



Approaching States' Obligations Under a Prospective Legally Binding Instrument on TNCs and Other Business Enterprises In Regard to Human Rights

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I. Introduction

The duty of the State to protect against human rights violations by private entities and to ensure remedies for victims of such violations is well established under international human rights law. It has also been recognized by the Guiding Principles (GPs) on Business and Human Rights¹. Yet, given the globalized and rapidly evolving economic realities driven by multinational corporations, individual States often face limitations in their ability to respond to human rights violations by private entities and to exercise their sovereign right to regulate. John Ruggie had noted in a 2008 report that legal rights of transnational corporations have been expanded significantly over the past generation, creating instances of imbalances between firms and States that may be detrimental to human rights².

Resolution A/HRC/26/9 established an open-ended intergovernmental working group (OEIWG) under the Human Rights Council on transnational corporations and other business enterprises with respect to human rights. The mandate of the intergovernmental working group is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereafter referred to as the Instrument). This mandate presents States with a multitude of strategic choices and policy options, including in regard to the subjective scope of the Instrument, that is, whose conduct will be subject to the disciplines eventually incorporated, and in regard to approaching States' obligations and addressing corporate obligations, among other elements.

These strategic choices ought to be approached in a way that effectively serves the primary objective of the Instrument as defined by the States discussing, and later negotiating, the content of the prospective Instrument. The wording of Resolution A/HRC/26/9 seems to suggest that the intended scope of the Instrument is narrower than that of the UNGPs, since the Resolution specifically alludes to the 'transnational character' of the enterprises' operations³. An enterprise owned or controlled by stakeholders residing in a country may have operations of a 'transnational character' if it engages in business activities

through an affiliate, subsidiary or a controlled undertaking in another country⁴. In the same line, one generally shared view during the first meeting of the OEIWG was that all entities linked to transnational corporations should fall within the subjective scope of a prospective Instrument; this includes subsidiaries and other entities in their supply chain⁵. While it is indisputable that human rights violations may be committed by enterprises whose operations are merely domestic, and that it has been universally accepted that *all* business enterprises are bound to respect all human rights, the wording of Resolution A/HRC/26/9 indicates that it is concerned with situations where transnational corporations and other entities with transnational activities are capable of evading their human rights' responsibilities based on jurisdictional grounds.

Moreover, it is also important to make the strategic choices pointed to above while limiting the areas of tension with established principles of international law and established approaches to treaty design. This brief discusses possible selected approaches to addressing States' obligations under a prospective Instrument⁶.

II. Current context and authoritative opinions in regard to States' obligations in the area of human rights

UN human rights treaty bodies⁷ have recognised that States have obligations in regard to acts committed by private persons or entities that would impair the enjoyment of Covenant rights⁸. This includes positive obligations to "exercise due diligence to prevent, punish, investigate or redress the harm caused by private persons or entities"⁹. States should regulate certain activities of private individuals and bodies by adopting effective measures to prevent future injury and respond to past injury¹⁰. UN human rights treaty bodies also recognized that it is necessary for States to have adequate legal and institutional frameworks to provide remedies in case of violations in the context of business activities and operations¹¹ (see Annex 1).

In the same line, different regional and international courts and tribunals have considered that States are not directly responsible for human rights abuses committed

by third parties, but that they can be responsible for failing to take available measures to prevent and punish the occurrence of such conducts¹² (see Annex 2). Thus, States' obligations *vis-à-vis* third parties are an obligation of conduct, rather than an obligation of result. It entails the duty of the State to comply with the expected conduct, including due diligence, as established in its international commitments¹³.

It is well established under international law that where a home State aids or assists a corporation in the commission of or in complicity in internationally wrongful acts, the State will incur international responsibility, at least where the aid or assistance contributed significantly to that act¹⁴. Some experts argue that such aid or assistance¹⁵ could take place through providing loans, investment guarantees, or political risk insurance or protections under investment and trade treaties to corporations operating abroad¹⁶.

Furthermore, the State's obligation of due diligence has an extraterritorial dimension in terms of home State obligations to exercise due diligence in relation to the acts of corporations under its jurisdiction. In this regard, the UN human rights treaty bodies seem to have accepted that States cannot ignore the fact that they may influence situations outside their borders, even in the absence of territorial control, and that with this power comes responsibility¹⁷ (see Annex 3). In this context, jurisdiction and territory are distinguished, whereby jurisdiction extends beyond territorial control to areas where a State has *de jure* or *de facto* effective control¹⁸.

III. A prospective Instrument as an additional tool of international cooperation

The design of a prospective Instrument is expected to build on the large body of opinion and jurisprudence emerging from universal and regional systems of human rights, part of which is highlighted in this article. In doing so, a prospective Instrument could focus on clarifying the means and measures by which States could fulfil existing obligations and on addressing related gaps.

