Russell Tribunal on Palestine

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ANNEX C

LEGAL FRAMEWORK FOR THE FINDINGS OF THE RTOP LONDON SESSION

A. INTRODUCTION

1. Lawyers presented the Tribunal with advice on four legal systems: the international legal system, including the work of the international community, the English legal system, the French legal system, and the legal system of the United States. The advice set out the rules and principles of international, English, French and U.S. law, which impose obligations on corporations to respect *inter alia*: international law (including international human rights and humanitarian law), domestic criminal and civil law, general principles of human rights, and the "Protect, Respect and Remedy" Framework, developed by the *Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* ("SRSG" – Professor John Ruggie). This document, Annex B to the London findings of the RTOP, is a summary of that advice, but has been supplemented in one major respect. Immediately following the conclusion of the London Sessions of the RTOP, Prof Ruggie posted the draft "Guiding Principles for the Implementation of the UN 'Protect, Respect and Remedy' Framework" on his online consultation forum, http://www.srsgconsultation.org. [1] It was possible for the members of the jury to therefore take these draft Guiding Principles into account when finalizing their London findings.

B. INTERNATIONAL LEGAL FRAMEWORK

2. International, regional and domestic law distinguishes between natural persons (individuals), legal persons (corporations,[2] the legal estate of a deceased individual etc.) and states (only international and regional legal systems apply to states). The framework considered below refers to corporations as legal entities. The question of whether corporate officials are liable for corporate conduct under their direction and control is an entirely separate matter. International criminal law

[1] http://www.reports-and-materials.org/Press-release-Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf

[2] The term "corporation" is used in the non-technical sense and regardless of the form of the entity – i.e. it includes all corporations, companies and business enterprises and regardless of the sector, country of domicile or operation, of any size, ownership, form or structure.

may provide for criminal liability and domestic legal systems almost certainly provide for civil and criminal liability. For example, there have been several successful claims against individuals under the Alien Tort Claims Act[3] in the United States, and both English and French legal systems make individuals liable for certain types of conduct: there is no defense of undertaking work in the course of employment and employees cannot hide behind a corporate veil.

3. Customary international law and international treaties provide for two regimes of responsibility: (1) state responsibility, which applies to states, and (2) individual criminal responsibility, which applies to individuals (including corporate officials). These sources of law are silent as to whether corporations, as legal entities, have direct legal obligations. Nevertheless, corporations can still "infringe on the rights" recognized by international legal instruments, specifically the International Bill of Human Rights[4] and international humanitarian law.[5] Furthermore, these rights "are the core standards against which other social actors hold enterprises to account for their adverse impacts. This is distinct from the question of legal liability, which remains defined largely by national law provisions in relevant jurisdictions".[6] Thus, the remainder of this Annex sets out: (i) the 'core standards' as interpreted and applied by instruments generated by social actors, and in some cases approved and implemented by States, and (ii) legal liability (of corporations and corporate actors), as defined by English, French and American national legal systems.

(i) The Special Representative's Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework ("Guiding Principles")

4. In 2005, in order to clarify the concept of the complicity of companies, the United Nations Secretary-General appointed Professor John Ruggie as Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (hereafter referred to as the Special Representative). The report that the Special Representative submitted in 2008 constitutes a considerable advance in the discussion of the

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3 For example, *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980) and *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004).

4 The "International Bill of Human Rights" includes, but is not limited to: the UDHR, the ICCPR, the ICSER, the CRC and the CEDAW.

5 Ruggie, *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remdy' Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 22 November 2010, A/HRC at p. 13 (hereafter "Ruggie, 2010 Report").

6 *Ibid*.

activities of multinationals and their consequences for international human rights and humanitarian law. The responsibility borne by companies with respect to human rights is emphatically confirmed:

> "23. The corporate responsibility to respect human rights is the second principle… Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts. There are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations."[7]

5. In order to carry out this mission of respect for human rights, the report refers to the idea of "reasonable diligence", which obliges every company to evaluate the potential risk of human rights violations to which is exposed as a result of its activities and, where possible, to cease those activities. Reasonable diligence revolves around three principles, which the Special Representative summarizes in the following terms:

> "Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context – for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances."[8]

6. The Special Representative also set out a three-part Framework, which was approved by the United Nations General Assembly:

    1. the state duty to protect against human rights abuses by third parties, including businesses;

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[7] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (*A/HRC/8/5), pp. 8-9, 7 April 2008.

[8] *Ibid*., p. 18.

2. a corporate responsibility to respect human rights; *and*
3. the need for individuals to have effective access to remedies for breaches of their human rights.[9]

7. In June 2008, the UN Human Rights Council approved the framework and extended the mandate of the Special Representative until 2011.[10] Professor Ruggie was asked to provide practical recommendations to assist states in protecting human rights from abuses involving corporations and to enhance the possibility of remedies for victims. To this end, he published, in November 2010, *Guiding Principles* for the implementation of his three-tired Framework. The following paragraphs set out some of the important Guidelines that apply directly to corporations.

12. Business enterprises should respect human rights, which means to avoid infringing on the human rights of others and to address adverse human rights impacts they may cause or contribute to. The responsibility to respect human rights:

a. Refers to internationally-recognized human rights, understood, at a minimum, as the principles expressed in the International Bill of Human Rights and in the eight International Labor Organization core conventions;

b. Applies across a business enterprise's activities and through its relationships with third parties associated with those activities;

c. Applies to all enterprises regardless of their size and ownership structure and of how they distribute responsibilities internally or between entities of which they are constituted.

8. The Commentary explains that this responsibility is independent of States' abilities and/or willingness to fulfill their human rights obligations.[11] "Internationally-recognized human rights" includes the "the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions, as set out in the Declaration on Fundamental Principles and Rights at Work."[12] Where corporations are working in conflict zones, they must also respect the rules and principles

[9] Report of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', UN Doc.A/HRC/8/5, 7 April 2008.

[10] UN Human Rights Council, Resolution 8/7, 18 June 2008.

[11] *Ibid*. p. 12

[12] *Ibid*., pp. 12-13.

enshrined in international humanitarian law. Ruggie considers that these instruments do not impose direct legal obligations on corporations, but "enterprises can infringe on the rights these instruments recognize".[13] Importantly, the Commentary explains that corporations cannot offset their human rights duties by undertaking ad-hoc or partial commitments in some areas and ignoring their obligations in other areas:

> "The responsibility to respect does not preclude business enterprises from undertaking additional commitments or activities to support and promote human rights. But such desirable activities cannot offset an enterprise's failure to respect human rights throughout its operations and relationships."[14]

13. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances that enable them to identify, prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to through their activities and relationships, and to account for their human rights performance.

9. A 'statement of policy' explaining the ways in which a corporation has measures in place to respect human rights should include procedures relating to human rights due diligence (see below) and remediation.[15]

14. As the foundation for embedding their responsibility to respect human rights, business enterprises should express their commitment through a statement of policy that:

a. Is approved at the most senior level of the business enterprise;

b. Is informed by appropriate consultation with relevant internal and external expertise;

c. Stipulates the enterprise's expectations of personnel and business partners;

d. Is communicated internally and externally to all personnel, business partners and relevant stakeholders;

e. Is reflected in appropriate operational policies and procedures to embed it throughout the business enterprise.

10. Corporations should be clear what the "lines and systems of accountability will be" and these "should be supported by training for personnel in relevant business functions".[16]

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13 *Ibid*., p. 13.

14 *Ibid*.

15 *Ibid*., p. 14

11. Guideline 15 is the 'human rights due diligence" provision, explaining the kind of due diligence corporations must undertake to ensure their respect human rights.

