



# Designing an International Legally Binding Instrument on Business and Human Rights

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## **Abbreviations and Acronyms**

ARP – Accountability and Remedy Project

ATCA - Alien Tort Claims Act

CARIFORUM – Caribbean Forum

CFIAs – Cooperation and Facilitation Investment Agreements

CSR – Corporate Social Responsibility

ECtHR – European Court of Human Rights

EPA – Economic Partnership Agreement

EU – European Union

FDI – Foreign Direct Investment

HRC – Human Rights Council

ICJ – International Court of Justice

IAs – International Investment Agreements

ISDS – Investor State Dispute Settlement

LI – Legally Binding Instrument

OBEs – Other Business Enterprises

OECD – Organisation for Economic Co-operation and Development

OEIGWG – Open-Ended Intergovernmental Working Group

OHCHR – Office of the High Commissioner for Human Rights

SDGs – Sustainable Development Goals

SMEs – Small and Medium Enterprises

TNCs – Transnational Corporations

UAE – United Arab Emirates

UK – United Kingdom

UN – United Nations

UNCITRAL – United Nations Commission on International Trade Law

UNCTAD – United Nations Conference on Trade and Development

UN ECOSOC – United Nations Economic and Social Council

UNGPs – United Nations Guiding Principles on Business and Human Rights

US – United States

WHO – World Health Organization

## List of Terms for Negotiations on a Legally Binding Instrument on Business and Human Rights

1. **Accountability:** implies the obligation of an individual or legal entity to accept responsibility for their actions, either through a claim in a civil procedure or in a criminal matter.
2. **Actus Reus (guilty act – criminal conduct):** it is the conduct (act or omission) considered a crime under domestic legislation. It consists of external elements and it is different from the mental element (*Mens Rea*).

In International Criminal Law, the *actus reus* considers all the external elements of the crime, particularly:

- **Consequences:** All the effects of the criminal conduct (harm or danger to the enjoyment of a particular right). There could be cases in which a specific consequence is required to constitute a criminal conduct. In such cases a causal link (see: *Causation/Causal Link*) between the conduct and the consequence should be clearly identified, which implies that it is necessary to prove that the conduct of the *perpetrator* is the direct reason of the existence of the consequence.
- **Circumstances:** International criminal law recognizes the need of certain special circumstances for a certain conduct to be considered a crime. This could be of a factual nature (age of the victim), or of normative characteristics (protected person).

3. **Adjudication:** is the act of taking a decision in a judicial procedure. It implies for a judge or arbitrator to make a ruling or judgement.
4. **Adjudicative Jurisdiction:** it largely concerns the ability of domestic courts to hear and resolve private disputes with a foreign element. One example is found on the Alien Tort Claims Act of the United States, Judiciary Act 1978, which provides for the obligation of the State to adjudicate (see: *Adjudication*) on cases involving the conduct of US citizens abroad. The foreign element in such case is identified as the conduct executed by a US citizen outside the US borders.
5. **Agency Theory (see: *Vicarious Liability*)**
6. **Agent:** is a person who has the legal authority (agent) to act on behalf of another (principal). An agent could be identified by explicit appointment of the principal (for example through a mandate or a contract), or by implication (see: *Superior Responsibility*). A good example of this relationship could be the relationship between an employer and its employees.
7. **Aiding and Abetting:** is a form of *attribution of responsibility* that implies the assistance of one person or entity for the commission of a conduct that constitutes a crime. Such assistance could be either by action or omission and involves the assistance or encouragement for the perpetration of a crime. Such assistance must have a substantial effect for the crime to be committed and must be intentional (see: *Mens Rea*), which means that

the aider or abettor is aware that its activity will further the criminal conduct of the *perpetrator*.

**8. Amicus (*Amicus Curiae* – friends of the court):** are briefs or reports submitted by anyone who is not a party to the judicial case or claim, with the aim of aiding the judge or tribunal in the *adjudication* of a claim. The courts or tribunals are not bound to answer or review such briefs, and have discretionary power to include them in their reasoning.

**9. Attribution of Responsibility:** it refers to the action of determining, by a particular tribunal or other competent authority, that a particular individual or entity could be held responsible for the harm or abuse caused to others (see: *Accountability* and *Wrongdoing*) in violation of a legal duty.

**10. Burden of Proof:** is the duty of a party to a legal procedure to prove the fact or facts raised in a dispute. Generally, the burden of proof falls over the party who asserts such particular fact.

**11. Causation/Causal Link:** is the relationship between a conduct and the consequences it produces. It will require proving that the conduct of a company was the reason why the harm was caused to the plaintiffs.

**12. Class Action Lawsuits:** refer to those procedures in which an entire class of victims may be represented by one or more representatives in a legal claim. This type of actions basically requires that individuals, belonging to a class, share common characteristics particularly that they suffered the same type of harm, as result of the same conduct from the same individual or legal entity.

This type of claims allows tribunals to hear claims that would otherwise be filed individually by persons who have suffered the same wrong because of the same defendant.

**13. Comity:** means neighbourly gestures or courtesies extended from one state to another, or others, without accepting a legal obligation to behave in that manner. Comity is founded upon the concept that all states are equal and is expected to be reciprocal between them.

**14. Corporate Personality:** is the legal personality of a company which is distinct from those of its members or shareholders. This allows a company to own property, incur debts and have its own rights and *liability*.

**15. Corporate Veil:** refers to the legal theory of separation between the owners of a company and the company itself. A company has its own *corporate personality*, which is different than those of its owners, creating a “veil” between both of them.

**16. de facto (by the fact of):** existing as a matter of fact rather than of right or by law

**17. de jure (according to the law):** refers to anything that exists by right or by operation of the law

**18. Direct Liability:** is *liability* on the part of an individual or a business that has been established on the basis of *negligence* or other factors directly resulting in harm or damage to another party.

**19. Discovery Procedures:** are legal processes used by parties in a civil dispute to gather information in preparation of the trial. These procedures are used before the start of the trial and cover all kinds of evidence that may be relevant to the party's claims or defences.

**20. Due Diligence (see also: *Tort*):** is the care that a reasonable person or entity exercises to avoid harm to other persons or their property. If the entity fails to exercise their duty of care, then they can be held liable for any consequences that arise from their failure.

In international law, States have 'due diligence' obligations regarding the course of conduct a State must follow to attain or avoid a given result.

**21. Duty of Care:** it implies a special relationship (obligation) that one person owes to another when conducting certain acts which could produce *reasonable foreseeable harm*.

**22. Equality of Arms:** is the principle that, during any legal proceedings, both sides must have equal access to the court and neither side should be procedurally disadvantaged. In some circumstances this may require the provision of financial support to allow a person of limited means to pay for legal representation (see: *Legal Aid*).

**23. Extraterritorial Jurisdiction:** means the ability of a State to exercise its authority over actors and activities outside its own territory.

It could entail 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 adjudicate and resolve private disputes with a foreign element; and enforcement jurisdiction, which concerns the ability of states to ensure that their laws are complied with.

**24. Extraterritorial Locus:** a conduct 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 (see: **Extraterritorial Jurisdiction**).

**25. Forum:** It refers to the tribunal or courts of a country where a case is being heard.

**26. *Forum Necessitatis*:** refers to the tribunals of a State different to the country of nationality of the victims, assert jurisdiction when the country that otherwise would have jurisdiction refuses to permit the action, will provide an unjust judgment, or is unable to adjudicate the claim. *Forum necessitatis* grants *Jurisdiction* in limited cases where the *forum* seized would ordinarily lack jurisdiction, but no other competent forum is available to the claimant.

27. **Forum Non Conveniens:** refers to the discretionary power of a court to decline *Jurisdiction* to hear a case if it finds that it is an inappropriate forum or that another forum would be more appropriate.

28. **Free, Prior and Informed Consent:** is a principle that requires any entity to take the consent of the people who may be affected by any activity undertaken by that entity. In this context, **Free** implies that there is no coercion, intimidation or manipulation; **Prior** implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of the consultation/consensus processes; and **Informed** implies that information provided covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; locality and areas affected; and procedures the project may entail.

29. **Global Value Chains (GVCs):** are the legal and contractual relationships among the *parent company*, contractors and subcontractors in the production of goods and provision of services located in different countries and across regions. These cover the full range of activities undertaken to bring a product or service from its conception to its end use and how these activities are distributed over geographic space and across international borders.

30. **Ius/Jus Cogens:** is a norm accepted and recognized by the international community of States as a norm from which no derogation is permitted.

31. **Joint Criminal Enterprise:** is a mode of liability that allows a Tribunal to prosecute members of a group responsible for contributing the commission of certain types of crimes with the direct intent to commit at least one crime falling within that purpose even if there is no evidence that the particular individuals physically participated in the crimes.

32. **Jurisdiction:** is the power of courts to hear and decide on a case. It also relates to the territorial limits in which courts can exercise their powers.

33. **Legal Aid:** is the provision of free or low-cost legal advice, assistance and representation to people who would otherwise be unable to access effective legal remedies.

34. **Liability:** is the result of a breach of a legal duty that a person owes to another person, which is recognized and enforced by a court.

35. **Lifting of the Corporate Veil:** is the possibility of raising the *corporate veil* allowing the parties to a claim to identify the different components of a corporate group. The corporate veil has been lifted only by a court in exceptional cases such as fraud, or where the directors and shareholders assume personal liability on behalf of the company.

36. **Limited Liability:** is a concept used in commercial law whereby a shareholder of a company has limited personal financial responsibility, and its responsibility extends only to the value of the shares held by them in the company.

37. **Mens Rea (guilty mind – criminal intention):** refers to the state of mind (intention) required in order to convict a particular defendant of a particular crime. Establishing the *mens rea* of an offender is usually necessary to prove guilt in a criminal trial.

38. **Negligence:** means the failure of a person to behave with the level of care that any reasonable person would exercise in the same circumstances.

39. **Parent Company:** is a company that controls or owns another company or companies through holding majority of its voting stock or through law control of the subsidiary company, thereby being able to dictate the policies or control the management of its subsidiary.

40. **Perpetrator:** generally denotes the person who actually commits a crime or delict, or by whose immediate agency it occurs. In case the crime is committed by a person acting on behalf of a company, the company itself may be regarded as the "perpetrator" of the act.

41. **Piercing the Corporate Veil:** A situation in which courts put aside *limited liability* and hold a corporation's shareholders or directors personally liable for the corporation's actions or debts, the act of disregarding the veil of incorporation that separates the personality of a corporation from the personalities of its members and directors. This exceptional course is occasionally sanctioned by statute, for example in relation to wrongful trading or fraudulent trading, when it may result in members or directors of a limited company incurring liability. It is also employed by the courts, for example if incorporation has been used to perpetrate fraud or gives rise to unreal distinctions between a company and its subsidiary companies.

42. **Proximity:** refers to the notion of closeness or connection or relationship between the particular act or course of conduct and the loss or injury/harm sustained. It reflects an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to another, or where a party relies on such care.

43. **Public Interest Litigation:** is a legal action instituted in a court for the enforcement of public interest or general interest in which the public or a section of the community has an interest by which their legal rights are affected.

44. **Reasonable Foreseeable Harm:** is an element of the principle of *duty of care* by which an individual or entity must reasonably foresee that her actions may cause physical damage to the person or property of others. The duty is owed to those people likely to be affected by the conduct in question.

45. **Statute of Limitations:** refers to the laws which set the maximum time periods during which certain actions can be brought in front of a court or other authority, or rights could be enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.

46. **Strict Liability:** refers to *liability* which is imposed directly to a person or legal entity without the need for the claimant to prove fault or *negligence*. In these cases, it is just enough to recognize that the activity carried out by the defendant is inherently hazardous and there is no reasonable care that could avoid such harm.

47. **Subsidiary Company:** is a company owned and controlled by another company known as its *parent company*. If the parent company owns all the shares in the subsidiary company, then it is known as a 'Wholly Owned Subsidiary Company'. The subsidiary may be located in the same or a different country from its parent company, and would have to follow the laws of the country where it is located.
48. **Superior Knowledge:** is a principle of tort law by which a person who has knowledge on some relevant aspects in a particular activity or industry should exercise reasonable care to avoid harming others to whom he has a *duty of care*. When addressing *liability* of a *parent company* with regard to its subsidiary, courts look at whether the parent company has, or ought to have had, superior knowledge.
49. **Superior Responsibility:** implies the effective control of a person who is senior in some sort of formal or informal hierarchy to the *perpetrator* of the act.
50. **Tort (Tort Law):** is any act or omission that causes injury or harm to another person, for which courts impose *liability*. Its purpose is to provide relief to injured parties for harm caused by others and to impose liability on parties responsible for causing the harm.
51. **Vicarious Liability:** means that the offences of individual employees or agents could be attributed to the corporation if the offence was committed while the *agent* was fulfilling its duty, and if the crime was committed with the intent of benefitting the corporation.
52. **Wrongdoing:** signifies injury to person, property or relative non-contractual rights of another person other than the person responsible for such action, with or without force; includes commission of *tort* and violation of a contract.

## Introduction

The possible impacts and abuses that private individuals and legal entities can have on the full enjoyment of human rights have been a long existing concern in international affairs and international law. The discussion about the need to protect human rights against transnational corporations' abusive conduct has been present for more than 40 years in the global governance system. It brings together various public and private interests. Some have worked hard to create principles and rules to address these ends while others made it difficult to design and adopt clear standards at national, regional and international level.

In this context, Ecuador and South Africa proposed Resolution 26/9 (A/HRC/26/9) to the Human Rights Council in 2014, which established an Open Ended Intergovernmental Working Group 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 five sessions since 2014. During its Fourth Session, the OEIGWG reviewed the Zero Draft submitted by the Chairperson-rapporteur. According to 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 access to justice and effective remedy, as well as preventing such violations. The Zero Draft focused on four main areas: (i) prevention of human rights violations within the framework of transnational business activities; (ii) the right of victims of these violations to access justice and effective action; (iii) international cooperation for the effective implementation of the instrument; and (iv) mechanisms for international monitoring.

The Chairperson-rapporteur submitted the revised draft of the legally binding instrument on 16 July 2019, including the comments and proposals received until the end of February 2019. The Fifth Session of the Working Group was held on October 2019, with a focus on direct substantive intergovernmental negotiations based on the revised draft.

The present document is based on the background materials prepared by the South Centre over the five sessions of the OEIGWG. It considers a number of issues and technical details that have been addressed during the different sessions of the OEIGWG.

These background materials are organized into three different sections. Section one contextualizes the discussions on a legally binding instrument considering the possible social, economic and environmental impacts of businesses on human rights, particularly with regard to the challenges of access to justice faced by victims of human rights violations by such companies.

Section two reviews the State's obligations under international law in relation to the legally binding instrument and its relationship with the current discussion on sustainable development, international human rights law and the role of the private sector. It also considers the issues around the business responsibility to respect human rights, mainly with respect to prevention, mitigation and remediation of violations of such rights.

Finally, the document provides a short overview of the core elements that a potential instrument on business and human rights could include. It does this on the basis of the revised draft of the legally binding instrument submitted by the Chairperson-rapporteur in July 2019.

The present document is based on the background materials prepared for the South Centre by Kinda Mohamadieh, as former Senior Researcher of the South Centre up until April 2019, Daniel Uribe and Danish for various sessions of the OEIGWG. Some of such materials have been published earlier as South Centre Policy Briefs<sup>1</sup>. Daniel Uribe and Danish reviewed and selected elements of the substantive contributions made by the South Centre staff and consultants, and conducted research for supporting findings and addressing new elements to facilitate a comprehensive analysis of the main issues discussed during the various sessions of the OEIGWG. They are thankful for the comments on this document by Prof. Carlos M. Correa and Dr. Mariama Williams.

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<sup>1</sup> See, for example, 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, October 2016; Daniel Uribe, “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”, South Centre Policy Brief 31, October 2016; 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 67, October 2019.

## 1. The need for a legally binding instrument on Business and Human Rights<sup>2</sup>

This section provides an overview of the possible social, economic and environmental impacts that transnational corporations and other business enterprises might have in the community as they relate to the realization of human rights. It also considers the challenges that victims face regarding access to justice in cases of human rights violations by TNCs and OBEs and the foundational principles that could drive discussions on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

The participation of corporations and other business entities in the commission of egregious violations of human rights during the Second World War<sup>3</sup> and their involvement in the political, economic and military life of States, particularly in developing countries<sup>4</sup>, have been the primary grounding motivations for the need to adjudicate on the responsibility of those companies for their involvement in the commission of human rights violations.

Discussions on the involvement of TNCs in the decision making processes of States have taken place since the 1970s. In his speech to the United Nations General Assembly in December 1972, former President of Chile Salvador Allende noted that corporations were interfering in the political, economic and military decisions of States, and that they acted as global organizations which were not accountable to, or regulated by any parliament or institution representing the collective interest.<sup>5</sup> Soon after, the UN decided to establish a Group of Eminent Persons to “study the role of multinational corporations and their impact on the process of development, especially that of the developing countries, and also their implication for international relations”.<sup>6</sup>

Eventually, during the fifty-seventh session of the UN Economic and Social Council, the UN Commission on Transnational Corporations (the Commission) was established. It was set up as an intergovernmental body composed of forty-eight member States to serve as a forum within the UN system for the comprehensive and in-depth consideration of issues relating to transnational corporations. The ECOSOC also decided to establish the UN Centre on Transnational Corporations (the Centre), which was intended to conduct research on various issues related to transnational corporations and serve as the technical and advisory body of the Commission on TNCs, particularly regarding its mandate to produce a ‘Code of Conduct on Transnational Corporations’. Both institutions were established with the objective of analysing

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<sup>2</sup> This section draws upon Daniel Uribe Terán, “Keeping the Head Up: Lessons Learned from the International Debate on Business and Human Rights”, *Homa Publica - Revista Internacional de Direitos Humanos e Empresas*, v. 2, n. 2, (2018).

<sup>3</sup> See e.g. Luis Gallegos and Daniel Uribe, “The Next Step against Corporate Impunity: A World Court on Business and Human Rights?” *Harvard International Law Journal*, vol. 57, Spring 2016 (Online Symposium) at <https://harvardilj.org/2016/07/the-next-step-against-corporate-impunity-a-world-court-on-business-and-human-rights/>.

