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POLICY BRIEF

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A Prospective Legally Binding Instrument on TNCs and Other Business Enterprises In Regard to Human Rights: Addressing Challenges to Access to Justice Faced by Victims

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Introduction

The complexity of corporate structures in the current globalized economy has shaped a number of legal barriers that limit the rights of victims to access to justice in cases of corporate-related human rights abuses. A number of these cases have been largely documented and commented on by scholars, non-governmental organizations, and other social actors around the world[1]. They are indicative of different practical and procedural hurdles that victims of corporate-related human rights abuses face when accessing judicial mechanisms in order to seek remedy, both in home and host States where transnational corporations (TNCs) operate.

While States have the primary obligation to protect human rights, it is also true that not all jurisdictions are capable of coping with the always shifting corporate world, particularly when such corporations operate transnationally forcing victims to bring legal actions against TNCs directly in their home State[2]. The challenges that victims face in these cases include constraints in the jurisdiction of the host State due to the lack of adequate substantive and procedural laws to achieve effective remedy[3], and obstacles related to jurisdiction of foreign courts, collection of evidence and information, or uncertainty about the possibility of 'piercing the corporate veil' when bringing claims in the home State of TNCs.

Under these conditions, a needed step to move forward in the discussions involving human rights abuses by TNCs and other business enterprises[4] should be to identify different legal and practical barriers that victims face when dealing with such cases, and to discuss some options to overcome them. These elements could be used by the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIWG) when analysing mechanisms to guarantee the rights to access to justice of victims and particularly to identify the gaps that could be covered by a prospective binding instrument on business and human rights.

Challenges faced by victims of corporate-related human rights abuses

During the first session of the OEIWG, Mr. Richard Meeran, partner of Leigh Day and solicitor in claims against UK based multinationals[5], noted that there are "significant deficiencies in access to remedies (…) including various procedural and practical obstacles (…)"[6]. Particularly, Mr. Meeran considered that some of the most common obstacles that victims face in cases involving transnational litigation of corporate-related human rights abuses include *forum non conveniens*, lifting the corporate veil and gathering of evidence[7].

Likewise, a report prepared for the Office of the High Commissioner for Human Rights on corporate liability for gross human rights abuses[8] also identifies these barriers, and highlights that "Differences in domestic conditions are to be expected and in many cases reflect variations in background legal systems, legal culture and traditions, levels of social and political stability and economic development (…) (T)hese differences also pose challenges to future efforts to improve access to remedy at domestic level"[9].

Practical barriers and limitations

Economic constraints (funding of lawyers and legal aid)

Bringing cases against TNCs and other business enterprises for alleged human rights abuses often involves large amounts of costs and time. TNCs usually have better economic financial capabilities than victims to sustain long and complicated judicial processes[10], and are able to hire large law firms for their defence. On the contrary, victims mostly depend on official legal aid or *pro bono* work to bring this type of claims. Moreover, the uncertainty of the final outcome of these claims involve higher risks than other private claims with respect to the total legal costs and may restrict the availability of victims to find suitable legal aid and expertise; therefore victims may be unable to bring human rights claims against TNCs and other business enterprises.

- **Lack of legal aid:** Commonly, legal aid is provided by States and it is based on income or available means of the claimant; this translates into the need of the claimants

to prove the lack of sufficient economic resources to cover the costs of litigation for themselves[11]. Likewise, the nationality or place of residence of the victim will also limit access to legal aid in the forum state; because it will be necessary to prove that the country of residence or nationality of the victim has not established legal aid for these cases, or that such mechanisms are ineffective[12].

Moreover, compulsory legal aid is generally only provided in criminal proceedings[13], but some jurisdictions recognise the feasibility of granting legal aid for civil claims based on its substantial merits[14]. Nevertheless, it has been argued than currently States are reducing funding for legal aid in non-criminal proceedings[15].