> **15. In order to identify, prevent and mitigate adverse human rights impacts, and to account for their performance, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking as well as communicating their performance. Human rights due diligence:**
>
> **a. Will vary in scope and complexity with the size of the business enterprise, the severity of its human rights risks, and the context of its operations;**
>
> **b. Must be on-going, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve;**
>
> **c. Should extend beyond a business enterprise's own activities to include relationships with business partners, suppliers, and other non-State and State entities that are associated with the enterprise's activities.**

12. The Commentary explains that the aim of human rights due diligence "is to identify and prevent or mitigate any adverse human rights impacts that its [the corporations'] activities and associated relationships may have on individuals and communities".[17] It further explains that,

> "Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by third parties. Complicity has both legal and non-legal meanings. **Many jurisdictions prohibit knowingly providing assistance to the commission of a crime and a number allow for criminal liability of legal entities in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these are often not framed in human rights terms.** In relation to complicity in international crimes, the weight of international legal opinion indicates that the relevant standard for aiding and abetting such crimes is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. Of course, business enterprises may be perceived as being 'complicit' in the acts of another entity whether or not they can be held legally responsible, for example, where they are seen to benefit from an abuse.
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> "Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid

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16 *Ibid*., p. 15

17 *Ibid*.

involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[18]

13. Guidelines 16-19 elaborate on the ways in which corporations can perform their human rights due diligence. Guideline 19 reinforces the importance of communication by corporations:

> **19. In order to account for their human rights performance, business enterprises should be prepared to communicate publicly on their response to actual and potential human rights impacts when faced with concerns of relevant stakeholders. Those business enterprises with significant human rights risks should report regularly on their performance. The frequency and form of any communications on performance should:**
>
> **a. Reflect and respond with adequate information to an enterprise's evolving human rights risks profile;**
>
> **b. Be subject to any risks such communications pose to stakeholders themselves, to personnel or to the legitimate requirements of commercial confidentiality.**

14. This Guideline concerns the need for transparency, which provides "a measure of accountability to groups or individuals who may be impacted and to other relevant stakeholders, including investors."[19]

15. Finally, where corporations are found to have been responsible for harm, they should provide for remediation:

> **20. Where business enterprises identify that they have been responsible for adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.**
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> **27. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective, operational-level grievance mechanisms for individuals and communities who may be adversely impacted.**

(ii) United Nations Global Compact[20]

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18 *Ibid*., pp. 15-16 (emphasis added).

19 *Ibid*., p. 19.

20 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

16. Kofi Annan established the Global Pact at the Davos Economic summit in order to develop moral and ethical dimensions to globalisation. It contains ten fundamental principles,[21] five of which relate to corporate responsibility in protecting and respecting human rights:

1. **Businesses should support and respect the protection of internationally proclaimed human rights.**
2. ***Make sure that they are not complicit in human rights abuses*.**
3. **Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.**
4. **The elimination of all forms of forced and compulsory labour.**
5. **The effective abolition of child labour.**

17. The Commentary to the second principle – that corporations should make sure they are not complicit in human rights abuses – clearly establishes a typology for various types of complicity in the following terms:

> "**Direct Complicity** occurs when a company knowingly assists a State in violating human rights. An example of this is where a company assists in the forced relocation of peoples in circumstances related to business activity.
>
> **Beneficial Complicity** suggests that a company benefits directly from human rights abuses committed by someone else. For example, violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities, are often cited in this context.
>
> **Silent Complicity** describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity."[22]

[21] Originally nine.

[22] Cited in John Ruggie, *Clarifying the Concepts of "Sphere of influence" and "Complicity". Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Entreprises*, (A/HRC/8/16), pp. 18-19, 15 May 2008.

18. The Global Compact contains national-level outreach measures and forums for discussion and dialogue that help engender a more cooperative environment for implementation of these principles.

(iii) The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 2002 ("the Norms")[23]

19. The Norms, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights at its 55th session in 2003, explain that:

"[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international law as well as national law…"

"Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law."

20. The Commentary sets out what is meant by "the complicity of companies" in the following terms:

> "(a) Transnational corporations and other business enterprises which produce and/or supply military, security, or police products/services shall take stringent measures to prevent those products and services from being used to commit human rights or humanitarian law violations and to comply with evolving best practices in this regard.
>
> (b) Transnational corporations and other business enterprises shall not produce or sell weapons that have been declared illegal under international law. Transnational corporations and other business enterprises shall not engage in trade that is known to lead to human rights or humanitarian law violations."[24]

21. The significance of this text lies essentially in the fact that it contains principles that are directly derived from international law and major human rights-related international conventions. In other

[23] Adopted on 26 August 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2

[24] Cited in Economic and Social Council / Commission on Human Rights, *Economic, Social and Cultural Rights, Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (E/CN.4/Sub.2/2003/38/Rev.2), pp.5-6, 26 August 2003.

words, it confirms existing state obligations and extends them to corporations.

22. The Norms also provide potential monitoring mechanisms. A breach of obligations under the Norms engenders an obligation to:

"…provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, *inter alia*, reparations, restitution, compensation and rehabilitation for any damage done or property taken."[25]

(iv) The OECD Guidelines for Multinational Enterprises (adopted 1976; last revised 2000)[26]

23. The Guidelines set out voluntary standards, rules and principles for responsible business conduct, applying directly to "companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways".[27] They advise corporations to **"respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".**[28]

24. The Guidelines' Commentary explains that the OECD Guidelines are a partnership between States and corporations:

> "…while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs [including corporations] are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments' international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard."[29]

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25 *Ibid*. at [18]

26 The Guidelines: http://www.oecd.org/dataoecd/56/36/1922428.pdf (Last accessed: 17 August 2009)

27 *Ibid*., p. 17

28 *Ibid*., p. 14

29 *Ibid*., 39

25. The Guidelines also benefit from a broad jurisdiction; enterprises should observe the Guidelines, "wherever they operate".[30] Governments that have signed up to the Guidelines are required to establish National Contact Points (NCPs) that promote the Guidelines and consider allegations that the conduct of a corporation is inconsistent with the Guidelines. The Guidelines do not legally bind corporations and as such are not a substitute for national or international law; they represent supplementary principles and standards of conduct of a non-legal character.

26. See for example, the section on the OECD/UK NCP in Part C of this paper.

(v) Voluntary Codes of Conduct

27. There are over 200 voluntary codes of conduct where corporations commit or express adherence to international standards on human rights. The scope, detail, level of obligation and content of these codes varies considerably,[31] with some codes referring to international guidelines and/or specific international human rights instruments.

28. In contradistinction to States, international law (including regional legal systems) is not the only system of law that can impose legal obligations and provide legal accountability for corporations. Many domestic legal systems provide for both criminal and civil liability of legal entities, including corporations. For example, they may prohibit knowingly providing assistance in the commission of a crime and provide both criminal and civil liability for corporations that violate this law. This may involve international law insofar as a domestic system provides for legal liability of violations of international law or it may be under the rules of the domestic system that, although not strictly human rights provisions, can be used to establish liability of corporations where they are found to be abusing human rights.

29. The following paragraphs provide a brief summary of the potential for legal liability of corporations under the three domestic legal systems considered by the Tribunal.

C. THE LAW OF ENGLAND AND WALES

30. In the UK, corporations acting as accomplices in violations of international law may find that their conduct gives rise to legal liability under criminal, civil or administrative law.

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30 *Ibid*., p.12

31 Kinley and Tadaki *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law* (2003) 44 *Virginia Journal of International Law* 931, 954-5

31. English tort law and public law has been used to provide a remedy for victims whose human rights have been violated by corporations in the conduct of their business operations. However, the direct application of international law in private actions (either under public or private law) is limited because the UK has not expressly incorporated into its domestic law a vast number of international treaties.[32] Therefore in a bringing a claim in public or private law a victim may not directly rely on international law enunciated in unincorporated international law treaties. However, they do have persuasive impact, not least because domestic law will often be interpreted in a manner that is consistent with international law.

(i) Private Law – Law of Tort

32. A series of fairly recent claims in the UK have demonstrated that private law, in certain circumstances, may provide an effective mechanism for redress for victims whose rights have been violated by corporate conduct.

