BUSINESS AND HUMAN RIGHTS STUDY GROUP

WORKING SESSION

Tuesday, 8th April 2014, 9.00am

Chair: Professor Myriam Senn (Switzerland)

The Chair welcomed attendees and explained the agenda for the session.

Professor Michael Addo (UK) welcomed attendees to the first meeting of the study group. The landscape of the topic of business and human rights had been extremely unstable. As a result of the endorsement of the *Guiding Principles for Business and Human Rights* (the "Guiding Principles") by the UN Human Rights Council in 2011, some of the issues concerning international law raised by subject of human rights were clear. At the periphery was the role of non-state actors (NSA) and in particular companies.

Professor Addo noted that there were lots of activities concerning business and human rights. It concerns investment issues, multilateral investment agreements, some Washington institutions (the International Monetary Fund and the World Bank), the environment etc. This was the first time that the International Law Association would be focusing specifically on business and human rights, and it was useful to gather minds on the subject in the Study Group.

Professor Addo provided a brief history of the topic of business and human rights within the UN, mentioning in particular the set of norms developed by the Sub-Commission on the Promotion and Protection of Human Rights in 2003, which were ultimately not adopted by the UN Human Rights Commission amid a very tense and disagreeable environment between stakeholders, including civil society groups, non-governmental organisations (NGOs), and governments. The UN Secretary-General subsequently appointed a Special Representative, Professor John Ruggie, who would go on to adopt a multi-stakeholder, consultative approach in developing the Guiding Principles.

The framework developed by Professor Ruggie for business and human rights was based on three "Pillars", which drew on existing standards of international law and corporate practice: (1) protect, (2) respect, and (3) remedy. Professor Ruggie made it very clear that the Guiding Principles did not create new law. Rather, the duty on States to *protect* human rights was derived from obligations under treaties, whereas the corporate responsibility to *respect* human rights was not necessarily based on law (except those national laws that already imposed such an obligation), but rather on societal expectations. These obligations were complimentary to each other, but if they were to fail, there needed to be a clear opportunity for *remedy*; this is where the third Pillar came in.

Although only soft law, the Guiding Principles themselves tied in heavily with various dimensions of law, and were underscored by the rule of law.

The Human Rights Council endorsed the Guiding Principles to operationalise the

business and human rights framework. In 2011, they set up a 'steering group' of experts (known as the Working Group on the issue of human rights and transnational corporations and other business enterprises) to help implement the Principles, as well as to increase capacity building. Since then, the Working Group had held seven sessions, presented two reports to the Human Rights Council and two reports to the UN General Assembly, and had sought to collaborate with various stakeholders, including civil society groups and other UN institutions.

The implementation of the Guiding Principles gave rise to issues of international law in many respects, and the Study Group was looking to identify and clarify these issues, also in terms of the Guiding Principles themselves, in order to contribute to the wider understanding of business and human rights.

Mr Antony Crockett (Australia) explained the purpose of the working session, to discuss what it the Study Group had identified in its work so far and what it was going to focus on in the future. He invited attendees to add to the list of issues that the Study Group had already identified and provide input on how the Study Group could move forward. He acknowledged the presence of several other members of the Study Group, and noted that some other members were unable to attend the session.

Mr Crockett recalled the mandate of the Study Group. The Study Group recognised that the Guiding Principles did not create any new law, yet there were clearly many issues of international law that arose in connection with their implementation. There were also many longstanding issues that had featured in the debate on business and human rights, which had remained effectively unresolved in the Guiding Principles.

Mr Crockett informed the session of the work already carried out by the Study Group, which had so far progressed through conference calls and email correspondence. A standard questionnaire had been circulated to members, asking them to identify substantive issues if public international law that remained unresolved following the endorsement of the Guiding Principles, as well as systemic issues that might create barriers to their effective implementation.

The following *substantive issues* had already been identified:
1. the status of multinational corporations and other forms of business enterprises in international law;
2. the extent of the duty to protect human rights, which might depend on the nature of the human rights in question, the location of the business activities, and the location of the human rights impacts. This gave rise to issues of jurisdictional scope of the duty and its possible extra-territorial application; and
3. the status of soft law instruments such as the General Principles in international law, and in what way they might become a source of international law or contribute to the development of it.

The following *systemic issues* had been identified:
1. the adequacy of accountability mechanisms and barriers to accessing remedies;
2. the role of UN treaty bodies and regional treaty bodies in implementation;
3. the role of international organisations in implementation;
4. the relationship of the General Principles to international human rights law and other areas of international law.

Mr Crockett ended his presentation by querying whether the mandate of the Study Group should be adjusted to examine the nature of the Guiding Principles and their relationship to existing international law noted that although the mandate of the Study Group was to identify issues. After all, international lawyers were not particularly engaged in the process that led to the conclusion of the Guiding Principles.

Ms Sara Seck (Canada) gave an overview of the methodological issues relevant to the work of the Study Group, noting an overlap with the experiences of the Non-State Actors Committee, which had also encountered similar issues in its work. It was important for the Study Group to discuss how it would approach these issues.

A key starting point was an acknowledgment that the Guiding Principles were not a treaty and could not be legally binding. The Principles explicitly stated that they should not be read as creating new international law obligations (for example, the duty to protect reflects existing obligations of States under international human rights law), and refer to corporate responsibility as a reflection of societal expectations of business.

Ms Seck queried whether the Study Group should address the international legal personality of multinational corporations and their participation in the international legal process. Some members of the Group had expressed concern that the corporate responsibility to respect human rights as addressed in the Guiding Principles was not fully reflective of existing human rights law obligations.

