



## **Papeles el tiempo de los derechos**

### **Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation**

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# Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation

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## Abstract:

Access to justice is a fundamental right that has been recognized as a priority for countries and now is a new Millennium Sustainable Development Goal to ensure more peaceful and just societies. International law has developed standards on the removal of legal and procedural barriers in case of violation of such international norms protecting Human Rights which undermine the possibility of victims access to justice; it is only a first step that, along with the creation of different institutions and mechanisms, can guarantee people the right to have legal and effective repair remedies. In that way we could evaluate the proposal of establishing a *forum necessitatis*, an exceptional mechanism created to prevent the growing impunity that in particular multinational corporations seem to enjoy. Such forum would also allow States to intervene in an *actio popularis* manner fulfilling international obligations in defense of the fundamental interests of the International Community and to not evade the legitimate expectations of other subjects, their own citizens, which are generated by the ratified international treaties on Human Rights.

**Key words:** Access to Justice, Right to remedy, Multinational corporations, Forum Necessitatis, Universal Jurisdiction, Alien Tort Claims Act

## I. Introduction

Internationally there is progress on the idea that access to justice is essential to ensure the development and to eradicate poverty. In fact, in recent months the States are actively participating in the creation of the new Millennium Sustainable Development Goals in which they are linking the concept of development to new effective measures to ensure that access to justice to all people and at all levels. Therefore, it is considered a priority to ensure the

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protection of other Human Rights, themselves deriving from ratified and accepted international treaties.

Given that, we cannot forget the existing legal and procedural barriers in national and international level for the prosecution of the activities such as genocide, war crimes or torture, committed by individuals and by companies<sup>2</sup>, which undermine the possibility of victims to access to justice and demonstrate the need to implement the existing international framework in this area. In other words, the analysis of the legal and procedural mechanisms that make up the international system created by the International Community in order to respect, protect and fulfill Human Rights, cannot get away from the recognition of the practical difficulties that they encounter when they're being used to give effects to *erga omnes*<sup>3</sup> obligations to prevent, prosecute and repair damage caused by violations of *jus cogens*<sup>4</sup> norms, as those prohibiting the commission of certain crimes that affect the International Community as a whole.

We have a good reason, then to seize this opportunity and under the auspices of the new goals of sustainable development, try to eliminate all existing legal and procedural barriers in national and international level and, in the same way, we ought to formulate concrete measures, strategies and actions, starting from the existing international legal system, to make access to justice effective at all levels. In particular, we need to create the conditions to guarantee an appropriate forum to determine all the responsibilities of the actors involved in serious violations of Human Rights, even in the case of multinational corporations, and finally to guarantee an adequate compensation to victims for the damages. Therefore, in terms of global justice it must be understood that the different legal and procedural instruments, that make up the international system, are complementary and necessary in fighting against impunity, and can

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<sup>2</sup> THE THIRD PILLAR Access to Judicial Remedies for Human Rights Violations by Transnational Business. ICAR, CORE, ECCJ. Prof. Gwynne Skinner, Prof. Robert McCorquodale and Prof. Olivier De Schutter with (case studies by Andie Lambe) in: <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>

<sup>3</sup> For the *erga omnes* obligations see *obiter dictum* de ICJ in the case *Barcelona Traction* (ICJ, Reports 1970, p. 32, p. 33-34). "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law [...] others are conferred by international instruments of a universal or quasi-universal character"

<sup>4</sup> HANNIKAINEN (1988), "Peremptory norms (*Ius cogens*)", p. 3: the 5 major criteria of peremptory norms as stipulated by the author: 1. A peremptory norm is a norm of general international law; 2. It must be 'accepted and recognized by the international community of states as a whole; 3. No derogation is permitted; 4. A peremptory norm may only be modified by a new peremptory norm; 5. Obligations under peremptory norms are owed by States to the international community of State".

be used to create an alternative judicial forum, that in some cases represent the last resort for victims.

These are obvious conclusions, but what we urgently need is a global strategy and do not contradict the principle of *venire contra factum proprium* and fulfill the obligation to guarantee access to justice to all people and at all levels in order to prevent those violations, and to prosecute and punish all the actors involved in, in particular the multinational corporations, and repair the victims with effective and efficient measures. In that way we could evaluate the proposal of establishing a *forum necessitatis*, an exceptional mechanism created to show the growing impunity that in particular multinational corporations seem to enjoy. Such forum would also allow States to intervene in an *actio popularis* manner, thereby, fulfilling international obligations in defense of the fundamental interests of the International Community.

It was Roman law which first outlined the concept of *actio popularis* as a public action in defense of public interest. By analogy, this concept has been taken and used by International Law for the protection of the fundamental norms of the international community whose violation threatens peace and international security. The International Court of Justice defined the *actio popularis* as: “the right resident in any member of a community to take legal action in vindication of a public interest”<sup>5</sup>. Voefray gives a more detailed definition of this institution through which the *actio popularis* is a legal action that every member of a community can use in order to protect fully or partially common interest<sup>6</sup>. So, if we transfer this concept at the international level, where the main actors are the States, the latter should be enabled to defend a totally or partially common interest of the International Community as a whole, such as ensuring access to justice to victims of gross violations of human rights and which have appropriate mechanisms.

Therefore, States exercising universal criminal jurisdiction that guarantee a *forum necessitatis* to victims in order to determine the criminal responsibility of those involved in illegal activities, they are in fact exercising *actio popularis* in defense of the principles and interests of the International Community. Consequently, as stated by Comellas Aguirrezábal States that use the universal jurisdiction are acting to preserve the international order as members of the

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<sup>5</sup> International Court of Justice, South West Africa (Liberia v. South Africa), 18 July 1996, in <http://www.icj-cij.org/docket/index.php?sum=288&code=lsa&p1=3&p2=3&case=47&k=f2&p3=5>.

<sup>6</sup> VOEFFRAY (2004, p.38).

International Community<sup>7</sup>. In fact, Bassiouni says that the purpose of the exercise of universal jurisdiction is to guarantee and respect global order<sup>8</sup>. While Sanchez Legido defines this ability of States as “desdoblamiento funcional cosmopolita” role splitting of the International Law, allowing them to assume guardianship of common essential interests and exercise its right to punish those who somehow have become enemies of humanity. The principle of universal jurisdiction would become expression of the ideal of *civitas maxima*<sup>9</sup>.

As a counterpart to universal jurisdiction in criminal matters, we must understand that the forum by necessity can be a resource to provide civil compensation to victims too, which could be a strong deterrent to prevent or reduce the violations of Human Rights also committed by transnational companies especially when the latter are moved by economic interests. As mentioned above, the repair of damage is another side to the fight against impunity and at the same time it contributes to satisfy victims.

