**International Commission of Jurists**

**Proposals for Elements of a legally binding instrument on Transnational Corporations and other Business Enterprises**

**ADVANCE UNEDITED DOCUMENT- PART II**

**2. Obligations and responsibilities of States and business enterprises**

Both States and business enterprises (transnational or solely domestic) have their respective obligations and responsibilities independent from each other but interrelated. International human rights obligations for States are contained in the respective treaties or flow from international customary law, while the human rights responsibilities of business enterprises are sparse in legally binding instruments (such as certain ILO conventions), but have been spelled out to some extent in such non-treaty instruments as the Guiding Principles on Business and Human Rights (UNGP), the ILO Tripartite Declaration on Multinational Enterprises and Social Policy (ILO MNE Declaration).

It would seem appropriate that a new business and human rights treaty affirm clearly, in a section on general principles and as a matter of law, the foundational principles of those States obligations and business enterprises responsibilities. Those general obligations and responsibilities coalesce around the State duty to protect human rights, including against business abuse, and ensuring the business responsibility to respect all human rights. The UNGP are built on three pillars: the duty of States under international law to protect human rights against abuses by third parties, including business enterprises; the responsibility of business to respect all human rights; and the need to guarantee access to a remedy for those whose rights have been impacted by business conduct. Under the duty to protect, States, in assessing, adopting and implementing protective measures, including through legislation, have to take account of all of their international human rights legal obligations.

One of the principal areas the OEWG needs to address is the substantive scope (*rationae materiae*) of the prospective treaty: which particular rights and rights areas the treaty is to cover. It should be recognized that all States already have obligations to protect all human rights against the conduct by business enterprises in respect of which they have treaty or customary international law obligations. From both principled and practical perspectives, there is no strong rationale for the prospective treaty to exclude any of the international human rights recognised in core treaties from its ambit. The OEWG should be aware that adopting an exclusive focus on certain kind of violations- such as “gross human rights violations”- may ultimately operate to facilitate such an exclusion. Yet it is clear that all human rights are relevant for business operations and all rights are susceptible of been infringed by business conduct. This conclusion is affirmed by various authorities, including UN human rights treaty bodies who have indicated that the obligation to protect from business abuse applies to the range of rights covered in their respective treaties.[[1]](#footnote-1) To that end, the Committee on the Rights of the Child has recently adopted a General Comment on State Obligations regarding the Impact of the Business Sector on Human Rights,[[2]](#footnote-2) and the Committee on Economic, Social and Cultural Rights is presently contemplating a similar General Comment with respect to businesses in relation to State obligations under the Covenant on Economic, Social and Cultural Rights. For a new treaty on business and human rights to fail to absorb this *acquis* in international standards would be a regressive step.

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| The following elements should be included to reflect States and business respective obligations and responsibilities:* The reaffirmation of the general State duty to respect human rights and protect them against abuses by third parties, particularly business enterprises. This duty comprises the duty to take necessary and appropriate measures, including legislative, to ensure business enterprises domiciled in the concerned country respect human rights in their global operations (i.e. including those taking place abroad)
* The reaffirmation of the principle that transnational corporations and other business enterprises have a responsibility to respect all internationally recognized human rights.
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These principles, suggested as elements to be affirmed in the treaty, find support not only in existing international human rights treaties and the UNGP, but also in international and regional declarations and jurisprudence and recommendations of human rights authorities. UNGP foundational principles 1 and 2 restate the general obligation of states to protect all human rights, including extraterritorially, and principles 11 through 15 lend support to the business responsibility to respect all human rights. Those principles have drawn further support from the work of UN bodies, especially General Comment 16, and the Council of Europe recommendation of 2016.[[3]](#footnote-3)

**3. The responsibility of TNCs and other business enterprises to respect all human rights**

Pursuant to their general obligation to respect, transnational corporations and other Business Enterprises (TNC-OBE) should carry out a series of actions to discharge their responsibility to respect all human rights. These include, among other things, the adoption of policies or codes of conduct; undertaking human rights due diligence measures; and adopting and implementing effective remediation processes. Preventative measures adopted by TNC-OBE are necessary to avoid or reduce the number or scale of human rights abuse and the eventual need to stop, sanction and remedy misconduct. Prevention is in all cases necessary to complement the effectiveness of any sanctions regime.

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| The following elements should be included to operationalize the TNC-OBE responsibility to respect all human rights:TNC-OBE will have the responsibility to:* Design, adopt, and implement effective policies and due diligence processes to identify and address risks of human rights abuses in their global operations, and to mitigate and when appropriate remedy them.
* Design, adopt, and implement policies or codes of conduct in accordance with internationally recognized human rights standards and establish internal processes to verify actual compliance during business operations.
* Design, adopt, and undertake Human Rights impact assessments that cover all main areas of their operations, including global business operations, and are designed and implemented with the active participation of local communities and other stakeholders.
* Take measures to respect impact assessments carried out by local communities through legitimate internal processes and take measures to incorporate their findings and recommendations in the business operations.
* Carry out consultations with local communities, including indigenous peoples seeking their free, prior and informed consent before undertaking business activities that will impact their human rights.
* Report periodically on the steps taken to assess and address human rights impacts.
* The above measures should be adopted with due regard to the size, sector, operational context, ownership and structure of the business enterprise, and conform to internationally recognized human rights standards.