Ms Seck noted a variety of examples demonstrating the impact of the Guiding Principles. In terms of *State practice*, a small number of States had prepared action plans for the implementation of the Guiding Principles, and there had been some incorporation of the Guiding Principles into development plans (such as the 2015 Development Agenda). National human rights instruments were being drafted with increasing engagement of businesses. In terms of *business* practice, some businesses had published or updated corporate human rights policies in response to the Guiding Principles, or had been working collaboratively to implement aspects of the Guiding Principles. Civil society groups had also referred to the encouragement [by whom?] of the use of judicial and non-judicial grievance procedures.

In addition, international standards, such as the OECD Guidelines for Multinational Enterprises and the UN Global Compact, had been updated to reflect the Guiding Principles. Research had also been carried on how international organisations, including the UN, could embed the Guiding Principles into their operations. It was also possible to turn to how the Guiding Principles had been articulated in this context of judicial and non-judicial grievance mechanisms. Here, there was no uniformity, as demonstrated by the case of *Kiobel v. Royal Dutch Petroleum Co.* before the US courts, where the business concerned did not interpret the Guiding Principles correctly.

Importantly, human rights mechanisms were increasingly referring to the General Principles. In its concluding observations on the sixth periodic report of Germany, the Human Rights Committee adopted language directly from the Guiding Principles when it encouraged Germany to “set out clearly the expectation that all business

enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the [ICCPR] through their operations". Reference to the Guiding Principles was also being seen in the Special Procedures mandates. For example, the Special Rapporteur on the Rights of Indigenous Peoples (Professor James Anaya) referred to the State's obligations and the corporate responsibility to respect human rights, and what these meant in the context of indigenous rights.

Against this background, Ms Seck queried the particular area on which the Study Group was best equipped to focus and in which it could provide a useful contribution.

Mr Crockett invited attendees to respond to the following four questions:

1. What should the product of the Study Group be?
2. How can the Study Group coordinate with other ILA Study Groups and Committees with which there was on overlap in mandate (notably the Study Group and the Due Diligence in International Law Study Group, the Socially Responsible Investment Study Group, the International Human Rights Law Committee, the Principles on the Engagement of Domestic Courts with International Law Study Group, and the Role of Soft Law Instruments in International Investment Law Study Group)?
3. What other issues arose in relation to the effective implementation of the Guiding Principles?
4. What should be the criteria for establishing a topic that would merit the establishment of a Committee?

Mr Peter Willis (UK) noted that the mandate of the Study Group also overlapped with that of the Committee on International Securities Regulation.

Ms Rae Lindsay (UK) mentioned that she would like to have a general discussion before answering these questions.

Mr Richard Allen (UK) noted that, from his experience of clients and interpretation of the overlapping regimes, corporate clients are not against human rights obligations, but that there was commercial or competitive harm caused by uncertainty. If businesses were aware of the real principles by which everyone had to abide, it would be easier for them to put policies in place. A useful product of the Study Group would be to consolidate all the different obligations around the world and to come up with the ones that seemed to be universal. It would be beneficial for businesses to receive a document that they would refer to when putting together their business plans.

Professor Robert McCorquodale (UK) indicated that the best way was to leverage the international power of the ILA and to look jurisdiction-by-jurisdiction to see what was happening. In this way, there would be a much more focused product which would look at the activities and action plans of companies' and States, and the situation in terms of litigation and access to remedies. There would inevitably be some overlap between jurisdictions, as multinational corporations would not be located in one jurisdiction alone.

Ms Lindsay queried whether such an endeavour would be more appropriate for a Committee on account of its size.

Professor McCorquodale agreed, but suggested that the Study Group could crystallise this endeavor, then pass on to a Committee. He warned against activities that ended up repeating what others had done before, and referred to the work of the Committee on International Human Rights as a positive example of what could be produced; this Committee was looking at the impact of human rights on other areas of international law, a huge endeavour, but had broken it down to produce a much more focused and concrete output.

Ms Lindsay sought clarification that according to this suggestion, the Study Group would identify the relevant issues, then produce a template and framework for future work.

Professor McCorquodale responded that, in terms of access to remedies, for example, the Study Group would identify issues for the particular jurisdictions that it would want a future Committee to address.

Ms Lindsay thanked Professor McCorquodale for his helpful suggestion.

Professor Addo mentioned that one of the objectives in developing the Guiding Principles was to bring together a common understanding of what was expected of corporations. When Professor Ruggie drafted the Guiding Principles, he involved and consulted an extensive number of stakeholders, who provided considerable input on their own understanding of what the situation was.

Professor Addo acknowledged that there was a "translation" issue present; the language that businesses used was not the same language that lawyers used. The Guiding Principles should be translated into the type of language that was familiar to businesses so that general managers could communicate them to operational managers on the ground. He queried whether the ILA could actually do something along these lines.

Ms Grace Khan queried whether a first draft could serve as an immediate reference tool for the private sector, and whether the Guiding Principles as they currently existed were not strong enough. The Study Group had an opportunity to strengthen them and to set forth a path towards them being accepted by States. She also liked idea of looking at each jurisdiction and at actual practice, in order to create something concrete that private enterprises could look at online to see what the situation was in a given State and to be aware of it. The State would then also be in the spotlight.

