

Ten Key Proposals for the Treaty

A Legal Resource for Advocates and Diplomats
Engaging with the UN Intergovernmental Working Group
on Transnational Corporations and Other Business
Enterprises

October 2016

TREATY

INITIATIVE

Ten Key Proposals for the Treaty

**A Legal Resource for Advocates and Diplomats
Engaging with the UN Intergovernmental Working Group
on Transnational Corporations and Other Business
Enterprises**

The Treaty Initiative

The combined membership of ESCR-Net and FIDH comprises over 400 human rights organisations, grassroots groups, academic centers and individual advocates, operating in more than half the countries of the world. For over a decade, both networks have been central to calls to strengthen the international legal framework to address corporate human rights abuses based on the experiences of affected communities.¹

The Treaty Initiative emanates directly from the demands of ESCR-Net members expressed at the ESCR-Net Peoples' Forum on Human Rights and Business (Bangkok, October 2013). Their demands found form in a joint civil society statement that became the first Statement of the Treaty Alliance. The Statement called for the development of an open-ended intergovernmental working group with a mandate to develop an international legally binding instrument to effectively address corporate human rights abuses, and ensure that effective accountability and redress mechanisms are available for affected people. The Statement gained the support of over 1000 signatories, including more than 600 organisations and 400 individual advocates from over 100 countries. In June 2014, the UN Human Rights Council passed Resolution 26/9 which established the *United Nations open-ended intergovernmental working group on transnational corporations and other*

¹ Throughout this publication the terms corporation(s), business(es) and business enterprise(s) are used interchangeably.

business enterprises with respect to human rights (IGWG), with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.

Following the passage of Resolution 26/9, ESCR-Net and FIDH established the Treaty Initiative to achieve four objectives: to ensure that members—particularly grassroots groups from affected communities—are able to engage in the UN Treaty-making process; to facilitate the collective development of resource materials by members for use in their own advocacy; to generate advocacy structures in different regions that support efforts to advance regulation and remedy at all levels; and to support civil society groups in the Treaty Alliance, by producing opportunities to engage in consultations, circulating resources to allies, and encouraging more human rights organisations to engage in domestic, regional and international advocacy. To achieve these objectives ESCR-Net and FIDH have coordinated three-day in-person consultations in the following regions: Asia-Pacific (Chiang Mai, May 2015), Africa and the Middle East (Nairobi, October 2015) and Latin America (Mexico City, May 2016). We also sought written inputs and conducted several online thematic consultations. Altogether, over 150 human rights organisations and grassroots groups have articulated their priorities for the Treaty over the course of this project in 2015-2016. ESCR-Net and FIDH have also supported the development and maintenance of regional advocacy platforms in Asia-Pacific, Africa and Latin America, as well as at the national level in several countries.

A central aspect of the Treaty Initiative has been the facilitation of ongoing interaction between diverse members and legal practitioners, who are members or allies. To this end, ESCR-Net and FIDH established a Legal Group of international legal practitioners with experience in applying international human rights law in the context of corporate human rights abuses. Members of the Legal Group participated in all the consultations and took a leading role in shaping the contents of the Key Proposals contained in this legal resource. Without the active involvement of the Legal Group, this project would not have been successful.

The aim of this legal resource is to support the advocacy efforts of our members and allies to participate in the development of a robust Treaty that responds to their everyday challenges dealing with corporate human rights abuses. This resource is also intended to

support the efforts of government officials and other actors seeking to engage with the IGWG in order to develop a Treaty that responds to the needs of those most affected by corporate human rights abuses.

Members of the Legal Group

Beth Stephens, *Rutgers Law School*

Carlos López, *International Commission of Jurists*

David Bilchitz, *University of Johannesburg*

Eduardo Bernabé Toledo, *Université de Paris 1 Panthéon*

Kranti Chinnappa, *Human Rights Law Network*

Marcos Orellana, *Center for International Environmental Law*

Nicola Jägers, *Tilburg University*

Olivier de Schutter, *Université catholique de Louvain*

Robert McCorquodale, *British Institute of International and Comparative Law*

Surya Deva, *City University of Hong Kong*²

William David, *Indigenous Rights Centre*

ESCR-Net and FIDH are deeply grateful to the members of the Legal Group for their enormous contributions to the Treaty Initiative. ESCR-Net and FIDH would also like to sincerely thank the more than 25 additional legal practitioners that took part in the Review Committee, providing invaluable written critique and input into earlier drafts of the Legal Proposals. The involvement of the Legal

² From January 2015-March 2016, prior to being appointed to the UN Working Group on Business and Human Rights

Group and Review Committee was entirely voluntary. The proposals were developed with the express intent of supporting civil society organisations involved in the Treaty Initiative, and were further refined by ESCR-Net and FIDH. As such, the contents of this document do not necessarily reflect the views of any one individual or organisation involved in the project, including the membership of ESCR-Net or FIDH.

Key Proposals

| | | |
|-----|--|----|
| 1. | Preamble..... | 13 |
| 2. | Primacy of Human Rights..... | 17 |
| 3. | Scope of the Treaty | 27 |
| 4. | Corporate Legal Responsibility to Respect Human Rights ... | 37 |
| 5. | Access to Information and Participation | 45 |
| 6. | Human Rights Due Diligence | 55 |
| 7. | Extraterritorial Obligations | 63 |
| 8. | Corporate Criminal Liability | 73 |
| 9. | Effective Remedies | 83 |
| 10. | Remedial Mechanisms | 89 |

1. Preamble

KEY PROPOSAL

The Treaty should include a Preamble, developed at the end of the Treaty drafting process, that contains reference to any primary concerns of civil society that were not included, or only partly included, into the text of the Treaty. The Preamble must also affirm, in addition to any further reference in the provisions of the Treaty: the particular and differentiated experiences that marginalised sections of society experience as a result of the activities of transnational corporations and other business enterprises; the primacy of human rights in the context of trade and investment law (including investor-state dispute settlement mechanisms); and, the human right to an effective remedy for any civil, cultural, economic, political or social rights violation, including in association with the acts or omissions of transnational corporations and other business enterprises.

Summary

The Preamble to a Treaty sets out the context of the events or other matters leading to the drafting of the Treaty, as well as its object and purpose. The Preamble is usually drafted at the very end of the Treaty process, not least as ‘the preamble is a convenient repository for the remnant of causes, large and small, which were lost during

the negotiating process'.³ Therefore, this paper simply raises some of the main matters that may be included in it but the final issues to be included in the Preamble must be considered at the end of the process of Treaty drafting.

Relevant Legal Context

While the Preamble does not usually have any operative force as such (in the sense that no legal action can be brought on the basis of the words in the Preamble), it 'has effect as indicating the general purposes and spirit of the Treaty, in the light of which the interpretation to be given to particular provisions may be considered'.⁴ Thus it is usually included in the process of interpreting a treaty under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (which reflects customary international law in this regard).⁵

As Aust points out: '[t]here is no rule of custom as to what...the preamble should contain...from the legal point of view there is no need to say more than: "The Parties to this [Agreement] have agreed as follows".⁶ The practice of the United Nations has been to include in the Preamble references to existing international law and legal principles. These also assist in ensuring that the Treaty clarifies and reinforces existing international law, as well as establishes developments in international law.⁷

All of the global human rights treaties have Preambles. These can be short but the practice has been developing that they can be very long. For example, the Convention on the Rights of Persons with Disabilities 2007 has 25 paragraphs in its Preamble.

3 *Vienna Convention on the Law of Treaties* ('VCLT') (1969), Preamble, p.337.

4 Fitzmaurice, G. 'Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Yearbook of International Law* 1. For example, in 'Rights of Nationals of the United States of America in Morocco', (1952) ICJ Rep 176, 196, the Court relied on the Preamble of some treaties to show their object and purpose.

5 See, for example, *Territorial Dispute Case* (Libya v Chad) (1994) ICJ Rep 6.

6 Aust, A. *Modern Treaty Law and Practice* (2000) 336 (emphasis as original).

7 See, for example, *Vienna Convention on the Law of Treaties* (1969), Preamble.

Components of the Proposal

The following (non-exhaustive) matters could be included in the Preamble to a Treaty on business and human rights:

- ❖ The Human Rights Council Resolution 26/9 which led to the Open-Ended Working Group on the Treaty;⁸
- ❖ Recognition of the UN Guiding Principles on Business and Human Rights (UNGPs);
- ❖ Reference to the work of the UN Working Group on Business and Human Rights;
- ❖ Existing international legal obligations on States with respect to human rights, both through being parties to treaties and under customary international law. These include, among others, obligations to protect against impairment of human rights enjoyment by third parties, and to provide remedies, including for actions by business enterprises;
- ❖ Reaffirmation of the primacy of human rights, especially in the context of State obligations to abide by trade and investment legal regimes and investor State dispute settlement structures;
- ❖ Acknowledgement of the need for special protection, in relation to, among others, women, children, indigenous peoples, people with disabilities, migrants and religious and other minorities;
- ❖ The purposes of the Treaty. This could include, for example, to redress power relations between corporations and affected people, as well as power relations between corporations and States in the context of trade and investment legal regimes, to encompass a broader responsibility for international human rights impairment beyond the actions of States, to improve access to remedies for victims, and to eliminate governance gaps;⁹
- ❖ In considering its purpose, there is also a choice of treaty types that need to be considered, such as a framework treaty or a more detailed treaty; and
- ❖ Reference to any particular issues that were resolved – or not – during the Treaty process.

8 UN Human Rights Council Resolution 26/9, UN Doc A/HRC/26/L.22/Rev.1 (June 25, 2014).

9 See Deva, S. 'Multinationals, Human Rights and International Law: Time to Move beyond the 'State-Centric' Conception?' in Jernej Letnar Čerňič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (2015) 27.

2. Primacy of Human Rights

KEY PROPOSAL

States must reaffirm the primacy of human rights, as guaranteed by their pre-existing obligations to respect, protect and fulfil human rights, in the context of negotiation, interpretation and dispute resolution of trade and investment treaties. Therefore, the provisions of the Treaty must supersede pre-existing obligations between States and other parties and, in order to retain the discretion necessary to meet their human rights obligations, the Treaty shall include a provision to ensure that commercial, trade, and investment treaties do not impose limits on their ability to protect human rights or require that disputes over human rights be decided through binding international arbitration.

Summary

The foundational principle of the primacy of human rights emanates from the Universal Declaration of Human Rights and the Charter of the United Nations, both established long before the creation of hundreds of trade and investment treaties between States, which have established a complex system governing trade and investment practices globally. Free trade in goods and services – the process of eliminating barriers to trade between countries – has been a key pillar of the neoliberal political and economic project for more than 50 years. During that time, the world's most powerful economic and

political institutions¹⁰ have promoted free trade as a central driver of economic growth, poverty reduction and – most recently – sustainable development. Similarly, foreign investment – investment by a company or entity in one country in a company or entity in another country – has become an increasingly important goal of free trade agreements).

Today, thousands of bilateral and multilateral trade and investment treaties between countries exist, as negotiated both through the World Trade Organization (WTO) and outside its ambit, creating a complex system governing trade and investment practices globally. However, these agreements have often been driven by the interests of powerful corporations and have served to consolidate their profit and market share at the expense of local opportunities for decent work, sustainable and equitable economies, and human rights.¹¹ Further, dispute resolution under such agreements can act to prevent the realisation of human rights by favouring corporate interests. The Treaty provides the opportunity for States to confirm that human rights obligations and the provisions of the Treaty itself take precedence over pre-existing trade investment treaties and are applicable to future similar treaties.

Relevance of this Issue for the Treaty

Both trade and investment agreements have been subject to criticism from social movements, NGOs and human rights experts. For example, in 2015, 10 UN Human Rights Council mandate-holders voiced their concern in joint and separate statements regarding the impact of such agreements on the realisation of human rights.¹²

In terms of trade agreements, since its inception the WTO has received sustained criticism for its perceived bias in favour of

10 This includes the World Trade Organisation and its predecessor, the General Agreement on Tariffs and Trade, the International Monetary Fund, the World Bank and the United Nations, particularly through the UN Commission on Trade and Development.

11 See, e.g., OECD (2004) Promoting SMEs for Development. Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation. Paper presented at the 2nd OECD Conference of Ministers Responsible for Small and Medium Sized Enterprises, Istanbul, 3–5 June, unpublished report, OECD.

12 See, e.g., Office of the High Commissioner for Human Rights, ‘UN experts voice concern over adverse impact of free trade and investment agreements on human rights’ (2 June, 2015). Available at www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E.

developed countries.¹³ For example, the WTO's rules on agriculture, which govern the extent to which government support (largely in the form of financial subsidies) is permitted for local farmers and agricultural producers, were designed with the objectives of developed countries in mind.¹⁴ Similarly, the WTO's rules covering intellectual property rights (elaborated in the Agreement on Trade-related Aspects of Intellectual Property Rights, also known as the TRIPS Agreement) have also been strongly criticized for their impact on the right to health, particularly on the right to affordable essential drugs in developing countries.¹⁵

Developing countries are further disadvantaged by the WTO's dispute settlement procedure. The WTO has a robust dispute settlement mechanism with coercive enforcement measures, and hundreds of disputes have been referred to the WTO for settlement over the last 20 years. If a decision of the WTO's highest dispute settlement body (the Appellate Body) is ignored by a party to the dispute, the Appellate Body may authorize retaliatory trade measures that can exact a heavy economic price.¹⁶ This can be contrasted with the very weak international enforcement mechanisms that exist to compel a government to fulfil its human rights obligations.¹⁷

Investment treaties can impact human rights in two ways. First, when a host State acts to protect human rights, investors may argue that newly imposed regulations violate their right to "fair and equitable treatment" by changing the basic expectations underlying their investment. Under this view, an investor has a right to know in advance the rules that will govern its investment, and changes in

13 Pascal Lamy, 'It's Time for a new "Geneva Consensus" on making trade work for development'. (Lecture delivered at Emile Noel Lecture, New York University Law School, New York, 30 October 2006). Available at: http://www.wto.org/english/news_e/sppl_e/sppl45_e.htm.

14 Joseph, S. *Blame it on the WTO? A Human Rights Critique* (2012) chapter 6. Available at: www.oopen.org/download?type=document&docid=454396.

15 Joseph, S. 'Trade and the Right to Health' in Andrew Clapham and Mary Robinson (eds), *Realizing the Right to Health* (2009). In its General Comment 14, the UN Committee on Economic, Social and Cultural Rights makes clear that the right to accessible (affordable) essential drugs is a core obligation of governments under the Covenant. See: UN Committee on Economic, Social and Cultural Rights, 'General Comment 14: The right to the highest attainable standard of health (art. 12)', UN Doc. E/C.12/2000/4 (11 August 2000)

16 World Trade Organisation, *Understanding the WTO: Settling Disputes*. Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ1_e.htm.

