

Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises

October 2016

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Acknowledgements

This paper was produced by ICJ staff with the research assistance of Benjamin Shea, Maria-Rosa Rinne and Divya Prasad, and thanks to the support of the Sigrid Rausing Trust and Misereor.

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Introduction

On 26 June 2014, the United Nations Human Rights Council (HRC) adopted Resolution 26/9 establishing an “open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” with the mandate to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (OP1).

Resolution 26/9 set out a road map for the work of the OEIWG, with the HRC deciding that the first two sessions would “be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument” (OP2) and the first meeting would collect inputs on “possible principles, scope and elements” of such instrument. The Chairperson-rapporteur was tasked with the preparation of elements for a treaty for negotiations to start at the third annual session (in principle, in 2017).¹

The first session of the OEIWG took place from 6 to 10 July 2015 with the attendance of a number of delegates from governments, international governmental organizations, such as OECD, Council of Europe, International Labour Organization, and UNCTAD, national human rights institutions and non-governmental organizations with ECOSOC status. The Report of that session was presented to the Human Rights Council in March 2016.² The second session will take place between 24 and 28 October 2016.

The International Commission of Jurists supports the objective of establishing an international legally binding instrument on transnational corporations and other business enterprises, with a focus on business accountability and access to effective remedies for human rights abuses by business enterprises. There is a substantial international protection gap to be filled in this respect, on which the ICJ has previously commented extensively.³ It is with a view to closing this gap and ensuring that international human rights law can optimally fulfil its protective function that the ICJ is engaging in the present treaty process.

This paper proposes a series of substantive elements that the ICJ considers will be key to an effective treaty as a contribution to the ongoing discussions about the future instrument. It does not intend to be exhaustive as to such elements. The ICJ has already published a paper focused on issues of scope of businesses to

¹ Human Rights Council, Resolution A/HRC/RES/26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

² See Human Rights Council, Report of the Chairperson –Rapporteur on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument (A/HRC/31/50)

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/50

³ ICJ, Needs and Options for a New International Instrument in the field of business and human rights, Geneva, June 2014, available at: http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf

be addressed in the treaty, in particular the meaning or “transnational corporations (TNCs) and other business enterprises” a question which remains unresolved and is contentious in the OEIWG discussions.⁴ The present paper will focus on the possible content of the prospective treaty.

1. General remarks on approach and objectives of the treaty

There are two issues that need clarification before proceeding with proposals as to contents. The first concerns the question of which kind of entity the duties established in the treaty are to be addressed: States or businesses? The second is in relation to proposals that have arisen on the possibility of creating an international tribunal with jurisdiction over claims against business enterprises.

1.1 The nature of the obligations of business enterprises

There is considerable debate as to whether a global agreement on business and human rights should establish obligations only for States arising from their duty to protect against the human rights impacts of business enterprises (which could also be seen as entailing indirect obligations for companies), or duties that would be directly incumbent on companies themselves.

The ICJ considers this dichotomy to be misconceived and not the most helpful way in which to frame the discourse. On the one hand, any treaty surely should set out standards of conduct for businesses, as well as for States. On the other hand, the task of supervising, regulating and enforcing any such standards and providing remedies for their breach necessarily will have to fall on States. Aside from the legal, conceptual and practical difficulties that would arise, there is simply no international governance machinery that would be practically capable of fully implementing an international agreement without the concurrence of domestic institutions and mechanisms. Even if proposals to establish international remedial mechanisms for abuses were to be adopted, these would likely have to complement first instance remedies at the domestic level that proved unavailable, inaccessible or ineffective.

While some have suggested that a new form of international law making is required that would directly engage the responsibilities of companies, many of the proposals offered by both States and civil society embrace an approach more in line with commonly accepted understandings of international law. For instance, a 2013 statement endorsed by a platform of 620 civil society organizations, including the ICJ, as well as hundreds of individuals called for a treaty that affirms “the applicability of human rights obligations to the operations of transnational corporations and other business enterprises”, and in which “States provide for legal liability for business enterprises for acts or omissions that

⁴ ICJ The scope of a legally binding instrument on business and human rights: Transnational corporations and other business enterprises, May 2015, available at: <http://icj2.wpenline.com/wp-content/uploads/2015/07/Global-Report-ScopeBusinessTreaty-2015.pdf> (accessed 30 September 2016)

infringe human rights".⁵ This statement calls for international standards that would make human rights applicable to business enterprises without being explicit about whether those obligations would be directly or indirectly binding onto business. The statement does however make clear that States should have a key role in their domestic enactment and implementation. Therefore, the following set of proposals will focus on both obligations for States in relation to business enterprises and for standards regarding business enterprises conduct that needs to be implemented through State-based mechanisms.

1.2 Calls for an international tribunal for corporations

Several advocates in the field of business and human rights have suggested the establishment of an international tribunal or court to try corporations for cases of human rights abuses.⁶ The idea has not been the subject of detailed elaboration or dedicated discussion either in the OEWG or other bodies of the UN Human Rights Council. The idea of an international tribunal with jurisdiction over corporations is not new and should be understood in the context of the need to fill accountability gaps that result from weak or dysfunctional national legal and judicial systems. In this respect, irrespective of whether a tribunal would be able to pursue a significant number of cases, international justice is still an important avenue to ensure justice and remedies for victims of rights violations because of the impact of an international judicial authority's decisions on national laws and procedures that tend to align themselves with the requirements and jurisprudence generated by such tribunals.⁷

Proposals by experts made so far include the initiative for a World Court of Human Rights, whose proponents initially suggested it would have also jurisdiction on corporate bodies.⁸ A more recent initiative has proposed an International Arbitral Tribunal.⁹ At the negotiations of the Rome Statute for an International Criminal Court France proposed an amendment, supported by some State delegations, to include corporations within the jurisdiction of the new court,

⁵ Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, <http://www.treatymovement.com/statement-2013> (accessed 20 June 2016)

⁶ See Cassel, D and Ramasastry, A (2016) "White Paper: Options for a Treaty on Business and Human Rights," *Notre Dame Journal of International & Comparative Law*: Vol. 6:1; Gallegos, L.& Uribe, D. The Next Step against Corporate Impunity: A World Court on Business and Human Rights? *Harvard Law Review*, 2016 vol. 57 at 7

⁷ Needs and Options Op cit note 3, p. 38

⁸ Novak, M et al "A World Court of Human Rights- Consolidated Draft Statute and Commentary, May 2010, available at <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf>. See also current proposals of a court without jurisdiction over corporate bodies for the moment, Swiss Initiative, Agenda for Human Rights, project on a World Court for Human Rights, <http://www.udhr60.ch/research.html>; see also International Commission of Jurists, Towards a World Court of Human Rights, December 2011, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf>

⁹ Cronstedt, Chambers, Margolis, Ronnegard, Thompson and Tyler, An International Arbitration Tribunal On Business & Human Rights – Reshaping The Judiciary, April 2014, available at: http://www.globalgovernancewatch.org/docLib/20140430_International_Arbitration_Tribunal_BHR.pdf

but it was not successful.¹⁰ At the regional level, a new Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Article 46C) expands the jurisdiction of the Court to try a number of crimes when committed by corporations.¹¹

While the need and the potential contribution of an international justice mechanism to the protection of human rights in the context of corporate operations may be clear, the creation of such international tribunal faces a series of challenges that need to be tackled first. One of them is the creation of a body of international law that such tribunal would eventually apply. This is closely linked to the question of whether such a court would be one of civil or criminal nature or both.¹² It may be argued that the treaty itself would contain such international law, but framing the discussions on the treaty with an international tribunal as main objective would entail an early choice of format that will unavoidably leave outside of the discussions a number of key issues that are addressed, for instance, in the present paper. These issues are regarded as crucial including by the same proponents of an international tribunal. Another consideration, not a minor one, is the political support that will be needed, associated also to the financial costs to be incurred. To date, there is no evident support among States for such a court. The current international environment of certain "fatigue" of international courts, as well as the fiscal austerity affecting the developed economies that are most likely to finance such judicial enterprise suggest that these debates may be suitably better postponed for a later stage after a first legally binding instrument is concluded and is in force or, alternatively, be reserved for discussions on an additional protocol to the main treaty.

1.3 The objectives of the agreement

The ICJ supports a legally binding instrument with a strong focus on legal accountability of TNCs and other business enterprises and remedies for the victims in cases of abuses.

The content of the provisions in the new treaty are likely to be influenced by content and language in existing and past instruments in the same or connected fields. Some of these instruments, although not of binding character may contain elements that reflect settled international law and/or enjoy wide support such as the UN Guiding Principles on Business and Human Rights that was adopted by consensus of the Human Rights Council in 2011, and the 2003 UN Sub-Commission Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which while not adopted or universally accepted, did garner substantial support among human

¹⁰ Clapham, A. 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in *Liability of Multinational Corporations under International Law*, ed. Menno T. Kamminga and Saman Zia-Zarifi (Kluwer Law International, 2000), 139-96.

¹¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Min/7(I) Rev. 1; In: The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, EX.CL/846(XXV) 20 -24 June 2014

¹² Cassel & Ramasastry, Op cit note 6, p. 29-33

rights stakeholders. Other instruments to consider include the ILO Tripartite Declaration on Social Policy and Multinational Enterprises.¹³

There are also a number of global and regional instruments and jurisprudence that have partially addressed some aspects of business and human rights.¹⁴

In terms of format, the ICJ favours a stand-alone general treaty, leaving open the possibility that additional or optional protocols addressing particular sector-specific or normative elements, or creating international justice mechanism may follow. To adequately address the main pressing issues in the field of business and human rights and, at the same time, address the wide diversity of business enterprises' size and contexts of operation the prospective treaty will probably have to be one of general coverage while providing also for clear and meaningful obligations. This treaty should have at least the following objectives, which should be stated in the main text of the treaty:

- To affirm, as legal principles, the basic human rights duties of States and business enterprises,
- To create an international framework to facilitate national level preventive efforts tackling business human rights abuse and legal accountability of TNCs and other business enterprises,
- To enhance a system of national remedies for victims of human rights abuse perpetrated directly or indirectly by business enterprises,
- To provide for an international framework for international cooperation, including mutual legal assistance to tackle business enterprises human rights-related abuses

The proposals and commentary below outlines in a non-exhaustive manner some of the principal issues and their respective content in the treaty. They are elaborated in the form of elements and/or issues that might be addressed, but do not suggest specific textual language for treaty purposes.

