



*European Master's Degree in Human Rights and Democratisation*

Master thesis:

Corporate Accountability for Economic, Social and Cultural Rights Abuses  
Committed Abroad: Foreign Victims' Access to Remedy in Home States

*An Assessment of the United Kingdom and the Netherlands regarding the  
Guiding Principles on Business and Human Rights and the Maastricht  
Principles on Extraterritorial Obligations of States in the Area of  
Economic, Social and Cultural Rights*

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*“ Two things are infinite: the universe and human stupidity; but I’m not sure about the universe.”*

Albert Einstein.

## ***Abstract***

*The lack of corporate accountability for human rights abuses committed in developing countries remains one of the major obstacles to the universal respect of fundamental human rights. To remedy this situation, the international community of States and academics have been considering the role that home States could play in the regulation and adjudication of extraterritorial corporate activities. In that context, the present thesis proposes to focus on the specific question of the possibility for victims of extraterritorial corporate economic, social and cultural rights abuses to obtain remedies from the concerned corporation in the home State. More precisely, it analyses whether, and if so, under which conditions, current international law requires or encourages home States to provide these remedies, on the basis of the combined study of two recent documents: the United Nations Guiding Principles Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, and the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. Furthermore, for a better understanding of the potential concrete implications of these documents, the present thesis assesses the UK and Dutch legislation and legal practice with regard to their content. Finally, the thesis concludes that, from a general point of view, these documents represent a great step forward for the re-shaping of the international legal order and thus for the creation of worldwide corporate accountability. However, the thesis also concludes that they are insufficient because they do not consider the specific question of the existence of a home State’s duty to compel its corporations to remedy their extraterritorial economic, social and cultural rights abuses.*

### Table of Abbreviations and Acronyms

CHR	Commission on Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
EU	European Union
GA	General Assembly
GLO	Group Litigation Order
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
LASPOA	Legal Aid, Sentencing and Punishment of Offenders Act
MDGs	Millennium Development Goals
MNE	Multinational Enterprise
MS	Member States
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OECD	Organisation for Economic Co-operation and Development
SRSG	Special Representative of the Secretary-General
TNC	Transnational Corporation
UK	United Kingdom
UN	United Nations

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## INTRODUCTION

During the nineties, the company Cape Plc., incorporated in the United Kingdom (UK), caused damages to workers and villagers in South Africa. It exploited a mine containing a level of asbestos 12-35 times higher than the level permitted in Great Britain, which affected those persons' health.<sup>1</sup> During the same period, in the Niger Delta, the United States (US) company Chevron's oil production caused massive erosion. This deprived local people of their housing, as well as of their fishing grounds and fresh water supply.<sup>2</sup> Later, in 2007, the indigenous Mayan Q'echi' population from El Elstor (Guatemala) were victim to brutal shooting and rapes in relation with the Canadian company Hudbay Minerals' mining project in Guatemala.<sup>3</sup>

These cases, chosen at random among many others, illustrate the great extent to which Western transnational corporations are responsible for the massive violations of economic, social and cultural rights (ESCR) in developing countries. The current situation is indeed such that businesses have nowadays a far more important impact on the realisation of these rights than the State on the territory of which the former undertake their activities.<sup>4</sup> This phenomenon is the result of the combination of several factors. First, corporations are very powerful actors in a globalised world driven by the free market.<sup>5</sup> Second, in order to be more competitive, companies conduct their activities in developing countries, where the social and environmental standards are lower.<sup>6</sup> Third, in these countries, corporations can often infringe upon human rights without breaching any national law, and, even when their activities are so damaging that they violate the host State's standard of human rights protection, they are not punished for it. Indeed, on the one hand, current international law does not apply directly to

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<sup>1</sup> Jägers, 2002, p. 207.

<sup>2</sup> Weschka, 2006, p. 638.

<sup>3</sup> Business & Human Rights Resource Centre, Case Profile: Hudbay Minerals lawsuits (re Guatemala), available at <http://businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/HudBayMineralslawsuitsreGuatemala> (consulted on 14 March 2012).

<sup>4</sup> Vandenhole, 2011, p. 430. This was already recognised by some experts in the late nineties (See the *Maastricht Guidelines on Violations in Economic, Social and Cultural Rights* (UN Doc. E/C.12/2000/13, 2 October 2000), Guid. 2).

<sup>5</sup> De Schutter, 2010, p. 21.

<sup>6</sup> Jägers, 2002, p. 8.



corporations, so that no international body can sanction them in case of violation of international human rights law.<sup>7</sup> On the other hand, host States are often unwilling or unable to regulate, monitor and sanction companies for their behaviour on their territory, either because they want to ensure foreign investment or because they lack financial resources, as well as a functioning non-corrupted judiciary system.<sup>8</sup>

Therefore, for ESCR to be universally respected, the role of home States in the regulation of their corporations' foreign activities and in the adjudication of the latter for wrongs committed abroad appears crucial.<sup>9</sup> That explains why many authors already discussed the extent to which home States hold, can hold, or must hold their corporations liable for extraterritorial human rights abuses.<sup>10</sup> In the continuum of this work, the present thesis aims at evaluating the impact of two recent international documents on the existence of a home States' duty to provide victims of extraterritorial corporate ESCR abuses with remedies, in a way that would compel the corporation to compensate its harmful conduct. These documents are: the *United Nations (UN) Guiding Principles Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* ("Guiding Principles") adopted in March 2011,<sup>11</sup> endorsed by the Human Rights Council in July 2011,<sup>12</sup> and the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* ("Maastricht Principles"),<sup>13</sup> adopted in September 2011.

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<sup>7</sup> UN Doc. A/HRC/17/31, 21 March 2011, paras. 2-3.

<sup>8</sup> Weschka, 2006, pp. 628-629. This whole situation of corporations' impunity in our globalised world in spite of their huge power is today often called the *governance gap* or the *accountability gap* (See Kamminga, 2012, p. 3).

<sup>9</sup> It should be insisted on that the present thesis is concerned with *regulation* and *adjudication*, i.e. with creating legal and enforceable obligations for business, and not with *negotiation* that would aim at inciting the latter to better respect human rights. Indeed, the present thesis is based on the assumption that such negotiation is not sufficient for enhancing the respect of human rights by the corporate world (for an illustration of the inefficiency of such negotiation, see for instance the concrete results of the agreement signed by Unilever under the auspices of the UK Government concerning workers' rights in India, at the webpage: <http://cms.iuf.org/?q=node/1772> (consulted on 3 July 2012)).

<sup>10</sup> For general studies, see Joseph, 2004, Weschka, 2006, Fédération Internationale des Ligues des Droits de l'Homme (FIDH), 2012, and Cernic, 2010; for State studies, see, for the United Kingdom, Byers, 2000, and Oxford Pro Bono Publico, 2008; for the Netherlands, see Castermans & van der Weide, 2009, and Jägers & van der Heijden, 2007-2008.

<sup>11</sup> UN Doc. A/HRC/17/31, 21 March 2011.

<sup>12</sup> UN Doc. A/HRC/RES/17/4, 6 July 2011, para.1.

<sup>13</sup> Maastricht Centre for Human Rights (Maastricht University) and the International Commission of Jurist (ICJ), Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28 September 2011, available at <http://www.icj.org/dwn/database/>

For this purpose, the present thesis analyses whether, and if so, under which conditions, these two documents require, or at least encourage, home States to provide remedies to victims of ESCR abuses committed by their corporations in developing countries.<sup>14</sup> On the basis of this analysis, the research evaluates both UK and Dutch norms and practice in order to establish whether these two countries comply with the requirements or encouragements contained in the Guiding Principles and in the Maastricht Principles. This evaluation will enable the realisation of the contribution of these two documents in the creation of a home States' duty to hold companies accountable for human rights abuses committed overseas, especially by compelling these companies to provide victims of their abuses with effective remedies.

With regard to the above mentioned research questions, it is important to define some methodological premises.

First, the choice of the United Kingdom and the Netherlands as tools permitting the understanding of the concrete possible implications of the Guiding Principles and the Maastricht Principles is motivated by several elements. Firstly, it focuses the research question specifically to the European level, so that both the relevant European Union (EU) law and that from the Council of Europe (CoE) can be taken into consideration. Secondly, these two States are ahead compared to other European States, on the question of liability of corporations for extraterritorial human rights abuses.<sup>15</sup> As a result, their analysis has a greater chance of being more interesting than the many other countries, in that there are at least some cases and legislation, as well as some literature, to examine. Considering these criteria, one should note that Germany could have also been the subject of a worthily research.<sup>16</sup> Nevertheless, the present thesis leaves this option aside, due to linguistic limitations. Thirdly, many important

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Maastricht%20ETO%20Principles%20-%20FINAL.pdf (consulted on 14 March 2012). Here after "Maastricht Principles".

<sup>14</sup> Some authors speak in this case of the application of a "double standard" of norms (see for example, Weschka, 2006, p. 633).

<sup>15</sup> Email from Ludovic Hennebel, Research fellow, Perelman Centre of philosophy of law, Free University of Brussels (ULB), 20 February 2012, and Email from Menno Kamminga, Professor in Maastricht University and Director of the Maastricht Centre for Human Rights, Maastricht University, 16 February 2012.

<sup>16</sup> Germany is also a country where a lot is done for corporate social accountability (see Federal Ministry of Labour and Social Affairs, 2010).

multinational corporations have the UK or the Netherlands as home States.<sup>17</sup> This renders the role of these States in creating corporate accountability for human rights abuses committed overseas even more important.

Second, in order to fulfil the first purpose of referencing, i.e. to render the reader able to find, check and learn more about the used sources, national material will be sourced according to English speaking standards when feasible, with translation when necessary.<sup>18</sup> Other sources will be cited in conformity with the *EMA Editing Rules*, and, in cases where the EMA rules are silent, with the *APA*<sup>19</sup> *Formatting and Style Guide*, used in Purdue and Oxford Universities, or with official citations, when provided.<sup>20</sup>

Thirdly, it shall be made clear that the research questions will be treated on the basis of a descriptive, analytical and normative approach, involving a comparative method. Indeed, as a first step, the thesis describes the requirements contained in the Guiding Principles and in the Maastricht Principles, to the extent that they appear relevant with regard to the chosen topic. The purpose of this description is to determine if and how these two documents create an obligation for home States to provide remedies to victims of corporate ESCR abuses committed abroad, by compelling corporations to make up for their wrongs. As a result, the examination of the chosen international documents follows a descriptive and analytical approach. As a second step, the thesis describes the situation in the UK and the Netherlands regarding the possibility for foreign victims of corporate wrongdoings to access remedies in these countries. This second step is also based not only on a descriptive approach but also on an analytical approach, since it consists in establishing both *what exists* in favour of foreign victims' access to remedy and *what could be used* in that favour. As a third step, the thesis assesses the UK and Dutch situations regarding what is required of them according to

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<sup>17</sup> The City of London is the seat of a very large number of companies, like Vodafone, BP, or the Royal Dutch/Shell Group and Unilever, both based both in the UK and the Netherlands (Oxford Pro Bono Publico, 2008, p. 260). As for the Netherlands, it is the seat of, aside from Unilever and Shell, Philips, and Heineken (Jägers & van der Heiden, 2007-2008, p 839).

<sup>18</sup> The following choices have been made in agreement with Professor Fons Coomans (Discussions with Fons Coomans, Professor in Maastricht University, UNESCO Chair in Human Rights and Peace, Head of the Department of International and European Law in the Faculty of Law of Maastricht University, Maastricht University, Maastricht, 29 February and 21 June 2012).

<sup>19</sup> American Psychological Association.

<sup>20</sup> European Master Degree in Human Rights and Democratisation, 2012. There is also a PowerPoint complementing the editing rules (Drabowska, 2011); Purdue Online Writing Lab, n.d.

the Guiding Principles and the Maastricht Principles, by comparing their respective situations, and makes some recommendation to these countries, on the basis of the assessment. This third step is thus based on an analytical and normative approach and uses a comparative method.

In the frame determined above, the present thesis will first give a precise definition of the notions and expressions used in the research questions in order to determine at best the thesis topic (1). The second section will analyse the Guiding Principles and the Maastricht Principles regarding the existence and scope of the home States' obligation to protect ESCR abroad, by providing access to remedies for victims of corporate human rights abuses that occurred in developing countries (2). The result of the analysis made under part 2 will permit the comparative assessment of the English and Dutch situations, on the basis of which some recommendations will be made (3).

## 1. NOTIONS

In order to define precisely the components of the chosen topic, the present section will first determine the four main actors involved in the situation considered by the research, i.e. the transnational corporation, its home State, its host State, and the victims of its wrongdoings (1.1). Second, it will be useful to distinguish between State extraterritorial jurisdiction, domestic law with extraterritorial effect, and State international extraterritorial obligations, in order to understand the exact meaning of the “extraterritoriality” considered by the present thesis (1.2). Third, this section will identify the different elements that the notion of “access to remedy” entails for the purpose of the present thesis (1.3). Lastly, the notions of ESCR will be defined, regarding both their common meaning and legal value, for a better comprehension of the nature of these rights and, hence, of what they may require from States (1.4).

### 1.1. Home State, Host State, Corporation, and Victims of Corporate ESCR Abuses Committed Abroad

It is necessary to define the four main actors considered by the research question, i.e., the corporation, its home State, its host States, and the victims of its abuse who would seek remedies to this abuse in the home State. Therefore, it must be distinguished between the legal and economic definition of these notions, as they will both be used in the present thesis.

From a *legal* point of view, a corporation – or company, or enterprise, or business – can be defined as “an entity that is legally separate from its members,<sup>21</sup> and which enjoys its own personality and can hold rights and obligations in its own name.”<sup>22</sup>

Furthermore, this corporation can “own or control production, distribution or services facilities outside the country in which it is based.”<sup>23</sup> Such corporations are defined as “transnational corporation” (TNC). Furthermore, in the present thesis, the country in which this TNC is based will be called its *legal* “home State”, while the other countries where it operates will be called its *legal* “host States.”<sup>24</sup> In that context, the “victims of corporate ESCR abuses committed abroad” will be, for the present research, local people living in host States who suffered from the wrongdoings committed by the TNC.

Concretely, the country where a company is based, i.e. the legal home State of this company, is the country of which the company has its nationality. For determining this nationality, States have used several methods, the description of which is given differently depending on the authors.<sup>25</sup> If there is no place here to discuss that matter, it is necessary for the purpose of the present thesis to state that, with regard to international private law, the UK gives its nationality to corporations that comply with the formalities for their establishment as companies, i.e. that are incorporated, in that

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<sup>21</sup> The term “members” refers to the shareholders as well as to the directors, executors, and employees of the corporation.

<sup>22</sup> Mulchinski, 2011, p. 1.

<sup>23</sup> Jägers, 2002, p. 11.

<sup>24</sup> Robinson, 2008, p. 2.

<sup>25</sup> See, among others, von Glahn & Taulbee, 2007, p. 223 and Andenas & Woodridge, 2009, pp. 34-35.

country (principle of incorporation). As for the Netherlands, it gives its nationality to corporations that have their statutory seat, i.e. the seat designated in their Articles of Association, in the Netherlands (principle of statutory seat).<sup>26</sup>

Differently, from an *economic* point of view, the notion of corporation refers rather to a group of legal entities, all pursuing the same specific commercial aim and hence forming a unique economic entity, in which subsidiary companies are controlled by the parent company.<sup>27</sup> In cases where such a group of companies is formed by legal entities that are situated all around the world, it is often spoken of as Multinational Enterprises (MNEs). In such cases, the “home State” is the State where the parent company is based, and the “host States” are the States where the subsidiary companies undertake their activities. For the present research, when considering these States, it will be spoken of *economic* home and host States. Consequently, in that context, the “victims of corporate ESCR abuses committed abroad” will designate local people living in host States who suffered from wrongdoings committed by one of the parent company’s subsidiaries.

## 1.2. Extraterritoriality

Before undertaking the chosen research, it is also necessary to distinguish between three different concepts in order to understand what “extraterritoriality” means for the present thesis. These three concepts are: extraterritorial jurisdiction (1.2.1); international extraterritorial obligations (1.2.2); and domestic legislation with extraterritorial effects (1.2.3).

### 1.2.1. *Extraterritorial Jurisdiction*

The notion of extraterritorial jurisdiction of States, as used in the present thesis, may correspond both to the most widespread definition of this notion, which considers

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<sup>26</sup> See Andenas & Woodridge, 2009, pp. 34-35.

<sup>27</sup> De Cordt, Lambrecht, Malherbe & Malherbe, 2009, p. 1187.

jurisdiction as a notion of State power, or that of State duty. Consequently, it is necessary to define these two meanings of jurisdiction.

In international law, there is widespread agreement on the fact that the notion of jurisdiction refers to a State's entitlement to act.<sup>28</sup> According to that meaning, jurisdiction demarcates the limits of the legal competence of States to *make, apply* and *enforce* rules of conduct upon persons.<sup>29</sup> Therefore, it is spoken of jurisdiction to *prescribe*, to *adjudicate*<sup>30</sup> and to *enforce*, respectively.<sup>31</sup> In that regard, it is worth emphasising that the present thesis is not concerned with the jurisdiction to enforce, which only applies to a State's national territory.<sup>32</sup>

Moreover, in international law, it is widely accepted that jurisdiction has several bases, some of which are well stated, and some of which are more controversial, even though many slightly different opinions can be found among academics.<sup>33</sup> Moreover, according to Martin Dixon, it is reasonable to consider that these bases are utilised in both criminal and civil matters, unless differently indicated.<sup>34</sup> Among the well-stated bases of State jurisdiction, three bases need to be explained for the present thesis.<sup>35</sup> First, *territorial jurisdiction* enables a State to apply its national law to facts that occurred within its territory.<sup>36</sup> Second, *nationality jurisdiction* gives a State the *power* (not the *obligation*) to exercise prescriptive and adjudicative jurisdiction over its

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<sup>28</sup> Higgins, 1994, p. 57.

<sup>29</sup> Lower & Staker, 2010, p. 313.

<sup>30</sup> When dealing with the question of the exercise of jurisdiction to adjudicate in private law matters, however, according to one school of thought, public international law, which determines State jurisdiction, is not relevant. As a result, there would not be any limit, in customary international law on the jurisdiction of municipal courts in civil trial (Hill, 2003, p. 42). Nevertheless, there is no space here to discuss this question. Therefore, State jurisdiction to adjudicate on private law matters will be treated in the present thesis on the basis of the general principles of international public law stated here below in the present section.

<sup>31</sup> For an explanation of these three types of jurisdiction, see Lower & Staker, 2010, section II.

<sup>32</sup> Dixon, 2005, p. 133.

<sup>33</sup> Compare, for instance, Higgins, 1994, pp. 56-77, with von Glahn & Taulbee, 2007, c. 10, Lower & Staker, 2010, pp. 313-337, and Dixon, 2005, c. 6.

<sup>34</sup> Dixon, 2005, p. 135.

<sup>35</sup> In Rosalyn Higgins' opinion, the other well-stated bases are: protective jurisdiction and passive personality jurisdiction (for an explanation about them, as well as concerning the effects jurisdiction basis, see the literature cited in note 33).

<sup>36</sup> More precisely, *subjective territorial jurisdiction* refers to the exercise of the jurisdiction to prescribed by a State applying its domestic law to an incident which is initiated within its territory but completed outside its territory; *objective territorial jurisdiction* corresponds to the exercise of prescriptive jurisdiction by a State applying its law to an incident that is completed within its territory, even though it was initiated outside its territory (Lower & Staker, 2010, pp. 321-322).

nationals, wherever they may be when the offense or civil wrong is committed.<sup>37</sup> Hence, nationality jurisdiction constitutes a basis for State extraterritorial jurisdiction. This is actually the basis that could be used by a corporation's home State that accepts to adjudicate a case in which victims of an extraterritorial wrong committed by this corporation seek for civil remedies. Third, *universal jurisdiction* gives to any State the power to apply law and try cases (prescriptive and adjudicative jurisdiction), even if these cases involve harmful acts that occurred outside the State's territory, and even if these acts have neither been perpetrated by nor harmed nationals of this State.<sup>38</sup> Universal jurisdiction is attached to certain acts because of their nature, in that these acts correspond to grave international crimes.<sup>39</sup> Thus, this last basis also represents a basis for State extraterritorial jurisdiction, but only in relation to criminal matters.

That being said, it must be stressed that the present thesis is concerned mainly with extraterritorial jurisdiction of the home State over cases of corporate ESCR abuses that exists on the basis of *nationality* jurisdiction, even if the concept of *universal* jurisdiction will be used to a small extent.<sup>40</sup>

Differently, according to the Maastricht Principles, when jurisdiction is exercised in relation with internationally recognised ESCR, it corresponds to a State duty. Indeed, Principle 9, entitled "scope of jurisdiction", defines the situations in which international obligations may arise for a State, although such situations may occur outside its national territory.<sup>41</sup> Thus, in this Principle, the notion of jurisdiction is used, not as a permissive notion, which is traditionally the case, but as a prescriptive notion.<sup>42</sup> This means that instead of describing what a State *can* do, Principle 9 refers to what a State *must* do.

Substantially, Principle 9 defines jurisdiction in a very broad way, since it includes situations of authority or effective control (*de facto* or *de jure*) over persons

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<sup>37</sup> Dixon, 2005, p. 137.

<sup>38</sup> Higgins, 1994, p. 57.

<sup>39</sup> For more details about it, see Lower & Staker, 2010, pp. 321-324.

<sup>40</sup> See *infra*, sections 3.2.1.4 and 3.3.1.4.

<sup>41</sup> De Schutter, Eide, Khalfan, Orellana, Salomon and Seiderman, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights (advance unedited version), 29 February 2012, available at <http://danton1066.files.wordpress.com/2012/03/maastricht-principles-commentary.pdf> (consulted on 30 February 2012), here after, "The Commentary", Comm. on Princ. 9, para. 1.

<sup>42</sup> *Ibid.*, Comm. on Princ. 9, para. 2.



and/or territory, or of foreseeable effects, and a position to exercise decisive influence.<sup>43</sup> These situations of extraterritorial jurisdiction – as defined by the Maastricht Principles – are legally based on the role of international assistance and cooperation in the fulfilment of ESCR.<sup>44</sup> In addition, they have the purpose of extending extraterritorial obligations of States, i.e. their responsibility, beyond situations in which they can exercise their jurisdiction, as traditionally defined in international law.<sup>45</sup>

### 1.2.2. *International Extraterritorial Obligations*

Aside from understanding the notion of extraterritorial jurisdiction, it is important to realise what can be the legal basis for requiring States to provide remedies for victims of corporate ESCR abuses that occurred overseas. This legal basis resides in the concept of international extraterritorial obligations of State in the area of ESCR.

According to Principle 8 of the Maastricht Principles, State extraterritorial obligations in the area of ESCR encompass:

“(a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to

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<sup>43</sup> Vandenhoe, 2011, p. 432; confirmed by the wording of Principle 9 of the Maastricht Principles: “A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: (a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; (b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; (c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.” For a better explanation of these different situations, see The Commentary, *op. cit.*, Comm. on Princ. 9, paras. 4-9.

<sup>44</sup> The Commentary, *op.cit.*, Comm. on Princ. 9, para. 9. To be more precise, only Principles 9(b) and (c) are formally based on the obligations of international cooperation set out in international law (*Ibid.*, Comm. on Princ. 3, para. 1).

<sup>45</sup> See the reference to the European Court of Human Rights (ECHR) in *Ibid.*, Comm. on Princ. 9, para. 7. See also *Ibid.*, Comm. on Princ. 8, para. 3.

realise human rights universally.”<sup>46</sup>

Thus, this Principle identifies two types of extraterritorial obligations. If, in practice, they overlap or are simultaneously arising, with similar legal consequences,<sup>47</sup> it should be understood that they have a different nature. Indeed, the first obligation relates to the fact that a State may be held responsible for the protection of ESCR, because it can exercise a certain influence on the actor that could commit an ESCR abuse outside the national territory. Differently, the second obligation relates to specific human rights matters that need to be dealt with at a global level in order to have a chance of being achieved in the future. For instance, infectious diseases cannot be combated other than in a worldwide manner, especially in a globalised world where communication and travel are extremely fast and frequent. Similarly, the environmental issue, which is closely related to the human right to health, needs to be treated by all the States acting together. As a result, as stated by Olivier De Schutter, this obligation “has nothing to do with territorial considerations but concerns the international economic environment and the shaping of international regimes.”<sup>48</sup>

### 1.2.3. *Domestic Legislation with Extraterritorial Effects*

If the nature of State international extraterritorial obligations allows a better understanding of why and in which type of circumstances a home State may be required to provide remedies for victims of extraterritorial corporate human rights abuses, it is necessary to identify an important tool that can be used by this State in order to fulfil its international obligations at national level. It is also important to distinguish this national tool from State extraterritorial obligations. This tool is domestic legislation with

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<sup>46</sup> Maastricht Principles, *op. cit.*, Princ. 8.

<sup>47</sup> The combination of these two grounds for the State’s responsibility occurs, for instance, in cases where a State is obliged to ensure that a corporation domiciled within its jurisdiction does not provide loans to a project leading to forced evictions. Indeed, in these cases, the State’s obligation arises under Principle 8(a), because the State has the power *de iure* and *de facto* to regulate the corporation’s conduct, as well as under Principle 8(b), because of the obligation to take separate and joined action to realise human rights internationally (The Commentary, *op. cit.*, Comm. on Princ. 8, para. 2).