17 Joseph, S. *Blame it on the WTO? A Human Rights Critique* (2012) chapter 2.

those rules violate the investor's rights.¹⁸ Second, investors interpret "expropriation" broadly to encompass "indirect expropriations" such as loss of profit, and argue that newly enacted statutes or regulations that lower the value of an investment constitute expropriations that trigger the right to compensation.¹⁹

Both of these arguments have been advanced when States impose regulations that impact a foreign investment, even if the goal of the new provisions is to protect health and safety, the environment, labor conditions, or other human rights. For example, when Australia enacted a law requiring cigarette manufacturers to include dire health warning on cigarette packages, the manufacturers filed an arbitration claim asserting that the new rules unfairly "expropriated" the value of its investment.²⁰ Similar trends have been found in other sectors also, such as the extractives.²¹

When such claims have been raised in investor-State arbitrations, the results have been mixed. Some arbitration panels recognize that human rights norms take precedence over conflicting obligations. Other panels, however, have ruled that the purpose of a new rule or regulation is irrelevant, and that, if the effect of the rule is to decrease the value of an investment, it constitutes an expropriation and triggers the right to compensation for the corporation.²²

18 de Brabandere, E. 'Human Rights Considerations in International Investment Arbitration', *Grotius Centre for International Legal Studies*, (2013) 17. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230305.

19 Jacob, M 'International Investment Agreements and Human Rights', INEF Research Paper Series: Human Rights, Corporate Responsibility and Sustainable Development, (2010) 16.

20 See: *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12. Available at: <http://www.italaw.com/cases/851#sthash.00OeqIGb.dpuf>.

21 Anderson, S. & Perez-Rocha, M. 'Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership', *Institute for Policy Studies* (2013). Available at: http://www.ips-dc.org/mining_for_profits_update2013/.

22 Jacob, M. 'International Investment Agreements and Human Rights', INEF Research Paper Series: Human Rights, Corporate Responsibility and Sustainable Development, (2010) 16. Available at: <http://docplayer.net/12649520-International-investment-agreements-and-human-rights-marc-jacob.html>. One panel concluded that "State obligations to pay can be triggered 'no matter how laudable and beneficial to society as a whole' regulatory measures may be" citing *Compania del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153, 192. (Note that this was a case of direct expropriation for conservation purposes). Cf. *Tecmed 121* and *Compania de Aguas de Aconquija SA and Vivendi Universal v Argentina*, ICSID Case No. ARB/97/320, Award, 20 August 2007.

Relevant Legal Context

International Trade

The WTO currently has 163 member States, and is the largest and most inclusive forum in which governments negotiate and resolve international rules and disputes relating to trade.²³ The dozens of agreements concluded within the WTO are meant to progressively eliminate all barriers to trade, which include tariffs and non-tariff barriers to trade, such as labelling laws and measures designed to protect human health and the environment that have trade-restricting effects.

International Investment

International investment is governed by approximately 3200 treaties, including treaties between two States (“bilateral investment treaties” or “BITs”) and multilateral agreements.²⁴ Designed to protect foreign investments in a host state, the investment agreements typically include a guarantee that foreign investors will not be treated less favorably than local investors; a “fair and equitable treatment” clause that ensures certain general “fairness” standards; and a guarantee of compensation if the investor’s assets are expropriated.

Most such treaties also allow an investor who claims that a host State has violated its rights to challenge the State’s conduct through international arbitration, rather than proceeding in the host State’s legal system. Investor-state arbitrations are generally conducted under the auspices of an international organization such as the International Centre for Settlement of Investment Disputes (ICSID). There is no requirement that the arbitrators follow prior decisions and no appeal from their decisions. A recent review of the jurisprudence of arbitral tribunals shows that, in interpreting these provisions, tribunals can take an extremely broad view of their scope in favour of the

23 See World Trade Organisation website. Available at: www.wto.org.

24 UN Commission on Trade and Development, ‘World Investment Report: Reforming International Investment Governance’ (2015). For an overview of investor-state agreements and human rights and business debates, see generally: Mann, H ‘International Investment Agreements, Business and Human Rights: Key Issues and Opportunities’, *International Institute for Sustainable Development* (2008). Available at: https://www.iisd.org/pdf/2008/ia_business_human_rights.pdf.

investor.²⁵ Further, a significant concern has been expressed regarding the consistency,²⁶ transparency and impartiality of decisions made in ISDS arbitrations.²⁷

United Nations Guiding Principles on Business and Human Rights

Of direct relevance to trade and investment treaty negotiation and interpretation, the UNGPs clearly confirm that:

- ❖ States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.²⁸
- ❖ Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.²⁹
- ❖ In all contexts, business enterprises should:
 - (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
 - (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;³⁰

In relation to remedies for corporate human rights abuses, the effectiveness criteria for non-judicial grievance mechanisms, both State-based and non-State-based, includes a requirement that such mechanisms are “[r]ights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights”³¹ The

25 Bonnitca, J. ‘The problem of moral hazard and its implications for the protection of ‘legitimate expectations’ under the fair and equitable treatment standard’ *Investment Treaty News* 3 (2011) 1, 6-9.

26 Jones, D. ‘The Problem of Inconsistency and Conflicting Awards in Investment Arbitration’. (Presentation to German-American Lawyers’ Association, Frankfurt, 2011).

27 French, R. ‘Investor-State Dispute Settlement—A Cut Above the Courts?’, (Presentation to Supreme and Federal Courts Judges’ Conference, Darwin, 2014).

28 United Nations’ Guiding Principles on Business and Human Rights (UNGPs), Principle 9. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also Principle 10 regarding the position of States when acting as members of multilateral institutions that deal with business-related issues.

29 UNGPs, Principle 11.

30 Ibid, Principle 23.

31 Ibid, Principle 31(f).

guiding commentary further notes that “[g]rievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights”.³² However, in light of the fact that the UNGPs are not binding, this framework should be operationalized through the Treaty, to ensure effective protection of human rights and access to remedy in practice.

Components of the Proposal

The proper interpretation of provisions under international human rights law and the ability of governments to comply with their existing obligations without violating their international trade and investment commitments are matters that affect all nations. The concomitant international responsibility of business enterprise to respect human rights has also been recognised through the UNGPs and will be confirmed in the Treaty.³³

General Rule

As a general rule, a new treaty overrides conflicting provisions of a prior treaty addressing the same subject matter if the States involved are both parties to the new treaty.³⁴ In addition, the interpretation of a treaty should take into account “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”³⁵ To trigger these rules of interpretation, the new treaty could state explicitly that it overrides prior conflicting treaties

32 Ibid, Principle 31, commentary.

33 For a useful overview of the basis for ensuring a human rights-based interpretation of investor-State dispute resolution, see the ‘Petition for Limited Participation as Non-Disputing Parties’ in *Piero Foresti, Laura de Carli & Others and the Republic of South Africa*, ICSID Dispute, ARB(AF)/07/01. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0333.pdf>.

34 See: *Vienna Convention on the Law of Treaties* (VCLT) 30(3): “When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

35 Ibid, 31(3)(a).

between parties, including investor-protection treaties. The following text could be included into the Treaty:

State parties agree that the provisions of this Treaty supersedes pre-existing obligations between themselves and other parties to this Treaty.

Situation where not all States ratify the new Treaty

A more problematic situation arises if two States to a trade or investment disputes have not ratified the new Treaty. In such cases, pre-existing treaty obligations between the two States are presumed to still apply.³⁶ To have some impact on this (likely very common) situation, the new Treaty could state that it is based on pre-existing human rights obligations that take precedence over conflicting treaty clauses.³⁷ It is hoped that this will impact interpretation both of the new Treaty and of potential conflicts between it and prior agreements,³⁸ based on the position – existing regardless of the Treaty – that State human rights obligations must be complied with, and that it would be beneficial to avoid the possibility of conflicting rulings between investor-State dispute tribunals and national or regional human rights courts or other decision-making bodies. The following text could be included into the Preamble of Treaty:

- ❖ *Recognizing* the primacy of human rights obligations, including obligations articulated in jus cogens norms, customary international law, and human rights treaties,
- ❖ *Reaffirming* states' obligation to respect, protect and fulfil human rights to those within their territory and subject to their jurisdiction,
- ❖ *Recognizing* that the right to an effective remedy for human rights violations is protected by numerous international documents,

36 Ibid, 30(4): “When the parties to the later treaty do not include all the parties to the earlier one ... (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

37 Issues about the interaction between new and old treaty obligations were raised in the negotiations of the *Cartagena Protocol on Biosafety*. The result was carefully crafted language in the preamble which stated that while environmental and trade treaties should be “mutually supportive” and that the Protocol was not subordinate to other agreements, also stated explicitly that it did not alter rights or obligation under any existing international agreements. Similar language presumably would be inadequate to deal with pre-existing investment treaties.

38 VCLT, 31(3)(c): treaty interpretation should take into account “[a]ny relevant rules of international law applicable in the relations between the parties.”

including, among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, adopted by the General Assembly in 2005, and is recognized by the UNGP 25.

Avoidance of future Treaty conflicts

The Treaty should also obligate State parties to avoid such conflicts in the future, by refraining from entering into treaties that limit their ability to protect human rights. This language is based on UNGP Principle 9 and its Commentary. The following text could be included into the Treaty:

In order to retain the discretion necessary to meet their human rights obligations, State parties shall ensure that commercial, trade, and investment treaties do not impose limits on their ability to protect human rights or require that disputes over human rights be decided through binding international arbitration.³⁹

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: the Preamble; Corporate Legal Responsibility to Respect Human Rights; and Human Rights Due Diligence.

³⁹ UNGP 9: “States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts”. Commentary to this Principles reads, in part: “...the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.”

3. Scope of the Treaty

KEY PROPOSAL

The scope of the Treaty should be determined with reference to the needs of rights-holders. Therefore, the Treaty should (a) prioritize addressing the complex regulatory challenges posed by transnational corporations (TNCs) while affirming that all corporations are required by international human rights law to respect human rights, and (b) cover the full range of interrelated, interdependent and indivisible human rights (i.e. civil, cultural, economic, political and social).

Summary

During the negotiations in relation to the Treaty, agreement will need to be reached about the scope of the Treaty. This involves two key questions: the types of companies to which the Treaty should apply (the ‘depth’) and the types of human rights that the Treaty should cover (the ‘breadth’). In consideration of these issues it is important to consider both the reality of current human rights violations and the extent to which existing mechanisms and processes can address such problems. It is clear from existing research and extensive consultation with civil society that: (1) while the potential impact of and difficulty in obtaining redress against transnational corporations is particularly significant, violations are associated with all types of companies without appropriate remedy; and (2) corporate activity impacts on

the full range of human rights. The Treaty offers the opportunity to ensure that the regulation of corporate conduct adequately corresponds to reality and provides a practical response to corporate human rights abuses.

Relevance of this Issue for the Treaty

The scope of the Treaty is one of the most fundamental (as well as contentious) components of the negotiations for a binding international instrument on human rights and business. It involves two aspects: the types of corporations to which the Treaty should apply (the ‘depth’ question), and the types of human rights that the Treaty should cover (the ‘breadth’ question). During the Treaty Initiative consultations in Asia, Africa and Latin America, over 150 civil society organizations (CSOs) considered both of these scope-related aspects of the Treaty.

In relation to ‘depth’, the Treaty Initiative consultations involved discussions about the types of corporate entity whose conduct has resulted in human rights violations. Many examples shared during these consultations highlighted human rights violations committed in developing countries by transnational corporations (TNCs) headquartered in the Global North.⁴⁰ It is clear that the regulatory challenges posed by TNCs are especially complex, because corporate operations across jurisdictions often undermine the pursuit of an effective remedy for affected people and communities due to legal and practical challenges, a lack of information and – in some circumstances – complicity between host governments and corporations in the context of a desire to attract foreign investment. At the same time, CSOs during the consultations also offered examples of how state-owned enterprises and local corporations too violate human rights and it is often also not possible to seek effective remedy from domestic redress mechanisms.

Hence, from the perspective of individuals and communities whose human rights are infringed by corporate operations, it is of little consequence if the corporation that violated rights is a TNC or not – the main concern for such affected communities is that despite a clear violation of their human rights, they presently face significant

⁴⁰ See reports from the ESCR-Net and FIDH Treaty Initiative consultations, here: <https://www.escr-net.org/corporate-accountability/treaty-initiative/materials>.

obstacles in obtaining effective and adequate remedies, irrespective of the nature of corporate violator.

Regarding the ‘breadth’ of the Treaty, CSOs which participated in the consultations stressed the importance of the Treaty covering all human rights: civil, political, social, economic, cultural, while also ensuring meaningful protection for the environment. If the Treaty is limited to ‘gross’ human rights violations, it will not be able to capture most of the human rights violations experienced by people and communities living in the Global South. Moreover, any attempt to limit the Treaty’s scope to certain gross or egregious human rights violations will run contrary to the ‘interrelated, interdependent and indivisible’ nature of human rights.

In other words, the Treaty Initiative consultations highlighted that from the perspectives of CSOs and affected people, the Treaty should have a wide scope: it should apply to all types of business enterprises (including those which are part of supply chains), and cover all civil, political, social, economic, cultural rights recognized under international human rights law.

Relevant Legal Context

The mandate of the open-ended inter-governmental working group (OEIGWG), established by the UN Human Rights Council (HRC) Resolution 26/9, is ‘to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.⁴¹ The Resolution further provides that the first two sessions of the OEIGWG ‘shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument’.⁴² This may suggest that the ‘scope’ of the Treaty is an open question to be settled during State negotiation. While this appears to be true regarding the ‘breadth’ aspect, the position concerning the ‘depth’ aspect has been complicated by a footnote to Resolution 26/9, which reads as follows: “‘Other business

41 UN Human Rights Council, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, UN Doc. A/HRC/RES/26/9 (26 June 2014), 1. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>.

42 Ibid, 2.

enterprises” denotes 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.’

The intent behind this footnote was to exclude local non-transnational businesses from the Treaty. However, as the language of the footnote is conceptually unclear, with it not appearing in the main text of Resolution 26/9, there are reasons to consider this an evolving debate in the Treaty negotiations. Moreover, there is nothing in international law that would inhibit member States reconsidering the effect of the footnote as the proceedings continue.