The clarification of States' obligations and related measures is expected to support States in encountering challenges they face in the protection of human rights in cases of corporate human rights abuses, particularly when facing an enterprise undertaking transnational conduct. Such cases cannot be addressed through domestic frameworks and mechanisms available to single States alone; they necessitate international cooperation.

Indeed, recent studies undertaken under the auspices of the Office of the High Commissioner for Human Rights have pointed out that two key problems presently contribute to undermining the ability of domestic legal regimes to effectively respond to cross-border cases concerning business involvement in human rights abuses. One is the "lack of clarity at international level as to the appropriate use of extraterritorial jurisdiction", which the report points out is a "significant source of legal uncertainty for both affected persons and business enterprises".

Another is the "lack of cooperation and coordination between interested States with respect to the investigation, prosecution and enforcement of cross-border cases"¹⁹.

A prospective Instrument could serve as an additional tool in the area of international cooperation to complement, not substitute, the domestic processes and to enable the exercise of sovereign rights to regulate. Accordingly, a prospective Instrument would complement the efforts undertaken to develop domestic legal systems, including through the work being done in some countries on action plans based on the Guiding Principles on Business and Human Rights²⁰.

IV. Multiple possible approaches available for addressing State obligations under a prospective Instrument

As noted in the opening of this brief, the mandate of Resolution A/HRC/26/9 presents States with a multitude of strategic choices and policy options. Each would have different implications, including in terms of complexity, effectiveness, political acceptance, and interface with the domestic legal frameworks.

For example, States could choose to establish under a prospective Instrument an obligation on State Parties to adopt certain measures in order to ensure that national legislation and remedy mechanisms cover conducts of corporations that can be identified as crimes, and other types of conduct that can be sanctioned through civil and administrative means. States could also choose to focus on clarifying the content of States' duty to protect human rights by regulating transnational conduct of corporations, including clarifying extraterritorial obligations of States under human rights law. Another element that could be considered is establishing an obligation on States to adopt national action plans or strategies on business and human rights and to report on the progress made in this regard. Other elements could include focusing on clarifying the grounds for international cooperation among States in facilitating the handling of corporate violations of human rights, including in investigation of cases, making resources available for victims to pursue a remedy, and recognition and enforcement of judgements in favor of victims. A further element that States could consider under a prospective Instrument could be to subject transnational corporations under their jurisdiction to a monitoring mechanism and to the jurisdiction of an international mechanism, which would be operationalized in cases where remedy could not be attained under national mechanisms.

These possibilities are neither exhaustive nor exclusive. Each of these propositions could form a focus for a prospective Instrument or one of the elements to be considered in the design of a prospective Instrument, among a multitude of other elements. The approach to these elements is also linked to the treaty design choices to be made by the negotiating Parties. This includes whether the negotiating Parties will choose the prescriptive approach of explicitly defining standards to be reflected in

the domestic law of States Parties to the Instrument, or whether they will focus on defining objectives to be achieved, leaving States leeway to choose different methods for implementing their obligations. Some of the elements mentioned in this section are discussed below.

a. Discussing selected possible approaches: Obligation to ensure certain requirements under national legislation

One option available to States is establishing an obligation on State Parties to a prospective Instrument to ensure that national legislation and remedy mechanisms cover corporate conduct that would be considered a violation under criminal, civil or administrative rules. Accordingly, the measures will be defined under national laws, but controlled by the international Instrument. Such an approach would allow for achieving a certain level of convergence among jurisdictions in terms of how they address corporate conduct and liability while allowing for certain flexibility that attends to national legal practices. Such an approach could include a stipulation that home States of corporations set an obligation on their nationals to comply with certain norms wherever they operate²¹.

This approach would fall within the accepted traditional norm for treaty making. Indeed, in most cases, international law regulates corporate conduct indirectly, through requiring States to enact and enforce regulation applicable to corporations. These instruments impose on the State the obligation to regulate the private actors. Private parties will then incur obligations by virtue of the domestic laws that give domestic legal force to the rights and obligations contemplated by the treaty. One example in this regard is 'The Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography'²², which provides for the obligation of States to introduce legislation establishing certain conducts as criminal offences, and also provides for States to establish the liability of legal persons for these offences, subject to the legal principles of the State party²³.

b. Discussing selected possible approaches: Clarifying extraterritorial obligations of States under human rights law

Addressing extraterritorial obligations (ETOs) of States in relation to the conduct of corporations under a prospective Instrument would be a core enabler of an effective treaty that would fill gaps in the current international legal order, which often hinders victims' access to effective remedies.

