



Fourth Annual Meeting of the International Corporate Accountability Roundtable (ICAR)

George Washington School of Law

Washington, DC

September 11-12, 2014

What is the International Corporate Accountability Roundtable (ICAR)?

The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

For more information about ICAR's work and campaigns, visit:

www.accountabilityroundtable.org

Fourth Annual Meeting Agenda

DAY 1: THURSDAY, SEPTEMBER 11

Jacob Burns Moot Court Room, 2000 H Street NW Entrance

9:00 am – 9:15 am: Arrivals and Breakfast

9:15 am – 9:30 am: Welcome and Introductory Remarks

9:30 am – 10:00 am: Presentations on Status of ICAR Projects and Initiatives

Disclosure and Transparency, Human Rights Due Diligence, and Procurement

Presented by: Amol Mehra, ICAR

Access to Judicial Remedy; Commerce, Crime, and Human Rights

Presented by: Katie Shay, ICAR

UNGPs Implementation, including National Action Plans (NAPs) on Business and Human Rights

Presented by: Sara Blackwell, ICAR

10:00 am – 12:00 pm: Open Floor for Updates from Members, Partners, and Invitees

1. Eric Cohen, Investors Against Genocide
2. Lien De Brouckere, Global Rights
3. Carla Garcia Zendejas, CIEL
4. Filip Gregor, Frank Bold
5. Elise Groulx Diggs & Michael Pates, Business and Human Rights Project, ABA Center for Human Rights
6. April Gu, NYU Stern School of Business
7. Jana Morgan, PWYP-US
8. Daniel Cerequerira, Due Process Law Foundation
9. John Jacoby, Oxfam America (10 min)
10. Simon Billenness, US Campaign for Burma
11. Pratap Chatterjee, Corp Watch
12. Michelle Harrison, ERI
13. Tamar Ayrikyan, PODER
14. Patrick Geary, UNICEF
15. Katie Gallagher, CCR
16. Kathy Mulvey, EIRIS Conflict Risk Network
17. Peter Micek, Access Now

12:00 pm – 1:00 pm: Lunch

12:30 pm – 1:00 pm: Open Dialogue and Q&A with Virginia Bennett, Principal Deputy Assistant Secretary (PDAS), U.S. Department of State

1:00 pm – 2:40 pm: Breakout Strategy Sessions 1 and 2 **Facilitated by ICAR staff members*

Breakout Strategy Session 1: Remedy Frameworks

Jacob Burns Moot Court Room

Breakout Strategy Session 2: UNGPs Implementation, including National Action Plans (NAPs) on Business and Human Rights

Stockton Room 306

2:40 pm – 2:50 pm: Coffee and Tea Break

2:50 pm – 4:30 pm: Breakout Strategy Sessions 3 and 4 **Facilitated by ICAR staff members*

Breakout Strategy Session 3: Regulatory Frameworks – Procurement and Disclosure

Jacob Burns Moot Court Room

Breakout Strategy Session 4: Multi-Stakeholder Initiatives – Bangladesh and Beyond

Burns Room 415

4:30 pm – 5:00 pm: Reporting Back from Breakout Sessions

EVENING RECEPTION: THURSDAY, SEPTEMBER 11

District Commons, 2200 Pennsylvania Avenue NW

5:15 pm – 7:30 pm: Reception with Hors d'oeuvres and Wine

5:30 pm: Remarks by Katie Redford, EarthRights International (ERI)

DAY 2: FRIDAY, SEPTEMBER 12

Jacob Burns Moot Court Room, 2000 H Street NW Entrance

9:30 am – 9:45 am: Arrivals and Breakfast

9:45 am – 12:00 pm: Roundtable Session 1—*International Developments*

12:00 pm – 1:00 pm: Lunch

1:00 pm – 4:00 pm: Roundtable Session 2—*Setting the Strategy and Building a Coordinated Movement*

**This session was closed to ICAR Members, ICAR Partners, and ICAR Experts only*

4:00 pm: Closing Remarks and Thank You

Presentations on Status of ICAR Projects and Initiatives

Disclosure & Transparency, Human Rights Due Diligence, and Procurement

On September 10, ICAR's public procurement project launched *Turning a Blind Eye*, ICAR's first report on respecting human rights in government purchasing. The report presents a range of options for reforming procurement to incorporate human rights protections, including elaborating how this can be done in the apparel sector.