<sup>4</sup> See e.g. Address delivered by Dr. Salvador Allende, President of the Republic of Chile, before the 27<sup>th</sup> Session of the United Nations General Assembly, December 4, 1972 at <https://undocs.org/en/A/PV.2096>.

<sup>5</sup> Ibid.

<sup>6</sup> UN ECOSOC Resolution 1721 LIII.

the extent of influence and impact of TNCs in the policy making of States and in the nascent “New International Economic Order”<sup>7</sup>.

From the very beginning, the program of work and agenda set out by the Commission incorporated a number of elements related to the discussion of an international framework addressing TNCs, particularly their role in the promotion of national development goals and global economic growth and the possible adverse effects arising from their activities.<sup>8</sup> The Commission also identified a number of concerns, which included discussions on preferential treatment given to TNCs in their host countries, their alleged lack of adjustment to domestic legislation of host countries, fiscal matters, labour policies, objectives and priorities for the development of developing States and the failure of TNCs to promote research and development in their host countries, among others.<sup>9</sup>

In 1983, the Commission held a special session in which the structure of the ‘Draft United Nations Code of Conduct on Transnational Corporations’ was discussed. This draft incorporated some of these concerns and divided them into three subsets of issues: the operations of TNCs; the treatment of TNCs; and international cooperation and the implementation of the proposed Code.

The first subset included discussions on the need to respect human rights and fundamental freedoms, the non-interference of TNCs in internal political affairs, issues related to control and ownership of corporations, taxation, restrictive business practices, consumer protection and disclosure of information. The second subset considered the general treatment of transnational corporations in the countries in which they operate, particularly focusing on expropriation, which was framed under the concept of “nationalization and compensation”, and jurisdiction, which included amicable settlement of disputes arising between States and investors, including international arbitration.<sup>10</sup> The third subset included the adoption of State actions directed towards ensuring and promoting the implementation of the Code at the national level. Such actions consisted of the publication and dissemination of the proposed Code of Conduct and reporting to the Commission by the States. Similarly, it mandated the Commission to become the “international institutional machinery” for the implementation of the Code, making the Centre the secretariat of the Commission.<sup>11</sup>

The Commission was assigned a number of functions, in particular, to assess the implementation of the proposed Code of Conduct and provide clarification of its provisions. However, the adoption of the instrument was put on hold by the country representatives in the ECOSOC. The opinions were starkly divided with regard to its possible legal nature, as some were only prepared to accept the establishment of guidelines, while others aimed at the establishment of *binding* rules for regulating the behaviour of TNCs.<sup>12</sup> During the 1980s, the

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<sup>7</sup> UN General Assembly, "Declaration on the Establishment of a New International Economic Order," UN Doc. A/RES/3201(S-VI) (1974).

<sup>8</sup> United Nations, Commission on Transnational Corporations: Report of the Second Session, UN Doc. E/5782 (1976).

<sup>9</sup> United Nations, Commission on Transnational Corporations: Report of the Second Session, UN Doc. E/5782, (1976) Annex I.

<sup>10</sup> United Nations, Commission on Transnational Corporations, UN Doc. E/1983/17/Rev.1 (1983) Annex II.

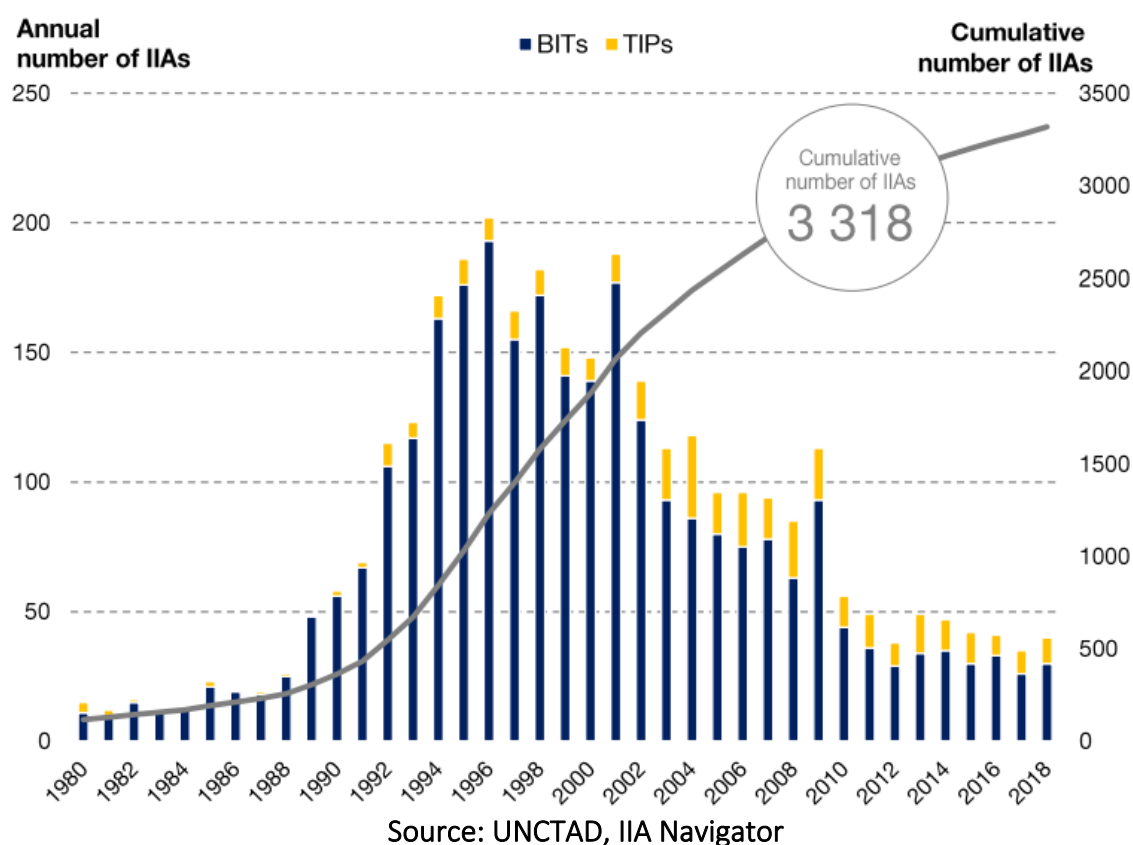
<sup>11</sup> United Nations, Commission on Transnational Corporations, UN Doc. E/1983/17/Rev.1 (1983) Annex II.

<sup>12</sup> Karl P. Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations", *The Journal of World Investment and Trade* No. 16 (2015), p. 48.

interest in the discussions on the Code of Conduct was weakened by the boom in international investment agreements including between developed and developing countries. This limited the participation of developed countries in the process, as the most important objective for this group of countries was to protect investments of their nationals through binding standards of treatment for foreign investors.<sup>13</sup> By the end of the 1980s, 385 IIAs had been signed. Today, that number has risen to over three thousand (see Figure 1).

By 1990, as the then Chair of the Commission Miguel Martin-Bosch tried to arrive to a final compromise text, certain developed countries voiced their concerns on the very objective of the Code. Although the text presented by the Chair represented a “developed country approach”<sup>14</sup>, the United States considered that the objective of the Code belonged to another era, and that the Code did “not reflect the current investment policies of many developing countries”.<sup>15</sup> In 1993, after two unsuccessful consultations, the negotiations of the Code of Conduct came to an end.

Figure 1 - Annual Number of IIAs



<sup>13</sup> Karl P. Sauvant, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations”, *The Journal of World Investment and Trade* No. 16 (2015), p. 75.

<sup>14</sup> Karl P. Sauvant, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations”, *The Journal of World Investment and Trade* No. 16 (2015), p. 55.

<sup>15</sup> John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000), p. 193, cited in Karl P. Sauvant, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations”, *The Journal of World Investment and Trade* No. 16 (2015), p. 54.

Although the negotiations on the Code of Conduct were unsuccessful, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) decided to prepare a background document on the question of the relationship between the enjoyment of human rights and the working methods and activities of TNCs, on recommendation of the Working Group on the Right to Development, which saw the need to adopt new international rules and institutions to regulate the activities of transnational corporations.<sup>16</sup>

After the publication of the background document, the Sub-Commission decided to establish a sessional Working Group for a three-year period with the mandate, among others, to “consider the scope of the obligation of States to regulate the activities of transnational corporations,”<sup>17</sup> (Sub-Commission, Res. 1998/8). The sessional Working Group, pursuant to its mandate, considered “developing a code of conduct for TNCs based on the human rights standards.”<sup>18</sup> This led to the development of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights by the Sub-Commission in 2003.<sup>19</sup> However, the UN Commission on Human Rights (HR Commission) only ‘took note’ of the Draft Norms, which marked the end of the discussions on possible binding rules to cope with the activities of corporations in the realm of human rights.

One of the reasons on why the Draft Norms were not adopted by the HR Commission was the argument that the development of international obligations on corporations would be equivalent to privatizing human rights.<sup>20</sup> For business representatives, the discussions on the Draft Norms represented a conflict between companies and human rights organizations and undermined voluntary initiatives at the UN.<sup>21</sup> The adoption of Resolution 2005/69 on ‘Human rights and transnational corporations and other business enterprises’ by the Human Rights Commission<sup>22</sup> set the tone for future negotiations on the matter as the United States delegation affirmed that it would reject any resolution intended to further the cause of norms or a code of conduct for TNCs.<sup>23</sup>

Resolution 2005/69 required the then UN Secretary-General Kofi Annan to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises. He appointed Prof. John Ruggie as the Special Representative (SR).

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<sup>16</sup> Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 49th session, Geneva, 4-29 August 1997, E/CN.4/1998/2-E/CN.4/Sub.2/1997/50 (1997), pp. 34-36.

<sup>17</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/SUB.2/RES/1998/8 (1998).

<sup>18</sup> Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its First Session, UN Doc. E/CN.4/Sub.2/1999/9 (1999).

<sup>19</sup> Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>20</sup> David Kinley, Justine Nolan and Natalie Zerial, “The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations”, *Company and Securities Law Journal* 25 (2007), p. 36.

<sup>21</sup> Corporate European Observatory, “Shell Leads International Business Campaign Against UN Human Rights Norms”, 1 March 2004. Available from <https://www.business-humanrights.org/en/shell-leads-international-business-campaign-against-un-human-rights-norms>.

<sup>22</sup> Human Rights Resolution 2005/69 on Human rights and transnational corporations and other business enterprises, E/CN.4/RES/2005/69.

<sup>23</sup> Jens Martens and Karolin Seitz, *The Struggle for a UN Treaty* (Global Policy Forum and Rosa Luxemburg Stiftung, August 2016), p. 11. Cited by Daniel Uribe Terán, “Keeping the Head Up: Lessons Learned from the International Debate on Business and Human Rights”, *Homa Publica - Revista Internacional de Direitos Humanos e Empresas*, v. 2, n. 2, (2018).

conducted a number of consultations with different stakeholders, including business organizations as well as enterprises. His intention was to conduct an evidence-based mandate, subject to the alternatives that time and circumstances permitted.<sup>24</sup> During his work, Prof. Ruggie struggled with the same politics and views that characterized former initiatives. Therefore, the SR was of the view that one way forward would be to recognize “multiple spheres of governance that shape the conduct of multinational corporations.”<sup>25</sup> This led to Prof. Ruggie submitting 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 (UN HRC, UN Doc A/HRC/17/31).

For a number of business representatives, the UN Guiding Principles required a period of reflection for its full implementation, while for a number of States endorsement was “(...) a first step, but without a legally binding instrument, it will remain only as such: a ‘first step’ without further consequence.”<sup>26</sup> Therefore, in 2014, Ecuador and South Africa proposed the Resolution 26/9 (A/HRC/26/9) which established an open ended intergovernmental working group 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.

### **1.1. The social, economic and environmental impacts of TNCs and OBEs**

During the 1950s, a nascent notion of corporate social responsibility was developed to respond to the fact that “several hundred largest businesses were vital centres of power and decision making and that the actions of these firms touched the lives of citizens at many points.”<sup>27</sup> Today, the dynamics of economic globalization have reached a scenario in which the richest so-called 1% have accumulated more wealth than the bottom 60 percent of the world population<sup>28</sup>, while 40 percent of the global wealth is concentrated in 147 transnational corporations.<sup>29</sup> Global value chains, which are typically coordinated by TNCs, have become the centre of global economic activity, further shifting the concentration of economic and market power to corporations.<sup>30</sup>

In this scenario of growing corporate power, a number of cases involving corporate misconduct have been reported around the world. These cases include corporations benefiting from modern slavery and human trafficking, unloading toxic waste and exposing communities to hazardous material, conducting illegal human pharmaceutical trials and aiding or participating

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<sup>24</sup> John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 2013).

<sup>25</sup> John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 2013).

<sup>26</sup> Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council (2013).

<sup>27</sup> A.B. Carroll, “Corporate social responsibility. Evolution of a definitional construct”, *Business and Society*, Vol. 38 No. 3, September 1999, p. 269.

<sup>28</sup> Oxfam International, “World’s billionaires have more wealth than 4.6 billion people”, 20th January 2020. Available from <https://www.oxfam.org/en/press-releases/worlds-billionaires-have-more-wealth-46-billion-people>.

<sup>29</sup> Credit Suisse, *Global Wealth Report* (2015). Available from <https://www.credit-suisse.com/about-us/en/reports-research/global-wealth-report.html>.

<sup>30</sup> UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, UNCTAD/WIR/2013.

in committing acts of violence against community representatives and human rights defenders, among many others. The loopholes in international law have allowed certain companies to act with impunity and disregard “effective environmental and human rights management of the whole enterprise,”<sup>31</sup> thereby requiring actions to address the social, economic and environmental impacts that the activities of corporations cause.

Similarly, the UNGPs have recognised that corporations have the responsibility to respect human rights and that “they should avoid infringing on human rights of others and should address adverse human rights impacts with which they are involved.”<sup>32</sup> The commentary on UNGP 11 provides that “addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation” of such adverse effects. This recognition has come in line with other developments in international law, in particular, judgments by the International Court of Justice recognizing that “the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States”<sup>33</sup>.

Shareholders’ interest have been at the core, or even the sole purpose, of business corporations with their ‘responsibilities’ being directed towards shareholders’ desires that supposedly involve making “as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom.”<sup>34</sup> This has been the core ideal promoting the free-market and shareholder-primacy as the dominant global economic model.<sup>35</sup> Nevertheless, close scrutiny and increased activism by civil society have forced companies and the private sector to design or develop new strategies for improving their compliance with international law and human rights. For example, in August 2019, the Business Roundtable – a corporate lobbying group composed of 181 CEOs of the world’s biggest companies – recognised that while each individual company has its own corporate purpose, they have a fundamental commitment to deliver value to all their stakeholders, including consumers, employees and communities.<sup>36</sup> This idea of stakeholder capitalism has established that “a company [...] integrates respect for human rights into the entire supply chain”<sup>37</sup> and considers that a company’s performance “must be measured not

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<sup>31</sup> Filip Gregor and Hanna Ellis, “Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses” (European Coalition for Corporate Justice).

<sup>32</sup> UN Guiding Principles on Business and Human Rights (UN HRC, UN Doc A/HRC/17/31), Principle 11.

<sup>33</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 178.

<sup>34</sup> Milton Friedman, “The Social Responsibility of Business is to Increase its Profits”, *The New York Times Magazine* (September 1970).

<sup>35</sup> Andrew Winston, “Is the Business Roundtable Statement Just Empty Rhetoric?”, *Harvard Business Review* (30 August 2019). Available from <https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric>.

<sup>36</sup> Business Roundtable, “Statement on the Purpose of a Corporation”, August 2019. Available from <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf>.

<sup>37</sup> World Economic Forum, *The Davos Manifesto 2020*. Available from <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives.”<sup>38</sup>

Although such principles have been harnessed through voluntary initiatives and statements, “forced labour continues to generate \$150 billion in illicit profits in the private economy per year”<sup>39</sup> and at least 572 cases of attacks against human rights defenders concerning business-related human rights abuses have been reported in 2019<sup>40</sup>. Corporate conduct has continued causing human rights violations (see Box 1). A report prepared for the European Parliament shows that 40 cases involving human rights violations by companies were brought before European courts between 1990 and 2015. From those 40 cases, only 3 cases resulted in compensation for the victims or found the company liable for criminal conduct, and 9 were settled out of the court.<sup>41</sup>

#### Box 1 - Types of conduct involving businesses in human rights violations

**Direct liability:** cases where the company, its executives and/or staff are accused of being directly responsible for human rights abuses;

**Vicarious liability:** cases where companies are providing goods, technology, services or other resources to governments or State authorities, which are then reported to be used in abusive or repressive ways;

**Complicity:** cases in which companies are accused of having provided information, assurance, logistical support or financial support to other companies which are causing human rights abuses;

**Strict liability:** cases in which the companies have made investments in projects or governments or State authorities with poor human rights records or with connections to known abusers accused of being complicit in human rights abuses or where companies are sourcing products from suppliers which are committing human rights abuses.

Moreover, transnational operations among and within corporate groups may adversely affect the enjoyment of human rights and foster practical and legal barriers to access to justice for victims. The Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises recognized that the current system

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<sup>38</sup> Ibid.

<sup>39</sup> Chris Patz and Claudia Saller (European Coalition for Corporate Justice - ECCJ), “Where is the European Commission going on due diligence and access to remedy in 2020?”, 3 February 2020. Available from <https://www.business-humanrights.org/en/where-is-the-european-commission-going-on-due-diligence-and-access-to-remedy-in-2020>.

<sup>40</sup> “Human Rights Defenders and Business, January 2020 Snapshot”. Available from <https://dispatches.business-humanrights.org/hrd-january-2020/index.html>.