In summary and from a more practical perspective, to understand which ones may be the mechanisms that States could activate in order to implement these international obligations, we can see how the principle of universal jurisdiction, ensuring an alternative forum and, in many cases, the last resort for victims to receive justice, could create a forum by necessity to determine the criminal liability; Moreover, the forms of civil jurisdiction over torts, as in the United States legislation<sup>10</sup>, allowing compensation for damage, would give rise to a forum by necessity from a civil perspective.

## **II. The right to access to justice**

The ratified international obligations, concerning persecution, punishment and reparation for serious violations of peremptory norms of general international law demonstrate the need for States to comply with the generic principles: ensure effective and efficient mechanisms, in other words, ensure access to justice<sup>11</sup>.

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<sup>7</sup> Comellas Aguirrezábal “el Estado que ejerce la jurisdicción universal actúa en nombre de la Comunidad internacional porque, como miembro de ella, tiene un interés en la preservación del orden mundial” COMELLAS AGUIRREZÁBAL (2010, p. 71).

<sup>8</sup> BASSIOUNI (2001).

<sup>9</sup> SÁNCHEZ LEGIDO (2002).

<sup>10</sup> More information in the section 5 of this article.

<sup>11</sup> Thus it was expressed the UN Special Rapporteur on Impunity, Louis Joinet: “surge del hecho de que los Estados dejan de cumplir la obligación de investigar y adoptar, especialmente en el ámbito de la administración de justicia, medidas que garanticen que los responsables de haberlas cometido sean acusados, juzgados y, en su caso, castigados. Se configura, además, cuando los Estados no adoptan medidas adecuadas para proveer a las víctimas de recursos efectivos, para reparar los daños sufridos por

The latter has become a fundamental human right and at the same time guarantees other human rights contained in modern Constitutions and International Treaties. It is also supported by the jurisprudence of the International Tribunals as an essential element for the development of societies, the elimination of discrimination and thereby, to the eradication of impunity for serious violations of human rights.

We can see how the concept of access to justice, essential guarantee of the rule of law, has been the result of a construction generated by the contribution of different disciplines such as procedural law, international law and legal sociology; thus it has been linked to other principles and rules as the equity or comprehensive development of peoples, depending on the guarantee and observance of individual and collective rights.

Access to justice means access to effective and efficient judicial and non-judicial remedies to establish responsibilities, punish those responsible and repair the damage. This concept turns out to be essential for the fulfillment of other obligations *erga omnes* and derived from the international treaties ratified by the states on the protection of Human Rights for the prevention, punishment and reparation for serious violations committed against them.

On this subject is transcendental the *Barcelona Traction Light & Power Co. case*<sup>12</sup>, where, on the one hand, it recognized the existence of *erga omnes* obligations in relation to fundamental rights, and on the other hand, it was estimated that some *erga omnes* obligations, such as ensuring access to justice, are so basic in international relations as they affect all humanity, and therefore all States have the right and obligation to help protect its compliance by allowing fighting impunity for those involved in the violations and repair damage caused.

In fact, the problem arises when the absence or obstruction of criminal and civil prosecution clashes with the protection of Human Rights, particularly the right to have access to adequate, impartial forum, with the consequence therefore, that the actors involved in the violations go unpunished and no adequate compensation for the suffering is guaranteed. Aware of this, within the General Assembly of the United Nations were approved through resolution number: A / RES / 60/147 of 24 October 2005, the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

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ellas y para prevenir la repetición de dichas violaciones" Distr. General E/CN. 4/Sub. 2/1997/20/Rev.1 2 October 1997, more information in: <http://www.derechos.org/nizkor/doc/joinete.html> .

<sup>12</sup> Barcelona Traction, Light and Power Company, Limited, C.I.J., Reports 1970.

## International Human Rights Law and Serious Violations of International Humanitarian Law. <sup>13</sup>.

The Principles VII and VIII establish:

### VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

### VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;
- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

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<sup>13</sup> Adopted and proclaimed by General Assembly resolution 60/147, 16 December 2005. More information in: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>



Speaking of the creation of mechanisms we have to say that the State should take into consideration the nature of the proceedings, judicial, administrative or otherwise, that should be adequate to the specific violation of a fundamental right. In this line, the Committee for Human Rights in the case of *Arellana Bautista vs Colombia*<sup>14</sup>, decided: “administrative remedies cannot be deemed to constitute adequate and effective remedies [...] in the event of particularly serious violations of human rights [...]”.

Finally, we can define the Access to Justice as a fundamental pillar of democratic State that obliges States to make available to its citizens mechanisms for effective protection of their rights and solving their legal disputes through judicial remedies available and appropriate<sup>15</sup>. It is a fundamental element in a democratic system that gives equal rights to all without discrimination and with the aim to guarantee the rights of everyone equally. In fact, access to justice is the way to claim the rights possibly violated under the supposed equality of all before the law. In a modern legal system it is the most important human right because it defend fundamental rights and freedoms <sup>16</sup>. For the same reasons, we can say that it is an essential and instrumental Human Right: Once guaranteed the access to justice, it becomes an instrument that gives sense to all other rights and constitutional guarantees. It includes all measures taken to protect rights and how the conflicts are resolved<sup>17</sup>.

This principle is recognized by most international treaties concerning the protection of Human Rights. However, it is necessary to include this principle in national legislations at all levels as well as the compensation of the victims. In order words, States must establish effective and efficient mechanisms to repair the damage suffered. Actually it is possible to say that there is no justice if an effective remedy is not guaranteed. In fact, if the right of access to justice is a right to judicial remedies, framed within the area of procedural law, the latter is probably linked to the substantive law of compensation for damages intended to eliminate as far as possible the consequences of the illegal acts, and restore the situation that would have existed if the act had not been committed. Thus, the International Permanent Court of Justice, now the International Court of Justice, said in 1927: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”<sup>18</sup>. On this point, the Principle IX of the basic guidelines on the rights of victims of

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<sup>14</sup> *Bautista de Arellana v Colombia* case, Doc. CCPR/C/55/D/563/1993 (1995), par. 8.2.

<sup>15</sup> Instituto Interamericano de Derechos Humanos, (2011, p. 54).

<sup>16</sup> *BIRGIN and KOHEN* (2006, p. 16).

<sup>17</sup> *Ibidem*, p.20.

<sup>18</sup> [http://www.icj-cij.org/pcij/serie\\_A/A\\_09/28\\_Usine\\_de\\_Chorzow\\_Competence\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf)

violations of international human rights standards of the United Nations General Assembly provides:

IX Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavor to establish national programs for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgments for reparation against individuals or entities liable for the harm suffered and endeavor to enforce valid foreign legal judgments for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments.