Access to Judicial Remedy; Commerce, Crime, and Human Rights

In December of last year, ICAR published *The Third Pillar*, a report on access to judicial remedies, in partnership with the Corporate Responsibility Coalition (CORE) and the European Coalition for Corporate Justice (ECCJ). *The Third Pillar* explores the challenges facing victims who attempt to bring cases in home States against corporations for violations that occur outside these home States' jurisdictions. *The Third Pillar* includes 30 recommendations to Canada, France, Germany, the Netherlands, Switzerland, the United Kingdom, and the United States of how to eliminate barriers access to judicial remedies. Follow-up projects to *The Third Pillar* include looking at how to operationalize the report's recommendations and holding parent companies accountable for the actions of their subsidiaries. One promising development has been reported in France, which has proposed requiring due diligence by parent companies to prevent and mitigate human rights abuses.

At the U.S. state level, ICAR is working with local law school clinics to identify the challenges that victims face in bringing human rights claims against U.S. corporations within state courts. The biggest issue facing victims in this regard is statutes of limitations for standard tort actions. Most human rights violations claims must be brought as assault, battery, or wrongful death claims; the short time periods for bringing these claims often close before victims gain access to a home State court. ICAR is looking to promote U.S. state-level legislation that negates the statutes of limitations in cases where the corporate harm rises to the level of an international human rights crime.

Additionally, ICAR is exploring the prosecution of companies for criminal violations linked to human rights violations, along with the challenges prosecutors face in bringing these charges. ICAR has reached out to international civil society organizations (CSOs) for advice on bringing criminal charges against corporations and recently did a consultation in London with CSOs who have brought these kinds of suits.

UNGPs Implementation, including National Action Plans (NAPs) on Business and Human Rights

In partnership with the Danish Institute for Human Rights (DIHR), ICAR has released a toolkit on National Action Plans (NAPs) on business and human rights. The report is both the result of and a resource for the many NAPs initiatives that have developed in the past year.

Following the UN Human Rights Council's June 2014 resolution calling on all Member States to develop NAPs to implement the UN Guiding Principles on Human Rights (UNGPs), governments have been increasingly enthusiastic about developing NAPs. At the time of this meeting, the United Kingdom, the Netherlands, and Denmark had published NAPs, while Finland, Spain, and Italy had released draft NAPs. Nevertheless, to date NAPs have not yet included a methodical process for analyzing State implementation and gaps, and thus many are not evidence-based and/or do not effectively address State shortcomings. Many stakeholders are looking at these existing NAPs as templates or exemplary models, despite their lack of thoroughness and measureable content.

The DIHR-ICAR NAPs Toolkit is intended to provide guidance to governments as to the process that should be undertaken in developing NAPs. The NAPs Toolkit starts with a National Baseline Assessment template, which allows governments to map current UNGPs implementation and identify gaps to address in their NAPs. ICAR has been working with the European Coalition for Corporate Justice (ECCJ) to survey existing NAPs, identify best practices, and to highlight opportunities for improvement in future NAPs. ICAR and DIHR have consulted with over 280 stakeholders in this process and have created the NAPs Toolkit based extensively on these consultations. As part of its efforts, ICAR has also called on the U.S. government to develop a NAP on business and human rights.

Concluding Remarks

After the presentations on the status of ongoing ICAR projects and initiatives, the session's Q&A session focused on stakeholders' first impressions of existing NAPs and their potential