¹³ Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, annexed to Report A/HRC/17/31; Responsibilities of Transnational Corporations and Other Business enterprises with regard to Human Rights, Sub-commission Resolution 2003/16, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003; Committee on the Rights of the Child; General Comment 16 on State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16, 17 April 2013. See also, ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm ; OECD Guidelines for Multinational Enterprises at <http://mneguidelines.oecd.org/guidelines/>

¹⁴ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002; United Nations Convention against Transnational Organized Crime of 15 November 2000, and the United Nations Convention against Corruption of 31 October 2003; Criminal Law Convention on Corruption (ETS No. 173), the Convention on Cybercrime (ETS No. 185), the Convention on Action against Human Trafficking (ETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201), the Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS No. 210)

2. Obligations and responsibilities of States and business enterprises

Both States and business enterprises (transnational or solely domestic) have their respective obligations and responsibilities independent from each other but interrelated. International human rights obligations for States are contained in the respective treaties or flow from international customary law, while the human rights responsibilities of business enterprises are sparse in legally binding instruments (such as certain ILO conventions), but have been spelled out to some extent in such non-treaty instruments as the Guiding Principles on Business and Human Rights (UNGP), the ILO Tripartite Declaration on Multinational Enterprises and Social Policy (ILO MNE Declaration).

It would seem appropriate that a new business and human rights treaty affirm clearly, in a section on general principles and as a matter of law, the foundational principles of those States obligations and business enterprises responsibilities. Those general obligations and responsibilities coalesce around the State duty to protect human rights, including against business abuse, and ensuring the business responsibility to respect all human rights. The UNGP are built on three pillars: the duty of States under international law to protect human rights against abuses by third parties, including business enterprises; the responsibility of business to respect all human rights; and the need to guarantee access to a remedy for those whose rights have been impacted by business conduct. Under the duty to protect, States, in assessing, adopting and implementing protective measures, including through legislation, have to take account of all of their international human rights legal obligations.

One of the principal areas the OEWG needs to address is the substantive scope (*rationae materiae*) of the prospective treaty: which particular rights and rights areas the treaty is to cover. It should be recognized that all States already have obligations to protect all human rights against the conduct by business enterprises in respect of which they have treaty or customary international law obligations. From both principled and practical perspectives, there is no strong rationale for the prospective treaty to exclude any of the international human rights recognised in core treaties from its ambit. The OEWG should be aware that adopting an exclusive focus on certain kind of violations- such as "gross human rights violations"- may ultimately operate to facilitate such an exclusion. Yet it is clear that all human rights are relevant for business operations and all rights are susceptible of been infringed by business conduct. This conclusion is affirmed by various authorities, including UN human rights treaty bodies who have indicated that the obligation to protect from business abuse applies to the range of rights covered in their respective treaties.¹⁵ To that end, the Committee on the Rights of the Child has recently adopted a General Comment on State Obligations

¹⁵ See Human Rights Committee General Comment 31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004; Special Representative of the Secretary General on Business and Human Rights, Report on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035, 9 February 2007, paras. 10 and ff; See State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties Individual report on the ICCPR (Report No. III) Prepared for the mandate of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises with the support of the Office of the UN High Commissioner for Human Rights June 2007

regarding the Impact of the Business Sector on Human Rights,¹⁶ and the Committee on Economic, Social and Cultural Rights is presently contemplating a similar General Comment with respect to businesses in relation to State obligations under the Covenant on Economic, Social and Cultural Rights. For a new treaty on business and human rights to fail to absorb this *acquis* in international standards would be a regressive step.

The following elements should be included to reflect States and business respective obligations and responsibilities:

- The reaffirmation of the general State duty to respect human rights and protect them against abuses by third parties, particularly business enterprises. This duty comprises the duty to take necessary and appropriate measures, including legislative, to ensure business enterprises domiciled in the concerned country respect human rights in their global operations (i.e. including those taking place abroad)
- The reaffirmation of the principle that transnational corporations and other business enterprises have a responsibility to respect all internationally recognized human rights.

These principles, suggested as elements to be affirmed in the treaty, find support not only in existing international human rights treaties and the UNGP, but also in international and regional declarations and jurisprudence and recommendations of human rights authorities. UNGP foundational principles 1 and 2 restate the general obligation of states to protect all human rights, including extraterritorially, and principles 11 through 15 lend support to the business responsibility to respect all human rights. Those principles have drawn further support from the work of UN bodies, especially General Comment 16, and the Council of Europe recommendation of 2016.¹⁷

3. The responsibility of TNCs and other business enterprises to respect all human rights

Pursuant to their general obligation to respect, transnational corporations and other Business Enterprises (TNC-OBE) should carry out a series of actions to discharge their responsibility to respect all human rights. These include, among other things, the adoption of policies or codes of conduct; undertaking human

¹⁶ General Comment 16 Op cit note 13

¹⁷ General Comment 16, Op Cit note 13 para.24-31; and Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, (Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies), at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2016\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2016)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true), para 13, 15 and 16

rights due diligence measures; and adopting and implementing effective remediation processes. Preventative measures adopted by TNC-OBE are necessary to avoid or reduce the number or scale of human rights abuse and the eventual need to stop, sanction and remedy misconduct. Prevention is in all cases necessary to complement the effectiveness of any sanctions regime.

The following elements should be included to operationalize the TNC-OBE responsibility to respect all human rights:

TNC-OBE will have the responsibility to:

- Design, adopt, and implement effective policies and due diligence processes to identify and address risks of human rights abuses in their global operations, and to mitigate and when appropriate remedy them.
- Design, adopt, and implement policies or codes of conduct in accordance with internationally recognized human rights standards and establish internal processes to verify actual compliance during business operations.
- Design, adopt, and undertake Human Rights impact assessments that cover all main areas of their operations, including global business operations, and are designed and implemented with the active participation of local communities and other stakeholders.
- Take measures to respect impact assessments carried out by local communities through legitimate internal processes and take measures to incorporate their findings and recommendations in the business operations.
- Carry out consultations with local communities, including indigenous peoples seeking their free, prior and informed consent before undertaking business activities that will impact their human rights.
- Report periodically on the steps taken to assess and address human rights impacts.
- The above measures should be adopted with due regard to the size, sector, operational context, ownership and structure of the business enterprise, and conform to internationally recognized human rights standards.

States must adopt legislative and other measures to provide a policy and legal framework that ensures business enterprises observe their human rights responsibilities described above. To this end, States must:

- Adopt regulations and enforcement measures to ensure business enterprises take effective steps to fulfil their responsibilities, on a sector-by-sector basis. This would include the requirement to adopt an approved policy or code of conduct and human rights due diligence

processes as conditions to access government contracts or financial support

- Exercise such regulatory activity extraterritorially, particularly where required under international law and standards.¹⁸
- Establish a national authority to oversee business enterprises adopt a human rights policy or code of conduct that conforms with internationally recognized human rights standards; to this end, a model human rights code of conduct may be included in the prospective treaty as an annex or created later by an international monitoring body for the treaty
- The regulatory process for approval of licenses and permits for certain kind of business operations involving potentially hazardous activities for the enjoyment of human rights should include an obligation to obtain a social license to operate in the form of fully informed community consent.¹⁹

Under international human rights law, States are required to take measures to protect persons against the impairment of human rights by non-States actors, including business enterprises. This principle is also reflected in the UNGP. State action pursuant to international obligations to protect against the abusive conduct of non-State actors involves requiring business entities to assess, prevent and mitigate risks of rights abuses during their operations, and to take measures to remediate the damage when it occurs.

Companies must develop and implement robust human rights due diligence procedures to ensure human rights compliance. Due diligence analysis has been an area of growing attention in the business and human rights field, and the developments in this area may well be used as a basis to inform the development of elements in the treaty. UNGP Principle 15 provides that business enterprises “should have in place policies and processes” in order to meet their responsibility to respect, including “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”.

One critical area in the discussion and operationalization of human rights due diligence by companies is their scope, in particular the need to cover subsidiaries and suppliers or other commercial partners operating abroad. Some of the specific proposals draw inspiration from the UNGP and propose making human rights due diligence a legal requirement. For instance, *Coopération Internationale*

¹⁸ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, The Principles and Commentary are available at <http://www.icj.org/protecting-human-rights-beyond-borders/> (accessed 23 March 2014) at 25

¹⁹ CIDSE, Human Rights Due Diligence: Policy Measures for effective implementation, September, 2013, at http://www.fastenopfer.ch/data/media/dokumente/entwicklungspolitik/menschenrechte/cidse_hr_due_diligence_2013.pdf p. 7

pour le Développement et la Solidarité (CIDSE) has proposed that States must “make human rights due diligence a requirement for businesses, everywhere they operate”, and that remedies should be available “for cases where businesses do not meet this requirement and human rights violations occur.”²⁰ Skinner, McCorquodale, and De Schutter advocate for the affirmation of “the duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations”, as part of the due diligence necessary to meet the corporate responsibility to respect human rights as set out in the UNGPs.²¹ Amnesty International has formulated similar recommendations.²² In addition, so as to increase access to information, the organization recommends that States “require companies to implement human rights due diligence processes”, including reporting on due diligence processes and impacts, and implementing “environmental, social and human rights impacts assessments”.²³

A White Paper for the American Bar Association outlines several options ranging from requiring businesses to report publicly on their human rights policies, risks, outcomes and indicators to requiring businesses to adopt policies, due diligence processes, human rights conditions in their supply chain contracts and remediation mechanisms, which could be considered during the debates within the OEWG.²⁴

State practice in this area is limited to a few initiatives as yet but is steadily growing. Legislation in the US and European countries requires disclosure or public reporting by companies, but is mostly directed to a limited number of rights areas, such as slavery, forced labour or abuses committed in conflict situations and limited to the largest companies.²⁵

A draft bill still under discussion in France’s Parliament would require businesses employing more than 5,000 people if their headquarters are in France or at least 10,000 people if their headquarters are in France or abroad, to adopt and implement a plan *de vigilance* requiring some form of due diligence. The plan would consist of reasonable measures to “identify and prevent risks of abuses to human rights and fundamental freedoms”, serious bodily and environmental harm or sanitary risks resulting from its own operations and from those of the corporations it controls directly or indirectly, those operations of sub-contractors or suppliers with whom it maintains a settled commercial relationship.²⁶ The plans must be made public and included in the company’s non-financial annual report. Any person with a legitimate interest has a legal cause of action to demand the

²⁰ Ibid p. 4

²¹ Skinner, G, McCorquodale, R, De Schutter, O. “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business”, ICAR, CORE and ECCJ, 2013, p. 65

²² Amnesty International, *Injustice Incorporated: Corporate abuses and the Human Right to Remedy*, 2014 p. 209

²³ *ibid* p. 210

²⁴ Cassel, D and Ramasastry, A., *Op cit* note 6 p. 18-19

²⁵ Directive 2014/95 of the European Union Parliament and of the Council of 22 October 2014; Modern Slavery Act 2015, United Kingdom, <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

²⁶ Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. (free ICJ translation from original French)

adoption of the plan and its publication. Lack of observance of the law may be punished with a fine up to 10 million Euros.