The issue of compensation is central to most international treaties on the prevention, punishment and reparation of serious violations against human rights as can be. For example: the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the War Crimes and Crimes against Humanity, the American Convention on Human Rights, Articles 10, Article 63.1 and Article 68 makes reference to compensation. In this line, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment in the Article 14 provides that:

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

From a practical view, the European Court of Human Rights has expressed in the *Kudla against Poland and Jabari against Turkey*<sup>19</sup> that the right to effective remedies must ensure a medium or instrument through which individuals may obtain compensation for violations of their rights guaranteed by the Convention. Also, in the case of the Inter-American Court of Human Rights in the case *Gonzales Mexico (Cotton Fields Case)*<sup>20</sup>, was established:

[i]t is a principle of international law that all violations of an international obligation that result in harm include the obligation to ensure adequate reparation. This obligation is regulated by International Law. The Court has based its decisions on Article 63(1) of the American Convention in this regard.

Therefore, as was stated by the Inter-American Court of Human Rights in *Goiburú and others vs Paraguay case*<sup>21</sup>, the impunity will not be eradicated if states fail to take the measures necessary to annul these violations by exercising their jurisdiction to apply their domestic law and international law to prosecute and, if applicable, punish those responsible. To this we can add that it is necessary to work on the different aspects of impunity, not only on the criminal ones but also in civil or administrative in terms of restitution and reparation of damages. In other words, under the international regime, States simply do not only have the obligation to respect and protect human rights, but also must ensure the effective and efficient remedies.

### **III. Access to Justice as a priority in the UN Sustainable Development Goals**

It is in the area of development cooperation where justice is taking a central role due to the close relationship between human development and poverty eradication. Indeed, it is in this area where we are witnessing a change in the understanding of the concept of access to justice as a factor that can contribute to eradicate poverty, and therefore, would be able also to prevent and overcome it by finding new mechanisms in the national and international justice system on the protection of Human Rights.

According to their commitments on development cooperation, in recent months the States are participating actively in preparing the new Millennium

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<sup>19</sup> European Court of Human Rights, *Kudla vs. Poland*, Judgment 26 October 2000 (par. 152) or *Jabari vs. Turkey*, Judgment 11 July 2000, (par. 48).

<sup>20</sup> Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") vs. Mexico*. Judgment, 16 November 2009, par. 446.

<sup>21</sup> Committee of Human Rights in the case *Griffin vs. Spain*, Communication no.493/1992, UN Doc. CCPR/C/53/D/493/1992 (1995), par. 11. Judgment, 22 September 2006, serie C, number 153.

Sustainable Development Goals<sup>22</sup>. In fact, they are engaging in the creation of more effective measures, demonstrating the will that access to justice be considered a priority to ensure other Human Rights derived from ratified international commitments. In the Millennium Development Goals of the United Nations until 2015<sup>23</sup>, access to justice was not established as a priority and was not intended as a specific goal, therefore, now we are witnessing a major change that could have important implications in relation to the specific measures that states have to take to give effect to these commitments.

The role of States in guaranteeing the basic rights of the people is emphasized. Currently, for the years 2015-2030, on the 25th of September 2015, the General Assembly of the UN prepared a new development agenda<sup>24</sup> with 16 goals whose greatest global challenge is the eradication of poverty by putting people at the center of sustainable development. To achieve this result we attend to a transformation of the concept of development<sup>25</sup>. The task is to “create a society which is sustainable and which will give the fullest possible satisfaction to its members. [...] Sustainable development has become a touchstone in law, education, and business”<sup>26</sup>. In fact sustainable development requires six essential elements; now reflected in the new goals:

1. Dignity:
- 2 People:
3. Prosperity:
4. Planet:
5. Justice:
6. Association

In particular we can see that the right of access to justice it is established in the Goal 16<sup>27</sup>: “Promote Peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

#### TARGETS

16.1 Significantly reduce all forms of violence and related death rates everywhere

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<sup>22</sup> More information in: <http://www.un.org/en/ecosoc/about/mdg.shtml>  
and: <http://www.un.org/millenniumgoals/> .

<sup>23</sup> See the report of the millennium goals 2015:

[http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf).

<sup>24</sup> More information in <http://www.un.org/apps/news/story.asp?NewsID=51968#.VjshVLcrLIX>.

<sup>25</sup> “Fifteen years ago the UN’s Millennium Development Goals set out to eliminate extreme poverty. They helped bring enormous progress, but there is much left to be done. Now, with the goals set to expire in 2015, the world is rethinking its development agenda. It’s a chance to get things right. It’s a chance to include a goal for justice.” Open Society Foundation, PROJECTS JUSTICE AND DEVELOPMENT: THE POST-2015 AGENDA.

<sup>26</sup>DERNBAC and CHEEVER (2015).

<sup>27</sup> More information in: <https://sustainabledevelopment.un.org/topics>

- 16.2 End abuse, exploitation, trafficking and all forms of violence against and torture of children
- 16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all
- 16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime
- 16.5 Substantially reduce corruption and bribery in all their forms
- 16.6 Develop effective, accountable and transparent institutions at all levels
- 16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels
- 16.8 Broaden and strengthen the participation of developing countries in the institutions of global governance
- 16.9 By 2030, provide legal identity for all, including birth registration
- 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements
  - 16.a Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime
  - 16.b Promote and enforce non-discriminatory laws and policies for sustainable development

This Goal aims to expand access to justice at all levels of the judicial system in terms of prosecuting crimes and victims reparation. Thus we can say that progress is being made at the international level on the idea that access to justice is essential for ensuring the development and the States have the duty to create legal conditions to guarantee people to enjoy it.

To this, we must add that the view that we had of the State having the sole or primary responsibility for the development of a country, is overcome. Now we have to understand that there are new subjects in the private sectors involved in this process, and without a fluid dialogue between public and private sectors, it will not be possible to meet those goals. The role of the multinational companies has also been evolving because of its impact on national development. For this reason they must be regarded as actors for the eradication of poverty and elimination of inequality; due to the fact that their activities directly affect, and in many cases in a negative way, on Human Rights and other economic, social and cultural rights in the communities in which they deploy their actions and on the environment, and they should be accountable for violations that could be verified.

Therefore, we must ensure that the private sector is being responsible for the violation of the rights mentioned above, as an actor in this process. As it was explained by Ignacio Aymerich<sup>28</sup>, in recent years we are witnessing a trend of change in our understanding of Human Rights as we were used to thinking of Human Rights in terms of protection of the individual against the public sectors, but now must provide to defend violations perpetrated by the private sector too.