The ‘depth’ issue under international law

There are at least four means by which the Treaty might address the question of what types of corporations should be covered by the Treaty: (i) strictly follow the resolution’s footnote so as to exclude domestic business enterprises that have no transnational character from the purview of the Treaty; (ii) negotiate a Treaty which applies to all types of business enterprises; or (iii) adopt a ‘hybrid option’ in which the main Treaty applies to TNCs and local business enterprises with a transnational character, while an Optional Protocol extends its application to all local business enterprises with no ‘transnational character’ (although as yet there is no legal definition of ‘transnational character’). Another method to operationalize this hybrid option may be to apply some chapters of the Treaty to all businesses and others dealing specifically with transnational business enterprises.⁴³

Whilst all of the above options are feasible under international law, it appears that the recent trend adopted by international regulatory initiatives is to target all types of business enterprises rather than only TNCs. For example, while the 1976 OECD Guidelines for Multinational Enterprises were limited to multinational enterprises (MNEs) ‘operating in’ the territories of OECD countries,⁴⁴ the revision

43 Such special provisions may, for example, relate to states’ extraterritorial obligations, liability within corporate groups, overcoming the obstacle posed by the doctrine of *forum non conveniens*, and states’ obligations regarding mutual assistance and cooperation.

44 OECD *Declaration on International Investment and Multinational Enterprises*, 21 June 1976, reprinted in 1976, ILM (15), 967, 968.

of these Guidelines in 2000 extended their scope⁴⁵ by applying them to MNEs ‘operating in or from’ the territories of OECD countries.⁴⁶

Moreover, the revised Guidelines also asked MNEs to encourage their ‘business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.’⁴⁷ In the same vein, the 2000 version of the ILO Declaration provided that the ‘principles laid down in the Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all.’⁴⁸

Building on these developments, the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises not only applied to TNCs, but also ‘other business enterprises’ such as contractors, suppliers, licensees or distributors if (i) they had any relation with a TNC, (ii) the impact of its activities is not entirely local, or (iii) the activities involved violations of the right to security.⁴⁹ The UNGPs in 2011 consolidated this advance in normative development by abolishing the distinction between TNCs and other business enterprises and positing that all companies have a responsibility to respect human rights.⁵⁰

The reasons for this regulatory trend are not difficult to find.⁵¹ It is not easy to provide an agreeable definition of a ‘TNC’. Even if such a definition is found, this will inevitably result in lawyers advising TNCs how to bypass the given definitional contours. Moreover, as noted above, people affected by corporate human rights abuses do struggle to hold even local corporations accountable, emphasizing the value of developing a common binding international normative

45 Deva, S. *Regulating Corporate Human Rights Violations: Humanizing Business* (2012), 80, 90.

46 OECD, *OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, DAFE/IME(2000)20, 8 November 2000, I.

47 *Ibid.*, II.

48 ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, November 2000, 11.

49 *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), paras. 20-21.

50 UNGPs, General Principles: “These Guiding Principles apply to all ... business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.” See also Principle 11 and the Commentary.

51 *See*: Deva, S. ‘Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics’ in Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (2017, forthcoming).

standard for States that includes these abuses in a more uniform way, like international human rights law does in other instruments.

The 'breadth' issue under international law

Again, there are various ways the Treaty might address the range of human rights that it will cover: (i) limit the scope of the Treaty to 'gross' human rights abuses; (ii) include all nine 'core' international human rights covenants and conventions; or (iii) include all human rights enumerated in the nine core human rights covenants and conventions adopted by the UN 'plus' the Universal Declaration of Human Rights (UDHR), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and eight fundamental ILO conventions.

Since there is no clear consensus on what the term 'gross' means,⁵² there is some leeway to interpret the term in a manner which is broader than⁵³ crimes covered by the ICC Rome Statute,⁵⁴ or even broader than the territory occupied by international corporate crimes.⁵⁵ The definition of 'gross and systematic violations' in the 1993 Vienna Declaration and Programme of Action also lends support to interpreting the term 'gross' broadly.⁵⁶

52 See: Zerk, J. *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies*, A report prepared for the Office of the UN High Commissioner for Human Rights, (2014) 25-29. Available at: <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

53 Ibid, in particular, the definition of gross human rights violations adopted for the report reads: "There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups" citing OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, United Nations, 2012, UN Doc. HR/PUB/12/02, copy available at: http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, 6.

54 The ICC Rome Statute covers four international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

55 See: Ramasastry, A. & Thompson, R. *Commerce, Crime, and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries*, FAFO (2006); Stewart, J. 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 *New York University Journal of International Law and Politics* 1.

56 *Vienna Declaration and Programme of Action, World Conference on Human Rights*, 1993, 30.

The second option may be that the Treaty covers all human rights stipulated in nine ‘core’ international human rights covenants and conventions.⁵⁷ However, even these nine instruments do not cover several important instruments related to labour rights and the rights of indigenous peoples. The third option, therefore, may be to encompass all human rights recognised in nine core international human rights conventions, UDHR, the UNDRIP and eight ‘fundamental’ ILO conventions.⁵⁸ As corporations can and do violate, directly or indirectly, almost all human rights, an international regulatory response should be in consonance to the extent of violations in practice.

Components of the Proposal

In order for the Treaty to be centered on the reality of those affected by corporate human rights abuses, the Treaty should have a wide scope both in relation to the types of corporations to which it applies (the ‘depth’ question) and the types of human rights that it covers (the ‘breadth’ question). It should require States to take all necessary steps (including legislative, administrative and judicial), appropriate to their legal systems, to establish liability of all corporations targeted by the Treaty and within their territory and/or jurisdiction for violation of all human rights covered by the Treaty.

Regarding the ‘depth’ question

The Treaty could adopt a ‘hybrid’ option in order to bridge the gap between the ‘needs’ of the rights-holders to have a Treaty which applies to all business enterprises and the ‘intent’ of Resolution 26/9

57 See: OHCHR, ‘The Core International Human Rights Instruments and their Monitoring Bodies’. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. It is worth noting that this list is wider than the ‘core’ list of internationally recognized human rights that the UNGPs recommend companies to follow, ‘at a minimum’.

58 See: International Labour Organisation (‘ILO’), ‘Conventions and Recommendations’. Available at: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>. All these conventions are widely ratified by states. See: ILO, ‘Ratifications of fundamental Conventions by country’. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F.

to exclude local corporations from the ambit of the Treaty. This option may be operationalized as follows:

- ❖ *Scope prioritizes regulatory complexity of TNCs:* The Treaty should briefly confirm that while all business enterprises can violate human rights and must therefore respect human rights, TNCs and other business enterprises with a ‘transnational character’ pose special regulatory challenges and therefore, this Treaty targets such transnational businesses as a matter of priority.
- ❖ *Indicative definition of TNCs:* As providing a comprehensive definition of a ‘TNC’ is very difficult and potentially leads to a means for TNCs to evade incorporation into the purview of the Treaty, the Treaty should follow the approach adopted by the OECD Guidelines⁵⁹ and merely provide an indicative rather than an exhaustive definition of TNC. The two key elements that make an enterprise TNC are: (i) operating in more than one country or jurisdiction through one’s affiliates (howsoever structured or defined), and (ii) exercising some level of control over one’s affiliates. On the other hand, the term ‘transnational character’ must capture those local business enterprises which have some transnational element, e.g., among other things, offering products or services outside the country of incorporation; direct sourcing of materials from overseas suppliers; or having overseas investors and/or directors.

Regarding the ‘breadth’ question

The Treaty should include all human rights enumerated in nine core human rights conventions, the UDHR, the UNDRIP and eight fundamental ILO conventions. This approach could be operationalized as follows:

- ❖ *Broad coverage of violations:* The Treaty should acknowledge that as corporations can and do violate almost all human rights, an international regulatory response should correspond to the full range of violations.
- ❖ *Listing of Human Rights Instruments:* The Treaty should contain an annexure listing the following human rights instruments applicable: the nine core international human rights covenants and conventions, the UDHR, the UNDRIP, and the eight fundamental ILO conventions. The annexure should provide flexibility

⁵⁹ OECD Guidelines for Multinational Enterprises, (2011), I.4. Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

to incorporate additional instruments developed by the Human Rights Council at a later date, consistent with the evolution of human rights standards and future State practice.

Relationship to Other Key Proposals

This proposal touches on almost all areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Effective Remedies; Corporate Legal Responsibility to Respect Human Rights; and Extraterritorial Obligations.

4. Corporate Legal Responsibility to Respect Human Rights

KEY PROPOSAL

The Treaty must recognise that corporations have legal responsibilities to respect human rights, and outline a framework for ensuring these legal responsibilities are observed in practice.

Summary

Traditionally, the focus of international human rights law has been on the obligations of States in relationship to individuals as rights-holders. Given the multiple examples of corporate activity that have resulted in, and continue to present a threat of, significant and widespread human rights violations globally, it is crucial to recognise that corporate entities themselves have binding responsibilities within the international human rights framework. Hence, corporations must ensure that they do not violate human rights. Further, these legal responsibilities of corporations need to be made operational through robust State and international mechanisms and processes to ensure that they are observed in practice.

Relevance of this Issue for the Treaty

Civil society organisations (CSOs) have attested in Treaty Initiative regional consultations that the human rights of individuals and groups of individuals across the world are being violated by corporations.⁶⁰ The current legal frameworks, far from protecting affected individuals, often actively perpetuates a culture of corporate immunity, privileging the pursuit of profit and other corporate objectives over human rights. It is also clear from many of the testimonies presented that States either actively play a part in these violations, fail to prevent them or make minimal or no effort to address them once they have occurred. An example is testimony from a CSO participant from Burma, who spoke of the fact that many people are being dispossessed from their land by big corporations. When attempting to assert their historical land claims, courts are refusing to recognise them and are instead backing up baseless claims by the corporation.

In such circumstances, States may be in violation of their obligation to protect individuals by preventing non-State actors from violating human rights (among other requirements of international human rights law). Any State failure to protect their citizens from the acts of a corporation, thereby failing to uphold its duty to protect, must be addressed. Further, the corporations whose activities gives rise to human rights violations must assume direct responsibility for their actions.

A recognition that human rights bind all actors within society, including corporations, is important for a variety of reasons:

- ❖ Corporations can then be held legally responsible for human rights violations that occur as a result of their activities, reflecting the reality that they are capable of, and in certain circumstances do, violate human rights;
- ❖ Arguments that corporations have no international legal responsibility to avoid violating human rights will be invalid in legal or other settings, which would result in increased accountability and access to justice through overcoming legal barriers to holding corporations accountable, which is particularly important in weak governance areas;
- ❖ Rebalancing the current economic discourse that privileges the

⁶⁰ Reports from the ESCR-Net and FIDH Treaty Initiative consultations are available here: <https://www.escr-net.org/corporate-accountability/treaty-initiative/materials>.

pursuit of profit and trade considerations over human rights, by a) legally requiring corporations to factor in human rights responsibilities into commercial decision-making, and; b) obliging States and corporations to integrate human rights into trade and investment treaty negotiations and dispute resolution.

The explicit recognition of the direct legal responsibilities of corporations to refrain from violating human rights would set out a clear and universal framework for all corporations, challenge the current worldview that facilitates economic growth on the basis of, or in the absence of regulation regarding, human rights violations, and protect responsible corporations from losing market-share to lesser scrupulous competitors.

Relevant Legal Context

International law

It is commonly understood that, in general, the international legal human rights framework requires States to respect (i.e. refrain from interfering with the enjoyment of human rights), protect (i.e. prevent others from interfering with the enjoyment of human rights), and fulfil (i.e. adopt appropriate measures towards the full realisation of human rights) all human rights. The State duty to protect acknowledges that non-State actors have the capacity to impair the human rights of others. The State has the primary role in enforcing the overarching objective to prevent human rights impairment by non-State actors, with the understanding that non-State actors also have corresponding responsibilities to themselves refrain from impairing human rights.⁶¹

Environmental law offers examples of the operationalization of corporate responsibilities. For example, the 1999 protocol to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Substances imposes civil liability against corporations for violations of the Convention. Similarly, the International Convention on Civil Liability for Oil Pollution Damage and the Paris Convention

61 For a detailed exploration of the arguments to support direct obligations for corporations, see: D Bilchitz 'A chasm between "is" and "ought"? A critique of the normative foundations of the SRSG's Framework and Guiding Principles' in S Deva and D Bilchitz (eds). *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) 112ff.

on Third Party Liability in the Field of Nuclear Energy both establish direct liability for corporations.⁶²

United Nations Guiding Principles on Business and Human Rights

The UNGPs outline the ‘corporate responsibility to respect human rights’ by noting that:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.⁶³

The accompanying commentary confirms that such responsibility “...exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”⁶⁴

Further, in explaining corporate responsibility, Professor Ruggie, the author of the UNGPs, noted in a 2006 report to the UN Human Rights Council that:

while it may be useful to think of corporations as “organs of society” as in the preambular language of the Universal Declaration, they are specialized organs that perform specialized functions...By their very nature, therefore, corporations do not have a general role in relation to human rights as do States; they have a specialized one.⁶⁵

Therefore, the UNGPs support the principle of a direct human rights role for corporations, albeit of limited scope according to their role and function in society. The UNGPs, however, do not explicitly connect the corporate responsibility to respect human rights with a corresponding legal liability to address circumstances where corporations do not fulfil their responsibilities. This is problematic as it renders human rights laws aspirational or merely voluntary standards to guide corporate activity, leaving no legal basis for taking

62 For further elaboration on all three conventions see, Ratner, S. ‘Business’ in Bodansky, D., Brunnee, J. & Hey, E. (Eds) *The Oxford Handbook on International Environmental Law* (2008).

63 UNGPs, Principle 11.

64 UNGPs, Principle 11 commentary.

65 John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97 (2006).

action against corporations that fail to adhere to human rights, even in the absence of State regulation or intervention. These gaps are compounded by weak enforcement of human rights in the field of corporate human rights abuses, in stark contrast to the strong, binding framework established to regulate the trade and investment field.⁶⁶

State implementation

A number of recent constitutions have increasingly recognised that non-State actors such as corporations bear direct responsibility in relation to human rights violations.

For example, the South African Constitution states that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.⁶⁷ This provision has been the subject of judicial interpretation which has recognised a number of direct duties upon corporations. These include duties to respect the dignity and reputation of individuals,⁶⁸ duties not to harm or impair the access of children to the right to education,⁶⁹ and duties to allow unlawful occupiers to remain on their land pending the State finding alternative accommodation.⁷⁰ Similarly, the Kenyan Constitution of 2010 confirms that “[t]he Bill of Rights applies to all and binds all State organs and all persons.”⁷¹ Some jurisdictions, such as the United Kingdom, do not expressly recognise legal human rights responsibilities of corporate entities, but achieve such outcome indirectly by placing a fiduciary duty on directors to consider the impact of their decisions on the community and the environment⁷² and to produce reports which include human rights questions.⁷³

66 See generally: Joseph, S. *Blame it on the WTO? A Human Rights Critique* (2012).

67 *Constitution of the Republic of South Africa Act 1996*, s 8(2).

68 *Khumalo v. Holomisa* (2002) (5) SA 401 (CC).

69 *Governing Body of Juma-Masjid Primary School v. Essay N.O.*, (2011) ZACC 13

70 *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties* (2011) ZACC 33.

71 *Constitution of the Republic of South Africa Act 1996*, s 20(1).