<sup>41</sup> Policy Department for External Relations, Directorate General for External Policies of the Union, “Access to legal remedies for victims of corporate human rights abuses in third countries”, STUDY Requested by the DROI Committee of the European Parliament (2019). Available from [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).

of remedies “remains incomplete and flawed. It must be improved in its parts and as a whole.”<sup>42</sup> States’ capacity to respond to such need will depend on external and internal factors, including (i) social capability, (ii) state capacity and (iii) civil society participation.<sup>43</sup>

The first of these factors primarily refers to the capability of domestic firms to respond to TNCs’ interventions. Human rights scholars consider that strong development of domestic firms’ capacities as part of global value chains will allow them to identify negative impacts and respond better in case of human rights abuses by TNCs.<sup>44</sup> The second factor relates to the State’s role in designing, implementing and enforcing obligations and regulation of businesses’ operations. According to a study covering 140 countries, States with more regulatory space are able to better protect their citizens from abuses from non-state actors.<sup>45</sup> Nonetheless, most States are constrained to pursue their legitimate public objectives through an unequal system in which a host State can be brought before international arbitral tribunals by foreign investors under ill-defined investment treaty provisions on ISDS. These tribunals can effectively review whether States’ actions, including its judicial processes, have violated the investor’s rights; without consideration of any human rights obligations arising from international treaties.<sup>46</sup> The third factor considers society as an important actor for increasing respect for human rights.<sup>47</sup> Civil society, including NGOs, academics and communities where corporations conduct their operations have an important role in the promotion and innovation of standards applicable to corporate accountability (see Figure 2).

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<sup>42</sup> Human Rights Council, “Protect, Respect and Remedy: a Framework for Business and Human Rights”, UN Doc. A/HRC/8/5 (2008), para. 87.

<sup>43</sup> Elisa Giuliani and Chiara Macchi, “Multinational corporations’ economic and human rights impacts on developing countries: a review and research agenda,” *Cambridge Journal of Economics* (2014), No. 38, p. 487.

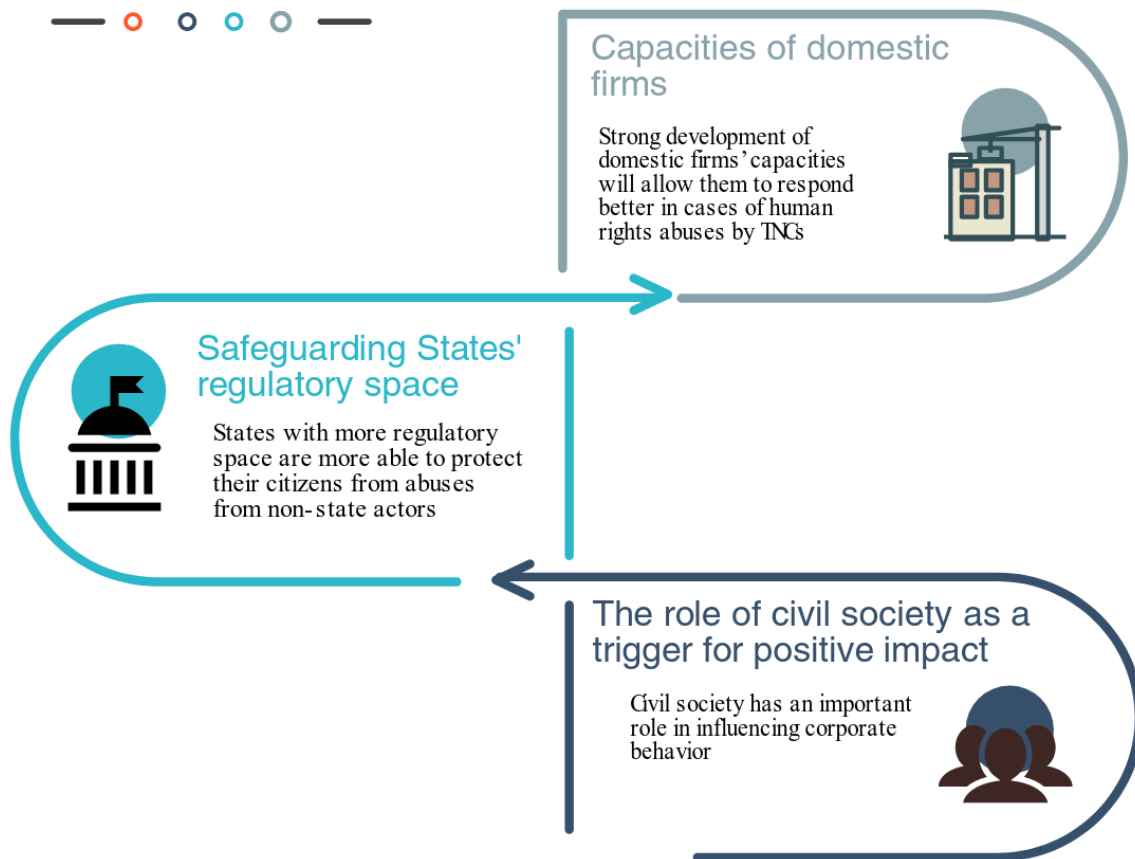
<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> See Sanya Reid Smith, Presentation during the First Session of the OEIGWG, in Kinda Mohamedieh and Daniel Uribe, “Discussing obligations of States and Businesses”, *South Bulletin 87-88*, 23 November 2015. Available from <http://www.southcentre.int/south-bulletin-87-88-23-november-2015/>.

<sup>47</sup> Elisa Giuliani and Chiara Macchi, “Multinational corporations’ economic and human rights impacts on developing countries: a review and research agenda,” *Cambridge Journal of Economics* (2014), No. 38, p. 490.

**Figure 2 - Internal and external factors to respond to the adverse effects of business operations on the enjoyment of human rights**



Corporate social responsibility has shaped business practices as a response to pressure by civil society and other stakeholders. The efforts of civil society to position corporate accountability in the public agenda have promoted different public initiatives at the national, regional and international level (see Box 2). Nevertheless, CSR has been a usual strategy to endow business and corporations with a “social role”, but one reliant on the discretion of business executives and occasionally used as a marketing strategy to limit reputational risks or to gain social legitimacy.<sup>48</sup> The voluntary nature endowed to CSR has limited its potential as a source of corporate behaviour directed towards “managing the firm in such a way that can be economically profitable, law abiding, ethical and socially supportive.”<sup>49</sup>

Given the existing limitations of the voluntary nature of CSR, particularly with regard to their accountability for human rights violations or abuses, the discussions on the design and adoption

<sup>48</sup> Dr. Başak Bağlayan, Ingrid Landau, Marisa McVey and Kebene Wodajo, “Good Business: The Economic Case for Protecting Human Rights”, (BHR Young Researcher Summits, Frank Bold and International Corporate Accountability Roundtable, December 2018), p. 15.

<sup>49</sup> A.B. Carroll, “Corporate social responsibility. Evolution of a definitional construct”, *Business and Society*, Vol. 38 No. 3, September 1999, pp. 268–295, cited in Ans Kolk, “The social responsibility of international business: From ethics and the environment to CSR and sustainable development”, *Journal of World Business* Volume 51, Issue 1, January 2016, p. 24.

of a legally binding instrument on business and human rights should assess different options to effectively articulate and apply legally binding obligations for businesses<sup>50</sup> in order to “effectively fill gaps in the current international legal order (...)”<sup>51</sup>.

#### **Box 2 - National and Regional Initiatives to regulate business conduct to prevent human rights abuses<sup>52</sup>**

**Switzerland:** Swiss public initiative to hold Swiss companies accountable for human rights abuses committed abroad.

**Germany:** Supply Chains Law Campaign to propose a bill by 2020 that would ensure German companies put in place human rights safeguards in their supply chains.

**France:** Law on duty of care, establishing reporting procedures for fulfilment of human rights for large corporations.

**Netherlands:** Child Labour Due Diligence Bill requires businesses to address the issue of child labour in their supply chains.

**Finland:** Agenda for Action on Business and Human Rights for the EU with the objective of advancing Human Rights Due Diligence, including in State financing and public procurement, development cooperation, trade and collective initiatives and guaranteeing access to judicial and non-judicial remedy.

**Ghana:** The fundamental human rights and freedoms enshrined in the Constitution must be respected and upheld by all natural and legal persons, government and the judiciary, and are enforceable by the Courts.

**Canada:** The Canadian Ombudsperson for Responsible Enterprise has the mandate to address complaints related to allegations of human rights abuses arising from a Canadian company’s activity abroad through collaborative and independent fact-finding missions, recommendations and report publicly throughout the process.

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<sup>50</sup> 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 South Centre South Bulletin 87-88 (November 2015), p. 24.

<sup>51</sup> 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 South Centre South Bulletin 87-88 (November 2015), p. 24.

<sup>52</sup> Policy Department for External Relations, Directorate General for External Policies of the Union, “Access to legal remedies for victims of corporate human rights abuses in third countries”, STUDY Requested by the DROI Committee of the European Parliament (2019). Available from [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).

**Europe:** Members of the European Parliament expect the EU Commissioner to act swiftly and introduce mandatory requirements on corporate environmental and human rights due diligence.

**Americas:** Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA, by its initials in Spanish) of the Inter-American Commission on Human Rights; published Thematic Report on “Business and Human Rights: Inter-American Standards”.

## 1.2. Challenges to access to justice faced by victims of human rights violations by TNCs and OBEs

The complexity of corporate structures in the current globalized economy has shaped several of the legal barriers that limit the rights of victims to access to justice in cases of corporate-related human rights abuses.<sup>53</sup> These cases 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 the home and host States where TNCs operate.

Different reasons explain this problem. First, it is important to understand that, as a matter of law, TNCs do not exist as a single legal entity, but as a collection of companies registered in different domestic jurisdictions, with separate legal personalities benefiting from limited liability. These arrangements have greatly benefited from the notions of shareholder-primacy and the free market. The doctrines of *separate legal personality* and *limited liability* have become the bedrock of corporate liability theories in various jurisdictions (see Figure 3). These doctrines were developed for shielding the assets of individual shareholders from the liabilities of the corporation, so that the shareholders would be liable for a corporation’s debts only to the extent of their shares.

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<sup>53</sup> For example see: EarthRights International, “Out of Bounds: Accountability for Corporate Human Rights Abuse After Kiobel” (2013), available at <https://earthrights.org/publication/out-of-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), December 2013); Center for Constitutional Rights, “Corporate Human Rights Abuses”, available at <https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses>; among others.

**Figure 3 - Limited Liability and Piercing the Corporate Veil**

**Doctrines of ‘separate legal personality’ and ‘limited liability’**

The corporation is considered a separate legal entity (artificial legal entity) from its shareholders. Therefore, limited liability protects the assets of the firm’s owners from the claims of the firm’s creditors .



**Piercing the corporate veil: exception to ‘limited liability’**

Addressing the ‘corporate veil’ operates as a gateway element that is necessary to enable addressing other issues such as the ‘control element’ within a corporate group and between parent company and subsidiaries.



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.<sup>54</sup> In other words, the doctrine of ‘separate corporate personality’ connotes that a subsidiary is a distinct legal entity from the parent company that owns or controls it. The same is applied for joint ventures, contractors or other entities in the supply chain of a corporation. This doctrine 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<sup>55</sup>.

Although the above doctrines were developed with the aim of protecting the individual shareholder, the evolution in corporate law and practice allowed corporations to also invest in other corporations and in this way the principle of *limited liability* also became applicable to this new relationships. As a result, parent corporations have no or limited liability *vis-a-vis* the actions of their subsidiaries. This limitation on legal liability of parent companies has the effect of discouraging multinational enterprises from effective environmental and human rights management of the whole enterprise.<sup>56</sup>

Exceptions to the doctrine of *limited liability* have been developed through *piercing the corporate veil*<sup>57</sup> and other statutory exceptions. This exception has mainly been applied in cases of fraud, misuse of the privileges of legal personality, and for protecting creditors or purchasers. Corporate principals have been found personally liable for corporate acts and omissions, and have been convicted for wrongful corporate acts.<sup>58</sup> However, the veil is pierced on a case by

<sup>54</sup> Dr. Jennifer Zerk, “Corporate Liability for Gross Human Rights Abuses – Towards a fairer and more effective system of domestic law remedies” (2013), p. 65. Available from <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

<sup>55</sup> Skinner, McCorquodale and De Schutter, op. cit., p. 59.

<sup>56</sup> Filip Gregor and Hanna Ellis, “Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses” (European Coalition for Corporate Justice).

<sup>57</sup> ICJ, Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain) (Merits) 1970 ICJ Rep 3, pp. 38-39.

<sup>58</sup> US v. Wade 577 F. Supp 1326 (ED Pa 1983); US v. Dotterweich 320 US 277 (1943); US v. Park 321 US 658 (1975), referenced in Stephen Tully, ed., *International Corporate Legal Responsibility* (Kluwer Law International, 2012), page 30.

case basis after long litigation; there is no coherence or predictability in this exercise, which is left to judicial discretion<sup>59</sup>. Moreover, studies showed that the veil is pierced less often in tort cases than in contractual disputes<sup>60</sup>. Thus, defining the criteria to identify the level of control of a parent company on its subsidiaries is central to addressing the attribution of responsibility between the parent company and other entities within its corporate group.

One of the direct effects of these doctrines is the difficulty of establishing causation between the conduct of the parent company and its subsidiaries' contribution to an injury or harm. This will also require that the parent company responsible for that conduct should have foreseen that such behaviour could produce the injury or harm.<sup>61</sup> 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.

The joint operation of these principles and the always shifting corporate practices have introduced a number of barriers that victims have to face in order to obtain reparation. This is particularly significant when such corporations operate transnationally, as the victims can only bring legal actions against them in the victims' home State<sup>62</sup>. The varied 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<sup>63</sup> and obstacles related to jurisdiction of foreign courts, including for the collection of evidence and information.

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.<sup>64</sup> These procedural and practical obstacles create "significant deficiencies in access to remedies (...)"<sup>65</sup>. Likewise, the differences in domestic conditions and legislations among States, including different "legal systems, legal culture and traditions, levels of social and political stability and economic development (...)"<sup>66</sup> pose important challenges for victims of corporate-related human rights abuses, especially in cases related to transnational corporations (see Figure 4).

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<sup>59</sup> See: Surya Deva, "Briefing Paper for Consultation: Parent Company Liability" (ESCR-Net, FIDH), referencing Dan D. Prentice, "Veil Piercing and Successor Liability in the United Kingdom" (1996) 10 *Florida Journal of International Law* 469, 474 and Robert Thompson "Piercing the Corporate Veil: An Empirical Study" (1991) 76 *Cornell Law Review* 1036, 1038, 1056, 1068-9.

<sup>60</sup> Ibid.

<sup>61</sup> See: Richard W. Wright, "Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof", *Loyola of Los Angeles Law Review* vol. 41 (2008), p. 1295.

<sup>62</sup> Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford, Hart Publishing, 2004).

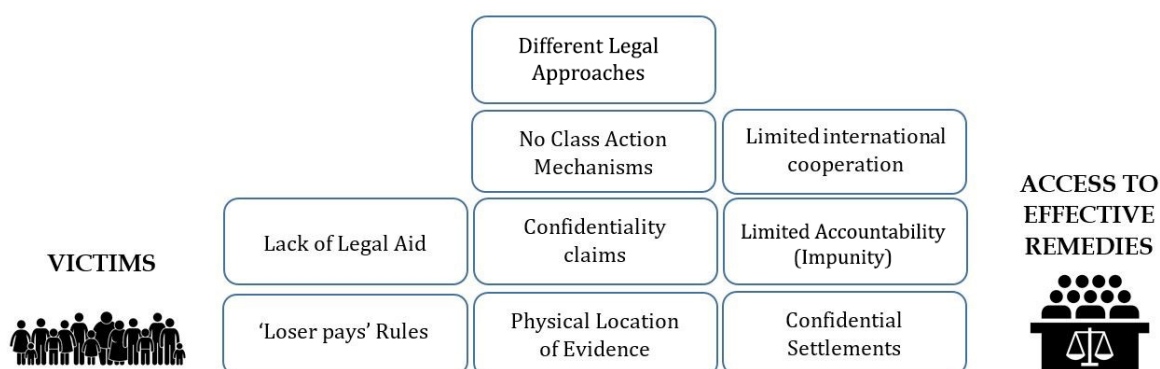
<sup>63</sup> Iman Prihandono, "Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries", *Journal of Law and Conflict Resolution* Vol. 3(7) (2011), p. 90.

<sup>64</sup> Ibid.

<sup>65</sup> 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.

<sup>66</sup> Zerk 2013, op. cit., p. 64.

Figure 4 - Common barriers faced by Victims



Bringing cases against corporations for alleged human rights abuses often involves large costs and time. Corporations usually have economic and financial capabilities to sustain long and complicated judicial processes,<sup>67</sup> while victims mostly depend on official legal aid or *pro bono* work to bring such claims. **Access to legal aid** is commonly provided by States generally depending on the income and other means available to the claimant/s to pursue the case. This usually requires claimants to prove their lack of sufficient economic resources to cover their litigation costs<sup>68</sup>. Usually, compulsory legal aid is only provided in criminal proceedings<sup>69</sup>, but some jurisdictions recognise the possibility of granting legal aid for civil claims based on their substantial merits<sup>70</sup>. Nevertheless, it has been argued that currently States are reducing funding for legal aid in non-criminal proceedings<sup>71</sup>.

Moreover, the uncertainty about the final outcome of those claims creates high risks with respect to the total legal costs, and may restrict the likelihood of victims finding suitable legal aid. The **'loser pays' rule** adds hurdles for victims, as according to this rule the losing party in a litigation must pay the legal costs of the winning party. In addition, in jurisdictions where the 'loser pays' rule is not applied, or only partially applied, the defendant may not only request the court to order the losing party to cover the legal costs if the claims were unduly filed, but also initiate 'retaliatory litigation' against the claimant seeking damages for reputational losses.<sup>72</sup> The risks of bringing human rights claims against corporations increase due to the large amount of economic resources that businesses may be willing to expend in defending against such claims.<sup>73</sup> Therefore, victims may be dissuaded from pursuing litigation or may prefer confidential out-of-court settlements.

<sup>67</sup> Justin Jos, "Voice of Bhopal: Different Dimensions of the Barriers to Justice in Bhopal Gas Tragedy Case" (2016). Available from [https://www.researchgate.net/publication/315395074\\_Voice\\_of\\_Bhopal\\_Different\\_Dimensions\\_of\\_the\\_Barriers\\_to\\_Justice\\_in\\_Bhopal\\_Gas\\_Tragedy\\_Case](https://www.researchgate.net/publication/315395074_Voice_of_Bhopal_Different_Dimensions_of_the_Barriers_to_Justice_in_Bhopal_Gas_Tragedy_Case).

<sup>68</sup> See Article 5(1) and (2) of European Council Directive 2003/8 in the Official Journal of the European Communities, Volume 46 (Brussels, 31 January 2003).