Certainly this is a good opportunity to include in the national level more effective measures and actions to achieve this result and thus give effect to protect the basic rights of people such as access to justice. Consequently, States should be able to remove all legal and procedural barriers that limit or hinder *de facto* this right and to create new mechanisms if it is necessary.

But, what will happen if these international commitments that States are taking and are already enshrined in international treaties and have created legitimate expectations to others, are not met? One might also think about the consequences that may result if indeed these commitments are not met in terms of international responsibility of the States which contradict the generated expectations and determinate rights for their citizens. And it is also necessary to evaluate the validity and the effectiveness of international norms and international commitments. Are they only dead letters? The central idea of the effectiveness of legal rules is that the rules are effective only if there is a certain relation between the norms and the human actions. So, there are some possibilities to use them in order to achieve justice?

#### **IV. The principle of Estoppel and the prohibition of *venire contra factum proprium***

The legal revolution of human rights surely cannot be terminated<sup>29</sup>. However, since the early stages, this revolution shows that the legal obligations of States, in protecting those rights, derived not only from its consent expressed in international conventions or agreements, but also from the principles of general international law as the principles of *pacta sunt servanda* and good faith. The latter in its articulation of *estoppel*<sup>30</sup>, and the closely related prohibition of *venire*

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<sup>28</sup>AYMERICH OJEA (2013).

<sup>29</sup>IGNATIEFF (2003).

<sup>30</sup> On this point Tanzi stands that in the practice of the States it is found the conviction of the mandatory and binding nature of the main general principles of law, in particular in the case of the principle of good faith in its articulations as the estoppel one. TANZI (2013, p. 106): "Di fatto, si riscontra nella prassi degli Stati il convincimento della obbligatorietà internazionale dei principali principi generali di diritto interno e, persino, della inderogabile natura cogente di alcuni di essi, in particolare del principio della buona fede con le sue articolazioni sostanziali (l'affidamento), procedurali (l'acquiescenza o l'estoppel), o come i principi *consuetudo est servanda* e *pacta sunt servanda*, riassuntivi del complesso delle regole sulla

*contra factum proprium*, which does not allow a State in public law system, in its relations with other States, to benefit from its internal contradictions for failing to comply with the international agreements to which it is party to or make it impossible to contradict its own previously completed act and has led to others to behave in good faith and create legitimate expectations<sup>31</sup>.

Therefore, States would be involved in its activities and the consequences arising from them. Beyond the relations between countries, this general principle of international law should guide the State's actions also in respect of its citizens and the expectations and rights arising from the ratification of international treaties concerning the protection of fundamental rights, and should serve as a criteria for the International Tribunals to determine the States responsibility in connection with the lack of compliance with international obligations mentioned above. So, the revolution of Human Rights has opened a process that has expanded the perspective of responsibilities in cases of violations of those rights and freedoms recognized and widely accepted by countries.

In fact, if we analyze the principle of estoppel in the private law perspective, in the civil law systems the principle of protection of legitimate expectations is connected to other principle of law, such as the legal certainty and its function is related to the protection of an individual citizen's legal status. On its function, we can see that the principle of legitimate expectations is closely related to the principle of estoppel, well known in common law countries<sup>32</sup> and mentioned above. In English law, there is a particular form of Estoppel, Estoppel by convention: where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other, but as long as the assumption is communicated by each party to the other, then each is estopped from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.

Elizabeth Cooke describes the principle of Estoppel as: "mechanism for enforcing consistency; when I have said or done something that leads you to believe in a particular state of affairs, I may be obliged to stand by what I have

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produzione e validità di consuetudini e accordi internazionali. A loro volta, questi ultimi rappresentano, sotto il profilo materiale che conferisce obbligatorietà giuridica alle consuetudini e agli accordi internazionali, declinazione coerente del principio di buona fede, elemento cerniera tra morale e diritto, tra processo di consapevolezza sociale e processo fondante del fenomeno giuridico, e perciò principio materiale di natura costituente dell'ordinamento".

<sup>31</sup> On the issue of access to justice and the principle of estoppel, see the Judgment of the Inter-American Court of Human Rights in the case: *Abrill Alosilla y otros vs. Perú*, 4 March 2011.

<sup>32</sup> For example, there are several varieties of 'estoppel' in English law, such as Estoppel by record, or estoppel per rem judicatam, Estoppel by deed, Estoppel by convention and Estoppel by representation.

said or done, even though I am not contractually bound to do so”<sup>33</sup>. Lord Denning’s statement in *Moorgate Mercantile Co. Ltd v. Twitchings* wrote: “is a principle of justice and equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so”<sup>34</sup>.

Consequently, if we extend this concept to the activities in which one part is a State and can create legitimate expectations to another part, such as its citizens, the implications have to be the same: the principle of estoppel will not allow the State to deny the possibility of meeting the legitimate citizen’s expectations, created by international obligations or commitments that States have ratified same as the guarantee of the access to justice and determinate the criminal and civil responsibilities derived from the violation of those international norms, respecting the State’s discretion in creating the most appropriate mechanisms to achieve these results.

Finally, beside the responsibilities of persons involved in a violation of international norm, there is the responsibility of other actors, such as multinational corporations, and the latter need not be limited to certain aspects of the activities that these entities develop but to understand all activities, also extraterritorial ones. The determination of these responsibilities and the legal consequences is the central objective of the rule of law to provide safety, legal certainty and respect for Human Rights and the States have a duty to eliminate all the existing legal and procedural barriers, and if it is necessary, to create new mechanisms to guarantee access to justice in case of determinate violations perpetrated by those corporations.

#### **V. The *forum necessitatis* as new mechanism to guarantee the access to justice**

As in other sectors of Private International Law<sup>35</sup>, due to the impossibility for victims to find a forum in which to assert their claims, we have to evaluate the opportunity to bring the case to other courts, based on the *forum necessitatis* doctrine, for the protection of the victims’ jurisdictional interests.

The forum of necessity doctrine allows a court to hear a claim, even when the standard tests for jurisdiction are not fully satisfied, if there is no other forum where the plaintiff could reasonably seek relief. It is thus

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<sup>33</sup> Cooke (2000).

<sup>34</sup> Lord Denning’s statement, *Moorgate Mercantile Co. Ltd v. Twitchings* [1976] 1 Q.B. 225 at 241.

<sup>35</sup> The expression *forum necessitatis* is not unknown, in fact we can find it in some European sources: el Reg (CE) n. 4/2009 and Reg. (CE) n. 44/2001.



the mirror image of *forum non conveniens*, which allows defendants to establish that a court should not hear a claim, despite the tests for jurisdiction being met, based on a range of discretionary factors. While the doctrines operate on similar principles, *forum non conveniens* gives defendants an extra chance to kill a case, whereas *forum of necessity* gives plaintiffs an extra chance to save it<sup>36</sup>.