72 See: *Companies Act* (UK) (2006) s 172

73 See: *Companies Act* (UK) (2006) s 414C. This section places an obligation to prepare strategic reports which, in the case of quoted companies, include information about social, community and human rights issues.

Components of the Proposal

In the process of codifying recognition of the corporate legal responsibility to respect human rights the Treaty must address the following:

Recognition of the legal responsibilities on the part of corporations, in relation to human rights

The Treaty should bring international human rights law into alignment with the recognition within international environmental and investment legal frameworks of corporations as bound by international law, which provide more detailed direction with, respectively, the responsibilities and rights of corporations. As such the Treaty should contain a provision that acknowledges corporations are legally bound to respect human rights and, thereby, can be held directly liable for their involvement in violations of human rights in all countries.

Outline State obligations to give effect to the corporate legal responsibility to respect human rights

The Treaty must outline what State measures are required to give effect to direct corporate legal responsibilities in relation to human rights, including enabling legislation, policies and practice. As a minimum requirement, domestic law should mandate corporate human rights due diligence, facilitate accountability and access to remedy through domestic corporate criminal and civil laws, and take steps domestically and through requests for and provision of international cooperation and assistance to address corporate involvement in extraterritorial human rights violations.

Establish an effective means of implementation, including a complementary international recourse mechanism

While the means of implementation can take many forms, the system that is established must effectively (a) monitor State compliance with the duty to protect against the impairment of human rights enjoyment by corporations; and (b) acting in a complementary way to national and regional systems, investigate allegations of corporate impairment of human rights and provide binding and enforceable decisions

on States and corporations involved, in circumstances where State remedies are unavailable or inadequate.

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Corporate Liability Proposal, particularly in relation to liability extending to the corporation itself as a legal person as well as corporate personnel; Effective Remedies; and Extraterritorial Obligations.

5. Access to Information and Participation

KEY PROPOSAL

States must ensure that civil society has access to relevant, sufficient, quality information in connection with each stage of corporate activity, to facilitate meaningful participation in the prevention of and response to human rights impacts.

Summary

Where corporate activity could impact or has impacted on the enjoyment of human rights, those involved must have enough information to be able to understand and discuss the situation fully, in order to make informed decisions on what action to take to prevent and address human rights violations. Currently, there is a serious lack of information available to local communities and the general public about corporate decisions and practices. In particular, access to relevant, sufficient, quality information necessary for meaningful participation is lacking at each stage of corporate activity: (1) prior to corporate activity, (2) during corporate activity, and (3) when seeking accountability if human rights abuse occurs. The failure to gather and/or disclose necessary information can affect many other rights such as the right to a remedy. The Treaty offers the opportunity to outline the State

obligation to provide/strengthen (independent access to) key information and therefore reduce the information gaps.

Relevance of this Issue for the Treaty

No meaningful public participation can take place without due access to information. Cases such as the Bhopal gas leak disaster in India⁷⁴ and the toxic waste dumping in Cote d'Ivoire⁷⁵ demonstrate the pivotal role of information in various stages. After the explosion at the Bhopal gas plant, reports of the parent company and subsidiary involved stated that the effects of the gas leak were limited and without long term effects. However, generations born after the explosion are still suffering from its effects. Years later, internal documents revealed that the companies were aware of the toxic nature of the gas plant. In the case of the dumping of toxic waste in Cote d'Ivoire, the trading company failed to provide information concerning the effects of the waste to the Ivorian company. In these and other cases, people were unaware of basic facts because companies withheld critical information and States have been unable or unwilling to compel the disclosure of the information.⁷⁶

The right to know/access to information can be referred to as a gateway-right. Without relevant information many other rights such as, for instance, right to an effective remedy, remain elusive. A lack of access to information can be an obstacle in legal proceedings. For example, complex legal structures can make it difficult for victims of corporate human rights abuse to start legal proceedings against a multinational corporation. These include the 'corporate veil', which separates the actions and liabilities of corporations from the decision-making individuals within the corporations. Aside from the corporate veil, corporate structure is also defined by its shareholders, stakeholders and associate companies (subsidiaries and holding) both domestic and international. These characteristics in the

74 Amnesty International *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy*, (2014). Available at: <https://www.amnesty.org/download/.../pol300012014en.pdf>.

75 Business & Human Rights Resource Centre, 'Trafigura Lawsuits (re Cote d'Ivoire)'. Available at: <https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire>.

76 For overviews of these cases, and for more examples of corporate human rights abuse and the role that the lack of information played See: Amnesty International, *Injustice Incorporated- Corporate Abuses and the Human Right to Remedy*.

structure of a corporation make it difficult for claimants because the hierarchical structure and responsible party is not always clear and this information is key to making a successful legal claim or engage in related advocacy activities in defence of the human rights of people affected by corporate operations. Legal claimants face an additional challenge when corporations do not make information available, the government institution responsible for providing public information is uncooperative and/or one or both are not under the purview of meaningful legal access to information procedures. Moreover, in many countries acquiring documents needed in court for the sake of evidence can prove difficult as a result of different national rules regarding provision of evidence. An example is the difficulty plaintiffs experienced in acquiring certain documents in the ongoing oil spill litigation against Shell before Dutch courts.⁷⁷ A major obstacle that the claimants faced in bringing their claims was difficulty in accessing internal information – from both Shell and its subsidiary Shell Nigeria – regarding the operations of the business. The court held that under Dutch Law that there was no obligation on the part of the company to disclose the requested information. As noted by Friends of the Earth Netherlands, this seriously affected the equality of the legal parties resulting in a fundamental imbalance in the conduct of the case.⁷⁸

Relevant Legal Context

International and comparative law

The right to information is part of the participatory framework which also includes the right to participate in public-decision-making and access to justice. These three pillars are interrelated. Participatory rights including the right to information have notably developed in two branches of international law: human rights law and environmental law. To include progressive provisions on access to information (and

77 *Fidelis A. Oruru v Royal Dutch Shell, plc*, District Court of the Hague, 30 Jan 2013. Available at: <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vs-shell-oil-spill-goi>. On appeal the court in The Hague ordered Shell to make available to the court documents that might shed light on the cause of the oil spills and whether leading managers were aware of them.

78 *See*: Statement of Appeal to the Hague Court of Appeal by Milieudedefensie, December 23, 2014, 224. Available at: <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/shell-courtcase-appeal-in-motion-to-produce-documents>.

generally participatory rights) in the Treaty interesting parallels may be drawn with existing treaties and jurisprudence in these two fields.

In human rights law a right to information and a corresponding duty upon States to enable access to information has developed based mainly on the ‘freedom to seek, receive and impart information and ideas of all kinds’ – this is guaranteed through, notably, Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to know, seek, obtain, receive, hold and disseminate information on human rights is fundamental to the effective promotion of human rights. The major regional human rights systems have also acknowledged access to information as a human right.⁷⁹ Human rights monitoring bodies have recognized the collection, analysis and publication of information as critical to ensuring that human rights are protected. For example, the Committee on Economic, Social and Cultural Rights (CESCR) has highlighted that as part of the State’s obligation to protect, “states should also ensure that third parties do not limit people’s access to health-related information and services”.⁸⁰ In relation to the human right to water the CESCR has stated that ‘individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.’⁸¹

While the focus in international law has traditionally been on the access to information by members of the public from public authorities, to ensure the enjoyment of human rights in a way that recognizes the increasing influence and power of corporations, it may be necessary to take more concrete steps to ensure that members of the public have the right to request information directly from corporations allegedly responsible for harming human rights. According to Principle 1 of the UN Principles on Freedom of Information Legislation, “private bodies themselves should also be included [in legislation] if they hold information whose disclosure is likely to diminish the risk of harm to

79 *Inter-American Declaration of Principles on Freedom of Expression* (2000); *Declaration of Principles on Freedom of Expression in Africa*, (2002); *Council of Europe, Access to Information Held by Public Authorities*, Recommendation No. R(81)19.

80 UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment 14: The right to the highest attainable standard of health (Article 12)’, UN Doc. E/C.12/2000/4, 11 August 2000, 35.

81 UN CESCR General Comment 15: the right to water (articles 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003, 48.

key public interests, such as the environment and health.”⁸² In some countries such legislation exists. For example, in South Africa, the Promotion of Access to Information Act requires private bodies to disclose information which is ‘required for the exercise or protection of any right’.⁸³ This is also provided in the Declaration of Principles on Freedom of Expression in Africa, which states: “[e]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right”.⁸⁴

At the international level, there are several conventions that rely on the State to ensure information is gathered and dispensed to encourage participation of members of the society to ensure accountability for human rights abuse and/or environmental degradation.

In the Convention on the Rights of Persons with Disabilities (CRPD), the General Obligations clause commits all public actors under a “shall” provision to “closely consult with and actively involve persons with disabilities ...in the development and implementation of legislation and policies to implement the present Convention and in other decision making processes concerning issues” affecting their lives.⁸⁵

The UN Convention on Corruption provides that States should ensure “that the public has effective access to information”.⁸⁶ It also requires that States respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption subject to certain restrictions.⁸⁷

82 United Nations (2000) ‘The Public’s Right to Know: Principles on Freedom of Information Legislation’, Principle 1. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement>

83 *Promotion of Access to Information Act 2 of 2000*, s 50(1)(a): “Right of access to records of private bodies; A requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights”. Available at: http://www.dfa.gov.za/departments/accessinfo_act.pdf.

84 African Commission on Human and Peoples’ Rights, ‘Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa’ (2002) s IV (2). Available at: http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf.

85 *UN Convention on the Rights of Persons with Disabilities*, 4.3, UN Doc. A/RES/61/106.

86 *UN Convention Against Corruption*, UN Doc. A/58/422, 13(1)b.

87 *Ibid*, 13(1)d.

The Aarhus Convention⁸⁸ is the most advanced environmental agreement also in providing for public participation, by setting relatively detailed minimum standards for different participatory procedures. It requires that States guarantee the rights of access to information to stakeholders, as it is in their power to make domestic laws and provide incentives for corporations to assist them in achieving this goal while creating institutional and structural adjustments to ensure the objective is achieved.⁸⁹ In 2010 the global, non-binding ‘Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters’ (‘Bali Guidelines’) were adopted.

United Nations Guiding Principles on Business and Human Rights

As contained in the UNGPs, human rights due diligence requires corporations to identify, prior to any activity, potential human rights impacts.⁹⁰ Article 21 of the UNGPs encourages business enterprises to provide sufficient information on possible human rights risks arising from their operations to their stakeholders to enable them “evaluate an enterprise’s response to the particular human rights impact.

While this recognizes the importance of the provision of information, this does not impose any *mandatory* responsibilities on States and corporations to ensure that information on corporate activity is sought, gathered and provided to those affected for matters that concern corporations.

State implementation of this obligation

It is increasingly being recognized that the right to information entails a positive duty for States to collect and disseminate information on human rights violations. States are under an obligation to take practical steps – including through legislation – to give effect to the right to freedom of information and access to information. Most countries have Access to Information/Freedom of Information legislation which grants individuals access to information held by the

88 UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

89 In the environmental field participatory rights including the right to information have found recognition in Principle 10 of the 1992 Rio Declaration on Environment and Development.

90 UNGP 17.

State. This right to information concerns mostly information held by bodies that fall under State control. This includes bodies that are owned or substantially funded by the State or which undertake public functions. There are some resources on this subject that show the impact the success of access to information.⁹¹

Components of the Proposal

Participatory rights consist of several interrelated components: public access to information; public participation in decision-making proceedings; and access to review procedures and remedies. The focus is here on the right to information but all these components are interrelated.

Prior to corporate activity (Design)

Possible Treaty provisions should mandate human rights impact assessment including provisions on disclosure of effective consultation with communities. Another issue that emerged during the regional consultations is that information regarding contracts needs to be more accessible. The Aarhus Convention and the Bali Guidelines may provide examples as they prescribe, among other things, that the public must be informed at an early stage in decision-making, and the kind of information to be made available as a minimum in such procedures. The importance of access to key information prior to corporate activity has been explicitly acknowledged by the Inter-American Court of Human Rights.⁹²

During corporate activity (Monitoring)

A second dimension is the flow of information during corporate activity. This concerns issues of transparency, reporting and

91 See Coliver, S. 'The Importance of the Right of Access to Information Held by Public Authorities, and the Need for the United Nations to Take Steps to Further Elaborate, Codify, Protect and Promote this Right', (Presentation to the 'UN Conference on Anti-Corruption Measures, Good Governance and Human Rights', Warsaw, 8- 9 November 2006). Available at: <http://www2.ohchr.org/english/issues/development/governance/docs/Coliver.pdf>.

92 *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgment on merits, reparations and costs of 19 September 2006, Inter-Am. Ct. H.R., (Ser. C) No.151 (2006), 77. In this case, Chile had refused to provide the petitioners with information on a foreign investment contract related to a forestry exploitation project. The Inter-American Court of Human Rights found that the State breached its international obligations by refusing to

disclosure. The Treaty should require States to adopt legislation aimed at enhancing transparency and disclosure by (parent) companies. There are various legislative developments at the national and regional levels that mandate access to information, including the Dodd Frank Act (United States),⁹³ the Modern Slavery Act (United Kingdom),⁹⁴ and the EU Directive on the disclosure of non-financial information by certain large companies.⁹⁵ Besides mandating corporations to disclose information, States themselves should be mandated, based on the above-described duty, to generate, collect, assess and update information on adverse human rights impact of corporate activity and disseminate that information to the general public, particularly those that may be adversely affected.

Accountability (Review)

A third dimension is the right for individuals to acquire certain information needed to ensure access to a remedy. The Treaty can set out procedural requirements aimed at providing information on complex legal structures, as needed in court cases. The Treaty could address the inequality of arms in legal proceedings by laying down minimum standards of access to certain documents and testimony.⁹⁶

provide the information requested or providing a justification for not doing so. Significantly, the Court considered that when projects affected public interest, such as the exploitation of natural resources, the information held by the State, though related to a private company's activities, must as a rule be publicly accessible.

93 *Dodd Frank Wall Street Reform and Consumer Protection Act*, 2010, s. 1033. Available at: <https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

94 *Modern Slavery Act*, (UK) 2015, s. 48(6)(e); 54(5); Schedule 2 s.3. Available at: http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf.

95 *Directive on the disclosure of non-financial information by certain large companies*, 2014, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32014L0095>.

96 An interesting development in this respect is the Foreign Legal Assistant Act in the US (FLA). The FLA is a US statute that allows advocates from other countries to obtain documents and testimony to use in their cases. Any “interested person” in a foreign lawsuit or other legal process can ask a U.S. court to order U.S. corporations to turn over relevant documents and testimony.