Mr Crockett drew a link between the intervention of Ms Khan and that of Professor McCorquodale and again raised the question of the status of the General Principles and their relationship between international law. If Professor Ruggie considered that there were already adequate obligations relevant to business and human rights, the focus should be on current practice. For example, what did the use of the language of the Guiding Principles by the Human Rights Committee in its concluding observations on Germany tell us about the nature of the Principles? Did they reflect international law and tell us what it was, or did they go beyond that? If the Guiding Principles were to be a treaty, how would they sit alongside existing instruments?

Mr Crockett queried whether it was possible to embark on a project towards

articulating obligations in a business and human rights treaty without first addressing the issue of the status of corporations in international law. The Study Group had spoken about this big question, but it remained unresolved.

Ms Khan referred to an incident in Bangladesh, where a factory fire had killed many workers. There was no response from some corporations to this incident, and there was outrage that corporations were not meeting their legal responsibilities. The Guiding Principles had been criticised as being not strong enough. If they did not cover corporate responsibility in the case of the workers who were killed, they were not strong enough.

Professor Addo noted, in response to the last intervention of Ms Khan, that the Principles did indeed cover corporate responsibility in such a case. The Principles proposed that companies should undertake due diligence in their business undertakings, identify human rights risks, and address them.

Professor Addo referred to the Rana Plaza disaster in Bangladesh, and noted that some of the issues would have been addressed earlier if the Guiding Principles had been used. After the fact, Pillar 3 (remedies) would came into play, and in this regard, the Accord on Fire and Building Safety in Bangladesh (known as the "Rana Plaza Accord") had been essential in providing redress. Although this was an *ex post facto* grievance mechanism, most redress mechanisms were.

Ms Khan commented that most companies did not want to do anything to help those who were victims. She proposed looking at result as a starting point in determining the purpose of the principles. If they are adequate to address really bad situations, and there is evidence of practice indicating that international businesses see it as binding, why not push this.

We should be working backwards, and thinking about the end result and the effect on the factory worker, and if the Guiding Principles would have protected them (with the business practice to support it). Instead of opening a can of worms by questioning the purpose, we should just say that this is the purpose.

Ms Lindsay expressed a personal view that the Study Group should be working with the Guiding Principles. There was not much value in the Study Group looking at the status of corporations in international law. The focus of the Study Group should be on Pillar 1. Doing so would give more shape to Pillar 2.

Mr Peter Willis (Australia) agreed with Ms Lindsay. He noted that the challenge is that they are expressed as "principles", but it is their day-to-day operation that matters. Companies need to have concrete measures or practices in order to convert these "principles" into something that is real and meaningful.

It would be beyond the resources of the Study Group to undertake such a task, which is better suited to a Committee. The membership of such a Committee would need to be reflective of the breadth of the ILA membership so that it could set in motion the kind of survey required. Most ILA Committees that have attempted surveys have found them to be very demanding but worthwhile. There is a lot of work involved in synthesising the issues to ensure that the result is more than just a collection of

isolated incidents.

Mr Kuzi Charamba observed, based on previous interventions, that there seems to be: (1) a corporate willingness to engage, but a question of translating the Guiding Principles into the language of corporate practitioners; (2) a suggestion of obtaining empirical data on the progress of implementing the Guiding Principles, and therefore to leverage the power of the ILA as an institution; and (3) a question of effectiveness of the Guiding Principles, and whether they are reflective of businesses having international obligations. A big question is whether, under Pillar 1, it is possible to garner the necessary political will.

It appears that corporations want to take part, but they have no obligations under international law. Perhaps the Study Group could look at contracts as a governance instrument, As seen in transnational public and private orderings. For private military and security companies there is a transnational association with significant buy-in for adherence to international humanitarian law and international human rights law among its members. How such an ordering would look substantively and procedurally has not yet been determined, but there has been the political buy-in, which is then translated to the legal obligations.

He suggested that the Study Group address the details of grievance mechanisms, namely how would they look procedurally, and how the obligations under international humanitarian law and international human rights law would be determined. These grievance mechanisms have not been traditionally charged with establishing international humanitarian law and international human rights law standards in the same way as courts.

Ms Seck noted that similar practices exist in other sectors, particularly in the context of indigenous peoples, development contracts, and mining companies.

Mr Allen stated that one of the reasons that governments do not create obligations on businesses in their national legislation is that it is not in their lobby to do so. If such an obligation were incorporated into a contract as a one paragraph term, it would show the willingness of corporations to comply with human rights, and would not need to go through the legislative process.

Ms Valentina Okaru-Bisant agreed that this is a very important and interesting area, but queried how binding the contracts would be. She gave the example of the non-binding agreement entered into by U.S. retailers Wal-Mart and Gap following the incident in Bangladesh, which may be lip-service oriented, but may also be seen as a commendable step.

In relation to the Study Group's aim of identifying issues of international law, Ms Okary-Bisant queried whether there is any established international law in the area. There are distinctions between public/private, binding/non-binding guidelines (of which there are too many), and the normative values in this area are so broad. It is very hard to balance all of the different values (economic, legal, business and social) that influence corporations to act in a certain way. It is not good to look at international law narrowly in this very multi-faceted and multi-disciplinary area. When looking at identifying the relevant issues of international law, how do we make

it more binding? This area is evolving and developing, and corporations seem enthusiastic to jump in, but it is bigger than just a legal issue.

Mr Jeffrey S. Collins (USA) concurred that this is a very good point from a company perspective. It can be useful for companies, but he would caution against creating just another guide that is difficult to manage. The idea expressed in an earlier intervention of an online database was a good one, but it would need an NGO or civil society group to be dedicated to maintaining it full time.

