

The Core Elements of a Legally Binding Instrument: Highlights of the Revised Draft of the Legally Binding Instrument on Business and Human Rights

By Daniel Uribe Terán*

1. Introduction

Under the Human Rights Council Resolution 26/9 (A/HRC/26/9), co-sponsored by Ecuador and South Africa in 2014, the United Nations (UN) Human Rights Council (HRC) established an Open-ended Intergovernmental Working Group (OEIGWG) with the mandate of “elaborating an international legally binding instrument to regulate, in accordance with international human rights law, the activities of transnational corporations and other business enterprises”.

The OEIGWG has held four sessions since 2014. During its Fourth Session, the OEIGWG reviewed the Zero Draft submitted by the Chairperson-rapporteur. The Zero Draft was developed on the basis of a victim-based approach to human rights violations in the context of transnational business activities, with a view to guaranteeing their access to justice and effective remedy, as well as preventing such violations. The Zero Draft contains at least six core elements: (i) the scope of the legally binding instrument; (ii) prevention of human rights violations or abuses in the context of business activities; (iii) access to remedy for victims of such violations or abuses; (iv) adjudicative jurisdiction of courts to hear such cases; (v) legal liability of business enterprises for such violations or abuses; and, (vi) international cooperation and mutual legal assistance for the effective implementation of the instrument.

The Chairperson-rapporteur submitted the Revised Draft of the legally binding instrument on 16 July 2019, having in view the comments and proposals received until the end of February 2019. The Fifth Session of the

Working Group is scheduled on 14 - 18 October 2019, with a focus on substantive intergovernmental negotiations based on the Revised Draft.

The present policy brief reviews those core elements of the legally binding instrument as they are contained in the Revised Draft, with the aim to provide analytical support to States’ delegations and other stakeholders during the negotiations on the binding instrument. This brief considers a number of issues, concerns and legal aspects that have been addressed during the previous sessions of the OEIGWG and how they have evolved going towards the 5th Session of the OEIGWG.

2. The Scope of the Legally Binding Instrument

Since the adoption of Resolution 26/9, one of the most discussed elements for the design of a legally binding instrument on business and human rights has been its scope, in particular the extent to which the instrument will cover all business enterprises, or only those conducting transnational activities. This has also been an issue of contention in historical discussions about the issue of business and human rights.¹

Thus, the adoption of the Human Rights Resolution 2005/69 on ‘Human rights and transnational corporations and other business enterprises’ by the Human Rights Commission² led to the appointment of Prof. John Ruggie as the Special Representative (SR) of the UN Secretary-General on the issue of human rights and transnational corporations (TNCs) and other business enterprises. This was the first time that the issue of ‘other business enter-

Abstract

Discussions towards the adoption of a legally binding instrument on business and human rights have reached its fifth year. The Chairperson-rapporteur submitted the Revised Draft of the legally binding instrument on 16 July 2019, having in view the comments and proposals received until the end of February 2019. The present policy brief reviews the core elements of the legally binding instrument as they are proposed in the revised draft, with the aim to provide analytical support to States’ delegations and other stakeholders during the negotiations on the binding instrument. This brief examines a number of issues, concerns and legal aspects that have been addressed during the previous sessions of the Open-ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights and how they have evolved going towards the 5th Session of the OEIGWG.

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prises' and human rights had been included in the mandate of special procedures of the United Nations.

Prof. Ruggie submitted the 'Protect, Respect and Remedy Framework for Business and Human Rights' to the UN Human Rights Council in 2008 (UN HRC, UN Doc A/HRC/8/5); and in 2011, the 'UN Guiding Principles on Business and Human Rights'³ (UNGPs). The UNGPs have interpreted the phrase 'transnational corporations and other business enterprises' as including 'all business enterprises'; but they also identified the factors and circumstances that should be considered when measures and policies are established by business enterprises to cope with and limit the impact of their operations on human rights. According to Principle 14 of the UNGPs, the scale, complexity and severity "of the enterprise's adverse human rights impacts" are factors that will differentiate the response that States and business enterprises should consider when designing such measures.