Accordingly to Chilenye Nwapi<sup>37</sup> compliance would be necessary with certain requirements outlined:

The application of the doctrine generally requires the existence of five elements: (1) the absence of jurisdiction in the forum seized of the matter; (2) the requirement of some connection with that forum; (3) the impossibility of bringing the proceedings in the foreign forum with jurisdiction; (4) the reasonableness of requiring the plaintiff to bring the proceedings in that foreign forum; and (5) the absence of fair trial in the foreign forum.

From a practical perspective, there is a type of jurisdiction that can create a *forum necessitatis* to determine criminal liability of individuals for the extraterritorial criminal behaviors, in a State where there is no connection with the crime. The so-called universal jurisdiction, creating alternative forums to assert the rights of victims, demonstrates the willingness of States to fulfill the above obligations in order that they do not remain dead letters. In fact, the principle of universal jurisdiction, ensuring an alternative in many cases, the last resort for international victims to receive justice to determine the criminal liability of individuals involved in the international criminal acts<sup>38</sup>.

In the last few years, because of the exercise of this type of jurisdiction in different countries, we have learned that there is an important precondition that allows to bring claims to courts that have no connection with the crimes committed: the creation of political and social conditions in the *forum* State. In case that this precondition is not verified, national economic and diplomatic interests become important limits for its application. In fact, due to the contradiction between the universality of its mission and the particularity of the political interests of sovereign States, which provide the legal framework for its implementation, this type of jurisdiction has suffered significant ups and downs showing that it is still characterized by its complexity and the existence of several problems concerning its application<sup>39</sup>.

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<sup>36</sup> GOLDHABER (2013, p. 137).

<sup>37</sup> NWAPI (2014, p. 40).

<sup>38</sup> To understand the developments on the exercise of this type of jurisdiction see: Universal jurisdiction Annual review 2015. MAKE WAY FOR JUSTICE [https://www.fidh.org/IMG/pdf/trial-ecchr-fidh\\_uj\\_annual\\_review\\_2014-2.pdf](https://www.fidh.org/IMG/pdf/trial-ecchr-fidh_uj_annual_review_2014-2.pdf).

<sup>39</sup> MARULLO (2015).

Moreover, the forms of jurisdiction over international torts, allowing compensation for damages, would give rise to a *forum necessitatis* from a civil perspective in the case of international torts committed by individuals or multinational companies; a good example of this is the U.S. *Alien Tort Claims Act*<sup>40</sup> (ATCA) and the *Torture Victims Protection Act* (TVPA).

For more than 25 years, the *Alien Tort Claims Act*, the US provision which empowers the District Courts to hear cases in which a foreigner claims violations of the law of nations and international treaties to which the United States is a party, has allowed the institution of civil proceedings for damages suffered by the victims and compensation to the United States supported for economic costs<sup>41</sup>. “The district courts shall have jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”<sup>42</sup>. Since the famous case *Filártiga*<sup>43</sup> in 1980, the doors for the victims of one of these international illicit acts where opened; they have been able to file civil lawsuits against individuals and companies involved in such acts in the federal courts. The ATCA has provided a *forum necessitatis* for victims of such acts.

Additionally, there is another US rule, the *Torture Victim Protection Act* 1992, which would create an alternative forum, in many cases *necessitatis*. This Act authorizes any individual to bring civil claim to an US court for committing acts of torture or extrajudicial executions, provided that the case has not had a solution in place of commission of such actions. This text has been codified in section 1350 volume 28 of the United States Code. The underlying idea behind this rule is clear, with its creation: “It highlights the role of U.S. Courts in providing a legal forum for outrageous violations of human rights regardless of where they are committed”<sup>44</sup> in order to “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.” In both norms the aim is to ensure a *forum* for the victims in the cases of denial of justice in the States where the facts where committed.

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<sup>40</sup>On this topic, see the articles of Professor ZAMORA CABOT (2005<sup>a</sup> and 2005b) and MARULLO (2014).

<sup>41</sup> A sector of scholars speaks in this context of a jurisdiction "almost" universal, PIGRAU SOLÉ (2012).

<sup>42</sup> Codified in the United States Code in its volume 28 section 1350.

<sup>43</sup> See The United States Court of Appeals for the second Circuit, *Filártiga v. Peña-Irala*, (630 F.2d 876 (2d Cir. 1980).

<sup>44</sup> KOEBELE (2009, p. 5).

In a recent case of a complaint for genocide, torture, cruel inhuman or other degrading treatment, arbitrary detention, crimes against humanity and the violation of freedom of religion, the plaintiffs use the deny of justice to justify the complaint: a) For compensatory damages according to proof; b) For punitive and exemplary damages according to proof; c) For reasonable attorneys' fees and costs of suit, according proof; d) For a declaratory judgment holding that Defendant's conduct amounted to "Genocide" and was in violation of the law of nations; e) and f) For such other and further relief as the court may deem just and proper<sup>45</sup>.

Nevertheless, now this system created under the ATCA must be considered in light of a recent decision of the U.S. Supreme Court in the cases *Kiobel* and *Daimler*<sup>46</sup>, considered as *F-Cubed cases*<sup>47</sup>. Due to the implication for the economic interests of the U.S. in protecting multinational companies, these courts have begun to use the standard of "touch and concern" in order to limit "extraterritorial case" that do not have a real connection with the U.S. territory. Through these two cases, it has to be noted that we are now facing a setback in the U.S. system in the defense of human rights and in the protection and repair of the victims when multinational companies are involved in such internationally wrongful acts.

However, at least for the victims of acts of torture committed by or with the participation of multinational companies, these cases have not had significant direct impact on the second rule, the TVPA. For the moment we can see that the Eleventh Circuit has interpreted the word "individual" established in this act, as also applicable to companies<sup>48</sup>; although this interpretation has not been free of criticisms and has not been followed by most of the federal courts<sup>49</sup>. As Martin explains:

Courts have relied upon case law to interpret "individual" to include corporations and to exclude corporations. Courts throughout American jurisprudence have interpreted "individual" in varying ways with

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<sup>45</sup> The United States District Court Southern District of New York, Civil Action. No. 15-7772, *Thein Sein and others*.

<sup>46</sup> See ZAMORA CABOT (2014 and 2013).

<sup>47</sup> ENNEKING as explained that *F-Cubed Cases* o *Foreign cubed nature* theory has been used to refer to cases in which plaintiffs and defendants are foreigners and criminal behavior is performed outside the United States, ENNEKING (2012, p. 399).

<sup>48</sup> The United States Court of Appeals for the Eleventh Circuit, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009).