<sup>48</sup> Email from Olivier de Schutter, Professor at the University of Louvain (Belgium) and at the College of Europe (Natolin), Catholic University of Louvain (UCL), 11 June 2012.

extraterritorial effect. Indeed, domestic legislation determines wrongs for which a corporation may be held liable at domestic level and, consequently, may be required to provide remedies to the victims of its wrongs. Hence, the fact that a victim of corporate human right abuse may or may not obtain any remedy in the home State will depend, among other things, on the content of national legislation, and especially on the question as to whether this legislation must be respected both inside and outside national boundaries, i.e. as to whether it has extraterritorial effects.

That being said, it is important to understand the difference between the notion of State extraterritorial obligations defined above and the notion of domestic legislation with extraterritorial effects. Indeed, this last notion describes a legal practice that exists independently from the carrying out of these obligations, even if the adoption of such legislation can be a consequence of this action, in some circumstances. In fact, from a general point of view, this notion refers to the adoption of rules that are formulated in such a way that they have to be respected out of the national territory of the State that drafted the norm. An illustration of this practice can be found in US law, which contains some acts having extraterritorial effects in order to ensure the protection of American citizens working for an American employer abroad.<sup>49</sup> One of these acts is the Foreign Corrupt Practice Act of 1977,<sup>50</sup> which requires in particular the corporation's assurance that any subsidiary or joint venture in which it has more than 50% ownership interest adheres to the specific accounting standards determined in this Act.<sup>51</sup>

Furthermore, it should be understood that the practice of domestic extraterritorial legislation finds its usual legal basis in the traditional concept of jurisdiction, especially when considering prescriptive and adjudicative jurisdiction, which corresponds to the *power* of a State to regulate and adjudicate on a situation occurring outside its territory, on the basis of *nationality* jurisdiction.<sup>52</sup> Nevertheless, as one can understand from the specific definition of jurisdiction given in the Maastricht Principles, in the area of ESCR, the concept of domestic regulation with extraterritorial

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<sup>49</sup> Broecker, 2008, p. 11.

<sup>50</sup> Pub. L. No.95-213, 91 Stat.1494 (codified as amended in scattered sections of 15 U.S.C.).

<sup>51</sup> 15 U.S.C. para. 78m(b)(6).

<sup>52</sup> See *supra*, section 1.2.1.

effects also has another legal basis, when it is the result of the fulfilment of its extraterritorial *obligations* by a State.

### 1.3. Foreign Victims' Access to Remedy Before Home States' Institutions

When speaking of victims of ESCR abuses' access to remedy before the home State of the corporation that is responsible for these abuses, a distinction shall be made between different concepts in order to understand precisely what this expression covers. First, a distinction needs to be made between the two components of the right to effective remedy. One component resides in the possibility for a victim to have his or her claim examined by a State institution. The other component concerns the possibility for a victim to get an effective remedy on the basis of this examination (1.3.1). Second, it is important to realise that the fulfilment of this obligation to provide victims of corporate human rights abuses with remedies entails the use of not only State judicial mechanisms but also of State non-judicial mechanisms (1.3.2).

#### *1.3.1. Access to Effective Remedy: Procedural and Substantive Aspects: Access to Justice and Effective Chance to Obtain the Cessation of or the Compensation for an Extraterritorial Corporate ESCR Abuse in the Home State*

As considered by the present thesis, the right to effective remedy implies the combination of two types of national norms. Indeed, on the one hand, access to effective remedy requires that domestic procedural norms give the possibility to victims of extraterritorial corporate ESCR abuses to present their complaint to a State institution that would adjudicate the case.<sup>53</sup> On the other hand, access to effective remedy requires that, if a State institution adjudicates such a case, there should be a possibility for the victims to obtain a favourable decision from that institution. This means that substantive domestic law should provide that in cases where a corporation commits an

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<sup>53</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 25, para. 2.

extraterritorial ESCR, it should remedy it. It should also give a possibility for foreigners to obtain a prevention of the harm that they could suffer from, if the abuse did not occur yet but is likely to occur.<sup>54</sup> Therefore, domestic substantive law needs to recognise that a corporate ESCR abuse, even if extraterritorial, amounts to the breach of a national norm. It should then also provide that the breach of this rule gives rise to a corporate obligation to remedy it, or that the impending breach of this rule could be stopped before occurring. However, this does not mean that substantive law shall state that every corporate human right abuse, the existence of which could be proven, would lead to remedy. Indeed, substantive law may require certain characteristics from the extraterritorial corporate ESCR abuse to correspond to the breach of a domestic rule. For instance, the present thesis is based on the opinion that it would be reasonable to think of a law allocating a certain sum of money to individuals that would suffer from corporate environmental damages, only if these damages took place after a certain date and if they provoked the impossibility for the individuals to continue working.

Furthermore, it should be stressed that for the present thesis, substantive law that recognises a right to remedy for victims of the breach, by a home State, of its international duty to protect individual from the violation of their ESCR, is not relevant. Similarly, the present thesis is not concerned with international norms requiring a State to provide remedies for such a breach. This is worth emphasising because under their duty to protect individuals from the violation of their ESCR by non-State actors, States may have an obligation to provide remedies for victims of extraterritorial corporate human rights abuses, under the Guiding Principles or the Maastricht Principles.<sup>55</sup> However, in such a context, the victim should not only prove that the corporate human rights abuse has been committed, but also that this commission amounted to a breach of his or her duty to be protected by the State against which the complaint is directed. Now, a corporate human rights abuse can happen even if the State complied with all its international obligations.<sup>56</sup> That is the first reason why the present thesis focuses only

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<sup>54</sup> *Ibid.*

<sup>55</sup> See the examination of the Maastricht Principles under section 2.2.2.

<sup>56</sup> In particular, this is confirmed by the Guiding Principles, which state, speaking of the State duty to protect human rights, that “States are not *per se* responsible for human rights abuse for private actors [...] States may breach their international human rights obligation where such abuse can be attributed to them, or when they fail to take appropriate steps to prevent, investigate, punish and redress private actors” (UN

on the existence of a possibility for victims to get remedies only by proving the existence of a corporate human rights abuse. The second reason resides in the fact that the present thesis is concerned with *corporate* accountability and not with *State* accountability, even though it examines the role of home States on the creation of corporate accountability.

In practice, therefore, the thesis considers UK and Dutch mechanisms to the extent that they allow pursuing corporations directly – and not a State that is considered to be in a position to regulate this corporation – for their wrongdoings.

### 1.3.2. *Judicial and Non-judicial Mechanisms*

Secondly, if the present thesis considers only claims that can be formulated before a State institution against a given corporation, it is not limited to the examination of judicial institutions. Hence, the present thesis will consider the State provision of remedies for victims of extraterritorial ESCR abuses, either by judicial and non-judicial State institutions. However, regarding the content of the Guiding Principles and the Maastricht Principles, it should be stressed that these mechanisms will be only considered by the present thesis to the extent that they are both State-based and present at the national level.<sup>57</sup>

## 1.4. Economic, Social and Cultural Rights

Before entering the core of the thesis topic, it is necessary to define the human rights that will be studied in order to answer to the research question, i.e. economic, social and cultural rights. Therefore, the present section will pay attention to their general meaning and to their legal value.

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Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ.1, para. 2 (own emphasis added). Specifically in the area of ESCR, this is still true, since under their duty to protect, today States only have to exercise due diligence in order to prevent non-State actors acting abroad to infringe upon ESCR (See the Euzkadi case, in Coomans & Künnemann, 2012, pp. 232-237, especially p. 235).

<sup>57</sup> See UN Doc. A/HRC/17/31, 21 March 2011, Guid. Princ. 28-30 and Comm. on Guid. Princ. 25, para. 6.

From a general point of view, the first notion of “economic rights” refers to “claims to participation in economic life” and to the right to undertake “professional activities aimed at survival and earning a living.”<sup>58</sup> Concretely, this notion covers, among others, the right to an adequate standard of living, including food, water and clothing, and the right to property. Second, the notion of “social rights” relates to the “legal protection of workers and of the conditions under which people live and work.”<sup>59</sup> This includes, for instance, the right to just and favourable working conditions, the right to health and the right to housing (which is linked to the right to property). Third, the notion of “cultural rights” allows each individual and each community to develop its cultural identity.<sup>60</sup> It relates to cultural rights of indigenous people and minorities in general, since it gives to the latter the right to practice and protect their language, ethnicity and religion. It also entails the right to enjoy the benefits of scientific progress, and it is closely linked to the right to education (which is also to a certain extent part of economic rights).

These general definitions must be kept in mind for the present thesis, together with the *general international legal value* of ESCR. This means that, for the purpose of the present thesis, these rights are considered as rights that have the same value as civil and political rights in international law.<sup>61</sup> This is worth stressing since, previously, ESCR were considered as non-justiciable rights, i.e. rights that cannot be easily applied by courts because of their more political nature.<sup>62</sup> They were also considered as creating positive, expensive, vague and progressive obligations, while civil and political rights corresponded to negative, precise and immediate obligations.<sup>63</sup> Moreover, the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>64</sup> if ratified, was not implemented because of the States’ community lack of interest in the

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<sup>58</sup> Coomans, 2011, p. 3.

<sup>59</sup> *Ibid.*, p. 4.

<sup>60</sup> *Ibid.*, p. 5.

<sup>61</sup> Sepúlveda, 2003, p. 116.

<sup>62</sup> Eide, 2001, p. 10.

<sup>63</sup> About the traditional point of view on ESCR, based on the existence of a difference between the nature of these rights and the nature of civil and political rights, which are considered in this viewpoint as “real rights”, see Sepúlveda, 2003, pp. 117-136.

<sup>64</sup> United Nations Treaty Series Online Collection, available at <http://treaties.un.org/> (consulted on 28 June 2012).

“non civil and political rights.”<sup>65</sup> Today, these dichotomies are not true anymore. The predominant literature recognises the same legal value to the civil and political rights, on the one hand, and to the economic, social and cultural rights, on the other hand.

## 2. INTERNATIONAL LEGAL FRAMEWORK: THE CHANGES BROUGHT BY THE GUIDING PRINCIPLES AND THE MAASTRICHT PRINCIPLES

Keeping in mind the notions defined in section 1, the present section will first turn towards the 2011 Guiding Principles, which concern: (1) human rights in general; (2) territorial and extraterritorial State obligations, without distinction; (3) human rights abuses, only to the extent that they are the result of a corporation’s act (2.1). Second, the thesis will examine the Maastricht Principles, which concern: (1) specifically ESCR; (2) State extraterritorial obligations (and not State obligations in general); (3) State violation of ESCR and, in that context, among other things, ESCR violations that are the result of corporate activities or decisions (2.2). The present section will end by stating the conditions under which these international instruments require home States to compel corporations to remedy their harmful conducts (2.3).

### 2.1. International Legal Framework Related to Human Rights Abuses in General and Focussed on Corporations: The Ruggie Framework “Protect, Respect and Remedy” and the Guiding Principles on Business and Human Rights

In the present section, the Guiding Principles will be dealt with. Therefore, it will first be explained where this document comes from (2.1.1). Secondly, its content will be examined, with a focus on its third part, which regulates the “access to remedy” question (2.1.2). Thirdly, the section will evaluate the legal value of the Guiding Principles (2.1.3).

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<sup>65</sup> Sepúlveda, 2003, p. 45.



### 2.1.1. *How the Guiding Principles Came into Existence*

When trying to understand the content and the value of the Guiding Principles, it is important to be aware of its *raison d'être* as well as of its normative starting point, which consisted of reviewing the approach chosen by another document that had failed, i.e. the 2003 *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN Draft Norms).

The Guiding Principles, endorsed unanimously by the Human Rights Council (HRC),<sup>66</sup> are part of the process that aims at fulfilling the so-called *Millennium Development Goals* (MDGs).<sup>67</sup> In order to understand the meaning of that, it is worth going back in 2000, when the General Assembly (GA) of the UN adopted the *United Nations Millennium Declaration*.<sup>68</sup> This Declaration sets out a vision for the twenty-first century characterised by globalisation that reflects a new global consensus on development.<sup>69</sup> In that context, it contained new commitments in the areas of: peace, security, and disarmament; development and poverty eradication; protecting the environment; human rights, democracy and good governance; protecting the vulnerable; meeting the special needs of Africa; and strengthening the United Nations.<sup>70</sup>

In order to implement the commitments cited under the “development and poverty eradication” section, the UN Secretariat issued a Road Map that focused on eight MDGs to be achieved by 2015, which both aimed at getting the poor out of poverty and hunger,<sup>71</sup> and recognised that eradicating poverty worldwide could only be achieved through international cooperation.<sup>72</sup>

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<sup>66</sup> For an explanation about the HRC, and its predecessor, the Commission on Human Rights (CHR), see Marquez & Nifosi Sutton, 2009.

<sup>67</sup> Catà Backer (a), 2011, p. 113. According to the wording of the United Nations Development Program (UNDP), MDGs are “quantifiable, time-bound goals that articulate the social, economic and environmental advances that are required to achieve sustainable gains in human development” (UNDP, 2007, p. 9).

<sup>68</sup> UN Doc. A/RES/55/2, 18 September 2000.

<sup>69</sup> *Ibid.*, paras. 5 and 32.

<sup>70</sup> *Ibid.*, ss. II-VIII.

<sup>71</sup> Goals 1 to 7: ending poverty and hunger, universal education, gender equality, child health, maternal health, combating HIV/AIDS, environmental sustainability (See the special targets for each MDG on the internet page: <http://www.un.org/millenniumgoals/>, consulted on 2 January 2012).

<sup>72</sup> Goal 8: global partnership (*Ibid.*).

It was with this idea of progress towards the achievement of these goals that Harvard Professor John Ruggie was first appointed in 2005 by the UN Secretary-General, Kofi Annan, as the Special Representative of the Secretary-General (SRSG) for Business and Human Rights.<sup>73</sup> His initial mandate was to propose measures to strengthen the human rights performance of the business sector around the world.<sup>74</sup> On that basis, John Ruggie started his work with consultations of stakeholders, including the corporate world, along with a set of fact-findings missions.<sup>75</sup> This task ended in 2008, when the SRSG produced his third report, finalising the current three Pillars structure of the Guiding Principles, which corresponds to the UN “*Protect, Respect and Remedy*” Framework.<sup>76</sup> Subsequently, the HRC renewed John Ruggie’s mandate in order to allow him to operationalise and promote the framework.<sup>77</sup> This led him to draft the content of the Guiding Principles.

When evaluating the normative content of this last document, one must bear in mind that it is the result of a shift in the approach to the business and human rights question in comparison to the rejected 2003 UN Draft Norms.<sup>78</sup> Indeed, both companies and States had refused that document, because it was seen as an instrument imposing direct international human rights obligations on corporations.<sup>79</sup> The reason for it was that the Norms were written in the form of a human rights treaty providing that every human right corresponded to a wide range of duties on every corporation.<sup>80</sup>

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<sup>73</sup> Catà Backer (a), 2011, p. 110. Actually, John Ruggie had already been appointed by Kofi Annan from 1997 until 2001 as Assistant Secretary-General and chief advisor for the strategic planning to the UN Secretary-General. During that time, he helped creating the UN Global Compact, which is an initiative that develops and encourages businesses to adopt principles in the areas of human rights, labour, environment and anti-corruption within their operations and strategies (for more details, see the official website of the initiative: [www.unglobalcompact.org](http://www.unglobalcompact.org)). He also proposed and gained the UN General Assembly approval for the MDGs (Catà Backer (a), 2011, p. 113).

<sup>74</sup> Catà Backer (a), 2011, p. 113. The appointment of 2005 was legally based on a resolution of the CHR, which requested the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years (UN Doc. E/CN.4/2005/L.10/Add.17, 20 April 2005, Art. 1).

<sup>75</sup> Ruggie, 2005.

<sup>76</sup> UN Doc. A/HRC/8/5, 7 April 2008. For details about this report and the two previous 2006 and 2007 reports, see Catà Backer (a), 2011, p. 115 and pp. 117-128.

<sup>77</sup> UN Doc. A/HRC/8/52, 1 September 2008, para. 8/7.

<sup>78</sup> UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

<sup>79</sup> Kinley, Nolan & Zerial, 2007, p. 462.

<sup>80</sup> Knox, 2011, p. 4.

Hence, against that approach, John Ruggie took a far less creative direction, in that he drafted a document that explicitly does not intend to create any new international law obligations but rather integrates the implications of the existing law within a “single, logically coherent and comprehensive template” and identifies “where the current regime falls short and how it should be improved.”<sup>81</sup> Also, the SRSG drafted a document with a larger scope than the UN Draft Norms since he not only stated the implication of existing standards regarding business and human rights for businesses themselves but also for States.<sup>82</sup>

### 2.1.2. *What the Guiding Principles Contain: The Three Pillars Structure*

The scope of John Ruggie’ work, encompassing both the study of State and business duties regarding the respect of human rights when related to corporate activities, has been translated into two of the three main titles structuring the Guiding Principles, i.e. *the State duty to protect human rights* and *the corporate responsibility to respect human rights*. These titles actually correspond to the two first Pillars of the UN “Respect, Protect and Remedy” Framework that the Guiding Principles serve operationalising.<sup>83</sup> In addition, John Ruggie devoted a third Pillar to the specific duty of States to “take appropriate step to ensure [...] that when [business-related human rights abuses] occur within their territory and/or jurisdiction those affected have access to effective remedy.”<sup>84</sup> Then, in the operationalisation phase, i.e. in drafting the Guiding Principles, he divided the content of each Pillar into *foundational Principles* and *operational Principles*. As it can be easily understood from their appellation, the first type of Principles states general duties while the second type of Principles describes what the fulfilment of the duties presented under foundational Principles implies.

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<sup>81</sup> UN Doc. A/HRC/17/31, 21 March 2011, para. 14.

<sup>82</sup> This actually corresponds to the request of the CHR, that asked the Secretary-General to appoint a Special Representative, in particular, “to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation” (UN Doc E/CN.4/2005/L.10/Add.17, 20 April 2005, Art. 1 (b)).

<sup>83</sup> UN Doc. A/HRC/8/52, 1 September 2008, para 8/7.

<sup>84</sup> UN Doc. A/HRC/17/31, 21 March 2011, Guid. Princ. 25.

Furthermore, John Ruggie commentated the meaning of all the Principles resulting in each of them being followed by a commentary.

The last Pillar contains the most important Principles, since the latter aid in the answering of the research questions. Therefore, the following sub-sections will consider the relevant Principles contained in that Pillar, respecting the double distinction between, on the one hand, procedural and substantive requirements, and, on the other hand, judicial and non-judicial mechanisms.<sup>85</sup> Moreover, it will verify whether the Principles that appear relevant do concern home States, as considered in their legal or economic sense.<sup>86</sup>

Before that, however, it is necessary to stress that John Ruggie drafted an international document that has been accepted by the international community in particular because it is based on the assumption that “extraterritoriality of States duties remains unsettled.”<sup>87</sup> Therefore, when considering a Guiding Principle, it is important to verify whether it may relate to extraterritorial situations in one way or another.

#### 2.1.2.1. Third Pillar: Access to Remedy: Foundational Principle

The single foundational Principle contained in the third Pillar states that:

“As part of their duty to protect against business-related human rights abuses, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”<sup>88</sup>

As it appears clearly from the wording of this Guiding Principle 25, the State duty to provide effective remedy, whatever its legal force is, does not correspond to an

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<sup>85</sup> See *supra*, section 1.2.

<sup>86</sup> See *supra*, section 1.1.

<sup>87</sup> Email from John Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, Faculty Chair, Corporate Social Responsibility Initiative Harvard Kennedy School of Government, Affiliated Professor in International Legal Studies Harvard Law School, Harvard University, 11 June 2012.

<sup>88</sup> UN Doc. A/HRC/17/31, 21 March 2011, Guid. Princ. 25.

immediate duty but to a progressive one, i.e. “to take appropriate steps to ensure” access to remedy. However, it should be noted that the European Commission invited EU Member States (MS) “to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles.”<sup>89</sup>

Moreover, commenting on that Principle, the SRSB defines the term “grievance mechanism.” It actually corresponds to “any routinized, State-based or non State-based, judicial or non judicial process through which grievances concerning business-related human rights abuses can be raised and remedy can be sought.”<sup>90</sup> As for the term “grievance”, it refers to “a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice or general notions of fairness of aggrieved communities.”<sup>91</sup> Hence, it is made clear that remedy should not only be available when the victim can establish a violation of law, but must also be achievable on the basis of other more vague concepts.

John Ruggie also states in his commentary to the foundational Principle that the purpose of substantive remedies shall be to counteract or to make good any human rights harms that have occurred.<sup>92</sup> For that purpose, remedies may take a variety of forms, which include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (criminal or administrative), or, when concerning the prevention of harm rather than its remediation, injunctions or guarantees of non-repetition.<sup>93</sup> Thus, it is made clear that the access to remedy, when related to judicial mechanism, does not only concern civil litigation but may also involve criminal litigation.

Furthermore, John Ruggie explains that judicial and non-judicial State-based mechanisms may be administered by a branch of agency of the State or by an independent body on a statutory or constitutional basis, and can either directly involve those affected or rather imply the involvement of an intermediary seeking remedy on behalf of those affected.<sup>94</sup>

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<sup>89</sup> COM(2011) 681 final, 25 October 2011, para. 4.8.2 (E).

<sup>90</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 25, para. 3.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, Comm. on Guid. Princ. 25, para. 2.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, Comm. on Guid. Princ. 25, para. 4.

In addition, John Ruggie specifies that ensuring access to remedy for business-related human rights abuses “requires also that States facilitates public awareness and understanding” of the instruments put in place, of how they can be accessed and of the existence of any support (financial or expert) for doing so.<sup>95</sup> Hence, when envisaging the specific requirements contained in the operational Principles, it should be kept in mind that they also require to be made known to the public in order to be considered accessible.

Lastly, before considering the specific content of the relevant operational Principles, it should be stressed that the foundational Principle only requires States to ensure access to effective remedy for those affected by business-related human rights abuses when such abuses occurred “within their territory and/or jurisdiction.” The meaning of this expression is hard to determine.<sup>96</sup> Taking into account, as a point of departure for reflection, that in John Ruggie’s opinion, extraterritorial duties of States are not settled, it is doubtful that he would use the notion of jurisdiction to introduce an extraterritorial dimension in the foundational Principle of access to remedy. Nevertheless, John Ruggie distinguishes between territory and jurisdiction, so that it cannot be concluded that when speaking of “jurisdiction”, he means territorial jurisdiction. As a result, for the purpose of the present thesis, the notion of jurisdiction as used by John Ruggie will be interpreted according to the classic meaning of this concept in international law, as stated *supra* in section 1.2.1.1. Consequently, the access to remedy Pillar will be considered as being addressed to corporation’s home States, on the basis of nationality jurisdiction.

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<sup>95</sup> *Ibid.*, Comm. on Guid. Princ. 25, para. 5.

<sup>96</sup> When questioning John Ruggie about the meaning of jurisdiction in that context, he answers that: “It means the territory or jurisdiction of the home State. Extraterritoriality is treated separately” (Email from John Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, Faculty Chair, Corporate Social Responsibility Initiative Harvard Kennedy School of Government, Affiliated Professor in International Legal Studies Harvard Law School, Harvard University, 11 June 2012). Aside from the fact that this answer does not define “jurisdiction”, the reference to extraterritoriality brings many questions that are rather rendering the situation more confused. As a result, this answer cannot be used.

### 2.1.2.2. Third Pillar: Access to Remedy: Judicial Mechanisms: Procedural and Substantive Aspects

#### 2.1.2.2.1. Relevant Guiding Principles

According to Guiding Principle 26, the access to effective remedy before a domestic Court for those affected by corporate human rights abuses includes a State duty to ensure the effectiveness of this access, “including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”<sup>97</sup>

Commenting on this Principle, John Ruggie identifies both substantive and procedural obstacles to access to remedy.

Concerning substantive obstacles, the SGSR points out in particular the fact that “[t]he way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability.”<sup>98</sup>

Concerning procedural obstacles, John Ruggie speaks of situations where “claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim.”<sup>99</sup> He also states that the costs of bringing claims constitute a procedural barrier if they “go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable level through government support, “market-based” mechanism (such as litigation insurance and legal fee structure), or other means.”<sup>100</sup> He identifies three other procedural barriers related to: the claimants difficulty to secure its legal representation; the inexistence of adequate options for aggregating claims or enabling representative proceedings (such as class action or other collective procedure); and the State prosecutor’s lack of resource, expertise or support to investigate business involvement in human-rights related

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<sup>97</sup> UN Doc. A/HRC/17/31, 21 March 2011, Guid. Princ. 26.

<sup>98</sup> *Ibid.*, Comm. on Guid. Princ. 26, para. 3.

<sup>99</sup> *Ibid.* It should be noted that this barrier is identified by John Ruggie as a legal barrier and not as a procedural barrier, but it is part of the procedural requirements according to the distinction made between substantive and procedural requirements in the present thesis (section 1.3.1).