As noted above, a project on accountability and remedy for victims of business-related human rights abuse under the auspices of the United Nations High Commissioner for Human Rights and related reports (April 2016)²⁴ provides that "lack of clarity at international level as to the appropriate use of extraterritorial jurisdiction", is a "significant source of legal uncertainty for

both affected persons and business enterprises" and undermines the ability of domestic legal regimes to respond effectively to cross-border cases concerning business involvement in human rights abuses²⁵. A report resulting from the project notes that "...while there is international consensus as to when States can exercise extraterritorial jurisdiction in business and human rights cases, there is less clarity as to the circumstances in which they should or must exercise such jurisdiction"²⁶. It adds that "some international treaty bodies have recommended that home States take steps to prevent and/or punish abuse abroad by business enterprises domiciled within their respective jurisdictions.

Extraterritorial jurisdiction could entail²⁸ prescriptive or legislative jurisdiction, which concerns the ability of States to prescribe laws for actors and conduct abroad; adjudicative or judicial jurisdiction, which concerns the ability of courts to hear, adjudicate and resolve disputes with a foreign element; and enforcement jurisdiction, which concerns the ability of States to ensure that their laws are complied with, for example through investigating a case, making an arrest, or using its police or prosecutor's office.

The discussion of ETOs will ultimately grapple with queries regarding the potential implications on sovereign domestic affairs as well as the approaches to exercise extraterritorial jurisdiction and the related legal bases for that. Olivier De Schutter, former Special Rapporteur on the right to food, notes that "[i]f the adoption by the State of origin of the investor of extra-territorial regulations in fact facilitates the role of the host State in regulating the investor, then ensuring that the investment will contribute to human development and will benefit local communities enhances rather than restricts the exercise by the host State of its sovereignty"²⁹.

It is worth highlighting that in several areas of law, there is substantial State practice of extending national law to regulate the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, such as in areas of competition law, shareholder and consumer protection, and tax³⁰. Overall, there are no controversial perspectives or doubts on States' extraterritorial jurisdiction over their own companies.

According to the Maastricht principles³¹, which constitute an international expert opinion restating human rights law on ETOs, the scope of extraterritorial jurisdiction of a State encompasses: a) situations over which it *exercises authority or effective control*, whether or not such control is exercised in accordance with international law; b) situations over which State acts or omissions bring about *foreseeable effects* on the enjoyment of economic, social and cultural rights, whether within or outside its territory; c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, *is in a position to exercise decisive influence* or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.

In the debate about the bases to exercise extraterritorial jurisdiction in the field of human rights, “domestic measures with extraterritorial implications” are differentiated from “direct extra-territorial jurisdiction”. For example, domestic measures with extraterritorial implications would require that a company domiciled in the forum jurisdiction has to supervise a foreign subsidiary or contractor. These measures thus deal with the action or inaction of the company at home, which could have effects in other countries³². The project on accountability and remedy for victims of business-related human rights abuse under the auspices of the United Nations High Commissioner for Human Rights and related reports highlights that “lack of coordination between States with respect to the use of domestic measures with extraterritorial implications can undermine the efforts of regulatory and domestic law enforcement bodies with respect to the prevention, detection and investigation of cross-border cases of business involvement in human rights abuses”³³. Direct extra-territorial jurisdiction entails exercising the State’s extraterritorial obligations under human rights law through direct jurisdiction over the foreign subsidiary or parties contracted by the corporation holding the nationality of that State. The level of intrusiveness in regard to sovereignty issues is also differentiated between these two approaches, with the latter approach imposing deeper challenges to sovereignty-related issues.

A prospective Instrument could address extraterritorial jurisdiction through clarifying two crucial elements; the home states’ responsibility to impose on parent corporations an obligation to comply with certain norms wherever they operate³⁴, and the jurisdiction of courts in the home State of a corporation over cases brought by victims of human rights abuse done in the host State of the corporation. This would help in overcoming difficulties facing victims of corporate human rights abuse by enabling litigation to take place in alternative jurisdictions, such as the home State of the corporation. Exercising extraterritorial jurisdiction as suggested here does not exclude the courts of the host State to exercise jurisdiction. However, ‘positive conflicts of jurisdiction’ may occur as a result whereby both the ‘home State’ and the ‘host State’ seek to control the activities of the transnational corporation³⁵. Some may argue that such situation run the risk of imposing conflicting requirements of multiple jurisdictions on the corporation. These issues could be addressed and clarified under a prospective Instrument.

It is worth noting that European Union Members States have taken steps towards clarifying the obligation of home States in terms of recognizing the jurisdiction of their national courts when civil claims are filed against persons (including corporations) domiciled on their territory, wherever the damage has occurred and whatever the nationality or the place of claimants’ residence³⁶. Thus, the doctrine of ‘forum non conveniens’³⁷ is not available in cases involving European Union defendants (including companies)³⁸. Indeed, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and

commercial matters, replacing the Brussels Convention³⁹, carried forward a rule positing jurisdiction in the Member State where the defendant is domiciled⁴⁰. In this regard, the European Court of Justice (ECJ) decision in *Owusu v. Jackson* (2005) has clarified that the doctrine of forum ‘non conveniens’ is incompatible with the regime established under Regulation 44/2001⁴¹, thus leaving no doubt in this regard. Abolition of forum ‘non conveniens’ in the European Member States embodies an attempt to ensure that their legal systems allow the bringing of court actions before their domestic courts relating to the liability of corporations operating abroad.