Mr Crockett noted that one of the systemic issues is the role of international organisations with respect to the implementation of the Guiding Principles. The Principles were developed under a Special Procedures mandate of the UN Human Rights Council, but other public international law organisations and international groups, which do not have this status, are coming up with their own initiatives. An interesting question is which institutional structure is the most effective to support implementation of the Guiding Principles, especially in the UN system. Could the use of contracts by private military and security company contracts (as referred to in an earlier intervention) be used as a model? If the Guiding Principles are not enough by themselves, what needs to be established and put in place to ensure their effective implementation from an institutional perspective?

Professor Addo commented that the Study Group would need more guidance on how to focus its work. All of the mechanisms should draw from the Guiding Principles, and it is possible for this to be done with some care. Alternatively, if the conclusions of the Study Group do not fit in with the Guiding Principles, what should be done with them? What do we do with the issues arising from the Principles? As a Study Group, they could clarify the depth that Ruggie paved the way towards, and un-package it.

Professor Addo noted that the Study Group has so far been trying to emphasise the international law character of the Guiding Principles, and he queried whether it should proceed in this direction. This may be the point at which the Study Group can bridge the public/private divide, but is it brave enough to state new understandings of international law? Should it look only at State practice, or also at corporate practice? These are new questions to which the Study Group could provide definitive answers. Professor Addo invited attendees to provide feedback from the audience as to whether the Study Group should push the boundaries.

Mr Uchemma Iloka (UK) expressed the view that the Study Group should not rely solely on the "paradigm" of the Guiding Principles, but should also pay attention to critics of the Principles, their effectiveness, and how they have been implemented. The Study Group should see whether it could initiate or be instrumental in the improvement of international law as it currently stands.

Mr Iloka noted that the State's duty to protectis compromised when placed on par with the influence and power of companies, and queried whether a hybrid solution could be found between a hard and soft law instrument.

Ms Okaru Bisant mentioned that the answers to the questions posed by Professor Addo depend on what is meant by "audience". Corporations must be included in the

analysis if the Study Group wishes to convince them, and that it is not necessary to argue from the reference point of relativist value.

She also questioned what standards would be applied by the Study Group, noting that business are operating in a multipolar, globalised economy. A burning issue in this area is the harmonisation of guiding principles. How can the Study Group tap into all of the economic, social and legal instruments to influence how businesses behave?

The Chair added that the Study Group on Socially Responsible Investment has studied weapons conventions that have not been signed due to conflicts of interest. There may be similar comparisons to be drawn with the Guiding Principles.

Professor Addo responded to the intervention by Ms Bisant by stating that the "audience" includes States, businesses, academics, and civil society groups. It is too narrow to focus solely on States in view of the influence of business on international law. He added his belief that every corporation understands and endorses having human rights standards.

In response to the question about applicable standards, Professor Addo stated that the set of international principles on human rights (or the 'International Bill of Rights', consisting of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and possibly the core ILO Conventions) formed the minimum standards.

Ms Okaru-Bisant noted that economic and institutional conditions differ between States. For example, in China, labour rights standards may be seen as slavery in the US. There are normative values that influence international law in terms of State practice and corporate practice. A company may query why it should be held responsible for harm caused by standards accepted by the country concerned. These issues are defined in a theoretical framework, but not in a practical one. A cost-benefit analysis needs to be conducted in order for the work of the Study Group to proceed.

Professor Susana Camargo Vieira (Brazil) recalled the significant the role that businesses can play if they consider that it to be in their interests. She suggested that the Study Group look at the work of the World Business Council for Sustainable Development, as well as how practice has developed in States. In Brazil, there have been substantial changes because businesses and labour unions were convinced. She noted that although Bangladesh is party to the ILO Conventions, most businesses operating there are clandestine. It is a universal truth that it is the responsibility of businesses to make money their god and to disrespect and circumvent the law and every attempt to make things better. Indeeed, businesses often start operations in countries where the infrastructure is not strong enough to uphold human rights.

There is a need to focus on the role of law in preventing, not resolving, conflict. She noted referred the Study Group to a stock exchange list for sustainability compiled by the Brazilian branch of the World Business Council for Sustainable Development (the *Conselho Empresarial Brasileiro para o Desenvolvimento Sustentável*), which has been published online at www.cebds.org. Brazil is party to the Madrid Protocol, and

customers in Brazil are beginning to look for goods that are produced in a better way, even if only for trade unions to protect jobs being taken away from them.

Ms Seck commented that the situation looks different depending on whether you are wearing an international human rights litigator hat or a corporate litigator hat.

Mr Crockett questioned what the Study Group could do to contribute to the effective implementation of the Guiding Principles. In his personal opinion, there can be much debate, but it is hard to write a theoretical treatise on the issue. This is a systemic issue where international law needs to develop.

Critics often refer to the absence of any accountability mechanism. But how do you design one, and how would you use existing structures to ensure accountability? The Study Group has to be pragmatic about what it can achieve. It may be able to identify and prioritise issues, and report back to ILA, to be followed by the establishment of a Committee. The product of the Study Group will be a document stating how the ILA can contribute to the development of international law in this area.

Ms Khan proposed the use of private contracts as a suggested working model. Corporations need something in the right language that they can look at.

Ms Khan noted that details for the Guiding Principles may still need to be fleshed out, and recalled her earlier suggestion of an online database show the status of implementation in the various jurisdictions. There is also a need to reach out to other actors like civil society groups. Businesses may be motivated to act through naming and shaming and by the threat of big lawsuits.