<sup>100</sup> *Ibid.*, Comm. on Guid. Princ. 26, para. 4.

crimes.<sup>101</sup>

Lastly, from a general point of view, John Ruggie stresses the importance of fighting against the imbalances between the victims and the corporation, regarding financial resources, and access to information and expertise.<sup>102</sup> Similarly, he emphasises the need to give special attention to vulnerable and marginalised groups when making procedural and substantive norms, in order to prevent discrimination against them.<sup>103</sup>

#### 2.1.2.2.2. For Which “Home State”?

Since nothing is specified about the States concerned in Guiding Principle 26, Guiding Principle 25 should be applied. Hence, States have to observe Guiding Principle 26 when the corporate human rights abuse that was committed falls under their jurisdiction, as traditionally defined in international law. As a result, the State of which the concerned company has the nationality shall respect Guiding Principle 26. This is true even if the abuse occurred abroad, on the basis of *nationality* jurisdiction. Therefore, the legal home States, as defined in the present thesis, can be considered as concerned by Guiding Principle 26. Furthermore, one should note that according to the commentary on that Principle, they are two other potential barriers to effective remedies, i.e.: (1) not letting access to home States’ national courts to those who face a denial of justice in host States: (2) establishing legal responsibility in a way that facilitates the avoidance of appropriate accountability within a group of companies. The first potential barrier seems to mean that in cases where the State on whose territory the corporate ESCR abuse occurred does not let victims access national courts, the legal home State of the corporation would be concerned by Guiding Principle 26 and should therefore respect its requirements.

As for the second barrier, it seems to refer to situations where the respect of legal separations within a group of companies would lead to inappropriate accountability. If this seems not to be relevant for the question as to whether home States are concerned by Guiding Principle 26, the combination of this barrier with the

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, Comm. on Guid. Princ. 26, para. 5.

<sup>103</sup> *Ibid.*



former one may lead to the conclusion that the economic home States may, in some circumstances, be addressed by Guiding Principle 26. Indeed, one can consider a case where a victim of a corporate ESCR abuse committed by a subsidiary company would face a denial of justice in the country where the wrong occurred. In such a case, combining the second potential barrier with the first one could mean that the victim should be able to access courts of the parent company's home State, at least if the victim direct his or her action against the parent company.

#### 2.1.2.3. Third Pillar: Access to Remedy: Non-judicial Mechanisms: Procedural and Substantive Aspects

##### 2.1.2.3.1. Relevant Guiding Principles

When speaking of “non judicial mechanisms”, John Ruggie refers to, for instance, National Human Rights Institutions (NHRIs),<sup>104</sup> National Contact Point (NCP) under the OECD<sup>105</sup> Guidelines for Multinational Enterprises,<sup>106</sup> ombudsman person offices and Government-run complaint offices.<sup>107</sup>

The SMSG notes that meeting the requirement of the Guiding Principles can be done by expanding the mandate of existing non-judicial mechanisms, and not only by

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<sup>104</sup> NHRIs are encouraged to be put in place at the national level by each UN MS (UN Doc. A/RES/48/134, 20 December 1993, Art. 3). They shall have the aim of protecting and respecting human rights. Therefore, they have several missions such as advising State competent authorities for a better protection of human rights or encouraging ratification of international human rights instruments or accession to those documents and ensuring their implementation (*Ibid.*). They may also be authorised to hear and consider complaints and petitions concerning individual situations. In that case, they possess a quasi-judicial competence (*Ibid.*, “Additional principles concerning the status of commissions with quasi-judicial competence”). Moreover, there are administrative bodies that can exist under the form of, most notably, commissions, ombudsmen, or institutes (European Union Agency for Fundamental Rights (FRA), 2010, p. 11).

<sup>105</sup> Organisation for Economic Co-operation and Development.

<sup>106</sup> The *OECD Guidelines for Multinational Enterprises* are recommendations that the adhering States, among which the UK and the Netherlands, address to their transnational corporations regarding responsible business conduct in the globalisation era. Since 2000, adhering States have had to set up an NCP that is responsible, among other things, for contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances (for more information see *infra*, section 3.2.2.1). See the 2011 version of this document: Directorate for Financial and Enterprise Affairs, OECD, *OECD Guidelines for Multinational enterprises*, 2011, available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>, consulted on 8 April 2012 (here after, “OECD Guidelines”).

<sup>107</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 25, para. 4.

creating a new institution.<sup>108</sup> Thus, he allows a large range of possibility for States to complying with the third Pillar of the Guiding Principles, which can put in place mediation, adjudicative or other culturally appropriate processes.<sup>109</sup> However, if the options are numerous for satisfying the access to remedy requirement, it is certain that, for one situation, one option is better than another. Indeed, according to John Ruggie, the appropriateness of a type of non-judicial mechanism shall be determined with regard to the issue involved, any public interest involved, and the potential needs of the parties.<sup>110</sup> Nevertheless, it should be admitted that it does not seem easy for a State to make the right choice on the basis of these indications.

Similarly, when speaking of access to remedy provided by State-based non-judicial mechanisms, John Ruggie assumes that this access is complementing and supplementing the access to remedy before judicial State institutions. More precisely, in John Ruggie's opinion, non-judicial remedy should be put in place when judicial remedy is not required and when the judicial approach is not the favoured approach by the claimants.<sup>111</sup>

Regarding the characteristics that non-judicial mechanisms shall have, it should first be noted that there is no specific substantive requirement linked to access to remedy before non-judicial mechanisms.

From a general point of view, one should note that, as it is the case when considering judicial mechanisms, the shaping of non-judicial mechanisms should respond to the general need to combat the imbalances between parties to business-related human rights claims, as well as discrimination of vulnerable people.<sup>112</sup>

That being said, it is necessary to identify the specific procedural requirements that relate to the provision of effective remedy by non-judicial State institutions. These requirements are enumerated in Guiding Principle 31, which applies to non-judicial mechanisms, whether State or non State-based.<sup>113</sup> According to this Principle, first, non-

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<sup>108</sup> *Ibid.*, Comm. on Guid. Princ. 27, para. 2

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, Comm. on Guid. Princ. 27, para. 1.

<sup>112</sup> *Ibid.*, Comm. on Guid. Princ. 27, para. 4.

<sup>113</sup> *Ibid.*, Guid. Princ. 31, paras. (a)-(f). For more explanation about Guiding Principle 31, see UN Office of the High Commissioner for Human Rights (OHCHR), 2012, p. 63.

judicial mechanisms ought to be *legitimate*, in order to build the potential mechanism users' trust, which depends in particular on the fact that there is an assurance that the parties cannot interfere with the fair conduct of the grievance process. Second, non-judicial mechanisms shall be *accessible*, which implies that those who may face particular barrier to access to the mechanism shall be provided with adequate assistance. Third, *predictability* of the mechanism implies that the latter should be based on a clear, precise and known procedure. Fourth, the procedure followed must be *equitable* for the aggrieved parties, who have therefore to be provided with reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms. Fifth, the State institution functioning ought to be *transparent*, for the parties to be informed about the progress of the grievance. Lastly, the outcome of its examination of the case shall be *rights-compatible* regarding internationally recognised human rights. This means that when grievances are not framed in terms of human rights or do not initially raise human rights concerns, care should be taken to ensure that outcomes are in line with internationally recognised human rights if these outcomes have implications for human rights.<sup>114</sup>

#### 2.1.2.3.2. For Which “Home State”?

As nothing is said about the State or corporation concerned in Guiding Principles 27 and 31 or in their commentaries, the requirement stated in Guiding Principle 25 should be applied. Hence, it can be considered that a State has to observe Guiding Principles 27 and 31 if the company accused of human rights abuses has the nationality of this State – even if the wrongdoings occurred abroad – on the basis of *nationality* jurisdiction.

#### 2.1.3. *What the Legal Value of the Guiding Principles Is: An Unclear Situation*

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<sup>114</sup> *Ibid.*, Comm. on Guid. Princ. 31, para. 3(f).

The remaining question is the one of the legal value of the Guiding Principles. Indeed, this can help determine the extent to which the State duty established by this document corresponds to the States international obligations, in the legal sense of the term. The present section will first explain some general rules that permit determining the legal value of an international document. On that basis, it will analyse the legal value of the Guiding Principles.

First, from a general point of view, it can be asserted that the Guiding Principles do not constitute an international legally binding instrument, creating legal obligation for States. This is the case with treaties, also known as “covenants” or “conventions”, which create immediate or progressive legally binding obligations for the States that ratified it (even though the enforcement mechanism put in place in order to ensure its respect can be more or less efficient, rendering more or less effective the legal character of the obligation).<sup>115</sup>

Second, there is a general agreement on the fact that, if these international instruments that intend to create legally binding obligations are *hard law*, all the international documents that cannot be put in this category are *soft law*.<sup>116</sup> These documents are often called, for instance, “recommendations”, “declarations”, “guidelines”, or “principles”. The fact that these documents would constitute *soft law* is always true to the extent that they have been drafted by international governmental organisations (IGOs) or States, which gain legitimacy by representing all people, and not only certain categories of them.<sup>117</sup> Some authors also consider that *soft law* documents are those which have: (1) only been endorsed by an IGO or a State and drafted by independent persons; (2) or not been endorsed by any IGO but drafted by experts at the attention of the international community of States.<sup>118</sup> On the contrary, the authors excluding these two categories of documents consider that the latter are only a

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<sup>115</sup> Batelaan & Coomans, 1999, p. 11. See also Blokker & Schemers, 2003, p. 810.

<sup>116</sup> Pate, 2009, p. 6.

<sup>117</sup> See J. Eijlbouts (b), 2012, p. 12. Hence, Jan Eijlbouts considers that the Guiding Principles express the “non-legal universal baseline expectation” from States and companies’ behaviour regarding business and human rights. In his opinion, this document is given a great authority as such since it has been endorsed unanimously by the HRC. However, for him, this does not mean that it constitutes *soft law* (Eijlbouts (a), 2011, p. 45).

<sup>118</sup> UN Doc. A/HRC/4/35, 7 February 2007.

source of information for States applying their international *hard law* or *soft law* obligations.

Third, if *soft law* international obligations are not legally binding, their binding force may vary, depending on the level of agreement among the international community or on the name of the document.<sup>119</sup> Thus, for instance, a drafted and adopted resolution of the UN GA has more authority and more binding power than a text endorsed by this same UN organ but drafted by independent persons. The same can be said about the HRC, the subsidiary body of the UN GA. Moreover, a text adopted by a UN GA unanimously rather than with a small majority of votes or with the positive vote of powerful States rather than the one of numerous weak States will have more authority in international law. Also, an IGO's "declaration" possesses a certain added value compared to an IGO's "recommendation". Indeed, the former proclaims a set of very important principles in international law that ought to be respected in any case. Differently, the latter asks for the adoption of a State specific policy or for a change in national law, by giving States the possibility not to act so if they explain the reasons for their failure.<sup>120</sup> In addition, the term "principles" generally requires greater respect than the notion of "guidelines", even if there are no official rules on this hierarchy.<sup>121</sup>

That being said, it should be emphasised that a *soft law* instrument would never be as legally binding as a *hard law* instrument.

Fourth, on the basis of their stronger or weaker binding force, *soft law* international instruments will be more or less likely to have the three possible legally binding effect of *soft law* that are: (1) leading to the creation and development of legally binding international norms (under customary law or treaty law); (2) being a source of inspiration for filling the lacunae or for interpreting legally binding international norms; (3) and helping national judges interpreting open norms in national law.<sup>122</sup>

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<sup>119</sup> For a complete explanation of the factors that can strengthen the legal effects of recommendations and declarations, see Blokker and Schermers, 2003, pp. 767-777 and p. 781.

<sup>120</sup> Batelaan & Coomans, 1999, pp. 12-14.

<sup>121</sup> Discussion with Fons Coomans, Professor in Maastricht University, UNESCO Chair in Human Rights and Peace, Head of the Department of International and European Law in the Faculty of Law of Maastricht University, Maastricht University, Maastricht, 5 April 2012.

<sup>122</sup> J. Eijssbouts (b), 2012, p. 12.

As a result of these rules, the legal value of the Guiding Principles can be determined to a certain extent. First, it is certain that this document is not part of *hard law*. Second, it can be accepted that it is a *soft law* instrument, even if one must note that this can appear untrue following the opinion of some authors. Indeed, it has been drafted under the direction of an expert, John Ruggie, and not by the UN GA or the HRC themselves.<sup>123</sup> Third, it must be noted that the Guiding Principles have been endorsed unanimously by the HRC, which does not represent all the UN MS, but which is supervised by the UNGA.<sup>124</sup> Therefore, the document presents a certain authority and is likely to have the first and second legally binding effects generally associated with *soft law*.

Furthermore, it should be noted that, as explained by John Ruggie, the name “Guiding Principles” aims at expressing the facts that the State and business duties stated in the document are requirements which should guide States and business in their respective functions and not “rules” or “tools”.<sup>125</sup> Hence, one can realise that this document actually aims at helping States to deal with the “business and human rights” question. Nevertheless, when considering what the Guiding Principles represent for EU MS such as the UK and the Netherlands, one should not forget that the European Commission asked the latter “to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles.”<sup>126</sup>

## 2.2. International Legal Framework Related to Economic, Social and Cultural Rights Abuses and Focussed on Extraterritoriality and State Duties: The Maastricht Principles

The thesis will now turn towards the description of another international instrument that is, on the one hand, specifically concerned with *economic, social and*

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<sup>123</sup> This is actually easy to accept since John Ruggie is not a total free and independent expert in that the UN Secretary-General gave him the mandate to draft the Guiding Principles.

<sup>124</sup> See *supra* note 66.

<sup>125</sup> Email from John Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, Faculty Chair, Corporate Social Responsibility Initiative Harvard Kennedy School of Government, Affiliated Professor in International Legal Studies Harvard Law School, Harvard University, 11 June 2012.

<sup>126</sup> See *supra*, section 2.1.2.1.

*cultural rights*, and on the other hand, only dedicated to the question of *international extraterritorial obligations of States*, namely the Maastricht Principles.

The present section will present the context of the adoption of the Maastricht Principles (2.2.1), the content of this document (2.2.2), and its legal value (2.2.3).

### 2.2.1. *The Maastricht Principles: Context of Adoption, Raison d’Etre and Drafting Process*

The *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* concerns States’ extraterritorial obligations related to legally binding instruments in this area, which include the ICESCR, but are not limited to it.<sup>127</sup>

It is the result of a legal analysis conducted over a period of four years by a group of forty experts in international law and human rights from all over the world,<sup>128</sup> under the direction of Maastricht University and the International Commission of Jurists (ICJ) and with the support of the ETO (“Extraterritorial Obligations”) Consortium. The latter consists of 70 institutions of academics and civil society’s members, and other experts on ESCR, among which Action Network FIAN International.<sup>129</sup> This legal analysis led the experts to meet in Maastricht from 26 to 28 September 2011 at a conference co-convened by Maastricht University and the ICJ. It was then that they adopted the Maastricht Principles.

These Principles have been designed in order to complement and build on two other important interpretative documents, namely the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*

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<sup>127</sup> For a list of the concerned instruments, see The Commentary, *op. cit.*, Comm. on Princ. 6.

<sup>128</sup> Among them, there were old and current members of international human rights treaties organs and of Special Procedures, academics, and judicial experts of the civil society. See the list of expert in the Maastricht Principles, *op. cit.*, p. 11 (Annex).

<sup>129</sup> This information has been found on the website of the Scottish Human Rights Commission (which was represented by one expert for the drafting of the Maastricht Principles), at the webpage: <http://www.scottishhumanrights.com/ourwork/publications/article/maastrichtprinciples> (consulted on 11 April 2012), as well as on the website of the NGO “humanrights.ch”, at the webpage: [http://www.humanrights.ch/fr/Instruments/International/Campagnes-Initiatives/idart\\_9075-content.html](http://www.humanrights.ch/fr/Instruments/International/Campagnes-Initiatives/idart_9075-content.html) (consulted on 11 April 2012).

(1986)<sup>130</sup> and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997).<sup>131</sup> The latter document already suggested the existence of a State extraterritorial obligation regarding corporations' human rights abuses. Indeed, Guideline 18 of the Maastricht Guidelines states that:

“The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.”

Re-taking this general idea, the Maastricht Principles provide more specific and severe requirements, which are enumerated in different Principles. These Principles are the result of the recognition of the need to re-think the basic tenet of human rights law, which is that human rights obligations are primarily, if not exclusively, incumbent upon the territorial State.<sup>132</sup> The reason for this is that in a globalised world, with regard to the issues of poverty and lack of realisation of ESCR, the territorial State shares its role with other more powerful actors such as, among others, TNCs and MNEs.<sup>133</sup>

### 2.2.2. *The Maastricht Principles: Content*

The Maastricht Principles are made of seven sections, dealing with: general principles (Principles 1-7); the scope of extraterritorial obligations of States (Principles 8-18); the extraterritorial obligation to respect (Principles 19-22), protect (Principles 23-27) and fulfil (Principles 28-35); accountability and remedies (Principles 36-41); and final provisions (Principles 42-44).

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<sup>130</sup> UN Doc. E/CN.4/1987/17, 8 January 1987.

<sup>131</sup> UN Doc, E/C.12/2000/13, 2 October 2000.

<sup>132</sup> Vandenhoe, 2011, p. 430.

<sup>133</sup> Maastricht Principles, *op. cit.*, Preamble (first paragraph).



Each Principle has been commented on by some of the authors of the Maastricht Principles, i.e. Olivier De Schutter, Asbjorn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman. However, it should be emphasised that the so-called *Commentary on the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (“the Commentary”) has not yet been approved by all the authors of the same document. Therefore, its content cannot be considered, today, as having an official value.<sup>134</sup> Nevertheless, currently the Commentary provides the only valuable indications about the meaning of the Maastricht Principles. Therefore, it will be used in the present thesis for describing the relevant Principles.

The following section will analyse the Principles that are relevant for the present thesis, which are mainly contained in the “accountability and remedies” section of the Maastricht Principles (2.2.2.1).<sup>135</sup> Therefore, the present thesis uses again the double distinction between, on the one hand, substantive and procedural law, and, on the other hand, judicial and non-judicial mechanisms. Moreover, on the basis of this analysis, the present section questions the relevance of the Maastricht Principles when considering the victims’ access to remedy by directing a complaint against corporations and not against States, since this corresponds to the chosen thesis topic (2.2.2.2).<sup>136</sup> Finally, this section establishes whether the possibly relevant requirements contained in the Maastricht Principles could concern home States, as considered in the present thesis (2.2.2.3).

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<sup>134</sup> They should acquire an official status in November 2012 (Discussion with Fons Coomans, Professor in Maastricht University, UNESCO Chair in Human Rights and Peace, Head of the Department of International and European Law in the Faculty of Law of Maastricht University, Maastricht University, Maastricht, 14 May 2012).

<sup>135</sup> Maastricht Principles, *op. cit.*, s. VI.

<sup>136</sup> See *supra*, section 1.3.1.

### 2.2.2.1. Maastricht Principles Under the “Accountability and Remedies” Section

#### 2.2.2.1.1. General Maastricht Principles: Procedural and Substantive Aspects

There are two Principles to be discussed in the present section: Principle 37 and Principle 38.

Principle 37 establishes the general State obligation to provide remedy. Under this obligation,

“States must ensure the enjoyment of the right to a *prompt, accessible and effective* remedy before an *independent authority*, including, where necessary, recourse to a judicial authority, for *violations of economic, social and cultural rights*”.<sup>137</sup> Moreover, in order to give effect to this obligation, Principle 37 provides that States should: “[...] (b) ensure that remedies are *available for groups as well as individuals*; [...] (d) ensure access to remedies, *both judicial and non-judicial* [...]”.<sup>138</sup>

This Principle contains several procedural and substantive requirements that shall be clearly identified.

From a procedural point of view, Principle 37 first states that remedies, provided by a judicial or non-judicial State institution, should be made *accessible* to victims, and should imply the treatment of the request in a *prompt* manner, by an *independent authority*.

Second, remedies have to be made available both for groups and individuals. There is no precision, however, neither in the Principle itself nor in the Commentary, concerning concrete ways through which this availability must be realised.

From a substantive point of view, Principle 37 specifies that remedies are only available when a violation of ESCR can be identified. Hence, the existence of a

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<sup>137</sup> Maastricht Principles, *op. cit.*, Princ. 37 (own emphasis added).

<sup>138</sup> *Ibid.*

“grievance”, as defined in the Guiding Principles, is not sufficient for the Maastricht Principles to create a State obligation to provide victims of corporate ESCR abuses with remedies. This would seem logical if it is accepted that the Maastricht Principles only require States to provide victims with remedies if the corporate ESCR abuse that the latter suffered from *corresponds to a State failure to comply with its obligation to protect ESCR*, as defined in section IV of the Maastricht Principles. However, this fact is never stated clearly in the “accountability and remedies” section. Nor is there a distinction, in Principle 37, between remedies that could stem from the simple existence of a non-State actor’s ESCR abuse, and remedies that could be granted only in cases where this abuse would amount to a breach of a State duty to protect.<sup>139</sup>

Principle 38 states that: “Remedies, to be effective, must be capable of leading to a *prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.*”<sup>140</sup> This Principle also provides that: “To avoid irreparable harm, *interim measures* must be available and *States must respect* the indication of interim measures by a competent judicial or quasi-judicial body” and that “victims have the *right to truth* about the facts and circumstances surrounding the violations, which should also be *disclosed to the public*, provided that it causes no further harm to the victim.”<sup>141</sup>

It is not easy to determine whether this Principle concerns judicial mechanisms only or both judicial and non-judicial mechanisms. Indeed, on the one hand, this Principle establishes the State obligation to respect the indication of interim measures ordered “by a competent judicial or quasi-judicial body”, which lets one think that Principle 38 is related both to judicial and non-judicial mechanisms. On the other hand, Principle 40, dedicated to non-judicial mechanisms, requires that the latter comply with Principle 37, which would direct a reasonable reader towards the deduction that Principle 38 would then only concern judicial mechanisms.<sup>142</sup>

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<sup>139</sup> This duty is described in Maastricht Principles, *op. cit.*, Princ. 23-27.

<sup>140</sup> Maastricht Principles, *op. cit.*, Princ. 38 (own emphasis added).

<sup>141</sup> *Ibid.*

<sup>142</sup> Maybe, the most coherent way of understanding the scope of application of Principle 38 is to consider that this Principle concerns both non-judicial and judicial mechanisms, to the extent that the latter possess quasi-judicial competence.

In any case, Principle 38 concerns judicial mechanisms, which the present thesis is concerned with. Therefore, the procedural and substantive requirements contained in the Principle must be identified.

On the procedural aspect, Principle 38 requires that the treatment of a complaint of a violation of ESCR includes the undertaking of a prompt, thorough and impartial investigation and the possibility to use interim measures in order to avoid the occurrence of irreparable harm resulting from the violation. However, it appears from the wording of Principle 38 that these interim measures ought to be addressed to States, which confirms the fact that the complaint has to be made against a State rather than a non-State actor.

Moreover, the conclusion of the State institution regarding the alleged violation of ESCR shall be made available to the public.

According to the substantive part of Principle 38, the provision of effective remedies means that proceedings based on a violation of ESCR should be capable of leading to the cessation of the violation if it is ongoing, or to adequate compensation, including, if necessary, restitution, compensation, satisfaction, rehabilitation and guarantee of non-repetition. The Commentary specifies that the restitution and satisfaction, in particular, should be tailored to individual needs.<sup>143</sup>

Moreover, Principle 38 creates a right for the victims to know the truth about the facts and circumstances surrounding the violations of their ESCR.

#### 2.2.2.1.2. Specific Maastricht Principles: Non-judicial State-based Mechanisms

Aside from the general requirements stated in Principles 37 and 38, it is relevant to examine Principle 40, which concerns non-judicial mechanisms. This Principle states that:

“[...] States should make non-judicial remedies available, which may include [...] access to complaints mechanisms established under the auspices of [...] national human rights institutions or ombudspersons, and ensure that

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<sup>143</sup> The Commentary, *op. cit.*, Comm. on Princ. 38, para. 3.

these remedies comply with the requirements of effective remedies under Principle 37.”

Hence, Principle 40 cites, as examples of potential non-judicial State institutions that could deal with complaints of extraterritorial corporate ESCR abuses, NHRIs or ombudspersons. Concerning the appropriate functioning of the latter, the Commentary suggests that by putting in place non-judicial mechanisms, States should take into account the rules contained in the *Principles relating to the Status of National Institutions* (the Paris Principles) that determine the status of human rights commissions with quasi-judicial competences.<sup>144</sup>

Moreover, the Commentary insists on the importance of the existence of such non-judicial mechanisms, since the latter may be more accessible to victims and provide them with a faster resolution of the issue.<sup>145</sup> In addition, the Commentary emphasises that

“their working methods may be more flexible; they may more easily address problems of a collective or structural nature; they may more easily enter into various forms of collaboration with the other branches of the State in order to provide effective redress and to ensure that the violations denounced shall cease and shall not be repeated.”<sup>146</sup>

However, the Commentary also asserts that judicial remedies are needed in case of serious violations of the ICESCR.<sup>147</sup>

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<sup>144</sup> The Commentary, *op. cit.*, Comm. on Princ. 40, para. 1. The Paris Principles constitutes universally recognised minimum standards for NHRIs (UN Doc A/RES/48/134, 20 December 1993). This document rules NHRIs’ competence and responsibilities, their composition (guaranteeing their independence and pluralism), their methods of operation and the additional principles that shall be respected by commissions with quasi-judicial competence. Under this last topic, the Paris Principles provides that: “Cases may be brought [...] by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances [...] the functions entrusted to them may be based on the following principles: (a) Seeking an amicable settlement [...]; (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them; (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law; (d) Making recommendations to the competent authorities [...]”

<sup>145</sup> The Commentary, *op. cit.*, Comm. on Princ. 40, para. 1.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, Comm. on Princ. 37, para. 4.