- **'Loser pays' rules:** The 'loser pays' rule implies that the losing party of litigation must pay the legal costs of the winning party. The risks of bringing human rights claims against corporations increase due to the large amount of economic resources that businesses are willing to expend defending from such claims[16]; therefore victims may choose not to pursue litigation or opt for extra-judicial settlements. Moreover, in jurisdictions where the 'loser pays' rule is not applied, or only partially applied, the defendant may request the court to order the losing party to cover the legal costs if the claims were unduly filed, or even initiate 'retaliatory litigation' against the claimant seeking damages for reputational losses[17].

- **Non-availability of class or collective action mechanisms:** Class action o collective action mechanisms refer to those procedures in which an entire class of victims may be represented by one or more representatives[18]. In addition, law firms acting in class action lawsuits normally act on a contingent basis; this means that they are responsible for expenses, but will be repaid depending on the final outcome. This type of actions basically requires that individuals, belonging to a class, share common situation of law or fact, and that the claims of the representative parties are typical of the claims of the class[19]. Nevertheless, not all jurisdictions allow this type of actions and, in jurisdictions where they are available, the standard for establishing commonality among the members of the class requires common *factual* circumstances of treatment, and not only general policy of treatment[20], therefore meeting these requirements results problematic.

Access to information and investigative efforts

Access to and collection of evidence in the host State, plus judicial cooperation between home and host States are critical elements to allow further investigation of alleged harms resulting from corporate wrongdoings. In addition, proceedings directed to allow access to information and evidence in corporate-related human rights abuses are time and resource consuming. Contrary to common street crimes, corporate wrongdoings involve a number of acts and decisions carried out in a multi-layered corporate office which are normally protected by corporate and privacy rules that makes gathering of evidence harder and costly to achieve[21].

- **The right to privacy (confidentiality claims):** In general the right to privacy entails the right of every person not to be subjected to arbitrary interference in his privacy, family, home or correspondence[22]. The right to privacy prevents the State to conduct warrantless searches or seizure of property. Although discussions have been held on whether or not business corporations have the right to personal privacy[23], it is a fact that commercial and business premises are private facilities, which implies that any search will require a warrant. This is particularly true in criminal proceedings, where law enforcement agencies are required to demonstrate a 'probable cause' to access relevant evidence related to the commission of a crime. In non-criminal matters, disclosure and discovery procedures require judicial orders, which are complex and time consuming, mainly because it will be necessary to specify the documents and information required, and its relevance to the inquiry[24].

- **Location of evidence and information:** Particularly in cases involving transnational conducts, the physical location of evidence and information could be used as an excuse to object the jurisdiction of courts of the home State of TNCs. Defendants could argue that home State courts do not have adequate jurisdiction to investigate the alleged harmful conduct as the evidence is located in another territory where it would be easier to collect. Moreover, in order to obtain further evidence, the investigation and prosecution of these cases involve the use of large amounts of resources and need full cooperation of the countries in question[25]. The lack of such resources or cooperation will result in the probable dismissal of the case[26].

- **Volume and complexity of information:** In addition, even in cases where the order of discovery is broad[27], the volume and complexity of corporate and financial records necessary to prove the case and control of TNCs over subsidiaries, contractors and other entities in a global value chain, could limit the effectiveness of the discovery[28] as wrongdoings in large corporate firms, such as TNCs, are "likely to be much more complex than in smaller, privately held firms, making it more costly for the government to untangle"[29].

Lack of cooperation among jurisdictions

International cooperation is essential in cases of corporate-related human rights abuses involving transboundary conducts. As explained above, claimants and governments' official agencies acting in these cases may require international judicial cooperation to access information, evidence or witnesses located abroad, or to seize assets and property to guarantee the enforcement of judicial decisions and effective redress. Nonetheless, judicial cooperation is not automatic and requires comity among States or international cooperation instruments to be operative.