<sup>69</sup> See: Skinner, McCorquodale and De Schutter, *op. cit.*, pp. 47–51.

<sup>70</sup> *Ibid.*

<sup>71</sup> See: Asher Flynn, Arie Freiberg, 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.

<sup>72</sup> See: Skinner, McCorquodale and De Schutter, *op. cit.*, pp. 48–53.

<sup>73</sup> Zerk 2013, *op. cit.*, p. 80.

One of the means to share the burden of initiating these procedures is the use of **class action suits or collective action mechanisms**. These mechanisms are procedures in which an entire 'class'<sup>74</sup> of victims may be represented by one or more legal representatives<sup>75</sup>. This option allows victims to increase their capacity to cope with costs and procedures. In addition, in class action lawsuits, law firms often act on a contingency basis, meaning that they are responsible for bearing expenses during the course of the litigation, and will be paid depending on the final outcome. This type of action basically requires that individuals, belonging to a class, share common questions of law or fact, and that the claims of the representative parties are typical of the claims of the class. 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<sup>76</sup>, thereby often making it difficult to meet these requirements.

**Access to and collection of evidence** in the home State of corporations requires strong and effective judicial cooperation between home and host States to allow further investigation of alleged harms resulting from corporate wrongdoings. Nevertheless, the current proceedings directed to allow access to information and evidence in corporate-related human rights abuses are time and resource consuming, as 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 make gathering of evidence harder and costly to achieve.<sup>77</sup> The use of the right to privacy to prevent the State from conducting warrantless searches or seizure of property of corporations is one of the most used defences to avoid accountability. This is particularly true in criminal proceedings, where law enforcement agencies are required to demonstrate a 'probable cause' in order to be able 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 their relevance to the inquiry.<sup>78</sup> In addition, even in cases where the order of discovery was broad,<sup>79</sup> the volume and complexity of corporate and financial records could limit the effectiveness of the discovery.<sup>80</sup>

Similarly, the **physical location of evidence and information** can be used as an excuse to object to the jurisdiction of courts of the home State of TNCs. Defendants may, and indeed have argued that home State courts do not have adequate jurisdiction to investigate the alleged harmful conduct as the evidence is located in another territory or jurisdiction. Moreover, in order to obtain such evidence, the investigation and prosecution of these cases involve the use

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<sup>74</sup> See for example: United States Federal Rules of Civil Procedure, Rule 23.

<sup>75</sup> Ibid.

<sup>76</sup> Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011) cited by Skinner, McCorquodale and De Schutter, op. cit., p. 57.

<sup>77</sup> Darryl K. Brown, "The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement", *Ohio State Journal of Criminal Law*, vol. 1 (2004), p. 528.

<sup>78</sup> Kent Greenawalt and Eli Noam, "Confidentiality Claims of Business Organizations", in *Business Disclosure: Government's Need to Know*, Harvey J Goldschmid, ed. (McGraw-Hill, 1979), p. 386.

<sup>79</sup> Ibid., p. 387.

<sup>80</sup> Brown, op. cit., p. 527.

of large amounts of resources and need full cooperation of the countries in question.<sup>81</sup> The lack of such resources or cooperation will result in the probable dismissal of the case.<sup>82</sup>

Given these limitations, international cooperation is essential in cases of corporate-related human rights abuses involving transboundary legal procedures. 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, the **differences in legal systems** may impede access to judicial assistance in foreign jurisdictions to carry out investigative or judicial proceedings in cases with transboundary elements. States also apply different legal standards with respect to the rules of enforcement of judicial decisions, including in relation to the scope of discovery orders or the nature of sanctions and remedies<sup>83</sup>. 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<sup>84</sup>.

Indeed, **lack of comity or international cooperation instruments among States** is an important obstacle faced by victims. Judicial cooperation is not automatic and requires comity among States or international cooperation instruments to be operative. The enforcement of judgments requires cooperation between the host and home State of corporations. The mutual recognition of formal procedures, applicable legal standards and valuation of damages requires special consideration.<sup>85</sup>

In addition to the practical barriers mentioned above, victims can also face more fundamental legal barriers in accessing justice. One of the most common barriers is the application of the doctrine of *forum non conveniens* in cases involving more than one jurisdiction. Under this doctrine, courts may decline to exercise jurisdiction in face of the existence of a more 'appropriate' jurisdiction to adjudicate the dispute. This is a discretionary decision of the court when it is considered that a different jurisdiction has a more 'real' and substantial connection with the case.<sup>86</sup> The doctrine of *forum non conveniens* has been a recurrent argument used to decline jurisdiction in corporate-related human rights abuses in some countries. For example, almost 40 to 50 percent of motions to dismiss cases on the basis of *forum non conveniens* were granted in the United States<sup>87</sup> and from those almost 99 percent were never filed again in any jurisdiction.<sup>88</sup>

The application of the doctrine of *forum non conveniens* serves as a basis for the establishment of a cycle of grounds for dismissal (see Figure 5). Although not all of such grounds are inter-related, they find a strong link with the presumption against extraterritoriality of the law, commonly applied in various jurisdictions such as the United States. The presumption against

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<sup>81</sup> Al-Haq, "Prosecutor Dismisses War Crimes against Riwal", 14 May 2013. Available from <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal>.

<sup>82</sup> Ibid.

<sup>83</sup> Zerk 2013, op. cit., p. 101.

<sup>84</sup> Ibid.

<sup>85</sup> Zerk 2013, op. cit., p. 85.

<sup>86</sup> See defendant's plea in *Connolly (A.P.) v. R.T.Z Corporation Plc and Others* [1997] UKHL 30.

<sup>87</sup> Matthew J. Eible, "Making Forum Non Conveniens Convenient Again: Finality and Convenience for Transnational Litigation in U.S. Federal Courts", 68 *Duke L.J.* 1193 (2019), p. 1227.

<sup>88</sup> Skinner, McCorquodale and De Schutter, op. cit., p. 24.

extraterritoriality implies that the legislation of one State is only applicable with respect to conducts occurring within that State<sup>89</sup>. 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.* is the most notable case involving corporate-related human rights abuses in which the principle of presumption against extraterritoriality of the law was developed and applied. In this case, the Supreme Court of the United States analysed if the Alien Tort Claims Act 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, limiting the extraterritorial application of ATCA only to cases that ‘strongly touch and concern’ the territory of the United States, and thus displaced the presumption against extraterritoriality, avoiding to trigger serious foreign policy consequences for the country.

In line with this principle, the notions of personal jurisdiction and lack of sufficient contact of the victim with the ‘perpetrator’ are one of the pillars on which the presumption of extraterritoriality applies. According to these notions, courts only have jurisdiction over conduct of individuals or legal entities occurring within the territory where they are seated. As TNCs act in host States through their subsidiaries, agents or distributors, courts in parent companies’ home States may decline jurisdiction in cases where the nexus between the TNC and the conduct abroad is not sufficiently proven.<sup>90</sup> 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<sup>91</sup> and, therefore, a more appropriate forum is required.

As mentioned in a Policy Brief by Kinda Mohamadieh<sup>92</sup>, “the European Union Members States have taken steps towards clarifying the obligations of home States in terms of recognizing the jurisdiction of their national courts when civil claims are filed against persons (including corporations) domiciled in their territory, wherever the damage has occurred, and whatever the nationality or the place of residence of the claimants”<sup>93</sup> in the application of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This can be understood as the European Union attempting to “ensure that their legal systems allow the bringing of court actions before their domestic courts relating to liability of European corporations while operating abroad.”<sup>94</sup>

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<sup>89</sup> William S Dodge, “Understanding the Presumption against Extraterritoriality”, *Berkeley Journal of International Law*, vol. 16 (1998), p. 88.

<sup>90</sup> See: *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

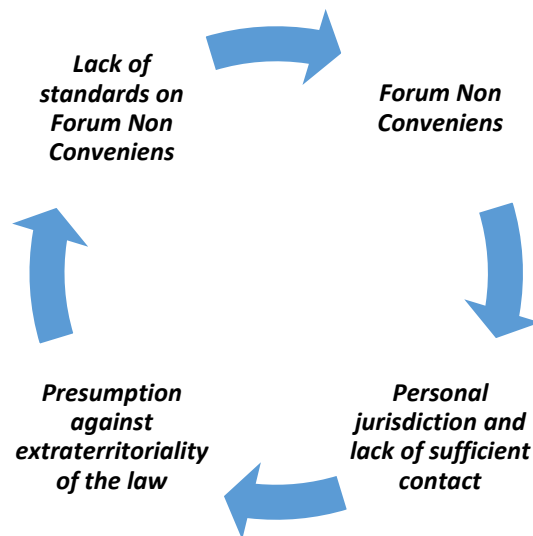
<sup>91</sup> Al-Haq, op. cit.

<sup>92</sup> 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, October 2016, p. 4.

<sup>93</sup> Ibid., p. 4.

<sup>94</sup> Ibid.

**Figure 5 - The Cycle of *Forum Non Conveniens***



Even though *forum non conveniens* requires examining the existence of a more adequate alternative forum to adjudicate the claims,<sup>95</sup> 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,<sup>96</sup> while others may decide that the complexity and nature of a case makes the supposedly adequate forum not appropriate to hear the case<sup>97</sup>. The lack of standards on applicability of the *forum non conveniens* undermines the rights of victims to access to justice, as there is legal uncertainty on how the court will determine the ‘convenience’ of the forum. In addition, the statutes of limitation provide for 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 on the nature of the claim, the amount of damages being 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<sup>98</sup>. The application of time limits will be particularly intricate in cases involving transnational conducts, as there may be different limits in the law of the forum State and in that of the foreign State where a human rights violation occurred<sup>99</sup>.

In cases with transnational elements, courts need to determine which law applies to the case<sup>100</sup>; 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<sup>101</sup>, but in cases involving human

<sup>95</sup> 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.

<sup>96</sup> *Sahu v. Union Carbide Corp.*, 746 F. Supp. 2d 609 (Dist. Court, SD New York 2010).

<sup>97</sup> *Connelly (A.P.) v. R.T.Z Corporation Plc and Others* [1997] UKHL 30.

<sup>98</sup> Skinner, McCorquodale and De Schutter, op. cit., p. 39.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, p. 43.

<sup>101</sup> Zerk 2013, op. cit., p. 50.

rights abuses the analysis becomes more complex. In such instances, the court may consider 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 and amount to remedy do not guarantee adequate and effective remedy, or other public policy reasons concerning the right of victims to access to justice. Nevertheless, the lack of certainty on the way courts decide which is the applicable law, gives rise to additional complexities for victims because, depending on the choice of law, claimants will be required to comply with different substantive and procedural rules.

### 1.3. Overcoming obstacles to access to justice in corporate-related human rights abuses

Overcoming the different obstacles to access to justice faced by victims of corporate-related human rights abuses, particularly in cases with transnational characteristics, requires the engagement of the international community in order to address the gaps in the international legal order so as to guarantee victims' access to justice and corporate accountability. Given the complex structures of multinational corporations, a one-size-fits-all approach is questionable with respect to the issue of business and human rights<sup>102</sup>. However, the efforts to design and implement different mechanisms to strengthen international human rights standards *vis-à-vis* the operations of business enterprises should, at a minimum, create effective mechanisms for international cooperation and strengthen the capacity of States to eradicate harmful behaviour by business enterprises. International cooperation should, in particular, include cooperation among law enforcement agencies and mutual assistance across borders.<sup>103</sup>

Discussions by the OEIGWG have tackled specific barriers to the exercise of victims' rights (see Figure 6). The focus of a legally binding instrument designed from a victim's perspective should be to reduce regulatory, procedural and financial obstacles in access to remedy, as repeatedly highlighted by lawyers and representatives of victims<sup>104</sup>. Thus, a broad definition of legal standing (*locus standi*) could guarantee adequate legal representation for victims, particularly communities or affected groups, allowing victims to bring claims individually or as a group. This will not only guarantee the principle of procedural economy by limiting the filing of multiple claims, but could also allow the sharing of cost and procedural burdens among all claimants.

Similarly, access to information is fundamental for victims to present a claim against business enterprises based on violations of human rights. Business enterprises are supposed to conduct their operations under the principle of transparency to ensure oversight by competent authorities, and as a matter of good corporate governance. Nevertheless, access to information continues to be one of the biggest hurdles experienced by victims. A legally binding instrument could include a set of measures requiring companies to submit mandatory human rights reports to national authorities. The discussion of a legally binding instrument could learn from other mechanisms, for example, by establishing a national prevention mechanism as provided for

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<sup>102</sup> John Ruggie, "Summary of discussions of the Forum on Business and Human Rights" (2013), Human Rights Council, UN Doc. A/HRC/FBHR/2012/4, para. 79.

<sup>103</sup> 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.

<sup>104</sup> See Robert McCorquodale, "Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises" (British Institute of International and Comparative Law, 17 July 2015). Available from <https://corporate-responsibility.org/wp-content/uploads/2015/12/BIICL-McQuordale-uk-access-to-remedies.pdf>.

under the Optional Protocol to the Convention against Torture<sup>105</sup>, and by including the supervision by judicial or other adequate bodies of any non-judicial settlement arrived at by the victims and a corporation.

Likewise, the measures adopted by States for regulating corporate conduct should introduce a clear regulatory framework that strengthens their domestic jurisdiction *vis-à-vis* violations of human rights by business enterprises. These measures could focus on the abuses that such enterprises may cause or contribute through their operations, including their own activities, as well as other business relationships linked to such operations. Furthermore, such preventive mechanisms could establish a duty of care of the parent company to ensure compliance with human rights obligation by all businesses linked to its operations, for example, their subsidiaries conducting operations abroad. Such duty of care should extend to the enterprises supplying goods and services to subsidiaries or parent companies.<sup>106</sup>

In addition, the prospective legally binding instrument could 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]”<sup>107</sup>. It should also assert the jurisdiction of the courts where the parent company is domiciled in cases involving corporate-related human rights abuses. This could be achieved by clarifying the concept of ‘no other available forum’ under the principle of *forum necessitates*,<sup>108</sup> or by banning the application of the doctrine of *forum non conveniens* discussed above, thereby securing an avenue for claimants to bring cases against business enterprises directly in their home State.<sup>109</sup> The OEIGWG has considered in this respect the need for “creating prevention, disclosure and reporting requirements, removing obstacles to the exercise of jurisdiction, such as *forum non conveniens*, facilitating cross-border cooperation in investigations and mutually recognizing national judgments.”<sup>110</sup>

In summary, international cooperation can allow victims to achieve greater access to remedies and help to address jurisdictional gaps in cases of human rights violations by business activities of transnational character. International cooperation, particularly mutual legal assistance, is an important tool to ensure efficient investigation, prosecution and enforcement of judgments. It can do so through guaranteeing access to information in investigations and prosecutions and the application of adequate standards of due process of law and enforcement of effective remedy.

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<sup>105</sup> 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.

<sup>106</sup> Filip Gregor and Hanna Ellis, “Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses” (European Coalition for Corporate Justice), p. 21.

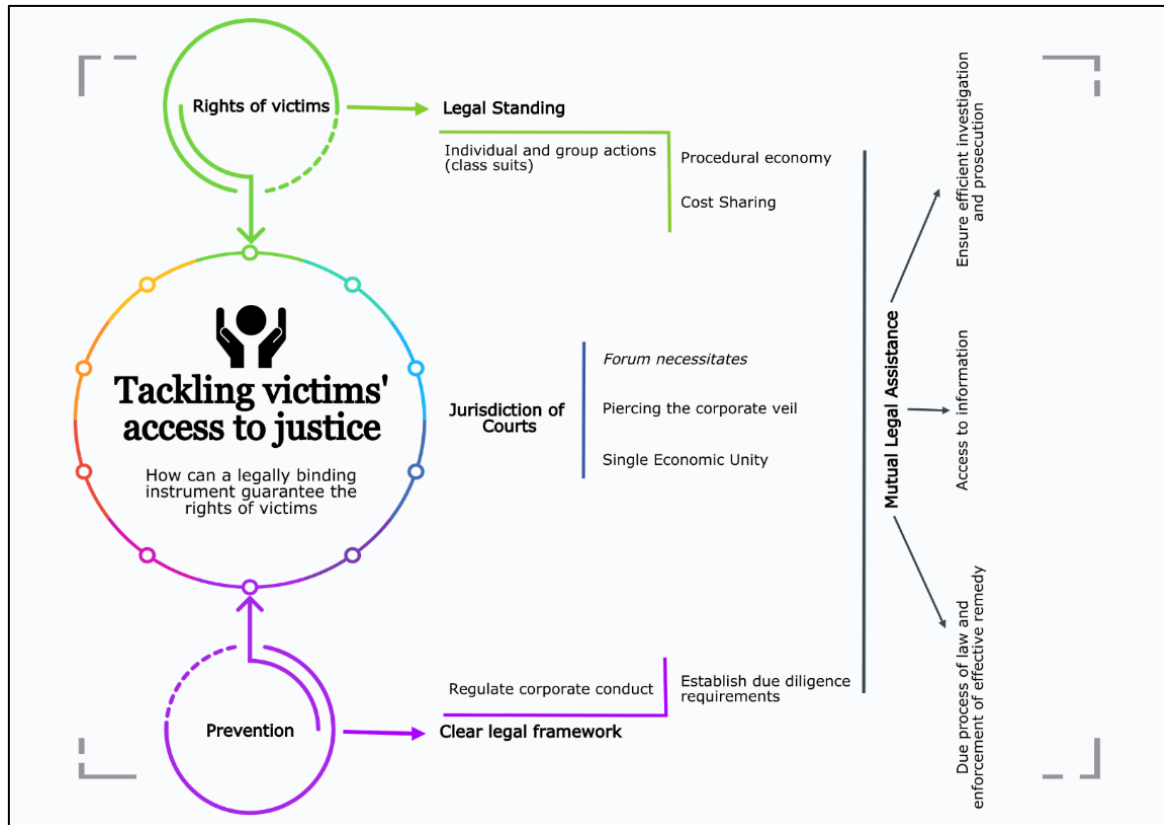
<sup>107</sup> Carlos M. Correa, “Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights”, South Centre Policy Brief No. 28 (September 2016).

<sup>108</sup> Skinner, McCorquodale and De Schutter, *op. cit.*, p. 30.