Resolution 26/9 also introduced a footnote defining what 'Other business enterprises' would denote towards the negotiation of a legally binding instrument. It provided that 'other business enterprises' are "all business enterprises that have a *transnational character* in their operational activities, and *does not apply to local businesses* registered in terms of relevant domestic law." Such drafting seems to suggest that the scope of the legally binding instrument should be confined to situations where transnational corporations and other business entities with transnational activities are capable of evading their human rights responsibilities on jurisdictional grounds.⁴

Indeed, the Zero Draft considered that the legally binding instrument shall "apply to human rights violations in the context of any business activities of a transnational character" (Article 3.1) and defined such business activities as "any for-profit economic activity (...) that take place or involve actions, persons or impact in two or more national jurisdictions" (Article 4.2). Nevertheless, the discussions held during the Fourth Session of the OEIGWG clearly showed a two-sided approach on the issue of scope. On the one hand, a number of States considered that the scope of the instrument should focus on the impact that a business activity generates and not on the nature of the activity being conducted. Therefore, the scope of the instrument should be broader, encompassing all business activities, and not only those of a transnational character.⁵ This position was built on past discussions on the fact that both domestic and transnational firms can be responsible for human rights violations or abuses, and that peoples whose rights have been violated are "unlikely to distinguish whether the business enterprise that causes them harm has trans-national ownership or operations."⁶

Nonetheless, for another position the scope of the instrument should be faithful to the content and mandate of the OEIGWG as established under Resolution 26/9 and, therefore, it should be limited to regulating

the activities of transnational corporations and other businesses with transnational activities in the field of human rights. This position considers that notwithstanding the principle that all organs of society must respect all human rights, as stated in the Universal Declaration of Human Rights, the legally binding instrument should focus on covering the legal gap that is found in situations where transnational corporations use their complex structures to evade justice, in particular along their value chains⁷.

The new Revised Draft seems to be building a bridge between these two positions. Article 3.1 sets out the coverage of the instrument as applying to "all business activities, including particularly but not limited to those of a transnational character." The language includes a general exception for the application to all business enterprises in the form of "except as stated otherwise", which will require the express inclusion of this exception in the text of a particular provision. In line with this, Article 3.2 mentions what elements constitute the transnational character of business activities, which include the following:

- a. It is undertaken in more than one national jurisdiction or State; or
- b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or
- c. It is undertaken in one State but has substantial effect in another State.

The reading of these provisions requires a systematic understanding of the text of the instrument, in particular of Article 1.3 and 1.4 which define 'business activities' and 'contractual relationships' respectively. Article 1.3 defines business activities as "any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means." Article 1.4 refers to contractual relationship as "any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State."

The reading of these articles sets the framework for the implementation of all other provisions of the instrument. There are certain elements in the Revised Draft that require certain clarification in their implementation. One example is that the exception provided in Article 3.2 is not included in other provisions, which seems to suggest that the implementation of the instrument will depend on an analysis on a case-by-case basis, in particular, with regard to the application of Article 7 on adjudicative jurisdiction, Article 9 on applicable law and Article 10 on mutual legal assistance. These articles are designed with the aim of facilitating access to justice in cases of transboundary harm; therefore the transnational nature of business activ-

ities would be an important element to be taken into consideration in each particular case.

Following this line of argument, it appears that the Revised Draft of the legally binding instrument has two objectives. The first is to provide a broad scope of protection for victims of human rights violations or abuses by any business activity through guaranteeing minimum standards for the treatment of victims in such cases (Article 4 on rights of victims) and the implementation of preventive measures in respect of all business enterprises (Article 5 on prevention). The second objective is to clarify the manner in which those rights should be implemented in cases where victims face challenges in gaining access to justice due to the transnational nature of the conduct, which often forces victims to bring legal actions against transnational corporations directly in their home State and to deal with substantive and procedural barriers (in relation to the collection of evidence, applicable law and access to legal aid, among others).

The OEIGWG could benefit from further discussions on how to clarify these objectives, for instance, by expressly stating which articles will be only applicable in cases dealing with transnational conduct. Article 5.3(d) could serve as an example in this regard, as it expressly mentions a mandatory action to be undertaken by business enterprises conducting transnational business activities by “[i]ntegrating human rights due diligence requirements in contractual relationships which *involve business activities of a transnational character*, including through financial contributions where needed.”