- **Differences in legal approaches:** Requiring judicial assistance from foreign jurisdictions becomes essential in order to continue with investigative or judicial proceedings in cases of corporate-related human rights abuses with transboundary elements. Nevertheless, not all States

share the same legal system, and these differences may bring disagreements on what legal standards should be applicable among jurisdictions with respect to the rules of enforcement of judicial decisions, the scope of discovery orders or to the nature of sanctions and remedy[30]. Therefore, courts, or law enforcement agencies, of the required jurisdiction may refuse to grant legal and judicial cooperation on the grounds of being inconsistent with its law and practice[31].

- **Lack of comity or international cooperation instruments among States:** The recognition of the principle of state sovereignty and the principle of non-interference in the internal affairs of States restricts the automatic operation of international judicial cooperation among States. This is the reason why, in order for international judicial cooperation to be effective, States depend on comity or the application of international agreements on the matter. Currently, not all States are part of international, regional or bilateral agreements on judicial cooperation[32], and in most cases States depend on the wilfulness of the required State to enforce judicial orders and decisions, or allow preparatory acts aimed at facilitating the investigation of human rights abuses perpetrated by corporations. Moreover, in such cases, political, economic and international relations among States could increase the hurdles that claimants or prosecutors face when dealing with foreign jurisdictions.

Enforcement of judgments

Even when victims' interests have successfully prevailed in judicial proceedings against TNCs and other business corporations, there are some practical limitations that may turn the enforcement stage difficult. Among others, the amount of damages awarded, the distribution of such damages among the victims in collective or class action suits and, in cases involving transnational conducts, the divergence of applicable legal standards and approaches to damages[33].

- **Escaping liability:** The corporate structure of business with transnational operations may spur impunity on cases of corporate-related human rights abuses, for example by winding down their activities and liquidating their assets in the host States, which hampers the possibility of victims to collect damages[34].

The nature of confidential settlements and human rights

The achievement of confidential settlements between TNCs and the plaintiffs limits the possibility for analysing other grounds of corporate liability, establishing precedent and deterrence to guarantee non-repetition of the same conduct. Moreover, the nature of these confidential settlements impedes the possibility of the State to oversee that achieved remedy is adequate and effective.

Legal barriers

Forum non conveniens

The doctrine of *forum non conveniens* is normally applied in cases involving more than one jurisdiction. Under this doctrine, courts may decline to exercise jurisdiction in face of the existence of a more adequate jurisdiction to adjudicate the dispute. This decision can be based on the fact that the court believes that there is another jurisdiction with a more real and substantial connection with the case[35]. The doctrine of *forum non conveniens* is a recurrent tool used to decline jurisdiction in corporate-related human rights cases.

- **Personal Jurisdiction and lack of sufficient contact:** Generally, courts only have jurisdiction over individuals or legal entities, and conducts occurring within the territory where they are seated; TNCs act in host States through subsidiaries, agents or distributors, therefore courts in their home states may decline jurisdiction on cases where sufficient contact between the TNC and the conduct abroad is not proven[36]. Defendants may also argue that the lack of sufficient contact with the home State's forum restricts the collection of evidence, and access to information and witnesses[37], and therefore a more appropriate forum should be required.

- **Lack of legal standards on applicability of *forum non conveniens:*** Even though the exercise of such doctrine requires examining the existence of a more adequate alternative forum to adjudicate the dispute[38], there is no common 'threshold' concerning the *adequacy* of such alternative forum. For example, courts may decide that the forum of the place where the conduct was carried out may simplify the collection of evidence and access to information[39], while others may decide that the complexity and nature of a case makes the supposedly adequate forum, not appropriate to hear the case[40]. The lack of standards on applicability of the *forum non conveniens* constrains the rights of victims to access to justice, as there is legal uncertainty on how the court will determine the 'convenience' of the forum.