Human rights impact assessments, which may be part of a broader environmental and social impact assessment or stand alone, in particular in the area of extractive operations and land and agro-industries projects, should also be adopted as effective tools in the prevention of harm. Impact assessments should be conceived as part of a broader integrated due diligence process, also comprising the elements of mitigation of risks and external communication. However, at present most States only make use of environmental and social impact assessments as independent tools in certain economic areas.²⁷ Impact assessments seem to be more common in the practice of financial institutions, although their focus on specific group rights tends to be limited.²⁸ These are shortcomings that the new treaty should seek to address.

Participation and consultation in decision-making by individuals and communities that are at risk of adverse impacts on the enjoyment of their human rights, especially from large-scale development projects, is another crucial element. Community participation may be relevant to the implementation of all business enterprises responsibilities but consultation is particularly important in certain projects that may impact land, health, housing, water and food rights. In this respect, it should be underscored that the UN Declaration on the Rights of Indigenous People (UNDRIP) of 2007 recognizes that indigenous peoples have the right to participate in decision-making in matters impacting their human rights.²⁹ States should consult and cooperate with indigenous peoples in order to obtain their free, prior and informed consent (FPIC) "before adopting and implementing legislative measures that may affect them".³⁰ While these standards are directly applicable to indigenous peoples through the Declaration, the underlying principles should be seen as similarly applicable to other affected individuals and communities.

As part of their general duty to protect, States should regulate on a sector-by-sector basis, to enhance business enterprises' respect for human rights in their global operations. State agencies or authorities with responsibility to regulate the activities of businesses in particular sectors (e.g., communications, transportation, military, security, extractive industries, public utilities, land and agricultural, education) or in respect of certain forms of activity (e.g. labour, trade, investment, development, (bilateral and multilateral)) should adopt and implement enforceable rules with a view to ensuring human rights compliant

²⁷ For instance, Sweden guidance on EIA at <https://www.slu.se/Documents/externwebben/centrumbildningar-projekt/mkb-centrum%20dokument/Helpdesk/Sustainable%20development%20guidelines%202002.pdf> last accessed 20/11/14; and also the regional Welsh Government Policy on Health impact assessment in open cast mining, at <http://wales.gov.uk/docs/desh/publications/090602mimppscoaltan1.en.pdf> last accessed 13/02/15

²⁸ ICJ, Financial Institutions and the Rights of the Child: An Overview of Policies and Accountability Mechanisms, Geneva, 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/FINANCE-CHILDelecversion.pdf>

²⁹ United Nations Declaration on the Rights of Indigenous People (UNDRIP), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 September 2007), art. 18

³⁰ Id. art. 19

practices by businesses within their ambit. Where significant gaps in regulatory authority exist in respect of certain sectors, States should adopt legislation to address these gaps.

A crucial area regarding the States' obligation to protect concerns discharging that obligation extraterritorially. Under international human rights law, States have an obligation to respect, protect and fulfil human rights both within their territories and extraterritorially, although the nature and scope of territorial and extraterritorial obligations are not in all contexts and situations coterminous. This dimension of the State duty to protect has been distilled in Principle 25 of the Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, underlining the obligation of States to adopt and enforce measures to protect human rights through legal and other lawful means where the corporation or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.³¹

4. Legal accountability of TNCs and other business enterprises

The obligation of States to establish an effective legal framework for legal accountability of business enterprises for their causing or contributing to human rights abuses must be considered as among the most important objectives of the prospective treaty. Addressing the legal responsibility of the potential perpetrators of human rights abuses is also closely linked to the realization of the right of victims to an effective remedy and reparation. Ensuring accountability can constitute a component of reparation, as well as provide for the condition by which remedies may be achieved.

Availability and effectiveness of remedies to provide redress to those who suffer harm as a result of the acts or omissions of business enterprises is the area where there is the most pressing need for action. This is an area that has been placed as a priority area by civil society groups, including the ICJ, and also by international organizations.³² In 2016, the Office of the High Commissioner for Human Rights published its final report and guidance on business accountability and access to remedy and the Council of Europe's Committee of Ministers

³¹ Maastricht Principles, 25:

"a) where the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory; e) where any conduct impairing [human] rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction."

³² See ICJ reports on Access to justice for business human rights abuse on various countries at <http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/>

adopted a set of recommendations that focus heavily on legal remedies.³³ In addition, several academic research projects have made important contributions to clarify the problems and outline some possible solutions.³⁴ There is thus a wealth of supportive material that can usefully feed into the deliberations of the OEWG regarding the legal accountability of business enterprises.

It is therefore necessary to define the kind of conduct that would trigger legal responsibility for business enterprises, within the terms of the treaty. The engagement of such liability would then necessarily give rise to the responsibility to provide redress to the victim.

There is currently no general international legal regime on corporate liability for human rights abuses, although it has been asserted in ATS litigation in the United States, that general international law (the "law of Nations") already provides a subject matter basis for corporate criminal and civil liability.

Despite the importance of legal accountability and access to effective remedies against business abuses, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography's (OPSC) Article 3(4), is the only human rights treaty that provide expressly for legal accountability (criminal, civil or administrative) of legal entities, including business corporations.³⁵

The OPSC draws on provisions incorporated in the UN Conventions on combating corruption and organized crime.³⁶ There are several other conventions adopted within the framework of the Council of Europe that provide for legal liability of

³³ OHCHR Report Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19, 10 May 2016; Council of Europe Recommendation 2016/3, Op cit note 17

³⁴ Human Rights in Business: Removal of Barriers to Access to Justice in the European Union, 2016, available at <http://humanrightsinbusiness.eu/>

³⁵ See Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002: "Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

- a. Sexual exploitation of the child;
- b. Transfer of organs of the child for profit;
- c. Engagement of the child in forced labour;

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

....

4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative."

³⁶ United Nations Convention against Transnational Organized Crime of 15 November 2000, and the United Nations Convention against Corruption of 31 October 2003

legal persons. These include the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health; the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; the Convention on Action Against Trafficking in Human Beings; and the Convention on Cybercrime.³⁷

These Conventions have the advantage of addressing business as legal persons with their own rights and obligations, besides recognizing the importance of individual criminal responsibility of managers and directors. At the same time, they generally adopt a flexible system of legal responsibility for these legal persons (criminal, civil or administrative) that is better adapted to the diverse approaches and national legal systems and traditions. Most of those conventions also explicitly provide that the legal liability of the legal person is without prejudice of the liability of the natural person that may be involved in the commission of the offence. However, these treaty regimes do not address clearly the reality that groups of (business) legal persons in practice operate as an economic unity, even though legally they are separate and distinct legal persons, and one enterprise within the group may contribute to the harm caused by another enterprise within the group even if each operates in different countries. What is typically known as a transnational corporation is in fact a group of enterprises - separate legal and/or natural persons- operating in a coordinated fashion as an economic unity across jurisdictions.

The Council of Europe Convention on the Protection of the Environment through Criminal Law (not yet in force) seems to adopt an approach that emphasizes corporate criminal liability (Article 9). This Convention recognizes that a number of serious offences against the environment that endanger life and physical integrity of natural persons should be criminalized under national law.³⁸

Although this Convention has been ratified by only one State of the three needed for it to enter into force, it has been influential at the level of the European Union where Directive 2008/99/EC on the Protection of the Environment through Criminal Law was adopted modelled on its provisions.³⁹ The model of criminal liability chosen by this Convention is also followed in a reduced number of other conventions, including the Council of Europe Conventions on Corruption (Article

³⁷ Criminal Law Convention on Corruption (ETS No. 173); the Convention on Cybercrime (ETS No. 185); the Convention on Action against Human Trafficking (ETS No. 197); the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201); the Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS No. 210)

³⁸ Council of Europe, Convention on the protection of the environment through criminal law, adopted on 4 November 1998, Strasbourg, <http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm> (Accessed 28 March 2014). Article 9 of the Convention provides for corporate liability, as follows:

"1. Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative.

"2. Corporate liability under paragraph 1 of this article shall not exclude criminal proceedings against a natural person."

³⁹ Council of Europe, Directive 2008/99/EC on the Protection of the Environment through Criminal Law, 19 November 2008, Official Journal of the European Union, L328/28, 6 December 2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF>.

18); the African Union Convention on Cyber Security and Personal Data Protection (article 30.2); and specially the recently adopted (not yet in force) Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46C of which grants the Court jurisdiction over a series of crimes committed by legal persons including crimes against humanity, war crimes, various trafficking offences and mercenarism.⁴⁰

A number of ILO Conventions establish responsibilities of employers (including business enterprises), for instance in relation to health and safety, but do not explicitly provide for legal responsibility of employers as legal persons. Article 9 of the Convention 155 of 1981 on Occupational Safety and Health⁴¹ prescribes that the enforcement of laws and regulations concerning occupational safety and health and the working environment "shall be secured by an adequate and appropriate system of inspection" and that the "enforcement system shall provide for adequate penalties for violations of the laws and regulations". The Convention concerning Benefits in the Case of Employment Injury,⁴² guarantees a series of entitlements for worker victims of employment accidents and injuries, but do not specifically require the domestic enactment of legal liability for business entities.

The general duty under various human rights treaties to ensure the realization and the protection of rights includes the duty to establish a national legal framework – including criminal law in the case of protection of the right to life - as a key element. The legal framework should in principle address also the

⁴⁰ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Min/7(I) Rev. 1; In: The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, EX.CL/846(XXV) 20 -24 June 2014

"Article 46C - Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

....

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."

"Article 28A

International Criminal Jurisdiction of the Court

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:

- 1) Genocide
- 2) Crimes Against Humanity
- 3) War Crimes
- 4) The Crime of Unconstitutional Change of Government;
- 5) Piracy
- 6) Terrorism
- 7) Mercenarism
- 8) Corruption
- 9) Money Laundering
- 10) Trafficking in Persons
- 11) Trafficking in Drugs
- 12) Trafficking in Hazardous Wastes
- 13) Illicit Exploitation of Natural Resources
- 14) The Crime of Aggression"

⁴¹ Convention concerning Occupational Safety and Health and the Working Environment (Entry into force: 11 Aug 1983) Adopted at 67th ILC session (22 Jun 1981)

⁴² Convention concerning Benefits in the Case of Employment Injury (Entry into force: 28 Jul 1967) Adopted at 48th ILC session (8 Jul 1964)

conduct of legal persons that impair the enjoyment of human rights, but State practice is inconsistent and highly diversified. While many States have in their national legal framework provisions establishing legal liability of legal persons (including business corporations), many others do not or provide for it only partially. Company directors, as natural persons, in principle fall within the scope of application of criminal law, including international criminal law, but the conditions and modalities of attribution of responsibility to those individuals on account of corporate crimes remain unclear and subject to insufficient state practice.