3. Prevention of Human Rights Violations or Abuses

During the fourth session of the OEIGWG, the Chairperson-rapporteur considered that the element of prevention was the first and primary pillar of the legally binding instrument. He mentioned that the Zero Draft incorporated elements of the UNGPs, and drew on experiences from national, regional and international systems.⁸

Similarly, the fourth session revealed a common approach by States and stakeholders on the need to strengthen and clarify the standards that would be applicable for business enterprises. One issue of particular concern was the nature of the standards included in Article 9 of the Zero Draft. According to some States and other stakeholders, the nature of human rights due diligence requirements should respond to an approach focused on an expected conduct, rather than expected outcomes. This differentiation is an important one, as it will establish the tone and manner in which States will fulfil their obligations.

For the International Law Commission (ILC), the obligations of conduct determine the means to be adopted by States for the purpose of achieving a certain result; and the obligations of result –or outcome– allow

the State the flexibility to choose what means can be used, but independently of the means, a given result should be achieved.⁹ Although it seems that the latter obligations will result in granting the State more flexibility on the adoption of certain measures to attain an outcome, the fact is that State responsibility will raise at the moment when the expected result was not achieved, for example, “the adoption of a law, while it may appear inimical to the result to be achieved, will not actually constitute a breach; what matters is whether the legislation is actually applied.”¹⁰

On the other hand, an obligation of conduct is an obligation to engage in a “more or less” determinate conduct.¹¹ The Committee on the Economic, Social and Cultural Rights (CESCR) recognises that the obligation of States to protect the rights recognised in the International Covenant on Economic, Social and Cultural Rights in the context of business activities “entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.”¹² Similarly, it states that such obligations should include “measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners.”¹³

The Revised Draft seems to be drafted in accordance with the spirit of General Comment 24 of the CESCR. Article 5.1 provides for the obligation of States to ensure that “their domestic legislation require all persons conducting business activities (...) in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses”. Similarly, Article 5.2 requires States to “adopt measures necessary to ensure that all persons conducting business activities (...) undertake human rights due diligence” and alludes to a set of preventive conducts that should be incorporated into those means and that business enterprises shall comply with, including identification of any potential human rights violations or abuse, taking appropriate actions to prevent those violations, monitoring human rights impacts and communicating these policies to all stakeholders. According to this article, business enterprises will have to make public all policies and measures adopted to achieve the prevention of human rights violations, including those under their contractual relations.

This seems to imply that States’ obligations are not based on achieving a determined outcome by any means, but rather to adopt domestic legislation and national enforcement mechanisms requiring all business enterprises to respect human rights and prevent human rights violations. The legal obligation to respect human rights applies to all business enterprises, and therefore, the violation or abuse of these rights requires legal liability as established under Article 6 of the Revised Draft, which then opts for

establishing obligations of conduct for States and clarifying the means of implementation of the UNGPs, in particular UNGP 3.

Although the Zero Draft suggested the inclusion of a general exception for the fulfilment of these obligations for small and medium enterprises (SMEs), which was welcomed by some delegations during the fourth session of the OEIGWG, others signaled that no exception should be included as it would generate a climate of discrimination. The current Revised Draft tries to solve the situation by introducing the right of States to provide incentives to facilitate compliance with the obligations set out in Article 5. This goes in line with the obligation of States to put in place effective national procedures to ensure such compliance while considering the size, nature, context of and risk associated with business activities (Art. 5.4); such incentives are applicable to all business enterprises, with their size as the only factor of differentiation. For example, one element that should be considered, in particular within global value chains, is the possibility of identifying mechanisms to put the weight of those measures on the business corporation at the top of global value chains rather than on SMEs belonging to them.

4. Access to Remedy for Victims

The fourth session of the OEIGWG discussed the issue of guaranteeing access to remedy for victims of human rights violations and abuses in the context of business activities. The Chairperson-Rapporteur noted that the primary objectives of the draft instrument focused on the protection of victims and their effective access to justice and remedy¹⁴. Similarly, he noted the need to overcome a number of obstacles victims face in accessing justice, particularly in cases where transboundary conduct is involved¹⁵. Several comments were made at that session regarding the need to clarify the text and ‘terminology’ used in the Zero Draft, as those issues, if not addressed, could lead to an inconsistent application of the instrument in different States.