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Effective Remedies and Remedial Mechanisms (regarding institutional pathways that may be explored to strengthen access to information); and Human Rights Due Diligence (although, from the perspective of participation, access to information must go beyond the corporate ‘knowing and showing’ dimension of HRDD. In order to participate in a meaningful manner affected communities and the public require independent access to information on, among other things, decision-making, corporate legal structures and available remedies.

6. Human Rights Due Diligence

KEY PROPOSAL

States must establish domestic legislation that legally requires corporations to identify, prevent, mitigate and account for adverse human rights impacts in line with, as a minimum, existing international standards for human rights due diligence, as well as establish effective compliance mechanisms and consequences for non-compliance.

Summary

Human rights due diligence is a key concept of the UNGPs. Linking the three pillars articulated by the UNGPs, i.e. respect, protect and remedy, human rights due diligence concerns the responsibility and activities by which business enterprises should identify, prevent, mitigate and account for the harms they cause, contribute to, or to which they are linked. The Treaty offers the opportunity to outline the State obligation to clarify the concept and elements of human rights due diligence.

The Relevance of this Issue for the Treaty

A current lack of statutory clarification regarding the standards of human rights due diligence – combined with the diversity of corporate structures (including where a parent company and its

subsidiaries are incorporated in different countries), issues as to whether the law in one country extends to actions in another country (i.e. transnational/extraterritorial applications), the relevant law that applies to the harm caused (being the ‘applicable law’), the difficulties in obtaining evidence, and the costs of legal proceedings – makes it very difficult for those harmed by a corporation or the conduct of a subsidiary company to seek reparation by filing a claim against a (parent) company.

Throughout the Treaty Initiative regional consultations with CSOs, organisations expressed frustration with the lack of meaningful human rights due diligence procedures established by corporations or States. This included calls for human rights impact assessment and forms of monitoring, greater transparency of activities (including the release of important information related to corporate activities), and improved consultation processes (including processes to respect the right of indigenous peoples to free, prior and informed consent (FPIC) in relation to projects that may affect the lands they customarily own, occupy or otherwise use).

Relevant Legal Context

The concept of human rights due diligence is defined by the UN as follows:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.⁹⁷

97 OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, 4.

An additional relevant element may be whether a company is aware that industry peers are causing or contributing to adverse human rights impacts.⁹⁸

There, as yet, is no internationally accepted definition of human rights due diligence. However, various State and regional legislation, such as the UK's Modern Slavery Act⁹⁹, the US's Federal Acquisition Regulations,¹⁰⁰ and the EU's Transparency Directive,¹⁰¹ give indications as to what type of reporting may be required of companies to show they have acted with due diligence. Similarly, some case law, such as *Chandler v Cape* in the UK (see below), indicate the extent to which a parent company may be responsible for actions of their subsidiaries if they have not acted with due diligence. The OECD has begun to create some clarification of the actions needed by companies in its June 2016 draft Due Diligence Guidance for Responsible Business Conduct.¹⁰² However, the only definition given in that draft is: "Due diligence" combines both the notion of "due" – i.e. that it is commensurate with the risks to be covered and "diligence" – i.e. acting with prudence and perseverance to address risks in light of the circumstances. It is a process for enterprises to "know and show" what they are doing about their adverse impacts.'

United Nations Guiding Principles on Business and Human Rights

Whilst the UNGPs do not include an explicit definition of human rights due diligence, they reference the responsibility and activities by which business enterprises should identify, prevent, mitigate and account for the harms they cause, contribute to, or to which they

98 OHCHR, Response to the Request from the Chair of the OECD Working Party on Responsible Business Conduct, 27 November 2013. Available at: <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf>, 13-14: "A business that is operating in a high-risk industry where information is brought to its attention that industry peers are causing or contributing to adverse human rights impacts should be able to demonstrate that it has carried out due diligence commensurate with the risk level and that it is not involved with adverse impacts."

99 *Modern Slavery Act*, (UK) 2015.

100 *Federal Acquisition Regulation; Ending Trafficking in Persons*, 80 FR 4967. Available at: <https://www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>.

101 Directive 2013/34/EU, Article 19 & 29(a).

102 OECD (2016) 'Draft Due Diligence Guidelines for Responsible Business Conduct', June 2016. DAF/INV/RBC (2016) 6. [Draft on file with ESCR-Net].

are linked.¹⁰³ These elements are clarified in UNGP principle 17 as having the following components:

- ❖ Assessment of actual and potential human rights impacts;
- ❖ Integration of, and action in relation to, this assessment;
- ❖ Monitoring of responses to the integration and action;
- ❖ Communication regarding how impacts are addressed; and
- ❖ Ensuring this is an ongoing activity.¹⁰⁴

The UNGPs also note that business enterprises have a due diligence responsibility in relation to both their own actions (where they must avoid causing or contributing to adverse human rights impacts and address such impacts when they occur), and the actions of third parties (including business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services, (where they should seek to prevent or mitigate adverse human rights impacts even if they have not contributed to those impacts)).¹⁰⁵

This difference is important if there is to be a requirement in the Treaty for parent companies to have due diligence responsibilities for their subsidiaries, as is suggested by the current French Bill on a duty of vigilance¹⁰⁶ and some case law on the duty of care.¹⁰⁷ It would also be relevant in terms of whether it is possible to transfer responsibilities along a value chain, such as through a contractual provision, or there is a duty of due diligence that remains at all times with a business enterprise. The terminology of a business enterprise used in the UNGPs hints at the idea that each corporate entity is not seen in isolation, even if the parts of it are incorporated in different States.

UNGP principle 17 also acknowledges that human rights due diligence will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature

103 UNGPs, Principle 15(b).

104 Ibid, Principle 17. Further elaborated in GPs 18-21.

105 UNGP, Principle 13.

106 *See*: Proposition de loi N° 1519. Referred to in French as ‘proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’. Available at <http://www.assemblee-nationale.fr/14/propositions/pion1519.asp> (In French).

107 For example, see *Chandler v Cape plc* [2012] EWCA Civ 525, a decision of the Court of Appeal of England and Wales which addresses the availability of damages for a tort victim from a parent company, in circumstances where the victim suffered industrial injury during employment by a subsidiary company.

and context of its operations. The latter issues would seem to require some external body to conduct the human rights impact assessment, as then appropriate comparator examples can be judged, and salient human rights of each operation are considered.

State implementation of this obligation

The commentary to the UNGPs provides guidance for the implementation of human rights due diligence in practice, which in turn offers a framework for State regulation of such activities. As such, human rights due diligence requirements are increasingly finding their way into legislation. Examples include the US Dodd-Frank Act,¹⁰⁸ the US Department of States' reporting requirements for US firms in Burma,¹⁰⁹ and the EU Directive on the disclosure of non-financial information by certain large companies.¹¹⁰ The UK Modern Slavery Act is another example.¹¹¹ However, these laws are piecemeal, as they deal with some specific human rights issues and not all human rights, are not present in most States, and are yet to show consistent and effective implementation.

Components of the Proposal

In seeking to address current gaps regarding the execution of human rights due diligence in practice, the Treaty could:

Confirm that all human rights due diligence should be binding and conducted according to, at minimum, the international standards of the UNGPs.

While the concept of human rights due diligence might be left open to interpretation through case law and legislation, a Treaty could confirm that, among other things: a corporation retains responsibility

108 *Dodd-Frank Wall Street Reform and Consumer Protection Act* (2010) 12 USC 5301 (US), s 1502.

109 United States Department of State 'Responsible Investment Reporting Requirements' (2012). Available at: <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

110 *Directive on the disclosure of non-financial information by certain large companies*, 2014, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

111 *Modern Slavery Act* (UK) (2015).

for human rights due diligence action at all times, including for its subsidiaries and other parts of a business enterprise; requirements of due diligence must be included in all business contracts, including along its value chain, with active monitoring remaining a responsibility of the contracting party; and a home State of a corporation retains some international legal responsibility for the corporations' actions across all its business enterprise, no matter where part of that enterprise is incorporated. One means of achieving the latter could be linked to requirements on a home State of international cooperation and capacity building in the host State.

For example, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), there is an obligation (primarily on developed States) of 'international assistance and cooperation, especially economic and technical' to achieve the realization of human rights in every State. By providing this assistance and cooperation, through regulation of their national corporations (and their broader enterprises), developed States can cooperate with developing States to protect human rights, and, if they also provide technical assistance through template laws and training, can assist in capacity building of the developing States to implement effective regulation of business activity that could violate human rights within their State.

Confirm a clear State obligation to put in place legislation or other regulation to require business enterprises to identify, prevent, mitigate and account for adverse human rights impacts.

It can do this by requiring all business enterprises to undertake a human rights impact assessment at key stages, such as for new or changed activities/operations and changed circumstances, and on an annual basis at least. This would normally include providing evidence of integration, tracking and monitoring, and transparent communication as to how human rights impacts are addressed. It is also important that there is a requirement of meaningful consultation with stakeholders, especially affected communities, which is undertaken in a culturally appropriate manner and in accordance with the right to FPIC. Further, the human rights impact assessment and the other elements of human rights due diligence should have external participation and supervision by ombudspersons, human rights defenders, credible independent experts and others. There would need to be a legal consequence where there is failure to comply with all these requirements.

Yet, as noted above, as there is a difference in responsibilities on a business enterprise as between the actions of the business enterprise itself and actions of third parties, the best approach may be to allow the defence of having conducting human rights due diligence to be available only where the adverse human rights impact is caused by a third party. So if the business enterprise has conducted human rights due diligence appropriately and there is an unforeseen human rights impact by a third party, the business enterprise could be considered to have done all they could to prevent it. This would also be relevant for claims of complicity against a business enterprise. The burden of proof would remain on the business enterprise to show that their human rights due diligence complied with the UNGPs.

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Extraterritorial Obligations; Corporate Legal Liability; and Corporation Responsibility to Respect Human Rights.

7. Extraterritorial Obligations

KEY PROPOSAL

In order to ensure that the Treaty consolidates a well-founded normative development in the area of extraterritorial obligations, it should include provisions that are guided by articles 24, 25 and 26 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights ('Maastricht Principles'), with the important addition that the Treaty would cover civil, cultural, economic, political and social rights.

Summary

One of the features of economic globalization is that corporate activity crosses national boundaries. In practice, this cross-border activity derives in a serious governance gap where two conditions are present, namely: where the home State of a corporation refuses to recognize and implement the extraterritorial dimension of its duty to protect human rights; and where the host State is unwilling, unable or complicit in corporate human rights abuses. Closing this gap requires effective control by the home State over corporations with which it maintains a reasonable link, as well as real access to judicial or other remedies in the home State for affected people.

Relevance of this Issue for the Treaty

While the application of extraterritorial obligations (ETOs) to transnational corporations (TNCs) is supported by the opinions of international tribunals, treaty bodies, and UN Special Procedures, effective compliance with ETOs is lacking in practice. States often do not take necessary measures to respect human rights or protect against human rights abuse by TNCs extraterritorially, nor ensure accountability where such human rights violation or impairment occurs. Often the biggest challenge faced by people and communities whose human rights are impaired by TNC activity comes when remedies are unavailable or inadequate where they are located, and they try to access the courts or other remedial mechanisms in the TNC's 'home' State.¹¹² In this regard, inconsistencies across jurisdictions exist because different countries have different rules about whether or how a person harmed by a TNC operating in a host State can seek remedy in the TNC's home State. Further, the practical and legal difficulties in pursuing remedies, are exacerbated when pursuing a remedy across borders.

Closing these governance gaps requires two things. First, States must take necessary measures to ensure that TNCs which they are in a position to regulate do not nullify or impair the enjoyment of human rights in any other State.¹¹³ Second, States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their ETOs, extending to the ability of persons whose human rights are impaired by a TNC in a host State to enjoy the right to a prompt, accessible and effective remedy in the TNC's home State.

112 References to 'home State' are in accordance with Principle 25(c) of the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* ('Maastricht Principles'): "...where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities". Available at: <http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles>.

113 For more information about the circumstances in which a State is in a position to regulate a transnational corporation, see the bases for protection outlined in Principle 25 of the Maastricht Principles.

Relevant Legal Context

The State's obligation to protect human rights from interference by private parties, including business enterprises, is widely recognized in international human rights law. Extraterritorial obligations (ETOs) can be generally conceptualized in human rights law as "the human rights obligations of Governments toward people living outside of its own territory."¹¹⁴ While the application of ETOs to transnational corporations (TNCs) and other business enterprises is supported by the opinions of international tribunals, treaty bodies, and UN Special Procedures, serious gaps currently remain as to their effective implementation. For this reason, the discussions towards the development of the Treaty must address how it can incorporate ETOs.

Opinions of United Nations' Treaty Bodies

UN treaty bodies have addressed ETOs in the course of their work to monitor compliance with their respective human rights treaties. The following is an illustrative list of interpretative statements by UN treaty bodies regarding ETOs:¹¹⁵

The Committee on the Rights of the Child (CRC) has explicitly stated that "home States have [human rights] obligations . . . in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned."¹¹⁶ According to the CRC, said 'reasonable link' exists

114 Ziegler, J. *Report of the Special Rapporteur on the Right to Food*, U.N. Doc. E/CN.4/2005/47 (2005), 35.

115 *See also*, the UN CESCR statement which has expressed the obligation of States Parties to the ICESCR "to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities." In elaborating on this obligation, the CESCR stated that "States Parties should take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant." UN CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social, and Cultural Rights*, UN Doc. E/C.12/2011/1 (July 12, 2011), 1. *See generally*: ESCR-Net 'Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy' (2014). Available at: <https://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf>

116 UN Committee on Rights of the Child ('CRC'), General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16 (April 17, 2013), 43.

where “a business enterprise has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned.”¹¹⁷

The Human Rights Committee has stated that “a State party must respect and ensure the rights laid down in the [International Covenant on Civil and Political Rights] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”¹¹⁸

The Committee Against Torture (CAT) has similarly stated that States should regulate “in 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.”¹¹⁹

Applying ETOs

The opinions of the United Nations’ Treaty Bodies (examined above) have established three tests that human rights bodies have used to articulate ETOs. They are as follows:

- ❖ ‘Effective Control’: This test establishes an ETO to protect where the State exerts ‘effective control’ over the private parties or their operations. Under this narrow test, States only have an ETO to protect when the control over the private actors by the State is such that the private actor may be equated with an organ of the government or as acting on behalf of the government.¹²⁰
- ❖ ‘Decisive Influence’: This test imposes an ETO to protect when the State exerts ‘decisive influence’ over the private parties or their operations. A State may be said to have ‘decisive influence’ over a private actor when it can materially influence the corporation’s conduct overseas. This influence may result from economic, financial, political, military or other form of support, etc.¹²¹ This test is particularly relevant in the context of business and human

117 UN CRC, General Comment 16, 43.

118 UN Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), 10.

119 UN Committee Against Torture (‘CAT’), General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2 (Nov. 23, 2007), 16.