<sup>109</sup> Meeran (2015), reported in South Centre South Bulletin 87-88 (November 2015), p. 21.

<sup>110</sup> OEIGWG, “Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”, UN Doc. A/HRC/34/47 (2017), para. 71.

**Figure 6 - Tackling victims' access to justice**



## 2. Placing the legally binding instrument in international law

One of the most discussed issues in the process of adopting an international legally binding instrument on TNCS, OBEs and human rights has been how to address the corporate actor under international law. Today, international law does not entail a conceptual barrier for developing an agreement among States that imposes direct obligations on private actors. Nonetheless, in most cases, international law regulates the conduct of private entities indirectly through national legislation.

The discussions about the international responsibility of transnational corporations are not new. During the 1998 Rome Conference, which resulted in the Rome Statute of the International Criminal Court, France had submitted a proposal to grant to the new court jurisdiction over legal persons (UN Doc. A/CONF.183/2/Add.1, 14 April 1998). Similar proposals have been contemplated by Member States of the African Union to amend the Statute of the African Court of Justice and Human Rights (Article 46C), which would establish direct jurisdiction over corporations.

Along these lines, a number of agreed international human rights instruments take the approach of regulating private actors by providing the obligation of States to treat certain conducts as offences, and to establish the liability of legal persons subject to the legal principles of the domestic laws,<sup>111</sup> or by requiring certain conduct or compliance with obligations by a private party.<sup>112</sup> A legally binding instrument on TNCs and OBEs could follow a similar approach by requiring States to develop national legislation in a way that clarifies the standards of liability of corporations under criminal, civil or administrative rules. This would help States to converge towards a common approach and to cover gaps in domestic systems where they currently exist.

The traditional theory of international law predicates the States' primary obligation to protect human rights under its jurisdiction, as subjects and creators of international law.<sup>113</sup> The nature and recognition of corporate entities as subjects of international law is one of the important issues under debate in the context of the negotiations on the internationally binding instrument given, in particular, the strong power that corporations may have in influencing decision-making at the international level as mentioned in section 1 above. The OEIGWG has addressed

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<sup>111</sup> The Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography (Article 3.4); Council of Europe Convention on the Protection of the Environment through Criminal Law 1998 (Article 9 provides that a liability can flow to the corporation as a result of finding liability of a natural person or organ of the entity involved); Criminal Convention on Corruption adopted in the context of the Council of Europe and open to other states (Article 18); The UN Convention against Corruption 2003 (Article 26 requires that legal persons be held liable and States have a choice of criminal, civil, or administrative methods to ensure liability); UN Convention on the Suppression on the Financing of Terrorism 1999 (Article 5 links corporate liability to a finding that an individual has committed the offence defined in the treaty); The International Convention on Civil Liability for Oil Pollution Damage 1992, provides that the owner of a ship registered in a Contracting State has the obligation to maintain an insurance or guarantee to cover his liability for pollution damage (Article VII.1), defining 'owner' as person or persons registered as owner of the ship (Article I.3), and person as any individual or partnership or any public or private body (Article I.2).

<sup>112</sup> The international Convention on Civil Liability for Oil Pollution (1992), Article VII (1).

<sup>113</sup> Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward", in *Unity and diversity of international law: essays in honour of Professor Pierre-Marie Dupuy* (Leiden, Martinus Nijhoff, 2014), p. 108.

the possibility of expressly recognizing international human rights obligations for private entities<sup>114</sup>.

In addition, as recognised by the REDESCA of the Inter-American Commission of Human Rights, the complex forms of organization and operation of economic actors require that “the mechanisms, policies or regulatory frameworks aimed at addressing the challenges in this field must incorporate and recognize the extraterritorial application of the obligations arising from international human rights law, whether with respect to the States or their effects on the same companies or non-state actors, so as not to leave the persons and communities involved unprotected.”<sup>115</sup>

Following this approach, a legally binding instrument on business and human rights could aim at strengthening domestic systems to cope with business enterprises that are liable for violations of human rights, in order to ensure an effective access to justice and remedy to victims of business activities. This principle could be built on the language of the UNGPs regarding the essential components of human rights’ due diligence requirements included in the operational principles of the Second Pillar of the UNGPs<sup>116</sup>, and on mandatory language provided for by national regulations. Such approach could clarify corporate due diligence obligations while allowing the States some flexibility to decide the modalities of such obligations according to their domestic laws and practices.

## 2.1. Obligations of States vis-à-vis private actors under international human rights law<sup>117</sup>

International law clearly defines the obligation of States to prevent violations and protect human rights and includes the duty to regulate the behaviour of private actors.<sup>118</sup> The human rights obligations of States vis-à-vis the conduct of non-state actors has been developed in international law by duly recognizing that States have an obligation not to encourage, aid or abet non-state parties to commit violations of international law,<sup>119</sup> and that States must discharge their obligations against acts committed by private persons or entities that would impair the enjoyment of human rights.<sup>120</sup> Thus, UN human rights treaty bodies and regional

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<sup>114</sup> See Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

<sup>115</sup> Soledad García Muñoz, “Informe Empresas y Derechos Humanos: Estándares Interamericanos”, Relatoría Especial sobre Derechos Económicos Sociales Culturales y Ambientales, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/191, November 2019.

<sup>116</sup> Included in Principles 18 – 21 of the UNGPs.

<sup>117</sup> This section draws upon 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, October 2016. Available from [https://www.southcentre.int/wp-content/uploads/2016/10/PB30\\_Approaching-States%E2%80%99-Obligations-Under-a-Prospective-Legally-Binding-Instrument-on-TNCs-and-Human-Rights\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2016/10/PB30_Approaching-States%E2%80%99-Obligations-Under-a-Prospective-Legally-Binding-Instrument-on-TNCs-and-Human-Rights_EN.pdf).

<sup>118</sup> Olivier De Schutter, *International Human Rights Law* (Cambridge, Cambridge University Press, 2014) and “Towards a Legally Binding Instrument on Business and Human Rights”, CRIDHO Working Paper 2015/2 (July 2015).

<sup>119</sup> ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment (1980), para. 61; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgement (1986), para. 104.

<sup>120</sup> General Comment 31 of the Human Rights Committee on the Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), para. 8.

human rights courts and tribunals have recognized that States must discharge their obligations against acts committed by private persons or entities that would impair the enjoyment of Covenant rights (see Box 3). UN human rights treaty bodies have 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 operations.<sup>121</sup>

**Box 3 - UN human rights treaty bodies and regional human rights courts and tribunals' recognition of States' human rights obligations *vis-à-vis* third parties**

UN Treaty Bodies		
Treaty Body	Document	Comment
Committee on the Elimination of Discrimination against Women	General Recommendation 19 on Violence Against Women (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
	General Recommendation 36 on the right of girls and women to education (2017)	The Committee recommends that States parties take all measures to ensure that user fees and hidden costs do not have a negative impact on girls' and women's access to education by instituting the following measures: [...] (d) Ensuring that private actors respect the same standards regarding non-discrimination of girls and women as do public institutions, as a condition of their running academic institutions;
	General Recommendation 37 on the gender-related dimensions of disaster risk reduction in the context of climate change (2018)	States parties should regulate the activities of non-State actors within their jurisdiction, including when they operate extraterritorially. General recommendation No. 28 reaffirms the requirement under Article 2 (e) to eliminate discrimination by any public or private actor, which extends to acts of national corporations operating extraterritorially.
Committee on Economic, Social and Cultural Rights	General Comment 12 on the Right to food (1999)	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
	General Comment 24 on State obligations under the International Covenant	The Covenant establishes specific obligations of States parties at three levels — to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the

<sup>121</sup> See: Committee on the Rights of the Child, General Comment 16, UN Doc. CRC/C/GC/16 (2013), para. 4.

	on Economic, Social and Cultural Rights in the context of business activities (2017)	national territory in situations over which States parties may exercise control.
Human Rights Committee	General Comment 27 on Article 12, Freedom of movement	The State party must ensure that the rights guaranteed in Article 12 are protected not only from public but also from private interference.
	General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (2004)	The positive obligation imposed 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
	General Comment 35 on Article 9, Liberty and Security of Person	The right to personal security also obliges States parties to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.
	General Comment 36 on Article 6, Right to life	Among other things, a State party must rigorously limit the powers afforded to private actors and ensure that strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, inter alia, that the powers granted are not misused and do not lead to arbitrary deprivation of life.
Committee on the Rights of the Child	General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (2013)	States have an obligation to ensure that all duty bearers have sufficient awareness, knowledge and capacity to fulfil their obligations and responsibilities, and that children's capacity is sufficiently developed to enable them to claim their right to health.
	General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights (2013)	It is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations.
	General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities,	Legislation, regulations and guidelines should be introduced, together with the necessary budgetary allocation and effective mechanisms for monitoring and enforcement, to ensure that all members of civil society, including the corporate sector, comply with the provisions of Article 31

	cultural life and the arts (Art. 31)*	
<b>Regional Courts and Tribunals</b>		
<b>Tribunal or Court</b>	<b>Judgment</b>	<b>Standard – Precedent</b>
<b>Inter-American Court of Human Rights</b>	Inter-American Human Rights Court, <i>Velásquez Rodríguez v Honduras</i> , Judgment (1988), paras. 172-174.	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.
	Inter-American Human Rights Court, <i>Peoples Kaliña and Lokono Vs. Suriname</i> , Judgment (2015), para. 224.	[...] the states have the responsibility to protect people's human rights against violations committed in its territory and / or its jurisdiction by third parties, including companies. For such effect States must take appropriate measures to prevent, investigate, punish and repair, through appropriate means, the abuses that such actors may commit, including through regulation and access to justice.
	Inter-American Human Rights Court, <i>Trabajadores de la Hacienda Brasil Verde Vs. Brasil</i> , Judgement (2016), para. 317.	Likewise, the prohibition against slavery plays a fundamental role in the American Convention, because it represents one of the most fundamental violations of the dignity of the human person and, concomitantly, of several rights of the Convention. States have the obligation to guarantee the creation of the conditions that are required so that violations of this inalienable right do not occur and, in particular, the duty to prevent their agents and private third parties from violating it.
	Inter-American Human Rights Court, <i>Yarce and others Vs. Colombia</i> , Judgement (2016), para. 181.	Thus, the obligation to guarantee follows a duty of means or behavior, not of result, to prevent individuals from violating goods protected by rights embodied in the treaty. This duty, as long as it is relevant with respect to the prevention of acts of violence
<b>The African Commission on Human and Peoples' Rights</b>	Social and Economic Rights Action Ctr. For Econ. And Soc. Rights v. Nigeria, Case No. ACHPR/COMM/A044/1 Afr. Comm'n on Human and Peoples' Rights (2001).	"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".

European Court of Human Rights (ECtHR)	ECtHR, <i>Fadeyeva v. Russia</i> , Judgment (2005), para. 89	Even if the State "cannot be said to have directly interfered with the applicant's private life or home", the authorities have the obligation 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)".
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It is important to note that the United Nations Guiding Principles on Business and Human Rights reaffirm States' obligations in regard to potential or manifest damage by corporations. The UNGPs recognize 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 (Guiding Principle 1). Under the UNGPs, States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations (Guiding Principle 2). Other obligations of States under their duty to protect include:

- Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts (Guiding Principles 3, 4, 5, 6, 7, 8, 9, 10, 25, 26, 27, 28, 29);
- Meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts (Guiding Principle 9).

However, the Guiding Principles were considered by some experts as 'introducing confusion' or possibly 'presenting a step backwards' in regard to the way they addressed the extraterritorial duty of States to regulate corporations,<sup>122</sup> particularly as the concept of 'due diligence' included in the UNGPs may carry different meanings. For business enterprises, it might refer to a set of voluntary processes used to manage risks to the business; while for such experts it stands for a legal standard of conduct grounded on both domestic and international

<sup>122</sup> See De Schutter 2015, op. cit., page 19 and Surya Deva and David Bilchitz, eds., *Human Rights Obligations of Business; Beyond the Corporate Responsibility to Respect?*, (Cambridge, Cambridge University Press 2013).

law<sup>123</sup>. These different interpretations could end up undermining accountability of private actors.

The State's obligations to protect individuals against violations by non-state actors constitute duties of conduct and not of results. Even where the conduct of a private person or entity cannot be attributed to a State, the latter bears obligations of 'due diligence' with respect to those actors. Obligations of result require States to reach a given result, and if that result has not been reached the responsibility of the State is engaged. On the other hand, 'due diligence' is focused rather on course of conduct a state must follow to attain or avoid a given result. Due diligence obligation requires sufficiently close nexus between the state and the non-State perpetrator and evidence that the State has failed to take all reasonable and appropriate measures to prevent, investigate and redress the human rights violations.

## 2.2. Clarifying extraterritorial obligations of States under human rights law<sup>124</sup>

Addressing extraterritorial obligations of States in relation to the conduct of corporations has been one of the core discussions on the issue of business and human rights. State practice shows that in certain areas of law, domestic regulatory measures are extended to cover conduct of corporations through foreign subsidiaries, such as in the areas of competition law, shareholder and consumer protection, and taxation.<sup>125</sup> One of the biggest challenges to understanding extraterritorial obligations of States under human rights law is its relationship with the principle of sovereignty. Although the broad understanding on the application of that principle is that the jurisdiction of the States extends to the territory where it exerts control, the extent of this control should also be considered.

The discussion about extraterritorial jurisdiction is linked to (1) limitations of general international law, in particular of state sovereignty; and (2) obligations under international human rights treaties as constitutive of a state's extraterritorial human rights obligations. The latter relates to the basic question of whether the State can incur obligations towards different actors, independently of where they are located, over whom it exercises factual power. Experts point out that "while the concrete prerequisites of extraterritorial human rights obligations remain subject to debate, it seems widely accepted that what is decisive is not a state's *de jure*

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<sup>123</sup> See Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward", in *Unity and diversity of international law: essays in honour of Professor Pierre-Marie Dupuy* (Leiden, Martinus Nijhoff, 2014). Available from [https://doi.org/10.1163/9789004262393\\_006](https://doi.org/10.1163/9789004262393_006).

<sup>124</sup> This section draws upon 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, October 2016. Available from [https://www.southcentre.int/wp-content/uploads/2016/10/PB30\\_Approaching-States%E2%80%99-Obligations-Under-a-Prospective-Legally-Binding-Instrument-on-TNCs-and-Human-Rights\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2016/10/PB30_Approaching-States%E2%80%99-Obligations-Under-a-Prospective-Legally-Binding-Instrument-on-TNCs-and-Human-Rights_EN.pdf).

<sup>125</sup> See: Skinner, McCorquodale, De Schutter, op. cit., p. 60.

authority but its exercise of *de facto* power or control over individuals outside its territory.”<sup>126</sup> Extraterritorial jurisdiction thus may entail:<sup>127</sup>

- **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 adjudicate and resolve private disputes with a foreign element;
- **Enforcement jurisdiction:** This concerns the ability of States to ensure that their laws are complied with.

These categories allow a differentiation between “domestic measures with extraterritorial implications” and “direct extra-territorial jurisdiction”, as each has different implications in regard to effects on State sovereignty (see Figure 7). In the first case, domestic measures with extraterritorial implications would require, for instance, a company domiciled in the forum jurisdiction to supervise a foreign subsidiary or contractor. These measures deal with the action or inaction of the company at home, which could have effects in other countries.<sup>128</sup> The second case, direct extra-territorial jurisdiction, will entail discharging the State’s obligations under human rights law through direct jurisdiction over the foreign subsidiary or parties holding the nationality of that State. The level of intrusiveness in regard to sovereignty issues is also

**Figure 7 - Domestic Measures with extraterritorial implications vs. Direct Extraterritorial Jurisdiction**

Domestic measures with extraterritorial implications	Direct extra-territorial jurisdiction
Requires a company domiciled in the home State to supervise a foreign subsidiary or contractor.	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.
Less intrusiveness to State Sovereignty: The home State deals with the conduct of the parent company at home, but it generates effects abroad.	More intrusiveness to State Sovereignty: The home State regulates the conduct of the subsidiaries abroad.

<sup>126</sup> See Daniel Augenstein, and David Kinley, “When Human Rights ‘Responsibilities’ become ‘Duties’: The Extra-Territorial Obligations of States that Bind Corporations”, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?, D. Bilchitz & S. Deva, eds. (Cambridge University Press, 2013); Sydney Law School Legal Studies Research Paper No. 12/71 (September 2012).

<sup>127</sup> See J. Zerk “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas”, Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA, John F. Kennedy School of Government, Harvard University, June 2010), page 13. Available from [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crri/files/workingpaper\\_59\\_zerk.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crri/files/workingpaper_59_zerk.pdf).

<sup>128</sup> Zerk 2010, op. cit. p. 206.

different between these two approaches, with the latter approach imposing deeper challenges to sovereignty-related issues.

The UN Committee against Torture has recognized that territories under a State's jurisdiction include "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;"<sup>129</sup> in accordance to this concept jurisdiction extends to areas where the State has *de jure* or effective control.<sup>130</sup> A similar approach has been followed by the Inter-American Commission on Human Rights, which has elaborated that the reference to 'any persons subject to [a state's] jurisdiction' under Article 1 of the American Convention on 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."<sup>131</sup>

On the other hand, the UNGPs provide in Guiding Principle 2 that "At present, States are not generally required under international human rights law to regulate the extra-territorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a jurisdictional basis". In its commentary, Prof. John Ruggie noted the following: "There are strong policy reasons for home states to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses", and gave examples, such as requirements on the parent companies to report on the global operations of the entire enterprise - in soft law instruments such as the OECD Guidelines for Multinational Enterprises, and other direct extraterritorial legislation and enforcement, including criminal regimes allowing for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. This might imply that the obligation of 'due diligence' of States has an extraterritorial dimension with regards to the home State obligation to exercise due diligence in relation to the acts of corporations under its jurisdiction.

This seems to be the approach taken by the Maastricht principles,<sup>132</sup> which state that the scope of extraterritorial jurisdiction encompasses that:

- a) States exercise *authority or effective control*;

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<sup>129</sup> Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, January 2008, para. 16.

<sup>130</sup> Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, January 2008, para. 16.

<sup>131</sup> Daniel Augenstein, and David Kinley, "When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations", in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?, D. Bilchitz & S. Deva, eds. (Cambridge University Press, 2013); Sydney Law School Legal Studies Research Paper No. 12/71 (September 2012).

