Therefore, in July 2018, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights released their first draft of the legally binding instrument, which is also referred to as the “Zero Draft.”¹⁷⁴ The Zero Draft aims to strengthen existing norms and ensure “effective access to justice and remedies” for victims, as well as to advance international cooperation to fulfill

said-it-would-be-easy (explaining that Australia, Canada and the US did not attend the forum, and the European Union walked out on the second day. The EU proposed to only include businesses with a “transnational character in their operational activities,” but this proposal was not accepted by many states).

170. The US has boycotted the entire intergovernmental process for a treaty on business and human rights. *See* Statement by Stephen Townley, delegation of the United States of America, Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights* (June 26, 2014), <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>.

171. *Id.*

172. *Id.* (South Africa opposed the EU proposal to exclude “local businesses registered in terms of relevant domestic law,” because it questions the merits of a treaty that would extend to companies beyond transnational corporations).

173. *See* Bilchitz, *supra* note 145, (arguing that a treaty is necessary to provide legal solutions to remedy serious lacunae and ambiguities in the current framework of international law).

174. *Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*, (Jul. 16, 2018), <https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>.

states' obligations under international human rights law.¹⁷⁵ It consists of a total of fifteen articles, which lay out the scope, definitions, jurisdiction, statute of limitations, applicable law, rights of victims, prevention, legal liability, mutual legal assistance, international cooperation, consistency with international law, institutional arrangements, as well as a section on final provisions that explains the technical aspects of the instrument.¹⁷⁶ One of the most significant parts of the instrument is the institutional arrangement requiring states parties to establish a Committee that has the authority to make general comments or other concluding observations and recommendations on the implementation on the Convention itself.¹⁷⁷

Subsequent to this instrument, an optional protocol was also adopted that provided more binding force. It did so by requiring states parties under Article 1 to establish, within their own legal and administrative systems, a National Implementation Mechanism to promote and monitor compliance.¹⁷⁸

B. Elements Necessary to Reduce the Governance Gap

Based on the case studies of Burma and the DRC, as well as recent discussions in the area of business and human rights, it can be concluded that three elements need to be further developed in the area of business and human rights to effectively reduce the governance gap.¹⁷⁹ First, the lack of incentives and

175. *Id.*

176. *Id.*

177. *Id.*

178. Human Rights Council, *Draft Optional Protocol to the Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>.

179. See also Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41 (2015). De Schutter argues that four options need to be considered in the open-ended intergovernmental working group:

- 1) to clarify and strengthen the states' duty to protect human rights, including extraterritorially; 2) to oblige states, through a framework convention, to report on the adoption and implementation of national action plans on business and human rights; 3) to impose direct human rights obligations on corporations and establish a new mechanism to monitor compliance with such obligations; and 4) to impose

enforcement mechanisms fail to induce states to take more action against their own and foreign companies. As illustrated in the case studies, states are reluctant to take action against corporations, largely due to the economic benefits they receive from these companies, as well as the close ties between governments and large conglomerates. For these reasons, many civil society groups and scholars argue for the need to establish an enforcement or monitoring mechanism, to oversee the implementation of existing norms on business and human rights and generate more awareness and capacity on these issues.¹⁸⁰ It is vital to note that monitoring mechanisms, such as the one described in the Zero Treaty, can be an effective means to induce compliance, not by merely enforcing norms on states, but by generating more awareness on the norms and enhancing capacity of states. In fact, empirical studies on monitoring mechanisms have shown that they can be effective in inducing greater compliance among states, even if they do not induce full compliance. It is certainly worth considering this option as a way to promote more awareness among states on their obligations to ensure corporations are not complicit in serious human rights abuses within their jurisdictional boundaries, as well as to enhance their capacity through continuous sharing of information and knowledge on best practices.¹⁸¹

duties of mutual legal assistance on states to ensure access to effective remedies for victims harmed by transnational operations of corporations.

180. See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935 (2002) (explaining the importance of monitoring in human rights treaties); see also generally PHILIP ALSTON & JAMES CRAWFORD, *THE FUTURE OF HUMAN RIGHTS TREATY MONITORING* (2000).

181. See generally Seunghyun Nam, *Domestic Impact of the Management Process under the OECD Anti-Bribery Convention*, U. PENN. J. INT'L 955 (2018); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *NEW SOVEREIGNTY* 3 (1995) (drawing from the Chayeses' writing about international regimes and treaty compliance in the arms control and environmental fields, based on their vast practical experiences); see also Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311 (1991); Abram Chayes & Antonia Handler Chayes, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, 4 INT'L SEC. 147 (1990); Abram Chayes & Antonia Handler Chayes, *Living Under a Treaty Regime: Compliance, Interpretation, and Adaptation*, in DEFENDING

Another measure for enhancing compliance is to require states to place liability on legal persons or companies for gross serious human rights abuses that may amount to international crimes. As mentioned, the ICC has discussed the possibility of expanding the jurisdiction of the court to include not only liability of natural persons, but also legal persons.¹⁸² Nonetheless, states parties will most likely oppose including liability of legal

DETERRENCE MANAGING THE ABM TREATY REGIME INTO THE 21ST CENTURY 197 (Antonia Handler Chayes & Paul Doty eds., 1989).