<sup>49</sup> The United States District Court for the Northern District of California, United States, *Bowoto v. Chevron Corporation, et al.*, --- F.3d ---, 2010 WL 3516437 (C.A. 9 (Cal.)). In that judgment the Court stated that: "Even assuming the TVPA permits some form of vicarious liability, the text limits such liability to individuals, meaning in this statute, natural persons. The language of the statute thus does not permit corporate liability under any theory".

respect to corporations<sup>50</sup>. As a result, the word “individual” itself is not determinative of whether corporations are within the scope of the TVPA. It should, though, be very persuasive that the Supreme Court has held “individual” as applicable to corporations in other areas of the law. [...] Since there is no clear “ordinary usage,” courts must then look to the legislative history, public policy, and other contexts surrounding the statute in order to interpret “individual” in a way that avoids unjust results. In the context of the Torture Victim Protection Act, this would lead courts to interpret “individual” as applicable to corporations [...]. Interpreting the Torture Victim Protection Act any other way than to hold corporations liable for their actions abroad is to limit victims’ access to remedies and to relieve corporations of the weight of international and domestic law, and allows corporations to continue to cause destruction in the lives of workers and citizens<sup>51</sup>.

Even so, although the “touch and concern standard” may represent an important limit to the creation of a *forum necessitatis* to repair damage, in the same Continent there are other States, as Canada, that are applying similar basis of jurisdiction. Also in Europe significant advancements on this matter are recorded. As Liesbeth Enneking<sup>52</sup> affirms:

This tendency is not confined to the US; similar claims have been brought before courts in other Western societies such as the UK, Australia, Canada and the Netherlands. In the absence of an ATS equivalent anywhere outside the US, these claims have typically been based on general principles of tort law and the tort of negligence in particular.

Regarding the civil responsibility of individuals involved in internationally wrongful acts, in Canada in 2010, the Ontario Court of Appeal took the matter further. In *Van Breda v Village Resorts Ltd Case* the Court explicitly recognized the need to reformulate the doctrine of denial of justice to meet the demands of justice and to adopt the doctrine of *forum necessitatis* as a jurisdictional corrective applicable to cases where there is no other forum in which the plaintiff could reasonably seek relief. The Court established:

The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace ‘forum of last resort’ cases; it operates as an exception to the real and substantial connection test. Where there is no

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<sup>50</sup> The Supreme Court of the United State, *Clinton v. City of N.Y.*, 524 U.S. 417 (1998) (holding that “individual” is applicable to corporations); *In re Goodman*, 991 F.2d 613, 619 (Cal. 1993) (holding that “individual” cannot encompass corporations)

<sup>51</sup> MARTIN (2010, p.209).

<sup>52</sup> ENNEKING (2012).

other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction<sup>53</sup>.

In the same line, on the issue of compensation for damages resulting from torture, inhuman treatment and illegal detention, it is interesting to note the recent case *Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others*<sup>54</sup> in which the English Court of Appeal established that national courts have jurisdiction in cases of serious violations of international law and human rights when it can be demonstrated that it is the last resort for the victims as access to justice, so a *forum necessitatis*:

Fifthly, the stark reality is that unless the English courts are able to exercise jurisdiction in this case, these very grave allegations against the executive will never be subjected to judicial investigation. The subject matter of these allegations is such that, these respondents, if sued in the courts of another state, are likely to be entitled to plead state immunity. Furthermore, there is, so far as we are aware, no alternative international forum with jurisdiction over these issues. As a result, these very grave allegations would go uninvestigated and the appellants would be left without any legal recourse or remedy<sup>55</sup>.

In March 2012, the *forum necessitatis* doctrine provided a basis for the District Court of The Hague in order to declare itself competent to hear a civil lawsuit brought by a foreign plaintiff that had been illegally imprisoned and tortured in Libya. In this case, the only connection that existed with the Netherlands was the presence of the applicant in the country<sup>56</sup>.

As regards to the responsibilities of the companies participating in the commission of an international tort, this doctrine was also proposed for the Brussels I recast, although it did not make it into the final version of the EU Regulation. In the Proposal, this residual jurisdiction, with a minimum connection to the forum, allowed a court to assert jurisdiction in the case where it appears no other court can do so<sup>57</sup>. Actually this doctrine is being used by Canadian courts; in particular, in the case *Anvil Mining*<sup>58</sup> to avoid the denial of justice. In addition, in many cases the plaintiffs draw on this doctrine in order

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<sup>53</sup> The Ontario Court of Appeal, *Van Breda v Village Resorts Ltd* (2010), 98 OR (3d) 721 , par. 100.

<sup>54</sup> *Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others - Full Judgment*, Case No: A2/2014/0596 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION MR. JUSTICE SIMON HQ12X02603, Royal Courts of Justice Strand, London, WC2A 2LL Date: 30/10/2014, in: <https://www.judiciary.gov.uk/wp-content/uploads/2014/10/belhaj-v-jack-straw.pdf>

<sup>55</sup> *Ibidem*, section 119., p. 49.

<sup>56</sup> *Rechtbank's-Gravenhage*, 21/03/ 2012, LJN: BV9748, El-Hojouj/Unnamed Libyan Officials, Netherlands.

<sup>57</sup> Commission proposal, COM(2010) 748/3 264 Audit (n 6) 298 ; Bright, (n 83) 213-6

<sup>58</sup> Information in: [http://www.cci.ca/programs/cases/index.php?DOC\\_INST=14](http://www.cci.ca/programs/cases/index.php?DOC_INST=14).

to support their claims before Canadian Courts, as is the case of Rennie Forsythe against Westfall and Jevco Insurance Company<sup>59</sup>. The appellant argued that the Ontario Court had jurisdiction over her claim or that it should assume jurisdiction under the forum of necessity doctrine. Nevertheless, the Court explained that this exception doctrine requires a real and substantial connection between the case and the forum and the appellant must establish that there was no other forum in which she could reasonably obtain access to justice. Referring to other cases the judge established:

I see no room for the operation of the forum of necessity doctrine. This doctrine is an exception to the real and substantial connection test that recognizes that there will be extraordinarily and exceptional cases where the need to ensure access to justice will justify the domestic court's assumption of jurisdiction: *West Van Inc. v. Daisley*, 2014 ONCA 232 (CanLII) at paras. 17-38; *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 (CanLII), [2010] O.J. No. 402 (Ont. C.A.) at para. 100, *affd.* S.C.C. (sub nom. *Club Resorts Ltd. v. Van Breda*), *supra*. The exception is very narrow, and the plaintiff must establish that there is no other forum in which he or she reasonably could obtain access to justice: *Bouzari v. Bahremani*, [2011] O.J. No. 5009 (S.C.J.).