to be positive examples. Unfortunately, none appear to be perfect, mostly for lack of good processes that permit effective government self-evaluation. ICAR has tried to lay out a set of criteria in the NAPs Toolkit that focuses primarily on reliable methods of assessment. Because each country faces different challenges in its effort to improve UNGPs adherence, ICAR has not listed specific substantive goals for States in its toolkit—instead, the emphasis is on using the correct processes no matter what substantive area a government must prioritize. For example, there is much interest surrounding transparency in the NAP creation process and how civil society input is or is not used by governments. Notably, the United Kingdom did not have much transparency in the development of their NAP. In ICAR's consultation with stakeholders involved in the UK NAP consultation process, many said that they did not see their priorities reflected in the finished product. Whether or not these priorities only represented a minority view and were rightly left out is unknown due to the lack of transparency in the process. In addition, there are also issues with follow-up procedures to these plans. Only the UK has announced that a second draft will be released to detail the progress of the initial plan. While there does not appear to be an example of a well-made NAP right now, many countries are in the process of developing good models and first conducting baseline assessments, such as Norway and Mozambique. Spain's draft NAP appears quite promising as well as it incorporates some far-reaching traditional demands such as parent company liability. The largest problem of the draft Spanish NAP is that, while the right elements are present, concrete measures for ensuring UNGPs adherence are lacking. Notwithstanding the above, the draft Spanish NAP is still in a draft stage and could be one of the best so far.

Breakout Session 1: Remedy Frameworks

Scope

During this session, there was discussion about developments and strategies in the fight for access to remedy around the world.

Trends in Europe: Extraterritoriality, Corporate Personhood, and Due Diligence

Starting with the challenges faced by remedy initiatives in Europe, the session explored the lack of political will from European Ministries of Justice to pay attention to business and human rights issues. Participants shared plans to lobby European governments to look into codifying mandatory due diligence for corporations regarding their supply chains. One promising development has been the French government's proposal for requiring due diligence on the part of parent companies.

In Germany, there is still no legal personhood for corporations due to the conservative business environment, and therefore corporations still cannot be held to account through either the civil or criminal systems. There are proposals, however, to allow for the attachment of civil claims to criminal proceedings against individuals in corporations, allowing for speedier adjudication on the merits for plaintiffs.

The Danish government has set up an inter-ministerial group on extraterritoriality. This presents a unique opportunity for civil society to engage with the Danish government and lobby for the principles of extraterritoriality and due diligence.

Policy Strategies for Improving Access to Remedy

In the next part of the discussion, participants explored strategies to improve access to effective remedy through national courts. Establishing an express duty of care upon the parent company was a key suggestion of a possible improvement to substantive law, as there is a current proposal before the French Parliament.

Participants also discussed the problem of corporate capture, whereby corporations have infiltrated the political and judicial process in many States and have compromised effective remedies.

Alien Tort Statute Litigation Updates

Much of the discussion featured updates on U.S. federal court decisions regarding human rights-based litigation against corporate tortfeasors. The key theme of the conversation was that federal ATS claims are facing strong opposition from a number of courts, notably the Second and the Eleventh Circuits, which have interpreted the Supreme Court's 2013 ruling in *Kiobel v. Royal Dutch Petroleum* quite restrictively.

One positive development in ATS litigation was the recent June 2014 decision of the Fourth Circuit in *Al-Shimari v. CACI*. The petitioners, all detainees tortured at the Abu Ghraib prison, sued private security contractor CACI with both ATS claims and common law claims. The court unanimously reversed the lower court's decision to dismiss the case on *Kiobel* grounds,

finding that their claims sufficiently “touched and concerned” the United States.

On the other hand, the Eleventh Circuit case of *Doe v. Chiquita Brands International* was dismissed despite substantial evidence that Chiquita made decisions to fund paramilitary groups from the United States. The Eleventh Circuit ruled that the events did not touch and concern the United States because they occurred outside of U.S. territory, and questioned whether a corporation could be held liable for torture at all.

The Supreme Court decided *Daimler-Chrysler v. Bauman*, another case that will bear on plaintiffs’ access to judicial remedies, in January 2014. The Supreme Court ruled that Daimler-Chrysler, a German corporation, was not subject to personal jurisdiction in California because it is not its place of incorporation or its principal place of business. This decision was a constitutional ruling on due process and thus will affect not just future federal interpretation of personal jurisdiction but state interpretation as well.

Updates on Remedy through Non-ATS Claims

Next, participants discussed the advantages of using non-ATS claims for remedy in U.S. federal courts. First, the session touched on the use of the Torture Victims Protection Act (TVPA) to pursue individuals within corporations. A drawback of the TVPA is that it only covers the offenses of torture and extrajudicial killings committed by natural persons, meaning that atrocities aided and abetted by corporations cannot be plead.