Experience has shown that victims of human rights violations and abuses by business enterprises face a number of constraints to access to justice. These challenges include the lack of access to jurisdiction of the host State of business enterprises due to the absence of adequate substantive and procedural laws to achieve effective remedy¹⁶, obstacles related to jurisdiction of foreign courts, collection of evidence and information, or difficulties for ‘piercing the corporate veil’ when bringing claims in the home State of TNCs. The Office of the High Commissioner for Human Rights has identified a number of barriers faced by victims, and highlighted that “[d]ifferences 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 (...) these differences also pose challenges to future efforts to improve access to remedy at domestic level”¹⁷. Similarly, Richard Meeran has recognised that

forum non conveniens, lifting the corporate veil and gathering of evidence are significant obstacles that victims face when dealing with corporate accountability.¹⁸

The Revised Draft of the legally binding instrument seems to follow the line of its predecessor with the inclusion of language that clarifies procedural rights for victims of human rights violations or abuses in the context of business activities. For example, the new document includes recognition of State-based non-judicial grievance mechanisms of the State parties (Art. 4.8) and a broader scope of protection for guaranteeing a “safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment” (Art. 4.9) and language concerning gender-based protection and support services to ensure equal and fair access to justice (Art. 4.4).

Nevertheless, it has been pointed out that certain elements require major attention. In particular, the Revised Draft relies on the concept of ‘contractual relationships’ which for some commentators might increase the burden of procedural requirements that victims will have to bear in order to prove that a ‘contract’ was signed between a parent company and a subsidiary, and just the element of control will not suffice.¹⁹ Certain aspects of the current text may allow to address these concerns, although certain clarifications may also be required.

First, as stated above, the concept of ‘contractual relationship’ is defined in a broad manner, allowing for a comprehensive implementation of the legally binding instrument to all business activities in the context of global value chains.

Second, although some business relationships could be developed without a contract in place, these cases are exceptional and they are developed on the basis of “norms, custom and practice, and written documents such as orders,”²⁰ which may be understood as a contract between the parties. For example, the European Court of Justice has held that “long-standing business relationships which have formed without a contract in writing may, in principle, be regarded as falling within a tacit contractual relationship, breach of which is liable to give rise to contractual liability.”²¹ For the Court, the existence of a tacit contractual relationship will require a body of consistent evidence which may include “the existence of a long-standing business relationship, the good faith between the parties, the regularity of the transactions and their development over time expressed in terms of quantity and value, any agreements as to prices charged and/or discounts granted, and the correspondence exchanged.”²² The non-existence of a written contract in a business relationship does not mean, hence, that an implicit contract relationship may not be in place; on the contrary, a long-standing business relationship, correspondence or other written orders would suffice to establish the existence of a contractual relationship.

Nevertheless, the provisions regarding the implementation of a legally binding instrument could introduce at

least two elements to facilitate access to justice. One is the reversal of the burden of proof at the request of the victims, not on a *proprio motu* basis. This could be obtained by recognising in the instrument the presumption of control and contractual relationships, although such recognition might entail further elaboration. The second element would be a clarification of the concept of ‘no other available forum’ under the principle of *forum necessitatis*²³, or by banning the application of the doctrine of *forum non conveniens*, securing an avenue for claimants to bring cases against TNCs directly in their home States²⁴. While Article 7 on jurisdiction includes the obligation of States to have jurisdiction over transboundary cases, a number of stakeholders have stressed the need to clearly introduce a prohibition of the application of *forum non conveniens*.

5. Adjudicative Jurisdiction of Courts

The Chairperson-rapporteur considered that the legally binding instrument should give a choice for victims to decide where they would bring a case. The choice of jurisdiction has been identified as key to ensuring effective access to justice. During discussions in the fourth session of the OEIWG, some delegations and civil society organizations (CSOs) expressed their appreciation for the article on jurisdiction in the Zero Draft and considered that extraterritorial jurisdiction by home States was crucial to ensuring that companies remain accountable for their conduct. However, other delegations voiced concern over a possible extraterritorial jurisdiction.

The Revised Draft has added the word “adjudicative” to the term jurisdiction, denoting a more centred approach to the jurisdiction of courts to hear claims brought by victims of human rights violations and abuses in the context of business activities. This excludes any confusion with prescriptive or legislative jurisdiction, which concerns the ability of states to prescribe laws for actors and conduct abroad, and enforcement jurisdiction, which concerns the ability of states to ensure that their laws are complied with. Adjudicative jurisdiction is an essential element for articulating access to remedies by victims, as it gives them the means for presenting cases to be heard by a competent court based on access to information, witnesses and other necessary evidence to pursue a claim and ensuring the enforcement of a judicial decision.