In the same direction, according to the study conducted by Professors Gwynne Skinner, Robert McCorquodale and Olivier De Schutter<sup>60</sup> about the Third Pillar, Holland<sup>61</sup>, France, United Kingdom<sup>62</sup> and Switzerland are applying it. In the case of France, courts would consider themselves competent where it is impossible to seize a foreign court, for reasons of fact (such as insurrection) or law (e.g. in the absence of a jurisdiction rule). In the French system, this mechanism is useful to avoid the denial of justice.

Denial of justice is, indeed, an admissible ground of jurisdiction for French courts. Yet, in order for the system to remain balanced and for France not to become the "last resort" in any case, whatever the circumstances, case law has provided for two conditions to be met: - the plaintiff relying on French courts' jurisdiction has to prove that it is impossible for him or her to bring his or her claim before a foreign court. Impossibility may be based on either factual (e.g. plaintiff facing

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<sup>59</sup> Court of Appeal for Ontario, *Forsythe v. Westfall, John Doe, Jevco Insurance Company and Intact Insurance Company*, 2015 ONCA 810, 24/11/2015.

<sup>60</sup> THE THIRD PILLAR Access to Judicial Remedies for Human Rights Violations by Transnational Business. ICAR, CORE, ECCJ. Prof. Gwynne Skinner, Prof. Robert McCorquodale and Prof. Olivier De Schutter with (case studies by Andie Lambe). in: <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>.

<sup>61</sup> Cass. Civ. 1<sup>ère</sup>, *Cognacs et Brandies*, JDI 1986; District Court of The Hague, *Friday Alfred Akpan v Royal Dutch Shell; Oguru, Efanga & Milieudéfense v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria*.

<sup>62</sup> *Guerrero vs. Monterrico Metals plc* ; *Bodo Community vs. Shell Petroleum Dev Co of Nigeria*; *Lubbe vs. Cape Plc*; *Connelly vs. RTZ Corporation Plc*.

major threats if putting foot on foreign soil) or legal grounds (e.g. the foreign court has already found it has no jurisdiction). French courts will also admit impossibility to seize a foreign court where, upon examination of foreign rules on jurisdiction of the states concerned, they find that no foreign court will retain its jurisdiction [...]; - the dispute has to bear some link with France. How important this link has to be remains debated: whereas case law seems to be satisfied with the plaintiff's having a stable residence in France, some authors are in favor of retaining jurisdiction even if said link is more remote (e.g. presence of financial or other interests in France, obligation to be performed in France)<sup>63</sup>

Finally, in the same line, in the Report: "Human rights due diligence: Swiss civil society pushes the envelope", Elizabeth Umlas explains the various initiatives promoted by organizations as the Swiss Coalition for Corporate Justice, calling on the Federal Council (executive body) and Parliament to "create the legal basis for companies headquartered in Switzerland to respect human rights and the environment throughout the world", to introduce hard law rules to reduce material and legal barriers that prevent access to justice for victims in Swiss territory. In 2012 the organization submitted a document to the Parliament; however, recently the latter has rejected this proposal<sup>64</sup>.

## VI. The need to implement the existing international legal system

These examples demonstrate that the right to access to justice is being considered as an essential priority for States that are concerned to resolve the problems related to it, in particular in the cases where multinational companies are involved. In the near future, it would be necessary to introduce in the legal instruments the proposal of *forum necessitatis* as a specific rule, in criminal and civil matters. Regarding to the implementation of the "Protect, Respect and Remedy" Framework<sup>65</sup>, the well-known voluntary and non-binding Principles on Business and Human Rights, *soft law rules*<sup>66</sup>, created by John Ruggie<sup>67</sup>, that

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<sup>63</sup> See the Report: COMPARATIVE STUDY OF "RESIDUAL JURISDICTION" IN CIVIL AND COMMERCIAL DISPUTES IN THE EU NATIONAL REPORT FOR: FRANCE. Section 16, p. 19: "...". In: [http://ec.europa.eu/civiljustice/news/docs/study\\_resid\\_jurisd\\_france\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_france_en.pdf)

<sup>64</sup> More information in: <http://business-humanrights.org/en/human-rights-due-diligence-swiss-civil-society-pushes-the-envelope>. Swiss jurisdiction in this matter see Gypsy International Recognition and Compensation Action (GIRCA) v. IBM, GIRCA, Tribunal Fédéral, 22/12/2004, ATF 131 III p. 153. And (decisión. Tribunal Fédéral, 14/08/2006, ATF 132 III 661, p. 668.

<sup>65</sup> The Framework has three Pillars: The State duty to protect against human rights abuses by business (Pillar One); The business responsibility to respect human rights (Pillar Two); and The responsibility of States and business to provide effective access to remedies (Pillar Three). All three Pillars provide more specific guidance for States and business.

<sup>66</sup> Tanzi defines those norms as instruments that are not legally binding but could participate in the formation of international legal rules process. "Si tratta di quegli strumenti non vincolanti giuridicamente

are promoting the creation of National Plans<sup>68</sup> , it would be useful to have a specific rule to bring criminal and civil claims behind the States where the multinational companies are domiciled, also in the case of extraterritorial damages and where the conduct is committed by a domestic subsidiaries of the parent company, without its participation.

Moreover, considering the U.N. Guiding Principles mentioned above and the legal Framework created in 2011, have not provided sufficient response to the Human Rights abuses committed by business corporations, the delegation of Ecuador delivered a statement at the UN Human Rights Council. As a consequence, in June 2014 the Council adopted Resolution 26/9, establishing an Intergovernmental Working Group with an open-ended mandate “to elaborate an international legally binding instrument”<sup>69</sup>. This is an historic achievement and it should be the subject of thoughtful reflections by the specialized doctrine, since an International Treaty on Business and Human Rights<sup>70</sup> is on its way, sponsored by the U. N., representing the adoption of *hard law* on this matter. In it we should solve two major problems: First we must try to solve the content of the responsibility of multinational companies from criminal and civil perspective, after that, we must solve the problem of access to justice that can contribute to ending the impunity.

On one hand, the new legally binding international instrument should include some specific obligation for corporations to respect international Human Rights law and international environmental norms. In fact, it is necessary that corporations should be bound to recognize the principle of the primacy of Human Rights and public interest over private economic interests. This duty must also include the obligation to ensure that their subsidiaries, chain of suppliers, licensees and subcontractors also respect Human Rights and the environmental norms. Consequently, in the legal treaty we must determine the specific content of the criminal and civil responsibility of the corporation violating those international norms. On the other hand, a decisive contribution of the binding treaty must be to recognize that States have extra-territorial

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che, tuttavia, tendono a fare parte delle dinamiche di formazione di obblighi giuridici internazionali secondo processi diplomatici e logico-giuridici in base al principio generale della buona fede”. TANZI (2013, p.63).