Clarifying extraterritorial jurisdiction could be built on the opinions of authoritative UN human rights bodies (see Annex 3) as well as emerging State practice.

c. Discussing selected possible approaches: Clarifying international cooperation among States in regard to investigation, recognition and enforcement

Victims of corporate human rights abuse often face a set of hurdles at the stage of preparing to bring a case as well as after a judgment is given, which often leads to undermining or blocking the way towards access to remedy and justice⁴². A study of barriers to access to judicial remedy (which focused on the US, Canada and Europe) indicated that among the barriers victims face are difficulties in investigating and gathering evidence for such claims, the costs of bringing transnational litigation in Europe and North America (including costs associated with gathering evidence in a foreign State, the availability of legal and technical experts, and the length of litigation time)⁴³. Moreover, the study noted that barriers include the ability to enforce a judgement in favor of the victims when the litigation includes assets located outside the forum State’s jurisdiction⁴⁴.

Furthermore, as noted above, one of the key problems identified as presently undermining the ability of domestic legal regimes to respond effectively to cross-border cases concerning business involvement in human rights abuses is “lack of cooperation and coordination between interested States with respect to the investigation, prosecution and enforcement of cross-border cases”⁴⁵. “This lack of international cooperation and coordination has had negative effects on access to remedy in a number of individual cross-border cases, for instance by hampering the ability of prosecutors to act on some complaints, by adding to the costs and procedural complexity of cross-border cases, and by introducing delays that have significantly reduced the likelihood of a successful prosecution”⁴⁶.

States have entered into a range of international treaties on these matters particularly because such mutual assistance cannot be effective without developing the needed legal instruments. The existing instruments are often regional or bilateral. For example, the “European Convention on Mutual Assistance in Criminal Matters” (Strasbourg, 20.IV.1959)⁴⁷ is designed with the understanding that “the adoption of common rules in the field

of mutual assistance in criminal matters will contribute to the attainment of [the] aim [of greater unity among its members]"⁴⁸.

In regard to recognition and enforcement of foreign judgements, differences are vast among countries⁴⁹. Some countries do not enforce foreign judgments in the absence of a treaty (i.e. Netherlands and some Scandinavian countries)⁵⁰. In the absence of treaty commitments, countries are under no obligation to recognize and/or enforce foreign judgments and State practice in this area is not considered specific enough to create rules of customary international law⁵¹. Within this context, recognition and enforcement treaties shift the basis from the unsure grounds, such as comity⁵², to legal rules. Treaties also provide firm basis for reciprocity among Member States to the treaty and clarify the scope of the recognizable judgments.

The European Member States have adopted the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁵³, with the objective of "strengthen(ing) in their territories the legal protection of persons...", while recognizing that "it is necessary for this purpose to determine the international jurisdiction of the courts, to facilitate recognition, and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements" (see preamble of the convention). The Lugano Convention of 30 October 2007 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (preceded by the Lugano Convention 1988) extended the objectives and principles of the Brussels Convention to EFTA states⁵⁴ beyond just member states of the European Economic Community⁵⁵. Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation) is substantively the same as the Brussels Convention (as regard recognition and enforcement). Unlike the Convention, the regulation has direct effect in domestic law and need not be implemented by local legislation, thus making it more reliably and uniformly applicable throughout the EU Member States⁵⁶. A regulation also has primacy over domestic laws, thus legislation contrary to the spirit and purpose of the Brussels Regulation would be disregarded by local courts⁵⁷.

The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention) was adopted in 1979 and entered into force in 1980⁵⁸. It was drafted with a view that "the administration of justice in the American States requires their mutual cooperation for the purpose of ensuring the extraterritorial validity of judgments and arbitral awards rendered in their respective territorial jurisdictions" (see Preamble of the Convention).