For litigating against U.S. providers of surveillance technology to repressive governments, criminal charges under the Wiretap Act may be brought if the communications of the human rights abuse victim were intercepted within the United States. However, identifying the point of interception becomes murky for “cloud”-based

services, and the extension of the Wiretap Act and/or other U.S. law into this realm may be undesirable.

Federal and State Legislation Initiatives in the United States

A number of federal and state acts have been proposed to improve access to remedy within U.S. courts. At the federal level, the Civilian Extraterritorial Jurisdiction Act (CEJA) (HR 5096) has been introduced and would extend court jurisdiction over non-military government contractors for crimes committed overseas.

At the state level, ICAR and EarthRights International have been developing legislation that would eliminate the statute of limitations for assault and battery, wrongful death, and potentially other claims, where the conduct would constitute torture or other gross human rights violations.

Concluding Themes

Civil society must work together with human rights law experts to establish consensus on legal definitions that are workable for legislation extending corporate liability within the supply chain and in other policy areas.

Non-ATS claims under federal criminal statutes such as the TVPA or the Wiretap Act may offer a more robust avenue for remedy in light of recent restrictions on the ATS.

State-level tort litigation is on the rise and must be accompanied by legislation that tolls the statute of limitations for human rights abuse-related torts and also expands the causes of action for such claims.

Breakout Session 2: UNGPs Implementation, including National Action Plans (NAPs) on Business and Human Rights

Scope

This session presented an overview on the progress of National Action Plans (NAPs) developments worldwide, with a focus on three specific nations—Norway, Germany, and the United Kingdom—to highlight the challenges of and possible solutions for implementation of the UNGPs.

NAPs Developments: Cases from Europe

Norway has begun its NAP development process in earnest and has commissioned consultants to conduct a mapping and gap analysis of its current UNGPs adherence. The findings will be released in report form by the end of 2014, while the NAP itself is expected to be released sometime during the winter of 2015.

Germany's government has been receptive to lobbying for a NAP and will soon start a process to create one by the end of 2016.

There was much discussion surrounding the recently-completed U.K. NAP, which was released in September 2013. The business and human rights strategy process that led to the U.K. NAP began in 2012 through a series of consultations, but the report's release was delayed due to the sheer number of challenges associated with the creation of the NAP. The U.K. environment was heavily pro-business and made it difficult for the plan to get approved.

This led to a final product that heavily emphasizes the business case for human rights and focuses primarily on Pillar II of the UNGPs and reliance on voluntary business initiatives. The U.K. government appears reluctant to enforce regulations on businesses for human rights obligations. Despite this, the NAP was still welcomed as a positive step by civil society.

Participants mentioned that the U.K. NAP process has shown that consultations with the government agency directly responsible for the creation of the plan, in this case the Foreign & Commonwealth Office (FCO), is not enough. Instead, civil society organizations should reach out to as many government agencies and departments as have a stake in the development of the NAP as possible.

Discussion and Key Themes

Starting the NAP Process

It was quickly noted that NAP drafters must make difficult choices about managing the various issues that compete for placement in the content of a NAP. Because managing the agenda and scope of a NAP takes extensive dialogue between stakeholders and therefore time, it is critical that CSOs focus on lobbying for the embedding of an NAP-creation *process* within their respective governments. This may take some effort, as stakeholders may not immediately see the value in creating a NAP. Nevertheless, governments in countries with

social market economies seem amenable to the creation of NAPs and could be an ideal starting place for CSOs to get involved.

Formulating the NAP

Participants made clear that cross-departmental collaboration within government is key to creating a well-rounded NAP that will ensure policy coherence across government. Content should also correlate to an objective set of expectations that can be reviewed at a future time. Moreover, having a solid focus on the domestic side of the application of UNGPs seems to be an important consideration for many NAPs. Lastly, NAPs must be sure to identify and address governance gaps that have been left open by deregulation or insufficient legal obligations in the form of voluntary norms for businesses. Voluntary norms are essential elements of the UNGPs, but must be accompanied by Pillar I and Pillar III guarantees as well.