Legal liability for business enterprises in domestic law typically includes responsibility under criminal, civil and administrative law. In certain jurisdictions, constitutional law plays a role in the protection of rights. The business liability landscape thus presents a combination of public and private law substantive and procedural elements. The protection of human rights being traditionally understood as something within the realm of public law (including constitutional, administrative and criminal law) it makes sense to assign to that branch of domestic law a leading or predominant role in upholding human rights vis a vis potential corporate abuses. However, the reality shows that those affected by business abuse, especially in certain jurisdictions, tend to use also private law (specifically the law of civil remedies –or non contractual responsibility), which is in principle ill-suited to deal with issues of public concern and interest such as human rights but may be transformed to better respond to the challenges of contemporary corporate abuse. The trends and problems in the practice of states in these areas of law have usefully been explored in various pieces of work.⁴³

Corporate Criminal liability

Although corporate criminal responsibility is not yet universally accepted, the underlying principle *societas non delinquere potest* (society cannot commit a crime) is in retreat in all regions of the world and a growing number of countries have now accepted some form of corporate criminal responsibility or its equivalent through administrative procedures. A comparative research commissioned by the European Union in relation to criminal legal liability of legal entities (including business enterprises)⁴⁴ also found that 50 percent of EU Member States have introduced general criminal liability in their legal systems and 41 percent recognize criminal liability of legal entities only for specific offences. Among those States that recognize only administrative liability of legal entities, 39 percent have introduced general administrative liability, whereas 33 percent have liability for specific offences. States that adopt legal liability of legal entities only for specific offences do so mostly with regard to trafficking in human beings, sexual exploitation of children and child pornography, environmental crime, illicit trade in human organs and racism and xenophobia.⁴⁵ There is a noticeable correlation between offences recognised in domestic law and the

⁴³ Needs and Options Op Cit note 3 p. 17; Zerk, J Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies, 2014 <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> p. 71

⁴⁴ Liability of Legal persons for offences in the EU, G. Vermeulen, W. De Bondt, Ch. Ryckman, IRCP- Series, Vol. 44, Antwerpen, 2012- p. 79 and ff.

⁴⁵ Ibid. p. 83

international treaties that explicitly require States to establish legal person liability for such offences. But it is clear that corporate criminal liability in many countries does not exist and where it exists covers only a heterogeneous set of serious human rights abuses and not others.

The doctrinal concepts or tests used to attribute criminal responsibility to a corporation also differ across jurisdictions. Some States use some form of theory of identification, whereby the acts and mental state (*mens rea*) of the manager or CEO may be treated as the “directing mind” of the corporation and this mental state is attributed to the corporation. Others use the theory of *respondat superior* (or vicarious liability) whereby the company as employer is responsible for the acts of its subordinates, as in the relationship of employer-employee or superior-subordinate. A third group uses a more novel concept of “corporate culture” to identify the corporate policies and procedures that have created a culture permissive or conducive to the commission of the offense. States use one or a combination of these approaches.⁴⁶

Because the practice of states in relation to corporate criminal responsibility is too limited, divergent and recent, it is difficult and probably counterproductive to require States to adopt any particular doctrine as a general test for attribution of responsibility. The most practical option at this stage is to allow states enough flexibility in that regard taking into account the need to ensure effective legal accountability of businesses enterprises.

In all cases, the offences have to be defined with sufficient clarity to meet the requirements of legality.

The ICJ recommends as elements of the treaty:

States party to the agreement must adopt effective legislative and administrative measures, in accordance with their national legal systems and principles, to establish in law the legal liability of business enterprises, in particular corporations, subject to their jurisdiction for business conduct that results in harm to human rights. Such responsibility should, as appropriate, be criminal, civil or administrative.

States must adopt measures to establish criminal responsibility or its equivalent for business enterprises subject to their jurisdiction for business-related human rights offences.

The following violations recognized as crimes under international law and for which international law require the imposition of criminal sanctions should be incorporated in national corporate criminal law:

- war crimes, crimes against humanity and genocide (as defined under international law in such sources as the grave breach provisions of the 1949 Geneva Conventions and 1977 Additional

⁴⁶ Wells, Celia, “Corporate Liability Principles” paper for the ICJ Panel on Corporate Complicity (on file); Stewart, James G. Corporate war crimes, Open Society Justice Initiative, 2012.

Protocols, the Rome Statute for the International Criminal Court, and customary international humanitarian and human rights law).

- torture,
- cruel, inhuman or degrading treatment,
- enforced disappearance,
- extrajudicial execution,
- slavery and slavery-like offences,
- forced labour and similar forms of forced labour,
- forced displacement of people,
- forced eviction,
- the use of child soldiers
- sexual violence.⁴⁷

States party must adopt legislative or other necessary measures to make applicable to business corporations the crimes recognized in their domestic legislation.

The criminal responsibility of the business corporation does not exclude the criminal responsibility of company directors, managers or employees

⁴⁷ See, for instance, Convention against Torture and other cruel, inhuman or degrading treatment or punishment (Art. 4); International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 7 and 25); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Art. 3); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Art. 4); Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Art. 5); Inter-American Convention to Prevent and Punish Torture (Art. 6); Inter-American Convention on Forced Disappearance of Persons (Art. III); and Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Art. 7). See also: Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 1); Declaration on the Elimination of Violence against Women (Art. 4); Declaration on the Protection of All Persons from Enforced Disappearance (Art. 4); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principle 7). The UN Human Rights Committee has affirmed in its General Comment 31 that for certain obligations under the ICCPR there is an obligation for States to criminalize, at the very least, conducted amounting a violation of the right to life (eg, extrajudicial executions), torture and cruel, inhuman or degrading treatment or punishment and enforced. See Human Rights Committee General Comment 31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, para 18; Human Rights Council, Basic Principles and Guidelines on Development based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Document No. A/HRC/4/18. Online Version: http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf; UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity (UN Impunity Principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005; Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 110th meeting of the Ministers' Deputies, available at http://www.coe.int/t/dgi/publications/others/h-inf_2011_7en.pdf

for their own conduct that constitutes a crime under the present treaty. The criminal responsibility of the business corporation should be independent from the finding of individual criminal responsibility of one of its members.

Irrespective of whether they are directed against natural or legal persons, investigations should be adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation. There is a duty to prosecute where the outcome of an investigation warrants this. Victims are entitled to request an effective official investigation, and any decision not to start an investigation, or to stay an investigation or prosecution should be sufficiently reasoned.

States should adopt legislative and other measures to ensure that the legal persons found responsible for the commission of offences defined in the treaty shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. A model law or appendix to the treaty may list the sanctions and penalties that can potentially be applied.

The treaty should also provide for States to adopt legislative and other measures to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal or other offences established in the treaty, or property the value of which corresponds to such proceeds.

The doctrines on penalties and sanctions have developed mainly in relation to natural persons and States, with those corresponding to legal persons still largely underdeveloped. However, adequate, effective and proportional penalties play important functions in relation to those legal persons, in particular a dissuasive function. Sanctions and penalties have also a remedial function since part or all of the penalty may serve to repair the harm caused. Economic or monetary penalties are usually appropriate to target economic actors, but other sanctions such as temporary suspension, exclusion from economic or financial benefits or services provided by the government or the black-listing of the company can also be effective and dissuasive.

Civil liability for business enterprises

Laws providing for civil remedies are common to most legal systems in the world, and serve as significant tools to redress harm committed by legal persons.⁴⁸ However, a number of substantive, procedural and practical obstacles often operate to undermine the potential of civil remedies as an effective avenue to hold companies legally responsible for the harm committed in their operations, problems that become especially acute when the harm is produced in the context

⁴⁸ Corporate Complicity & Legal Accountability, Report of the ICJ Panel of Legal Experts, 3 vols, Geneva, 2008, vol. 3 Civil Remedies

of business transnational (cross-border operations). Several reports, including by the ICJ, have analysed the nature and import of those obstacles in detail.⁴⁹ They range from limitations on the courts to exercise jurisdiction over subsidiaries, the use of doctrines such as *Forum non conveniens*, to the lack of clarity as to the substantive civil law that applies in cross-border cases and the conditions under which parent or controlling companies should bear responsibility when their subsidiaries or controlled company commits human rights abuse. All elements considered, there is a strong unbalance between rights and privileges granted to transnational business and the relatively weak regime of private law to be used in holding them accountable. For instance, proving the existence of negligence on the part of the parent company requires a number of elements that are difficult to obtain by the plaintiffs, accentuating their position of vulnerability vis-à-vis the company. While it may be challenging for the treaty negotiators to address all specific aspects pertaining to the operation of civil remedies in a transnational context, mostly dealt with by private international law, the prospective treaty can and must make a contribution to the potential use of private law as a means to redress human rights harm.

States party should adopt legal or other necessary measures to establish the civil responsibility of the business enterprise for their conduct that results in harm to rights guaranteed under their international obligations and rights recognized under domestic law.

Business enterprises that have entered into commercial contracts with the State should not be allowed to invoke state immunities or privileges as shields against civil legal liability.

The law of civil remedies should contemplate more use of strict liability regimes, where the harm is serious, the company carries out hazardous operations and the societal value to protect is especially important with a view to afford a stronger guarantee of redress to the victim of harm.

Civil responsibility of the business enterprise should be separate and independent from the civil liability of individual members or employees of the company, who themselves may also be held individually liable.

Civil liability of the business enterprise should not be made contingent upon the finding of criminal responsibility or its functional equivalent of the same actor.

These elements should enhance the protective function of the law of civil remedies in respect to the broad range of potential human rights abuses by business enterprises, and provide causes of action to the victims of harm relating to the same rights. They find support in recommendations made in OHCHR

⁴⁹ ICJ, Needs and Options, Op cit note 3; Skinner; McCoquordale and De Schutter, Op Cit note 21; Human Rights in Business Project, Op cit note 34

Guidance, Policy Objective 12.1, 12.6 and 12.7. Further, the Council of Europe also recommends that human rights abuses by business enterprises give rise to civil liability under respective laws (rec. 32), and that business enterprises that are owned, controlled or otherwise have entered into commercial contracts with States to provide public services should refrain from invoking immunities to be sued in court.⁵⁰

Other public law tools establishing legal liability of business enterprises

Specific laws on consumer protection, environmental harm, employment relations also generally establish grounds of legal liability for corporate bodies, which similar to the law of civil remedies may also fulfil the function of protecting rights without using the term explicitly. Many offences under these special areas are generally dealt with through administrative procedures that may end with the imposition of administrative sanctions that typically include suspension of operations or licenses, cancellation, fines or eventually blacklisting. The sanctions are based on the breach of regulatory requirements and procedures (i.e. consultation with local communities, impact assessments, etc).