<sup>67</sup> the “Protect, Respect and Remedy” Framework in:

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_SP.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_SP.pdf). See ESTEVE MOLTÓ, (2011).

<sup>68</sup> More information about the National Plans in: <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>.

<sup>69</sup> More information in: <http://www.treatymovement.com/>.

<sup>70</sup> Resolution A/HRC/26/L.22/Rev.1 in: [http://www.aieti.es/wp-content/uploads/2014/09/Resolucion-del-consejo-de-DD.HHA\\_HRC\\_26\\_L22\\_rev1.pdf](http://www.aieti.es/wp-content/uploads/2014/09/Resolucion-del-consejo-de-DD.HHA_HRC_26_L22_rev1.pdf).



obligations related to their duty to protect Human Rights and ensure access to justice and redress for the affected communities and victims of the activities of multinational corporations abroad. On the last duty, the creation of a *forum necessitatis* could therefore be a useful and necessary tool for achieving this result.

The scholars are divided on this point. Those in favor of a binding instrument argue that U.N. Principles, mentioned above, have not provided accountability or real remedies for corporate abuses and that after four years of its endorsement, only a few States have developed national plans. Whereas, those against a binding instrument maintain that the Guiding Principles need more time and think that a new treaty can become an excuse not to implement them and the National Plans.

In this regard, I think that the Guiding Principles and the National Plans are compatible with the adoption of a binding treaty; on the subject of greater protection of Human Rights nothing is superfluous or redundant. Certainly, I recognize the importance the U.N. Framework in the international arena, it has been an important starting point and can be useful nowadays in national level for the implementation of the others National Plans and can guide the legislators, judges and practitioners in general on these subjects and can be an important instrument to reduce the negative impacts of the activities of the multinational corporations. For all these reasons, I think that the commitments established in it can be easily included in a new binding treaty.

According to Camarero Suárez and Zamora Cabot<sup>71</sup>, regardless of the progress of States in implementing the Guiding Principles on Business and Human Rights of the United Nation and of the making of a binding Treaty on this subject, there are some others initiatives that could contribute to the defense and protection of victims and could ensure access to justice in cases of serious violations committed by multinational companies.

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<sup>71</sup> "Al margen [de esas dos iniciativas] de las Naciones Unidas, y completamos ya este epígrafe, han surgido y/o se encuentran operativas una serie de iniciativas que inciden sobre lo aquí tratado. Nos referimos, por ejemplo, a la propuesta de M. Steinitz sobre la creación de un Tribunal Internacional de Justicia Civil, de la de un Tribunal Arbitral Internacional, o la auspiciada por, entre otros, OMAL y el Transnational Institute (TNI), sobre un "Tratado Internacional de los Pueblos para el Control de las Empresas Transnacionales" o a la muy importante labor que viene desarrollando el Tribunal Permanente de los Pueblos o a la Iniciativa Popular para Empresas Responsables, auspiciada en el País Helvético por la Coalición Suiza de Justicia Corporativa (SCCJ) o, en fin, a la Iniciativa de la Oficina del Alto Comisionado para los DD.HH. de las Naciones Unidas (OHCHR) para Reforzar la Responsabilidad de las Empresas y el Acceso a los Remedios. CAMARERO SUÁREZ and ZAMORA CABOT (2015).

Last but not least important, in this context it should be considered the possibility of extending the Rome Statute of the International Criminal Court to legal entities, increasingly involved in international crimes and determine their international criminal responsibility. In this regard it would be necessary to have a new development of international criminal law more consistent with the new threats to peace and security of the international community that could ensure a stable and effective *forum necessitatis* for victims.

## VII. Conclusions

The international community accepted the challenge of modern times to propose the protection of Human Rights guaranteeing access to justice at all levels, setting the latter as a fundamental right and an obligation *erga omnes* for States. Access to justice is a fundamental right that has been recognized as a priority for countries and a new Millennium Sustainable Development Goal to ensure more peaceful and just societies.

International law has developed standards on the removal of legal and procedural barriers in case of violation of such international norms protecting Human Rights; it is only a first step that, along with the creation of different institutions and mechanisms, can guarantee people the right to have legal and effective repair remedies. States have participated in the creation of such standards and have accepted, therefore, the obligations arising from them. So, in order to not contradict his own acts, at national and international levels, legal and practical barriers to access to justice would need to be addressed and States should create more effective measures to ensure access to justice at all levels including the compensation of the damages because there is no justice without compensation.

The *forum necessitatis* is an exceptional mechanism that can contribute to achieve this result:

When a court lacks territorial jurisdiction to adjudicate a dispute, it may turn to an emerging doctrine in jurisdictional law, which allows the court to assume jurisdiction over the dispute where the court considers that there is no other forum in which the dispute may be adjudicated or in which the plaintiff may reasonably be expected to initiate the suit. A court exercising such jurisdiction is said to be acting as a forum of necessity or, as it is called in civil law parlance, *forum necessitatis*. Such jurisdiction serves as 'a safety valve' to avoid a total denial of access to justice<sup>72</sup>.

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<sup>72</sup> NWAPI (2014).

This mechanism could contribute effectively in the fight against impunity, that seems to be enjoyed especially by multinational companies. The latter are not full subjects of international law and therefore, they argue that in the current state of law they should not be subject to the same obligations of States to respect and guarantee the Human Rights. In any case, creating a *forum necessitatis* could give the victims, who were denied or just do not have at all judicial remedies at the place where the facts were accomplished, the possibility of bringing a suit before a national court of another State, with the procedural and substantive rules suited to the determination of the responsibilities of the individuals and companies involved in international violations.

This is in line with the new idea, advanced in the new Millennium Sustainable Development Goals and that is being promoted internationally for the creation of a binding treaty on business and human rights, that the promotion and respect of human rights are not only responsibility of the State, but also involves the combination and interaction of other key actors such as civil society and the business sector.

We have to overcome the impasse that currently produces more problems internationally, that is trying to establish whether the companies are or not subjects of international law and if it imposes direct obligations on these bodies, and understand that these rules impose on States to ensure access to justice and redress the violations that are committed against international standards on the protection of Human Rights. Although the fullness of the legal status of multinational corporations is not recognized, this does not mean that the latter cannot be held responsible for their actions. It simply means that States have the obligation to remove those barriers and create the mechanisms needed to complete their duty as primary subjects of international law and not to evade the legitimate expectations of other subjects, own citizens, which are generated by the ratified international treaties on the issues of violations of Human Rights.

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