33. The foundation of a claim is grounded on principles of domestic tort law, not upon a breach of international law.

Jurisdiction – Torts Committed by UK Corporations

34. In order to establish the jurisdiction of the English courts over a claim, it is necessary to show that the Defendant is domiciled within UK jurisdiction. The Civil Jurisdictions and Judgment Act 1982, as amended, stipulates that any company:

- With its registered office in the UK, or
- Which was incorporated in the UK, or
- With its central administration/principal place of business in the UK

32 England and Wales are dualist legal systems, which mean that domestic law takes primacy over international law. International law is of direct effect only when it is expressly incorporated into domestic law by Parliament (for instance the UK ratified the Rome Statute of the International Criminal Court but had to legislate the International Criminal court Statute 2001 in order to incorporate the ICC Statute provisions into UK domestic law.

can be sued in UK courts.[33] The UK Courts had a general power to stay proceedings on the grounds that some other forum is more appropriate for the determination of the proceedings (the *forum non convenience* principle), but the ECJ decision of *Owusu v Jackson*[34] held that the Brussels Convention[35] precluded a member state court from declining jurisdiction conferred on it pursuant to that Convention on the ground that a court in a non-contracting state would be a more appropriate forum. Following this decision, a UK court is bound to accept claims where the Defendant is domiciled in the UK even if it involves a tort that occurred abroad.[36]

Jurisdiction – Torts Committed by Non-UK Corporations

35. UK courts may accept jurisdiction over a defendant outside the UK in relation to a tort where damage was sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction.[37]

36. However, foreign parties with no connection with England could be brought into proceedings in England if the English court has jurisdiction over one potential defendant. A defendant outside the UK may be joined into proceedings in England against a defendant who is the subject to the jurisdiction of the English courts with the court's permission even if the overseas defendant would not otherwise be subject to the jurisdiction of the UK courts – if:

- There is a real issue to be tried between the claimant and the first defendant[38]
- The overseas defendant is a "necessary and property party" to the claim;[39] *and*
- The claims can conveniently be disposed of in the same proceedings[40]

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33 Now substantially superseded y EC Regulation (EC) 44/2001 of 22 December 2000, which has direct effect in the UK.

34 [2002] EWCA Civ 877.

35 Brussels and Lugano conventions 1968 and 1988 incorporated into UK law by the Civil Jurisdictions and Judgments Act 1982 as amended.

36 There are only very narrow circumstances whereby the court will not hear a claim and these situations are: a) where proceedings have already been commenced between the same parties involving the same subject matter in another jurisdiction; b) where parties have contractually agreed for any disputes arising between them to be subject to the jurisdiction of another court; and c) where there is a particular close connection between the dispute and another jurisdiction which precludes the exclusive jurisdiction of EU member states under Article 22 of the Brussels Convention.

37 Civil Procedure Rules ("CPR"), 6.20(8).

38 CPR, 6.20(8)

39 CPR, 6.20(3).

40 CPR, 7.3.

37. Civil law claims in relation to torts occurring overseas are subject to the provisions of the EC Rome II Regulation, the provisions of Part III of the Private International Law (Miscellaneous Provisions) Act 1995, and common law rules in determining the applicable law to the dispute.[41]

Some Practical Problems Regarding the Applicable Law in the Israel/Palestine Context

38. Some problems within the Israel/Palestine Context may arise in determining the applicable law to the dispute:

- Ascertaining where exactly the conduct that gives rise to a tort claim took place; for example construction and work on the Wall occurs on Palestinian land but Israel regards this land as its own. Similarly, Israel has annexed East Jerusalem onto its territory but it is still regarded as part of the Occupied Palestinian Territories.
- Given the conduct often occurs on Occupied Palestinian Territory, whether the applicable law is that of Israel or Palestine (which may be Israeli law, Jordanian/Egyptian law, British Mandate Law or Palestinian law).

Corporate Veil, Parent Company Responsibility & the Acts of Subsidiaries

39. A significant issue in litigation of this nature is establishing liability for the UK parent company for the acts and omissions of its subsidiary based overseas because companies rely upon the notion of the 'corporate veil' as each company is recognised as a separate legal person and this legal personality cannot be bypassed in order to attribute its rights and responsibilities to its shareholders or parent company.[42] The corporate veil will only be 'pierced' in very limited circumstances. A number of UK tort cases against corporations have sought to circumvent the corporate veil theory by seeking to argue for the existence of a 'parent company responsibility' that the Defendant company's intimate knowledge and role in the conduct which led to harm/damage gave rise to direct duty of care between the parent company and the claimant which was breached. This principle has been accepted at interlocutory hearings[43] in many cases and defendants have settled significant claims premised upon this concept.

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[41] In general practice and for claims which deal with events giving rise to damage which occurred on or after 19 August 2007 the applicable law to the dispute would be the law where the tort occurred

[42] *Salomon v Salomon & Co Limited* [1897] AC 22.

[43] This was in part the basis of the claim before the House of Lords in *Lubbe v Cape plc [2000] 1 WLR 1545* and more recently in *Guererrero & Ors v Monterrico [2009] EWHC 2475*.

Summary of Tort Law Principles

40. To establish civil liability it will often be relevant to consider the following:

1. If the matter involves more than one company, can jurisdiction be established against the parent company (usually based in the UK) and the foreign subsidiary?
2. What harm has occurred and under which law?
3. Did the perpetrator provide the principle perpetrator of the harm with the means to carry out the harm?
4. Is there a duty of care and if so, what is the duty?
5. Did the company know or could a reasonable company in the same circumstances have known that its conduct posed a risk of harm to the victim's interest?
6. Either in its own conduct or in the context of a joint venture, would a reasonable company have foreseen the risk of harm, could occur as a consequence of it's partner's conduct? Did the corporation undertake risk assessments?
7. The character of the product or service and the character of the corporate/state/organisation using the product/service
8. Did the company take precautionary measures a responsible company would have taken in order to prevent the risk (that the product could be used to violate the claimants' human rights) from materialising?
9. Did the corporation's conduct contribute to the infliction of the harm?
10. Have the company's goods/services provided been tailored for a specific purpose that involved the perpetration of harm?
11. Examine the specific acts of the corporation – if the corporation were not involved would he same harm (or any harm) have occurred?
12. Are there any issues with regard to the statute of limitation which may prevent a legal claim from being brought?

(ii) English Criminal Law

41. Companies can and have been prosecuted for a wide range of offences in the UK.[44] The Crown Prosecution Service (CPS) guidance on corporate prosecution defines a company as "a legal

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[44] *Legal Guidance issued by the Crown Prosecution Service for corporate prosecutions* (updated 21/04/10), which sets out the common approach of the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office to the prosecution in

person, capable of being prosecuted, and should not be treated differently from an individual because of its artificial personality". Unincorporated bodies (for e.g. Trusts, clubs and partnerships) may also be criminally prosecuted.[45] A company in UK law refers to a company registered under the UK Companies Act 2006 or one or more of its predecessors cited in the Act or equivalent legislation in another jurisdiction.

42. Enforcement of the criminal law against corporate offenders is done with a view to having a deterrent effect, to protect the public and to support ethical business practices.[46]

43. The principal methods by which a company may be held to be criminally responsible under common law are:

    (a) Vicarious liability for the acts of a company's employees/agents (in circumstances where a natural person would be similarly liable). This has limited application at common law, for instance in relation to public nuisance and in the regulatory context.[47]
    (b) Non-vicarious liability arising from the 'identification principle'.

Identification Principle

44. According to this principle, those having key roles, i.e. the most senior officers, are considered to be acting as (rather than on behalf of) the company itself because their conduct (which is within the scope of the senior officer's authority) can be linked to furthering the activity of the company itself. As a result a company is liable for serious offences committed by its most senior officers. In circumstances where a company is to be prosecuted, corporate officials could equally be prosecuted for individual culpability.[48]

45. The landmark House of Lords case *Tesco Supermarkets v Nattrass [1972] AC 153* clarified the situations where individuals are deemed to represent the corporation, relying on a "controlling

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England & Wales of corporate offending other than offences for corporate manslaughter (for which separate guidelines have been issued).