In the international arbitration sphere, the New

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)⁵⁹ is considered a successful model in the field of commercial arbitration that enables the effective functioning of the investor-State dispute settlement under investment treaty rules, which is available to multinational corporations in their capacity as foreign investors. Under this Convention, State Parties give the possibility for any investor with an investor-state dispute settlement award in his favor to initiate enforcement proceedings in various jurisdictions party to the New York Convention where there are attachable assets of the sovereign involved in the case. With similar purposes, the Inter-American Convention on International Commercial Arbitration, also known as the 'Panama Convention', was adopted in 1975 and entered into force in 1976.⁶⁰

Furthermore, the Hague Convention on Choice of Court Agreements, which was concluded in 2005 and entered into force in 2015⁶¹, aims at ensuring effectiveness of 'forum selection clauses' or 'jurisdiction clauses' between parties to international commercial transactions⁶². As noted by the International Chamber of Commerce, this instrument promotes legal certainty for cross-border business and creates a climate more favourable to international trade and investment⁶³. The Convention applies to choice of court agreements in civil or commercial matters, and excludes consumer and employment contracts, family matters, tort or delict claims for damage to tangible property that do not arise from a contractual relationship, marine pollution and related issues, anti-trust (competition) matters, among other issues that are usually covered by more specific rules. The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (of 1 February 1971)⁶⁴ establishes common provisions on mutual recognition and enforcement of judicial decisions among its State Parties.

Addressing elements of cross border cooperation in regard to investigation, prosecution and recognition and enforcement of judgements under a multilateral binding instrument could potentially tackle some of the most complex hurdles faced by victims of corporate human rights abuse in an endeavor to raise a case or enforce a judgment against a transnational corporation. There are multiple models at the regional and multilateral levels, as illustrated above, which could serve as reference in this regard.

V. Concluding remarks

The brief attempted to highlight some of the areas that are decisive in regard to access to remedy by victims of corporate human rights abuse. States could cooperate towards filling such gaps in the international legal order that cannot be effectively covered through action at the level of domestic legal systems alone. These include clarification of States' extraterritorial obligations, ensuring certain requirements under national legislation in regard to the conduct and liability of corporations, and cooperation in regard to investigation, recognition and enforcement.

Developing the legal framework with a view towards adapting to the economic reality of corporations requires

considerations and changes on both sides of the corporate chain, including in home and host States. In such a context, a prospective legally binding Instrument could be an additional means under international cooperation to support States in fulfilling their obligations, through ensuring that corporations cannot maneuver jurisdictional limitations to avoid liability. It would thus complement the domestic processes, mechanisms and legal frameworks available to States and victims.

Annexes:

Annex 1: Opinions by UN Human Rights Treaty Bodies in Regard to States' Obligations (emphasis added)

General Comment 31 of the Human Rights Committee on the Nature of the General Legal Obligation on States Parties to the International Covenant on Civil and Political Rights CCPR (2004) provided: "the positive obligation on state Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, *not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities...there may be ...violations by states Parties of those rights, as a result of states Parties' permitting or failing...to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities*"⁶⁵.

Committee on the Elimination of Discrimination against Women, General Recommendation 19 (1992): "Under general international law and specific human rights Covenants, States may also be *responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish such acts of violence, and for providing compensation*"⁶⁶.

Committee on Economic, Social, and Cultural rights, General comment 12 on the Right to food (1999) provided that "violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States" and "as part of their obligations to protect people's resource base for food, *States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food*"⁶⁷.

Annex 2: Opinions by Regional Human Rights Courts on State's Obligations (emphasis added)

The European Court of Human Rights (ECHR) considered that the State's international responsibility "*may arise from a failure to regulate private industry*"⁶⁸ (in the *Fadeyeva v. Russia* case (2005)). The case involved environmental and health damage produced by a privatized iron smelter located in a highly inhabited village in Russia. The fact

that the iron smelter was private-owned led the Court to consider that "the Russian Federation cannot be said to have directly interfered with the applicant's private life or home", but that the possibility of the authorities to "evaluate the pollution hazards and to take adequate measures to prevent or reduce them [...] shows a *sufficient nexus* between the pollutant emissions and the State to *raise an issue of the State's positive obligation under Article 8 of the Convention* (European Convention on Human Rights)".

The Inter-American Court of Human Rights recognised that states have the *duty to take reasonable steps to prevent human rights violations and to carry out serious investigation of violations committed within its jurisdiction*⁶⁹ (*Velásquez Rodríguez v. Honduras*). The *Velásquez Rodríguez v. Honduras* case involved the enforced disappearance of a Honduras national allegedly by agents of the state. Nevertheless, the act was committed by individuals wearing civilian clothes and without any official identification. The fact that the actual kidnapping and disappearance could not be directly allocated to the state compelled the Court to establish that "*An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention*"⁷⁰.

The African Commission on Human and Peoples' Rights⁷¹, in a case⁷² regarding practices in oil extraction in Ogoniland, including concerning violations of economic and social rights under the African Charter on Human and Peoples' Rights (1981), perpetrated by both public and private actors. Nigeria and Shell Petroleum were involved in an oil consortium whose operations caused serious environmental degradation in the land of the Ogoni people. The African Commission on Human and Peoples' Rights states that "*the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies*". The Commission held that the *duty to protect* requires "*the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of law and regulations so that individuals will be able to freely realise their rights and freedoms*".