States must adopt legislative and other measures to provide a policy and legal framework that ensures business enterprises observe their human rights responsibilities described above. To this end, States must:* Adopt regulations and enforcement measures to ensure business enterprises take effective steps to fulfil their responsibilities, on a sector-by-sector basis. This would include the requirement to adopt an approved policy or code of conduct and human rights due diligence processes as conditions to access government contracts or financial support
* Exercise such regulatory activity extraterritorially, particularly where required under international law and standards.[[4]](#footnote-4)
* Establish a national authority to oversee business enterprises adopt a human rights policy or code of conduct that conforms with internationally recognized human rights standards; to this end, a model human rights code of conduct may be included in the prospective treaty as an annex or created later by an international monitoring body for the treaty
* The regulatory process for approval of licenses and permits for certain kind of business operations involving potentially hazardous activities for the enjoyment of human rights should include an obligation to obtain a social license to operate in the form of fully informed community consent.[[5]](#footnote-5)
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Under international human rights law, States are required to take measures to protect persons against the impairment of human rights by non-States actors, including business enterprises. This principle is also reflected in the UNGP. State action pursuant to international obligations to protect against the abusive conduct of non-State actors involves requiring business entities to assess, prevent and mitigate risks of rights abuses during their operations, and to take measures to remediate the damage when it occurs.

Companies must develop and implement robust human rights due diligence procedures to ensure human rights compliance. Due diligence analysis has been an area of growing attention in the business and human rights field, and the developments in this area may well be used as a basis to inform the development of elements in the treaty. UNGP Principle 15 provides that business enterprises “should have in place policies and processes” in order to meet their responsibility to respect, including “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”.

One critical area in the discussion and operationalization of human rights due diligence by companies is their scope, in particular the need to cover subsidiaries and suppliers or other commercial partners operating abroad. Some of the specific proposals draw inspiration from the UNGP and propose making human rights due diligence a legal requirement. For instance, *Coopération Internationale pour le Développement et la Solidarité* (CIDSE) has proposed that States must “make human rights due diligence a requirement for businesses, everywhere they operate”, and that remedies should be available “for cases where businesses do not meet this requirement and human rights violations occur.”[[6]](#footnote-6) Skinner, McCorquodale, and De Schutter advocate for the affirmation of “the duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations”, as part of the due diligence necessary to meet the corporate responsibility to respect human rights as set out in the UNGPs.[[7]](#footnote-7) Amnesty International has formulated similar recommendations.[[8]](#footnote-8) In addition, so as to increase access to information, the organization recommends that States “require companies to implement human rights due diligence processes”, including reporting on due diligence processes and impacts, and implementing “environmental, social and human rights impacts assessments”.[[9]](#footnote-9)

A White Paper for the American Bar Association outlines several options ranging from requiring businesses to report publicly on their human rights policies, risks, outcomes and indicators to requiring businesses to adopt policies, due diligence processes, human rights conditions in their supply chain contracts and remediation mechanisms, which could be considered during the debates within the OEWG.[[10]](#footnote-10)

State practice in this area is limited to a few initiatives as yet but is steadily growing. Legislation in the US and European countries requires disclosure or public reporting by companies, but is mostly directed to a limited number of rights areas, such as slavery, forced labour or abuses committed in conflict situations and limited to the largest companies.[[11]](#footnote-11)

A draft bill still under discussion in France’s Parliament would require businesses employing more than 5,000 people if their headquarters are in France or at least 10,000 people if their headquarters are in France or abroad, to adopt and implement a plan *de vigilance* requiring some form of due diligence. The plan would consist of reasonable measures to “identify and prevent risks of abuses to human rights and fundamental freedoms”, serious bodily and environmental harm or sanitary risks resulting from its own operations and from those of the corporations it controls directly or indirectly, those operations of sub-contractors or suppliers with whom it maintains a settled commercial relationship.[[12]](#footnote-12) The plans must be made public and included in the company’s non-financial annual report. Any person with a legitimate interest has a legal cause of action to demand the adoption of the plan and its publication. Lack of observance of the law may be punished with a fine up to 10 million Euros.

Human rights impact assessments, which may be part of a broader environmental and social impact assessment or stand alone, in particular in the area of extractive operations and land and agro-industries projects, should also be adopted as effective tools in the prevention of harm. Impact assessments should be conceived as part of a broader integrated due diligence process, also comprising the elements of mitigation of risks and external communication. However, at present most States only make use of environmental and social impact assessments as independent tools in certain economic areas.[[13]](#footnote-13) Impact assessments seem to be more common in the practice of financial institutions, although their focus on specific group rights tends to be limited.[[14]](#footnote-14) These are shortcomings that the new treaty should seek to address.