[45] *Ibid*., p.2; also Archbold [2009] paras 1-78 and 1-81b.

[46] *Ibid*., p.2

[47] *Ibid*., p.3

[48] *Ibid*. When considering prosecuting individuals, prosecutors are expected to consider criminal culpability of the company itself where the criminal conduct is for corporate gain.

officer test": does the person control the corporation as the brains control the human body? This was deemed to be a question of law once the facts were proved.

46. The category of controlling officers usually encompasses the members of the board of directors, the managing director, and some other persons responsible for the general management of the corporation. If these persons delegate parts of their management functions to someone else in the corporation, that person will be a controlling officer as well (and the identification theory applies to the acts of the delegate), provided that he was acting independently of any instructions.[49]

47. When dealing with different decision-making structures within different companies or where the corporation has a diffused structure, evidential difficulties may arise because of the need to link the offence to the controlling officer in order to make the corporate entity liable.[50] For this reason, whenever a company is prosecuted under an offence that requires the *mens rea* element, at least one controlling officer of the company must be clearly identified and this person must also be jointly prosecuted along with the company.[51]

Jurisdiction

48. The UK has universal jurisdiction over crimes of torture, hostage taking and war crimes in international armed conflict. The UK has not legislated for universal jurisdiction in respect of genocide, crimes against humanity and war crimes in internal armed conflict.[52] The UK has provided limited retrospective application of the International Criminal Court Statute, which means that it has jurisdiction to prosecute crimes after 1 January 1991.

49. UK law also recognises criminal liability of corporations and has exercised jurisdiction to prosecute corporations in their complicity in international crimes, for instance in the Nuremburg industrialist cases.

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[49] *Esseden Engineering Company v Maile [1982] RTR 260.*

[50] *Legal guidance issued by the Crown Prosecution Service for corporate prosecutions* (updated 21/04/10), p.5.

[51] *Ibid*. The guidance note provides that certain types of offences (such as false accounting and regulatory offences) committed by the business entity at the connivance of a director/manager/company secretary make those individuals criminally liable.

[52] International Criminal Court Act 2001.

50. In the UK, an accomplice may be found guilty on the basis of knowledge of someone else's intention to commit a crime, and/or reckless disregard as to the risk that there may be the commission of an offence. According to Section 8 of the Accessories and Abetters Act 1861, any person who aids, abets, counsels or procures an offence is liable as a principal offender. A company may therefore aid or abet one or more perpetrators in carrying out an offence. Cases on complicity are discussed below.

The Zyclon B Case

51. Heard before a British Military Court, *Zyclon B* relates to the charge of complicity by three German industrialists in the murder of interned allied civilians by means of poison gas. Bruno Tesch, the owner of the company that supplied Zyclon B gas to concentration camps, as well as two other officials were charged for arranging shipments of "poison gas used for extermination of allied nationals in concentration camps, well knowing that the said gas was so to be used". The case resulted in one acquittal and the conviction and execution of Tesch and another.[53]

52. The UK does not have any specific legislation that clearly allows for the possibility of extra-territorial jurisdiction to include cases of corporate abuse abroad by corporate "nationals" based in the foreign state, which are, for example, a subsidiary to a UK parent company.[54] However, under certain legislative provisions, the UK does occasionally extend jurisdiction over offences committed abroad, on the basis that: (a) the offender (individual or corporation) was a UK national;[55] or (b) part of the offence (e.g. the planning of it) took place within UK territory.[56] Nevertheless, the exercise of extra-territorial jurisdiction is still subject to the proviso that it is not an unreasonable interference with the domestic affairs of the foreign state where the alleged criminal offence was committed. Therefore, territorial limitations may make it difficult for the UK to prosecute UK based parent multinational companies, which are found to be allegedly involved

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53 Case No. 9, *The Zyclon B Case*, Trial of Bruno Tesch & 2 Ors, British Military Court, Hamburg 1946, available at: http://www.ess.uwe.ac.uk/wcc/zyklonb.htm#SUMMING.

54 In addition, certain statutory offences, for instance statutory conspiracy, can only be prosecuted if committed within the UK. The law provides for circumstances when the UK can exercise extraterritorial jurisdiction over criminal conspiracies outside the UK but a number of factors have to be established before jurisdiction may be exercised. See ft 54.

55 For example, s. 109 of the Anti-Terrorism, Crime and Security Act 2001, which extends UK criminal jurisdiction to cover corruption offences committed by UK nationals and by bodies incorporated under the law of any part of the UK, so long as the act (if committed in the UK) would qualify as corruption under UK law. However, this provision does not apply to unincorporated bodies (such as Trusts), for which territorial contact with the UK must be demonstrated. See also the Bribery Act 2010, which specifically allows for extra-territorial jurisdiction.

56 Criminal Justice (Terrorism and Conspiracy) Act 1998.

(either directly or by way of its subsidiary) in alleged violation of international criminal law abroad, unless the parent company itself is directly complicit.

53. Individuals may commence a private prosecution by applying to a magistrate for a summons or arrest warrant. This right to commence private prosecutions applies to all offences.[57]

54. The grant of a summons or warrant by a court means criminal proceedings against the suspect have begun. The evidence required to persuade a court to issue a summons or warrant is obviously not the same as the evidence required to secure a conviction for that offence. In considering whether an arrest warrant ought to be issued, the court ascertains that it has jurisdiction, and looks to see if there is *prima facie* admissible evidence that (if un-contradicted) would meet all the legal requirements of an offence and could therefore lead to a conviction.

55. However, certain offences, including all offences where there is an international element, require the consent of the Attorney General (not the DPP) before a charge or a prosecution can proceed. For this reason a summons will not be issued until the necessary consent to the prosecution has been given. But section 25 of the Prosecution of Offences Act 1985 provides that absence of consent does *not* prevent the issue of a warrant.

56. It is therefore possible for a private individual to secure the arrest of a foreign visitor to England and Wales. [58] However, on 1 December 2010, the UK Government published the Police Reform and Social Responsibility Bill 2010, which included a provision (at clause 151 of the Bill) that would make it impossible for an application to be made for an arrest warrant against visitors to the United Kingdom for alleged war crimes, torture, hostage taking and some other crimes that are subject to universal jurisdiction under UK Law.

57. Corporations may be directly prosecuted for the crime of conspiracy both under common law and statute. The statutory crime of conspiracy occurs where there is an agreement between two or more persons to break the law at some time in the future, and, in some cases, with at least one

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[57] Note by the Ministry of Justice on "Arrest Warrants - Universal Jurisdiction" 17 March 2010. The note states that the right to commence private prosecution is not unique to England and Wales but is also found in other common law countries like New Zealand and Australia.

[58] *Ibid*., p.2. In 2009, lawyers acting for some of the Palestinian victims of 'Operation Cast Lead' obtained a warrant of arrest from the Westminster Magistrate's Court for former Israeli foreign Minister, Tzipi Livni who was a member of the war cabinet during 'Operation Cast Lead'. The warrant was withdrawn when it was discovered she was not in the UK as she had cancelled her visit. This incident prompted the UK Government to review the law in this area and come up with proposals for change http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest; http://www.justice.gov.uk/news/newsrelease220710b.htm

overt act in furtherance of that agreement. The Criminal Law Act 1977 abolished all common law varieties of conspiracy, except the following:

(a) Conspiracy to defraud – it is an offence for two or more people to agree dishonestly to prejudice the rights of another.
(b) Conspiracy to corrupt public morals or to outrage public decency

58. Section 1(1) of the Criminal Law Act 1977 provides that if two or more individuals agree to pursue a course of conduct, and if that agreement is carried out as per their intentions, leading to an offence, then the person(s) are guilty of conspiracy to commit the offence(s) in question. The elements of the crime are: (a) there must be a real agreement with evidence of the parties having agreed to the details of the crime; (b) the crime is intended to be committed within the territorial jurisdiction of the UK Court;[59] and (c) the parties must "intend" or "know" the facts, which make the conduct criminal.