Mr Willis questioned the desirability and feasibility of making multinational corporations a subject of international law, thereby imposing international obligations directly on them and involving them directly in the development of international law. If at the heart of all of the criticism of multinational corporations is a sociological or economic concern about the power they exercise, it is undeniably a different quality of power than the rulemaking power that exists in treaties.

Professor Addo welcomed the thoughtful intervention by Mr Willis and noted the need to take the issue he raised seriously. However, if foreign ministries are already taking on board what corporations think when determining matters of business and human rights, involving corporations directly would be a formalisation of what actually happens. The question then is whether this role can we formalise without giving away the role of the State. If corporations essentially dictate what is happening in developing countries, we need to question how international law is made. This is an open question, and may be answered by acknowledging that a few actors are involved,, and putting a label on what each of them does.

Mr William Shipley responded to Professor Addo by noting that it is extremely difficult for decision makers to say what applies in decision-making. He then went on to observe that the various international bodies are targetting high-level decision makers in industry and government without the message filtering down through the subcontracting and bureaucracy to where the harm ultimately materialises. It is important to involve in the enforcement of human rights standard those trade unions,

community leaders, and NGOs that represent the interests of those most likely to be harmed. Procedural mechanisms such as those established under the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters or the ILO system of tripartite consultation offer examples of forums to support dialogue among the various stakeholders.

Ms Laura Marschner intervened to follow up on the idea of "unpacking" the Guiding Principles from an international legal perspective, as proposed by Professor Addo in his earlier intervention. She wondered whether it would be worthwhile for the Study Group to address how the responsibility to respect (as set forth in the second Pillar) can be conceptualised from a legal perspective; specifically, the extent to which it should be translated into an obligation. She also suggested that the Study Group address the scope of extraterritorial jurisdiction (in the context of the first and third Pillars), which has been a source of controversy, including in relation to criminal prosecution.

Mr Crockett refocused attention on his suggestion that the Study Group to identify "manageable" issues , particularly those that may become a barrier to the effective implementation of the Guiding Principles. Extraterritoriality is an interesting issue. He gave the example of the case concerning the involvement of a German company in alleged labour rights violations and displacement of people at a plantation in Africa. After a drawn-out investigation by the German National Contact Point for the OECD Guidelines for Multinational Enterprises, the case was brought to the attention of the UN Human Rights Council. The Human Rights Council found that, by virtue of Article 2 of the ICCPR, Germany needed to do more to make sure that all German companies were aware of the duty to respect human rights wherever they operate. Mr Crockett noted that some governments have objected to a way that the Guiding Principles frame extraterritoriality, but that even those governments acknowledge a duty to protect beyond their territory. He added that the issue of the extraterritorial effect of Article 2 of the ICCPR is the subject of an ongoing and divisive debate. A future ILA Committee could take on this issue, and there is indeed a feeling that unless the issue is resolved, there will be problems with effectively implementing the Guiding Principles.

Ms Seck expressed her reluctance to use the term "extraterritoriality", favouring instead the term "transnational obligations" and "transnational jurisdiction". When discussing transnational companies, a difference language is needed. Going back to is this idea that perhaps if the focus of Study Group were on design of accountability mechanisms, but taking that in the broad way the Guiding Principles talk about them. The Guiding Principles are referred to as polycentric governance framework. Do we in the ILA just focus on the public international law piece of that, or on the methodology and role of business and how we approach this? Do we embrace the reality that businesses are part of this picture? That is very much where the Guiding Principles take us. If we were to take the focus to consider the designs of accountability mechanisms, you can do this with corporate solicitor hat on. If you take the grievance mechanisms in the Guiding Principles you can bring in the role of business in actually attempting to resolve these problems. But also perhaps resolve the e-word (extraterritoriality) and the treaty piece. On the treaty piece, it not so crazy to think about civil liability treaties, like the environmental treaties or nuclear energy. It

is not like there are no treaties that address disasters that involve business. It is something industry might like particularly if it incorporated the role of insurance in addressing harm. A committee could do that.

Mr Charamba addressed the previous comment about unpacking the Guiding Principles. We can get carried away because there is a lot of ranting against transnational corporations and their role in public international law. It can take us down a road we do not want to go down. But one thing we can do with customary international law, taking the idea of the polycentric nature of the Guiding Principles, rather than focusing on potential obligations that exist for transnational corporations, is to look at the nexus between states and corporations so we are not being too bold to say private actors are subject to legal obligations, but does this lead to new interpretation of customary international law. That synthesis with business can help in unpacking and interpreting the legal obligations within the Ruggie principles that seem vague at this time. It is developing international law in a way that does not lead to the debate on the status of private actors in international law.

Ms Okaru-Bisant reiterated her earlier question about the Study Group developing some criteria that will guide it through. Do the Study Group have a criteria in determining the scope and content of what will be its focus? Is it looking at pressing issues in human rights and business, unresolved issues? There are a lot of ideas here that can open up a can of worms. So are there guidelines or provisions in the preamble that help to determine these criteria?

Mr Crockett recalled that of the questions to address is what should be the Study Group's criteria. That will help to tie in the issues that are worthy of focus back to the mandate. What issues might be a barrier to the implementation of the Guiding Principles? Are there issues that will prevent progress? Are there issues that states continue to debate amongst one another or international organizations debate against one another that an ILA committee can look at in detail and try to resolve? The Study Group has not come to a conclusion on these issues.

Ms Lindsay looking for facilitators rather than trying to identify the barriers as a way to deal with the gaps. It may be difficult to shift or change barriers in terms of effective implementation.