The African Charter of Human and Peoples' rights specifies in Article 1 that the states parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also "*undertake ...measures to give effect to them*", in other words if a state neglects to ensure the rights in the African Charter, this may constitute a violation even if the State or its agents are not the immediate cause of the violations⁷³.

Annex 3: Opinions by UN Treaty Bodies and Regional Courts on Extraterritorial Obligations of States (emphasis added)

The UN Human Rights Committee provided that: “a State party must respect and ensure the rights laid down in the International Covenant on Civil and Political Rights to anyone *within its power or effective control*....even if not situated within the territory of the State Party...and regardless of the circumstances in which such power or effective control was obtained”.

The Committee on Economic, Social and Cultural Rights General Comment No. 14 (2000) on the right to highest attainable standard of health (Art. 12 of the UNCESCR)⁷⁵ provided that: “States parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the right in other countries *if they are able to influence these third parties by way of legal or political means*, in accordance with the Charter of the United Nations and applicable international law”.

The Committee on the Rights of the Child⁷⁶ in General Comment 16 explains that: Home States have obligations to respect, protect and fulfil children’s rights in the context of businesses’ extra-territorial activities and operations provided that there is a *reasonable link* between the State and the conduct concerned, namely where the enterprises have center of activity, are registered or domiciled or have their main place of business or substantial business activities in the State⁷⁷. The Committee proposes measures for states to prevent harm abroad, such as making public finance and other public support conditional on carrying out a process to identify, prevent or mitigate any negative impacts on children’s rights in their overseas operations, taking into account the prior record of business enterprises for the same purposes; ensuring that state agencies such as export credit agencies take steps to identify, prevent and mitigate adverse impacts of projects they support.

The Committee on Economic, Social, and Cultural Rights⁷⁸ provided that: States should take steps to “prevent human rights contraventions abroad by corporations *which have their main seat in their jurisdiction*, without infringing the sovereignty or diminishing the obligations of host states under the Covenant.”

The Inter-American Commission of Human Rights provides that reference to ‘any persons subject to [a state’s] jurisdiction’ under Article 1 of the American Convention of Human Rights refers to “*conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state - usually through the acts of the latter’s agents abroad*. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control”.

Endnotes:

¹ The Guiding Principles provided that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” and “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations” (see Foundational Principles 1 & 2), available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 11.7.2016).

² See: A/HRC/8/5, page 5, <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

³ See: Carlos Correa (2016), “Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights”, South Centre Policy Brief 28, available at: <https://www.southcentre.int/policy-brief-28-september-2016/>.

⁴ Ibid.

⁵ See: South Centre South Bulletin Issues 87-88 entitled “Business and Human Rights: Commencing discussions on a legally binding instrument”, available at: <https://www.southcentre.int/south-bulletin-87-88-23-november-2015/>.

⁶ This brief is based on a presentation by the author during the first meeting of the open-ended inter-governmental working group established by Resolution A/HRC/26/9 (6-10 July 2015) and material prepared by the South Centre team working on following the process of Resolution A/HRC/26/9.

⁷ See for example: Human Rights Committee, General Comment 35 and General Comment 27; and Committee on the Rights of the Child, General Comment 16.

⁸ UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), par. 8. General Comment 31 of the Human Rights Committee on the Nature of the General Legal Obligation on States Parties to the International Covenant on Civil and Political Rights (CCPR).

⁹ UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), par. 8. provides the following: The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.

¹⁰ See: Human Rights Committee, General Comment 35, UN Doc. CCPR/C/GC/35 (2014), para. 9; General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 6; and, Committee on the Rights of the Child, General Comment 16, UN Doc. CRC/C/GC/16 (2013), p. 2.

¹¹ See: Committee on the Rights of the Child, General Comment 16, UN Doc. CRC/C/GC/16 (2013), para. 4.

¹² See: ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment (1980), para. 61; and, European Court of Human Rights, *Fadeyeva v Russia*, Judgment (2005), paras. 89 and 133. See: "Global Economy, Global Rights: A Practitioner's Guide for Interpreting Human Rights Obligations in the Global Economy", by ESCR-Net (2014).

¹³ See: Committee on the Rights of the Child, General Comment 16, UN Doc. CRC/C/GC/16 (2013), para. 25; and, Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward", in D. Alland, V. Chetail, O. de Frouville & J.E. Vinuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Prof. Pierre-Marie Dupuy*, Martinus Nijhoff (2014), p. 125.

¹⁴ See: International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, referenced by Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998664 (accessed 30.9.2016).

¹⁵ State responsibility requires showing that the state knew that it was aiding or assisting in commission of a wrongful act.

¹⁶ See footnote 11, Robert McCorquodale and Penelope Simons.

¹⁷ Olivier De Schutter, forward for « A practitioners' guide for interpreting human rights obligations in the global economy » (ESCR-net).