182. Prior to the adoption of the Rome Statute, the draft statute for the ICC submitted to the delegates did, at one point, include jurisdiction over legal persons, see Rep. of the Preparatory Committee on the Establishment of an International Criminal Court, art. 23(5) & art. 76, U.N. Doc. A/CONF.183/2/Add.1, (Apr. 14, 1998) The draft considered:

The Court shall also have jurisdiction over legal persons, with the exception of states, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives, and Article 76 regulates 'Penalties applicable to legal persons' and states that a legal person shall incur one or more of the following penalties: (i) fines, (ii) dissolution, (iii) prohibition, (iv) closure, (v) forfeiture, (vi) appropriate forms of reparation.

Id.

See also Andrew Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139 (Menno Kamminga & S. Zia-Zarifi eds., 2000); for reasons not reaching an agreement, see Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* (Roy S. Lee ed., 1999). Saland explained:

whether to include criminal responsibility of legal entities This matter deeply divided the delegations. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its inclusion, which would have had far-reaching legal consequences for the question of complementarity. Others strongly favored the inclusion on grounds of efficiency. . . . Among the last opponents were Nordic countries, Switzerland, the Russian Federation and Japan. Some other countries opposed inclusion on procedural . . . grounds. Time was running out. . . . Eventually, it was recognized that the issue could not be settled by consensus in Rome. . . .

Id.

persons. Thus, a more realistic approach is to oblige states to impose liability on companies for complicity in serious human rights abuses, as in the anti-corruption regime, including the OECD Anti-Bribery Convention and the UN Convention against Corruption.¹⁸³ Article 10 of the Zero Treaty also follows this model in the anti-corruption regime by requiring states to ensure that their domestic laws hold both natural and legal persons liable in a criminal, civil, or administrative manner for violations of human rights in the context of transnational business activity. This is in alignment with recent developments in the draft treaty on crimes against humanity, whereby the International Law Commission included a provision on liability of legal persons for crimes against humanity. That was the first time that an instrument on international criminal law recognized the liability of legal persons.¹⁸⁴

Second, existing norms, including the UN Guiding Principles, still lack clarity, particularly with regard to the issue of extraterritoriality. As the case studies illustrate, companies are often accused of involvement in serious human rights abuses for acts outside of the territory where they are based or registered. Yet, it is still unclear what role the host state and the home state need to play in preventing and addressing potential abuses. Since these abuses often take place due to lack of governance in weak and failed states, the home state clearly must play a fundamental role. That being said, the UN Guiding Principles do not explicitly mention whether a home state has, as a matter of law, a duty to exercise its jurisdiction extraterritorially. Due to such ambiguity, there is strong reluctance among home states to investigate or exercise any form of extraterritorial jurisdiction. The Zero Treaty, however, aims to re-

183. See OECD Anti-Bribery Convention, *supra* note 165; U.N. Convention Against Corruption, *supra* note 165.

184. G.A. Res. A/CN.4/L.892, art. 6(7) (May 26, 2017), Crimes against humanity, Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (May 26, 2017) Art. 6(7)

Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

duce this gap by stipulating a broad scope of jurisdiction in terms of states' obligations. In other words, a new instrument needs to emphasize that a state can be responsible for acts that take place outside of its own territory if there is a sufficient link between the company and the jurisdiction of the state.¹⁸⁵

Third, there is a need for more international cooperation, such as through mutual legal assistance when carrying out international investigations. Yet, the case studies show that states rarely cooperate with one another to carry out investigations regarding business and human rights issues, largely due to a lack of awareness and capacity. For this reason, more international mechanisms need to be in place to enhance legal coordination between the host and home states through bilateral treaties on mutual legal assistance or other relevant multilateral treaties.¹⁸⁶ Only through such effective mutual legal cooperation can justice for the victims be achieved, primarily for such transnational cases involving multiple jurisdictions.

CONCLUSION

There is clearly a push from developing countries and civil society groups for more norms and regulations in the area of business and human rights, but more developed states and companies tend to resist such movements due to concerns that it will hinder their economic activities. Nonetheless, it can be observed from the case studies in Burma and the DRC that a governance gap does exist, and if this gap is not reduced, individuals will continue to suffer from potential human rights risks.

To reduce this gap, some argue for the need to adopt a treaty on business and human rights for a more binding instrument. Others find that it is not necessary to add another layer to the already existing UN Guiding Principles. A new treaty could certainly be a way to enforce better compliance, but the objective should not be to make a more binding instrument. Instead, the attention should be on finding effective and creative ways to raise more awareness, increase capacity of states, and make a business case for human rights, which can be implemented in

185. See HRC Res. A/HRC/RES/26/9 (Sept. 29, 2017).

186. See also Nam, *supra* note 181, at 1004 (explaining the importance of legal coordination among states for effective enforcement of international norms regulating businesses).

the form of a treaty or with other instruments. Such mechanisms would be more effective in inducing compliance among states and promoting sustainable business practices and support from the business community.