120 *See: Nicaragua v. United States of America.*, 1986 I.C.J. 14, 181 (June 27), VII.4.

121 *See: Ilascu & Others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179 (July 8), 392; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, 2007 I.C.J. 43 (Feb. 26), 435.

rights in light of the relationship that States have vis-à-vis their TNCs. Home States often provide economic, financial, political, and other forms of support for TNC activities abroad, for example in the form of diplomatic efforts, negotiation and ratification of investment agreements, and political influence in international financial institutions, and these forms of support may rise to the level of material influence over the corporation's conduct overseas. Further, home States enable TNCs' legal existence and exert control and influence over TNCs through their own domestic corporate law.

- ❖ 'Reasonable Link': A broader test than the other two outlined above, this test imposes an ETO to protect on a State if there is a 'reasonable link' between the State and the conduct of the private actors. A 'reasonable link' may be said to exist where the private actor, including a business enterprise, has its center of activity, is registered or domiciled, or if the private actor carries out substantial activity in the State concerned.¹²²

Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights

Each of the above standards has been incorporated into the Maastricht Principles, drafted and adopted by a group of experts in international and human rights law to articulate the current state of international law regarding ETOs, based on legal research conducted over a period of more than a decade.¹²³

The Maastricht Principles comprehensively lay out the content and scope of ETOs as reflected in international human rights law, and as such provide a strong legal basis for the codification of ETOs in an internationally legally binding instrument.¹²⁴ Maastricht Principle 8 defines two types of obligations as extraterritorial. The first type includes obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment

122 UN CRC, General Comment 16, 43.

123 The experts came from universities and organizations located in all regions of the world and included current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council.

124 For more information, see the Commentary to the Maastricht Principles (2012). Available at: <http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/>.

of human rights outside of that State's territory.¹²⁵ The second type includes obligations of a global character, as set out in the Charter of the United Nations (UN Charter) and in human rights instruments, to take action separately and jointly through international cooperation, to realize human rights universally.¹²⁶

Maastricht Principle 9 covers the scope of the Principles, namely where a State has 'effective control', 'decisive influence' or a 'reasonable link', as covered above. Maastricht Principle 10 sets out limitations on the scope of extraterritorial jurisdiction, providing that a State's obligation to respect, protect, and fulfil extraterritorially does not authorize a State to act in violation of the UN Charter and general international law.¹²⁷

United Nations Guiding Principles on Business and Human Rights

With regard to ETOs, UNGPs concluded: "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."¹²⁸ This approach has, however, been criticized on the grounds that it does not accurately reflect the aforementioned statements of UN treaty bodies and special mandate holders regarding ETOs.¹²⁹ The perspective of the UNGPs also is out of step with what is required of the international legal order to ensure protection of human rights in the context of the modern globalized economy.

125 Maastricht Principles, 8(a).

126 Ibid, 8(b).

127 Ibid, 10.

128 UNGPs, Principle 2, commentary.

129 Amnesty International, CIDSE, ESCR-Net, FIDH, Human Rights Watch, International Commission of Jurists, RAID, 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights', (2011). Available at: https://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf. The statement criticized the then-draft Guiding Principles for encouraging business enterprises to respect human rights throughout their global operations. The CSOs wrote that "This does not reflect increasing international recognition, including by UN treaty bodies, of the legal obligation for States to take action to prevent abuses by their companies overseas." The final version altered slightly in Principle 2, calling instead for States to "set out clearly the expectation" that all business enterprises should respect human rights throughout the operations again failed to address the shortfall vis-à-vis the requirement laid-out in the aforementioned jurisprudence of UN treaty bodies."

State implementation of this obligation

While there are many different examples of national legislation with extraterritorial effect on companies with regard to human rights, in recent years a number of notable national and sub-national laws have been developed in this area. For example, in the United States the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) contains a number of relevant provisions. Section 1502 requires companies to make annual disclosures to the Securities and Exchange Commission concerning whether any minerals they source originated in the Democratic Republic of the Congo or an adjoining country.¹³⁰ Section 1504 requires extractive companies to annually make public “any payment made by [them], a subsidiary, or an entity under its control to a foreign government or the federal government for the purpose of the commercial development of oil, natural gas, or minerals”.¹³¹ The European Union passed legislation with similar effect after the adoption of the Dodd-Frank Act.¹³² At the State level in the USA, California has passed the Transparency in Supply Chains Act (2015), requiring medium and large companies to disclose their initiatives to eradicate slavery and human trafficking from their supply chains.¹³³ The UK has also passed the Modern Slavery Act (2015) which, among other things, requires corporations to produce a statement on slavery and human trafficking in their annual report.¹³⁴ The act has led to convictions in the UK for acts committed outside the country.¹³⁵

Components of the Proposal

Effective operationalization of ETOs under human rights law is critical to closing existing gaps of protection with regard to corporate

130 *Dodd-Frank Wall Street Reform and Consumer Protection Act* (2010) H.R. 4173, s 1502.

131 *Ibid*, s 1504.

132 *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.*

133 *For further information see:* Harris, K.D. ‘The California Transparency in Supply Chains Act – A Resource Guide’, (2015). Available at: <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>

134 *Modern Slavery Act* (UK) (2015).

135 *See:* Business and Human Rights Resource Centre, ‘UK Modern Slavery Act’. Available at: www.business-humanrights.org/en/uk-modern-slavery-act.

accountability for human rights abuses. The articulation of ETOs in an internationally legally binding instrument on TNCs and other business enterprises with respect to human rights would also confront the structural imbalance apparent in the international legal order which privileges business interests above human rights obligations.

Treaty provisions dealing with ETOs should draw from Maastricht Principles 24, 25 and 26

Firstly, by incorporating Maastricht Principle 24, the Treaty would ensure that “All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, . . . such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social, and cultural rights.”¹³⁶ In this case, the Treaty should also extend the scope of this provision to civil and political rights. The measures included in this provision cover administrative, legislative, investigative, adjudicatory and other measures.¹³⁷ For example, mandatory human rights due diligence, as discussed in the Treaty Initiative proposal on this theme, provides one means for bringing into operation this element of extraterritorial oversight. Restricting access to procurement to those corporations that implement certain measures within their global practices and supply chains would be another means of bringing some aspects of effective ETO regulation into effect. Concerning adjudicatory measures, taking steps to reducing barriers to accessing an effective remedy in home States (such as clarifying the criteria on ‘lifting the corporate veil’, etc) would be an important step forward in the Treaty, which are covered in the Treaty Initiative proposal titled ‘Effective Remedies’.

Secondly, including Maastricht Principle 25 into the Treaty would prescribe the circumstances which elicit ETOs, namely that, “States must adopt and enforce measures to protect” in circumstances where “the harm or threat of harm originates or occurs on its territory”¹³⁸ where “the non-State actor has the nationality of the State concerned”¹³⁹ or where “any conduct impairing . . . rights

136 Maastricht Principles, 24.

137 Ibid, 24.

138 Ibid, 25(a).

139 Ibid, 25(b).

constitutes a violation of a peremptory norm of international law.”¹⁴⁰ Incorporation of Principle 25 would include the ‘reasonable link’ test, providing that States must adopt and enforce measures to protect “where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor’s activities are carried out in that State’s territory.”¹⁴¹ This Principle further elaborates that “where any conduct impairing . . . rights constitutes a crime under international law, States must exercise universal jurisdiction over those bearing a responsibility or lawfully transfer them to an appropriate jurisdiction.”¹⁴²

Finally, the inclusion of Maastricht Principle 26 into the Treaty would ensure that if the State is “in a position to influence the conduct of non-State actors, even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, [the State] should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect [human] rights.”¹⁴³ This is consistent with the principles of international cooperation set out in the Charter of the United Nations.¹⁴⁴

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Remedial Mechanisms; Effective Remedies; and Human Rights Due Diligence.

140 Ibid, 25(e).

141 Ibid, 25(d).

142 Ibid, 25(e).

143 Ibid, 26.

144 Charter of the United Nations, 55, 56.

8. Corporate Criminal Liability

KEY PROPOSAL

States must ensure that corporate liability for human rights abuses a) includes (among other forms) criminal corporate liability, b) that such criminal liability can extend to corporations as legal entities as well as individuals within corporations, and c) the assessment of such criminal liability takes into account both the acts and omissions of corporations acting alone, as well as the acts or omissions by corporations that contribute to human rights impairment or violations by other parties.

Summary

While the international human rights framework envisages that State measures to ensure access to remedy for human rights violations will cover judicial, administrative, legislative and other appropriate steps, the recognition within criminal justice systems that corporations (and not solely individuals within corporations) can be held criminally liable is inconsistent across jurisdictions. Indeed, corporate criminal liability is not uncommon in domestic legal systems, but international standards that provide a coherent approach across all States are missing. The Treaty provides the opportunity to consolidate the advances made at national level and thereby establish a consistent approach, which will strengthen the ability of claimants to seek accountability and access effective remedy from corporations themselves.

Further, while the human rights framework has traditionally been understood as relating to the relationship between States and individuals, it is well recognised that corporate activity cannot easily be separated from the conduct of governments or State authorities. There are many ways in which corporations can become involved in or implicated in human rights impairment or violations. The concept of “corporate complicity” is a key way to understand and assess the extent to which corporations should be held responsible for their own contributions to acts of third parties, such as governments, the military and security providers, as well as subsidiaries and other businesses in corporate supply chains. The Treaty offers the opportunity to: reaffirm that criminal liability extends to the corporation as a legal person as well as corporate personnel; and outline the State obligation to adopt approaches that provide a clear method to attribute acts and omissions to corporate legal persons and personnel where these acts and omissions contribute to other (State or non-State) parties’ criminal actions.

Relevance of this Issue for the Treaty

The international human rights framework envisages that State measures to ensure access to remedy for human rights violations will cover judicial, administrative, legislative and other appropriate steps. As such, such violations may be addressed through a range of different legal options available in a particular jurisdiction, which may include claims under specific human rights legislation or constitutional provisions, or pursuant to relevant criminal, environmental or other legislation, and so on.

In terms of criminal law, which represents one of the strongest and most effective remedial options, the criminal prosecution of corporate entities or individuals within corporations (or both) for their role(s) in human rights impairment is at least recognised in the law in many jurisdictions.¹⁴⁵ However, the idea that corporations themselves can be held criminally liable is not universal, and very few

¹⁴⁵ See, for example, Kyriakakis, J. ‘Australian Prosecution of Corporations for International Crimes’ 5, *Journal of International Criminal Justice*, (2007) 809-826. Available at: http://www.geneva-academy.ch/RULAC/pdf_state/Joanna-Kyriakakis-paper.pdf. See also: Allens Arthur Robinson (2008) ‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations’. Available at: <https://business-humanrights.org/en/corporate-culture-as-basis-for-criminal-liability-of-corporations-paper-for-un-special-representative-ruggie-by-allens-arthur-robinson-law-firm#c33179>.

criminal prosecutions occur in practice due to political and practical limitations. For instance, in some jurisdictions a prosecution against a corporate entity (beyond the liability of an individual within a corporation) requires written approval of the Attorney General, or equivalent government executive official.¹⁴⁶ These and other obstacles resulting from restrictive models of attribution of liability represent a failure by States to comply adequately with their duty to protect.

Further, it is important to note that corporations can become involved in the impairment of human rights or human rights violations in various direct and indirect ways. Many recent and ongoing legal cases are profiled on the Business and Human Rights Resource Centre website.¹⁴⁷ As noted by a recent report on corporate liability, these cases can be grouped in the following broad categories:

- ❖ situations where corporations and individuals within the corporations have been accused of being directly responsible for the abuse of human rights;
- ❖ situations where governments and State authorities have engaged corporations to provide goods, technology, services or other resources which are then allegedly used in abusive or repressive ways;
- ❖ situations where corporations have allegedly provided information, or logistical or financial assistance, to others who have then engaged in human rights abuse on the basis of such information or assistance; and
- ❖ situations where corporations have made investments in projects or joint ventures or regimes with poor human rights records or with connections to known abusers.¹⁴⁸

“Corporate complicity” is a term used by many, particularly in the field of human rights and business, to reflect the understanding of how corporations, through their business relationships, support or facilitate human rights violations or abuse by others, usually governments, State authorities or other companies.¹⁴⁹ As such, in

146 See generally: Allens Arthur Robinson (2008) *‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations*.

147 ‘Corporate Legal Accountability Quarterly Bulletins’. Available at: <https://business-humanrights.org/en/corporate-legal-accountability/publications/corporate-legal-accountability-quarterly-bulletins>.

148 UN Human Rights Council, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Report of the United Nations High Commissioner for Human Rights* (HRC, Improving Accountability), UN Doc. A/HRC/32/19 (May 10, 2016) 16.

149 For a detailed overview of the circumstances in which international criminal law could hold companies and their officials criminally responsible when they participate in gross

assessing corporate criminal liability, it is important to recognise and address the direct instances of human rights abuse by corporations but also the varying ways in which corporations can be complicit in contributing to human rights violations or abuse by others.

Furthermore, in considering corporate criminal liability vis-à-vis corporate civil liability, it is important to note they serve different, although complementary, purposes and advancing the case for the Treaty to include corporate criminal liability does not negate the value of affirming also the applicability and enforceability of the corporate civil liability framework. The benefits of corporate criminal liability include the stronger procedural protections it provides, more powerful means of enforcement, more severe sanctions and also, arguably, stronger deterrent due to the greater moral judgment attached to criminal sanctions.¹⁵⁰

Finally, legal liability for corporate entities themselves (in addition to liability connected within individuals within corporations) is a necessary tool for keeping pace with the design of modern corporate structures. Lines of responsibility within very small corporations are relatively easy to identify compared with the enormous structures of corporate groups, which may contain many corporations, lines of authority and levels of activity. These complex structures render the notion of one individual as being responsible for any given activity as outdated. The benefit of a corporate liability approach is that liability is attributed – though means of attributing liability vary across jurisdictions – over the entire corporation. Formulating liability in this way reduces the burden of connecting the abuse to the actions of a particular individual and creates an incentive for the whole corporation to take systematic and sustained action to avoid criminal conduct because the company as a whole bears the

human rights violations that amount to crimes under international law, see International Commission of Jurists, *Corporate Complicity and Legal Liability, Volume 2: Criminal Law and International Crimes*, (2008) 56. Available at: <http://icj2.wpengine.com/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol2-publication-2009-eng.pdf>.