¹⁸ Committee against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties', January 2008, para 16. Article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that: "Each State Party shall take such measures as may be necessary to establish *its jurisdiction*...when the offences are committed *in any territory under its jurisdiction*". According to the UN Committee against Torture, any territory under a State's jurisdiction includes 'all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure or de facto effective control*, in accordance with international law" (emphasis added).

¹⁹ See: Background document "The Accountability and Remedy Project", accompanying consultation draft of the OHCHR Accountability and Remedy Project, available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf (accessed 11.7.2016).

²⁰ For more information, see the following website: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

²¹ This approach would require addressing the mode of determining the nationality of the corporation. Currently, there is no specific mode of determination of the nationality under international law. Three approaches are usually used and considered to be generally accepted to denote sufficient effective link between the state and the corporation to justify exercise of jurisdiction - Place of incorporation; Principal place of business; and Central

place of administration. See also: De Schutter (2015), "Towards a Legally Binding Instrument on Business and Human Rights", page 19, who notes that "there is a risk that the modes of determination of the nationality of the corporation will be manipulated in order to allow a State, relying on the principle of active personality, to extend its jurisdiction to extraterritorial situations - including acts adopted by companies incorporated abroad - which it might otherwise be prohibited under international law to reach".

²² 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.

²³ See Article 3 of the Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography.

²⁴ See: Report of the United Nations High Commissioner for Human Rights "Improving accountability and access to remedy for victims of business-related human rights abuse" (A/HRC/32/19) and its addendum A/HRC/32/19/Add.1 which encapsulates findings from the research undertaken by the Accountability and Remedy project (ARP) and key findings in relation to the six work streams or project components of the ARP presented in the Background Paper accompanying a consultation draft of the ARP available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf.

²⁵ See: Background document "The Accountability and Remedy Project", accompanying consultation draft of the OHCHR Accountability and Remedy Project, page 18, available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf (accessed 11.7.2016).

²⁶ See: para. 33 of report A/HRC/32/19/Add.1.

²⁷ See the explanatory note addendum para. 33 of report A/HRC/32/19/Add.1.

²⁸ Extraterritorial prescriptive and enforcement jurisdiction (related to the extent to which states can prescribe and enforce their laws extraterritorially) are governed by public international law. Adjudicative jurisdiction is largely governed by domestic law (i.e. conflicts of law). See J. Zerk "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" (June 2010), page 13.

²⁹ Olivier de Schutter, "Sovereignty plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations" (2010).

³⁰ See: Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (December 2013), "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", p. 60.

³¹ See: http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (visited on 8.7.2016).

³² Jennifer Zerk (2010), "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas", page 206, a report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, Working Paper No. 59, available at: <https://www.hks.harvard.edu/m->

rcbg/CSRI/publications/workingpaper_59_zerk.pdf (accessed 11.7.206).

³³ Ibid, page 18.

³⁴ See: Olivier De Schutter (2010) "Sovereignty-plus in the Era of Interdependence", page 6, CRIDHO Working Paper.

³⁵ Ibid, page 7.

³⁶ Ibid, page 5.

³⁷ The doctrine of *forum non conveniens* allows a court, whose jurisdiction is established under the applicable rules, to decline to hear a case if it finds that it is an inappropriate forum or that another forum would be more appropriate. It is based on the idea of discretionary dismissals of specific cases, leading into an assumption that jurisdictional rules are sometimes too broad, resulting in the allocation of jurisdiction to a court which is not an appropriate (or not the most appropriate) forum. *Forum non conveniens* is applied almost exclusively in common law countries such as the United States, United Kingdom, Australia and Canada. The effects of this doctrine were seen in the Bhopal case and the Asbestos Miners case. See: "A Critique of the Doctrine of Forum Non Conveniens", markus a petsche, Taylor's University (2011).

³⁸ Presentation by Richard Meeran at the first meeting of the open-ended working group on transnational corporations and other business enterprises with respect to human rights (6-10 July 2015).

³⁹ With the exception of the Member State of Denmark.

⁴⁰ Article 4 (1) of the Brussels Regulation provides that a corporation which is 'domiciled' in an EU Member State could be sued in that Member State. Article 4 states: "1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". Article 63 (1) of the Brussels Regulation: the domicile of legal persons or companies is determined by the jurisdiction where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business".

⁴¹ See : <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/02>

⁴² Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (December 2013), "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business".

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Background Paper accompanying a consultation draft in relation to the Office of the High Commissioner for Human Rights Accountability and Remedy Project, page 18, available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf.

⁴⁶ Background Paper accompanying a consultation draft in relation to the Office of the High Commissioners for Human Rights Accountability and Remedy Project, page 18, available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf.