Professor Addo tied both Ms Lindsay's and Mr Crockett's comments together saying that it could be the same between barriers and facilitators. When you talk about accountability mechanisms, the reason we do not get very far is the barriers. In that sense the whole accountability mechanism has become a flogging horse, but this horse is alive, and we need to look at the positive aspects in order to facilitate the accountability process.

Ms Lindsay noted that you have to have the substantive standards before accountability.

Professor Addo agreed and asked how we contribute to understanding of effective accountability mechanisms. How do we design a credible accountability mechanism? Is it for states, companies, or a model that captures both?

Ms Seck pointed out the problem with focusing on a single accountability mechanism

rather than multiple sites for accountability. Multiple accountability mechanisms are mentioned in the Guiding Principles, that seems to be really important.

Ms Khan was concerned that international law is very messy. Domestic law is also messy, but at least you have a Parliament, you do not have that in international law. In advance of barriers to actually trying things, it is very difficult. You cannot resolve many of these lingering questions until you actually start trying things, then you will know. This balance is between how much we want to advance in international law versus what is the current law and what is realistic. It is a messy thing that can only be resolved by trying to do things like float a draft boilerplate for contracts, or setting up a mechanisms where you reach out to non governmental organisations, unions, the press, etcetera and you will quickly find out what the barriers are.

Mr Jeremy Carver (UK) noted that we are at a cold phase, a brand new phase. We do not know what we will find. He recalled a story from the year 2000 as the American Bar Association (ABA) published, with a group of lawyers in the United Kingdom, a set of essays called *Common Law, Common Values, Common Rights*. It took a set of twenty-five subjects to get short essays from each side of the Atlantic. A small group of people, including Mr Carver edited the essays. He has one set of essays on the regulation of corporations. One was a brilliant essay from a professor in the United Kingdom; it was fantastic. When he received the American one, he rang up head of ABA Bob Stein, and said he was really embarrassed to publish it because it was gibberish, there was absolutely no law in this at all. Mr Stein explained that the writer was not a lawyer, but a professor of ethics. He was writing an essay about the ethics of corporate behaviour. Now, you read that essay, he is spot on.

Mr Carver lamented that it was ten years before the rest of us caught on. We know corporate conduct needs discipline. International law has given way in certain areas and not others. We look at what has happened with investor state arbitration under the umbrella of international law and treaty arrangements governed by international law. Now there are commercial techniques in a commercial framework. This area it seems is about trying to define what are the limits, what are the constraints that should operate as corporations go on, they have been doing it for years, and other corporations have come on and it is a global playground. International law is not designed to deal with corporations as such. International law assumes that everyone is subject to a state.

He recalled that the Organization for Economic Co-Operation and Development's (OECD) guidelines produced a code. It generated the National Contact Points as a forum, and no more than a forum. The banter goes on about whether it is a voluntary process, or whether states' subscribing to it makes it something companies must pay attention to. We do not know what is going to happen next week. We have brilliant articulations of possibilities. The advantage of this Study Group is to look beyond the shadows and define a process by which to assess corporate conduct in international business. Go on study group. Do it.

Professor Addo expressed his gratitude for Mr Carver's points and said this was one of those speeches that we will recall in ten years' time.

Ms Okaru-Bisant strongly agreed with everything Mr Carver said tying together the multidisciplinary approach, the economic, legal, social, normative values that

influence corporations to the accountability. She noted that if the UN Human Rights Council (HRC) is the Study Group's audience then it should make sure the Guiding Principles actually work. For them to work, we have to take a multidisciplinary approach to solving the problem. We should not limit ourselves to public international law; we should be more concerned with what our purpose is and what are the unresolved pressing issues that we need to address and how do we go about it. A multidisciplinary approach is needed. Law and economics have to come into this. It is very multi-faceted and very complicated.

Ms Lindsay agreed that the Study Group should contemplate whether it is too narrowly focused on human rights, thus missing an opportunity. In terms of corporate behaviour, why should they be different from environmental or other issues that involve corporate regulation?

Professor Addo conjectured that there may be lessons to be learned from existing mechanisms that have been successful in these other areas.

Professor Camargo Vieira gave an example that illustrates these points in Brazil. The Socially Responsible Investment (SRI) Study Group discussed an index that rates sustainability on the part of companies. But when advising investors, many do not take that into consideration. The mentality of lawyers and teachers has to change. Professor Camargo Vieira's teaches at a university in the Brazilian mining state, Minas Gerais, the name of the capital would mean beautiful horizons in English. Anglo-American mining had destroyed the mountains around it. It is a town of 80,000 inhabitants. A local man started a mining company; he basically started his life with a cart. Now he practically owns the city. He has been among the best in terms of human rights and environment. Brazil is not the only place with these examples. There are so many scars left by irresponsible mining. This not need be kept as a practice. In Africa there are probably similar things. One of the things people should do more is pay attention in developing countries. This is going to be a new world. We better prepare for that. We can draw on experiences of places where there is a little less destruction done.

Erin Shaw (Canada) noted that comes up in a very political context. One thing that is interesting is the extent to which obligations may apply to corporate actors if they are implementing a state's development assistance. In that case, do they have different obligations?

Professor Addo recalled Mr Charamba's point as well that the state-business nexus may be a slow, gentle way of entering into this horizon. But do we really want to stick ourselves to what is comfortable?

Ms Okaru-Bisant asked if anyone has done a study on the values that influenced the man who started the corporation in Brazil? He is a businessman.