Participation and consultation in decision-making by individuals and communities that are at risk of adverse impacts on the enjoyment of their human rights, especially from large-scale development projects, is another crucial element. Community participation may be relevant to the implementation of all business enterprises responsibilities but consultation is particularly important in certain projects that may impact land, health, housing, water and food rights. In this respect, it should be underscored that the UN Declaration on the Rights of Indigenous People (UNDRIP) of 2007 recognizes that indigenous peoples have the right to participate in decision-making in matters impacting their human rights.[[15]](#footnote-15) States should consult and cooperate with indigenous peoples in order to obtain their free, prior and informed consent (FPIC) “before adopting and implementing legislative measures that may affect them”.[[16]](#footnote-16) While these standards are directly applicable to indigenous peoples through the Declaration, the underlying principles should be seen as similarly applicable to other affected individuals and communities.

As part of their general duty to protect, States should regulate on a sector-by-sector basis, to enhance business enterprises’ respect for human rights in their global operations. State agencies or authorities with responsibility to regulate the activities of businesses in particular sectors (e.g., communications, transportation, military, security, extractive industries, public utilities, land and agricultural, education) or in respect of certain forms of activity (e.g. labour, trade, investment, development, (bilateral and multilateral)) should adopt and implement enforceable rules with a view to ensuring human rights compliant practices by businesses within their ambit. Where significant gaps in regulatory authority exist in respect of certain sectors, States should adopt legislation to address these gaps.

A crucial area regarding the States’ obligation to protect concerns discharging that obligation extraterritorially. Under international human rights law, States have an obligation to respect, protect and fulfil human rights both within their territories and extraterritorially, although the nature and scope of territorial and extraterritorial obligations are not in all contexts and situations coterminous. This dimension of the State duty to protect has been distilled in Principle 25 of the Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, underlining the obligation of States to adopt and enforce measures to protect human rights through legal and other lawful means 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, in the State concerned.[[17]](#footnote-17)

1. See Human Rights Committee General Comment 31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004; Special Representative of the Secretary General on Business and Human Rights, Report on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035, 9 February 2007, paras. 10 and ff; See State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations’ core Human Rights Treaties Individual report on the ICCPR (Report No. III) Prepared for the mandate of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises with the support of the Office of the UN High Commissioner for Human Rights June 2007 [↑](#footnote-ref-1)
2. General Comment 16 Op cit note 13 [↑](#footnote-ref-2)
3. General Comment 16, Op Cit note 13 para.24-31; and Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, (Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies)*,* at <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2016)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true>, para 13, 15 and 16 [↑](#footnote-ref-3)
4. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, The Principles and Commentary are available at <http://www.icj.org/protecting-human-rights-beyond-borders/> (accessed 23 March 2014) at 25 [↑](#footnote-ref-4)
5. CIDSE, Human Rights Due Diligence: Policy Measures for effective implementation, September, 2013, at <http://www.fastenopfer.ch/data/media/dokumente/entwicklungspolitik/menschenrechte/cidse_hr_due_diligence_2013.pdf> p. 7 [↑](#footnote-ref-5)
6. Ibid p. 4 [↑](#footnote-ref-6)
7. Skinner, G, McCorquodale, R, De Schutter, O. “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business”, ICAR, CORE and ECCJ, 2013, p. 65 [↑](#footnote-ref-7)
8. Amnesty International, Injustice Incorporated: Corporate abuses and the Human Right to Remedy, 2014 p. 209 [↑](#footnote-ref-8)
9. ibid p. 210 [↑](#footnote-ref-9)
10. Cassel, D and Ramasastry, A., Op cit note 6 p. 18-19 [↑](#footnote-ref-10)
11. Directive 2014/95 of the European Union Parliament and of the Council of 22 October 2014; Modern Slavery Act 2015, United Kingdom, <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> [↑](#footnote-ref-11)
12. Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. (free ICJ translation from original French) [↑](#footnote-ref-12)
13. For instance, Sweden guidance on EIA at <https://www.slu.se/Documents/externwebben/centrumbildningar-projekt/mkb-centrum%20dokument/Helpdesk/Sustainable%20development%20guidelines%202002.pdf> last accessed 20/11/14; and also the regional Welsh Government Policy on Health impact assessment in open cast mining, at <http://wales.gov.uk/docs/desh/publications/090602mimppscoaltan1en.pdf> last accessed 13/02/15 [↑](#footnote-ref-13)
14. ICJ, Financial Institutions and the Rights of the Child: An Overview of Policies and Accountability Mechanisms, Geneva, 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/FINANCE-CHILDelecversion.pdf> [↑](#footnote-ref-14)
15. United Nations Declaration on the Rights of Indigenous People (UNDRIP), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 September 2007), art. 18 [↑](#footnote-ref-15)
16. Id. art. 19 [↑](#footnote-ref-16)
17. Maastricht Principles, 25:

“a) where the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, 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, in the State concerned; d) 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; e) where any conduct impairing [human] rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.” [↑](#footnote-ref-17)