⁴⁷ Available at :

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800656ce>

⁴⁸ See Preamble of the European Convention on Mutual Assistance in Criminal Matters. Other examples of conventions that tackled cross border cooperation for the purposes of preventive, investigative and enforcement efforts include: UN Convention against Transnational Crime, ILO Convention on the Worst Forms of Child Labor, the Convention on the Rights of the Child including the Protocol on the Sale of Children, Child Prostitution and Child Pornography.

⁴⁹ Ralf Michaels, "Recognition and Enforcement of Foreign Judgments", 2009 Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² International comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. See: "Enforcement of foreign judgments on the basis of international comity", available at: <http://www.sebalulule.co.ug/?p=257>.

⁵³ See:

<http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>

⁵⁴ EFTA (The European Free Trade Association) includes: Iceland, Liechtenstein, Norway and Switzerland.

⁵⁵ Oliver Browne (October 2012), "Reform of the Brussels Regulation: Developments in Questions of Jurisdiction and the Recognition and Enforcement of Judgments across the European Union", Latham and Watkins, The London Disputes Newsletter, available at: <https://m.lw.com/thoughtLeadership/reform-of-brussels-regulation>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ The Agreement has 18 signatories and 10 Member State Parties, including: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. The 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgements (La Paz Convention), is devoted primarily to elaborating the meaning of the phrase 'competent in the international sphere' under Article 2 of the Montevideo Convention. See: Jose Daniel Amado (1990), "Recognition and Enforcement of Foreign Judgements in Latin American Countries: An Overview and Update".

⁵⁹ Available at:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

⁶⁰ Available at:

<http://www.oas.org/juridico/english/treaties/b-35.html>, currently has 19 State Parties, including: Venezuela, Uruguay, United States, Peru, Paraguay, Panama, Nicaragua, Mexico, Honduras, Guatemala, El Salvador, Ecuador, Dominican Republic, Costa Rica, Colombia, Chile, Brazil, Bolivia, Argentina.

⁶¹ Number of States and REIOs (regional economic integration organisations) bound by this Convention: 30 (as of September 2016). See:

<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> .

⁶² Arbitration agreements in international cases are recognized pursuant to the rules established by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

⁶³ "The Hague Convention of 30 June on Choice of Court Agreements", Outline of the Convention.

⁶⁴ There are five Contracting States to this Convention (Albania, Cyprus, Netherlands, Portugal, Kuwait). See: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78> , Entry into force: 20-VIII-1979.

⁶⁵ See para. 8 of UN Doc CCPR/C/21/Rev.1/Add. 13 (2004).

⁶⁶ Para. 9 of Recommendation 19.

⁶⁷ UN Economic and Social Council, Article 11, 20th session, UN Doc E/C.12/1999/5 (1999).

⁶⁸ ECHR, *Fadeyeva v. Russia*, Judgment (2005), para. 89.

⁶⁹ Inter-American Human Rights Court, *Velásquez Rodríguez v Honduras*, Judgment (1988), paras. 172-174.

⁷⁰ Inter-American Convention on Human Rights: Part I: State Obligations and Rights Protected

Chapter 1: General Obligations

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

⁷¹ The African Charter established the African Commission on Human and Peoples' Rights. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat has subsequently been located in Banjul,

The Gambia.

In addition to performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, the Commission is officially charged with three major functions:

the protection of human and peoples' rights

the promotion of human and peoples' rights

the interpretation of the African Charter on Human and Peoples' Rights

The Commission consists of 11 members elected by the AU Assembly from experts nominated by the State Parties to the Charter. Their mandates are for six years, renewable. <http://www.achpr.org/about/>

⁷² Social and Economic Rights Action Center and Center for Econ. And Soc. Rights v. Nigeria, Case No. ACHPR/COMM/A044/1, Afr. Comm'n on Human and Peoples' Rights (2001)

⁷³ See Olivier De Schutter (2015), "Towards a Legally Binding Instrument on business and human rights".

⁷⁴ Human Rights Committee, General comment No. 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, May 2004, para. 10.

⁷⁵ Committee on Economic, Social and Cultural Rights, General Comment 14, UN Doc. E/C.12/2000/4 (2000), para. 39.

⁷⁶ General Comment 16 (para. 43)

⁷⁷ See "Need and Options for a New International Instrument in the Field of Business and Human Rights" (International Commission of Jurists, 2010), p. 30. The General Comment 16 proposes: measures for states to prevent harm abroad, such as making public finance and other public support conditional on carrying out a process to identify, prevent or mitigate any negative impacts on children's rights in their overseas operations, taking into account the prior record of business enterprises for the same purposes; ensuring that state agencies such as export credit agencies take steps to identify, prevent and mitigate adverse impacts of projects they support.

⁷⁸ UN Committee on Economic, Social and Cultural Rights, Statement on Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UN Doc E/C.12/2011/1 (July 2011)

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