59. A corporation can be a party to a criminal conspiracy but only with at least two other natural persons, including at least one who is an appropriate officer of the company and acting within the scope of his/her authority.[60]

(iii) Public Law

60. Public law claims, brought by way of an application for judicial review, are challenges to the legality of the acts and omissions of public bodies (it is a method used to hold to account states for acts/conduct engaged by corporations who may be complicit in violations of IHL and international human rights law which are domiciled in the UK rather than directly holding the corporation to account). The law adopts a liberal definition of who amounts to a public body; for example, the following would all be amenable to judicial review:

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[59] But see Section 1A(a) to (5), which provides UK jurisdiction over criminal conspiracies outside the UK if the pursuit of the agreed course of conduct would involve: (a) commission of an act by at least one party; (b) the happening of some other event intended to take place outside the UK's territorial jurisdiction; (c) the act is deemed a criminal offence within in the territory in which it takes place; or (d) a party in England either committed an act in relation to the agreement before its formation, or a party to the agreement became a party in England & Wales UK or the party to the agreement committed an act in England and Wales in furtherance of the agreement.

[60] *Legal guidance issued by the Crown Prosecution Service for corporate prosecutions* (updated 21/04/10), p.6.

- Government bodies – e.g. government ministers, departments and agencies, local authorities, health authorities, the police, prisons, schools, courts, tribunals and regulatory and supervisory bodies.
- Private bodies that are authorised by Parliament and/or that carry out a 'public function'.

61. The grounds for challenging decisions by way of judicial review are where it can be shown that a decision was:

- Without legal authority/outside the power of the public body
- In pursuance of an improper purpose
- In violation of the proper exercise of discretionary powers (e.g. fettering of discretion, use of discretion for a purpose for which it was not intended and/or taking irrelevant factors into consideration or failing to take into consideration all relevant factors)
- Irrational or contrary to the rules of natural justice – i.e. fairness
- In violation of the Human Rights Act 1998, which requires public bodies to act in a way that is compatible with the European Convention on Human Rights: a failure to do so creates a freestanding statutory ground of challenge. The Act also requires all domestic legislation to be interpreted in a way that is compatible with Convention rights; thus the Act potentially affects all of the legal bases underpinning the public body's powers and duties.
- In violation of European Community Law/European Convention on Human Rights

Direct Challenges

62. There have been two judicial reviews brought before the English Courts that have sought to directly challenge the United Kingdom's Government policy in respect of Israel/Palestine.

63. The first in time was *R (Saleh Hasan) v Secretary of State for Trade and Industry*[61], which was a request to scrutinise the Secretary of State's decision to grant export licences for weapons used by Israel in violation of international humanitarian and human rights law. The second case was *R (on the application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs*[62], *which*

[61] *R (Saleh Hasan) v SS for Trade and Industry* [2008] EWCA 1311 (hereafter "*Hasan*"). Saleh Hasan, a Palestinian living in the West Bank and operating in conjunction with Al-Haq, filed a claim requesting he UK government to clarify its position on its arms-related licensing agreements with Israel. In particular, the claim sought to require the UK government to reveal how it satisfies its own criteria that material sold under these agreements is not used in the commission of human rights abuses in the occupied Palestinian territories.

[62] *R (on the application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin)* (hereafter "*Al-Haq*"). Al-Haq, a Palestinian human rights organisation, sought judicial review of the UK Government's failure to comply with four key obligations under customary international law

was a claim against the UK Government claiming it had failed to adhere to its international law obligations vis-à-vis Israel. Both cases failed and although in each case the facts are relatively specific, the general thrust of the Courts approach was a reluctance to interfere with the Government's handling of foreign affairs. This judicial reticence was clothed in the legal terminology of justiciability. The Courts held:

- It is beyond the competence of Courts to evaluate the conduct of a state in relation to its foreign affairs except in exceptional circumstances; a court will also not evaluate the conduct of a foreign state.[63] Here the Courts repeated their refrain from earlier cases: they would not interfere with foreign policy decisions unless the rights of individuals were crucial to the decision – see for example *CND v Prime Minister*, a case seeking a declaration that a second UN Security Council authorisation was required before war with Iraq could be lawful and *Abbassi v Secretary of State of Foreign Affairs*, a case seeking to compel the UK to seek the release of a national held in Guantanamo Bay.

- In *Al-Haq* the Court noted three exceptions: (1) where the breach of international law is "plain and acknowledged" (*Kuwait Airways*[64]) or "clear to the court"[65] (*Abbasi*[66]);[67] (2) there is legislative authorisation (*Gentle*[68]);[69] or (3) the issue arises in the context of ensuring a fair trial in England & Wales.[70]

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arising from Israeli breaches of peremptory norms of international law: (1) to denounce and not to recognise as lawful situations created by Israel's actions; (2) not to render aid or assistance or be otherwise complicit in maintaining the situation; (3) to cooperate with other states using all lawful means to bring Israel's breaches to an end; and (4) to take all possible steps to ensure that Israel respects its obligations under the Geneva Conventions.

63 *Al-Haq*, paras. 41-6. In *Al-Haq*, the Court determined the subject matter of the claim to be: (1) the "condemnation of Israel" (paras. 41, 53) and (2) to direct the UK Government's foreign policy (paras. 46, 51). It ruled that it was not competent to decide whether Israel is in breach of its international obligations (para. 41).

64 *Kuwait Airways Corp v Iraqi Airways Corp* (No 5) - [2003] All ER (D) 225 (Jan).

65 The court was not satisfied in this case because there was no authoritative judgment on Operation Cast Lead.

66 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

67 *Al-Haq*, para. 42.

68 *R (Gentle) v The Prime Minister & Others* [2006] EWCA Civ 1689 at para. 26.

69 *Al-Haq*, para. 54.

70 *Al-Haq*, para. 54.

- A further difficulty facing those who wish to challenge UK policy in respect of foreign affairs is demonstrating that they have sufficient 'standing' to mount a challenge. In *Al Haq* the Court cast doubt on whether a non-UK NGO had a sufficient standing to bring a claim before the English Court in respect of domestic foreign policy.

64. In the *Al-Haq* case the court deferred to the executive (it is not for the court to determine the foreign policy of the UK nor is it for the court to determine whether another state has committed a violation of international law: thus, a court will only consider a 'violation of international' if it has already been sufficiently confirmed by the executive: i.e. state practice) and in *Hasan* the court deferred to the legislature (the UK Parliament already exercised a sufficient level of oversight of arms-export licensing, rendering the claim unnecessary; further, given the sensitive nature of the material it is preferable for Parliament to view it rather than through unguarded publication).

Less Direct Challenges

65. Direct challenges raise constitutional issues relating to the separating of powers in England and Wales; the court considers that some roles are best filled by the executive or Parliament. Therefore, less direct challenges may be more successful. For example, where government loans or facilities are provided to a corporation that assists in the violation of human rights in the OPT, and the public body has guidelines or a published policy that sets out its intention not to facilitate human rights violations. In this situation, a public law challenge could be used to force a public body to adhere to its own voluntarily adopted standards.

Public Procurement

66. This could take place through public procurement law, which regulates public body purchases of contracts for goods, works of services. Although the law is designed to open up the EU's public procurement market to competition and to ensure the free movement of goods and services, it may be possible to use it to include human rights obligations in the tendering process. During the oral evidence given to the Joint Committee on Human Rights, it was explained that:

> "The Government told us that departments and other public sector bodies can "take steps to exclude firms with a poor human rights record from tendering and where relevant ensure that appropriate human rights issues are covered in the contract".[71]

[71] Parliamentary Joint Committee on Human Rights, 'Any of our business? Human Rights and the UK private sector', First Report of Session 2009-10, Volume I: Report and formal minutes, HL Paper 5-I, HC 64-I (16 December 2009) at p. 67.