<sup>132</sup> In September 2011, a group of experts in international law and human rights, including current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the UN HRC, adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social, and Cultural Rights. See: [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23).

- b) States' acts or omissions bring about *foreseeable effects* in the enjoyment of human rights;
- c) States are in a position to *exercise decisive influence* or to take measures to realize human rights in accordance with international law.

Similarly, a number of judicial decisions and authoritative interpretations of international law have recognized elements of extraterritorial jurisdiction when States are conducting their obligations under international law (see Box 4). 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 (April 2016)<sup>133</sup> also note that the "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."<sup>134</sup> A report produced in the context of this 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."<sup>135</sup> 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".<sup>136</sup> For Olivier De Schutter, former Special Rapporteur on the Right to Food, the adoption of a "new international Instrument allocating responsibilities to control transnational corporations could codify in treaty form what is already, arguably, emerging customary international law."<sup>137</sup>

#### Box 4 - UN human rights treaty bodies and International courts and tribunals' decisions recognizing Extraterritorial Jurisdiction

##### UN Treaty Bodies

Treaty Body	Document	Comment
Human Rights Committee	General Comment No. 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10	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

<sup>133</sup> 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 encapsulate 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](http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf).

<sup>134</sup> Background Paper accompanying a consultation draft of the ARP, page 18.

<sup>135</sup> See: para. 33 of report A/HRC/32/19/Add.1.

<sup>136</sup> Ibid.

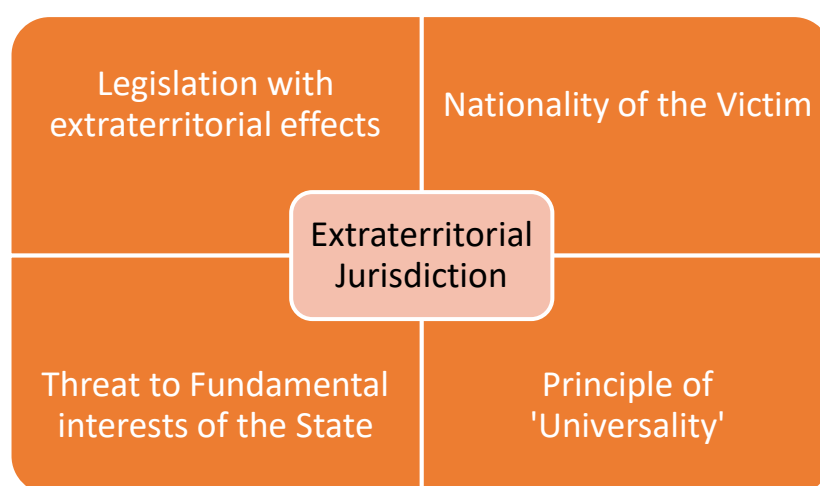
<sup>137</sup> De Schutter 2010.

		control...even if not situated within the territory of the State Party..."
Committee on Economic, Social and Cultural Rights	General Comment No. 14 (2000) on the right to highest attainable standard of health, para. 39	States parties have to respect the enjoyment of the right to health in other countries, and to 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.
	Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights	States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.
Committee on the Rights of the Child	General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, para. 43	Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned.
Regional Courts and Tribunals		
Tribunal or Court	Judgment	Standard – Precedent
Permanent Court of International Justice	<i>Case of S. S. Lotus</i> (France v. Turkey) para. 40 (1927)	"... the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention... It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law..."

There are several principles that could be applicable when looking at extraterritorial jurisdiction.<sup>138</sup> First, the adoption of domestic legislation which has extraterritorial effects and regulates activities with substantial, direct and foreseeable effect in its national territory.<sup>139</sup> Second, the nationality of the victim, for example following the active personality principle under which the State enacts legislation that applies to their nationals abroad;<sup>140</sup> and passive personality, where the State protects its nationals abroad by adoption of extraterritorial legislation. Third, the State could exercise jurisdiction on persons, property or acts abroad that constitute a threat to fundamental national interests of the State, and finally, exercise jurisdiction based on the principle of ‘universality’, under which certain crimes may be prosecuted by any State in the name on the international community (see Figure 8).

A close review of the discussions held in the last meetings of the OEIGWG seems to evidence that the approach to extraterritorial jurisdiction could be articulated in a legally binding instrument, through clarifying two crucial elements: (1) the home states’ responsibility to impose on parent corporations an obligation to comply with certain norms wherever they operate (parent based extraterritorial obligations),<sup>141</sup> and (2) 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 subsidiaries or other entities linked to the parent company. This could 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. Without extraterritorial jurisdiction, only the courts of the host countries of the subsidiaries that committed human rights abuses are supposed to take jurisdiction over their actions within the national territory.

**Figure 8 - Four general bases for exercise of extraterritorial jurisdiction**



<sup>138</sup> Olivier De Schutter, “Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations” (2006), paper prepared for seminar organized within the mandate of J. Ruggie, former Special Representative of the UN Secretary-General on issues of human rights and transnational corporations and other enterprises.

<sup>139</sup> Antitrust law, for example, has been developed to have certain effects over foreign parties and activities. See: Zerk 2010, op. cit.

<sup>140</sup> Restatement (3<sup>rd</sup>) of the Foreign Relations Law of the US (1987): “...a state has jurisdiction to prescribe law with respect to...the activities, interests, or relations of its nationals outside as well as within its territory”.

<sup>141</sup> See: De Schutter 2010, op. cit., page 6.

### 2.3. Beyond the Second Pillar: Obligations for business entities<sup>142</sup>

Principle 11 of the UNGPs recognises that the responsibility of corporations to respect human rights “exists over and above compliance with national laws and regulations protecting human rights.” Even if States have the primary responsibility to protect human rights by means of legislative, administrative and judicial measures, corporations have direct obligations to prevent, mitigate and redress the human rights abuses committed on occasion of their operations. As such, the non-fulfilment of these obligations could entail the direct attribution of a violation of human rights to the corporation. Several States and other stakeholders have suggested that there is no **legal or technical barrier** to limit the recognition of corporate legal personality in international law and that there is a need to strengthen the obligations of business enterprises to respect human rights, prevent, and be accountable for any human rights violations resulting from their activities.<sup>143</sup>

Some business entities and corporate groups tend to hide behind the corporate veil or the principle of separate legal entity to escape liability for their misconduct.<sup>144</sup> This has created difficulties for identifying a causal link between the damage caused and the conduct of the business entity, especially when violations occur in a different jurisdiction than the one in which the parent company is located. This situation also gives rise to difficulties in accessing information to substantiate such claims and derived from the lack of mechanisms to address collective redress, the high cost of legal procedures for victims, the lack of legal aid or funding for transnational litigation, and the obstacles for the execution of judgments delivered in other States, as mentioned in Section 1.

The issue of corporate human rights obligations under international law has been addressed by many scholars and commentators<sup>145</sup>. Views shared during the sessions of the OEIGWG considered that a legally binding instrument could include human rights obligations for corporations, while clarifying and distinguishing them from obligations borne by States.<sup>146</sup> Similarly, a number of regional and international instruments on human rights recognize the duty of “all organs of society” to respect human rights. For example, the American Declaration of the Rights and Duties of Man recognizes that,

*[T]he fulfillment of duty* by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty;

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<sup>142</sup> This section is based on Daniel Uribe, “Setting the pillars to enforce corporate human rights obligations stemming from international law”, South Centre Policy Brief 56 (October 2018). Available from [https://www.southcentre.int/wp-content/uploads/2018/10/PB56\\_Setting-the-pillars-to-enforce-corporate-human-rights-obligations-stemming-from-international-law\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2018/10/PB56_Setting-the-pillars-to-enforce-corporate-human-rights-obligations-stemming-from-international-law_EN.pdf).

<sup>143</sup> OEIGWG, “Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”, UN Doc. A/HRC/37/67 (2018), pg. 13.

<sup>144</sup> E/C.12/GC/24, 10 August 2017. See paras. 42 and 43 of the document.

<sup>145</sup> See for example: Vincent Chetail, “The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward”, in *Unity and diversity of international law : essays in honour of Professor Pierre-Marie Dupuy* (Leiden, Martinus Nijhoff, 2014), p. 10; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, 2016); Jernej Letnar Černič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights* (Groningen, Europa Law Publishing, 2010).

<sup>146</sup> UN Doc. A/HRC/31/50 (2016), at para. 75.

The Universal Declaration of Human Rights is understood as “as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*” shall strive to promote respect for human rights. Moreover, Article 28 of the Universal Declaration establishes that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

This wording has been interpreted as implying that the “respect of human rights applies to all societal relations locally, regionally and globally.”<sup>147</sup> Likewise, some international tribunals have considered the imposition of international human rights obligations on private parties.<sup>148</sup> Thus, it has been recognised that in order to guarantee the full enjoyment of human rights, it is necessary to “ensure that no other individual or entity, public or private [...] act in disregard of such rights”<sup>149</sup>, thereby creating a corresponding obligation on the basis of Article 30 of the Universal Declaration. Although certain commentators consider that this approach will weaken and limit States’ obligations under international law by shifting the burden to private entities,<sup>150</sup> traditional treaty making has used different avenues to introduce such obligations in international law, either by requiring States to regulate certain conducts in their domestic legislation,<sup>151</sup> or by introducing obligations of conduct for non-state actors.<sup>152</sup> Following this approach, it is undisputed that all business enterprises are bound to respect all human rights.

The idea that including direct obligations for businesses corporations in any international legally binding instrument will innovate beyond existing principles of public international law has shaped certain discussions in the OEIGWG.<sup>153</sup> Nonetheless, even if such direct obligations are not included, it is necessary to recognise that natural and legal persons should be subject to civil and criminal liability under the jurisdiction of the State party. This recognition of liability

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<sup>147</sup> Dinah Shelton, “Protecting Human Rights in a Globalized World”, *Boston College International and Comparative Law Review* Vol. 25 (2002), p. 284. Available from: <http://lawdigitalcommons.bc.edu/iclr/vol25/iss2/7>.

<sup>148</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26 (Award of 8 December 2016), at para. 1194.

<sup>149</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26 (Award of 8 December 2016), at para. 1196.

<sup>150</sup> International Organisation of Employers, “Response of the international business community to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (“Zero Draft Treaty”) and the Draft Optional Protocol to the Legally Binding Instrument (“Draft Optional Protocol”) Annex” (September 2018). Available from <https://www.ioe-emp.org/en/policy-priorities/human-rights-and-responsible-business-conduct/>.

<sup>151</sup> Article 3.4 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography provides: Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.

<sup>152</sup> The international Convention on Civil Liability for Oil Pollution (1992) provides that “[T]he owner of a ship registered in a Contracting State [...] shall be required to maintain insurance or other financial security [...]” (Article VII (1)) in order to be able to respond for any claim of pollution damage. It also establishes that the ‘owner’ is any person registered as such, and continues defining ‘person’ in Article I (2) as: “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivision.

<sup>153</sup> Charlie Holt, Shira Stanton and Daniel Simons (Greenpeace), “The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps along the Irresistible Path to Corporate Accountability”. Available from <https://www.business-humanrights.org/en/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability>.

will in turn provide clarity under the principles of public international law<sup>154</sup> and will follow the traditional concept that States are the subjects under international law, and that they are bound to implement treaty obligations whether through their incorporation into domestic laws or by recognizing their self-executing character (see Figure 9). However, this does not imply that a violation cannot be directly attributable to a business entity. On the contrary, victims of such violations must have the right to seek direct remedy on the basis of obligations stemming from international human rights law, either in jurisdictions where such obligations are self-executing, or on the basis of domestic legislation incorporating such obligations.<sup>155</sup> This view has been shared by regional courts recognizing that third parties can violate human rights.<sup>156</sup>

**Figure 9 - How international instruments are enforced in different States<sup>157</sup>**



The progression from the *human rights due diligence* principles in the UNGPs, to compulsory requirements in a legally binding instrument on business and human rights, might bring together the essential components of the due diligence requirements included in the operational principles of the Second Pillar of the UNGPs, on the one hand, and the mandatory language derived, for instance, from the French *Devoir de Vigilance* (due diligence) law,<sup>158</sup> on the other. This approach could strengthen the ‘preventive’ component of human rights due

<sup>154</sup> Alison Berthet, Peter Hood and Julianne Hughes-Jennett, “UN treaty on business and human rights: Working Group publishes draft instrument”, Hogan Lovells Blog Focus on Regulation, 26 July 2018. Available from <https://www.hlregulation.com/2018/07/26/un-treaty-on-business-and-human-rights-working-group-publishes-draft-instrument>.

<sup>155</sup> UN Doc. E/C.12/GC/24 (2017), para. 51.

<sup>156</sup> See for example *Case of the Kalifña and Lokono Peoples v. Suriname* (Judgment, 25 November 2015), para. 224.

<sup>157</sup> Jurisdictions as Colombia, Chile, Ecuador, Spain and France have recognized the concept of ‘block of constitutionality’ by which international treaties (particularly human rights treaties) will become part of the Constitutional Law as soon as ratified and could be directly enforced by the State judiciary. Although in a limited fashion, the United States follows a similar approach with the application of the ‘Supremacy Clause’ which intends to give international treaties automatic domestic legal force and could be applied directly by the courts. See: Rodrigo Uprimny, “BLOQUE DE CONSTITUCIONALIDAD, DERECHOS HUMANOS Y NUEVO PROCEDIMIENTO PENAL” at [https://cdn.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recurso\\_47.pdf](https://cdn.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_47.pdf); and Carlos Manuel Vásquez, “The Four Doctrines of Self-Executing Treaties”, Georgetown Public Law and Legal Theory Research Paper No. 12-101 (1995).

<sup>158</sup> Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>).

diligence before any violation is committed and address remediation after the occurrence of harm through grievance mechanisms recognized by the State (judicial or non-judicial remedies).

### 3. Foreign Investment, Sustainable Development and Human Rights

Today, the corporate responsibility to respect human rights is an important element of good corporate governance and ethical business conduct<sup>159</sup>. There is now a solid ‘business case’ for human rights, and firms and investors are aware of the opportunities and incentives they stand to gain as model corporate citizens<sup>160</sup>. This also has financial benefits for enterprises as research has found that consumers are more willing to pay a premium for certain products if the company has a good reputation<sup>161</sup>.

Given that the 2030 Agenda recognises that “private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation”<sup>162</sup>, it is necessary to consider the important linkages between foreign investment and respect for human rights, including their integration throughout the business operations<sup>163</sup>. This section therefore elaborates on the possible relationship between a legally binding instrument and promotion of foreign investment and sustainable development.

There is no doubt that FDI can contribute to sustainable development, but there is also a clear relationship between the potential of FDI to achieve such objective and the active role that States have to play to ensure that such contribution materializes in line with the needs and priorities of its national development plans and the respect of human rights. This relationship materializes through the design and implementation of regulations and policies as a tool for development, and through the strengthening of legislative frameworks for establishing an environment of certainty and rule of law for the protection of human rights and inclusive development, while promoting national and foreign investment.

According to UNCTAD, achieving the 17 Sustainable Development Goals and its associated indicators included in the 2030 Agenda for Sustainable Development will require “between \$4.6 trillion and \$7.9 trillion at the global level”<sup>164</sup>, while “the total annual investment gap in key sustainable development sectors is estimated at \$2.5 trillion”. Similarly, the contribution of investment to global growth has declined on an average of 1.4 percentage per annum in the

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<sup>159</sup> International Corporate Governance Network, “Human rights through a corporate governance lens”, April 2015. Available from <https://www.icgn.org/policy/viewpoints/human-rights>.

<sup>160</sup> Dr. Başak Bağlayan, Ingrid Landau, Marisa McVey and Kebene Wodajo, “Good Business: The Economic Case for Protecting Human Rights”, (BHR Young Researcher Summits, Frank Bold and International Corporate Accountability Roundtable, December 2018). Available from [https://corporatejustice.org/2018\\_good-business-report.pdf](https://corporatejustice.org/2018_good-business-report.pdf).

<sup>161</sup> Jeanette Settembre, “People will pay 22% more for certain products if the company has a good reputation”, MarketWatch, 14 December 2018. Available from <https://www.marketwatch.com/story/people-will-pay-22-more-for-certain-products-if-the-company-has-a-good-reputation-2018-12-14>.

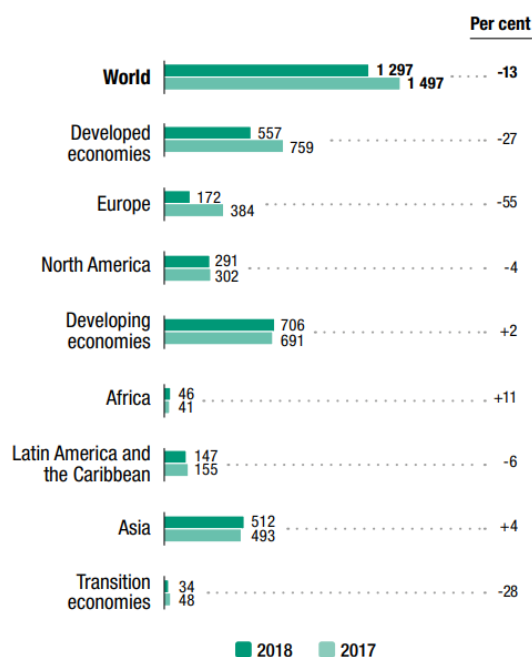
<sup>162</sup> UN, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, para. 67. Available from <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

<sup>163</sup> See OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012). Available from [https://www.ohchr.org/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf).

<sup>164</sup> UN Department of Economic and Social Affairs, “World Economic Situation and Prospects”, Monthly Briefing No. 128 (1 July 2019). Available from [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/Monthly\\_Briefing\\_128.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/Monthly_Briefing_128.pdf).

period of 2003-2007, to 0.7 percent per annum since 2012.<sup>165</sup> While foreign direct investment flows to developing economies have remained stable, FDI flows to developed countries have declined sharply by 27 percent in comparison to 2017<sup>166</sup> (see Figure 10). The drop of FDI represents a serious risk for the achievement of the SDGs, in particular given the fact that Official Aid for Development has also declined almost 3 percent in real terms over 2017.<sup>167</sup>

**Figure 10 - FDI Inflows, by region, 2017 - 2018 (Billions of Dollars and per cent)**



Source: UNCTAD, FDI/MNE database ([www.unctad.org/fdistatistics](http://www.unctad.org/fdistatistics)).