The Revised Draft considers three elements to establish jurisdiction: the place where human rights violations occurred; where the victims are domiciled; or where the natural or legal person or association of natural or legal persons are domiciled, characterising the latter as the place where it has its (a) incorporation; or (b) statutory seat; or (c) central administration; or (d) substantial business interests.²⁵

Clearly, the language established under this provision allows victims to define which forum will represent the best chances for a successful claim and ad-

dresses a number of factors that might limit their access to justice. For example, a number of cases of human rights violations by business entities with transnational activities have encountered difficulties at the enforcement stage. Even if victims are successful in a claim at their home State, companies could wind-down operations and leave the country before redress is provided. In such cases, the treaty allows victims to initiate legal proceedings in the home State of the corporation. Similarly, in cases in which victims have been forcibly displaced due to acts or omissions causing harm because of business operations, victims could initiate proceedings in the country in which they are currently residing, or in the country where the damage occurred.

Finally, the inclusion of the place of domicile of the victims broadens the scope of their protection allowing them to pursue their case where they live, eventually reducing litigation costs and facilitating access to justice. Moreover, the fact that the Revised Draft mandates States to recognise the jurisdiction of the court where the defendant is domiciled will avoid the use of the doctrine of *forum non conveniens* in cases covered under Article 7.

6. Legal Liability for Human Rights Violation or Abuses

Legal liability has been one of the issues that attracted great attention during the discussions on the legally binding instrument. The Chairperson-rapporteur considered that the Zero Draft “sought to balance prescription and flexibility, thus allowing States the freedom to determine how best to implement the article. The provisions on civil liability focused on broadly accepted principles, while those on criminal liability allowed States to apply effective non-criminal sanctions in order to garner broader acceptance by States.”²⁶

The current Article 6 on legal liability has been clarified by including a list of criminal offences that States should consider for establishing liability of legal persons conducting business activities. Similarly, it considers liability for harm caused by natural or legal persons conducting business activities including through contractual relationships. Such liability is based on control or supervision over the business activities that caused the harm, or the foreseeability of risks for human rights. This goes in line with the recognition of the obligation to ensure a comprehensive and adequate system of legal liability for human rights violations or abuses.

Nevertheless, the inclusion of a list of criminal offences in Art. 6.7 has been understood by a number of civil society organizations as limiting the liability of legal persons only to those acts included in Art. 6.7. According to this reading, legal persons will only be liable for violations or abuses that resulted from those criminal offences. Nevertheless, while recognising the need for more clarity in the text, Art. 6.6 and Art. 6.7 must be read separately, as the Revised Draft includes two levels of legal liability. The first one recognises legal liability for any harm caused by a natural or legal person conducting business activities

amounting to human rights violations or abuses as defined in Article 1 (Art. 6.6); and the second one provides for legal liability of legal persons on the basis of a limited list of criminal offences. Therefore, there is no limitation to the criminal liability of natural persons that have committed criminal offences beyond those listed in Article 6.7, nor to the possibility of States establishing that other criminal offences will carry legal liability for legal persons.

7. International Cooperation and Mutual Legal Assistance

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders considered that international cooperation was indispensable to achieve the protection of the rights of victims of abuse of power. It concluded that there was a consensus on the need to strengthen international cooperation for “exchange of information, policy formulation and mutual assistance in law enforcement and in judicial proceedings.”²⁷ The Chairperson-rapporteur considered that international cooperation and mutual legal assistance under the Zero Draft aimed at filling jurisdictional gaps, and some delegations observed that the wording of the suggested articles was grounded in existing international law and that it was important for the future instrument²⁸.

Mutual legal assistance and international cooperation is fundamental for the attainment of the goals of the legally binding instrument, as individual countries are not “always in a position to fight corporate abuses which transcended national borders.”²⁹ The Revised Draft builds a bridge for increasing collaboration among countries for ensuring access to effective remedies for victims of human rights violations or abuses due to business activities.³⁰

8. Conclusions

The Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights enters its fifth year of discussions for the adoption of a legally binding instrument on the matter. These discussions will now be based on a Revised Draft that has clarified and improved the language of the Zero Draft, which may contribute to move forward towards its adoption. Although a number of elements are still under discussion, and would require further improvement, the work of the OEIGWG is on the right track.