Presumption against extraterritoriality of the law

For several years, the United States has become one of the most used forums to adjudicate human rights cases involving transnational corporations. This is because the Alien Tort Statute[41] offered a cause of action for victims of torts committed abroad to start claims against those responsible in the federal courts of the United States. Nevertheless, the presumption against extraterritoriality is commonly known in the United States, and it is based on the principle of sovereignty and non-interference in the internal affairs of States. Under this presumption, the legislation of one State is only applicable with respect to conducts occurring within that State[42]. Practically, this implies that courts of one State will refrain from applying national legislation in cases involving acts or conducts abroad, thus limiting their jurisdiction over such cases.

- ***Kiobel v Royal Dutch Petroleum Co*[43]:** This is the most notable case involving corporate-related human rights abuses in which the principle of presumption against extraterritoriality of the law was further developed. In this case, the Supreme Court of the United States

analysed if the Alien Tort Claims Act (ATCA)[44] could be applied extraterritorially. The Court concluded that ATCA is only applicable for conduct occurring within the United States, and not for conducts that occurred abroad[45], limiting the extraterritorial application of ATCA only to cases that strongly touch and concern the territory of the United States and that do not trigger serious foreign policy consequences for the country[46], thus displacing the presumption against extraterritoriality.

Doctrine of 'separate corporate personality'

The doctrine of 'separate corporate personality' is embedded in principles of private corporate law, and has broadly influenced the domestic legislation of most countries. Under this doctrine, parent companies are not automatically liable for the conduct of the subsidiaries they own or control[47]. In other words, the doctrine of 'separate corporate personality' implies that a subsidiary is a distinct legal entity than the parent company that owns it or controls it; the same is applied for joint ventures, contractors, or other entities in the supply chain of a corporation. This principle has broad effects in international law, as it is understood that subsidiary companies have the 'nationality' of the country where they are located, and not of the country where the parent is seated[48].

- **Establishing causation:** Another effect coming from the doctrine of separate corporate personality is the difficulty of establishing causation. In order to demonstrate causation it is necessary to prove that the conduct of an individual contributed to an injury, and that such individual can be held liable because it was foreseeable to expect that such conduct will produce an injury[49]. Nevertheless, in cases of TNCs, the doctrine of 'separate corporate personality' not only impairs the establishment of a connection between the parent company and the violation of human rights, but also between the parent company and its subsidiaries, therefore limiting the options of victims to obtain effective and adequate remedy in cases of corporate-related human rights abuses.

Statutes of limitation

The statutes of limitation refer to rules that set the time period in which certain legal claims can be brought in front of a court. These rules are common in most jurisdictions, but the time period may vary depending in the nature of the claim, the amount of damages claimed, among others. In the case of corporate-related human rights abuses, these time limitations could constrain access to justice for victims due to the necessary time required to gather evidence and information, or difficulties in the official investigation of claims[50]. The application of time limits or statutes of limitation will be further intricate in cases involving transnational conducts, as the courts will have to decide which national law is applicable for the case in question[51].

Choice of applicable law

In cases with transnational elements, courts usually deal with the analysis of applicable law to determine what law applies to the case[52]; whether the law of the forum State or the law of the foreign State. Generally, courts will apply the law of the place where the injury is sustained[53], but in cases involving human rights abuses the analysis becomes more complex because the court may consider strong reasons to apply the law of the forum State, for example when limitation periods of the foreign State does not allow to bring a claim, the nature of and amount to remedy does not guarantee adequate and effective remedy, or other public policy reasons necessary to assure the right of victims to access to justice. Nevertheless, the lack of certainty in the way courts decide which is the applicable law gives rise to certain complexities for victims because, depending on the choice of law, claimants will be required to comply with different substantive and procedural rules.

Options to overcome obstacles to access to justice in corporate-related human rights abuses

Even though a one-size-fits-all approach is questionable with respect to the issue of TNCs and other business enterprises and human rights[54], this should not limit the efforts to design an international legally binding instrument on this matter in order to strengthen international standards of human rights *vis-à-vis* the operations of TNCs. The different obstacles and limitations to access to justice faced by victims of human rights abuses perpetrated by business enterprises require the engagement of the international community in order to develop different proposals aimed at tackling gaps in the international legal order aimed at guaranteeing access to justice and corporate accountability.