67. Under the Public Contract Regulations 2006 in England and Wales, a contracting authority may (i) exclude an economic operator (i.e. corporation) from bidding for a contract or (ii) reject a bid where it is found that the corporation has committed an act of grave misconduct in the course of business.

68. However, though there is nothing in the EU Public Procurement Directive that prohibits public authorities incorporating human rights principles into their purchasing practises, the only issue currently been examined by the UK Government is that of equality.[72] The new Equality Bill contains the power for central Government to impose specific equality duties on public authorities in relation to public procurement.

(iv) OECD / UK NCP

69. Claims may be submitted to the UK National Contact Point. The UK NCP[73] is made up of officials from the Department for Business, Innovation and Skills (BIS). There is also a Steering Board[74] that monitors the work of the UK NCP and provides it with strategic guidance. The UK NCP has also worked with the FCO to provide guidance to British Embassy staff overseas on the OECD Guidelines so that they can assist UK companies operating overseas.

70. The procedure for the UK NCP is as follows:[75]

    1. If a complaint involves the operations of a UK registered corporation or its subsidiaries, it can be filed with the UK NCP by filling out the appropriate complaints form.[76]
    2. There will be an initial assessment, which involves a desk-based analysis of the complaint, the corporations' response and any additional information provided by the parties. The UK NCP will decide whether further consideration is warranted.

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72 EU Public Procurement Directive, Clause 149.

73 For further information, see http://www.bis.gov.uk/nationalcontactpoint/.

74 Composed of representatives of relevant Government Departments and four external members nominated by the Trades Union Congress, the Confederation of British Industry, the All Party Parliamentary Group on the Great Lakes Region of Africa, and the NGO community. I am the external member nominated by the NGO community.

75 See further at http://www.bis.gov.uk/files/file53566.pdf.

76 Available at http://www.bis.gov.uk/files/file47341.pdf.

3. If a complaint is accepted, the UK NCP will offer conciliation/mediation to both parties with the aim of reaching a settlement agreeable to both. If this fails or the parties decline the offer, the UK NCP will examine the complaint in order to assess whether it is justified.
4. If a mediated settlement is reached the UK NCP will publish a Final Statement with details of the agreement. If the UK NCP has examined the complaint, it will prepare and publish a Final Statement setting out whether or not the Guidelines have been breached and, if necessary, recommendations to the corporation as to future conduct.
5. If the Final Statement includes recommendations, it will specify a date by which both parties are asked to update the UK NCP on the corporations' progress towards meeting these recommendations. The UK NCP will then publish a further statement reflecting the parties' responses.

D. THE FRENCH LEGAL SYSTEM

(i) Criminal Law

71. Articles 121-2 of the French Criminal Code stipulate that criminal liability may arise:

- "For profit" private legal persons (civil or commercial companies, economic interest groups)
- "Not-for-profit" legal persons (political parties or groups, unions, employee representative institutions); *and*
- Public legal persons, with the exception of the State (territorial collectives, public institutions)

Complicity under French Criminal Law

72. In order to engage a person's accomplice liability, that person must have participated in the reprehensible act of the principal perpetrator; her participation must have taken one of the material forms and must have been intentional in character. The theory of assumed criminality requires that the participation of an accomplice must be linked to the principal's punishable act: i.e. the act designated a felony or misdemeanor by law.

73. For acts committed abroad, Article 113-5 of the Criminal Code provides that:

> French criminal law is applicable to any person who, on the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanor committed abroad if the felony or

misdemeanor is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court.

74. Conversely, crimes committed abroad as an accomplice that are linked to a principal crime punishable in France are punishable in France.

75. An accomplice must provide material participation, as set out in Articles 121-7 of the Criminal Code. Complicity also requires a positive act. Therefore, a natural person cannot be complicit through omission.

76. Article 121-7 of the Criminal Code provides three forms of material participation of an accomplice, which are: aiding or abetting, provocation and giving instructions.[77]

77. Complicity includes not only a legal and material element, but also a moral element. The accomplice must have intended to participate in the crime committed by another person. The Criminal Code expressly formulates this third condition. Article 121-7 is in fact directed at "the person who knowingly" makes himself an accomplice.

78. However, the criminal intent required for an accomplice is distinct from that of the principal. It is nonetheless made up of two elements: awareness – of law and also of fact: i.e. of the criminal character of the acts of the principal – and the will to participate in the crime.

79. However, it is not necessary that the intent of the accomplice conform completely to that of the principal. The criminal chamber of Court of Appeal in its judgment of 23 January 1997 declared that:

> "…the last paragraph of article 6 of the Statute of the Nuremberg International Military Tribunal does not require that an accomplice to crimes against humanity adhere to the ideological policy of hegemony of the principal perpetrators, nor that he belong to one of the organizations declared criminal by that Tribunal".

80. The requirement of awareness and willing participation in a specific crime raises two issues. First, in each case it will be necessary to establish a relationship between the intent of the accomplice and the crime accomplished by the principal. Second, the difficulty of applying this rule to strict

[77] Court of Appeal, Criminal Chamber, 4 March 1964 : JCP 1964, ed. G, IV, p. 57 – 29 March 1971: Criminal Bulletin, No. 112.

liability crimes. In relation to the first issue, the courts have held that the accomplice is not guilty if the elements of the crime committed were different from the crime originally planned. If it can be established that the role of the accomplice is sufficiently significant to the commission of the crime, the court will not hesitate to designate the defendant a co-principal.[78] However, legal persons can be prosecuted as principal perpetrators and as accomplices: article 121-2 defines the criminal liability of legal persons by reference to articles 121-6 and 121- 7. However, in certain scenarios, particularly where crimes of omission or negligence are concerned, characterized by the absence of criminal intent or the material act of commission, the liability of the legal person could be established even in circumstances where a natural person could not be found criminally liable. A legal person can be found to have committed certain acts without it being necessary to identify liability for specific natural persons who work within the organisation.

Proposed Universal Jurisdiction Law

81. On 13 July 2010, the French National Assembly adopted draft legislation to implement the Statute of the International Criminal Court. The legislation allows for limited extra-territorial jurisdiction, falling far short of universal jurisdiction. Under the provisions, the offences within the Rome State can be prosecuted in France if the following criteria are met:[79]

1. **The suspect's usual residence must be on French territory**[80]
2. **Only a public prosecutor can commence proceedings**[81]
3. **Double criminality** – the act (or criminal inaction) has to be illegal in both France and the country where the crimes were committed.[82]
4. **The International Criminal Court has expressly decided not to exercise jurisdiction**.[83]

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78 Cf. in particular Court of Appeal, Criminal Chamber, 25 January 1962: Criminal bulletin no. 68; Rev. sc. Crim. 1962, p749, obs. A. Légal

79 This information has been taken from: Redress, "Prosecuting International Crimes in France: Contradictory Legislation" in 7 *EU Update on International Crimes* (July 2007) at p. 1.

80 Redress note that "This condition is inconsistent with the "prosecute or extradite" requirement for torture that requires only "presence" on the territory."

81 This criterion is a radical break with French penal and legal tradition. Consequently, victims of international crimes would not be able to initiate proceedings as civil parties against those suspected of crimes against humanity, war crimes or genocide. Experience shows that French prosecutors are reluctant to initiate such proceedings, since none of the proceeds for torture or other international crimes were intiaited by the public proseutor.

82 This condition means would mean that France implicitly acknowledges impunity. For example, the courts would refuse to exercise jurisdiction over genocide in situations where was it was not publishable by law in the state where it was committed.

(ii) Civil Law

Jurisdiction

82. Pursuant to Article 46 of the New Code of Civil Procedure, in relation to delictual matters, a claimant may commence proceedings before a court in whose province:

- the defendant is domiciled;
- the wrongful act occurred; or
- the damage was suffered.

Applicable Law

83. French case law has confirmed that the applicable law is that of the place where the wrongful act took place, i.e. *lex loci delicti commissi*.[84] The *lex loci delicti commissi* regulates, *inter alia*:

- the definition of fault;
- attribution;
- the existence of responsibility for the acts of third parties; *and*
- modes and types of reparation.