4.1 Transnational corporations and legal liability: parent company liability, supply chain and corporate complicity

Establishing legal liability of the business enterprise is a first step, but it is always not enough to tackle obstacles to effective remedy and accountability, given the complex way in which businesses organize and operate across-frontiers and the frequent involvement of a plurality of actors in the commission of human rights abuse. Because of the prevalence of the doctrine of "separate legal personality" and the frequent fact that parent and subsidiary (or supplier) are located in different jurisdictions and subject to different legal regimes, domestic legal accountability and remedies are many times unable to deliver satisfactory results for victims of abuse committed by subsidiaries and suppliers. Situations whereby one business enterprise participates in the commission of a human rights abuse by another business enterprise, by facilitating, aiding or abetting, or enabling the commission of the abuse, must be covered in the treaty if it is to be an effective framework for accountability and remedies.

There are various degrees and intensity in the relationship between the enterprises involved. For instance, one enterprise may be the wholly-owned or partially-owned subsidiary of another enterprise, or it may have a controlling or dominant position in relation to the other or others. There may be cases in which one enterprise is linked to another only on the basis of a commercial contract as supplier or contractor or sub-contractor, without having a controlling or dominant position in their mutual relations. In all these cases it is always possible that one may contribute to the abuse committed by another enterprise.

The relationship pertaining to parent-subsidiary companies is a particular source of concern. The parent company and its subsidiaries are separate legal entities.

⁵⁰ OHCHR Guidance, Policy Objective 12; Council of Europe Recommendation 2016/3, at 32 and 37

There is a "corporate veil" that separates one legal entity from the other even if both have a common owner or shareholders or have a single operational policy in many areas. What is commonly known as a "transnational enterprise," is in fact a conglomerate of enterprises which have separate legal personality, operating in practice as a single economic unit. The existence of this "corporate veil" has been seen over the years as an impediment to allocate responsibilities to the parent and subsidiaries respectively and as an obstacle for the victims of abuse to obtain remedies vis-à-vis the parent company, which many times contributed to the commission of the abuse.

There are also legal and jurisprudential developments that support the need to recognize the group of legally separate companies that operate as an economic unity as a single enterprise capable of bearing legal responsibility on its own right. The Court of Justice of the European Union in application of EU Directives on competition law, consolidated accounting and taxes disregarded the legal formalism of the separate legal entities doctrine and considered the economic reality of groups of enterprises that are legally separate from each other but in practice act as economic unities under a controlling or dominant enterprise.⁵¹ The Directive on Competition law uses the word "undertaking" which the Court interpreted as comprising also the group of enterprises that have a common controlling or dominant parent. The Court has also developed a rebuttable presumption in cases of anti-competitive conduct whereby the parent and the subsidiary would form a single undertaking if the parent holds all or most of the assets of the subsidiary.⁵²

Similar developments may be observed in the United States, but also limited to certain areas, notably competition law, tax law, bankruptcy, regulation of public utilities and securities and investments. In addition, United States practice is worth to note in the areas of environmental torts and labour law. For instance, in *re Oil Spill by Amoco Cadiz off Coast of France* a Federal court in Illinois,⁵³ in addition to holding Standard oil directly liable for the spill, found Standard liable as part of the integrated enterprise.⁵⁴ But in *United States v. Bestfoods*, the Supreme Court found that statutory provisions did not displace or alter common law standards of limited liability or separate personhood, although parent companies could be held directly liable for hazardous spills from a subsidiary's facility if the parent was involved with the operations related to the pollution.⁵⁵ The United States National Labor Relations Board (NRLB) has developed its own

⁵¹ C.170/83 *Hydroterme Gerätebau GmbH v Compact del Dott. Ing Mario Andreoli & C. Sas*, CJEC 1984 §11; C-41/90 *Klaus Höfner and Fritz Elser v Macrotorn GmbH*, CJEC 1991, §21

⁵² Case 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the EC*, CJEC, 1973

⁵³ The Court had to assess liability where a supertanker crashed and spilled over 200,000 tons of crude oil into the seas off Brittany. The ship was owned and operated by subsidiaries of the Amoco International Oil Company, which was a wholly owned subsidiary of Standard Oil Company of Indiana. In *re Oil Spill by Amoco Cadiz off Coast of France* on Mar. 16, 1978, No. MDL 376, 1984 A.M.C. 2123 (N.D. Ill. Apr. 18, 1984).

⁵⁴ *Id.* at 2194 "As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities."

⁵⁵ See *United States v. Bestfoods*, 524 U.S. 51, 70 (1998)

unique standard reflecting enterprise principles, called the “integrated enterprise,” for the purposes of the National Labor Relations Act (NRLA),⁵⁶ and the Supreme Court affirmed the concept of “integrated enterprise” in some of its jurisprudence.⁵⁷ Under the Employees Retirement Income Security Act (ERISA) all businesses “which are *under common control* shall be treated ... as a single employer.”⁵⁸

The English law of civil remedies has evolved to permit the attribution of responsibility to the parent company where the parent was involved in the operations that caused the damage, among other factors, by its subsidiary abroad. However, courts in the Netherlands seem to have cast doubt on whether the parent would have a duty of care in relation to the communities living near the operations of their foreign subsidiary.⁵⁹ Further evolution of English common law may bring about sufficient clarity in this field, but the prospective treaty could also make a contribution in laying global rules to guide national action on this issue that is seen as one of the most acute.

It does seem fair and consonant with the need to enhance the protection of human rights in the global economy to contemplate a system of enhanced responsibilities, including legal, for the parent or controlling companies of large multinationals. At present, transnational corporations obtain a substantive part of their benefits from their foreign operations or investments while assuming very limited local costs (taxes, legal and regulatory liabilities, etc). The global expansion of economic operations has brought together investors, businesses, consumers, workers and local communities in an ever closer network that allows the creation of wealth in a global scale. Yet that interconnection does not find expression at the level of legal responsibilities of parent and controlling companies.

It is in this context that several actors have made proposals to create legal duties for parent companies to enhance their responsibility in the global economy. The ICJ believes those and other similar proposals should be seriously considered by the OEWG.⁶⁰

⁵⁶ Blumberg, Phillip I., *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295, pp. 333-34 (1996), at 307

⁵⁷ *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255 (1965)

⁵⁸ So long as a company owns 80 percent of the voting shares of a subsidiary, then those companies are part of a “controlled group of corporations.” 29 U.S.C. §§ 1001-1461, § 1301(b)(1). As noted in *Connors v. Hi-Heat Coal Co., Inc.*, each “business that is a member of a controlled group is . . . jointly and severally liable for the withdrawal of any other member of the group.” *Connors v. Hi-Heat Coal Co.*, 772 F. Supp. 1, 5 (D.D.C. 1991) Thus, a parent is obligated to pay the withdrawal liability incurred by subsidiaries within its controlled group. See also, e.g., *McDougall v. Quickie Transp. Co.*, 6 F. App’x 456, 458 (7th Cir. 2001); *Pension Ben. Guar. Corp. v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994); *Cent. States, Se. & Sw. Areas Pension Fund v. Koder*, 969 F.2d 451, 452 (7th Cir. 1992)

⁵⁹ *Chandler v Cape plc*, England and Wales Court of Appeal (Civil Division) 25 April 2012, case number [2012] EWCA Civ 525, paras. 69-80. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html> (accessed 28 March 2014).

⁶⁰ Amnesty International, among others, has suggested placing parent companies “under an express duty of care towards individuals and communities whose human rights may be

Some of the proposals the ICJ has made in this paper might play a role in clarifying the extent of responsibility for parent companies. For instance, a general legal responsibility to respect human rights and to carry out human rights due diligence in the corporation's global operations encourages more involvement of the parent in the operations of the subsidiary, and could serve as proof of such involvement in the concrete operation that caused harm.⁶¹ In any event, delineating in the prospective treaty more detailed and tailored rules can only add more certainty and enhance the protection of rights.

The OEIWG should consider the following as elements of the prospective treaty to clarify the legal responsibility of the parent company:

States should adopt measures to make possible the civil liability of business enterprises based in their jurisdiction for their contribution to human rights harm caused by business corporations under its ownership or control. To that end:

- Incorporate in their statutes relating to civil proceedings a rebuttable presumption of control by the parent company of the subsidiary's operation that caused harm. This presumption would operate in situations where the parent exercises general control in the sense of tax, accounting or competition law (control of majority of shares or voting rights, right to appoint the majority of managers, or the power to exercise dominant influence).
- Incorporate in their laws an obligation for business enterprises under their jurisdiction to conduct human rights due diligence that covers at least the operations of business enterprises domiciled in other countries and that are under their ownership or control.

States should adopt measures to ensure that their national legislation on corporate criminal liability contemplates liability for accessory responsibility, including various forms of participation in the crime committed by another agent, including "complicity". The corporate liability for complicity should not be made contingent to the existence of the equivalent substantive criminal law in the

or are affected by their global operations, including the activities of their subsidiaries". In serious cases, it is further proposed, the parent company should be presumed to be legally responsible, subject to rebuttal. Amnesty International, *Injustice Incorporated*, 2014 p. 201-205. The general recognition of a clear duty of care of the parent company in relation to these subjects will eliminate existing uncertainty, and facilitate proceedings against the parent company. See an analysis of the difficulties in this area in *Needs and Options Report*, p. 14. At the level of the EU, the project *Human Rights in Business* has made several recommendations concerning this same issue that may usefully be considered at the international level. See: www.humanrightsinbusiness.eu. Another possibility, suggested by Quenec and Bourdon is to consider the parent company fully and automatically responsible for the negative impacts caused by their owned or controlled subsidiary and that such presumption may be rebuttable by the company showing that they could not reasonably have had knowledge of the events in question.

⁶¹ Corporate Complicity & Legal Accountability, Report of the ICJ Panel of Legal Experts, 3 vols, Geneva, 2008, vol. 3, p. 28 and ff

country where the principal perpetrator committed the crime.

5. Access to justice and effective remedy

Access to justice, including the right to an effective remedy, is the corollary of efforts to hold business accountable for human rights abuses. The prospective treaty must require measures to ensure access to effective remedies and redress for persons and groups of persons that suffer abuse arising from the conduct of business enterprises.