Some options could include the following:

International cooperation and complementarity

Creating mechanisms for international cooperation might be the key to secure access to justice for victims of corporate-related human rights abuses, as it might strengthen the efforts of States to eradicate harmful behaviour by business enterprises. International cooperation should include cooperation among law enforcement agencies and mutual assistance across borders[55].

As an alternative to tackle more specific barriers, the prospective binding instrument could allow foreign courts to assert jurisdiction in cases involving corporate-related human rights abuses by clarifying the concept of 'no other available forum' under the principle of *forum necessitates*[56], or by banning the application of the doctrine of *forum non coveniens*, thereby securing an avenue for claimants to bring cases against TNCs directly in their home State[57]. This scheme should be based on the principle of complementarity, by which adjudicative jurisdiction is granted to a foreign court, when the main forum fails to exercise its primary jurisdiction[58].

Furthermore, a prospective international instrument on this matter could also cover the need for establishing rules for mutual recognition and enforcement of judgements in

cases of corporate violations of human rights. A number of international and regional treaties[59] have addressed the recognition and enforcement of judgments in civil and commercial matters[60] and in the recognition and enforcement of foreign arbitral awards[61]. These instruments have the main objective of facilitating the avenue of recognition of foreign judgments and introducing expeditious procedures to enforce them. Under this approach, the OEIWG could learn from the models developed by these instruments and developed mechanisms for the enforcement of judgments in cases of human rights abuses perpetrated by TNCs and other business enterprises, with the objective of assuring the grounds in which Member States could recognize these judgments, and provide firm basis for reciprocity among them[62].

The principle of 'duty of care', transparency and reporting requirements

In order to guarantee the effectiveness and efficiency of the prospective binding instrument on TNCs and other business enterprises and human rights, the prospective instrument could introduce a requirement for corporations to put in place corporate responses and policies lined up with international and national human rights standards aimed at assessing, preventing and addressing adverse human rights impacts across their operations, including the respect and enforcement of judgements. This could entail the recognition of a legal duty of care, under which a parent company will be directly liable for a harm committed abroad by an entity belonging to its corporate structure if it is not able to prove that it took all the necessary measures to avoid such harm[63].

Under these conditions, TNCs and other business enterprises must conduct their operations under the principles of transparency and public access in order to ensure oversight by competent authorities, which might include the requirement of submitting mandatory human rights reports to national authorities created by the prospective instrument for that end, resembling the establishment of national preventing mechanisms under the Optional Protocol to the Convention against Torture (OPCAT)[64], and could include the supervision by judicial or other adequate bodies of any non-judicial settlement arrived by the victims and the corporation. In addition, the prospective instrument should guarantee the competence of judicial authorities "to apply doctrines permitting them to determine the real links between formally separate entities, such as through [piercing the corporate veil] or the doctrine of [single economic unit]"[65].

Conclusions

The current economic globalization has prompted transnational operations among and within corporate groups. In conducting these operations, business enterprises may adversely affect and infringe the enjoyment of human rights. Nevertheless, the existence of different practical and legal barriers to access to justice of victims of these abuses allows business enterprises to escape from accountability and remedy of both host and home States.

The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises recognised that the current "patchwork of mechanisms remains incomplete and flawed. It must be improved in its parts and as a whole"[66]. Therefore, the discussions on the design and adoption of a legally binding instrument on transnational corporations and other business enterprises and human rights should address the different practical and legal barriers in this field , and assess different options to tackle them, particularly by promoting international cooperation mechanisms, including "effective articulation and application of extra-territorial obligations"[67] in order to "effectively fill gaps in the current international legal order (…)"[68].

End notes:

[1] For example see: EarthRights International, 'Out of Bounds: Accountability for Corporate Human Rights Abuse After Kiobel' (2013) <https://www.earthrights.org/publication/out-bounds>; Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business'(International Corporate Accountability Roundtable (ICAR), CORE and European Coalition for Corporate Justice (ECCJ), 2013),; Center for Constitutional Rights (CCRJustice), 'Corporate Human Rights Abuses' < https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses>; among others.