Moreover, the Commentary adds to the text of Principle 40 a reference to Guiding Principle 31 establishing the effectiveness criteria for non-judicial mechanisms. Consequently, the non-judicial mechanisms that are put in place for implementing the Maastricht Principles shall comply with these criteria.<sup>148</sup>

#### 2.2.2.2. Relevance of the Described Maastricht Principles: A Remedy Against States or Corporations' Wrongs?

When considering the described Principles, there are actually more reasons for thinking that they relate to State violations of ESCR than to the violation of the same rights by corporations, even if the first violation can stem from the second, due to the State duty to protect. Nevertheless, the State duty to cooperate, which is stated under the “obligations to protect” section of the Maastricht Principles, might lead to another the interpretation of the “accountability and remedies” Principles. Indeed, this duty, stated in Principle 27, establishes expressly the obligation of all States to cooperate in order to ensure that non-State actors do not impair the enjoyment of the ESCR *of any persons*. Now, under this obligation, States are not only required to prevent human rights abuses by non-State actors, but also to hold corporations accountable for such abuse and to ensure an effective remedy for those affected.<sup>149</sup>

Moreover, the authors of the Commentary refer to the Guiding Principles in order to explain the meaning of this Principle, i.e. that home States have an obligation to provide remedies, preferably of a judicial nature, for victims of extraterritorial corporate ESCR abuses, in cases where no effective remedies are available in the host State where the abuse occurred.<sup>150</sup>

The Commentary also expressly states that this requirement is related to the provision of effective remedies as discussed under the “accountability and remedies” section. However, it is hard to find the normative consequences of this relation. Does it mean that, under the obligation to cooperate, States should compel corporations to compensate an extraterritorial wrong following a procedure that complies with the

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<sup>148</sup> *Ibid.*, Comm. on Princ. 37, para. 2.

<sup>149</sup> *Maastricht Principles*, *op. cit.*, Princ. 27.

<sup>150</sup> The Commentary, *op. cit.*, Comm. on Princ. 27.

requirements stated in the “accountability and remedies” section? When searching for an answer from the authors of the Maastricht Principles, it appears that, according to Olivier de Schutter, this option “is not necessarily excluded.”<sup>151</sup> Nevertheless, according to Fons Coomans, this option ought to be considered carefully because Principle 27 is part of the section that concerns the State duty to *protect*. Now, under this duty, State A just has to exercise *due diligence* to protect citizens in other countries from any corporate ESCR abuse that would be committed by a company that is a national of this State A.<sup>152</sup> In that perspective, even if one assumes that victims have the right to launch an action directly against corporation, under Principle 27, it remains that, in order to win their case, they would have to prove that the corporate human rights abuse corresponds to a home State’s failure to prevent that abuse from occurring. Now, the present thesis is concerned with cases in which victims, in order to win their case, must only prove that the corporation acted illegally.

#### 2.2.2.3. For Which “Home State”?

In any case, even if one assumes that the Maastricht Principles are relevant, it is still necessary to know which home States would be concerned by the “access to remedy” requirements contained in this document. Therefore, one must remember that Principle 9 defines the cases in which States have extraterritorial obligations in the area of ESCR, under the “jurisdiction” notion.<sup>153</sup> In addition, as the duty to cooperate is part of the duty to protect, it is worth having a look at the basis for protection stated in Principle 25. This Principle creates a State extraterritorial obligation to ensure the respect of ESCR by a corporation, when: (1) this corporation has its *nationality*; (2) this corporation has its centre of activity, is registered or domiciled, or has its main place of business or substantial business in this country; (3) the *parent company* of this

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<sup>151</sup> Email from Olivier de Schutter, Professor at the University of Louvain (Belgium) and at the College of Europe (Natolin), Catholic University of Leuven (UCL), 11 June 2012.

<sup>152</sup> Discussion with Fons Coomans, Professor in Maastricht University, UNESCO Chair in Human Rights and Peace, Head of the Department of International and European Law in the Faculty of Law of Maastricht University, Maastricht University, Maastricht, 14 May 2012. See also the obligation of Canada in the Marlin Case, described in Coomans & Künnemann, 2012, pp. 237-245, especially pp. 242-243.

<sup>153</sup> See *supra*, section 1.2.1.

corporation has its centre of activity, is registered or domiciled, or has its main place of business or substantial business in this country; (4) this corporation has relevant aspects of its activities carried out in this State; (5) this corporation has no link at all with this State, but it impaired ESCR in a way that constitutes a violation of a peremptory norm of international law.<sup>154</sup> Following this Principle, the State duty to cooperate would concern both legal and economic home States. However, according to Fons Coomans and Rolf Künnemann, for this to be true, it should be proven that the impairment or nullification of ESCR that occurs in the host State results from a violation committed in the home State, which can consist of a decision or other measures, taken at the headquarter of the home State.<sup>155</sup>

### 2.2.3. *The Maastricht Principles: Legal Value*

The legal value of the Maastricht Principles is hard to determine, since the document only makes the vague claim of being “drawn from international law”.<sup>156</sup> One may at least reasons that, as the opinion of experts, international tribunals and treaties bodies will surely take it seriously in the future.<sup>157</sup> Moreover, like the Maastricht Guidelines, the Maastricht Principles could acquire more normative authority if the HRC would endorse them.<sup>158</sup> However, there is a very slim chance that this will happen in a near future, as no State is willing to present them to the Council.<sup>159</sup>

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<sup>154</sup> Maastricht Principles, *op. cit.*, Princ. 25 (b)-(e).

<sup>155</sup> Coomans & Künnemann, 2012, p. 232.

<sup>156</sup> Maastricht Principles, *op. cit.*, Preamble (eighth paragraph).

<sup>157</sup> See the website of the NGO “humanrights.ch”, at the webpage: [http://www.humanrights.ch/fr/Instruments/International/Campagnes-Initiatives/idart\\_9075-content.html](http://www.humanrights.ch/fr/Instruments/International/Campagnes-Initiatives/idart_9075-content.html) (consulted on 11 April 2012).

<sup>158</sup> One must note that the HRC is officially aware of the existence of the Maastricht Principles since the latter were presented to the Council at the occasion of the fifth international conference of the ETO Consortium on 6 and 7 March 2012, in Geneva (See the FIAN’s minutes on the webpage: <http://fian.org/news/press-releases/new-human-rights-principles-launched-at-un-geneva>, consulted on 11 April 2012).

<sup>159</sup> Discussion with Fons Coomans, Professor in Maastricht University, UNESCO Chair in Human Rights and Peace, Head of the Department of International and European Law in the Faculty of Law of Maastricht University, Maastricht University, Maastricht, 5 April 2012).



### 2.3. Analysis: Which Obligations Do Home States Have Regarding Foreign Victims' Access to Remedy

The description of the requirements contained in both the Guiding Principles and in the Maastricht Principles permits the use of this section for stating concretely whether and under which conditions these documents require legal and/or economic home States to provide victims of corporate ESCR abuses with remedies. Therefore, some preliminary remarks need to be made (2.3.1). On that basis, general (2.3.2), procedural (2.3.3), and substantive (2.3.4) will be stated. Furthermore, in the section relating to the procedural and substantive requirements, a distinction will be made between judicial and non-judicial mechanisms.

#### *2.3.1. Preliminary Remarks*

First of all, it should be understood that neither the Guiding Principles nor the Maastricht Principles, whatever their content, create legal obligations for States. At best, they could be considered as being able to have one of the three effects of *soft law*, i.e.: (1) leading to the creation and development of legally binding international norms (under customary law or treaty law); (2) being a source of inspiration for filling the lacunae or for interpreting legally binding international norms; (3) or helping national judges interpreting open norms in national law.<sup>160</sup>

Nevertheless, this is only true if considering these documents in isolation from others. Indeed, when looking at the European Commission's reaction to the Guiding Principles, one notices that EU MS are actually asked to present a plan for the implementation of this document by the end of this year. Consequently, even if the Guiding Principles are guidelines for helping States to fulfil their international duties regarding the "business and human rights" question, for EU MS, these guidelines ought to be followed. Indeed, the Member States are obliged to indicate, to the EU, how they will implement the Guiding Principles before the end of 2012.

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<sup>160</sup> J. Eijssbouts (b), 2012, p. 12.

Aside from the “legal value” issue, another problematic question needs to be solved before identifying the concrete State duties contained in the analysed documents. This issue relates to the question as to whether the Maastricht Principles require States, in any way, to provide victims of corporate abuses with remedy *in the sense of the present thesis*. Indeed, one should remember that this thesis is concerned with the victims’ right to make a complaint, not against a State, for the violation of its obligation to protect, but against a company, for the abuse that it committed. The answer to this question stems quite clearly from the analysis stated in the previous section: at best, the State obligation to cooperate could be considered as requiring home States to compel companies to remedy their ESCR abuses, by respecting the requirements stated in Principles 37, 38 and 40. However, this understanding of the Maastricht Principles is far from being obvious, if one remembers that Principle 27 stems from the State obligation of *due diligence* to protect ESCR extraterritorially.<sup>161</sup>

Therefore, with the aim of presenting realistic conclusions, the present thesis will examine the UK and Dutch situations only on the basis of the requirements present in the Guiding Principles, bearing in mind that the obligation to cooperate stated in Principle 27 of the Maastricht Principles reinforces the Guiding Principles as far as the latter concerns provisions of remedies for *extraterritorial ESCR* abuses. The reason for this is that the Commentary on the Maastricht Principles expressly refers to the extraterritorial content of the Guiding Principles, as described in section 2.1.2.2.2.<sup>162</sup>

Moreover, before analysing the guidelines contained in the Guiding Principles, it must be insisted on that they do not especially concern extraterritorial human rights abuses. Hence, they may sometimes have been formulated without taking into account extraterritorial situations. For that reason, it is worth questioning the feasibility or the meaning of certain guidelines if applied in extraterritorial contexts, which the next sub-sections will do.

At last, one shall remember that the information contained on the Guiding Principles is only relevant to the extent that it concerns duties for home States. As a result, the present section will only deal with Principles that are addressed to legal

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<sup>161</sup> See *supra*, section 2.2.2.2.

<sup>162</sup> The Commentary, 2012, *op. cit.*, Comm. on Princ. 27.

and/or economic home States. Furthermore, it will be specified for each relevant Principle whether it concerns legal and/or economic home State.

### 2.3.2. *General Requirements*

There are some general guidelines that States ought to respect when implementing the Guiding Principles.

First, it should be recalled that the Guiding Principles do not limit the “access to remedy” requirement to the breach of legal norms, since John Ruggie considers that the existence of a “*grievance*” shall give rise to remedy. Now, a grievance, in John Ruggie’s mind, is “a perceive injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice or general notions of fairness of aggrieved communities.”<sup>163</sup> Nevertheless, it is hard to imagine that a legal action before a national Court would not be based on a breach of the law. However, the law may give legal effect to contract, promises, customary practice or “general notions of fairness of aggrieved communities” even if the meaning of this last notion is not obvious. Furthermore, it is not to be excluded that judges could take into account these elements for applying and interpreting a given legislation. Nevertheless, aside from that, the notion of grievance seems more appropriate to non-judicial mechanisms. This seems to be implicitly confirmed by the Guiding Principles. Indeed, in the operational Principles of the third Pillar, it is spoken of State-based judicial *mechanisms* and of State-based non-judicial and non-State-based *grievance mechanisms*.<sup>164</sup>

Second, it is a State duty to “facilitates public awareness and understanding” of instruments put in place, of how they can be accessed and of the existence of any support (financial or expert) for doing so.<sup>165</sup> Regarding extraterritorial situations, this would mean that home States should inform foreign victims, living sometimes very far away, of their possibility to obtain remedies for certain corporate human rights abuses

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<sup>163</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 25, para. 3.

<sup>164</sup> *Ibid.*, Guid. Princ. 26-28.

<sup>165</sup> *Ibid.*, Comm. to Guid. Princ. 25, para. 5.

before their domestic courts. Nevertheless, in practice, it would be hard to imagine that State A, being the home State of company B, would launch an information campaign in each State where this company operates.<sup>166</sup> Rather, the use of the Internet seems to be a reasonable concretisation of this Principle, since it can be accessed in many places in the world, even if not by every individual. Moreover, it would not be practicably possible to require that States provide information in every language, so that all the people in the world could access this information. Instead, it is more reasonable to require that this information would be available in English, or in Spanish, which are commonly considered as the most international languages.

Third, John Ruggie stressed the importance of shaping domestic rules concerning effective remedy in a way that counters the imbalance existing between the victims and the corporation, regarding financial resources as well as access to information and expertise.<sup>167</sup> Similarly, he emphasises the need to give special attention to vulnerable and marginalised groups when making procedural and substantive rules, in order for them not to be discriminated against.<sup>168</sup> Therefore, when analysing the UK and Dutch situations, it will be necessary to check whether their relevant domestic rules take into account this imbalance, in one way or another.

Fourth, the Guiding Principles require States to put in place both judicial and non-judicial mechanisms. As a result, the existence of only judicial or non-judicial mechanisms ensuring the provision of remedies for victims of corporate human rights abuses does not seem to ensure compliance with the Guiding Principles. However, it is doubtful whether both judicial and non-judicial mechanisms should be concerned with corporate human rights abuses *that occurred abroad* specifically. Nevertheless, with regard to ESCR, States implementing the Guiding Principles should note that, according to the Maastricht Principles, in cases where a serious violation of these rights occurred, access to *judicial* mechanisms should be ensured.

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<sup>166</sup> From the point of view of current international law, it could actually be argued that this would violate the sovereignty of host States. Indeed, it would imply an action of the home State on the territory of the host State, which may correspond to an extraterritorial application of the jurisdiction to enforce, which is illegal (see *supra* section 1.2.1).

<sup>167</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 26, para. 5 and Comm. on Guid. Princ. 27, para. 4.

<sup>168</sup> *Ibid.*

Fifth, concerning the question as to whether the relevant guidelines contained in the Guiding Principles concern legal and economic home States, it can already be asserted that the following Principles are all addressed to legal home States, except when otherwise specified below. Indeed, in the foundational Principle of the third Pillar, the notion of “jurisdiction” is used, without further clarification. Therefore, in the present thesis, the choice has been made to use this notion according to its classic meaning in international law.<sup>169</sup>

Sixth, John Ruggie gives a large freedom to States with regard to the form of remedy, even though it requires that there should be a possibility for victims to both obtain a *remedy* and to *prevent* human rights abuses. Nevertheless, regarding ESCR, it would be useful for States to note that, according to the Maastricht Principles, remedies should be tailored to the individual needs of the victims.

### 2.3.3. *Access to Justice for Foreign Victims Before the Corporation's Home State: Procedural Requirements*

#### 2.3.3.1. Judicial Mechanisms

In relation with judicial mechanisms, the Guiding Principles contain several procedural requirements.

From a general point of view, it stems from Guiding Principle 26 that States should reduce legal, practical or other relevant barriers that could lead to a denial of justice. This is a general principle that should be respected by States. Therefore, in practice, any norm that would lead to a denial of justice for victims of corporate human rights abuses shall be deleted or modified. To illustrate what these norms could be, John Ruggie gives some examples of barriers.<sup>170</sup>

First, the costs of bringing claims cannot “go beyond being an appropriate deterrent to unmeritorious cases.” Moreover, if it happens that they are so high that that

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<sup>169</sup> See *supra*, section 2.1.2.

<sup>170</sup> For more certainty, the following section 3 will only consider these examples when assessing the UK and Dutch situations.

they only prevent people with low financial resources to bring a claim, there should be a possibility to reduce them “to reasonable level through government support, “market-based” mechanism (such as litigation insurance and legal fee structure, or other means).”<sup>171</sup>

Second, claimants shall not encounter difficulties to secure their legal representation. In practice, this seems heavily linked to the costs that legal representation involves. Nevertheless, it can also be related to the fact that lawyers would not be willing to represent victims of extraterritorial ESCR abuses, for one reason or another.

Third, there should be adequate options for aggregating claims or enabling representative proceedings (such as class action or other collective procedure). Hence, collective claims may exist under different forms. It is possible that legislation provides for a possibility to launch one single action stemming from a corporate action that affected similarly several individuals, but the law may also entitle some organisations to represent these victims and to launch an action on their behalf.<sup>172</sup>

Fourth, the State prosecutor should not lack resources, expertise or support to investigate business involvement in human rights related crimes.<sup>173</sup> This is related to John Ruggie’s commentary that makes clear that punitive sanctions (criminal or administrative) constitute a type of remedy for the purpose of the Guiding Principles.

Fifth, situations where “claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim” should not happen.<sup>174</sup> This shows that extraterritorial situations are not excluded from the “access to remedy” requirement stated in the third Pillar of the Guiding Principles, to the extent that the latter concerns judicial mechanisms. However, this also suggests that the above mentioned procedural requirements concern legal home States *only in situations where the host State does not provide victims with any access to adjudicative mechanisms* concerning corporate human rights abuses. As a result, legal home States would only be

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<sup>171</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 26, para. 4.

<sup>172</sup> In both cases, according to the previous procedural requirement, the group of individuals or the organisation should have the possibility to be legally represented if this is necessary for launching a certain action.

<sup>173</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 26, para. 4.

<sup>174</sup> *Ibid.*, Comm. on Guid. Princ. 26, para. 3. .

responsible for the fulfilment of the procedural requirements related to judicial mechanisms *when it appears that in the State where the abuse occurred, there is no possibility for the victims to have their complaint treated by a State institution.*<sup>175</sup>

Finally, it can be noted that if the Maastricht Principles could be used, they would require that the case be treated promptly. They would also oblige the judge to provide victims with the truth concerning the violation of their rights, thanks to, among other things, a prompt, thorough and impartial investigation. Moreover, they would require an adequate public disclosure of the decision establishing the existence of the violation. As a result, in cases where the violation by a State of its extraterritorial obligation to protect would stem from corporate abuses, the existence of the wrong committed by the corporation should also be made public. This could affect the corporation's reputation, which represents a great deal of a TNC or MNE's commercial value. Consequently, this could convince the corporation not to reiterate its wrongful acts, in a stronger way than any other sanction, such as the duty to compensate victims financially.

#### 2.3.3.2. Non-judicial Mechanisms

Non-judicial State-based mechanisms ought to be legitimate, accessible, predictable, equitable, transparent and rights-compatible, according to the definition of these notions laid down in the Guiding Principles.<sup>176</sup> These notions do not present any peculiar content regarding extraterritorial situations, except that the remark about the use of the Internet for raising awareness of the available remedies can be applied to the *predictability* of the procedure.<sup>177</sup>

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<sup>175</sup> This sort of limitation is close to the doctrine of the *forum necessitates*, according to which a State would be competent to adjudicate on a given situation entailing a foreign element if it appears that there is no other reasonably alternative forum existing. This doctrine is little used and little known in private international law (Raffaelli & Wray, 2012, p. 127 and Jägers and van der Heijden, 2008, p. 854).

<sup>176</sup> UN Doc. A/HRC/17/31, 21 March 2011, Guid. Princ. 31, paras. (a)-(f), and Comm. on Guid. Princ. 31. See *supra*, section 2.1.2.3.1.

<sup>177</sup> See *supra* the precedent section 2.3.2.

#### 2.3.4. *Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for an Extraterritorial Corporate ESCR Abuse in the Home State: Substantive Requirements*

##### 2.3.4.1. Judicial Mechanisms

The only substantive requirement that specifically concerns judicial mechanisms stems from the commentary made by John Ruggie about Guiding Principle 26, which says that if the way in which legal responsibility is attributed among members of a corporate group under domestic law facilitates the avoidance of appropriate accountability, access to remedy is not satisfied.<sup>178</sup> Hence, a home State, because of the procedural requirement contained in Guiding Principle 26, is only required to adjudicate judicially extraterritorial corporate human rights abuses when it is a fact that the State where the event occurred cannot provide this adjudication. However, according to the commentary on this Guiding Principle, this does not mean that the home State shall be a legal home State, i.e. the State of which the corporation is a national. Indeed, it can also be an economic home State, i.e. the State of which the parent company of the corporation that committed the abuse is a national. Nevertheless, at the same time, it must be insisted that, following John Ruggie's commentary, economic home States are only required to create a *parent company's liability* in cases where its subsidiaries commit human rights abuses abroad. They do not seem to be required, *procedurally*, to allow victims to sue the *subsidiary* before their domestic courts.

In addition, domestic law shall contain provisions that, in a way or in another, create a corporate liability for the commission of ESCR abuses.<sup>179</sup> Indeed, even if this is not stated expressly in the Guiding Principles, it stems from the fact that, in general, a claimant needs to prove that a legal provision has been violated for being granted a favourable judicial decision.

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<sup>178</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. to Guid. Princ. 26, para. 3.

<sup>179</sup> See *supra*, section 1.3.1.



#### 2.3.4.2. Non-judicial Mechanisms

There is no specific substantive requirement attached to the non-judicial mechanisms in the Guiding Principles. However, it should be stressed that non-judicial mechanisms should be made available for victims of “grievance” related to a corporate human rights abuse.

### 3. ACCESS TO REMEDY FOR VICTIMS OF CORPORATE ECONOMIC, SOCIAL AND CULTURAL RIGHTS ABUSES COMMITTED OVERSEAS IN THE UNITED KINGDOM AND IN THE NETHERLANDS: ASSESSMENT WITH REGARD TO THE NEW INTERNATIONAL LEGAL FRAMEWORK

On the basis of the analysis stated in the previous section, the present section examines the UK and Dutch legislation and legal practice, in order to understand how States can implement the extraterritorial requirements that are contained in the Guiding Principles on the “access to remedy” question.<sup>180</sup> Therefore, the present section will provide these countries with some recommendations or general comments, which may appear useful since they both should plan the implementation of the Guiding Principles before 2012, according to the European Commission.

Concretely, before describing (3.2 and 3.3) and assessing and comparing (3.4) the relevant rules and policies of these two national systems, this section recalls European regulation that limits the EU MS’ freedom in adopting norms in the area of international private law (3.1.1). This is indeed relevant for the present thesis since this area determines both jurisdiction and applicable law in private law cases where there is a foreign element. In addition, for more clarity, this section explains preliminarily the method of analysis used for describing each national system (3.1.2).

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<sup>180</sup> For a justification of this choice, see the introduction of the present thesis.

### 3.1. Preliminary Considerations

#### 3.1.1. *European Union Regulations*<sup>181</sup>

With regard to complaints of extraterritorial corporate ESCR abuses brought before UK and Dutch courts being home States' courts, two EU Regulations are particularly relevant: EU Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("EU Regulation 44/2001")<sup>182</sup> and EU Regulation 864/2007 on the applicable law to non-contractual obligations ("EU Regulation Rome II").<sup>183</sup>

##### 3.1.1.1. Domestic Jurisdiction in Civil Litigation: EU Regulation 44/2001

In EU Regulation 44/2001, the combination of Article 2 and Article 60 appears to be of importance. Indeed, Article 2 states that a person domiciled in a EU MS can be sued before courts of that MS.<sup>184</sup> As for Article 60.1 of the same regulation, it explains that a corporation's domicile, for the purpose of this regulation, is determined by the place of either the corporation's statutory seat, either its central administration or its principal place of business.<sup>185</sup> It also specified that for the UK, "statutory seat" means "the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place."<sup>186</sup> Consequently, regarding Dutch and UK laws, a

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<sup>181</sup>The application *ratione temporis* of the relevant regulations will not be discussed in the present section, since the present thesis is concerned with the future development of a normative framework based on the Guiding Principles, so that it is rather concerned with abuses that will occur in the future.

<sup>182</sup> EU Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 012, 16 January 2001, pp. 1-23 (here after, "EU Regulation 44/2001").

<sup>183</sup> EU Regulation No. 864/2007 on the law applicable to non-contractual obligations, O.J. L 199, 31 July 2007, pp. 40-49 (here after, "EU Regulation Rome II").

<sup>184</sup> EU Regulation 44/2001, Art. 2(1). It should be noted, however, that there is a hierarchy for the application of the different provisions present in Regulation 44/2001, according to which Article 2, together with Article 5 and 6, only apply if neither Article 22, neither Article 24, neither Articles that protect consumers (15 et sq.), holders (8 et sq.) and workers (18 et sq), nor Article 23 apply. Nevertheless, these Articles concern specific situations that the present thesis is not concerned with.

<sup>185</sup> EU Regulation 44/2001, Art. 60(1).

<sup>186</sup> *Ibid.*, Art. 60(2).

corporation that has its domicile in the Netherlands/the UK for the purpose of EU regulation 44/2001, also has the Dutch/UK nationality.<sup>187</sup> Consequently, these two jurisdictions are competent for adjudicating a civil case directed against a corporation, as legal home States of this corporation.<sup>188</sup>

### 3.1.1.2. Applicable Law in Civil Litigation:<sup>189</sup> EU Regulation Rome II

About applicable law, European regulation is less favourable to legal action concerning extraterritorial ESCR abuses brought before home States' courts than it is in the field of domestic jurisdiction. Indeed, EU Regulation Rome II requires the application of the *lex loci damni* principle, which means that the Dutch or English judge facing a complaint from a victim of a human rights abuse committed abroad must apply the law of the host State where the abuse has been committed. Now, in situations concerned in the present thesis, this law is assumed not to protect human rights as satisfactorily as home State law. Indeed, the present thesis is concerned with abuses committed in States where most of the human rights abuses do not correspond to a breach of law. Therefore, it is useful to examine the conditions under which EU Regulation Rome II allows the application of domestic law when a case of extraterritorial ESCR abuse is brought before UK or Dutch courts.

First, domestic legislation is to be applied in case of environmental damage. Indeed, such a damage, which may lead to damage to persons and property, will be compensated according to the law of the country in which the event that caused the

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<sup>187</sup> See *supra*, section 1.1.

<sup>188</sup> In the specific case where the judicial action is related to the existence of an employment contract between the victim and the corporation, Article 19(1) will apply and will lead to the same result, i.e. that the worker can launch a legal action against his employer, which is assumed to be a company, before a Court of this employer's home State.