Review of NAPs

It is crucial that NAPs link performance expectations with progress. International review mechanisms, such as the Universal Periodic Review (UPR) process, can serve as assessment tools to track States' performance with their NAPs. Another method of gauging NAP quality, especially for States where the NAP process has been exclusive of civil society organizations, is the publishing of shadow reports. These reports can review the adequacy of recently-released NAPs or serve as review mechanisms to gauge progress of the NAPs in the future.

Future Opportunities

The session revealed three promising future project ideas to help ICAR and other civil society organizations advocate for UNGPs implementation and the development of NAPs: (1) the investigation and spread of best practices for CSOs to initiate and influence their

national governments' NAP development, (2) the investigation and dissemination of best practices on where the NAP process should be housed within governments and how the development process should be managed within governments, and (3) the writing of shadow reports on recently-released NAPs to gauge adequacy of existing NAP processes and content, as well as State progress in implementing their commitment to the UNGPs.

Breakout Session 3: Regulatory Frameworks, Including Procurement and Disclosure

Scope

ICAR's panel of procurement experts discussed their recently released report, *Turning a Blind Eye?: Respecting Human Rights in Government Purchasing* with fellow partners involved in both U.S. and foreign government procurement and disclosure policy reforms. The discussion highlighted strategies to integrate human rights protection into government procurement and the obstacles to doing so. Moreover, participants discussed the opportunities and challenges of implementing social disclosure policies and legislation in the United States.

Formulating a Government Policy on Procurement

The conversation started with a presentation on the five-stage process laid out in *Turning a Blind Eye* for integrating human rights protection into the procurement process of the U.S. federal government.

One issue that arose was around the training and capacity building of procurement officers themselves. Procurement officers are employees within agencies that oversee the contracting process. More work needs to be done to develop this training.

The Importance of Human Rights Protection Mechanisms in Procurement

Participants highlighted that the biggest advantage to improving human rights protection through procurement is the market

incentive that triggers corporations to see human rights respect as an edge to beat competitors. Some corporations are already voluntarily conforming to high standards, such as Knights Apparel in the Dominican Republic, and have begun to recognize the right to organize and the need to improve local workers' living and safety standards. The Knights Apparel operation has shown the viability of a corporation dedicated to human rights respect by becoming profitable in its fourth year of operation (2014). Despite this good news, the discussion made clear that U.S. government needs to lead by incentivizing corporations to respect human rights throughout their international operations.

Case Study: Norway

One promising example of government leadership for human rights protection in procurement is the development of Norway's National Action Plan (NAP) to implement the UNGPs. Participants noted that this in-the-works NAP includes stringent standards for Norwegian government contractors.

Disclosure and the Dodd-Frank Act

The conversation moved to ICAR's efforts to lobby the Securities and Exchange Commission (SEC) to implement Sections 1502 as part of the Dodd-Frank Act, passed in 2010. Section 1502 mandates corporate disclosure of information regarding conflict minerals that are "necessary to the functionality" of a company's products. Its sister provision, Section 1504 orders oil,

natural gas, and mineral extraction companies to disclose certain payments to governments.

Industry has sued the SEC over the implementing regulations of these provisions. The lawsuits have been based both on administrative grounds, and on a corporate personhood free speech argument that the mandated disclosure constitutes “compelled speech” in violation of the First Amendment of the U.S. Constitution. Internal changes within the SEC’s composition since the passing of the Dodd-Frank Act and ongoing negotiations about the final form of the new rules have also slowed down their implementation.

Disclosure and Anti-Slavery Initiatives

The U.S. House of Representatives is currently considering the Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 (HR 4842), which mandates that business disclose annually to the SEC their due diligence to determine whether their supply chains are slavery- or human trafficking-free. The House bill is similar to the California Transparency in Supply Chains Act, a 2010 bill that covers retailers and manufacturers doing business in California with annual global gross receipts of \$100 million or more. Under the California act, companies must disclose online their policies and efforts to combat the use of slave labor or trafficked humans in their supply chains.

Currently, the California law is regarded as relatively toothless—only a small percentage of Californian companies have followed its disclosure mandate, with varying levels of quality, and there exist no punitive measures or rights to civil remedy against companies that fail to follow the procedures correctly or at all. Furthermore, the disclosure only covers whether a company has a policy to combat slave labor and human trafficking—nothing more. On the upside, the law has generated momentum in the public for the support of disclosure initiatives at the state and federal levels.