[2] Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishers, Oxford, 2004).

[3] Iman Prihandono, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries', *Journal of Law and Conflict Resolution* Vol 3(7) (2001), p. 90.

[4] This policy brief will refer to TNCs and other business enterprises as transnational corporations (TNCs) and multinational corporations.

[5] See: https://www.leighday.co.uk/Our-experts/partners-at-ld/Richard-Meeran

[6] Presentation by Richard Meeran, at the UN Human Rights Council Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (July 2015), reported in the South Centre's South Bulletin 87-88 (November 2015), p. 21.

[7] Ibid.

[8] Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (2013), available in http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, accessed August 2016.

[9] Ibid, p. 64.

[10] Justin Jos, 'Voice of Bhopal: Different Dimensions of the Barriers to Justice in Bhopal Gas Tragedy Case' (2016), available in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2803271, accessed August 2016.

[11] See Article 5(1) and (2) of European Council Directive 2003/8 in Official Journal of the European Communities, Volume 46 (Brussels, 31 January 2003).

[12] See: Connelly (A.P.) v. R.T.Z Corporation Plc and Others, [1997] UKHL 30, and Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States', *City University of Hong Kong Law Review* (2011), p. 34.

[13] See: Skinner, McCorquodale and De Schutter (2013), *op. cit.*, p. 47–51.

[14] Ibid.

[15] See: Asher Flynn, Jude McCulloch, Bronwyn Naylor, Natalie Byrom and Jackie Hodgson, 'Access to Justice: A Comparative Analysis of Cuts to Legal Aid' (2014), Report of the Monash Warwick Legal Aid Workshop Hosted by Monash University with the support of the University of Warwick.

[16] Zerk (2013), *op. cit.*, p. 80.

[17] See: Skinner, McCorquodale and De Schutter (2013), *op. cit.*, p. 48-53.

[18] Ibid, p. 57.

[19] United States Federal Rules of Civil Procedure, Rule 23.

[20] *Wal-Mart Stores Inc. v. Dukes,* 131 S. Ct. 2541 (2011) cited by Skinner, McCorquodale and De Schutter (2013), *op. cit.*, p. 57.

[21] Darryl K. Brown, 'The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement', *Ohio State Journal of Criminal Law* vol. 1 (2004), p. 528.

[22] The right to privacy is recognised in Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, and a number of regional human rights instruments.

[23] Especially, the United States Supreme Court has examined the application of the Fourth Amendment (protection of the right to privacy) to business corporations, holding that the Fourth Amendment protects business corporations in a lesser degree than it protects individuals. See: Brandon L. Garrett, 'The Constitutional Standing of Corporations', *University of Pennsylvania Law Review* vol. 163 (2014), p. 122 – 128.

[24] Kent Greenwalt and Eli Noam, 'Confidentiality Claims of Business Organizations' in Harvey J. Goldschmid and Columbia University (eds.), *Business Disclosure--Government's Need to Know* (McGraw-Hill, 1979), p. 386.

[25] Al-Haq, 'Prosecutor Dismisses War Crimes against Riwal', available in http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal, accessed August 2016.

[26] Ibid.

[27] Greenwalt and Noam (1979), *op. cit.*, p. 387.

[28] Brown (2004), *op. cit.*, p. 527.

[29] Ibid, p. 528.

[30] Zerk (2013), *op. cit.*, p. 101.

[31] Ibid.

[32] See for example: The Brussels Convention of 27 September 1968 among European Member States on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters , The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards , The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), The Inter-American Convention on International Commercial Arbitration.

[33] Zerk (2013), *op. cit.*, p. 85.