<sup>189</sup> It should be specified that norms of international private law that concern the applicable law cover substantive law, and not procedural law. For the latter, the principle to be always applied is the principle of *lex fori*, which means that if the case is brought before a Court of the State A, the applicable procedural norms are the ones of the law of State A (van Rhee, 2012, p. 5). In addition, when speaking about substantive law, it is assumed that it concerns civil matters, as it stems from the title of EU Regulation Rome II, and not criminal matters. Indeed, one must note that a primary principle of international customary international law holds that a Court may only apply the criminal law of the State from which it derives its competence (von Glahn & Taulbee, 2007, p. 231).

damage occurred.<sup>190</sup> In case of environmental damage caused by a corporation, this place is situated where the corporation took the decision that caused the environmental damage. Hence, if it stems from the facts that the place of the decision actually corresponds to the place where the corporation – or its parent company – has its statutory seat, then the law of the home State, assumed to be adjudicating the case on the basis of Article 2 of EU Regulation 44/2001, would apply.

Second, UK or Dutch judges adjudicating a civil case involving a foreign element can invoke the UK or Dutch public policy (*ordre public*) if the applicable law according to EU Regulation Rome II is manifestly incompatible with domestic norms that concern this public policy.<sup>191</sup> This ground carries potential regarding human rights since it is possible that a European State like the UK or the Netherlands treats fundamental human rights as public policy issues.<sup>192</sup>

Third, in Veerle Van Den Eeckhout's opinion, two other Articles of the EU Regulation Rome II could be used. First, Article 17 could allow home States' judges deciding a case of extraterritorial human rights abuses to take into account the domestic standards regarding working conditions and the protection of the environment.<sup>193</sup> Second, Article 16 requires a judge treating a case that presents a foreign element to apply the mandatory provisions of domestic law, even if Regulation Rome II designated another national law as being the applicable law. As a result, if in the UK and in the Netherlands, domestic norms concerning ESCR would be granted the status of "mandatory provisions" in the sense of Regulation Rome II, these norms could be applied to decide cases concerning extraterritorial corporate ESCR abuses.

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<sup>190</sup> EU Regulation Rome II, Art. 7.

<sup>191</sup> *Ibid.*, Art. 26.

<sup>192</sup> Castermans & van der Weide, 2009, p. 54.

<sup>193</sup> This Article states that: "In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability." One can realise that for using this Article, as for using Article 7 concerning environmental damage, it is needed to situate the event that gives rise to the civil damage in the home State.

### 3.1.2. *Methodology*

Before entering into the analysis of the UK and Dutch systems, bearing in mind these EU norms, it is worth explaining how these systems will be considered.

It should first be made clear that the only domestic policies, norms or legal practices that will be analysed are the ones that seem relevant regarding the “Guiding Principles” requirements, as stated *supra* in section 2.3.

Second, it should be kept in mind that for analysing each relevant national norm or practice, two questions will be asked: (1) does this norm/practice take into account the imbalances that can exist between victims and businesses or the vulnerable position in which certain victims can be; (2) is this norm/practice valuable for extraterritorial situations involving wrongs committed by a corporation of which the UK/the Netherlands is the home State? In addition, regarding each relevant judicial or non-judicial mechanism put in place, the question will be asked as to whether the awareness and understanding of the existence of this mechanism, of how it can be accessed and of the existence of any support (financial or expert) for doing so, is ensured.

Third, for more clarity, the structure of the analysis will respect the double distinction between procedural and substantive rules, on the one hand, and between judicial and non-judicial mechanisms, on the other hand, as used in section 2.3.

### 3.2. The United Kingdom

This next section will present the possibility for victims of extraterritorial ESCR abuses to get remedies in the UK being a home State, both procedurally and substantively, with regard to the extraterritorial requirements contained in the Guiding Principles and identified *supra* in section 2.3.

Before that, it is important however to specify that the United Kingdom comprises three legal systems: England and Wales, Scotland and Northern Ireland. As a result, legal norms are different in each of these territories.<sup>194</sup> It is for that reason, and

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<sup>194</sup> Oxford Pro Bono Publico, 2008, p. 264.

because there is no space here for dealing with the norms of the three legal systems, that the present thesis focuses on norms applied in England and Wales. Therefore, “UK” norms and practice described in the following subsections will correspond to what exists in England and Wales, unless stipulated otherwise.

### 3.2.1. *Access to Justice for Foreign Victims Before the Corporation’s Home State: Judicial Mechanisms: Barriers to Justice in English Proceedings*

The first aspect of UK law to be looked at is the existence of possible barriers to the access to justice in ordinary civil proceedings, which is the type of proceedings normally applied when a victim of corporate ESCR abuses launches a legal action against a business in order to obtain remedy. The reason for that resides in John Ruggie’s request to “*reduce barriers that could lead to a denial of justice*”, which may be costs, legal representation and the absence of collective action.<sup>195</sup> Furthermore, since criminal law and the prosecutor’s resource, expertise and support to investigate business involvement in human rights-related crimes are possible barriers too, criminal proceedings will be also considered, to the extent that it is related to victims’ rights.

Before getting into the examination of such possible barriers in the UK, it is worth noting that until the *Owusu* judgment pronounced by the European Court of Justice (EUCJ) in 2005, English courts had continued to refuse adjudicating a case involving a UK company on the basis of the *forum non conveniens* doctrine, in spite of EU Regulation 44/2001.<sup>196</sup> This doctrine permitted UK courts to decline to hear a case when there was a foreign Court more appropriately situated to hear the matter, regarding, in particular, the place of events concerned and location of the witnesses.<sup>197</sup> Thus, the decision of the EUCJ was needed before that the English courts declared

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<sup>195</sup> UN Doc. A/HRC/17/31, 21 March 2011, Guid. Princ. 26 and Comm. on Guid. Princ. 26.

<sup>196</sup> Case C-281/02 *Owusu v. Jackson* [2005] ECR- I-1383, [2005] QB 801. Some authors still discuss the scope of this judgment, asserting that in some specific cases, the *forum non conveniens* doctrine would still apply (see for instance Knight, 2007). Nevertheless, this opinion is not shared by the majority. Therefore, it is not taken into account in the present thesis.

<sup>197</sup> Weschka, 2006, p. 631. For details, see Nuyts, 2004.

themselves automatically competent when facing a violation of civil law by a UK corporation.<sup>198</sup>

Moreover, a general remark can be made regarding the assurance of awareness and understanding of the *functioning* of judicial mechanisms, to the extent that the latter would allow a victim of extraterritorial ESCR abuses to bring her case before courts and to be granted a favourable judgement. Indeed, in practice, victims ought to be represented by a lawyer in order to access courts. Now, this lawyer knows well the functioning of the judicial mechanism. Furthermore, since the procedure will take place in the language of the country, the lawyer should know this language, which means that he could translate the norms to the victims in a language that they understand.<sup>199</sup> Thus, victims should always be in a position that allows them to understand the functioning of the judicial State institution, whatever the language used, and whatever the available explanation, thanks to the work of the lawyer. As a result, the requirement related to awareness and understanding can be considered as fulfilled when it concerns judicial mechanisms. As for the raising of awareness and understanding of the *existence* of judicial mechanisms, it should include a public explanation on the possibility to bring cases and to win cases of extraterritorial corporate ESCR abuses before national courts, as well as of the need to be represented by a lawyer and on how to obtain this representation. Nevertheless, as it has already been stated, only the Internet, and English or Spanish languages, can be required to be used in that context.<sup>200</sup>

#### 3.2.1.1. Costs

In the United Kingdom, litigation is said to be very expensive, even if it is hard to give a calculated estimation. Indeed, costs depend on the nature of the case, the level

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<sup>198</sup> For an illustration of this new behaviour of the Court, see *Guererro c. Monterrico Metals Plc. & Rio Blanco Copper SA* [2009] EWHI 2475 (QB). There are still the political questions and the act of State doctrines that can lead to a refusal of the Court to decide a case of extraterritorial corporate human rights abuse if this abuse involves acts of the host State. However, there is no space here for treating this specific question (for information about these doctrines, in relation to human rights violations committed overseas, see International Law Association & Human Rights Committee, 2001).

<sup>199</sup> It can be noted that the official Dutch website providing domestic legislation is translated into English, but the laws themselves are not. However, an unofficial translation can be found on the following webpage: <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwened.htm> (consulted on 31 May 2012).

<sup>200</sup> See *supra*, section 2.3.2.

of expertise, and the locality of the practice – when they related to hourly rates for solicitors – and on the nature of the litigation and the type of document being filed at court – when they relate to court fees.<sup>201</sup>

However, there are several possibilities for limiting these costs. First, victims may try to be granted legal aid. Nevertheless, currently, by virtue of the Access to Justice Act that is to be applied until April 2013, legal aid cannot be granted in relation to allegations of negligently caused injury or death.<sup>202</sup> Now, in practice, violations of ESCR will often be related to such injury. Furthermore, legal aid is not granted in relation to claims where the applicable law is not that of the UK.<sup>203</sup> Now, if the case concerns extraterritorial ESCR abuses, due to EU Regulation Rome II, it is greatly possible that the English judge must apply the law of the developing country where the abuse occurred, and not UK law.<sup>204</sup>

From April 2013, new legislation will be applied to legal aid, i.e. the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA).<sup>205</sup> According to this new legislation, legal aid will be available neither in relation to personal injuries or death, nor in relation to a claim related to a tort of negligence.<sup>206</sup> Now, tort of negligence constitutes a great substantive element of UK law for victims of corporate human rights abuses.<sup>207</sup> Moreover, in this new legislation, the rules concerning the exclusion of legal aid when the applicable law is a foreign law is maintained.<sup>208</sup>

Second, victims of extraterritorial corporate human rights abuses may apply for litigation insurance to cover possible adverse cost awards in the event that a claim is unsuccessful.<sup>209</sup> This sort of insurance is very important in the UK since the general principle is that the loser of the case must pay for both his legal costs and those of the

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<sup>201</sup> Oxford Pro Bono Publico, 2008, p. 289.

<sup>202</sup> Access to Justice Act 1999, c. 22, s. 6, schedule 2, Art. 1 (a) and (h).

<sup>203</sup> *Ibid.*, s. 19.

<sup>204</sup> See *supra*, section 3.1.1.2.

<sup>205</sup> For the moment of the entry into force of the different provisions, see Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10, s. 151.

<sup>206</sup> It should be understood that personal injury or death might be the result of negligence or of a breach of a statutory duty. In addition, tort of negligence covers personal injury and death that stem from negligence, as well as other situations where there is no personal injury or death (White, 1999, p. 245).

<sup>207</sup> See *infra*, section 3.2.3.2.

<sup>208</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10, s. 32(1)(b).

<sup>209</sup> Oxford Pro Bono Publico, 2008, p. 289.



winner.<sup>210</sup> Furthermore, this insurance cannot represent an unbearable cost for the winner since the insurance fees would be also paid by the loser. As a result, a claimant who is granted litigation insurance is ensured that he will neither suffer financially if he loses the case nor lose money because of the insurance subscription if he wins the case. Nevertheless, in practice, insurers are not likely to grant this insurance to claimants who are victims of extraterritorial corporate ESCR abuses, for several reasons.<sup>211</sup> The main idea that lies behind these reasons is that insurers do not want to take the risk of having a great chance of paying the costs of the case. Furthermore, there is a practical problem that is due to the novelty of legal actions that concerns corporate human rights abuses committed overseas. Indeed, most standard policy wordings may not extend to such cases and it is likely that insurers will need to persuade (and seek permission from) their underwriters/reinsurers to insure cases that go beyond the authorisation of their line slip. Furthermore, insurers will be influenced by political and commercial elements, such as: What interests do the insurer or their reinsurers have in this country – past, existing and future? Which corporate entity is the claim against? Is there a potential conflict of interest?

#### 3.2.1.2. Legal Representation

A third way for victims to overcome the heavy costs attached to litigation in England resides in the negotiation of a conditional fee agreement with their lawyer. Under these arrangements, a claimant can be assured that he need not pay his lawyer if he loses. For compensating this risk for the lawyer, it is stated in the agreement that the lawyer will receive “a success fee” exceeding the ordinary fee, based on hourly billing, if the claimant wins the case.<sup>212</sup> Nevertheless, the LASPOA, without deleting the possibility to agree on success fees, states stricter rules for negotiating the attribution of

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<sup>210</sup> Byers, 2000, p. 244.

<sup>211</sup> These reasons have been explained by Christophe Baumont, by email (Email from Christophe Baumont, employee of the UK insurance litigation company *the judge*, the judge, 6 June 2012).

<sup>212</sup> Andrews, 2005, pp. 176-177. This success fee cannot exceed 100% of the ordinary fee (Conditional Fee Agreement Order 2000, No. 823, Art. 4).

such fees.<sup>213</sup> Furthermore, it expressly states that the Court cannot order the defendant to pay for success fees.<sup>214</sup>

It is certain that this change in the law will not encourage lawyers to plea for victims of extraterritorial human rights abuses, since it increases the total risks that this type of action entails for them. This could be confirmed in the (near) future by reaction of the law firm *Leigh Day & Co*, which is specialised, among other things, in the litigation of human rights abuses, even when committed overseas.<sup>215</sup> At least, the existence of such a firm shows the interest of English lawyers in the provision of remedies for victims of corporate human rights abuses, which represents an advantage for these victims, rather than a barrier.

### 3.2.1.3. Collective Actions

According to the Guiding Principles, another potential barrier may stem from the absence of a possibility for victims to launch an action collectively. In England, there are two main types of collective actions: the representative action and the Group Litigation Order (GLO). The GLO allows courts, at the request of one of the parties or on its own initiative, to manage the claims covered by their order in a coordinated manner, because they give rise to common or related issues of fact or law.<sup>216</sup> Hence, the GLO does not give a right to collective action to the parties, but to the judge. Nevertheless, it serves the parties if used. This was, in particular, the case in the *Trafigura* case, which concerns an extraterritorial corporate human rights abuse.<sup>217</sup>

Representative actions, which have priority over GLO,<sup>218</sup> concern cases where a person who has the same interest as others can sue a defendant, as a representative of

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<sup>213</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10, s. 44(4).

<sup>214</sup> *Ibid.*

<sup>215</sup> See the website of the law firm: [www.leighday.co.uk](http://www.leighday.co.uk) (consulted on 28 May 2012).

<sup>216</sup> See Civil Procedure Rules 1998, No. 3132 (L.17), ss. 19.10-13.

<sup>217</sup> See *infra*, section 3.2.3.2. A GLO has been also made in the BP lawsuit, which concerned several environmental damages caused to the lands of Colombian farmers by the construction of a pipeline (see Business and Human Rights Resource Centre, Case Profile: BP lawsuit (re Columbia), available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BPlawsuitreColombia> (consulted on 2 June 2012).

<sup>218</sup> Lascelles, 2011, p. 4.

his or her own interest and of the interests of others.<sup>219</sup> In such actions, the representative can represent parties who are not before the Court. As a result, the judgment is binding for all the persons represented in the claim.<sup>220</sup> However, this judgment may only be enforced by or against a person who is not a party to the claim with the permission of the Court.<sup>221</sup>

#### 3.2.1.4. The Relationship Between Criminal and Civil Laws

Procedural barriers are not only linked to civil proceedings. Indeed, they can also relate to the content of national criminal law and to the relationship between civil and criminal proceedings. In the United Kingdom, it must be understood that there is a strict separation between proceedings in civil and criminal laws. Consequently, if it happens that a corporate human right abuse corresponds both to an English criminal offense and to a breach of domestic tort law, this will give rise to two separate procedures, one criminal and one civil.<sup>222</sup>

However, this does not mean that a criminal judge cannot order a convicted person to provide victims of the offense with compensation. Actually, the 2012 LASPOA transforms the former power of the criminal judge to consider making compensation orders where victims have suffered harm or loss into a duty.<sup>223</sup> Nevertheless, even in cases where such an order is made, a victim is not prevented from bringing a civil claim in respect to the loss or damage to which the compensation order relates, since the victim was never a party to the criminal proceedings.<sup>224</sup>

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<sup>219</sup> Civil Procedure Rules 1998, No. 3132 (L.17), s. 19.6(1). The expression “same interest” has been traditionally interpreted in a way that excludes cases where there are claims for damages, or where there are separate defences (Civil Consulting, Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms, Country Report United Kingdom, March 2008, available at [http://ec.europa.eu/consumers/redress\\_cons/uk-country-report-final.pdf](http://ec.europa.eu/consumers/redress_cons/uk-country-report-final.pdf) (consulted on 2 June 2012), p. 2).

<sup>220</sup> Civil Procedure Rules 1998 No. 3132 (L.17), s. 19.6(4)(a).

<sup>221</sup> *Ibid.*, s. 19.6(4)(b).

<sup>222</sup> Jolowicz, 2000, p. 13.

<sup>223</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, c. 10, s. 63.

<sup>224</sup> Jolowicz, 2000, p. 15.

Furthermore, proof of conviction is admissible in civil proceedings as (normally) rebuttable evidence that the person convicted committed the offense of which he or she was convicted.<sup>225</sup>

Regarding these implications of criminal proceedings for victims of criminal offenses, the criminalisation of extraterritorial corporate human rights abuses, as well as investigations by the prosecutor in relation to such crimes – if existing – are of importance.

About the criminalisation of extraterritorial corporate human rights abuses by UK law, one should firstly note that the UK recognises the possibility for criminal liability of a legal person, so that there is a possibility for criminal liability of corporations.<sup>226</sup> However, there is only a limited scope for prosecution of TNCs for criminal acts corresponding to human rights abuses that have been committed outside the UK territories. Indeed, for the UK to exercise its jurisdiction as a home State, such an abuse must correspond to: (1) genocide, war crimes or crimes against humanity, or to an ancillary thereto; (2) or to the commission or the aiding and abetting of the commission of a grave breach of the Four Geneva Conventions of 1949 and their protocols, which concern international humanitarian law.<sup>227</sup> Moreover, all these offenses are punishable by imprisonment, which cannot be applied to a legal entity. Furthermore, for these offenses to be recognised as having been committed, both the existence of the criminalised act and the intention to commit it (mental element, or *mens rea*) need to be proved. Now, according to the “identification” principle, for proving the existence of the so-called *mens rea* on the part of a corporation, it must be demonstrated that the moral element can be attributed to the individuals who constitute the “direct mind” of the former, i.e. directors, not officers and employees.<sup>228</sup>

As for the prosecutor, it is doubtful whether he is supported in the investigation of business involvement in human rights related crimes that occur abroad, since the UK is very reluctant to use extraterritorial or universal jurisdiction in criminal matters. The

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<sup>225</sup> Civil Evidence Act 1968, c. 64, ss. 11 and 12.

<sup>226</sup> FIDH, 2012, p. 280.

<sup>227</sup> Geneva Conventions Act (as amended) 1957, c. 52, s. 1; International Criminal Court Act 2001, c. 17, s. 70.

<sup>228</sup> Oxford Pro Bono Publico, 2008, p. 266.

reason for this is that it is still very attached to the idea that a criminal offense is territorial by nature.<sup>229</sup> In addition, one must understand that in the UK, there is no possibility for victims to compel the prosecutor to undertake any investigation, as is the case in some other European systems, like France or Italy.<sup>230</sup>

#### 3.2.1.5. Remark: The Fight Against the Imbalances Between the Parties: Evidence and Power of the Judge

Aside from asking States to preclude procedural barriers, John Ruggie also warns States about the need to remedy the imbalance that can exist between the victims and the corporation as well as the vulnerable position in which some victims can be found. From a procedural point of view, in civil litigation, this may be done by helping victims to access key evidence, so that they are able to prove the facts that ground their allegations. Now, the UK system distinguishes itself from the continental model since it requires disclosure of evidence. Indeed, it requires parties to disclose all the information that they know or possess and that can be relevant for deciding the case, even if that information is not in their favour.<sup>231</sup>

#### 3.2.2. *Access to Justice for Foreign Victims Before the Corporation's Home State: Non-judicial Mechanisms*

The following section will examine the existing UK non-judicial mechanisms that can adjudicate on complaints about extraterritorial corporate human rights abuses.

For each of these mechanisms, the question will be asked whether there are legitimate, accessible, predictable, equitable, transparent and rights-compatible, in the sense of the Guiding Principles.

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<sup>229</sup> By 2010, there was simply no case applying universal jurisdiction (FIDH, 2012, p. 318, note 410).

<sup>230</sup> Jolowicz, 2000, p. 16.

<sup>231</sup> More precisely, for remediating the abuses that occurred in that regard, the 1998 Civil Procedure Rules limits the types of evidence that shall be submitted to documents. Hence, according to Article 31.6, Party A is required to disclose documents: on which A rely; or which adversely affect A's own case; or which adversely affect B's case; or any other relevant document that A is required to disclose by a relevant practice direction (For more information about disclosure, see Civil Procedure Rules 1998, No. 3132 (L.17), Part 31).

### 3.2.2.1. The UK National Contact Point

National Contact Points (NCPs), which must be put in place by adhering States to comply with the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”), are responsible for contributing to the resolution of issues related to the implementation of these Guidelines, which are brought before them under the form of “specific instances”.<sup>232</sup> Under the specific instances procedure, any organisation (or individual) that wants to raise the violation of one or several Guidelines by a corporation having the nationality or operating in one of the adhering country can complain before the NCP of this country.<sup>233</sup> Then, the role of the NCP is to offer a forum for discussion and to assist the parties in dealing with the issue raised.<sup>234</sup> Therefore, the NCP will first make an *initial assessment* of the allegation of violation of the OECD Guidelines in order to determine whether the issue raised merits further examination.<sup>235</sup> If it is the case, the NCP will offer good offices to help the parties involved, that is to say the plaintiff and the corporation, to resolve the issue. This may include offering and facilitating access to consensual and non-adversarial means, such as conciliation or *mediation*.<sup>236</sup> If this process appears not to be successful, the NCP will make a statement in which it *determines* why and how the issue raised corresponds to a violation of the OECD Guidelines and makes *recommendations* on the implementation of the latter.<sup>237</sup>

Moreover, it is worth noting that the OECD Guidelines have been reviewed in May 2011 for inserting the content of the second Pillar of the Guiding Principles (i.e. the corporate duty to respect human rights) into the document. As a result, today the OECD Guidelines contain a human rights section, under which corporations have several duties that are related to the respect of internationally recognised human rights,

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<sup>232</sup> OECD Guidelines, *op. cit.*, Part II, “Decision of the Council on the OECD Guidelines for Multinational Enterprises”, para. I.1.

<sup>233</sup> *Ibid.*, part II, “Procedural Guidance”, para. C.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*, para. C.1.

<sup>236</sup> *Ibid.*, para. C.2.

<sup>237</sup> *Ibid.*, para. C.3.

of international human rights obligations of the countries in which they operate, as well as of the relevant domestic law and regulations in that area.<sup>238</sup>

The United Kingdom, as a Member State of the OECD, has a legal obligation to respect the OECD Guidelines.<sup>239</sup> In order to fulfil this obligation, it put in place its NCP, in a way that complies with the content of the document. As a result, the United Kingdom, as a home State, possesses a functioning<sup>240</sup> non-judicial mechanism that can deal with complaints concerning corporate ESCR abuses that have been committed abroad. Indeed, one should remember that the criterion for NCP of a State X to be competent is that the corporation that is accused of not having respected the OECD Guidelines has the nationality of this State X or operates in this State X. Furthermore, a complaint before an NCP is directed against the corporation directly – not against State X, and only requires the plaintiff to prove that the corporation violated one of the Guidelines – not that this violation also involves a State wrong. Consequently, the UK NCP is indeed relevant for the present thesis.

Therefore, it is necessary to assess whether the UK NCP complies with the procedural requirements stated in the Guiding Principles.

For this assessment, it should be specified that, since its 2011 review, the OECD Guidelines require that NCPs comply with five of the six effectiveness criteria stated in Guiding Principle 31, as re-stated in the *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*. These criteria are the following. First, NCPs should be *accessible*, which means that their access should

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<sup>238</sup> *Ibid.*, part I, s. IV. These duties include respecting human rights, redressing adverse human rights impacts that the business is nevertheless involved in, and seeking to prevent adverse human rights impacts that stem from business relationship even if the business did not contribute to these impacts itself (see paras. 1 and 3). It can be regretted that the national standard taken into account seems to be the standard of the country where the wrongs complained about occurred rather than the one of the country where the specific instance before NCP is started. Indeed, in situations where the human rights abuse occurred in a developing country and where the NCP that is chosen is the one of a developed country, where the protection of human rights is in general higher, it would be more efficient for corporate accountability that the latter could rely on the domestic standards of protection.

<sup>239</sup> Indeed, OECD Member States are automatically bounded by legal texts drafted by this IGO. Nevertheless, other States can decide to be bounded as well. For designating these States and the OECD MS, it is spoken of “adhering States” (OECD Guidelines, *op. cit.*, “Declaration on International Investment and Multinational Enterprises”, note 1).