150 Weissman, A. & Newman, D. 'Rethinking Criminal Corporate Liability', *Indiana Law Journal* (2013) 82, 411. Available at: <http://www.corporatecrimereporter.com/wp-content/uploads/2013/07/weissmann.pdf>.

punishment – rather than leaving one individual to bear this burden while the entity itself would carry on regardless.¹⁵¹

Relevant Legal Context

Approaches to attributing criminal responsibility in relation to human rights abuse connected with corporate activity

Different practices occur at the international and domestic levels regarding whether both individuals and corporations can be held criminally liable:

- ❖ At the international level, international criminal law institutions have focused on individual criminal responsibility, rather than on the criminal responsibility of the corporation itself as a separate legal entity.
- ❖ At the domestic level (i.e. national systems), while widely recognised in many jurisdictions, the approaches to attributing corporate criminal responsibility differs across jurisdictions.¹⁵² Furthermore, while some domestic legal systems recognise that criminal liability can extend to corporations, some systems only extend criminal liability to individuals.

Following World War II, various legal trials were conducted in which corporate executives were prosecuted, for example in connection with the sale of poisonous gases to concentration camps, and for involvement in forced labour. An important development in corporate criminal liability evolved before the US Military Tribunals at that time. While ultimately prosecutions of corporate executives established individual criminal responsibility, in some instances this liability was only ascribed after first establishing the criminal acts of the corporation as a legal entity. As such, this is an important development in the recognition of criminal liability for corporations themselves, relevant to this proposal in relation to the content of the future Treaty. In a case involving a company called IG Farben (prosecuted

151 For further reading on the benefit of corporate criminal liability vis-à-vis individual liability of corporate officials, see: V.S. Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?', 109 *Harvard Law Review* (1996) 1477, 1495-1496. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=803867.

152 HRC, *Improving Accountability*, 32. For an overview of discussions of how corporations can be held criminally liable, see International Commission of Jurists, *Corporate Complicity and Legal Liability, Volume 2: Criminal Law and International Crimes*, (2008) 56. Available at: <http://icj2.wpengine.com/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol2-publication-2009-eng.pdf>.

for using slave labour) the US Military Tribunals found individual executives guilty on the basis of violations of the laws of war by the company itself, through its governing body.¹⁵³ Therefore, the tribunal drew particular attention to how the members of the governing body used legal incorporation to engage knowingly and wilfully in unlawful acts. In another case before the US Military Tribunals, liability for Krupp company officials for supply of armaments to Nazi Germany during the war, was established with reference to the actions of the Krupp corporation, rather than the individual defendants. Among other things, the evidence presented illustrated that “the initiative for the acquisition of properties, machines and materials...was that of the Krupp firm [which utilised] the Reich government and Reich agencies whenever necessary to accomplish its purposes”.¹⁵⁴

As stated by Stoitchkova, “...as in the Farben case, the tribunal concluded that it was the company itself that committed violations... Individual defendants were then convicted for having acted ‘through the instrumentality’ of the firm”.¹⁵⁵ The individual liability established in these cases rested on the “recognition that organisations, public or private, are bound by international criminal law to refrain from engaging in the commission of war crimes and crimes against humanity”.¹⁵⁶

Today, under the Rome Statute of the International Criminal Court¹⁵⁷ and the International Criminal Tribunals for Rwanda (ICTR) and Yugoslavia (ICTY), an individual – including corporate officials – can be held responsible for committing,¹⁵⁸ planning,¹⁵⁹

153 *Law Reports of Trials of War Criminals* (UNWCC), Vol. X, London: His Majesty’s Stationary Office, 1949 (the case of I.G. Farben), at 50-52, in Stoitchkova, D., *Towards Corporate Liability in International Criminal Law, School of Human Rights Research, Vol. 38*, (2010) 59.

154 *Ibid*, (the case of Krupp), at 92, in Stoitchkova, D. 60.

155 Stoitchkova, D., *Towards Corporate Liability in International Criminal Law, School of Human Rights Research, Vol. 38*, (2010) 60. Stoichkova cites the term “through the instrumentality” to *Law Reports of Trials of War Criminals* (UNWCC), Vol. X, London: His Majesty’s Stationary Office, 1949 (the case of I.G. Farben), at 52.

156 Stoitchkova, D., 59.

157 *Rome Statute of the International Criminal Court*, article 25. Available at: <http://legal.un.org/icc/statute/romefra.htm>.

158 ‘Committing’ refers to the physical participation of an accused in the actual acts, which constitute the material elements of a crime. International Criminal Tribunal for Rwanda (ICTR), *Rutaganda*, (Trial Chamber) 6 December 1999, 40; International Criminal Tribunal for the former Yugoslavia (ICTY), *Galic*, (Trial Chamber) 5 December 2003, 168. See also article 25(3)(a) of the *Rome Statute of the International Criminal Court*.

159 ‘Planning’ occurs when one or more persons contemplate designing the commission of a crime at both the preparatory and execution phases. See: ICTR *Akayesu*, (Trial Chamber) 2

ordering¹⁶⁰ or instigating¹⁶¹ a crime or otherwise aiding and abetting a crime.¹⁶²

At national levels, criminal liability can be applied to – depending on the jurisdiction – both individuals and corporations. For example, in France companies are able to be found guilty of an offence, major or minor, under the Penal Code.¹⁶³ Many other jurisdictions in Europe provide for corporate criminal liability including Belgium, Italy, Poland, the United Kingdom, the Netherlands, the Czech Republic, Romania, Luxembourg and Spain.¹⁶⁴ Corporate criminal liability arises also in many other jurisdictions around the world,¹⁶⁵ sometimes in novel ways. In Australia, for example, liability can arise based on “corporate culture”, which refers to an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.¹⁶⁶

In the African regional system, a 2014 Protocol to the African Court of Justice and Human and Peoples’ Rights has a section called ‘Corporate Criminal Liability’ which establishes jurisdiction for the court over the actions of legal persons, including corporations.¹⁶⁷ The

September 1998, 480; ICTR, *Rutaganda*, (Trial Chamber) 6 December 1999, 37; ICTY, *Galic*, (Trial Chamber) 5 December 2003, 168.

160 ‘Ordering’ means a person in a position of authority using that authority to instruct another to commit an offence. ICTR, *Akayesu*, (Trial Chamber) 2 September 1998, 483; ICTR, *Rutaganda*, (Trial Chamber) 6 December 1999, 39; ICTR, *Gacumbitsi*, (Appeals Chamber) 7 July 2006, 181-183. See also article 25(3)(b) of the *Rome Statute of the International Criminal Court*.

161 ‘Instigating’ means prompting another to commit an offence which is actually committed, either through an act or omission. ICTR, *Gacumbitsi*, (Appeals Chamber) 7 July 2006, 129. See also article 25(3)(b) *Rome Statute of the International Criminal Court*, which prohibits soliciting or inducing the commission of a crime.

162 International Commission of Jurists, *Corporate Complicity and Legal Liability, Volume 2: Criminal Law and International Crimes*, (2008) 11. See also: article 28 of the *Rome Statute of the International Criminal Court* which covers command (or superior) responsibility.

163 See, ‘Memorandum of the Ministry of French Foreign Affairs, Re: Criminal liability of private law entities under French law and extra-territoriality of the laws applicable to them: Review of the situation and discussion of issues’ (2006). Available at: <http://www.lancaster.ac.uk/universallhumanrights/resourcesOfficial.htm>; Xavier-Bender, P. (2008) *Criminal Liability of Companies: FRANCE*.

164 Clifford Chance, *Corporate Liability in Europe – January 2012*, (2012) 2. Available at: https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.

165 Allens Arthur Robinson, ‘*Corporate Culture as a Basis for the Criminal Liability of Corporations*, (2008).

166 Ibid.

167 *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, 22, adding art 46C, article 46C(1), which states that: “For the purpose

crimes covered include a wider range than contained in the Rome Statute of the International Criminal Court¹⁶⁸ and there are many modes of responsibility covered in article 28 of the Protocol.¹⁶⁹

In terms of penalties imposed in response to findings of corporate criminal liability, these vary across jurisdictions but include (most commonly) a fine, dissolution of the corporate entity, and a ban from participating in public procurement tenders.¹⁷⁰

United Nations Guiding Principles on Business and Human Rights

Of particular relevance to the issue of corporate criminal liability, the UNGPs set out that, in protecting against corporate human rights abuse: States must take “...appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”,¹⁷¹ access to remedy for such violations must be ensured “...through judicial, administrative, legislative or other appropriate means...”¹⁷²; and “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing corporate human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”¹⁷³

However, the UNGPs do not make explicit reference to corporate criminal liability. The Commentary to the UNGPs, however, note that “the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility”. This approach, beyond being only voluntary, is also just a commentary on the important, and so far incomplete, development of the international legal system in this area. In recognition of the challenges in ensuring accountability and effective legal liability for corporate human rights

of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States”. Available at: http://www.ahg.int/en/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf.

168 Ibid, 28A.1.

169 Ibid, 28N.

170 Clifford Chance, *Corporate Liability in Europe – January 2012*, (2012) 7.

171 UNGPs, Principle 1.

172 Ibid, Principle 25.

173 Ibid, Principle 26.

abuses, it is submitted that what is required is an explicit recognition of corporate criminal liability in the Treaty, and an articulation of how this liability can be brought into operation in all States.

Components of the Proposal

In seeking to ensure the possibility of stronger sanctions for corporate human rights abuse and therefore address the gap between the current reality and lack of redress for many human rights violations, the Treaty should set out State obligations to:

- ❖ Ensure that criminal liability for acts or omissions that materially contribute to human rights abuse can also extend to corporations themselves, without prejudicing the (concurrent) application of civil, administrative or individual liability;
- ❖ Adopt measures that provide a clear method to attribute criminal acts and omissions to both corporations acting alone, as well as to corporations complicit in the criminal actions of other parties; and
- ❖ Ensure corporations found criminally liable are subject to effective, proportionate and dissuasive sanctions.

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Scope; Corporate Legal Responsibility to Respect Human Rights; and Effective Remedies.

9. Effective Remedies

KEY PROPOSAL

States must ensure that people affected by human rights violations connected with corporate activity have access to adequate, effective, prompt, and appropriate remedies.

Summary

All people affected by human rights violations have a right to an effective remedy. This has two components: procedural (a functional mechanism to seek a remedy) and substantive (a full remedy for the violation).¹⁷⁴ Remedies are necessary where people have been harmed by corporate activity, through, for example, death or injuries, destruction of their homes, displacement, environmental contamination, unjustified interference with their livelihoods, or inadequate or dangerous conditions at work. A full remedy means to halt ongoing or imminent harms and to prevent future violations, as well as to provide appropriate reparation. In practice, however, those affected often find it difficult or impossible to obtain a remedy that prevents, responds to, and corrects the abuses, and that guarantees that abuses will not reoccur. The Treaty offers the opportunity to outline the State obligation to take legislative, judicial and other measures to ensure that a full range of effective remedies are available.

¹⁷⁴ Remedial mechanisms are discussed in a separate key proposal.

Relevance of this Issue for the Treaty

Despite the internationally protected right to an effective remedy, those impacted by corporate human rights abuses often find it difficult or impossible to obtain a remedy.¹⁷⁵ Many obstacles result from the limited mechanisms available to seek remedies, as discussed in a separate briefing paper. But even when impacted communities and individuals are able to obtain some remedy, it is often inadequate. For example, the possibility of future compensation is an inadequate remedy for people faced with irreversible corporate human rights abuses, who need access to quick interim orders to protect their security, their homes, and their property. Relocation assistance is an insufficient remedy for community members who have lost access to land or other resources on which they depend for their livelihood. Monetary compensation, when available, is usually far less than needed to repair the harms suffered.

Moreover, internationally guaranteed remedies include more than money. People devastated by corporate human rights abuses may need ongoing medical, psychological and social services. Survivors of abuses have the right to full disclosure of the truth about corporate human rights abuses, apology, and punishment of those responsible for the abuses. A full remedy must provide guarantees that the violations will not occur again.

Remedies must also be culturally appropriate, being respectful of culture of individual and communities, sensitive to gender and life-cycle requirements, and particularly attentive to the lived experiences of minorities and indigenous peoples. Finally, people who assert rights and remedies for human rights violations – human rights defenders – must be protected from reprisals.¹⁷⁶

175 A UN report recently concluded that remedies remain “elusive”: HRC, *Improving Accountability*, 2. See also: Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (2014); Skinner, G., McCorquodale, R. & De Schutter, O., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013). Available at: <http://icar.ngo/wp-content/uploads/2013/12/The-Third-Pillar-FINAL1.pdf>.

176 See: UN Declaration on Human Rights Defenders, UN Doc. A/RES/53/144, <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>.

Relevant Legal Context

International and comparative law

The right to an effective remedy is at the heart of human rights law. For example, the Universal Declaration of Human Rights, article 8, states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁷⁷ The Committee on Economic, Social and Cultural Rights has made clear that States must “ensure access to effective remedies to people affected by corporate abuse of economic, social and cultural rights.”¹⁷⁸ The UN Basic Principles and Guidelines on the Right to a Remedy recognize that business entities should provide reparations to people affected by corporate human rights abuses.¹⁷⁹

The right to an effective remedy encompasses adequate, effective, prompt, and appropriate remedies for harm suffered, including full reparation.¹⁸⁰ Under international law, reparation is a broad term that incorporates measures to restore the situation that would have existed without the wrongful act, as far as possible, and includes restitution, compensation, rehabilitation, satisfaction, and guarantees

177 Similar commitments are found in virtually all of the major international human rights instruments, including, for example, the International Covenant on Civil and Political Rights, Art. 2; the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 6; the Convention on the Rights of the Child, Art. 39; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14(1).

178 UN CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc. E/C.12/2011/1 (20 May 2011), 5.

179 *Basic Principles and Guidelines on the Right to a Remedy and Reparation* (UN Remedy Principles), G.A. Res. 60/147, UN Doc. A/RES/60/147 (Dec. 16, 2005), 15 (obligation to provide remedies applies to “legal persons” and other entities). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

180 UN Remedy Principles, 3. For extensive discussion of these basic reparation concepts, see generally UN Remedy Principles; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34 (Nov. 29, 1985); UN Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, 15-20, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) (detailing obligation to provide full remedies for human rights violations); UN CAT, General Comment No. 3, Implementation of article 14 by States parties (2012) (defining redress and reparations under international law). See also REDRESS, *Justice for Victims: The ICC’s Reparations Mandate* (2011). Available at: http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf (analysing the State obligation to provide reparation under major international treaties, and through the practice of the Human Rights Committee and regional human rights bodies).

of non-repetition.¹⁸¹ Reparation should be proportional to the gravity of the violations and the harm suffered.¹⁸²

- ❖ *Restitution* should restore the people affected by corporate abuses to the original situation before the violations occurred, including, for example, return to places of residence, restoration of employment, and return of property.
- ❖ *Compensation* must take into account any economically assessable damage, including physical or mental harm; lost opportunities, including employment, education and social benefits; property loss; loss of earnings, including loss of earning potential; moral damage; and costs of legal, medical and psychological services.
- ❖ *Rehabilitation* includes medical and psychological care as well as legal and social services.
- ❖ *Satisfaction* includes cessation of violations, full and public disclosure of the truth, and a public apology, including acknowledgement of the facts and acceptance of responsibility.
- ❖ *Guarantees of non-repetition* encompass a wide range of institutional reforms to prevent future violations, including law reform, education, and promotion of mechanisms to resolve future disputes.