Increasing amounts of FDI are required to fulfil the 2030 Agenda for Sustainable Development, in particular climate change adaptation, sustainable infrastructure and energy investment.

Given this backdrop, the increasing exposure of countries to claims under investor-state dispute settlement mechanisms has placed the international investment regime under close scrutiny at the multilateral, regional and bilateral levels. The excessive compensations awarded by ISDS tribunals, coupled with the risk of ‘regulatory chill’ has also created barriers for protecting human rights and hampered the ability of States to act in their public interest<sup>168</sup>.

This has prompted a wave of reforms with many countries reviewing their obligations under IIAs. Similarly, UNCTAD continues to take stock of its policy tools for Phase 2 of IIA

Reform to modernize old-generation investment treaties and is initiating Phase III on improving investment policy coherence and synergies. The UNCITRAL Working Group III has been entrusted with the mandate to reform the ISDS system having in view, in particular, the cost and duration of ISDS cases, the role of arbitrators and decision makers, and the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals.<sup>169</sup> Similarly, structured discussions on Investment Facilitation have also been organized in the World Trade Organization<sup>170</sup>.

Several options have been developed, or are under development, for realizing the full potential of FDI, while guaranteeing the accountability of investors on the basis of explicitly stated obligations (see Box 5). The level of protection that such efforts will provide to victims of human

<sup>165</sup> United Nations, *World Economic Situation and Prospects 2017*, p. 12.

<sup>166</sup> United Nations Conference on Trade and Development, *World Investment Report* (2019), p. 3.

<sup>167</sup> World Economic Situation and Prospects Monthly Briefing No. 128, p. 2.

<sup>168</sup> See Lorenzo Cotula, “Rethinking investment treaties to advance human rights”, International Institute for Environment and Development Briefing, September 2016. Available from <https://pubs.iied.org/17376IIED/>.

<sup>169</sup> See documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.151-153, available on the UNCITRAL website [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>170</sup> WTO, “DG Azevêdo welcomes progress in investment facilitation discussions”, 12 December 2019. Available from [https://www.wto.org/english/news\\_e/spra\\_e/spra298\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra298_e.htm).

rights violations will depend on the standards created for each of the issues under debate, as well as the how such standards will deal with common challenges to access to justice.

#### Box 5 - Policy Options adopted by States and other Stakeholders for addressing Investor Obligations

Investor Obligations - Policy Options	
<b>Brazil Cooperation and Facilitation Investment Agreements (CFIAs)</b>	The Brazilian CFIAs with countries like Ecuador, Morocco, UAE and others require investors to make best efforts to adopt a high degree of socially responsible practices based on the principles and voluntary standards included therein.
<b>CARIFORUM States-United Kingdom Economic Partnership Agreement</b>	The EPA requires Parties to cooperate, including by facilitating support for enforcement of adherence to national legislation and work regulation, including training and capacity building initiatives of labour inspectors, and promoting corporate social responsibility through public information and reporting.
<b>India Model Bilateral Investment Treaty</b>	Investors and their enterprises are encouraged to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principles that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.
<b>Netherlands Model Investment Agreement</b>	Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws.  It further allows investors to be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.
<b>The Hague Rules on Business and Human Rights Arbitration</b>	These Rules provide a set of procedures for the arbitration of disputes related to the impact of business activities on human rights. These could help in establishing stronger investor obligations through a non-State grievance redressal mechanism.
<b>Bangladesh Accord</b>	This agreement was signed in 2013 between global clothing brands and trade unions in the aftermath of the Rana Plaza disaster. Renewed in 2018, it functions as a fire and building safety program in Bangladesh garment factories. Its operative elements include regular inspections, remediation, trainings, complaints process, dispute resolution etc.

### 3.1. Potential benefits of a LBI for facilitating FDI

One of the arguments made by certain business representatives is that a legally binding instrument could “have unintended consequences on flows of foreign direct investment [...] Assigning greater liability to parent companies, retailers and brands on the basis of their high-

up position in the supply chain - rather than assigning liability to the business entity that is ultimately responsible for the harm - would have perverse consequences for the structure and conduct of global business.”<sup>171</sup> From a different perspective, there is concern about a “race-to-the-bottom” situation, in which States could feel the pressure to undervalue, non-enforce or deregulate human rights issues in order to prioritise foreign direct investment.<sup>172</sup>

Developing countries and civil society organizations have recognised that the ‘threat’ of losing investment because of increasing the rule of law is counterproductive to the objectives of ‘sustainable investment’ or investment for sustainable development as recognised in the 2030 Agenda and incorporated in the majority of CSR strategies and statements, and that said narrative should not “limit the policy options and choices of States to exercise the right to regulate, by excluding certain regulatory measures or putting them under pressure by requiring the State to pay compensation.”<sup>173</sup> Moreover, as noted by one commentator, FDI “creates costs and risks and nothing guarantees that host states will deal with them appropriately. To realise the benefits of FDI, countries need to ensure that the benefits outweigh the costs, and that those who suffer unavoidable costs will be appropriately compensated. Regulating and monitoring FDI is then fundamental. But the problem is that some states may lack regulatory capacity or face regulatory chill.”<sup>174</sup>

There are, in fact, a number of benefits deriving from the possible adoption of legally binding regulations. For example, a report prepared by The Economist Intelligence Unit<sup>175</sup> observed that one of the common barriers that businesses face in this area is the “lack of understanding of human rights responsibilities”.<sup>176</sup> It also showed that 83% of respondents agreed (74% of whom do so strongly) that human rights are a concern for business as well as governments.<sup>177</sup> A recent study shows that there is in fact a correlation between decreasing FDI inflows in States with ‘weak’ human rights frameworks as “pressures by civil society and stakeholders have been

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<sup>171</sup> International Organization of Employers, Business response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft Treaty") and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol") Annex, October 2018. See: <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=134717&token=a4b7b47e93e851b5831dfade7bc74a147414f9b1>.

<sup>172</sup> Nick Mabey & Richard McNally, “Foreign Direct Investment and the Environment” (1999), p. 3.

<sup>173</sup> Markus Krajewski, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights* (Brussels, CIDSE, 2017). Available from [https://www.cidse.org/wp-content/uploads/2017/03/CIDSE\\_Study\\_Primacy\\_HR\\_Trade\\_Investment\\_Policies\\_March\\_2017.pdf](https://www.cidse.org/wp-content/uploads/2017/03/CIDSE_Study_Primacy_HR_Trade_Investment_Policies_March_2017.pdf).

<sup>174</sup> Nicolás M. Perrone, “The ISDS Reform Process: The Missing Development Agenda”, South Centre Investment Policy Brief No. 19 (March 2020). Available from [https://www.southcentre.int/wp-content/uploads/2020/03/IPB19\\_The-ISDS-Reform-Process-The-missing-development-agenda\\_EN-1.pdf](https://www.southcentre.int/wp-content/uploads/2020/03/IPB19_The-ISDS-Reform-Process-The-missing-development-agenda_EN-1.pdf).

<sup>175</sup> The Economist Intelligence Unit, “The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights” (2015). Available from [https://eiuperspectives.economist.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB\\_corrected%20logos%20a nd%20UNWG%20thx.pdf](https://eiuperspectives.economist.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB_corrected%20logos%20a nd%20UNWG%20thx.pdf).

<sup>176</sup> Ibid., p. 18

<sup>177</sup> See: Kinda Mohamadieh, “Corporations, Investment Decisions and Human Rights Regulatory Frameworks”, South Centre Policy Brief No. 32 (October 2016).

described as social risks for firms that may influence or even outweigh economic advantages of investing abroad, and ultimately deter FDI.”<sup>178</sup>

The adoption of the 2030 Agenda and the SDGs gave a new impetus to discussions surrounding responsible investment practices and the need to balance the rights and obligations of investors while safeguarding the sovereign right of States to regulate in the public interest. Some of those efforts could trigger a positive impact for the development of an international framework that frames the conditions not only for the achievement of the 2030 Agenda, but also for the establishment of a global legal framework aimed at effectively promoting and guaranteeing human rights, in the interest of both States and business enterprises.

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<sup>178</sup> Krishna Chaitanya Vadlamannati, Nicole Janz and Øyvind Isachsen Berntsen, “Human Rights Shaming and FDI: Effects of the UN Human Rights Commission and Council” (2018) 104 *World Development* 222.

#### 4. Core elements of a potential legally binding instrument

As noted above, pursuant to the Human Rights Council Resolution 26/9 (A/HRC/26/9), co-sponsored by Ecuador and South Africa in 2014, the Human Rights Council established the Open-ended Intergovernmental Working Group 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 five sessions since 2014. During its Fourth Session, the OEIGWG reviewed the Zero Draft<sup>179</sup> submitted by the Chairperson-rapporteur. According to 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. A reading of the Zero Draft allows us to distinguish 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<sup>180</sup> on 16 July 2019, including the comments and proposals received until the end of February 2019. The fifth session of the OEIGWG took place on 14 – 18 October 2019, with a focus on direct substantive intergovernmental negotiations based on the revised draft.

This section 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 State delegations and other stakeholders in respect of the negotiations on the prospective binding instrument on business and human rights. The section considers a number of issues, concerns and technical aspects that have been addressed during the different sessions of the OEIGWG.

##### 4.1. Scope

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<sup>181</sup>. For instance, Resolution 2005/69 on ‘Human rights and transnational

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<sup>179</sup> Zero draft, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (16.7.2018). Available from <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

<sup>180</sup> Revised draft, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (16.7.2018). Available from [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf).

<sup>181</sup> 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

corporations and other business enterprises' adopted by the Human Rights Commission<sup>182</sup> was the first time that the issue of 'other business enterprises' and human rights had been included in the mandate of special procedures of the United Nations.

The UNGPs submitted by Prof. Ruggie in 2011 interpreted the phrase 'transnational corporations and other business enterprises' as including 'all business enterprises'; but it 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 concerns itself with the situation in which transnational corporations and other business entities with transnational activities are capable of evading their human rights responsibilities on jurisdictional grounds.<sup>183</sup>

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 to the issue of the 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 application of the instrument should be broader, encompassing all business activities, and not only those of a transnational character.<sup>184</sup> 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

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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 Direitos Humanos e Empresas*, v. 2, n. 2 (2018).

<sup>182</sup> Human Rights Resolution 2005/69 on Human rights and transnational corporations and other business enterprises, E/CN.4/RES/2005/69.

<sup>183</sup> 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).

<sup>184</sup> See: Oral Statements, Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, in <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

that peoples whose rights have been violated are “unlikely to distinguish whether the business enterprise that causes them harm has transnational ownership or operations.”<sup>185</sup>

The other position iterates that the scope 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 in the field of human rights. This position considers that although 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 chains<sup>186</sup>.

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 characterize business activities as ‘transnational’, 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 articles also sets the framework for the implementation of all other provisions of the instrument. Notwithstanding the general exception provided in Article 3.2, it seems that the implementation of the instrument will depend on a case-by-case analysis, 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.

From a preliminary consideration of the text, it appears that the revised draft of the legally binding instrument has two primary objectives. The first one is to provide a broader 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 to all business enterprises (Article 5 on prevention). The second objective is to clarify the manner in which those rights should be implemented in cases in which victims face challenges in gaining access to justice due to the transnational nature of the conduct, particularly how victims can bring legal actions against

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<sup>185</sup> International Network for Economic, Social and Cultural Rights, 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 from <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/PanellIII.aspx>.

<sup>186</sup> See: Oral Statements, Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, in <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

transnational corporations directly in their home State and deal with substantive and procedural issues that can create barriers for the collection of evidence and information, as discussed above.

The OEIGWG could benefit from broader discussions on how to clarify these objectives, for instance, by expressly stating which articles will only be 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 required 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.”

## **4.2. Jurisdiction**

The issue of jurisdiction under the Revised Draft is covered under Article 7, titled ‘Adjudicative Jurisdiction’. This builds upon the previous provision in the Zero Draft (Article 5) by including the new element of considering the domicile of the victims as a basis for determining if a court is competent to hear the claim.

In addition, for the purpose of determining the domicile of the business enterprise, it removes the option of using its ‘subsidiary, agency, instrumentality, branch, representative office or the like’. Instead, it now includes the ‘place of incorporation’ as a relevant factor for determining domicile.

The Revised Draft seeks to give more clarity and accuracy to the issue of which courts would be competent to hear claims on human rights violations or abuses due to business activities. It provides three distinct grounds for the courts to claim jurisdiction, namely the place where (i) the violations or abuses have occurred, (ii) the victims themselves are domiciled, or (iii) the entity alleged to have committed such violations or abuses is domiciled. Given the possibility that in certain situations, these may be simultaneously applicable, this provision seems to provide the victims with the choice to approach the court that is most convenient to them for accessing effective remedies.

Further, the draft provision provides criteria to determine the domicile of the entity which is alleged to have committed human rights violations or abuses. This entity can be a ‘natural or legal person conducting business activities of a transnational character, including through their contractual relationships’. It lists four criteria which can be used, namely the place of incorporation; statutory seat; central administration; or substantial business interests. Of these, the first would be applicable only to legal persons, while the rest may be applicable to both natural and legal persons.

While business enterprises can set up under the laws of a particular country, the place of incorporation - where their statutory seat is, they can be managed from another location, which may become its central administration. In addition, the company can be linked to other entities with whom it has business relationships for undertaking commercial activities in different territories, suggesting the existence of its substantial business interests. All of these can be used to establish a domicile of the natural or legal business enterprise for the purposes of the legally binding instrument.

The need for having these detailed criteria for determining the domicile of commercial enterprises stems from the reality that corporations, especially transnational corporations, have business activities and assets in several territories, while their management is conducted from one territory, and they are governed by the laws of yet another State.

The essence of this provision is to establish a solid basis for victims to have recourse to the courts which have competence to hear their claims and provide remedies for violations or abuses of human rights due to business activities, irrespective of the domicile or nationality of the victims. It focuses on where the alleged acts or omissions were committed or where the actors are located. Such a formulation therefore strengthens the ability of victims to bring appropriate claims and that of the courts to hear them.

### 4.3. Standards of Liability

Legal liability as covered under Article 6 of the Revised Draft substantially overhauls the corresponding provision in the Zero Draft, which provided for criminal, civil or administrative liability for violations of human rights undertaken in the context of business activities of transnational character.

Instead of prescribing the types of liability, in Article 6(1) the Revised Draft seemingly seeks to engage the State to provide for “a *comprehensive* and *adequate* system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character” (emphasis added). By establishing this rule, the Revised Draft attempts to have a level of convergence for legal liability among countries, while simultaneously acknowledging the plurality of legal traditions that exist in respect of the determination of liability.

The Revised Draft maintains the distinction between the individual liability of natural persons and the liability of legal persons in Article 6(2), which is also recognized in many domestic legal systems. For instance, the liability of directors of an enterprise is different from the liability of the enterprise itself in the case of any human rights violations in the course of its business activities.

Article 6(3) also emphasizes the distinct nature of civil and criminal liability, stating that the former shall not be made contingent upon a finding of the latter. This provision differs from the similar provision in the Zero Draft [Article 10(2)] in one significant aspect, as instead of liability being established for the ‘same actor’, it uses ‘same acts’. This formulation thus shifts the focus from the perpetrator of the human rights violations or abuses to the act itself, which would provide more flexibility for victims in their access to effective remedies.

The provision on reparation in the Zero Draft [Article 10(3)] draws upon paragraph 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation<sup>187</sup> for cases where liability for reparation to victims has been found. The equivalent provision in the Revised Draft [Article 6(4)] seems to have instead taken inspiration from EU law in that it seeks to provide

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<sup>187</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

‘effective, proportionate and dissuasive’ remedies<sup>188</sup>. The provision requires States to “adopt legal and other measures” for imposing sanctions on and reparations from businesses whose activities have caused harm to victims. For strengthening the aspect of reparations, it clearly indicates that they are “to the benefit of the victims”.

There are certain aspects within this provision that need to be examined in detail. First, the introduction of the ‘effective, proportionate and dissuasive’ standard for remedies. Given its comprehensive treatment by courts in the EU, there is a substantial body of jurisprudence that can be drawn upon. Similar to the EU approach, which allows its Member States to choose the type of remedies, the approach in the Revised Draft provides substantial flexibility to design a liability regime in accordance to national law and practices while ensuring the availability of remedies in cases of human rights violations.

Second, there is the rule that the reparations must be granted having in view ‘benefits of the victims’, meaning that the victims might have certain agency in deciding the form and scope of the reparations that need to be provided for human rights violations. This however does not preclude the role of the State in the process, as it may help in ensuring that the reparations are effective and benefit the victims in reality. This is also aligned with the UNGPs, whose Pillar 3 is based on having greater access by victims to effective remedies.

Third, there is an important issue regarding the use of the term ‘harm’ in this provision. It is possible that this may introduce some ambiguity in the interpretation of the text as ‘harm’ by itself is not defined in the draft itself. As jurisdictions utilize differing standards for evaluating ‘harm’, this may lead to different levels of human rights protections.

The definition of “human rights violation or abuse” [Article 1(2)] does, however, use the concept of ‘harm’. A plain reading of this definition suggests that it would include, but not be limited to, “physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights”. Given that the Revised Draft uses the concept of ‘harm’ in only a limited number of operative sections (specifically Articles 6(4), 6(6) and 10(12)) it might have been more useful to uniformly use “human rights violation or abuse” as included in Article 1 throughout the document for ensuring consistency.

The requirement to maintain financial security has been included in Article 6(5) by shifting it from the article on prevention in the Zero Draft [Article 9(2)(h)]. This remains a necessary provision given the significant number of cases where violations of human rights are committed by subsidiary companies of transnational corporations. Subsidiaries hold few physical assets in the host state, and generally have the ability to just pick up and leave, see e.g. Union Carbide in Bhopal, which by themselves hold the title for limited assets in their host states. This proves to be a significant barrier for ensuring that financial reparations are made to the victims, especially in the territory where the violations have occurred.