<sup>240</sup> See the section “cases” on the website of the Department for Business Innovation & Skills: <http://www.bis.gov.uk/nationalcontactpoint> (consulted on 30 May 2012). It may be added that the *Afrimex* case has been discussed in the literature for understanding the importance of the power of the UK NCP regarding its procedural freedom (see Catá Backer (b), 2009).

be facilitated and that specific instances should be dealt with in an efficient and timely manner. Second, NCPs shall be *transparent* in all their activities. However, when the NCP helps the parties to find an agreement in the framework of specific instances or when it delivers outcome in the framework of the same procedures, they may be confidential, if this is necessary for the effective implementation of the OECD Guidelines. Third, NCPs should ensure *predictability* of specific instances by providing clear and publicly available information on their role in the resolution of specific instances and on the time framing of specific instances procedure. Fourth, NCPs shall ensure that the parties can engage in specific instances on fair and *equitable* terms, for example by providing reasonable access to sources of information relevant to the procedure to both parties. Fifth and lastly, the outcome of NCPs should be *compatible with the principles and standards contained in the Guidelines*, which actually refer to human rights.<sup>241</sup>

Now, the UK NCP stated on its website that the 2011 reviewed text of the OECD Guidelines would be effectively applied from 1<sup>st</sup> September 2011.<sup>242</sup> Furthermore, when looking at the UK NCP website, the criteria contained both in the Guiding Principle 31 and in the OECD Guidelines seem greatly respected. Nevertheless, it must be affirmed that it is hard to evaluate whether the UK NCP would investigate a case when it appears that the claimant could not get proper factual evidence because of its lack of financial resource or social position, in order to ensure *equitability*.

In addition, it should be stressed that the existence and functioning of the UK NCP is made known and understood by the people who could be interested in using the UK specific instances procedure, thanks to the clarity and comprehensiveness of the information made available on the Department for Business Innovation & Skills (BIS) website.<sup>243</sup> However, the question remains as to whether the whole functioning of the UK NCP really allows re-balancing the relationship between the victims and the

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<sup>241</sup> See here above, at note 238.

<sup>242</sup> See the webpage of the Department for Business Innovation & Skills: <http://www.bis.gov.uk/nationalcontactpoint> (consulted on 30 may 2012).

<sup>243</sup> The OECD Guidelines actually require NCPs to be *visible*, which means that the business community, workers organisations and other interested parties, including NGOs, shall be informed about the availability of facilities associated with NCPs (OECD Guidelines, *op. cit.*, “Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises”, para. I).



business. It is true that any organisation, without the need for this organisation to justify any interest in the treatment of the case by the UK NCP, can start a specific instance. In this way, victims of extraterritorial human rights abuses could contact any strong Non-Governmental Organisation (NGO) to act on their behalf before the NCP. In such cases, the position of the NGO, regarding financial resources and expertise, may ensure that the latter could discuss on equal footing with a business. However, if it happens that the victims desire to make a complaint on their own, they would be confronted with a negotiation with the business in order to resolve the issue in a friendly way, since the first aim of an NCP is to facilitate this negotiation. In that frame, it is not sure whether the equality between the parties can indeed exist. In practice, it must be stressed that it actually never happened that individuals, alone or together, made a complaint before the UK NCP. At best, some local NGOs have been involved in UK specific instances.<sup>244</sup>

#### 3.2.2.2. Other Relevant Non-judicial Mechanisms

There is no other non-judicial State institution in the UK authorised with the power to deal with complaints of extraterritorial corporate human rights abuses that would lead to the provision of any sort of remedy for the victims of these abuses.

#### 3.2.3. *Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for a Corporate ESCR Abuse Committed Abroad in the Corporation's Home State: Judicial Mechanisms*

This section examines whether the State judicial institutions that are entitled to adjudicate on complaints of corporate ESCR abuses could also find a basis in domestic law to compel a company to remedy the harm that it caused to the plaintiffs or to

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<sup>244</sup> See for instance UK NCP, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: National Grid Transco* (5 July 2005), available at [www.bis.gov.uk/files/file47555.doc](http://www.bis.gov.uk/files/file47555.doc) (consulted on 30 May 2012). In that case, the UK NCP closed the complaint for want of prosecution because of the lack of information provided by the African NGO that had made the complaint and because of the absence of response from the accused company within a reasonable time.

prevent the former from infringing upon the rights of the latter, in a way that complies with the Guiding Principles.

There are three elements that need to be analysed when dealing with this question. The first subsection will look at the variety of remedies offered by UK law, to the extent that they could be granted in cases of complaints of extraterritorial corporate ESCR abuses (3.2.3.1).<sup>245</sup> The next subsection will look at legal bases that could be used by victims of corporate ESCR abuses for being effectively granted one of these remedies (3.2.3.2). Third, it is to be reminded that, according to John Ruggie, each State should make sure that the way in which responsibility is attributed among members of a corporate group under domestic law does not constitute a barrier to the provision of remedies for victims of corporate human rights abuses. In that regard, the last subsection will examine the possibilities that exist in UK law for holding UK parent companies liable for wrongdoings committed abroad by their subsidiary companies (3.2.3.3).

#### 3.2.3.1. Variety of Remedies Provided by Law

Both in the UK and in the Netherlands, the main available remedies in civil litigation that could be granted in case of complaints about extraterritorial corporate ESCR abuses are: compensation for damages (that generally take the form of an amount of money); declarations of law (aiming at confirming the existence or absence of a certain legal relationship); and injunctions (i.e. court order to a defendant to perform or to abstain from certain acts).<sup>246</sup>

Moreover, it is important to point out the important number of cases that are settled by agreement in the UK.<sup>247</sup> This might be due to the fact that parties have the

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<sup>245</sup> It should be noted that regarding international private law, remedies are considered as part of procedural rules, so that remedies that are available are the ones contained in the law of the State where the litigation takes place (see *supra*, note 189, and *Harding v. Wealands* [2006] UKHL 32, [2007] 2 AC 1, para. 24).

<sup>246</sup> Eijssvoegel & van Hooijdonk, 2009, pp. 48-51.

<sup>247</sup> In 2009, around 1,879,000 claims were issued while only 67,000 indeed led to a judgement (Partington, 2011, p. 217). For an illustration of this regarding extraterritorial human rights abuses, see the next subsection.

possibility to settle the case out of court, if the claimant dismisses the case.<sup>248</sup> Indeed, contrary to what exists in continental systems, agreement of the judge on the terms of the settlement is not necessary for it to officially end the case.

Nevertheless, it should be noted that this option is not open to the representative in a representative action. Indeed, in such an action, the Court must approve a settlement for it to be legitimate, in order to make sure that the latter is for the benefit of all the persons represented.<sup>249</sup> In addition, according to Oscar Chase, Helen Hershkoff and others, the fact that so many cases are settled by agreement before the trial phase is rather due to the high costs of litigation.<sup>250</sup>

It remains that this great practice of settlement appears interesting when considering complaints of extraterritorial human rights abuses, since it gives the possibility to victims to obtain a remedy *even if they are meant to lose the case regarding the merits of the claim*. Indeed, a corporation could make an offer of settlement for ending the case, because, for instance, it wants to avoid harm to its reputation. This remains true in cases where the corporation has a great chance of winning the case regarding substantive UK law. Thus, in such cases, the victims of the abuse can obtain a sort of remedy that will depend on the terms of the agreement while if the case would not be settled, they would not obtain anything. Even worse, they would have to pay the costs of litigation.

Nevertheless, several authors pointed out the inappropriateness of settlements out of court, at least when related to personal injuries or death. In their opinion, such a process is not one of equal bargaining, while this is a condition for settlement out of court to make sense.<sup>251</sup> For understanding the importance of this remark, one must remember that John Ruggie requires States to combat the imbalances that can exist between the victims and the corporation.

Aside from the developed practice of settlement, it is worth noting that courts in the UK may award punitive damages, in addition to compensating damages, in cases where “the defendant’s conduct was calculated to make a profit for himself which

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<sup>248</sup> White, 1999, p. 260.

<sup>249</sup> Civil Procedure Rules 1998, No. 3132 (L. 17), ss. 19.7(5)-(6).

<sup>250</sup> Chase, Hershkoff, Siberman, Taniguchi, Varano & Zuckerman, 2007, p. 17.

<sup>251</sup> See White, 1999, p. 260.

would exceed any compensation.”<sup>252</sup> Of course, the existence of such a calculation is hard to prove, but its existence in many cases of corporate human rights abuses committed in developing countries cannot reasonably be excluded.

### 3.2.3.2. Corporate Liability for ESCR Abuses Committed Abroad

Regarding the question as to whether corporations are explicitly obliged to respect human rights under UK law, one should note that corporate liability may arise both from international law rules and from more requiring domestic law rules. However, the UK being a dualist system, the victims can invoke the violation international norms before national courts of this country only if the latter has transposed these norms into national law.<sup>253</sup> This section examines the relevant domestic norms, depending on their international (and regional) or national origin.

#### 3.2.3.2.1. Norms of International Origin

When considering international norms that would create corporate liability for extraterritorial ESCR abuses, one could first think about the ICESCR, which is the main international legally binding document concerning ESCR. Nevertheless, the UK refuses to transpose the ICESCR into domestic law, for several reasons, such as the imprecise wording of the Covenant, and the fact that, in the UK Government’s point of view, the rights contained in the ICESCR correspond to aspirational policy goals, and not to enforceable rights.<sup>254</sup> Moreover, it is hard to imagine how the transposition of ICESCR into domestic law might be helpful regarding this thesis topic, since it only creates an obligation for States, so that its use could only be relevant in a legal action launched against a State, and not directly against a corporation.

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<sup>252</sup> *Rookes v Bernard* [1964] AC 1129 (Lord Delvin).

<sup>253</sup> Oxford Pro Bono Publico, 2008, p. 262.

<sup>254</sup> Joint Committee on Human Rights, 2004, paras. 52-53. One must note that this point of view has been expressly regretted by the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR by States Party (*Ibid.*, paras. 56-57).

What could be relevant among international instruments is rather the European Convention of Human Rights (ECHR), which has become part of UK law since the adoption of the 1998 Human Rights Act.<sup>255</sup> Indeed, this Convention contains some rights that could be qualified as ESCR, such as the right of respect for private and family life or the freedom of assembly and association.<sup>256</sup> Furthermore, the ECHR has been given *horizontal effect* by the European Court of Human Rights (ECtHR).<sup>257</sup> This means that the violation of the ECHR can be invoked in private relationships between individuals.<sup>258</sup> Thus, victims of corporate ESCR abuses launching an action against the corporation, responsible for these abuses, in the UK could invoke the violation of rights protected by the ECHR. This possibility is based on the existence of a State's *positive obligation*, under the ECHR, to secure the individuals rights protected by the ECHR.<sup>259</sup> Especially, in *Lopez Ostra v. Spain*,<sup>260</sup> the ECtHR ruled that Spain had violated Article 8(1) ECHR, which protects private and family life of individuals, because it had allowed a corporation to create severe environmental pollution that had infringed upon other individuals' right to respect of their home.<sup>261</sup> Hence, Spain had failed to comply with its positive obligation to regulate private industry so as to prevent the latter from damaging the environment in a way that would harm the private life of other people.<sup>262</sup>

However, the ECHR could not be used in cases involving *extraterritorial* corporate human rights abuses. Indeed, the ECHR creates a State positive obligation to ensure that the ECHR is respected in private relationships between individuals only for the State that has *jurisdiction* over this relationship, in the sense of the ECHR.<sup>263</sup> Now, the way that "jurisdiction" is defined for the purpose of the ECHR excludes the corporation's home State's responsibility regarding cases of corporate human rights

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<sup>255</sup> Human Rights Act 1998, c. 42.

<sup>256</sup> CETS No. 005, Arts. 8 and 11.

<sup>257</sup> Akandji-Kombe, 2007, p. 14.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.* For more a definition of the concept of positive obligations under the ECHR, see White & Ovey, 2010, p. 99-102.

<sup>260</sup> *Lopez Ostra v. Spain*, 9 December 1994, 20 EHRR (1994) 277.

<sup>261</sup> More precisely, the claimant before the ECtHR claimed that her family home had been subject to serious pollution (including gas fumes and pestilent smells) from a private sector tannery reprocessing plant, which had been built with a State subsidy on municipal land at only twelve meters from the applicant's flat (Mowbray, 2007, p. 546).

<sup>262</sup> *Lopez Ostra v. Spain*, 9 December 1994, 20 EHRR (1994) 277, para. 51.

<sup>263</sup> CETS No. 005, Art. 1. See Akandji-Kombe, 2007, p. 14.

abuses committed abroad. Indeed, in *Bankovic v. Belgium*, the Grand Chamber of the ECtHR identified four categories of exceptions to the territorial character of the notion of jurisdiction in the sense of the ECHR, as following: *extradition and expulsion* cases; *consular or diplomatic* cases; *extraterritorial effects* cases (i.e. “cases where the acts of State authorities produced effects or were performed outside their own territory”); and *effective control* cases (i.e. “cases when as a consequence of military action (lawful or unlawful) [a Contracting Party] exercised effective control of an area outside its national territory”).<sup>264</sup>

#### 3.2.3.2.2. Norms of National Origin

At national level, the UK did not adopt any law obliging TNCs incorporated in the country to respect specific rules in the area of ESCR when operating abroad. However, victims of a UK corporation’s ESCR violation may obtain remedies before a UK Court by grounding their legal action on the *common law* tort of negligence. This tort law allows liability of a UK company for human rights abuses committed by this company, by its subsidiaries or by its suppliers. Indeed, it imposes a duty of care on UK corporations (among other actors). In other words, it allows any person to sue a UK corporation before UK courts if the latter did not take all the necessary and reasonable precautions in order to avoid the occurrence of damages to the plaintiffs.<sup>265</sup> This tort law has been invoked in the *Lubbe v. Cape Plc.* case<sup>266</sup> that had occupied the English court system from 1997 until 2000, when the case was settled out of court. This settlement out of court prevented the English judge from deciding whether the tort of negligence could oblige a UK company to ensure that its subsidiaries, operating abroad, respect human rights. In this case, the UK company Cape was sued in England by Mr Lubbe and four other South African mine workers alleging asbestos-related personal

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<sup>264</sup> *Bankovic v. Belgium* (G. Ch.), 12 December 2001, 44 EHRR (2001) SE5, paras. 68-70 and 73. One could note that these grounds for jurisdiction cover less situations than the Maastricht Principles (see *supra*, section 1.2.1 and The Commentary, *op. cit.*, Comm. on Princ. 9, paras. 4-9), while they both refer to a notion of State *obligation* (and not of State *power*).

<sup>265</sup> Séroussi, 2003, p. 58; FIDH, 2012, p. 248.

<sup>266</sup> *Lubbe and Others v. Cape Plc.* [2000] 4 All ER 268. For a good summary of this case, see Jägers, 2002, pp. 207-208.

injuries and deaths caused by working in the company's subsidiary's South African mines. They argued that the parent company had acted negligently by establishing a company and a plant in South Africa without having taken care of its proper safety and environmental management afterwards. This led to damage being caused to employees and neighbours of the plant. Actually, even though the subsidiary, wholly owned by the British parent company, had respected the South African law, the fact that the asbestos dust levels at the South African mine were 12-35 times higher than the levels permitted in Great Britain could have amounted to negligence from the parent company.<sup>267</sup>

A similar situation has been brought before British courts in the *Thor* cases.<sup>268</sup> In the middle of the nineties, South African workers claimed to have suffered potentially lethal mercury poisoning in a factory of the parent company Thor Chemicals' subsidiary in South Africa. For obtaining remedies for that harm, the workers launched an action against the UK parent company, in the UK. This case was also settled. However, the High Court in London had the occasion to state that, since the mercury levels were consistently in excess of the UK standards, the parent company could be accused of a violation of its duty of care.<sup>269</sup> This shows that, quite logically, when assessing whether a UK corporation has been negligent with regard to damages that occurred abroad, UK courts decide according to UK standards. As a result, even when the damage was caused in the respect of the law of the host State where the abuse was committed, this abuse can constitute a tort of negligence under UK law.

Another interesting case could have been the *Trafigura* case, settled before the matter reached trial, in September 2009.<sup>270</sup> In this case, the 30,000 claimants, all residents of Abidjan (Ivory Coast), filed proceedings in the UK courts against the UK

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<sup>267</sup> *Rachel Lubbe v. Cape Plc.* [1998] C.L.C. 1559.

<sup>268</sup> *Ngcobo and Others v. Thor Chemicals Holdings Ltd. and Another*, [1995] T.L.R. 579; *Sithole and Others v. Thor Chemicals Holdings Ltd. and Another* [1999] T.R.L. 110. The following information has been found in Jägers, 2002, pp. 208-209.

<sup>269</sup> Jägers, 2002, p. 209.

<sup>270</sup> It should be specified that English civil proceeding is separate in two sections: the pre-trial phase and the trial phase. During the first period, the parties prepare the case (i.e. collecting of evidence) (Vacarelu (a), 2012, p. 13). For information about this case, see Zerk, 2010, pp. 168-169 (the following information has been red in this source).

company Trafigura Limited.<sup>271</sup> Their action was based on the allegation that they had been injured as a result of exposure to toxic substances allegedly carried to the Ivory Coast aboard the ship, *The Probo Koala*.<sup>272</sup> The claimants accused Trafigura because they considered that it had chartered the ship, and had ordered it to proceed with its cargo to the Ivory Coast, while it knew or ought to have known that the substances aboard were dangerous to human health and that there were not adequate facilities in Abidjan to dispose of them safely. Furthermore, the claimants claimed that Trafigura ought not to have entrusted the task of disposing of the substances to a local contractor without first ensuring that the latter was properly resourced and qualified to carry out the work.

### 3.2.3.3. Legal Action in the Economic Home State: “Piercing the Corporate Veil” and Tort Law

These cases show that the tort of negligence does not only allow the UK, as the *legal* home State of a corporation, to rule on a complaint of extraterritorial human rights abuses. Indeed, it also renders UK courts competent when the UK is an *economic* home State of a corporation, i.e. when it is the legal home State of the parent company of the subsidiary that committed the abuse. The *Lubbe v. Cape Plc.* and *Thor* cases described above actually imply the use of the tort of negligence in relation to corporate ESCR abuses committed by a UK corporation’s subsidiary. However, for the liability of the parent company to exist in such cases, the own fault of the latter needs to be proven. Indeed, in case where the company’s subsidiary committed the ESCR abuse, it must be proven that the parent company did not respect its duty of care because it did not use its position in order to prevent the subsidiary from committing the abuse.<sup>273</sup>

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<sup>271</sup> The claimants actually sued both the UK company Trafigura Limited and the Dutch company Trafigura Beheer BV, which form the Trafigura group. These two companies have also been prosecuted in the Netherlands (see *infra*, section 3.3.1.4.).

<sup>272</sup> From a human rights point of view, the right of local people of Abidjan to the enjoyment of the highest attainable standard of physical and mental health, set out in Article 12 of the ICESCR, had been violated (UN Doc. A/HRC/12/26/Add.2, 3 September 2009, para. 12(b)).

<sup>273</sup> This last duty of care should require less than the first one, since a parent company, even if closely linked to its subsidiary, cannot be obliged to ensure the same respect of human rights by its subsidiary



There is nevertheless another way to render a parent company responsible for the acts of a subsidiary, i.e. *attributing* the acts of a subsidiary to the parent company. Thanks to this attribution, it is not necessary to prove the existence of any wrong committed by the parent company itself. However, in the UK, it is clear that there is no liability for a group of companies. This has been stated in the *Adams v. Cape Industries Plc.* case, which related to the same facts as the *Lubbe v. Cape Plc.* case.<sup>274</sup> Nevertheless, attribution of the acts of the subsidiary to its parent company can result from the application of the theory of the corporate veil by UK courts, even if the latter narrowly apply this theory. Indeed, UK courts only pierce the corporate veil when the corporate structure is a “mere *façade* concealing the true facts.”<sup>275</sup> In the *Adams v. Cape Industries Plc.* case, the Court held that Cape’s subsidiary AMC was a “mere *façade*” to the former because, on the one hand, it was wholly owned by Cape, and, on the other hand, it was, in the facts, only a corporate name that Cape used in invoices.<sup>276</sup> Hence, the fact that the parent company would wholly own its subsidiary is not sufficient to pierce the corporate veil. Moreover, the sort of factual circumstances that could lead UK courts to pierce the corporate veil is hard to determine since they never explained what a “mere *façade*” is.

#### 3.2.4. *Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for a Corporate ESCR Abuse Committed Abroad in the Corporation’s Home State: Non-judicial Mechanisms*

This section examines whether the State non-judicial institution that is entitled to treat complaints of corporate ESCR abuses, i.e. the UK NCP,<sup>277</sup> can also provide effective remedies to the victims, in the sense of the Guiding Principles.

Therefore, a distinction needs to be made between situations in which an agreement is found between the parties, before that the NCP determines whether the

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than by itself. Nevertheless, this might be untrue when the subsidiary is fully owned by the parent company, as it was the case in *Lubbe v. Cape Plc.* case.

<sup>274</sup> [1990] Ch. 433, Scott J. and CA (pet. dis. [1990] 2 W.L.R. 786, HL). Here after, “Cape”.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Cape, op. cit.*, paras. 479E and 543E.

<sup>277</sup> See *supra*, section 3.2.2.1.

OECD Guidelines have been violated or not, on the one hand, and the situations in which the NCP makes recommendations and states that one or several of the OECD Guidelines have been infringed upon, on the other hand.

In the case where an agreement is reached, even the UK NCP final statements do not always state what has been agreed upon,<sup>278</sup> it can be reasonably assumed that the agreement of the claimant means that he obtained a form of remedy, which is at least a guarantee of non-repetition.

Differently, in cases where the NCP recognises that one or several Guidelines have been infringed upon and hence makes recommendations, there is no requirement that these recommendations ask the corporation to remedy the situation of the possible victims of the breach of the OECD Guidelines, even in cases where these victims would have started the specific instance. What happens often in practice is that the NCP recommends to the business that it changes its behaviour for future compliance with the OECD Guidelines.<sup>279</sup> By means of such recommendations, at least, victims can obtain a guarantee of non-repetition, with the condition, of course, that the recommendations are respected, which is favoured by the recent practice of the UK NCP to ensure the follow up of its final statements.<sup>280</sup> However, so far, there is no example of a recommendation from the UK NCP that would require a business to compensate the violation of the OECD Guidelines that is recognised in the final statement.

### 3.3. The Netherlands

The Dutch system will be analysed in the next section, following the same method as the one used for examining the situation in the UK. Furthermore, some of the

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<sup>278</sup> See for instance, UK NCP, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: ICT Cotton (UK) Ltd.* (11 July 2011), available at [www.bis.gov.uk/files/file47555.doc](http://www.bis.gov.uk/files/file47555.doc) (consulted on 30 May 2012).

<sup>279</sup> See for instance UK NCP, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: British American Tobacco Malaysia Behrad* (4 March 2011), available at [www.bis.gov.uk/files/file47555.doc](http://www.bis.gov.uk/files/file47555.doc) (consulted on 30 May 2012).

<sup>280</sup> See the webpage <http://www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases> (consulted on 1 July 2012), “Follow-up to Final Statements”.

rules will be described with regard to what has been explained about the English system, in preparation of the comparative assessment lay down in the next section (3.4).

3.3.1. *Access to Justice for Foreign Victims Before the Corporation's Home State.*<sup>281</sup> *Judicial Mechanisms: Barriers to Justice in Dutch Proceedings*

3.3.1.1. Costs

Dutch civil litigation has a certain price, even if, in Peter Eijssvoogel and Marieke van Hooijdonk's opinion, the costs of civil litigation in the Netherlands are substantially lower than in the UK.<sup>282</sup> For reducing these costs, Dutch legal aid is a good tool. Nevertheless, in the Netherlands, legal aid is only granted "for legal interest within the Dutch legal sphere."<sup>283</sup> It is hard to imagine how this hurdle could be overcome in a case concerning extraterritorial corporate human rights abuses.

Furthermore, costs of Dutch litigation may be put on the shoulders of both the winner and the loser of the case. Indeed, the losing party is required to pay the court registry fee, together with the costs of witness and attachments and attorneys' fees, but the Court can decide to moderate the potential penalty for the loser.<sup>284</sup> Moreover, the payment of the attorneys' fees by the loser is limited to the amount that results from the calculation based on a "liquidated tariff" that is set out in non-binding generally applied court guidelines.<sup>285</sup> In practice, this tariff leads to a remuneration that only covers a small part of the attorneys' costs actually incurred by the winning party.<sup>286</sup> Therefore,

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<sup>281</sup> About access to justice before Dutch courts for corporate human rights abuse, aside from the following section, see ICJ, 2010.

<sup>282</sup> Eijssvoogel & van Hooijdonk, 2009, p. 5.

<sup>283</sup> Dutch Legal Aid Act 1993 (*Wet van 23 december 1993, houdende regelen omtrent de door de overheid gefinancierde rechtsbijstand*), Art. 12. Translation from Castermans & van der Weide, 2009, p. 68.

<sup>284</sup> Dutch Code of Civil Procedure 1838 (*Wetboek van Burgerlijke Rechtsvordering*), Arts. 237-245; Castermans & van der Weide, 2009, p. 68; Eijssvoogel & van Hooijdonk, 2009, p. 40.

<sup>285</sup> Eijssvoogel & van Hooijdonk, 2009, p. 41.