The treaty should make provision for access to an effective remedy for wrongful conduct against both States and business enterprises. For States, the remedy would be in respect of situations of complicity or participation in business activity or for failing to discharge their duty to protect against the conduct of business enterprises. Regarding remedies against business enterprises, these should be available to remedy abuses by businesses in States where the company, or its parent or controlling company a) has its centre of activity, b) is registered or domiciled, c) has its main place of business or substantial business activities.⁶²

The possibility for victims to initiate judicial complaints against companies directly in their domicile (whether it is in a host State or the home State) will further help to redress the inequality in rights and obligations that exist as between companies on one side and people on the other side. The growing web of bilateral or multilateral agreements on investments and free trade often grant business enterprises and investors in general the right to a very extensive set of protections including the right to sue governments before international arbitral tribunals, a right that individuals and communities do not have in relation to companies that abuse their human rights. An international treaty that guarantees an enhanced remedy system for harm caused by companies including extraterritorially would serve as a corrective instrument in this respect.⁶³

Failure to provide for effective remedies and redress, even in some cases where provided for in domestic law, has a range of causes, legal and political. These involve a complex set of factors that vary for each States but also present some common features. Among the most common problems are those related to: weakness in the fundamental rule of law (including regarding the independence of the judiciary and the work of the legal profession); difficulty or unwillingness of executive and or legislative officials to counter resistance by powerful corporate interests in seeking to address legal and governance gaps; public officials who lack knowledge or capacity to uphold the law according to international standards; prevalence of corruption; limited resources of protection mechanisms (including the judiciary); high court fees and costs of legal representation in legal

⁶² Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Principle 25.

⁶³ Remarks by Martin Khor in Ecuador/South Africa "Workshop of Human Rights and Transnational Corporations: Paving the way for a Legally Binding Instrument", 11 March 2014. http://www.southcentre.int/wp-content/uploads/2014/05/Ev_140311_Final-Report.pdf (accessed 3 June 2014)

suits; limited jurisdiction over events taking place abroad and involving companies domiciled within the territory, and other procedural hurdles that create a system of disincentives to litigation against companies.⁶⁴

- States must provide in law for prompt, accessible and effective remedies, including judicial remedies, as against both State authorities and businesses, for those who claim that their rights have been violated or infringed. The right of action must arise in relation to all rights guaranteed under international law and should also extend to those provided for under the domestic law of the concerned States.
- In cases where a State or a State agent is accused of having participated in or otherwise of complicity with the abusive conduct of a business, the principle that the victim has a right to an effective remedy and reparation from the State should be given effect, in accordance with the principal human rights treaties and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.⁶⁵
- Consistent with basic principles of State responsibility, the responsibility of the State will also be engaged and subject to remedial action in circumstances where a business is acting on the instructions or under the direction or control of the State; or where a business is empowered to exercise elements of governmental authority and has acted in such capacity when committing the abuse.
- In respect of remedies for abuse or misconduct by businesses, judicial remedies must always be provided where the misconduct rises to the level of a serious crime and other public law offences. For less serious misconduct, non judicial remedies may be provided, including company grievance procedures or similar mechanisms in the first instance that

⁶⁴ See, ICJ reports on Access to Justice in countries such as India, China, Philippines, Poland, Netherlands, Nigeria, among others.

<http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/>

⁶⁵ Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Articles 13 and 14 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 39 of the Convention on the Rights of the Child; Articles 25 and 63(1) of the American Convention on Human Rights; Article 7(1)(a) of the African Charter on Human and Peoples' Rights; Articles 12 and 23 of the Arab Charter on Human Rights; Articles 5 (5), 13 and 41 of the European Convention on Human Rights; Article 47 of the Charter of Fundamental Rights of the EU; Article 27 of the Vienna Declaration and Program of Action. UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, Article 3. See also UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity (UN Impunity Principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 31: "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator."

are fully compatible and do not prejudice the right to an effective judicial remedy.

- The State must provide for access to a judicial remedy, or, at a minimum an impartial administrative remedy the decisions of which must be subject to judicial review.

Civil remedies

Many claims against business enterprises use the framework provided by private law in domestic jurisdictions: the law of civil remedies, and the corresponding rules set out by private international law on jurisdiction, choice of law and recognition and enforcement of judgements in civil and commercial matters. The existing international legal instruments in this field have limited geographical and substantive scope. The Hague Conference on Private International Law's 1980 Convention on International Access to Justice is especially relevant here but has been ratified by only 26 of the 87 States members of The Hague Conference. It covers the areas of access to legal aid, security and orders for costs, and security of witnesses and experts in judicial proceedings. Some of the provisions of this Convention will be relevant for discussion within the OEIWG, but they are not comprehensive in scope.

Jurisdictional reach of national courts or tribunals is a crucial element in access to a judicial remedy. There is diversity in approaches across countries but jurisdiction is generally based on territory, nationality (active and passive), state interests and universal jurisdiction principles. The regime created by the European Union Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters (Regulation 44/2001/EC)⁶⁶ provides for a broad jurisdiction of European Union courts in civil and commercial matters, but operates only within the European Union. The Brussels I Regulation covers matters relating to jurisdiction, choice of law and enforcement of judgments within the EU. Although many of its principles are recognized beyond EU countries, it is binding only on EU Member States.

Private law as a means of addressing claims relating to human rights abuses offers an important avenue of redress for harm caused, potentially including harm affecting human rights, but it presents many of the inconveniences and impracticalities related to the private nature of legal actions under this regime. One of these problems is that the burden (legal and financial) to carry the claim to completion is left with the claimant or plaintiff, and procedural rules rarely take into account his or her deficiency of resources or inability to provide full evidence in proceedings. Public legal aid is generally not available, or significantly limited, in private law claims in most countries. In this context, there have been efforts to instil human rights principles into the regime of private law on responsibility for tort. The need to guarantee fundamental rights such as effective remedy, fair trial

⁶⁶ Brussels I Regulation Recast, Regulation 1215/2012/EU, entered into force in January 2015.

and due process is a crucial transformative element of the private law of civil remedies.⁶⁷

The treaty should contemplate the following elements:

States should ensure in law that judiciaries are afforded the necessary jurisdictional scope to consider civil claims concerning human rights abuses alleged to have been committed by business enterprises, including in their global operations. To this end, States should ensure that their laws:

- Grant domestic courts jurisdiction over claims concerning business enterprises domiciled within their jurisdiction.
- Grant domestic courts jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of companies domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.
- Ensure that their domestic courts are able to exercise jurisdiction over civil claims concerning business-related human rights abuse against business enterprises not domiciled within the jurisdiction of the state if no other effective forum guaranteeing fair trial is available and there is sufficiently close connection to the state concerned.

States must take effective measures, including legislative measures, to ensure effective access to remedial mechanisms, overcoming existing barriers. To this end, States should grant the wider possible right to bring legal suits to individuals and groups, including minors and developing collective complaints.

States should ensure that their legal systems guarantee the principle of equality of arms, including in proceedings concerning civil claims against business enterprises over which their domestic courts have jurisdiction. This should include the provision of legal aid.

States should ensure that their civil procedures allow access to information in the possession of the defendant if such information is relevant to substantiating claims of business-related human rights abuses against

⁶⁷ See One recent example is the *Sophia Guidelines and Best Practices for International Civil Litigation for Human Rights Violations* adopted by the International Law Association. *Sophia Guidelines and Best Practices for International Civil Litigation for Human Rights Violations*, adopted by the International Law Association, 75th Conference, Sophia, August 2012. See also: Council of Europe, Draft recommendation of the Committee of Ministers to member States on human rights and business (Appendix III to document CDDH-CORP(2015)R4, available at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Documents/CDDH-CORP\(2015\)R4FIN_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Documents/CDDH-CORP(2015)R4FIN_en.pdf) (accessed 16 June 2015)

enterprises under their jurisdiction.

The foregoing proposals find support in various sections of General Comment 16, Maastricht Principles on Extraterritorial Obligations, Council of Europe Recommendation 2016/3, and the final results and recommendations of the EU Project Human Rights in Business.⁶⁸

6. International cooperation for investigation and enforcement

The general obligation of international cooperation to assist States to better promote and protect human rights is one running throughout international human rights law, beginning with the UN Charter itself. Articles 55 and 56 of the Charter state a general pledge of all Members “to take joint and separate action in cooperation with the Organizations” to achieve certain purposes, including “universal respect for, and observance of, human rights and fundamental freedoms...” Particular obligations of international cooperation appear throughout international human rights law instruments.

The need to guarantee people’s access to justice and remedies in cases of alleged violations of their rights with the involvement of business enterprises raises a number of practical issues relating to investigations, trial and sanctions across jurisdictions. To effectively investigate allegations of human rights abuses committed abroad it will often be necessary to obtain the cooperation of police and judicial authorities in the territorial State. An effective investigation in accordance with international standards is essential to determine if prosecution is appropriate and likely to be successful. Gathering the necessary evidence in the context of transnational offences is particularly challenging. Cooperation among States in this field is thus essential, as it is in the context of other transnational crimes such as the bribery of foreign public officials.

In the area of international legal and judicial cooperation and mutual legal assistance, there are a number of instruments of regional and international scope but they constitute at best a patchy system of rules that so far has not enabled efficient cooperation across the board.

The International Covenant on Economic, Social and Cultural Rights, in article 2(1) requires that each State Party Covenant “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical” to realize the rights in the Covenant. The Convention on the Rights of Persons with Disabilities also requires that States “undertake appropriate and effective measures” of international cooperation. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States parties to provide each other “the greatest measure of assistance in connection with criminal proceedings” relating to torture, including “the supply of all evidence at their disposal necessary for the proceedings”. A similar obligation is contained in the International Convention for the Protection of all

⁶⁸ General Comment 16 Op Cit note 13; Maastricht Principles, Op Cit note 18; Human Rights in Business, note 34

Persons from Enforced Disappearances. The first two Optional Protocols to the Convention on the Rights of the Child also oblige States party to cooperate in order to prevent and punish the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict.⁶⁹

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, determines that States parties must co-operate in connection with investigations, or criminal and extradition proceedings in relation to the offences set forth in the Protocol, "including assistance in obtaining evidence at their disposal necessary for the proceedings".⁷⁰ In addition, under Article 6(2), States must fulfil their obligations arising from other treaties of mutual legal assistance that may exist between them.

The UN Convention against Transnational Organized Crime, the UN Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials contain extensive provisions on State cooperation and mutual legal assistance that are useful precedents to take into account. Such cooperation extends to areas relating to exchange of information and data, judicial and administrative proceedings, gathering and securing evidence.

Beyond State cooperation and mutual legal assistance for investigation, international cooperation is also essential for the execution of civil judgments, or criminal orders for forfeiture and the like. Once prosecution has concluded and a conviction has been secured, or a civil suit has been successful, the resulting orders need to be enforced so that plaintiffs and victims obtain redress. Enforceability of judicial decisions is an essential element of an effective judicial remedy.

There are some international instruments on mutual legal assistance and judicial cooperation in the enforcement of foreign judgments that have been concluded in the framework of The Hague Conference on Private International Law,⁷¹ although none of these have entered into force. The 1971 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, which provided that any judicial decision adopted by a Court of a Contracting State shall be entitled to recognition and enforcement in another Contracting State if the court issuing the decision has jurisdiction and if the judgment is final.⁷² The Convention has been ratified only by Cyprus, Netherlands, Portugal and Kuwait.