There was also fundamental conversation around the role of the SEC in this disclosure. The DC Circuit’s recent decision against the proposed rules for Section 1504 of the Dodd-Frank Act, along with the court’s general openness to the compelled speech arguments against disclosure of human rights issues—seen by opponents as “non-financial” and therefore unwarranted—have threatened the viability of the SEC as a partner for such disclosures.

Concluding Themes

An important step going forward for ICAR and its partners’ procurement strategy is identifying sectors where harm is most apparent and where the political atmosphere is most amenable to implementing a proactive policy to mitigate that harm. The particulars of a possible U.S. policy on procurement are also unclear at this point, though ICAR’s stage-based process should be used from the start in order to create a comprehensive and effective policy.

The primary issue facing disclosure initiatives is the SEC’s willingness to consider social disclosure as part of required disclosure. Furthermore, the content of the reports themselves is also of concern.

To be the most useful, reports should offer concrete case evidence of company practices instead of anonymous facts and figures. And, if an agency reporting system would fail to effectively monitor corporate practice, CSOs could consider creating their own collaborative audit process and turning the reporting project into a nongovernmental, independent one. No matter whether reporting is done to the SEC or an independent group, a final key consideration is the perception of investors on the value of having such reports at their disposal. Investor support for the disclosure process is an unparalleled ally in the fight to hold corporations accountable for human rights impacts at all points within their supply chains.

Breakout Session 4: Multi-Stakeholder Initiatives – Bangladesh and Beyond

Risks and Benefits of Multi-Stakeholder Initiatives (MSIs): The Bangladesh Accord Example

The discussion started with an overview of the challenges posed by broad multi-stakeholder initiatives (MSIs), as well as their value for corporate accountability.

Essential Considerations and Challenges for MSIs

Participants identified four key questions to consider when talking about the credibility of MSIs:

1. What is the quality of engagement with civil society? Within the MSI, the civil society presence should be robust, and its input must be part of the decision-making process.
2. Does the governance structure allow for balanced decision-making?
3. Is there transparency about the goals and the progress of the MSI?
4. Is there some level of remedy or a grievance process?

The recent 2013 Bangladesh Accord served as a convenient case study to demonstrate these considerations. The Accord is an independent and legally binding agreement between garment producers and civil society organizations that requires inspections of garment factories and public reporting of the inspections' findings. Although two companies signed on to the

MSIs face a number of challenges that can hamper their effectiveness. To start, if corporate participants in an MSI are not required make public commitments, there is no way to verify their progress and ensure accountability. Second, it is imperative that the right people are at the table both when the MSI is formed and as part of the governance structure. Another challenge identified relates to the risk that the proliferation of MSIs could present a barrier to policy unity, effectiveness, and clear public outreach. For example, In the case of the Bangladesh Accord, North American companies were hesitant to sign onto a legally binding document and instead created their own corporate-driven and more voluntary "Bangladesh Alliance." which has created some competition with the Accord. Finally, there is tremendous capacity needed to manage an effective MSI, as it can be seen with ambitious sector-wide initiatives like the Bangladesh Accord.

Tools for MSI Improvement

Legislation could be used to push better practice from MSIs. For example, the proposed Global Online Freedom Act (GOFA), included a "safe harbor" provision to disclosure requirements for companies involved with the Global Network Initiative (GNI), specifying that certain corporate conduct would be exempt from disclosure. GOFA lists a set of criteria that an MSI must meet before its members would be exempt from disclosing information required by the legislation.

Also, the organization MSI Integrity has developed a tool for evaluating the design of MSIs. The focus of the tool is on human rights, but it has broad application and should be public by the end of 2014.

Future Opportunities

It was recognized by participants that there are several members and partners of ICAR with expertise on MSIs. In the future, these groups could engage with each other to create a knowledge base and serve as a resource for other ICAR members seeking to learn best practices for MSI engagement.

Roundtable Session 1: International Developments

Closed strategy session.

Roundtable Session 2: Setting the Strategy and Building a Coordinated Movement

Closed strategy session.

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Access

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