Professor Camargo Vieira answered that he is much more attuned to the social situation than others. He saw what was happening and he changed it. His practices were evaluated. This has led to an increased value of his company in the market. He saw that he was making money, not only making money, but also educating his workforce. When they go to work, they watch videos on the good practices. This guy came from zero and is now one of the richest men in the world.

Ms Okaru-Bisant gave Merck as an example of a company that is doing well in the area of corporate social responsibility (CSR). In terms of philanthropy, they have a good reputation. They had it on their website to promote CSR long before it became a fad. It may be good to look at companies like that and what distinguishes them. The corporate culture is very hard to change. When people say that it is about profit maximisation, Merck has been able to achieve that in a sustainable way. At the same time they are able to achieve their long-term goal for profit maximisation. This goes back to understanding business, economics to be able to be useful to the HRC to tap into the area of getting a sense of business. They are a different kettle of fish, their approach to CSR is different if they are publicly traded than if they are a closed corporation. What kind of business is the mine? Is it publicly traded?

Professor Camargo Vieira answered that the mine is a publicly traded company.

Mr Allen agreed that it is an important point. A lot of corporations are happy to comply with these human rights obligations if they are indeed obligations, because large corporations have their own responsibility to their own shareholders. If there are solid obligations that they can refer to in documents that are directly enforceable against them, they can balance this against maximising their profit. This is currently not clear in either national or international law. However, putting the obligations into a contract would be a good way of circumventing the hurdles of the national legislative process.

Mr Carver would not quarrel with the proposition that there are some corporations of insight sensitivity, and intelligence that have highly developed sense of what they are doing and its impact. However, all over the world there are corporations that do not have the first idea about such impacts and their involvement and give statements like the ones made today about just abiding by the law and sticking to the contracts and doing what the law says. That is not how things happen.

Mr Carver noted that in his field of corruption, companies that bribed lost money. And they saw if they clean up their act and try to resolve the problems of entering into a contract in area that they were not familiar and did it cleanly, they made money. Those that were done cleanly were very profitable. Shell fifty years ago was one of the most enlightened corporations. They seriously invested in looking ahead. The head of legal department was John Blair who created panel of international lawyers in 60s and 70s calling together professors to talk seriously about what international law was going to look like in ten or fifteen years; time and to react and position Shell as part of that process. By the 1980s the Board of Directors was replaced and was only interested in profits. Now the chairman of Shell is just escaping jail in order to maximise reserves. There is of course the Nigeria, pipeline issue across the Ogoni land, which has turned into a unique environmental catastrophe. Shell says it is for the Government of Nigeria to deal with it. No, Shell, you have the obligation to deal with it. That will be tested in the New York courts now. We cannot sit back and say corporations just do things by the book. No corporation will do that. There are a lot of insensitive corporations.

Ms Seck sensed that law professors, such as herself, teach law students that what they need to understand is the law. But that is not how life works. There is an added layer of CSR. That is a moving target that needs to be understood from day one. Even if you put in place a contract, you have to have an on-going relationship with the

company to define what their interests are what is or is not being met over time. One of the problems is that contractual certainty at day one is seen later as an injustice. How do you take this language of short-term financial certainty now with the reality that it is not what social expectations are over time? The idea of seeking certainty through law is something we need to confront and move away from. We need to think about the on-going processes we can put into place. That is where grievance mechanisms that are part of the Guiding Principles are important. What are the processes we need in place that make certain that it is not only one piece that is the quest.

Mr Koka brought the conversation back to accountability mechanisms. Business is business. It is difficult to give business the duty of the state. In the accountability issue we are trying to decipher, one should try to bring minds to the issue of state complicity with human rights abuses that happen as a result of businesses. We should look how states can be key to the whole idea of this discussion. That comes with tricky ground when trying to deal with CSR in terms of states and sovereignty and the complexities that come with it. We should not focus on CSR but we should bear in mind how the Study Group can also deal with state complicity, which is a fuel for corporate abusers in certain states, especially when states are seeking investments and that fuels different priorities. Their priorities tend to align more with businesses, which is profit.

Mr Eric Cheng recalled that Ruggie separated these concerns into three different pillars. We should look at prevention as opposed to accountability, but we have to develop different approaches to these different problems. The International Finance Corporation has performance standards and there are criteria for on-going engagement for specific vulnerable individuals and groups. This is best way to address human rights risk as a risk factor. This idea of human rights due diligence is only the first initial aspect of it. Maybe that is a lacuna we can address here. If we are going to do it as a society and corporations, we have to do it. Aside from accountability, he did not know how to approach these issues, but they must exist.

Professor McCorquodale clarified that corporate social responsibility is not the same as business and human rights. They start from very different bases. CSR is from a corporation's perspective looking at business risk. The other is the human rights issues that businesses have caused. Turning to contracts, the public procurement, where a state can put into place specific requirements that include human rights. The private military contractor approach has begun to go that way, but it is still not a requirement that private military contractors operate that way. The other is the supply chain. Corporations tend to pass liability down the chain. So simply saying there is a contract is not always enough. On grievance mechanisms, there are different kinds. Ruggie looks at non-judicial elements. But if there are good grievance mechanisms, you do not end up at the judicial. That is an important starting point. Ruggie requires consultation and free consent. That is especially true in indigenous situations where government hands over land without getting consent of the group. That is a tricky issue to say there is appropriate consultation. The legal aspect you can bring to this, there are legal risks involved with a corporation, not just business risks. This area is not just about public international law, but there are private international issues, corporation issues, and environmental issues. In some ways, even customary international law. We would be unwise to look at just public international law.