<sup>286</sup> *Ibid.*

contrary to what happens in the UK, in the Netherlands, the prevailing party to civil proceedings will generally only recover a small part of its costs.<sup>287</sup>

#### 3.3.1.2. Legal Representation

Regarding the obstacle that legal representation may constitute in John Ruggie's opinion, it should be noted that there is normally no possibility for a victim to agree with her lawyer that the latter will only be paid if the case is won by the former.<sup>288</sup> Nevertheless, as regard personal injury cases, a five-year trial may lead to the application of rules "*à l'anglaise*". Indeed, in such cases, there is a possibility to make a "no win no fee" arrangement and to agree on the payment of a success fee that corresponds to a percentage of the ordinary remuneration, based on the number of hours spent on the case.<sup>289</sup>

In addition, like in England, there is a law firm in the Netherlands that is concerned with representing victims of extraterritorial corporate human rights abuses, i.e. the Dutch law firm *Böhler Advocaten*, which is in particular involved in the representation of victims in the Shell case.<sup>290</sup>

#### 3.3.1.3. Collective Actions

In the Netherlands, there is a possibility for collective actions that would be launched by an organisation, representing the interests of the victims. Indeed, organisations that are legal persons under Dutch law, and that are established for the purpose of protecting the interests of certain groups of persons, can commence an action in court for the protection of these interests. In that context, the organisation may claim a declaration of law that the defendant has breached his duties or committed a tort towards the represented persons.<sup>291</sup> The organisation can also apply for an injunction,

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<sup>287</sup> *Ibid.*, p. 5.

<sup>288</sup> Jägers & van der Heiden, 2007-2008, p. 860.

<sup>289</sup> Eijssvoegel & van Hooijdonk, 2009, p. 5.

<sup>290</sup> (About this case, see *infra*, section 3.3.3.3) Email from Bernice Brandwijk, Secretary to Liesbeth Zegveld, Böhler Advocaten, 11 June 2012.

<sup>291</sup> Dutch Civil Code 1838 (*Burgelijk Wetboek*), Art. 3:305a(5).

ordering the defendant to do or to refrain from doing something.<sup>292</sup> However, the organisation is not entitled to seek monetary compensation for damages, which can constitute a disadvantage for victims of corporate human rights abuses.<sup>293</sup> Nevertheless, regarding the Guiding Principles, the limitation of remedies that can be sought by the organisation does not matter, since this document does not require availability of a specific form of remedy.

#### 3.3.1.4. The Relationship Between Criminal and Civil Laws

Different from the UK system, the Netherlands gives the possibility for victims of crimes to join criminal proceedings.<sup>294</sup> Indeed, since the entering into force of the 1993 Criminal Injuries Compensation Act, the victim can join the criminal procedure and can claim full financial compensation from the defender to be decided on by the criminal Court.<sup>295</sup> For the victim, this helps saving money, and he or she can benefit from the evidence found by the prosecutor regarding the corporation's liability. Nevertheless, monetary compensation might be awarded in that frame only in a very limited extent. Indeed, the criminal judge will only treat the civil aspect of the case if it appears that the civil claim is of a straightforward nature.<sup>296</sup> Hence, according to a judgment of the Dutch Supreme Court (*Hoge Raad*), criminal judges must refuse to grant the victims any compensation when the civil case is too complicated to be dealt with in the criminal proceedings.<sup>297</sup>

Moreover, Dutch law gives binding force to criminal judgments regarding determination of facts, and proof of conviction is admissible as conclusive evidence that the person convicted committed the offense of which he or she was convicted.<sup>298</sup>

As a result of these two characteristics of Dutch law, victims of corporate ESCR rights abuses could benefit greatly from criminal proceedings in order to obtain

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<sup>292</sup> Eijssvoogel & van Hooijdonk, 2009, p. 85.

<sup>293</sup> Dutch Civil Code 1838 (*Burgelijk Wetboek*), Art. 3:305a(3).

<sup>294</sup> Tak, 2008, pp. 107-108.

<sup>295</sup> Dutch Code of Civil Procedure 1838 (*Wetboek van Burgerlijke Rechtsvordering*), Art. 51a.

<sup>296</sup> Castermans & van der Weide, 2009, p. 18.

<sup>297</sup> Supreme Court (*Hoge Raad (HR)*) 30 June 2009, NJ 2009, 481, with note by N. Keijzer.

<sup>298</sup> Vacarelu (b), 2012, p. 7.

remedies. Nevertheless, therefore, on the one hand, such an abuse must amount to a criminal offense under Dutch law, and, on the other hand, prosecutors must be keen on investigating this criminal offense.

On the “criminalisation” question, one should know that Dutch law recognises the possibility for legal entities’ criminal liability.<sup>299</sup> Additionally, Dutch courts may decide on the existence of genocide, crimes against humanity (such as enslavement, deportation, or apartheid), and war crimes or torture, in particular, when a Dutch national committed one of these crimes outside the Netherlands.<sup>300</sup> Moreover, the Dutch Criminal Code gives *nationality* jurisdiction to the Dutch judge in cases concerning extraterritorial involvement of Dutch nationals in people smuggling, sexual abuse of minors and genital mutilation.<sup>301</sup>

On the question of prosecution, Nicola Jägers and Marie-José van der Heijden asserted in 2008 that the Dutch prosecutor, who has the exclusive right to initiate criminal proceedings,<sup>302</sup> was broadly unwilling to prosecute corporations.<sup>303</sup> Nevertheless, it is hard to evaluate whether this is confirmed or invalidated by the criminal prosecution of the Dutch company Trafigura Beheer BV. This prosecution related to the same facts as the UK *Trafigura* case.<sup>304</sup> The Dutch prosecutor Look Bogert filed criminal charges against Trafigura for illegal exportation of hazardous waste to Ivory Coast.<sup>305</sup> This led the Dutch Court, in July 2010, to convict the company for having concealed the dangerous nature of the waste aboard the Probo Koala and fined the company €1 million. However, the NGO Greenpeace found it unsatisfying that the prosecution was limited to the export of hazardous waste. Therefore, it filed a complaint with the Court of Appeal in The Hague trying to compel the public prosecutor to prosecute the company for more than just the export of hazardous waste. The Court of Appeal dismissed this request in April 2011, ruling that the public

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<sup>299</sup> Dutch Penal Code 1981 (*Wetboek van Strafrecht*), Art. 51.

<sup>300</sup> Dutch International Criminal Act 2003 (*Wet Internationale Misdrijven*), para. 1, s. 2.1. and para. 2 (“crimes”).

<sup>301</sup> Dutch Penal Code 1981 (*Wetboek van Strafrecht*), Art. 5.

<sup>302</sup> Even if there is a possibility for victims to complain against non-prosecution (see Tak, 2008, p. 108).

<sup>303</sup> Jägers & van der Heiden, 2007-2008, p. 865.

<sup>304</sup> See *supra*, section 3.2.3.2.

<sup>305</sup> For the following information about the Trafigura case, see Business & Human Rights Resource Centre, Case Profile: Trafigura Lawsuits (re Côte d’Ivoire), available on the website <http://www.business-humanrights.org/>, (consulted on 2 June 2012).

prosecution department had no duty to prosecute Trafigura for the dumping of the waste in Ivory Coast.

#### 3.3.1.5. Remark: The Fight Against the Imbalances Between the Parties: Evidence and Power of the Judge

In the Netherlands, the parties do not have an automatic general duty to provide all the documental evidence that they possess even if it is unfavourable to their case, as required in the English system of disclosure.

Nevertheless, the judge has the power to require certain pieces of evidence in order to allow parties to supply missing evidence.<sup>306</sup> The parties can also request evidence from the other party, if the judge accepts it.<sup>307</sup> However, for being able to use this possibility, a party ought to know which documents he or she wants disclosed.<sup>308</sup> Moreover, the judge is free to refuse the party's request. This actually happened in the case related to the extraterritorial human rights abuses committed by the company Shell.<sup>309</sup>

#### 3.3.2. *Access to Justice for Foreign Victims Before the Corporation's Home State: Non-judicial Mechanisms*

##### 3.3.2.1. The Dutch National Contact Point

Similar to the UK NCP, the Dutch NCP is a relevant non-judicial State mechanism regarding the thesis topic.<sup>310</sup> Therefore, it is necessary to examine whether it complies with the procedural requirements associated to non-judicial mechanisms that are stated in the Guiding Principles. In that regard, one should remember that the 2011

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<sup>306</sup> Dutch Code of Civil Procedure 1838 (*Wetboek van Burgelijke Recht*vordering), Art. 22.

<sup>307</sup> *Ibid.*, Art. 843a.

<sup>308</sup> Eijssvoegel & van Hooijdonk, 2009, p. 25.

<sup>309</sup> See *infra*, section 3.3.3.3. See the judgment of the District Court of The Hague from September 2011, available at <http://milieudefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case> ("judgment exhibition Fidelis A. Oguru"), consulted on 2 June.

<sup>310</sup> See *supra*, section 3.2.2.1.

revised OECD Guidelines state that NCPs ought to be accessible, transparent, predictable, accessible and compatible with the principles and standards contained in the Guidelines, which actually refer to human rights.<sup>311</sup>

It must also be specified that the Dutch 2011 Decree that determines the status and functioning of the Dutch NCP from the 1<sup>st</sup> January 2011, stipulates that if the NCP is entitled to establish its own procedural functioning, the latter should be made available to the public.<sup>312</sup> Moreover, these procedural rules must describe precisely how the NCP would treat a complaint, and according to what timing.<sup>313</sup> They shall also show how the separation between the three phases of the procedure is guaranteed, and how information is received and used by the NCP.<sup>314</sup>

In spite of these two sources of law - national and international - that are applicable to the Dutch NCP, it does not seem that the Dutch NCP fully respects the requirements contained in the Guiding Principles. Indeed, the English version of the official website of the Dutch NCP is not updated. First, it does present the OECD Guidelines under their old content. Second, it refers to the old decree that was applicable before the 2011 Decree.<sup>315</sup> This seems, at least, not to comply with adequate raising of awareness and understanding of the Dutch NCP and its functioning. Furthermore, this could undermine the credibility of the Dutch NCP, which is linked to its *legitimacy*.

Moreover, as it is the case regarding the UK NCP, it is doubtful whether the procedure put in place by the Dutch NCP permits overcoming the imbalances that can exist between the parties.<sup>316</sup>

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<sup>311</sup> *Ibid.*

<sup>312</sup> This Decree is only available in Dutch: *Besluit van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie van 24 maart 2011 houdende instelling van het Nationaal Contact Punt voor de OESO-richtlijnen voor multinationale ondernemingen* Nr. WJZ /11037742, Staatscourant, 30 March 2011, nr. 5571, p.1, Art. 6.1.

<sup>313</sup> *Ibid.*, Art. 6(1) and (2).

<sup>314</sup> *Ibid.*, Art. 6(2).

<sup>315</sup> See, on the official Dutch website for the OECD Guidelines, the webpages <http://www.oecdguidelines.nl/guidelines/> and <http://www.oecdguidelines.nl/ncp/organisation/> (consulted on 1 June 2012).

<sup>316</sup> See *supra*, section 3.2.2.1.



### 3.3.2.2. Other Relevant Non-judicial Mechanisms

There is no other non-judicial State institution in the Netherlands that is authorised to deal with complaints of extraterritorial corporate human rights abuses and to provide any sort of remedy for the victims of these abuses.<sup>317</sup>

### 3.3.3. *Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for a Corporate ESCR Abuses Committed Abroad in the Corporation's Home State: Judicial Mechanisms*

#### 3.3.3.1. Variety of Remedies Provided by Law

Aside from the usual remedies, settlements may also be used in the Netherlands in cases of extraterritorial corporate ESCR abuses, especially in cases where the victims are seeking remedies collectively. Indeed, the 2005 Dutch Bill on the Settlement of Mass Damages, inserted in the Dutch Civil Code, gives the power to the Court of Amsterdam to issue a declaration of binding force for a settlement between plaintiffs and defendants, which is binding on an entire class of injured parties, unless the latter opt out.<sup>318</sup> Before giving this binding force to the settlement, the Court will check whether the agreement is reasonable, well written and if all the interests at stake are

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<sup>317</sup> However, it should be noted that the Netherlands is in the process of establishing a Dutch Human Rights Commission (*College voor mensenrechten and gelijke behandeling*). The draft of the statute that is to be adopted empowers the Commission with the right to adjudicate on complaints about violation of human rights (See the webpage: <http://internetconsultatie.nl/collegevoormensenrechtenengelijkebehandeling> (consulted on 1 June 2012)). Nevertheless, it is not sure whether the content of the original draft is maintained since Jan Eijbouts considers that, in relation to the Dutch Human Rights Commission, “it is not to be excluded that some complaints mechanism may be established” (Email from Jan Eijbouts, Extraordinary Professor Corporate Social Responsibility (CSR) and Professorial Fellow of the Institute of Corporate Law, Governance and Innovation Policies at the Law Faculty of Maastricht University, Maastricht University, 14 May 2012). Furthermore, it is doubtful that the mandate of the Dutch Human Rights Commission would empower it to treat complaints that concern extraterritorial facts.

<sup>318</sup> Dutch Bill on the Settlement of Mass Damages 2005 (*Wet Collective Afwikkeling Massaschade (WCAM)*), inserted in the Dutch Civil Code: Dutch Civil Code 1838 (*Burgelijk Wetboek*), Arts. 7:907-910. For more information about the functioning of this process of settlement of mass damages, see Eijssvoodel & van Hooijdonk, 2009, pp. 86-87.

guaranteed.<sup>319</sup> Nevertheless, victims may only use this settlement process if they find an organisation to represent them in this process. Indeed, only associations and foundations that fulfil the hurdles stated by the law are entitled to enter such a settlement process, on behalf of the injured parties.<sup>320</sup>

### 3.3.3.2. Corporate Liability for ESCR Abuses Committed Abroad

As for the question as to whether the Netherlands requires its companies to respect ESCR wherever they operate, it is worth stressing that, contrary to the UK, the Netherlands is a monist system. This means that international legal texts that have been ratified by the Netherlands do not need to be re-stated in a national text to be part of Dutch law. However, this is only true for international law that is considered to be *directly applicable*.<sup>321</sup> This is the case, for instance, for Article 8 ECHR discussed earlier,<sup>322</sup> or for Article 26 of the International Covenant on Civil and Political Rights (ICCPR)<sup>323</sup> prohibiting discrimination.<sup>324</sup> On the contrary, the Netherlands considers that most of the provisions contained in the ICESCR do not have direct effect in Dutch law.<sup>325</sup> Therefore, even if one would estimate that some of these provisions might have a horizontal effect, i.e. that they could be invoked in private disputes, they could not be used in such disputes.

As a result, and keeping in mind what has been said about the ECHR in the UK section,<sup>326</sup> there is no international norm that could be used by victims of extraterritorial corporate ESCR abuses for grounding their claim for remedy before Dutch courts.

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<sup>319</sup> Dutch Civil Code 1838 (*Burgelijk Wetboek*), Art. 7:906, para. 3.

<sup>320</sup> Among other things, the organisation shall be a legal person and shall have as its objective, stated in its Articles of Association, the protection of the interest of the victims on behalf of whom it acts (Dutch Civil Code 1838 (*Burgelijk Wetboek*), Art. 7:907). One should note that this “representation” hurdle is also to be fulfilled for launching a collective action, as explained *supra*, in section 3.3.1.3.

<sup>321</sup> Jägers, 2002, p. 210. See Dutch Constitution (*Nederlandse Grondwet (Gw)*), Art. 93 (English translation of Ministry of Foreign Affairs, available at [http://www.minbzk.nl/contents/pages/6156/grondwet\\_UK\\_6-02.pdf](http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf), consulted on 2 June 2012).

<sup>322</sup> See *supra*, section 3.2.3.2.

<sup>323</sup> United Nations Treaty Series Online Collection, available at <http://treaties.un.org/> (consulted on 28 June 2012).

<sup>324</sup> Jägers, 2002, p. 210.

<sup>325</sup> Castermans & van der Weide, 2009, p. 20.

<sup>326</sup> See *supra*, section 3.2.3.2.

As for the existence in the Netherlands of relevant laws from national origin, Professor Castermans notes that there are some private laws, aside from non discrimination laws – such as the Working Conditions Act, the Working Hours Act, the Child Labour Regulations and the Compulsory Education Act – that may render corporations liable for certain ESCR abuses.<sup>327</sup> More specifically, these laws relate to some child rights, stated in particular in the Convention on the Rights of the Child (CRC),<sup>328</sup> and to the right to work in good conditions, stated in particular in Article 7 of the ICESCR.

However, the question remains how the violation of these national laws may create a right for the victim to obtain remedies before Dutch civil courts. The answer resides in Article 162 of Book 6 of the Dutch Civil Code. Indeed, under this legal provision, anyone who committed an unlawful act against any other person must compensate such damage.<sup>329</sup> Now, the violation of specific rights of the injured party, to the extent that these rights are protected by Dutch law, constitutes an unlawful act.<sup>330</sup> Consequently, if a corporation infringes upon one of the provisions contained in the above-mentioned private laws, victims could claim remedy before Dutch courts, on the ground of Article 162.

Additionally, Article 162 can also be rightly invoked outside of any violation of law, i.e. when the damage that the claimant suffered from is due to the breach of the defendant's duty of care.<sup>331</sup> This duty of care corresponds to an unwritten norm expressing “what is deemed to be acceptable social behaviour”, which may change over time.<sup>332</sup> In Cees Van Dam's opinion, today, it can be considered that companies are required, under their duty of care, to respect internationally recognised human rights as

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<sup>327</sup> Castermans & van der Weide, 2000, p. 16.

<sup>328</sup> United Nations Treaty Series Online Collection, available at <http://treaties.un.org/> (consulted on 28 June 2012).

<sup>329</sup> Castermans & van der Weide, 2009, p. 19. Actually, the claimant cannot only ask for compensation of damage but also for injunction to perform an obligation with which the defendant has a duty to comply, under Article 3: 296(1) of the Dutch Civil Code. This injunction may also be asked in relation with the Criminal Code or with the duty of care (*Ibid.*, p. 19).

<sup>330</sup> *Ibid.*, p. 20.

<sup>331</sup> Indeed, paragraph 2 of this Article states that an unlawful act, which gives right to compensation of damages, is constituted by: “a violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law concerning what is deemed to be acceptable social behaviour” (translation from Castermans & van der Weide, 2009, p. 20).

<sup>332</sup> *Ibid.*

a principle of action.<sup>333</sup> However, this author notes that human rights actions based on the Dutch notion of duty of care are always risky. Firstly, because what this tort requires from a corporation acting abroad remains to be determined.<sup>334</sup> Secondly, liability under the duty of care would always depends on many circumstances, such as the danger of the activity carried out by the business, the nature and dimension of the interest of the victim, the required know-how of the company, the possibility to foresee the damage, the proximity of the damage and the costs of the precautionary measures.<sup>335</sup> Nevertheless, some elements that must be taken into account may encourage the Dutch judge to rule the case against the company if it indeed committed an extraterritorial ESCR abuse. First, a Dutch judge facing a lawsuit launched against a listed company on the basis of the breach of its duty of care (stemming from the commission of an extraterritorial ESCR abuse) can find guidelines for deciding on the case in the Dutch Corporate Governance Code. Indeed, this Code states that the management board must take into account Corporate Social Responsibility (CSR) issues, which includes respecting human rights.<sup>336</sup> Second, the judge can have a more precise idea about what respecting human rights entails for that specific corporation, by looking at international

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<sup>333</sup> Van Dam, 2008, p. 58.

<sup>334</sup> *Ibid.*, p. 57.

<sup>335</sup> *Ibid.* It is interesting to consider this statement with regard to the Maastricht Principles. Therefore, one must imagine a situation in which the victim of a corporate ESCR abuse would like to bring a complaint before a Dutch institution, against the Netherlands, on the basis of the non-respect of its international duty to protect ESCR, as defined in Maastricht Principle 24. In that context, the victim would claim that the Netherlands failed to exercise due diligence in order to prevent the corporation to commit the abuse. Regarding that situation, one should remember that Maastricht Principle 37 requires that such a claim would be heard and would lead to a favourable decision to the victim, if it appears that the Netherlands indeed did not fulfil its duty to protect. As a result, the question which could be asked is the one as to whether, in such a situation, the duty of care stated in Article 162 of the Dutch Civil Code could be used by the Dutch State for complying with the Maastricht Principles. For answering this question, one must look, in particular, at Principle 13, which states the general State obligation to avoid causing harm. Indeed, under Principle 13, for instance, a State attracts its international responsibility where the resulting impairment of human rights is a *foreseeable* result of that State's conduct (The Commentary, *op. cit.*, Comm. on Princ. 13, para. 3). In that regard, the standard of the Dutch duty of care appears appropriate, since, according to the Dutch standard, following Cees Van Dam, a person's duty of care would be easily respected if this person could not *foresee* the damages that would be caused by her behaviour or action.

<sup>336</sup> Castermans & van der Weide, 2009, p. 26. See Corporate Governance Code Monitoring Committee, Dutch Corporate Governance Code, 2008, available at [http://www.commissiecorporategovernance.nl/page/downloads/DEC\\_2008\\_UK\\_Code\\_DEF\\_uk\\_.pdf](http://www.commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF_uk_.pdf) (consulted on 8 May 2012), preamble, para. 8, and Princ. II.1.

instruments such as the OECD Guidelines, the company's code of conduct, or the self-regulation instruments that the company at stake is part of.<sup>337</sup>

### 3.3.3.3. Legal Action in the Economic Home State: "Piercing the Corporate Veil" and Duty of Care

Professor Castermans asserts that the corporation's duty of care not only requires that the company respects human rights itself, but also that it uses its influence, which might be less or more important, in order to ensure the respect of human rights by its subsidiaries. In that case, the breaching of the duty of care corresponds either to the passivity of the parent company ("failure of supervision") or to the fact that it actually initiated the human rights violation.<sup>338</sup> It is visible from the Dutch case-law that the more a company can or does interfere in the affairs of the subsidiary, the more likely it is to be held accountable for the acts of the latter.<sup>339</sup> However, holding a parent company accountable for the acts of its subsidiary on the basis of the former's duty of care implies, as for the application of the UK tort of negligence, that the own mistake of the parent company is proven.

Therefore, it is worth examining whether there is a possibility under Dutch law to *attribute* wrongs of the subsidiary to the parent company. In that respect, the ICJ notes that the Dutch identification theory, which is part of the theory of the corporate veil, has been developed to overcome the separate legal personality of a subsidiary. Nevertheless, in general, Dutch courts are reluctant to find identification of legal persons since they consider that it must remain an *ultimum remedium*, used in exceptional cases only.<sup>340</sup> Factual circumstances that could however lead to

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<sup>337</sup> These instruments are very numerous. The most famous one, supported by the UN, is the UN Global Compact requiring companies, among other things, to respect human rights and labour rights (see the official website: [www.unglobalcompact.org](http://www.unglobalcompact.org) and *supra*, note 73); Castermans & van der Weide, 2009, p. 27.

<sup>338</sup> Castermans & van der Weide, 2009, p. 38.

<sup>339</sup> *Ibid.*, p. 37.

<sup>340</sup> ICJ, 2010, p. 17; Supreme Court (HR) 13 October 2000, JOR 2000, 238 (Rainbow).

identification are, inter alia, a dominant position of one corporation over another, thorough involvement in the management, or close intermingling.<sup>341</sup>

Nevertheless, it remains unclear whether claimants may use the theory of the corporate veil *stricto sensu* for overcoming limited liability of the subsidiary company and hence for holding its shareholders, i.e. its parent company, liable for the acts of the former, in case of human rights violations committed abroad.<sup>342</sup> Indeed, the theory of the corporate veil has rather been developed in order to attribute a subsidiary's debts to its Dutch parent company. In that context, the Dutch Supreme Court stated that the fulfilment of three hurdles was needed for "piercing the corporate veil": (1) the parent company, while being the majority shareholder, knew or should have known that the creditors' rights were to be infringed by the subsidiary; (2) the infringement resulted from an act or a failure to act on behalf of the parent company; (3) and, the creditors' interests were not taken into account by the parent company.<sup>343</sup>

Additionally, in *Oguru and Others v. Shell*, which is still pending before Dutch courts, the plaintiffs tried to obtain the recognition of the existence of the "enterprise liability" theory. According to this theory, MNEs that are highly integrated ought to be held jointly liable for wrongs committed by their company members.<sup>344</sup> Hence, Nigerian citizens sued the Dutch company Royal Dutch Shell Plc. and its local subsidiary before the Dutch Court for environmental damages caused in Nigeria by an oil leak from a pipeline owned by a local subsidiary of Shell. In order to justify the jurisdiction of Dutch courts, the plaintiffs stated that Shell's group operated as one entity, since Shell set terms according to which its local subsidiaries behaved. Nevertheless, the civil tribunal of The Hague rejected the application of this theory for retaining jurisdiction against both the parent company and the local subsidiary.<sup>345</sup> Consequently, it cannot be considered as being part of Dutch law.

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<sup>341</sup> See for an illustrative case Dutch Supreme Court (HR) 26 January 1994, NJ 1994, 545 (Heuga).

<sup>342</sup> ICJ, 2010, p. 18.

<sup>343</sup> Supreme Court (HR) 21 December 2001, NJ 2005, 96; Supreme Court (HR) 12 June 1998, NJ 1998, 727; Supreme Court (HR) 8 November 1991, NJ 1992, 174; Supreme Court (HR) 25 September 1981, NJ 1982, 443.

<sup>344</sup> Zerk, 2010, p. 171.

<sup>345</sup> However, it must be stressed that the tribunal did retain jurisdiction against these two companies, but grounded its decision on another legal basis. See the analysis of Jennifer Zerk in Zerk, 2010, p. 171.

#### 3.3.4. *Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for a Corporate ESCR Abuses Committed Abroad in the Corporation's Home State: Non-judicial Mechanisms*

As in the UK, the only relevant non-judicial mechanism for the present research that has been identified for the Netherlands is the NCP. When verifying whether this institution offers substantive remedies to victims of corporate human rights abuses in the Netherlands in a way that complies with the Guiding Principles, the conclusion about the UK NCP may be applied *mutatis mutandis* to the Dutch NCP.<sup>346</sup>

### 3.4. Comparative Assessment and Recommendations

On the basis of this analysis of the UK and Dutch systems, this section assesses these systems with regard to the Guiding Principles. Therefore, a comparison of these systems is helpful. On that basis, some recommendations will be made, when appropriate.