[34] See: Transnational Institute (TNI), 'Architecture of Impunity' (2015), available in https://www.tni.org/en/impunityinfographic, accessed August 2016; Business and Human Rights Resource Centre, 'Kaweri Coffee (part of Neumann Gruppe) lawsuit (re forced eviction in Uganda)' available in https://business-humanrights.org/en/kaweri-coffee-part-of-neumann-gruppe-lawsuit-re-forced-eviction-in-uganda, accessed August 2016.

[35] See defendant's plea in *Connelly (A.P.) v. R.T.Z Corporation Plc and Others* [1997] UKHL 30.

[36] See: *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013)

[37] Al-Haq, *op. cit.*

[38] Carlos Arevalo, 'Is an International Corporate Human Rights liability framework needed? An Economic Power, Business and Human Rights, and American Extraterritorial Jurisdiction analysis', *Opinion Juridica Universidad de Medellin* vol. 12 (2013), , p. 110.

[39] *Sahu v. Union Carbide Corp*., 746 F. Supp. 2d 609 (Dist. Court, SD New York 2010)

[40] *Connelly (A.P.) v. R.T.Z Corporation Plc and Others* [1997] UKHL 30.

[41] 28 U.S.C. § 1350 : US Code - Section 1350

[42] William S Dodge, 'Understanding the Presumption against Extraterritoriality', *Berkeley Journal of International Law* vol. 16 (1998), p. 88.

[43] 133 S.Ct. 1659 (2013)

[44] The Alien Tort Claims Act recognises that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or a treaty of the United States". The objective is to allow non-US citizens to bring claims in domestic courts against individuals or an organization seated in the United States. See: Theresa Adamski, 'The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations,' *Fordham Int'l L.J.* vol. 34 (2011), 1502.

[45] 133 S.Ct. 1659 (2013).

[46] Ibid.

[47] Zerk (2013), *op. cit.,* p. 65.

[48] Skinner, McCorquodale and De Schutter (2013), *op. cit.,* p. 59.

[49] See: Richard W. Wrigh, 'Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof', *Loyola of Los Angeles Law Review* vol. 41 (2008), p. 1295.

[50] Skinner, McCorquodale and De Schutter (2013), *op. cit.,* p. 39.

[51] Ibid.

[52] Ibid, p. 43.

[53] Zerk (2013), *op. cit.,* p. 50.

[54] John Ruggie, 'Summary of discussions of the Forum on Business and Human Rights' (2013), Human Rights Council, UN Doc. A/HRC/FBHR/2012/4, par. 79.

[55] One example to operationalize such approach can be found in: International Labour Organization, 'Forced Labour (Supplementary Measures) Recommendation' (2014), Recommendation 203, 103rd International Labour Conference Session.

[56] Skinner, McCorquodale and De Schutter (2013), *op. cit.,* p. 30.

[57] Meeran (2015), reported in the South Centre South Bulletin 87-88 (November 2015), p. 21.

[58] Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' *88 International Review of the Red Cross* (2006), p. 377.

[59] For a detailed view see: Kinda Mohamadieh, 'Approaching States' Obligations Under a Prospective Legally Binding Instrument on TNCs and Other Business Enterprises in Regard to Human Rights,' South Centre Policy Brief 30 (2016).

[60] See for example the Brussels Convention of 27 September 1968, the Brussels Regulation (Council Regulation (EC) No 44/2001) of December 2000, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards adopted in 1979, among others.

[61] See for example the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Inter-American Convention on International Commercial Arbitration adopted in 1975.

[62] Mohamadieh (2016), *op. cit.* p 5.

[63] Filip Gregor Garde and Hannah Ellis, 'Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses' (European Coalition for Corporate Justice, 2016), p. 21.

[64] Article 3 of the Optional Protocol to the Convention against Torture recognises the obligation of States to set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

[65] Carlos M. Correa, '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 (2016).

[66] Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008),

UN Doc. A/HRC/8/5, par. 87.

[67] Highlights of some elements of discussion and points of view shared during the UN Human Rights Council Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (July 2015), reported in the South Centre South Bulletin 87-88 (November 2015), p. 24.

[68] Ibid.

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