Major changes have been incorporated into the Revised Draft to attain this objective; this reflects the openness of the Chairperson-rapporteur to new approaches towards attaining the best negotiated outcomes for the promotion and protection of human rights. The Revised Draft continues to place the rights of victims at the centre. Discussions during the fifth session of the legally binding instrument should focus now on the most prominent discrepancies on the revised text while finalizing those provisions which enjoy

a broader consensus and developing constructive alternatives for the evolution of the text.

Endnotes:

¹ For example, during the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the congress recognised the need for making the public aware of the “harmful consequences of the abuse of economic and political power, including those abuses committed or generated by the activities of multinational and transnational corporations.” Similarly, the UN Commission on Transnational Corporations was established with the mandate, among others, to produce a Code of Conduct for Transnational Corporations (TNCs), and a Working Group to consider the need to develop a “code of conduct for TNCs based on the human rights standards.” See: Daniel Uribe Terán, “Keeping the Head Up: Lessons Learned from the International Debate on Business and Human Rights”, *Homa Publica - Revista Internacional de Derechos Humanos e Empresas*, v. 2, n. 2 (2018).

² Human Rights Resolution 2005/69 on Human rights and transnational corporations and other business enterprises, E/CN.4/RES/2005/69

³ United Nations Human Rights Council, UN Doc A/HRC/17/31

⁴ 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 No. 28 (September 2016).

⁵ See: Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Oral Statements in <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

⁶ International Network for Economic, Social and Cultural Rights (ESCR-Net) Corporate Accountability Working Group, Joint Oral Statement on the Scope of the Legally Binding Instrument: TNCs and other Business Enterprises submitted to the first session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (6 to 10 July 2015), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel3/Others/ESCR-NET_Joint_Statement.pdf.

⁷ See: Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Oral Statements in <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

⁸ Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48 (2019).

⁹ James Crawford, Second report on State responsibility, United Nations International Law Commission, UN Doc. A/CN.4/498 and Add.1-4 (1999).

¹⁰ James Crawford, Second report on State responsibility, United Nations International Law Commission, UN Doc. A/CN.4/498 and Add.1-4 (1999), para. 53.

¹¹ James Crawford, Second report on State responsibility, United Nations International Law Commission, UN Doc. A/CN.4/498 and Add.1-4 (1999), para. 58.

¹² Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (2017), para. 16.

¹³ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (2017), para. 16.

¹⁴ Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48 (2019), para. 26.

¹⁵ Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48 (2019), para. 28.

¹⁶ 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.

¹⁷ Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies" (2013), p. 64. Available from <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (accessed August 2016).

¹⁸ 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 South Centre South Bulletin 87-88 (November 2015), p. 21.

¹⁹ See: Richard Meeran, "The Revised Draft: Access to judicial remedy for victims of multinationals' abuse" (2019) in <https://www.business-humanrights.org/en/the-revised-draft-access-to-judicial-remedy-for-victims-of-multinationals-abuse> and Gabriela Quijano, "A new draft Business and Human Rights treaty and a promising direction of travel" (2019) in <https://www.business-humanrights.org/en/a-new-draft-business-and-human-rights-treaty-and-a-promising-direction-of-travel>.

²⁰ Debbie Harrison, "Is a Long-term Business Relationship an Implied Contract? Two views of a Relationship "Disengagement". Available from <https://www.impgroup.org/uploads/papers/62.pdf> (accessed on October 2019).

²¹ *Granarolo SpA v Ambrosi Emmi France SA*, Judgment of European Court of Justice (Second Chamber) of 14 July 2016, para. 23.

²² *Granarolo SpA v Ambrosi Emmi France SA*, Judgment of European Court of Justice (Second Chamber) of 14 July 2016, para. 28.

²³ 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 Europe-

an Coalition for Corporate Justice (ECCJ), 2013), p. 30.

²⁴ Meeran, as reported in South Centre South Bulletin 87-88 (November 2015), p. 21.

²⁵ General Comment 16 (para. 43) of the Committee on the Rights of the Child explains that: home states have obligations to respect, protect, and fulfill children's rights in the context of business enterprises' foreign operations when there is a reasonable link between the State and the conduct concerned, namely when the enterprises have center of activity, are registered or domiciled or have its main place of business or substantial business activities in the State.

²⁶ Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48 (2019).

²⁷ Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980, para. 165.

²⁸ Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48 (2019), para. 64.

²⁹ Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980, para. 165.

³⁰ See : Danish, "Enhancing Access to Remedy through International Cooperation: Considerations from the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises", South Centre Policy Brief No. 67 (October 2019).

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