#### 3.4.1. *Access to Justice for Foreign Victims Before the Corporation's Home State: Judicial Mechanisms: Barriers to Justice in Proceedings*

Whatever the content of domestic UK and Dutch norms, it is certain that victims of corporate ESCR abuses committed overseas can bring their case before UK and Dutch courts acting as home State courts. Indeed, this is provided for by EU Regulation 44/2001, which concerns civil matters. As a result, when questioning access to justice in the Netherlands and in the UK for victims of corporate ESCR abuses, the relevant question is the following: do the procedural characteristics of civil and criminal

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<sup>346</sup> See *supra*, section 3.2.4.

litigations constitute barriers to this access, according to the Guiding Principles, or not?<sup>347</sup>

#### 3.4.1.1. Costs

Both in the UK and in the Netherlands, costs for trial are high, even if they are less high in the Netherlands. Consequently, for these costs not to constitute a barrier, there needs to be some means available for victims to reduce them.

The first means could be legal aid. However, as explained earlier, in the UK, legal aid is only available for victims of extraterritorial corporate ESCR abuses to a limited extent, and this extent will be reduced from April 2013, when the legal aid provisions of the LASPOA will enter into force.<sup>348</sup> In the Netherlands, the situation is even worse. Indeed, it is simply impossible for these victims to obtain legal aid because of the extraterritorial character of the case.

The second means, which is only available in the UK, would be insurance. This would avoid situations in which the victims should pay the costs themselves if the case is unsuccessful, while the insurance fee would be paid by the business if the case succeeds. However, in practice, this type of insurance is granted only in extremely rare circumstances to victims of extraterritorial corporate ESCR abuses.

The third means could be that the risk to launch an action and to lose it would be compensated by the fact, that, in case of success, all the costs would be paid by the winner. This is the case in the UK today. Nevertheless, as soon as the LASPOA enters into force, it will no longer be true for the success fees stemming from a “no win no fee” arrangement. This might delete the benefit of the “loser pays” rule for victims of corporate ESCR abuses, since the negotiation of a “no win no fee” agreement can be a way to overcome the financial obstacle that legal representation may constitute. In the Netherlands, the victims of ESCR abuses always have to pay a part of the litigation

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<sup>347</sup> For answering this question, it will be avoided to give an appreciation of both the UK and the Netherlands depending on the nature of their legal system. Indeed, even if it may appear interesting to identify rules that reflect the *common law* or continental character of a legal system, the purpose of the present thesis is not to assess whether a *common law*/continental system would be possibly more likely to lead to compliance with the Guiding Principles.

<sup>348</sup> See *supra*, section 3.2.1.1.



costs, even if they win the case. Indeed, first, the Court can decide to allocate some costs for the winner. Second, in any case, the loser will never have to pay more than the winner's attorney's fees that result from the calculation based on the "liquidated tariff", which generally covers only a small part of the attorney's fees.

As a result, it can be asserted that the costs of the case, as they are rather high, may constitute a barrier in the UK, in cases where legal aid is not granted. Nevertheless, as long as the LASPOA does not enter into force, this barrier can be diminished by the "loser pays" rule. Indeed, even if this rule does not make the costs less high *per se*, it at least constitutes an incentive for victims of extraterritorial corporate ESCR abuses who would otherwise think twice before launching a legal action in the UK due to the costs of litigation. However, for these benefits to be fully enjoyed, the availability of litigation insurance for these victims would also be required. In the Netherlands, the litigation costs constitute a barrier as there are no available means to reduce them, at least if it is accepted that they are indeed high. Consequently, for respecting the Guiding Principles, the Dutch Government should consider ways to reduce costs of civil litigation for victims of extraterritorial corporate ESCR abuses, for instance, by giving them the possibility to be granted legal aid.

#### 3.4.1.2. Legal Representation

Another barrier to access to justice for victims of extraterritorial corporate ESCR abuses may reside in the necessity for claimants to be represented before the Court by a lawyer, aside from the fact that this necessity has also a certain cost. Indeed, a lawyer would be aware of the practical inability for this type of victims to pay very high trial costs, and would therefore think twice before taking the financial risk of representing them at court.

One incentive for taking this risk would be the guarantee of receiving a high remuneration in case of success at trial. This can be achieved by using "no win no fee" arrangements, which are much more broadly authorised in the UK than in the Netherlands. However, one should note that from the time of the entry into force of the LASPOA, the use of such arrangements would be restricted in the UK.

Another factor that helps lawyers overcoming the high risk of losing their clients' case is to serve their own professional interest by representing victims of extraterritorial corporate ESCR abuses before Dutch courts. This is the case of lawyers that are human rights activists fighting for worldwide corporate accountability. Now, such lawyers can be found in the UK law firm *Leigh day & Co* as well as in the Dutch law firm *Böhler Advocaten*.

As result, it can be concluded that the UK and the Netherlands manage to reasonably overcome the obstacle that legal representation presents. Actually, the fact that lawyers such as those working at *Leigh Day & Co* or *Böhler Advocaten* are also human rights activists can even represent a procedural advantage for victims of extraterritorial corporate ESCR abuses. Indeed, such lawyers act in their own interest when they bring such cases before UK/Dutch courts, which leads them to invest more time and money in order to favour this type of legal representation.<sup>349</sup> However, if the UK and the Netherlands would still wish to enhance the situation for victims of extraterritorial corporate ESCR abuses, they should be informed that, even the “no win no fee” arrangements can indeed present some disadvantages as such,<sup>350</sup> this type of arrangement appears very useful regarding such cases of human rights abuses. As a result, it could be welcomed to render the use of such arrangements easier in these cases.

#### 3.4.1.3. Collective Actions

John Ruggie requires that victims of corporate human rights abuses be provided with remedies both individually and collectively. Consequently, it is worth realising the extent to which collective actions may be launched by these victims in the UK and in the Netherlands.

Regarding the existence and conditions for the use of representative action in these two countries, it may be reasonably considered that collective action is a real option for victims launching an action before UK and Dutch courts. The fact that in

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<sup>349</sup> See Frydman & Hennebel, 2009, pp. 106-107.

<sup>350</sup> Andrews, 2005, pp. 54-55.

both these States, this type of action hardly leads to the compensation of damages does not imply that it is insufficient with regard to the Guiding Principles. Indeed, monetary compensation constitutes only one type of the acceptable effective remedies mentioned by John Ruggie. Moreover, the fact that the representative ought to be an organisation, i.e. not a victim, in the Netherlands, is not a problem regarding the Guiding Principles. Indeed, John Ruggie specified that the mechanisms put in place for insuring the access to remedy could either directly involve those affected or imply the involvement of an intermediary seeking remedy on behalf of those affected.

#### 3.4.1.4. The Relationship Between Criminal and Civil Laws

Another question to be asked regarding the Guiding Principles is the one as to whether there is a possibility for victims to benefit from criminal proceedings in order to get remedy. Therefore, there are three elements to examine: the extent to which the victim of an offense can get remedy on the basis of the existence of this offense; the extent to which corporate ESCR abuses committed overseas constitute criminal offenses under domestic law; and the behaviour of the prosecutor regarding investigation of business involvement in human rights related crimes.

As to the first element, it should be noted that in both the UK and in the Netherlands, the existence of an offense plays a facilitating role in the provision of remedy. Indeed, on the one hand, both in the UK and in the Netherlands, there is a small possibility for the victims to obtain remedies from the criminal judge and thus to avoid the cost of civil proceedings. In fact, in the Netherlands, victims can join criminal proceedings, and be awarded monetary compensation, but only in cases where the civil claim is of straightforward nature. In the UK, if the party cannot join criminal proceedings, the judge has nevertheless the power, and soon will have the duty, to consider making compensation orders where victims have suffered harm or loss. On the other hand, the proof of conviction that stems from a criminal judgment may help the victims proving the facts that ground their claim before the civil judge in both countries, even if more so in the Netherlands than in the UK. Indeed, proof of conviction is admissible in civil proceedings, as (normally) *rebuttable* evidence in the UK, and as

*conclusive* evidence in the Netherlands, that the person convicted committed the offense of which he or she was convicted. That being said, whether this role of criminal proceedings in the civil provision of civil remedy is sufficient or not regarding the Guiding Principles is hard to determine.

As to the second element, the extent to which extraterritorial corporate ESCR abuses constitute criminal offense under both UK and Dutch law is limited, even if one should be aware of the fact that these two countries stay leader in the criminalisation of corporate human rights abuses.<sup>351</sup> Indeed, UK and Dutch laws criminalise the most serious human rights violations, which rather concern the right to life and the prohibition of torture, i.e. civil and political rights, than ESCR, which are the rights considered in the present thesis. However, once more, it is hard to determine whether the Guiding Principles ask for more than that.

As to the third element, both UK and Dutch prosecutors are said to be reluctant to investigate human rights related corporate crimes, which do not seem to be welcomed by the Guiding Principles. Nevertheless, the behaviour of Look Bogert in the *Trafigura* case must be welcomed, even if it did not satisfy Greenpeace. Indeed, this prosecutor gave some hope regarding a change in the “territorial mentality” of Dutch criminal law when it concerns corporations, since he publicly stated that Trafigura “had put self interest above people health and environment.”<sup>352</sup> It remains that both the UK and the Dutch Governments, if they are willing to comply with the Guiding Principles, should depart more generally from the conservative view that criminal law is a national matter when considering the need for corporate accountability.

Moreover, one should note that, both in the UK and in the Netherlands, victims of criminal offenses could not compel the prosecutor to prosecute the person that these victims designate as being responsible for these offenses. Nevertheless, the Guiding Principles do not seem to require from States that they grant this power to victims of corporate human rights abuses, especially if these abuses occurred abroad.

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<sup>351</sup> See Sherman, n.d.

<sup>352</sup> See on the website of *The Guardian*, the webpage: <http://www.guardian.co.uk/world/2010/jun/01/trafigura-trial-toxic-waste-netherlands> (consulted on 3 June 2012).

#### 3.4.1.5. Remark: The Fight Against the Imbalances Between the Parties: Evidence and Power of the Judge

Finally, it is worth having a look at the way the imbalance between victims and the corporation may be overcome by using procedural law, since John Ruggie requires that in general, this overcoming should be ensured. In that regard, the principle of disclosure that is part of English law is welcomed. Indeed, in cases concerning corporate human rights abuses committed in developing countries, claimants – victims or NGO acting on behalf of these victims – are often in a weak position. Now, English disclosure constitutes a guarantee for the victims to access the information that they need to prove their case. As for the Dutch Government, it would better comply with the Guiding Principles if it would adopt new rules, related to evidence or not, in order to ensure equality between parties in cases concerned by the present thesis. Indeed, today, in the Netherlands, party A's taking of evidence that is in the hands of party B depends on the will of the judge and on party A's ability to identify the document needed. Nevertheless, it is not sure whether the *common law* principle of disclosure might be implemented in the Dutch system, which is one of civil tradition.<sup>353</sup> Other alternatives should be sought, which are however not easy to identify.

#### 3.4.2. *Access to Justice for Foreign Victims Before the Corporation's Home State: Non-judicial Mechanisms*

The following section serves to establish the existence, in UK and in the Netherlands, of a non-judicial mechanism that could examine complaints of extraterritorial ESCR abuses directed against a corporation and that would comply with six of the criteria enumerated in Guiding Principle 31.

In the two examined countries, the only relevant mechanism appeared to be the NCP.

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<sup>353</sup> See Parisi, 2007, p. 8 and Trocker & Verano, 2005, p. 258, in which it is explained that the disclosure rule makes sense because of the existence of other rules or principles of procedure, which are peculiar to *common law* systems.

In addition, the compliance of the UK NCP with Guiding Principle 31 can be considered as satisfying. As for the Dutch NCP, it may be regretted that the English version of its official webpage is not updated, since availability of information in English (or Spanish) is a minimum for ensuring access to information to non-Dutch people. Indeed, this is problematic regarding both the obligation to raise awareness and understanding of the existence and functioning of the Dutch NCP, and the need for creating trust from potential claimants, as required by the *legitimacy* criterion.

Moreover, from a general point of view, both in the UK and in the Netherlands, a better control of settlement would ensure more *equality* between the parties.

### 3.4.3. *Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for an Extraterritorial Corporate ESCR in the Corporation's Home State: Judicial Mechanisms*

This section concerns situations where a Dutch or English Court could declare itself competent for adjudicating a case of corporate ESCR abuse on the ground of EU Regulation 44/2001, and would then find a way to apply domestic substantive law, on the basis of Article 7, 16, 17 or 26 of EU Regulation Rome II.<sup>354</sup>

On that basis, the section examines whether the UK and the Netherlands comply with the substantive requirements contained in the Guiding Principles, as identified *supra* in section 2.3.

#### 3.4.3.1. Variety of Remedies Provided by Law

Regarding the availability of remedies, it should first be made clear that any of the remedies normally available both in the UK and in the Netherlands are satisfying regarding the Guiding Principles, if two conditions are fulfilled. First, access to court must be possible. Second, the merits of the case must give the claimant a possibility to

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<sup>354</sup> However, one should remember that this is not true regarding remedies themselves, even if they can be considered as being part of substantive law. Indeed, it is the principle of *lex fori* that is applied to remedies, so that the latter are always the ones provided by domestic law.

win the case, so that the remedies provided by domestic law can indeed be considered as being available.

Aside from that, two remarks need to be made.

First, the UK possibility for a victim to be granted punitive damages may represent a great advantage in terms of amount of money that the company would have to pay. As a result, not only victims could get better compensation but also the company could find a higher incentive not to commit another human rights abuse.

Second, the possibility for settlement meant for the compensation of all the individuals that would have suffered from a corporate wrongdoing, which exists both in the UK and in the Netherlands, should not be underestimated when considering available remedies. Indeed, settlements present the great advantage of providing remedies for victims whatever the merits of the case. Nevertheless, it should be paid attention to the fact that victims and business are not on an equal footing, both in terms of economic power and knowledge. As a result, settlement out of court, which can be made in the UK, except in the context of representative action, may appear contrary to the Guiding Principles. Indeed, one should remember that, commenting on that document, John Ruggie pointed out the necessity to ensure equality between the victims and the corporation, regarding financial resources, and access to information and expertise.

#### 3.4.3.2. Corporate Liability for ESCR Abuses Committed Abroad

This section verifies the existence, in both the UK and the Netherlands, of legal grounds that could be used by victims of extraterritorial corporate ESCR abuses for obtaining remedies, which is necessary for these remedies to be effectively available.

The current substantive rule that is to be used in relation to such abuses is, in the UK, tort of negligence, and in the Netherlands, Article 162 of the Dutch Civil Code. One should however note that the latter has a broader scope, since it concerns both violations of written norms – which currently prevent child labour and guarantee the right to work in good conditions – and of an unwritten norm, expressing “what is deemed to be acceptable social behaviour.” Different, the UK tort of negligence only

refers to an unwritten norm, expressing every citizen's general duty not to act negligently.

Additionally, regarding these two legal bases, the importance of the role of the judge in rendering effective remedies available should be underlined. Indeed, UK and Dutch judges have the power to interpret norms, especially open norms such as “negligence” or “duty of care”. Consequently, they have to power to decide that a corporate ESCR abuse corresponds to a tort of negligence or to a violation of Article 162.

#### 3.4.3.3. Legal Action in the Economic Home State: “Piercing the Corporate Veil” and Tort Law/Duty of Care

In his commentary on Guiding Principle 26, John Ruggie specified that the attribution of responsibilities among members of a group of companies should not lead to the denial of access to remedy for victims of any human rights abuse committed by one of the entity members. Therefore, it is necessary to realise the extent to which the UK and the Netherlands, as home States of a parent company, allow liability of the latter for wrongs committed by one of its subsidiaries in developing countries, where it is assumed that no remedy is available.

In that regard, it must first be noted that both the UK tort of negligence and Article 162 of the Dutch Civil Code permit liability of parent companies for human rights abuses committed by their subsidiary. However, therefore, it is necessary for the victims to prove that the former did act in a way contrary to the law, aside from proving that the subsidiary indeed committed a human rights abuse.

Nevertheless, there is a way to hold a parent company liable for acts of its subsidiaries even if the former did not breach the law, i.e. overcoming the legal separation that exists between the parent and the subsidiary companies. Both in the UK, – on the ground of the theory of the corporate veil and the concept of “mere façade” – and in the Netherlands – on the ground of the identification theory – this possibility exists. Nevertheless, if UK and Dutch judges do not use these theories in ways that permit to attribute a subsidiary's human rights abuse to its UK or Dutch parent



company, the existence of these theories do not help the UK and the Netherlands complying with the Guiding Principles. Consequently, one should note that, once more, compliance of these two countries with the Guiding Principles depends on the judges interpreting domestic norms. Indeed, they are in a position to assess whether the facts of the case allow overcoming the legal separation between a parent company and one of its subsidiaries, whichever theory they use for justifying their decisions. As a result, for enhancing compliance with the Guiding Principles, UK and Dutch judges should make this assessment by keeping in mind that the need for ensuring appropriate corporate accountability must be taken into account. Therefore, they should be willing to find enough factual elements to overcome the legal separation that exists between the parent and subsidiary companies in cases of corporate human rights abuses committed by the subsidiary in a country where no remedy is available for the victims.

Moreover, for complying with the Guiding Principles, the Dutch and the UK States, as actually all the other States, should think about reviewing their rejection of the so-called “enterprise liability” theory, according to which MNEs that are highly integrated ought to be held jointly liable for wrongs committed by their company members.

#### *3.4.4. Effective Chance for a Foreign Victim to Obtain the Cessation of or the Compensation for an Extraterritorial Corporate ESCR in the Corporation’s Home State: Non-judicial Mechanisms*

The comparative analysis of the UK and Dutch situations regarding the “access to remedy” requirements of the Guiding Principles still requires the examination of whether the UK and Dutch NCPs provide victims of extraterritorial corporate ESCR with effective remedies. In order to answer this question, it must be understood that recommendations made by the UK and Dutch NCPs do not have to contain anything regarding the victims and the necessity to remedy their suffering. As a result, in cases where, on the one hand, no agreement is reached by the plaintiff and the business put at stake, and where, on the other hand, the NCP considers that the business violated one or

several of the OECD Guidelines and consequently makes some recommendations, victims do not have any guarantee that the NCP will ask the corporation to remedy its harmful conduct. In order to ensure compliance with the Guiding Principles, one could think of an easy way to change this situation. Indeed, it would be very satisfying that the OECD require NCPs to expressly and automatically recommend the corporation to provide the victims of the violations of the OECD Guidelines with one of the types of remedy enumerated by John Ruggie in the Guiding Principles, such as monetary compensation.

## CONCLUSION

In order to conclude the present thesis, these last words will sum up the answers to the research questions that have been dealt with in sections 2 and 3.

As stated in the introduction, as a first step, the thesis proposed to analyse whether, and if so, under which conditions, the Guiding Principles and the Maastricht Principles required home States to provide remedies to victims of corporate ESCR abuses committed in developing countries, by compelling corporations to remedy their harmful conduct. The analysis stated in section 2.3 established that the Maastricht Principles did not contain such a requirement. Indeed, if this document requires States to provide victims of extraterritorial ESCR abuses with remedy, it interprets this requirement in the sense that victims should have a possibility to obtain a remedy from the State itself, which implies that the former prove that the State violated its international extraterritorial obligation to protect ESCR. With regard to corporate ESCR abuses, this means that, in order to be granted a right to remedy on the basis of the Maastricht Principles, victims must prove that the State did not exercise due diligence for preventing the corporation from committing the ESCR abuse.

Focussing therefore on the Guiding Principles, section 2.3 identified relevant general, substantive, and procedural requirements, both for State-based judicial and non-judicial mechanisms. For doing so, special attention has been paid to the fact that the Guiding Principles do not concern extraterritorial situations especially and that their

author considers that that “extraterritoriality of States duties remains unsettled.”<sup>355</sup> It has also been kept in mind that the Guiding Principles concern human rights in general, and not ESCR especially, so that the question remains whether the requirements contained in the Guiding Principles could not have been different if this document would have concerned ESCR specifically.

The general, substantive and procedural requirements finally identified on the basis of these precautions appeared not to be so numerous. Furthermore, they remained quite broad and vague, since one must remember that the Guiding Principles do not contain rules but guidelines helping States contributing to corporate accountability for human rights abuses. Nevertheless, these requirements were concrete enough to compare several aspects of national laws with their content.

Consequently, in a second step, the thesis evaluated both UK and Dutch norms and practice in order to establish whether these two countries complied with the requirements contained in the Guiding Principles, as identified in section 2.3. This evaluation led to make concrete recommendations to these countries regarding each of the national aspects that seemed relevant with regard to the Guiding Principles. Indeed, the assessment showed that these two countries still had some way to go before ensuring appropriate access to remedy for victims of extraterritorial corporate human rights abuses committed in countries where remedies are not available. From a more general point of view, it can be added to these specific recommendations that both the UK and the Netherlands should favour a change of mentality at domestic level. Indeed, this change is needed for achieving effective availability of remedies for victims of extraterritorial corporate ESCR abuses in the future. Especially, lawyers and judges should be more aware of the great role that they have to play in that regard, either because access to court depends on them, or because success of the claim depends on their interpretation of the law. Moreover, as pointed by John Ruggie, effectiveness of remedies available in the UK and in the Netherlands cannot be achieved if foreign victims cannot become aware of this availability.<sup>356</sup> In that regard, it must be noted that

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<sup>355</sup> Email from John Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, Faculty Chair, Corporate Social Responsibility Initiative Harvard Kennedy School of Government, Affiliated Professor in International Legal Studies Harvard Law School, Harvard University, 11 June 2012.

<sup>356</sup> UN Doc. A/HRC/17/31, 21 March 2011, Comm. on Guid. Princ. 25, para. 5.

neither the UK nor the Netherlands put in place a strategy for ensuring this awareness. Nevertheless, it is hard to evaluate the extent to which the UK and the Netherlands, as home States, could inform victims of corporate abuses living in host States, of their rights before home States' institutions, regarding the host State's sovereignty. In addition, it should be stressed that both the UK and the Netherlands are already in a position that many other States should take example of. Furthermore, one must remember that the Guiding Principles are rather new, and that the European Union asked Member States to make a plan for their implementation only for the end of this year. Thus, the comparative assessment and recommendations attached thereto, in section 3.4, may serve rather for drafting and evaluating the UK and Dutch plans that are to come, than for judging the current situation in these countries.

In addition, the assessment of UK and Dutch situations showed that the weaknesses of the UK and the Netherlands regarding compliance with the Guiding Principles could come from the regional or international norms implemented by these two countries. Indeed, first, the description of EU Regulation Rome II showed that even if the UK and the Netherlands would adopt substantive norms that would permit a victim of extraterritorial corporate ESCR abuses to win her case before the UK/Dutch courts, these courts would not have many possibilities for applying these domestic norms. Indeed, the principle stated in EU Regulation Rome II is that in such cases, the law of the State where the abuse occurred is the applicable law. Now, one of the reasons why effective remedies cannot be considered as available in the country where the abuse occurred – which justifies the fact that the home State has a role to play – is precisely that the law of this country does not protect human rights at a level that would prevent corporations from infringing upon local people's ESCR. Consequently, EU Regulation Rome II prevents, in a way, home States from offering effective remedies to victims of an extraterritorial corporate human rights abuse. Indeed, respecting this Regulation, home States' judges cannot find any violation of applicable substantive law, i.e. the law of the host State where the abuse occurred, stemming from such abuse.

Second, the comparative assessment of the UK and the Netherlands regarding the question as to whether the UK and Dutch NCPs could be considered as providing effective remedies, in the sense of the Guiding Principles, led to a negative answer.

Indeed, the NCPs do not include in their recommendations any reference to the need for the corporation to remedy the harm that stemmed from the violation of the Guidelines, primarily because the OECD does not require that the NCPs do so. Consequently, it has been recommended in the present thesis that the OECD should require all OECD Member States' NCPs to expressly include such specific recommendations in their final statements.

As a third step, dealing with a broader question, the thesis aimed at realising the contribution of the Guiding Principles and of the Maastricht Principles to the creation of a home States' duty to hold companies accountable for ESCR abuses committed overseas, especially by compelling these companies to provide victims of their abuses with effective remedy. Regarding that broader reflection, the present thesis ends up with the conclusion that if the UK and the Netherlands should change some of their national norms or add some new rules to their national law in order to comply with the guidelines provided by the Guiding Principles, the one that appears to have the most work to do is the international community. This does not mean that that the progress that both the Guiding Principles and the Maastricht Principles represent should be let aside. Indeed, both these documents contribute to the re-shaping of the international legal order that is needed for realising human rights universally in the global era of the 21<sup>st</sup> century.<sup>357</sup> It is actually the reason why it has been chosen to focus, in the present thesis, on the following question: since they re-shape the international legal order for a better respect of human rights, do then the Maastricht Principles and the Guiding Principles create a right for a victim of a corporate ESCR abuse – committed in a country where corporations are not subject to any sanctions when they commit such abuse – to obtain a remedy from the corporation before a home State's institution? Nevertheless, regarding that specific question, the present research leads to the conclusion that it is doubtful whether the Guiding Principles and the Maastricht Principles are sufficient bases for a future new normative framework.

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<sup>357</sup> See Olivier De Schutter's words in Coomans and Künneman, 2012, Foreword, pp. vi-viii.

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