Mr Crockett recalled that two members of the Study Group who are not present are particularly interested in private international law and the issue of access to remedy. An ILA Study Group may not be the appropriate framework to tackle private international law. There was a recent ILA declaration on the private international law issues. The other issue is about the way that stock exchanges are imposing requirements on companies with respect to human rights. This comes back to discussion of looking at how the Guiding Principles are influencing practice of not just corporations, but of states as well. The reporting requirements of stock exchanges demonstrate the way corporate responsibility to respect gets translated into the legal obligations. You have a requirement in United Kingdom to report on human rights.

Professor McCorquodale noted that the requirement is a very vague one.

Mr Crockeet agreed that it is very vague, but noted that the discussion is on the nature of these Guiding Principles. Ruggie said no new laws, but there is something valuable to them.

Professor Addo conjectured that this may be one of the few areas where public international law, private international law, environmental and others converge and that there must be a multidisciplinary approach going forward.

With the focus on the Guiding Principles, the body is getting on with a lot of activities and it is important to focus on this. Lead has to come from pillar one of the Guiding Principles, then under a national action plan you have corporate responsibility to identify what the corporation does. Then you set out what the action plan does. How do you position issues like business-state nexus procurement, due diligence, and how exactly do you define it? These are aspects of details that an expert body can help un-package. Through which you can push the limits of international law because it is a receptacle waiting to take things forward.

Professor Camargo Vieira recalled earlier statements about Latin American and indigenous lands given by governments to corporations, stating that Latin America cannot be defined as one unit. Latin America and Africa are the future in terms of resources and we have to work well with that. Regarding the importance of teaching, we produce what we have always learned. Recalling the Shell scandal in Nigeria with the Ogoni people, a building company in Brazil did something similar in Mozambique, which is a very peaceful place. The mentality of those involved must change. Companies will change because they see profit in it. We can also empower society to demand more of local governments.

Professor McCorquodale clarified that he only said there are some examples within Latin America of land being given away.

Professor Camargo Vieira continued that those who have the most money to get the best lawyers do whatever they want. See Chevron. We have to look at things another way. Your committee should think about propaganda.

Ms Okaru-Bisant asked whether there is necessarily an overlap between corporate social responsibility and business and human rights. Business and human rights is about obligations of corporations to abide by human rights instruments and strong labour laws. This discussion is about where they meet one another. Certain issues

make them the same and share the common boundary.

Professor McCorquodale agreed that they can share common aspects, but they start from different premises.

Alex Kunzelmann (Australia) thought that that private international law can be very relevant to the work of this Study Group. The previous committee in the ILA set out in Sofia guidelines of 2012 are certainly a good starting point if the Study Group were to determine that private international law questions are something that can be addressed. That would bring some continuity of that committee to this Study Group. On the question of human rights and private international law, in The Hague Conference on the Enforcement of Foreign Judgments, there was work done in the 1990s which did not result in an instrument. Human rights interest groups did try to voice their thoughts and views on how this could be effected into human rights instruments. If it gains momentum, it would be good to see if these human rights voices voices will come to the table yet again in this context.

Ved Nanda (US) echoed what was said about corporate social responsibility and business and human rights coming from different premises, but added that he would like this group to focus on how human rights can play a vital role in seeing corporate social responsibility becoming a reality. He would emphasise the nexus.

Ms Seck noted that she calls her class corporate social responsibility and law. There is a connection, but the difference is the rights holders in the business and human rights context. It is easier to talk to businesses about international corporate social responsibility and law rather than business and human rights.

Ms Khan asked if the Study Group has considered strengthening of jurisdiction for criminal prosecutions for people who do not abide by the Guiding Principles. Domestically, when people commit massive fraud they get jail time, that should be somewhere in the picture for altering behaviour.

Mr Crockett proposed that law professors could present this as a fascinating problem to give their students to look at—to ask them to design a new article for the Rome Statute to address corporate responsibility. How would you design a model around compulsory winding up procedure?

Mr Carver asked if he can bring back the discussion to private international law. Years ago there was no difference. Most of the vocabulary that has obsessively divided the field has come about in the last fifty years. It weakens us in comprehending the world as it really is. The world goes on without lawyers. We need to try to comprehend what happening rather than to stick to narrow specialist limits, especially with law firms. But it is also for professors who will not go out their narrow areas. You do not get insight into them by saying you just want to concentrate on one aspect of the law. Exxon Valdez had a big corporate scandal. It cost them a lot of money and it cost the people of Alaska a lot of money. The law eventually changed to adapt to it. Aston Doyle had a refinery on the Missouri River and said they cannot have that happen. They put into place a reactive policy. Then it happened. They put 100 loss adjusters on either side of the river. In that process, they saved billions of dollars, they actually made good reputational value of it. Nothing of the law was there. But the law shaped in the wake of it. BP twenty years later in Texas, no plan in

place; it was a catastrophe for them. Extractive industry companies always feature in this debate because they are supposed to be entering into contracts. You have to look at what you are booking ten or twenty years down the road. How do you put a legal framework on it? You have to comprehend the law.

The Chair thanked everyone for the very interesting and enlightening meeting and asked Professor Addo to give a few words on future of study group.

Professor Addo thanked the chair, the excellent panel and the attendees for fantastic contributions. He expressed the Study Group's gratitude at the immense agenda they will have to now consider. He promised that the study group will consider it and be selective and organised. Some things will go up on the ILA website and the Study Group invites everyone to comment. In two years it will produce a report and the Study Group looks forward to the attendees' contributions.

Reporters: Lottie Lane and Marie Soueid