United Nations Guiding Principles on Business and Human Rights

The UNGPs, in Principle 25, recognize that States must ensure that those affected by human rights abuses have access to effective remedies. The UNGPs also recognize that corporations have the responsibility to provide redress for human rights violations caused by their business operations.¹⁸³ But the UNGPs provide little detail on the content of an effective remedy, and, since they are non-binding principles, do not obligate either States or corporations to guarantee access to effective remedies.

181 The following discussion relies on the definition of “reparation” in the UN Remedy Principles, 18-23. See also: Maastricht Principles, 38; UN CRC, General Comment 16, 30, 31. The UNGPs also address the kinds of remedies required by international law: “Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.” Principle 25, Commentary.

182 UN Remedy Principles, 15.

183 See: UNGPs, Principles 11, 13, 15, 22.

State implementation

As discussed above, State compliance with the international law obligation to guarantee adequate, effective, appropriate remedies has been inconsistent at best. Individuals and communities impacted by corporate human rights abuses are rarely able to obtain any remedy at all, much less remedies that acknowledge violations of human rights, and comply with the obligation to protect against imminent harm, to ensure full reparations, and to provide for an apology, punishment of those responsible, and guarantees of non-repetition.¹⁸⁴

Components of the Proposal

The Treaty will need to state the components of an effective remedy and emphasize the State obligation to ensure the provision of adequate, effective, prompt, and appropriate remedies. This would involve requiring States to take concrete, targeted measures to, among other things:

Ensure the availability of interim or provision measures of protection

To avoid irreparable harm, communities faced with corporate human rights abuses must have quick and affordable access to interim measures to halt abusive activities and to prevent further violations, and those measures must be enforced by the State.

184 The Inter-American Court of Human Rights has developed an approach to remedies for indigenous peoples that recognizes collective rights, and has ordered a broad range of remedies. However, States have not consistently implemented the remedies order by the Court. Moreover, the Court's limited awards of monetary compensation have denied those harmed by the human rights violations full compensation. *See generally*: Antkowiak, T.M., 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', 25 *Duke Journal of Comparative & International Law* 1-80 (2014). Contreras-Garduño, D. & Rombouts, S. 'Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights', 27 *Utrecht Journal of International and European Law* 4-17 (2010).

Ensure reparation for people affected by corporate human rights abuses

In accordance with international law, reparation should include restitution, compensation, rehabilitation, and satisfaction, and be subject to effective implementation.

Ensure a means to prevent future abuses

Reparation includes guarantees of non-repetition.

Hold corporations and their employees accountable for any human rights abuses

An effective remedy includes sanctions against those responsible for the violations, both to punish them and to deter future violations.

Engage in international assistance and cooperation relevant to the facilitation of effective remedies for corporate human rights abuses.

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Remedial Mechanisms; Extraterritorial Obligations; Corporate Legal Liability; and Human Rights Due Diligence.

10. Remedial Mechanisms

KEY PROPOSAL

States must ensure that people affected by human rights violations connected with corporate activity have access to adequate, effective, prompt, and appropriate remedies.

Summary

All people affected by human rights violations have a right to an effective remedy. This has two components: procedural (a functional mechanism to seek a remedy) and substantive (a full remedy for the violation).¹⁸⁵ Remedies are necessary where people have been harmed by corporate activity, through, for example, death or injuries, destruction of their homes, displacement, environmental contamination, unjustified interference with their livelihoods, or inadequate or dangerous conditions at work. In practice, however, effective remedial mechanisms are rarely available. The Treaty offers the opportunity to express the State's obligation to take legislative, judicial and other measures to ensure that accessible mechanisms exist to offer effective remedies to those injured by corporate abuses.

¹⁸⁵The substance of remedies is discussed in Remedial Mechanisms proposal.

Relevance of this Issue for the Treaty

Despite the internationally protected right to an effective remedy, those impacted by corporate human rights abuses often find it difficult or impossible to obtain a remedy, because of both legal and practical obstacles¹⁸⁶

Existing remedial mechanisms are deeply flawed

The procedures that, in theory, offer remedies for corporate abuses are wholly inadequate in practice. Most are heavily influenced by corporations, and not responsive to community complaints. Company-based grievance procedures usually are designed to protect the corporation, not to provide access to appropriate remedies, and may improperly require complainants to waive other rights, including the right to go to court. State non-judicial remedies (for example, national human rights agencies, government procedures, OECD national contact points, etc) often consist of recommendations, not enforceable orders. Judicial remedies are central to an effective remedial system, but courts are often underfunded and unable to enforce judgments. Moreover, complex corporate structures and jurisdictional limitations in both host and home States may make it impossible to hold any corporate entity responsible.¹⁸⁷ International remedial mechanisms are rare and generally have no enforcement powers.

Where remedial mechanisms do exist, multiple practical obstacles prevent access to justice in practice

Those impacted by corporate human rights abuses are often unable to access remedies for many reasons, including lack of legal assistance; the expense of initiating a legal action; technical difficulty and cost of gathering evidence; and lack of information about corporate

¹⁸⁶For a thorough analysis of the obstacles to remedies for corporate human rights abuses, see: Zerk, J. *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies*, A report prepared for the Office of the UN High Commissioner for Human Rights, (2014); HRC, *Improving Accountability*; Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (2014); Skinner, G., McCorquodale, R. & De Schutter, O., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013).

¹⁸⁷Jurisdictional issues, extraterritorial obligations, and standards for corporate complicity are each addressed by other Treaty Initiative proposals.

operations and the availability of remedy mechanisms. These obstacles are particularly onerous for diverse sections of the population that often have additional cultural differences that exacerbate existing challenges accessing remedy mechanisms, particularly related to language and cultural unfamiliarity with accessing legal remedy mechanisms. In the rare cases in which those injured do obtain a judgment against a corporation, they may be unable to enforce that judgment.

The threat of violence or other retaliation prevents survivors of corporate abuses from making full use of opportunities to obtain remedies that do exist

Hundreds of human rights defenders have been killed in retaliation for their work.¹⁸⁸ In this operating environment it is not possible for human rights defenders to carry out their activities in safety.

Additional obstacles to remedies are discussed in other proposals

Additional Treaty Initiative proposals address lack of access to information, the standard applied to hold corporations liable when they are complicit in human rights abuses, due diligence obligations and States' extraterritorial obligations.

Relevant Legal Context

International and comparative law

Those injured by corporate human rights abuses have a right to equal access to a judicial remedy that provides fair, impartial proceedings before an independent tribunal, protected from corporate or political manipulation.¹⁸⁹ To be truly accessible in practice, international law requires that remedies must be affordable, including the costs of legal services and any other expenses. Legal systems should allow collective actions, to reduce the danger and cost of litigation. Judgments must be enforced, and the process must operate promptly and provide

188 For recent examples and ongoing issues, see: ESCR-Net, System of Solidarity, <https://www.escr-net.org/sos>; International Service for Human Rights, Corporate Accountability, <http://www.ishr.ch/news/corporate-accountability>.

189 For discussion of the international law norms discussed in this section, see: UN Remedy Principles, 2, 3, 12, 13; HRC, *Improving Accountability*, UN Doc. A/HRC/32/19 (May 10, 2016), ¶ 2; Amnesty International, *Injustice Incorporated*, *supra* note 2, at 17, 26-29.

timely remedies. People who seek to enforce these rights must be protected from physical or economic harm.

United Nations Guiding Principles on Business and Human Rights

Access to an effective remedy for corporate human rights abuses constitutes one of the three Pillars of the UNGPs. Principles 25 and 26 confirm that States have a duty to ensure access to remedies for corporate human rights abuses, emphasize the importance of judicial remedies, and recognize the many obstacles to access to remedies. Although the analysis is on point, the UNGPs require no actions to implement the norms or to remove the many barriers to remedies. States are reminded of their duties, but are not required to do anything in response. The UNGPs provide no protection for the situation faced by most of those injured by corporate abuses: a State that fails to comply with its obligation to provide remedies for such injuries. Further, the UNGPs rely heavily on the non-State mechanisms described in Principles 28-31: corporate grievance mechanisms and multi-stakeholder initiatives, voluntarily adopted by business enterprises.¹⁹⁰ Even if any of these were implemented as envisioned in the UNGPs, communities impacted by corporate abuses have little trust for initiatives developed and administered by the very entities responsible for their injuries.

State implementation

As noted above, in practice, individuals and communities impacted by corporate abuses often face insurmountable obstacles when they seek the remedies that are, on paper, guaranteed by international law. States have taken few, if any, steps to comply with the duties reflected in the UNGPs.¹⁹¹ The UN High Commissioner for Human

¹⁹⁰ As John Ruggie himself has written in an analysis of one such mechanism, the National Contact Points established by the Organization for Economic Cooperation and Development (OECD), “Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job by itself.” Ruggie, J.G. & Nelson, T., Human Rights and the OECD *Guidelines for Multinational Enterprises* (2015), 21.

¹⁹¹ For detailed assessments of implementation of the access to justice framework in multiple States, concluding that remedial mechanisms remain generally ineffective, see reports prepared by the International Commission of Jurists, on Brazil, China, Colombia, Democratic Republic of Congo, Guatemala, India, the Netherlands, Nigeria, Peru, the Philippines, Poland and South Africa. Available at <http://www.icj.org/category/publications/?theme=international-economic-relations>. For a similarly pessimistic study of access to remedies in the United Kingdom, see British Institute of International and Comparative Law,

Rights recently concluded that remedies for corporate abuses remain “elusive.”¹⁹² Multiple reports have confirmed the deficiencies of each of the remedial mechanisms recommended by the GPs. For example, in the absence of State oversight, operational-level grievances allow corporations to control the process and the remedy offered, offer no guarantee of enforceable or appropriate remedies, and often require participants to waive their right to take further legal action.¹⁹³ State non-judicial procedures, when available, are often limited to issuing reports or engaging corporations in voluntary mediation procedures.¹⁹⁴ And, as the UN High Commissioner for Human Rights has documented, States have not eliminated the multiple barriers that block effective judicial remedies in both host and home States.¹⁹⁵ Finally, no progress has been made toward creating an international mechanism that would provide some recourse when States fail to comply with their international law obligation to guarantee access to an effective remedy.

Components of the Proposal

In order to ensure that those impacted by human rights abuses connected with corporate activity have access to effective remedial mechanisms, the Treaty should outline State obligations in relation to the following:

Survey of the Provision in the UK of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises (2015). Available at: www.corporate-responsibility.org/wpcontent/uploads/2015/12/BIICLMcQuordale_uk_access_to_remedies.pdf.

192 HRC, *Improving Accountability*, 2.

193 See: SOMO, *The Patchwork of Non-Judicial Grievance Mechanisms: Addressing the Limitations of the Current Landscape* (2014); Rights and Accountability in Development (RAID), *Principles Without Justice: The Corporate Takeover of Human Rights* (March 2016). Available at: www.raid-uk.org/sites/default/files/principles_without_justice.pdf, 57; UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/26/25 (5 May 2014), 36-42.

194 See, for example: OHCHR, *Business and Human Rights: A Survey of NHRI Practices* (May 23 2008) (explaining the limited powers of National Human Rights Institutes). Available at: www.reports-and-materials.org/OHCHR-National-Human-Rights-Institutions-practices-Apr-2008.doc; OECD Watch, *Remedy Remains Rare* (2015) (documenting the inadequacies of the OECD National Contact Point system). Available at: http://www.oecdwatch.org/publications-en/Publication_4201.

195 HRC, *Improving Accountability*.

Address the conflict of interest inherent in non-State mechanisms

The Treaty should recognize the inherent conflict created when a business entity purports to regulate its own operations. If the Treaty includes non-State mechanisms as part of a range of possible remedial procedures, it should require that those mechanisms be subject to State and other forms of supervision in both design and operation, that they do not delay access to other remedies or require that participants waive their legal right to seek additional remedies, and that they protect the safety of participants.

Ensure availability of judicial remedies in both host and home States

States cannot comply with their obligation to provide effective remedies in the absence of judicial systems that provide fair, impartial proceedings before independent tribunals, protected from corporate or political manipulation. The Treaty should address both practical obstacles to judicial remedies and the legal barriers that make litigation against business entities difficult.

- a)-The Treaty should require State parties to take concrete, targeted steps to ensure the existence of efficient, quality, adequately funded judicial systems; provide legal, financial and other assistance to individuals and communities challenging corporate abuses (in order to address any financial and informational inequality between parties, and attentive to the needs of individuals, communities and peoples of heightened vulnerabilities); and protect the safety of those engaged in the legal process.
- b) The Treaty should address key legal obstacles to holding corporations accountable, including extraterritorial jurisdiction, parent company liability, due diligence obligations, and the standard necessary to show corporate complicity in abuses, each of which is addressed in a separate Treaty Initiative proposal.
- c)-The Treaty should address the criminal liability of corporations and corporate employees, as addressed in the Corporate Criminal Liability Proposal.

Establish an effective means of implementation, including a complementary international recourse mechanism

Individuals and communities impacted by corporate human rights abuses recognize that their own States are often unwilling or unable to provide remedies for the injuries they have suffered. As a result,

many specifically require the inclusion of an international mechanism to address corporate human rights abuses where domestic remedial mechanisms are unavailable or inadequate. As detailed above, while the means of implementation can take many forms, the system that is established must (a) effectively monitor State compliance with the duty to protect against the impairment of human rights enjoyment by corporations; and (b) have the authority to, acting in a complementary way to national and regional systems, investigate allegations of corporate impairment of human rights and deliver binding and enforceable decisions on States and corporations involved, in circumstances where State remedies are unavailable or inadequate.

Relationship to Other Key Proposals

This proposal touches on many other areas of the future Treaty, but in particular should be read in conjunction with the Key Proposals on: Effective Remedies; Extraterritorial Obligations; Corporate Legal Liability; and Human Rights Due Diligence.

International Network for Economic, Social and Cultural Rights

The International Network for Economic, Social and Cultural Rights (ESCR-Net) unites over 280 NGOs, grassroots groups, and advocates across 75 countries, facilitating strategic exchange, building solidarity, and coordinating collective advocacy to secure social and economic justice through human rights. ESCR-Net members define common strategies and advance joint action foremost through international working groups, including the Corporate Accountability Working Group (CAWG). CAWG coordinates collective actions, supports member-to-member capacity-building to challenge emblematic cases of corporate abuse, collectively challenges undue influence corporations exert on the decision-making of the state, and advocates for new accountability and remedy structures.

International Federation for Human Rights

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice. FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights. FIDH was established in 1922, and today unites 184 member organisations in more than 112 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level. Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

TREATY

INITIATIVE