⁶⁹ Universal Declaration of Human Rights Articles 22 and 29; Convention on the Rights of People with Disabilities-CRPD, article 32; CAT article 9(1); CESCRC (articles 2(1); 11(1), 22); among others.

⁷⁰ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002, article 6. Available Online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

⁷¹ For example the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958), and the Convention on the Choice of Court (1965).

⁷² The Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Concluded on February 1971, art. 4. Available Online: http://www.hcch.net/index_en.php?act=conventions.text&cid=78 (accessed 28 March 2014).

The *Brussels I* regulation has in practice superseded this agreement in relation to the three ratifying States that are members of the EU.

Negotiations in 2001 led to the conclusion of The *Hague Convention on Choice of Court Agreements*.⁷³ Under Article 8 of this Convention, a judgment given by a designated court of a Contracting State shall be recognized and enforced in other Contracting States without any other review of the merits of the case and the judgment. This Convention only applies to civil and commercial matters, excluding, for instance, interim measures of protection from its purview. Currently, only Mexico has acceded to it. The United States and the European Union signed the Convention in 2009 but are yet to deposit instruments of ratification.⁷⁴

Other international instruments contain obligations for States to cooperate with other States in the recognition and enforcement of judicial decisions and procedures. For example, the *Convention on Civil Liability for Oil Pollution Damage* (1969), replaced by the Protocol of 1992,⁷⁵ provides that a final judgement in a contracting state shall be recognised in any other contracting state unless it was obtained by fraud or fair trial rules were not respected.

Article 18 of the United Nations *Convention against Transnational Organized Crime* in turn provides that State Parties have the obligation to afford one another the necessary co-operation and mutual assistance in investigations, prosecutions and proceedings in relation to the offences covered by the Convention. Although the Convention does not directly refer to the recognition and enforcement of judgments, under Article 16(12) a State Party shall consider the enforcement of a judgment imposed by another Party when a request for extradition, submitted with the purpose of enforcing a sentence, is refused because the person sought is a national of the requested State Party.

These instruments form a patchy framework for international cooperation in the investigation, prosecution and enforcement of judicial sentences. This system is in clear and pressing need of improvement to respond to the challenges of

⁷³ Hague Conference on Private International Law, *Convention on Choice of Court Agreements*, concluded 30 of June 2005. Available Online: <http://www.hcch.net/upload/conventions/txt37en.pdf> (accessed 28 March 2014).

⁷⁴ See: http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (accessed 28 March 2014).

⁷⁵ Article 10:

"1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

(a) where the judgment was obtained by fraud; or
(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

"2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

Convention on Civil Liability for Oil Pollution Damage, adopted 9 November 1969; Entry into force: 19 June 1975; replaced by 1992 Protocol: adopted 27 November 1992; Entry into force: 30 May 1996. Available Online: http://www.iopcfunds.org/uploads/tx_iopccpublications/Text_of_Conventions_e.pdf (accessed 28 March 2014).

guaranteeing access to effective remedies for victims in business-related human rights abuses caused or contributed to by business enterprises.

Under the foregoing and other bilateral arrangements, some States have developed useful and effective practices that should be considered as a basis for replication or adaptation. These practices include frameworks for exchange of information and expertise between law enforcement and judicial bodies to detect and evaluate risks, cooperation in joint bodies of peer review of regulations, technical assistance and capacity building.⁷⁶ To complete the existing international legal framework and take advantage of the good practice in several related areas of work, the prospective treaty should contain a number of provisions on international cooperation, mutual legal assistance, and recognition and enforcement of judicial decisions.

The following elements should be included and developed in the treaty:

The general obligation of States party to cooperate with and provide the necessary and mutual legal assistance in respect to identification, investigation, prosecution and enforcement of relevant judicial orders in cases of human rights abuses committed by or with the participation of business enterprises under their jurisdiction.

States should enter into bilateral or multilateral arrangements to enable and facilitate the request and lending of mutual legal assistance between their law enforcement bodies and to enable the latter to carry out joint or coordinated cross-border investigations when necessary, or the gathering of evidence for use in civil claims proceedings.

States party should establish mechanisms, jointly or in a coordinated fashion with other States party, to facilitate the exchange of information and the request and provision of legal assistance,

States should provide adequate training, information and support to their law enforcement agencies and judicial bodies to make efficient use of arrangement for mutual legal assistance, through the establishment of networks, holding of workshops and other initiatives.

7. National bodies for implementation, monitoring and promotion

The conclusion of an international agreement, as critically important as it is, would not in and of itself, plug the existing protection gaps resulting from business impacts on human rights.⁷⁷ Implementation is a key element for the actual effectiveness of any legal regime. The current regime with the UNGP and other non-treaty instruments is notoriously weak in international and national implementation processes and institutions. Without robust national

⁷⁶ OHCHR Report Improving Accountability and Access to a Remedy, Addendum A/HRC/32/19/Add.1, paras 36-38

⁷⁷ ICJ, Needs and options, Op. cit note 3, p. 37

implementation there is limited chance that the substantive provisions of the prospective treaty will have an impact on the actual situation of individuals and communities potentially impacted by business operations. A good combination of national and international processes and mechanisms will facilitate rapid and robust implementation.

Strong emphasis on national processes and institutions is justified by the need to enhance on the ground protection of human rights and to promote and monitor implementation. Besides national judiciaries there is a host of governmental or independent institutions with traditional roles in the area of human rights, but few of them have explicit mandate and budget to work in the area of business and human rights. Moreover, the nature of business impacts on human rights necessarily require the intervention of a number of bodies and institutions with mandate in the economic, financial, social and human rights fields. Coordination and coherence among national authorities and departments remains a challenge that cannot be met necessarily by creating additional or specialised institutions but need also the creation or strengthening processes and protocols of coordination and consultation in the pursuit of common objectives.

Effective implementation at the national level depends on political will, capacity and available resources. The prospective treaty may make an important contribution to enhance national action in the promotion and protection of human rights in the context of business operations. The provisions of the treaty in this regard should build on the design and good practice of existing national mechanisms such as national human rights institutions (including human rights and equality commissions, ombudsmen, people's defender) and the promotional system of National Contact Points under the OECD Guidelines for Multinational Enterprises.

Previous sections have dealt with national judiciaries and law enforcement agencies in the context of access to remedies and justice as well as international legal and judicial cooperation. The following proposals focus on additional administrative, independent or cross-sector processes with a key role.

The prospective treaty may require states to establish a national authority with cross-sector and social representation (or entrust this functions to existing bodies or institutions) with, inter alia, the following functions:

- Review, advise and assist with the adoption by business enterprises of a human rights policy or code of conduct that conforms with internationally recognized human rights standards (a human rights code of conduct may be included in the prospective treaty as an annex or created later by an international monitoring body for the treaty)
- Carry out in depth research, promote training and other capacity building of relevant stakeholders
- Receive information and communications regarding the human

rights impact of business enterprises in the country, and carry out inquiries especially where systematic or widespread patterns of abuse are manifest

- Provide advice on accessing legal aid and other support to people who have a claim to make before the judiciary or law enforcement agencies,
- Lead in the development and establishment of national action plans on business and human rights, and on its periodic evaluation and update.
- Report periodically to relevant international bodies and mechanisms, including the supervisory system of the present treaty

The establishment of a national action plan for the implementation of the prospective treaty, taking into account other existing international obligations and commitments.

8. International supervisory and monitoring mechanism

International monitoring and supervisory mechanisms fulfil the needed function of providing support to States to implement obligations under international treaties at the domestic level, identify the obstacles to this end and the potential means of overcoming them. Existing UN and regional human rights treaties provide for such monitoring or supervisory mechanisms. It is critical that the treaty on business and human rights likewise containing provision for an international supervisory mechanism.

The function of such a supervisory mechanism, in addition to monitoring the compliance of States with the provisions of an international instrument, is to also provide commentary or jurisprudence, thus facilitating consistent implementation of the treaty across jurisdictions.

In addition, there will need to be provisions for amending the treaty through a Conference of State parties. In addition to convening for the purpose of amendment, it may be desirable that the treaty provides for periodic review by the Conference of State Parties of State implementation and the taking stock of new challenges and developments.

The following elements should be considered:

The creation of a Committee of experts (approx. 10 persons), appointed by States parties in the conference of States party, by proposals from States, NGOs with ECOSOC status.

The Committee should receive periodic reports from States party about their implementation of their obligations under the treaty. The

Committee may request both comprehensive and/or focussed reports on specific areas of concern.

The Committee may also receive reports from business enterprises that have adhered to the Code of Conduct annexed to the present treaty and wish to have their implementation reviewed by the Committee.

The Committee (or a sub set of it) can carry out country visits to evaluate the implementation of the treaty, assess the challenges and issue tailored recommendations with specific timeframes.

The Committee, among other functions, should be given the competency to receive and consider communications containing information about serious abuses of human rights caused or contributed to by business enterprises and, where a particularly serious, widespread or systematic problem seems evident, it may establish an inquiry with in-country fact finding and reporting with recommendations. The Committee should be given the possibility and resources to have recourse to external expertise and advisory services to carry out this mandate.

States must implement in good faith the findings and recommendations of the Committee and shall adopt the necessary measures to enforce them at the domestic level.

ANNEX

CONSOLIDATED SET OF RECOMMENDATIONS FOR ELEMENTS OF A TREATY ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

1. Objectives of the treaty

This treaty should have at least the following objectives, which should be stated in the text of the treaty:

- To affirm, as legal principles, the basic human rights duties of States and business enterprises,
- To create an international framework to facilitate national level preventive efforts tackling business human rights abuse and legal accountability of TNCs and other business enterprises,
- To enhance a system of national remedies for victims of human rights abuse perpetrated directly or indirectly by business enterprises,
- To provide for an international framework for international cooperation, including mutual legal assistance to tackle business enterprises human rights-related abuses

2. States and business respective obligations and responsibilities

- The reaffirmation of the general State duty to respect human rights and protect them against abuses by third parties, particularly business enterprises. This duty comprises the duty to take necessary and appropriate measures, including legislative, to ensure business enterprises domiciled in the concerned country respect human rights in their global operations (i.e. including those taking place abroad)
- The reaffirmation of the principle that transnational corporations and other business enterprises have a responsibility to respect all internationally recognized human rights.

3. The responsibility of TNC-OBE to respect all human rights

TNC-OBE will have the responsibility to:

- Design, adopt, and implement effective policies and due diligence processes to identify and address risks of human rights abuses in their global operations, and to mitigate and when appropriate remedy them.
- Design, adopt, and implement policies or codes of conduct in accordance with internationally recognized human rights standards and establish internal processes to verify actual compliance during business operations.