Cause of Action

84. The French Civil Code sets out the situations where cases of delictual liability may arise, including:

- **Article 1131**: "An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect."

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[83] This criterion is contrary to the complementarity principle established in Article 17 of the Rome Statute, which places the primary responsibility to prosecute on States Parties. The ICC has jurisdiction the State is unwilling or unable to investigate or prosecute.

[84] Civ 1re, 1 juin 1976, Bull Civ I n° 207 p 167. See also Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse* (3 November 2008) at p. 134.

- **Article 1133**: "A cause is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public policy." Note also article 6: "Statutes relating to public policy and morals may not be derogated from by private agreements."

- **Article 1382**: any human deed that causes harm to another, creates an obligation on the person whose fault it was, to compensate the victim.
- **Article 1383**: everyone is liable for the harm caused, not only by his/her own deed, but also for his/her failure to act or lack of care.
- **Article 1384**, para. 1: individuals are liable for the deeds of those under their responsibility or for harm caused by things that one has in one's keeping.

85. These have been interpreted by the French Courts as giving rise to three forms of liability:

1. **Personal fault**
    - Fault is "abnormal behavior" or "failure to do what one should". Badge explains that in principle the courts will apply an objective standard by deciding what a reasonable man would have done, but some subjective characteristics will be taken into account. For example, the skill(s) of a defendant.[85]
2. **Liability without fault for the deeds of "things in one's keeping"**
    - An example of "things in one's keeping" is factory machinery. This form of liability is strict, the idea being that if someone profits or benefits from something, they should bear the risk and the consequences of that risk if it transpires.
3. **Possibly, liability without proof of fault for the deeds of persons for whom one is responsible.**
    - This form of liability is not entirely clear in French law. It is not clear whether this liability applies only to specific examples set out in the Code (e.g. parents for children, teachers for pupils etc.) or whether this can be expanded.

86. These obligations apply to legal as well as natural persons. The following principles must be satisfied:

- Harm in this context must be "direct, certain and legal".

[85] Badge, *Transboundary Accountability for Transnational Corporations: Using Private Civil Claims*, Chatham House Working Paper (March 2006) at p. 59.

- There must be a causal link between the conduct and the harm (though there need not be a duty of care). In practice, French courts require the act that causes the harm to be of such a nature that it does so in the natural course of events: i.e. it is not exceptional.

87. Commission of a criminal offence automatically constitutes a civil fault, and many claims for damages based on delictual liability are brought in the French criminal courts.

E. THE LEGAL SYSTEM OF THE UNITED STATES[86]

(i) Alien Tort Claims Act (ATCA)

88. Palestinians may bring a civil suit against a corporation in US courts under the ATCA for aiding and abetting war crimes and extrajudicial killing. Some US courts currently require that the plaintiff prove the corporation knowingly provided substantial assistance to the perpetrator of the war crimes (the "knowledge standard"). Others require that the plaintiff prove the corporation provided the assistance for the purpose of commission of the war crimes (the "purpose standard").

(ii) Torture Victim Protection Act (TVPA)

89. Both Palestinians and US citizens may bring a suit under the TVPA against a corporation for aiding and abetting torture and extrajudicial killings. US courts are divided as to whether corporations may be sued under the TVPA or just the company's officers. Some courts do allow a suit against the corporation. The statute requires that the offences must have been approved under the law of a foreign nation or under the authority of a foreign official. US courts have applied this statute against persons who aided and abetted the violation. Unlike ATCA, the TVPA requires that plaintiffs first exhaust any "adequate" remedies available under domestic law of the State where the conduct takes place.

(iii) Racketeer Influenced and Corrupt Organizations Act (RICO)

90. US citizens (and individuals who can claim jurisdiction through ATCA or TVPA) may sue the military contractors under the RICO to recover for *property* loss or damage. RICO makes it unlawful to form an enterprise to engage in extortion and "racketeering activity," including

[86] For further information the application of US law to corporations acting in occupied territories, see: Gado, *Principles and Mechanisms to Hold Business Accountable for Human Rights Abuses*: *Potential Avenues to Challenge Corporate Involvement in Israel's Oppression of the Palestinian People*, BADIL Resource Centre for Palestinian Residency and Refugee Rights, Working Paper No. 11, December 2009.

murder and robbery, and allows victims to sue for property damage. It is unsettled whether RICO applies to conduct committed outside the U.S. In RICO claims against corporations challenging the commission of crimes or human rights abuses overseas, US courts have taken the approach that the RICO statute applies where (a) the crime had an effect within the US (such as giving the company a competitive advantage) or (b) the company's conduct in the US (such as transfer of technical or financial assistance) directly caused the plaintiffs' injuries overseas.

(iv) United States' Traditional Torts

91. US citizens, and any foreign nationals who have access to US courts through an ATCA or TVPA claim, can add claims against military contractors for negligently or recklessly harming the plaintiffs or their property and for intentional torts such as wrongful death, battery (a harmful bodily contact), assault (fear of an imminent battery) and infliction of emotional distress. If a company sells goods or services to a third party which uses them to commit crimes that cause the plaintiff to suffer mental or bodily harm or loss of or damage to property, and this harm is foreseeable to the company (due to the third party's history of criminal conduct vis-à-vis the plaintiffs for example) then the company is liable for (a) *negligently* harming the plaintiff (because it disregarded a foreseeable risk), (b) *recklessly* harming the plaintiff (because it ignored an obvious unjustifiable risk), and (c) *intentionally* harming the plaintiff *assuming* it was substantially certain the company's acts would result in harm to the plaintiff.

(v) Shareholder Breach of Fiduciary Duty Claim

92. Under US corporate law, shareholders (of any nationality) can sue the directors of military contractors on the grounds that by approving or condoning the aiding and abetting of war crimes or gross human rights abuses, they breached their duties of care, loyalty and good faith to the company and its shareholders and caused them to suffer a loss.

(vi) Potential Defenses

93. Corporate defendants facing the above claims[87] can raise the following defenses: (a) that the case raises a political question committed to another branch of government such as a foreign policy issue ("political question doctrine"), (b) that the case involves questioning an act of a foreign sovereign state within its territory ("act of state doctrine"), (c) that the court is not the appropriate forum to decide the case due to the location of the evidence and witnesses, the burden on the court

[87] For the breach of fiduciary duty claim, only the political question and act of state defenses apply.

or the defendant ("*forum non conveniens*"); or (d) that the US court lacks jurisdiction because: (i) the company does not do significant business where the court is located, or (ii) the defendant is a parent or subsidiary of the offshore corporate entity that caused the plaintiff's harm and is shielded (by the corporate form) from liability for the overseas entity's conduct.

(vii) Public Law: Lawsuit to Force the State to Revoke Corporate Charter or License

94. A charter issued by state authorities, typically a state Attorney General (AG), establishes US corporations. Foreign companies are issued licenses to do business by the same state authority. States have the legal right to revoke the license or charter where: the company has abused or misused its power; is a consistent violator of the law; is deemed incapable of reform; or has engaged in crimes considered to be a serious breach of the public trust. Consistently approving or condoning illegal action that results in widespread human rights abuses including war crimes is outside the power granted by a charter or license and should be grounds for revocation. Private citizens may sue for an injunction forcing the AG to revoke the charter or license of a company. However, these suits are difficult to win because the court would defer to the AG decision unless it was "irrational".

(viii) United States' Criminal Law

95. A corporation is considered a "person" under U.S. domestic law. As such, corporations in theory may be prosecuted for violating international criminal laws that have been incorporated into U.S. law, because there is no legal distinction between natural persons and legal persons. Genocide, war crimes, and torture are some of the international crimes that have been incorporated by federal statutes into U.S. domestic law to meet its obligations under international treaties.[88] Aiding and abetting such crimes is also criminalized under U.S. law, as in most jurisdictions.