Article 6(6) seeks to enable States to create a liability regime to cover any failures in the duty of care owed by business enterprises in their contractual relationships. It essentially codifies widely accepted legal principles that are seen in both common law and civil law countries. For instance, the duty of care is present in both tort law (especially for vicarious liability) and in

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<sup>188</sup> See Christa Tobler, “ECJ case law on effective, proportionate and dissuasive remedies” at <https://eu.vlex.com/vid/ecj-effective-proportionate-dissuasive-455424>.

statutory law (such as the French law 2017-399)<sup>189</sup>. In respect of the former, in a recent case, the UK Supreme Court observed that “Vicarious liability is a longstanding and vitally important part of the common law of tort. A glance at the Table of Cases in Clerk & Lindsell on Torts, 20th ed. (2010) shows that **in the majority of modern cases the defendant is not an individual but a corporate entity**. In most of them vicarious liability is likely to be the basis upon which the defendant was sued. The policy objective underlying vicarious liability is to ensure, insofar as it is fair, just and reasonable, that **liability for tortious wrong is borne by a defendant with the means to compensate the victim...**”<sup>190</sup> (emphasis added).

Article 6(6) also includes two specific legal tests for the establishment of liability as per domestic law, namely the ‘control test’, which looks at whether there was sufficient control or supervision of the relevant activity; and the ‘foreseeability test’, which considers whether the risks of human rights violations or abuses in the conduct of business activities should have been foreseen by the business enterprise.

A defined list of criminal offences has been included in Article 6(7), which in turn draws on an array of international legal instruments such as the Rome Statute, UN Conventions, ILO Conventions, certain international Principles and Guidelines as well as offences such as slavery, forced displacement of people, human trafficking, and sexual and gender-based violence.

By opting for a clearly defined list of criminal offences, the Revised Draft provides greater clarity on the specific offences that will be covered by the LBI. Further, sourcing these offences from pre-existing international legal instruments also gives more weight to the list and could increase their acceptability to States.

However, the same listing could become challenging in situations where the States are not party to any of the cited legal instruments, as they might consider it an imposition of obligations emanating from a source other than the LBI. In addition, a closed list could limit the kinds of criminal offences that would be considered under the LBI. For instance, it could preclude the possibility of new forms of human rights violations occurring due to the activities of digital business enterprises from being considered.

Article 6(8) includes a more specific provision on criminal liability. However, it may be redundant in light of Article 6(2), which is about liability in general and, hence, it also includes criminal liability.

Finally, Article 6(9) requires the establishment of legal liability for “acts that constitute attempt, participation or complicity” in any of the listed criminal offences in the text, as well as any other criminal offences as defined by the domestic law of States.

In summary, the provision on legal liability has been clarified and strengthened considerably in the Revised Draft, though some inconsistencies still remain. By providing latitude to States in establishing their own liability regimes for human rights violations in the course of business

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<sup>189</sup> *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

<sup>190</sup> *The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2012] UKSC 56 (21 November 2012), para. 34. Available from <http://www.bailii.org/uk/cases/UKSC/2012/56.html>.

activities, while also enshrining certain core baselines, this article maintains a fine balance and will go a long way in ensuring that victims of human rights violations have access to effective remedies and justice.

#### 4.4. Prevention

Article 5 on Prevention in the Revised Draft of the LBI substantially builds upon the previous provision on prevention (Article 9) in the Zero Draft, while also aligning it more closely with the UN Guiding Principles.

The Zero Draft conveyed the view on the need to address the prevention of human rights violations in the context of business activities of a transnational character. It required States to impose due diligence regulations for such business activities taking place “under their jurisdiction or control”. Commentators had however pointed out that language on prevention incorporated in the Zero Draft was an extremely tall order for any due diligence requirement, as it was requiring a standard of result, rather than a standard of conduct.<sup>191</sup>

Article 5 as envisioned in the Revised Draft views prevention as the first step of a legal framework for the protection of human rights. It seeks to empower States to enact comprehensive legislative frameworks for regulating the human rights impact of the activities of all business enterprises operating within their territories. By having a strong framework for preventing the occurrence of human rights violations, it would minimize the human rights related risks in business activities, promote more business certainty for all enterprises as well as avoid litigation.

A primary function of this article is to enhance and integrate human rights due diligence in business activities. According to the OHCHR, “[h]uman rights due diligence is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved.”<sup>192</sup> The four core components identified by the OHCHR, which are also present in the UN Guiding Principles 17 – 21, can be found in Article 5(2) (a)-(d) of the Revised Draft.

Article 5 provides States with the requisite flexibility and policy space by including a number of elements which can be considered when designing the relevant laws and regulations. These elements draw directly upon the UNGPs and can be further strengthened if they are accorded a legally binding character. They include:

- Identification of possible and actual human rights violations due to business activities before and during the course of such activities;
- Taking appropriate actions to prevent and address such human rights violations;
- Having continuous monitoring of the impacts; and
- Substantial and meaningful engagement with all stakeholders.

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<sup>191</sup> See Daniel Uribe, “Setting the pillars to enforce corporate human rights obligations stemming from international law”, South Centre Policy Brief 56 (October 2018).

<sup>192</sup> See <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

Moreover, Article 5 recognizes additional elements under 5(3) that could be part of the human rights due diligence framework, such as:

- Impact assessment and the inclusion of their findings into business activities;
- Meaningful consultations, including specifically those who are more vulnerable;
- Financial and non-financial reporting – while financial reporting is generally mandated under the financial and corporate regulatory regimes, non-financial reporting can also contribute substantially to the prevention of human rights violations;
- Integrating human rights due diligence into all of the business enterprises' contractual relationships; and
- Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas.

This provision would allow countries to decide which elements would be most suitable for the regulation of business enterprises operating in their territories, as well as to include any other elements which would be useful in the context of their own national circumstances.

After framing a 'human rights due diligence' framework, it is essential that the State also has the means required to oversee its implementation. Article 5(4) seeks to provide such a monitoring mechanism at the national level, which may enhance access to remedy by making it available to all natural and legal persons having a legitimate interest, within the framework of the domestic law of the State.

Article 5(5) has been brought up from the previous Article 15(3) of the Zero Draft, which itself was inspired from Article 5(3) of the WHO Framework Convention on Tobacco Control. This provision seeks to prevent the undue influence from "commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law" in the setting and implementation of public policies of States for putting into effect the LBI. It recognizes that there may be instances where State policies may be unduly influenced by commercial interests that may frustrate the achievement of the objectives sought by the LBI, and therefore provides for a necessary safeguard.

Finally, Article 5(6) recognizes that the LBI may possibly impose additional burdens on small and medium enterprises (SMEs) and, therefore, allows States to provide them incentives and take any such measures which will ease their regulatory burdens and help increase compliance. In comparison to Article 9(5) of the Zero Draft, this provision seeks to provide positive reinforcements for enabling compliance, rather than creating exceptions for small and medium-sized undertakings, in order to avoid their potential misuse, as each State has its own metrics for determining when a company falls under the category of 'SME'.

For instance in Europe, where the metrics of staff headcount or either turnover or balance sheet total is used, any business which employs fewer than 250 persons, and which has either an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, would qualify as a medium sized enterprise<sup>193</sup>. Thus, 99% of all businesses in

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<sup>193</sup> European Commission, User guide to the SME Definition (2015). Available from <https://ec.europa.eu/docsroom/documents/15582/attachments/1/translations/en/renditions/pdf>.

the EU qualify as being SMEs<sup>194</sup>. However, for a developing country like Namibia, a medium sized enterprise only has 31 to 100 full time employees and/or annual turnover of N\$ 3,000,001 to 10,000,000<sup>195</sup> (approximately EUR 150,000 to 500,000).

This level of disparity among countries' classifications would have meant that some enterprises with significant transnational operations could have been exempted from the provisions of this LBI, despite having significant risks of human rights violations in their business activities. Thus, by opting for an incentives-based over an exceptions-based approach, the Revised Draft significantly strengthens the prevention mechanism.

#### 4.5. Cooperation

Discussions in the OEIGWG over the past sessions have clearly recognised the need to cover jurisdictional gaps through mutual legal assistance and international cooperation, in order to ensure effective access to remedies for victims of human rights violations or abuses due to business activities.

Mutual legal assistance is a process by which States seek and provide assistance in gathering evidence for use in judicial cases in their territories<sup>196</sup>. It is a form of international cooperation between States with respect to the conduct of legal proceedings in one of the States which may have some elements, for instance relevant documents, in the territory of the other.

Article 10 on mutual legal assistance and Article 11 on international cooperation as included in the Revised Draft contain materially similar language as that of Article 11 and Article 12 of the Zero Draft respectively, with few changes.

The Revised Draft includes a new provision which requires a State to inform the other State of any additional information or documents needed to support their request for assistance and, where requested, of the status and outcome of the request for assistance. It adds that the State may require the other State to keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

It also seeks to better streamline the concept of mutual legal assistance by shifting the provision requiring States to "cooperate in good faith to enable the implementation of commitments under this Convention and the fulfilment of the purposes of this Convention" under the article on international cooperation instead.

The Revised Draft also recognises the variety and diversity in the legal systems of countries, and thus provides a State with the ability to refuse to provide legal assistance if the violation to which the request relates is not covered under the LBI or if it would be contrary to its legal system [Article 10(11)].

The language used in the drafting of these provisions seems to reflect the wording and articulation of several other international treaties, such as the Convention against Corruption,

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<sup>194</sup> See [https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition\\_en](https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en).

<sup>195</sup> See <http://www.mti.gov.na/downloads/MSME%20policy%20final.pdf>.

<sup>196</sup> UN Manual on Mutual Legal Assistance and Extradition (2012), p. 19.

the Convention against Transnational Organized Crime and the Convention on the Rights of Persons with Disabilities.

In summary, the provisions examined in this section have integrated mutual legal assistance and international cooperation as a mechanism for ensuring efficient investigation and prosecution of violations of human rights due to business activities, as well as the effective enforcement of judgments (see below). This integration seeks to guarantee access to information for investigations and prosecutions, adoption of rules for mutual judicial cooperation, adequate standards of due process of law and enforcement of effective remedies through cooperation.<sup>197</sup>

#### 4.6. Access to Remedy

A fundamental premise of the LBI is to provide victims of human rights violations or abuses due to business activities with avenues to seek access to effective remedies. In its preamble it recognises the “right of every person to have effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion”.

Based on this, the Statement of purpose [Article 2] reiterates that the LBI is *inter alia* meant to “ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities”. It also intends to promote and strengthen international cooperation to provide effective access to justice and remedy to victims of such violations and abuses.

The right of victims to have access to effective remedies is deeply embedded in the text of the draft LBI and has been sought to be operationalized through various modes. For instance, Article 4 on ‘Rights of Victims’ states that “victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law” [Article 4(5)]. This includes, but is not limited to, the provision of “[r]estitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims”. In addition, it also covers other remedies like “environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.” This latter portion can be especially important in cases of large scale disasters such as the Bhopal gas tragedy in 1984, which affected thousands of people and is still awaiting effective clean up<sup>198</sup>.

In addition, the revised draft LBI is also cognisant of the fact that victims can face significant barriers in their pursuit of effective remedies. To this end, it requires countries to guarantee victims with access to information which is relevant to the pursuit of remedies and provide victims with access to appropriate diplomatic and consular means, as needed, to ensure that they can exercise their right to access justice and remedies.

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<sup>197</sup> See Kinda Mohamadieh, “Advancing international cooperation in the service of victims of human rights violations in the context of business activities”, South Centre Policy Brief 55 (October 2018).

<sup>198</sup> Nikita Mehta, “The endless wait for a clean-up in Bhopal”, Livemint, 03 Dec 2014. Available from <https://www.livemint.com/Politics/765bka9vVaQAiFvKRGtqRL/The-endless-wait-for-a-cleanup-in-Bhopal.html>.

Such access to information can include the information required to bring a claim; procure legal aid; and the procedural and substantive requirements to pursue claims before competent domestic courts and State-based non-judicial grievance mechanisms. The requirement for legal aid is further reinforced by the articles on mutual legal assistance and international cooperation, which also include a requirement to “provide legal assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations covered under the LBI” [Article 10.8].

Finally, recognising the plurality of legal regimes and standards that exist in different countries, the draft LBI also specifically emphasises the ability of victims to benefit from “any provisions that are more conducive to the respect, promotion, protection and fulfilment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities...” Such provisions could be contained in the domestic law, or regional or international agreement that is in force for that State [Article 12.3].

#### **4.7. Enforcement**

Recognition and enforcement of judgments on the claims of victims of human rights violations or abuses due to business activities is essential for fulfilling the aims and purposes of the LBI. It is used in cases where the perpetrator of such violations or abuses is located in the territory or jurisdiction of a country other than the one where the judicial process was undertaken and final judgment has been passed.

In instances where other countries or jurisdictions recognize the outcome of a judicial process that happened in another territory on the basis of the LBI, it would also be necessary that they provide the means required to implement such outcomes and further the effective access to remedy for such victims. This can therefore include the service of documents, freezing and confiscation of assets etc. for ensuring that fair reparations can be paid to the victims.

The current system for the recognition and enforcement of foreign judgments generally relies on bilateral<sup>199</sup> or multilateral arrangements<sup>200</sup> between countries (in rare instances it is granted without an express agreement). In the case of arbitral awards, which may be possible in the case of State-based non-judicial grievance mechanisms, the victims may also be able to utilise the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the ‘New York Convention’).

Under the provisions on the rights of victims, the draft LBI requires that States provide effective mechanisms for the enforcement of remedies for violations of human rights, including through prompt execution of national or foreign judgements or awards, in accordance with the LBI, as well as their domestic law and international legal obligations [Article 4(14)].

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<sup>199</sup> For e.g. see Agreement between the Republic of India and the United Arab Emirates on Juridical and Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Commissions, Execution of Judgments and Arbitral Awards. Available from <http://legalaffairs.gov.in/sites/default/files/mlat.PDF>.

<sup>200</sup> For e.g. see Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Available from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02012R1215-20150226>.

The issue of recognition and enforcement of foreign judgments is considered in Article 10(9), which provides for the procedural requirements. It requires that for any judgment to be enforceable, it should no longer be subject to ordinary forms of review in its State of origin. Further, such action is required to be taken in the country where it is sought to be enforced as soon as the requisite formalities have been completed. These formalities cannot be more onerous and the attendant fees and charges should not be higher than those required for the enforcement of domestic judgments. Finally, the provision does not allow for the possibility of a reconsideration of the merits of the case.

While under the proposed rule there would be a positive duty to recognise and enforce the judgment, this duty would not be absolute on the signatory countries. The grounds for refusal of recognition and enforcement are contained in Article 10(10), and reflect those commonly seen in other legal instruments that deal with the matter. Thus, it provides three grounds for such refusal by a court or the competent authority, and only at the request of the defendant. The grounds include that the defendant was not given reasonable notice and a fair opportunity to present their case; that the judgement is irreconcilable with an earlier judgement validly pronounced in another country with regard to the same cause of action and between the same parties; or where the judgement is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the country where its recognition and enforcement is sought.

The inclusion of these grounds seeks to ensure that due process is upheld for both the victims and the defendants, while also preserving the essential sovereign interests of the State such as its internal security or public order. It would also prevent the possibility of forum shopping and parallel proceedings being conducted in multiple jurisdictions between the same parties on the same issues.

Finally, under Article 12.4, it is envisaged that the provisions of the LBI would be applied in conformity with any new or previously existing agreements or arrangements on the mutual recognition and enforcement of judgements in force between the State Parties. This would allow victims to fully utilise the benefits of new treaties and arrangements meant to increase international cooperation among countries for the protection and promotion of human rights.

## Conclusion

The efforts towards realizing a legally binding instrument on business and human rights have been steadily gaining momentum as the process moves onward to its upcoming sixth session, currently scheduled to be held in Geneva from 26 to 30 October 2020<sup>201</sup>. The session will focus on direct intergovernmental negotiations based on the second revised draft of the legally binding instrument, which will be presented by the Chairperson-rapporteur.

The adoption of a legally binding instrument on business and human rights, as required by Resolution 26/9, will represent a significant milestone for victims of human rights violations due to corporate conduct, as it will help bridge the existing gaps in access to justice in international human rights law and provide the possibility of obtaining legal remedies and reparation for the harms they have suffered. It will also be a new benchmark for transnational enterprises and other businesses which seek to respect and promote the integration of human rights throughout their operations, and help reinforce their contributions towards achieving the SDGs by 2030 and building a fair and equitable future for the coming generations.

It can be envisaged that the LBI would be the core international instrument providing the necessary legal framework, which will be supplemented by “a ‘smart mix’ of actions to protect persons and communities from the adverse impact of business-related activities”<sup>202</sup>. This could include legislation which is already being rolled out in many countries for ensuring human rights due diligence and prevention of modern slavery in supply chains, development of National Action Plans by States, and voluntary actions by business enterprises towards ensuring the global respect and promotion of human rights. Such action would also help fulfil the UNGPs which “stipulate that States should periodically assess the adequacy of national laws that are aimed at, or have the effect of, requiring companies to respect human rights and ‘address any gaps’ (Guiding Principle 3). This means that where there are no relevant laws in place or where these are ineffective to ensure business respect for human rights, States are expected to address such regulatory gaps or deficiencies”<sup>203</sup>.

The role of civil society will be critical in the success of the LBI and needs to maintain its role as the driving force behind the process. Ultimately however, it will be the cooperation between all stakeholders, including States, transnational corporations and civil society actors that will ensure the protection of human rights for the most vulnerable persons and communities. Till then, in the immortal words of Bob Marley, we need to “Get up, stand up, stand up for your rights.”<sup>204</sup>

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<sup>201</sup> See <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

<sup>202</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/74/198, 19 July 2019, para. 16.

<sup>203</sup> OHCHR, Frequently Asked Questions about the Guiding Principles on Business and Human Rights (2014), p. 11. Available from [https://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf).

<sup>204</sup> Bob Marley & the Wailers, Get Up, Stand Up, in Burnin’ (Album, 1973).



The present document is substantially based on the background materials prepared by the South Centre (authored by Kinda Mohamadieh, Daniel Uribe, and Danish) for various sessions of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), established by Resolution 26/9 of the Human Rights Council, held since 2015.

The objective of this document is to provide support material for State delegations and other stakeholders for the negotiation of a binding international instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The document considers a number of issues and technical details that have been addressed during the different sessions of the OEIGWG.

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