- Design, adopt, and undertake Human Rights impact assessments that cover all main areas of their operations, including global business operations, and are designed and implemented with the active participation of local communities and other stakeholders.
- Take measures to respect impact assessments carried out by local communities through legitimate internal processes and take measures to incorporate their findings and recommendations in the business operations.
- Carry out consultations with local communities, including indigenous peoples seeking their free, prior and informed consent before undertaking business activities that will impact their human rights.
- Report periodically on the steps taken to assess and address human rights impacts.
- The above measures should be adopted with due regard to the size, sector, operational context, ownership and structure of the business enterprise, and conform to internationally recognized human rights standards.

States must adopt legislative and other measures to provide a policy and legal framework that ensures business enterprises observe their human rights responsibilities described above. To this end, States must:

- Adopt regulations and enforcement measures to ensure business enterprises take effective steps to fulfil their responsibilities, on a sector-by-sector basis. This would include the requirement to adopt an approved policy or code of conduct and human rights due diligence processes as conditions to access government contracts or financial support
- Exercise such regulatory activity extraterritorially, particularly where required under international law and standards.
- Establish a national authority to oversee business enterprises adopt a human rights policy or code of conduct that conforms with internationally recognized human rights standards; to this end, a model human rights code of conduct may be included in the prospective treaty as an annex or created later by an international monitoring body for the treaty
- The regulatory process for approval of licenses and permits for certain kind of business operations involving potentially hazardous activities for the enjoyment of human rights should include an obligation to obtain a social license to operate in the form of fully informed community consent.

4. Legal liability of TNC-OBE

States party to the agreement must adopt effective legislative and administrative measures, in accordance with their national legal systems and principles, to establish in law the legal liability of business enterprises, in particular

corporations, subject to their jurisdiction for business conduct that results in harm to human rights. Such responsibility should, as appropriate, be criminal, civil or administrative.

Criminal responsibility

- States must adopt measures to establish criminal responsibility or its equivalent for business enterprises subject to their jurisdiction for business-related human rights offences.
- The following violations recognized as crimes under international law and for which international law require the imposition of criminal sanctions should be incorporated in national corporate criminal law:
 - war crimes, crimes against humanity and genocide (as defined under international law in such sources as the grave breach provisions of the 1949 Geneva Conventions and 1977 Additional Protocols, the Rome Statute for the International Criminal Court, and customary international humanitarian and human rights law).
 - torture,
 - cruel, inhuman or degrading treatment,
 - enforced disappearance,
 - extrajudicial execution,
 - slavery and slavery-like offences,
 - forced labour and similar forms of forced labour,
 - forced displacement of people,
 - forced eviction,
 - the use of child soldiers
 - sexual violence.
- States party must adopt legislative or other necessary measures to make applicable to business corporations the crimes recognized in their domestic legislation.
- The criminal responsibility of the business corporation does not exclude the criminal responsibility of company directors, managers or employees for their own conduct that constitutes a crime under the present treaty. The criminal responsibility of the business corporation should be independent from the finding of individual criminal responsibility of one of its members.
- Irrespective of whether they are directed against natural or legal persons, investigations should be adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation. There is a duty to prosecute where the outcome of an investigation warrants this. Victims are entitled to request an effective official investigation, and any decision not to start an investigation, or to stay an investigation or prosecution should be sufficiently reasoned.
- States should adopt legislative and other measures to ensure that the legal persons found responsible for the commission of offences defined in the treaty shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. A model law or appendix to the treaty may list the sanctions and penalties that can potentially be applied.

- The treaty should also provide for States to adopt legislative and other measures to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal or other offences established in the treaty, or property the value of which corresponds to such proceeds.

Civil responsibility

- States party should adopt legal or other necessary measures to establish the civil responsibility of the business enterprise for their conduct that results in harm to rights guaranteed under their international obligations and rights recognized under domestic law.
- Business enterprises that have entered into commercial contracts with the State should not be allowed to invoke state immunities or privileges as shields against civil legal liability.
- The law of civil remedies should contemplate more use of strict liability regimes, where the harm is serious, the company carries out hazardous operations and the societal value to protect is especially important with a view to afford a stronger guarantee of redress to the victim of harm.
- Civil responsibility of the business enterprise should be separate and independent from the civil liability of individual members or employees of the company, who themselves may also be held individually liable.
- Civil liability of the business enterprise should not be made contingent upon the finding of criminal responsibility or its functional equivalent of the same actor.

4.1 Responsibility of the parent company and the supply chain

States should adopt measures to make possible the civil liability of business enterprises based in their jurisdiction for their contribution to human rights harm caused by business corporations under its ownership or control. To that end:

- Incorporate in their statutes relating to civil proceedings a rebuttable presumption of control by the parent company of the subsidiary's operation that caused harm. This presumption would operate in situations where the parent exercises general control in the sense of tax, accounting or competition law (control of majority of shares or voting rights, right to appoint the majority of managers, or the power to exercise dominant influence).
- Incorporate in their laws an obligation for business enterprises under their jurisdiction to conduct human rights due diligence that covers at least the operations of business enterprises domiciled in other countries and that are under their ownership or control.

States should adopt measures to ensure that their national legislation on corporate criminal liability contemplates liability for accessory responsibility, including various forms of participation in the crime committed by another agent, including "complicity". The corporate liability for complicity should not be made contingent to the existence of the equivalent substantive criminal law in the country where the principal perpetrator committed the crime.

5. Access to justice and effective remedy

- States must provide in law for prompt, accessible and effective remedies, including judicial remedies, as against both State authorities and businesses, for those who claim that their rights have been violated or infringed. The right of action must arise in relation to all rights guaranteed under international law and should also extend to those provided for under the domestic law of the concerned States.
- In cases where a State or a State agent is accused of having participated in or otherwise of complicity with the abusive conduct of a business, the principle that the victim has a right to an effective remedy and reparation from the State should be given effect, in accordance with the principal human rights treaties and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.
- Consistent with basic principles of State responsibility, the responsibility of the State will also be engaged and subject to remedial action in circumstances where a business is acting on the instructions or under the direction or control of the State; or where a business is empowered to exercise elements of governmental authority and has acted in such capacity when committing the abuse.
- In respect of remedies for abuse or misconduct by businesses, judicial remedies must always be provided where the misconduct rises to the level of a serious crime and other public law offences. For less serious misconduct, non judicial remedies may be provided, including company grievance procedures or similar mechanisms in the first instance that are fully compatible and do not prejudice the right to an effective judicial remedy.
- The State must provide for access to a judicial remedy, or, at a minimum an impartial administrative remedy the decisions of which must be subject to judicial review.

Civil remedies

- States should ensure in law that judiciaries are afforded the necessary jurisdictional scope to consider civil claims concerning human rights abuses alleged to have been committed by business enterprises, including in their global operations. To this end, States should ensure that their laws:
 - Grant domestic courts jurisdiction over claims concerning business enterprises domiciled within their jurisdiction.
 - Grant domestic courts jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of companies domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.
 - Ensure that their domestic courts are able to exercise jurisdiction over civil claims concerning business-related human rights abuse against business enterprises not domiciled within the jurisdiction of the state if no other effective forum guaranteeing fair trial is available and there is sufficiently close connection to the state concerned.

- States must take effective measures, including legislative measures, to ensure effective access to remedial mechanisms, overcoming existing barriers. To this end, States should grant the wider possible right to bring legal suits to individuals and groups, including minors and developing collective complaints.
- States should ensure that their legal systems guarantee the principle of equality of arms, including in proceedings concerning civil claims against business enterprises over which their domestic courts have jurisdiction. This should include the provision of legal aid.
- States should ensure that their civil procedures allow access to information in the possession of the defendant if such information is relevant to substantiating claims of business-related human rights abuses against enterprises under their jurisdiction.

6. International cooperation for investigation and enforcement

- The general obligation of States party to cooperate with and provide the necessary and mutual legal assistance in respect to identification, investigation, prosecution and enforcement of relevant judicial orders in cases of human rights abuses committed by or with the participation of business enterprises under their jurisdiction.
- States should enter into bilateral or multilateral arrangements to enable and facilitate the request and lending of mutual legal assistance between their law enforcement bodies and to enable the latter to carry out joint or coordinated cross-border investigations when necessary, or the gathering of evidence for use in civil claims proceedings.
- States party should establish mechanisms, jointly or in a coordinated fashion with other States party, to facilitate the exchange of information and the request and provision of legal assistance,
- States should provide adequate training, information and support to their law enforcement agencies and judicial bodies to make efficient use of arrangement for mutual legal assistance, through the establishment of networks, holding of workshops and other initiatives.

7. National bodies for promotion, implementation and monitoring

The prospective treaty may require states to establish a national authority with cross-sector and social representation (or entrust this functions to existing bodies or institutions) with, inter alia, the following functions:

- Review, advise and assist with the adoption by business enterprises of a human rights policy or code of conduct that conforms with internationally recognized human rights standards (a human rights code of conduct may

be included in the prospective treaty as an annex or created later by an international monitoring body for the treaty)

- Carry out in depth research, promote training and other capacity building of relevant stakeholders
- Receive information and communications regarding the human rights impact of business enterprises in the country, and carry out inquiries especially where systematic or widespread patterns of abuse are manifest
- Provide advice on accessing legal aid and other support to people who have a claim to make before the judiciary or law enforcement agencies,
- Lead in the development and establishment of national action plans on business and human rights, and on its periodic evaluation and update.
- Report periodically to relevant international bodies and mechanisms, including the supervisory system of the present treaty

The establishment of a national action plan for the implementation of the prospective treaty, taking into account other existing international obligations and commitments.

8. International Supervisory and Monitoring Mechanism

- The creation of a Committee of experts (approx. 10 persons), appointed by States parties in the conference of States party, by proposals from States, NGOs with ECOSOC status.
- The Committee should receive periodic reports from States party about their implementation of their obligations under the treaty. The Committee may request both comprehensive and/or focussed reports on specific areas of concern.
- The Committee may also receive reports from business enterprises that have adhered to the Code of Conduct annexed to the present treaty and wish to have their implementation reviewed by the Committee.
- The Committee (or a sub set of it) can carry out country visits to evaluate the implementation of the treaty, assess the challenges and issue tailored recommendations with specific timeframes.
- The Committee, among other functions, should be given the competency to receive and consider communications containing information about serious abuses of human rights caused or contributed to by business enterprises and, where a particularly serious, widespread or systematic problem seems evident, it may establish an inquiry with in-country fact finding and reporting with recommendations. The Committee should be given the possibility and resources to have recourse to external expertise and advisory services to carry out this mandate.

States must implement in good faith the findings and recommendations of the Committee and shall adopt the necessary measures to enforce them at the domestic level.

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August 2016 (for an updated list, please visit www.icj.org/commission)

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