96. While no prosecutor has actually initiated such a prosecution, it is possible, not only in the U.S. but in other jurisdictions as well. For victims of human rights abuses, criminal prosecutions are not as advantageous as civil litigation because in many jurisdictions (including the U.S.) they cannot initiate a prosecution or receive reparations. In addition, the standard of proof (reasonable doubt) is higher than in a civil case (preponderance of the evidence).

[88] Those treaties are the Genocide Convention, the Geneva Conventions, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

97. One issue invoked by a case where the crimes in question occurred outside the U.S. is that of extraterritorial jurisdiction – i.e. the domestic court would be required to exercise jurisdiction over parties or activities abroad. Courts are often reluctant to do so out of fear of interfering in the affairs of another state or with U.S. foreign policy. However, even if many of these crimes occur outside the U.S., extraterritorial corporate abuses that are directed or planned from an office within the U.S. would likely fall within the jurisdiction of U.S. courts. Moreover, U.S. war crimes statutes approve the exercise of extraterritorial jurisdiction to prosecute grave breaches of international criminal law by and against U.S. nationals.[89] U.S. law also applies extraterritorial jurisdiction in cases under the Foreign Corrupt Practices Act, which imposes criminal liability on companies (and those acting on its behalf) for acts of bribery of foreign officials for the purpose of obtaining business.[90]

98. The RICO statute allows both a civil claim and a criminal prosecution. The military contractors can be prosecuted for forming an illegal enterprise with the Israeli government to engage in a pattern of extortion and "racketeering activity" including murder, robbery and physical violence. The issue of extraterritorial jurisdiction also applies here.

F. STATE RESPONSIBILITY FOR CORPORATE VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

99. The duty on states to protect human rights may, in some cases, include the responsibility to regulate the behavior of corporations in order to safeguard the rights of others. The means by which states meet their duty varies from state to state. In his April 2009 report, Professor Ruggie explained:

> "…states are not held responsible for corporate-related human rights abuse *per se*, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs. Within these parameters, states have discretion as to how to fulfil their duty. The main human right treaties generally contemplate legislative, administrative and judicial measures."[91]

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89 18 USC § 118

90 15 USC §§ 78dd-1–78dd-3.

91 Professor John Ruggie, UN special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights: operationalising the 'protect, respect, remedy' framework*, 22 April 2009, UN General Assembly, A/HRC/11/13, para 14.

100. Where corporations act as emanation of the state – either because they are state owned (in part or in whole) or because they are fulfilling a public function on behalf of a state – violations by the corporation will likely engage state responsibility in international law.

(i) The Special Representative's Guiding Principles: State Responsibility for the Activities of Corporations

101. The Special Representative's *Guiding Principles* highlight the responsibility of States in holding corporations to account for their conduct. The following paragraphs set out some of the relevant principles.

1. States must protect against business-related human rights abuse within their territory and/or jurisdiction by taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation, and adjudication.

102. The Commentary explains that the **legal foundation** for this Guideline is to be found,

> "…in international human rights law. The specific language in the main United Nations human rights treaties varies, but all include two sets of obligations for States Parties: first, to refrain, themselves, from violating the enumerated rights of persons within their territory and/or jurisdiction, generally known as the State duty to respect human rights; second, to "ensure" (or some functionally equivalent verb) the enjoyment or realization of those rights. Where private actors, including business enterprises, are capable of impairing human rights, "ensuring" the enjoyment of those rights includes States protecting against such abuse. This is without prejudice to other State duties usually associated with human rights, such as the duties to promote and fulfill."[92]

5. As part of their policy and regulatory functions, States should set out clearly their expectation for all business enterprises operating or domiciled in their territory and/or jurisdiction to respect human rights, and take the necessary steps to support, encourage and where appropriate require them to do so, including by:

a. Enforcing laws that require business enterprises to respect human rights;

b. Ensuring that laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

[92] Ruggie, *2010 Report*, p. 6.

c. Providing effective guidance to business enterprises on how to respect human rights;

d. Encouraging, and where appropriate requiring, business enterprises to provide adequate communication on their human rights performance.

103. Significantly, the Commentary explains that, "States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights."[93]

10. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts do not commit or contribute to such abuses, including by:

a. Engaging at the earliest stage possible with business enterprises to help them identify and mitigate the human rights related risks of their activities and relationships;

b. Providing adequate assistance to business enterprises to assess and address the heightened risks of abuse;

c. As appropriate, reducing or withdrawing access to public support and services for a business enterprise that is involved in gross human rights abuse and fails to cooperate in addressing the situation;

d. Ensuring that their current policies, regulation and enforcement measures are effective in addressing the risk of business involvement in situations which could amount to the commission of international crimes.

104. The Commentary notes that,

"Because there is a heightened risk of businesses committing or contributing to international crimes in conflict-affected areas, States also should review whether their policies, regulation and enforcement measures effectively address this heightened risk. Where they do not, **States should take appropriate steps to address such gaps. This may include exploring civil, administrative or criminal liability for businesses domiciled or operating in their territory and/or jurisdiction that commit or contribute to international crimes.** Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives."[94]

93 *Ibid*., p. 8.

94 *Ibid*., p. 11 (emphasis added).

105. In relation to Ruggie's third Framework principle – "access to a remedy" – the Guidelines set out *inter alia* the following:

23. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means.

24. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights-related claims against business, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

25. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights harms.

26. States should consider ways to facilitate access to effective non-state-based mechanisms dealing with business-related human rights grievances.

29. Non-judicial grievance mechanisms, whether state-based or non-state-based, should be:

a. Legitimate: having a clear, transparent and sufficiently independent governance structure to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;

b. Accessible: being publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

c. Predictable: providing a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

d. Equitable: ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;

e. Rights-Compatible: ensuring that its outcomes and remedies accord with internationally recognized human rights standards;

f. Transparent: providing sufficient transparency of process and outcome to meet the public interest concerns at stake and presuming transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

Operational-level mechanisms also should be:

g. Based on Dialogue and Engagement: focusing on processes of direct and/or mediated dialogue to seek agreed solutions, and leaving adjudication to independent third-party mechanisms, whether judicial or non-judicial.

106. The Commentary points towards the "more recent international human rights treaties", which *require* States to deal with abuses by corporations by establishing liability for legal persons.[95] For example,

- **Convention on the Elimination of All Forms of Discrimination Against Women**
  - Article 3: "States Parties shall take in all fields, in particular in the political, social, *economic* and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."
  - Article 11(1): "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights…".
  - Article 13: "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights".
- **Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography**
  - Article 3(4): "Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative."
- **Convention on the Rights of Persons with Disabilities**
  - Article 27(1): "States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps…".

107. Earlier treaties that do not contain such specific references to the State responsibility of legal persons, "require in more general terms that States investigate, punish and redress human rights abuse by third parties, commentary from the UN Treaty Bodies and relevant regional human

[95] *Ibid*., p. 21

rights commissions and courts has provided some clarification of how these provisions can apply to abuse by business enterprises."[96]

108. The Commentary also provides that State-based grievance mechanisms may take many different forms, including those under already existing international agreements, such as the OECD National Contact Point system. For example a mechanism may be:[97]

- Administered by a branch or agency of the State or by an independent body on a statutory basis.
- May be judicial or non-judicial – for example, courts, labour tribunals, national human rights institutions, National Contact Points under the OECD, ombudsperson offices and government-run complaints offices.
- May be adversarial or mediation-based.

109. Indeed, "[a]dministrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms":[98]

> "Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all legitimate claims; judicial remedy is not always required or necessary; nor is it always the favored approach for all claimants.
>
> Gaps in the provision of remedy for business-related human rights harms could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes - or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties.
>
> National Human Rights Institutions have a particularly important role to play in this regard.

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96 *Ibid*.

97 *Ibid*.

98 *Ibid*., p. 23.

As with judicial mechanisms, vulnerable and marginalized groups often face particular barriers in accessing, using and benefiting from non-judicial grievance mechanisms, which should be taken into account at each stage of the remedial process."[99]

[99] *Ibid*.