**International Commission of Jurists**

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

**ADVANCE UNEDITED DOCUMENT- PART IV**

*Corporate Criminal liability*

Although corporate criminal responsibility is not yet universally accepted, the underlying principle *societas non delinquere potest* (society cannot commit a crime) is in retreat in all regions of the world and a growing number of countries have now accepted some form of corporate criminal responsibility or its equivalent through administrative procedures. A comparative research commissioned by the European Union in relation to criminal legal liability of legal entities (including business enterprises)[[1]](#footnote-1) also found that 50 percent of EU Member States have introduced general criminal liability in their legal systems and 41 percent recognize criminal liability of legal entities only for specific offences. Among those States that recognize only administrative liability of legal entities, 39 percent have introduced general administrative liability, whereas 33 percent have liability for specific offences. States that adopt legal liability of legal entities only for specific offences do so mostly with regard to trafficking in human beings, sexual exploitation of children and child pornography, environmental crime, illicit trade in human organs and racism and xenophobia.[[2]](#footnote-2) There is a noticeable correlation between offences recognised in domestic law and the international treaties that explicitly require States to establish legal person liability for such offences. But it is clear that corporate criminal liability in many countries does not exist and where it exists covers only a heterogeneous set of serious human rights abuses and not others.

The doctrinal concepts or tests used to attribute criminal responsibility to a corporation also differ across jurisdictions. Some States use some form of theory of identification, whereby the acts and mental state (*mens rea*) of the manager or CEO may be treated as the “directing mind” of the corporation and this mental state is attributed to the corporation. Others use the theory of *respondat* *superior* (or vicarious liability) whereby the company as employer is responsible for the acts of its subordinates, as in the relationship of employer-employee or superior-subordinate. A third group uses a more novel concept of “corporate culture” to identify the corporate policies and procedures that have created a culture permissive or conducive to the commission of the offense. States use one or a combination of these approaches.[[3]](#footnote-3)

Because the practice of states in relation to corporate criminal responsibility is too limited, divergent and recent, it is difficult and probably counterproductive to require States to adopt any particular doctrine as a general test for attribution of responsibility. The most practical option at this stage is to allow states enough flexibility in that regard taking into account the need to ensure effective legal accountability of businesses enterprises.

In all cases, the offences have to be defined with sufficient clarity to meet the requirements of legality.

The ICJ recommends as elements of the treaty:

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| States party to the agreement must adopt effective legislative and administrative measures, in accordance with their national legal systems and principles, to establish in law the legal liability of business enterprises, in particular corporations, subject to their jurisdiction for business conduct that results in harm to human rights. Such responsibility should, as appropriate, be criminal, civil or administrative.  States must adopt measures to establish criminal responsibility or its equivalent for business enterprises subject to their jurisdiction for business-related human rights offences.  The following violations recognized as crimes under international law and for which international law require the imposition of criminal sanctions should be incorporated in national corporate criminal law:   * war crimes, crimes against humanity and genocide (as defined under international law in such sources as the grave breach provisions of the 1949 Geneva Conventions and 1977 Additional Protocols, the Rome Statute for the International Criminal Court, and customary international humanitarian and human rights law). * torture, * cruel, inhuman or degrading treatment, * enforced disappearance, * extrajudicial execution, * slavery and slavery-like offences, * forced labour and similar forms of forced labour, * forced displacement of people, * forced eviction, * the use of child soldiers * sexual violence.[[4]](#footnote-4)   States party must adopt legislative or other necessary measures to make applicable to business corporations the crimes recognized in their domestic legislation.  The criminal responsibility of the business corporation does not exclude the criminal responsibility of company directors, managers or employees for their own conduct that constitutes a crime under the present treaty. The criminal responsibility of the business corporation should be independent from the finding of individual criminal responsibility of one of its members.  Irrespective of whether they are directed against natural or legal persons, investigations should be adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation. There is a duty to prosecute where the outcome of an investigation warrants this. Victims are entitled to request an effective official investigation, and any decision not to start an investigation, or to stay an investigation or prosecution should be sufficiently reasoned.  States should adopt legislative and other measures to ensure that the legal persons found responsible for the commission of offences defined in the treaty shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. A model law or appendix to the treaty may list the sanctions and penalties that can potentially be applied.  The treaty should also provide for States to adopt legislative and other measures to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal or other offences established in the treaty, or property the value of which corresponds to such proceeds. |

The doctrines on penalties and sanctions have developed mainly in relation to natural persons and States, with those corresponding to legal persons still largely underdeveloped. However, adequate, effective and proportional penalties play important functions in relation to those legal persons, in particular a dissuasive function. Sanctions and penalties have also a remedial function since part or all of the penalty may serve to repair the harm caused. Economic or monetary penalties are usually appropriate to target economic actors, but other sanctions such as temporary suspension, exclusion from economic or financial benefits or services provided by the government or the black-listing of the company can also be effective and dissuasive.

*Civil liability for business enterprises*

Laws providing for civil remedies are common to most legal systems in the world, and serve as significant tools to redress harm committed by legal persons.[[5]](#footnote-5) However, a number of substantive, procedural and practical obstacles often operate to undermine the potential of civil remedies as an effective avenue to hold companies legally responsible for the harm committed in their operations, problems that become especially acute when the harm is produced in the context of business transnational (cross-border operations). Several reports, including by the ICJ, have analysed the nature and import of those obstacles in detail.[[6]](#footnote-6) They range from limitations on the courts to exercise jurisdiction over subsidiaries, the use of doctrines such as *Forum non conveniens*, to the lack of clarity as to the substantive civil law that applies in cross-border cases and the conditions under which parent or controlling companies should bear responsibility when their subsidiaries or controlled company commits human rights abuse. All elements considered, there is a strong unbalance between rights and privileges granted to transnational business and the relatively weak regime of private law to be used in holding them accountable. For instance, proving the existence of negligence on the part of the parent company requires a number of elements that are difficult to obtain by the plaintiffs, accentuating their position of vulnerability vis-à-vis the company. While it may be challenging for the treaty negotiators to address all specific aspects pertaining to the operation of civil remedies in a transnational context, mostly dealt with by private international law, the prospective treaty can and must make a contribution to the potential use of private law as a means to redress human rights harm.

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| States party should adopt legal or other necessary measures to establish the civil responsibility of the business enterprise for their conduct that results in harm to rights guaranteed under their international obligations and rights recognized under domestic law.  Business enterprises that have entered into commercial contracts with the State should not be allowed to invoke state immunities or privileges as shields against civil legal liability.  The law of civil remedies should contemplate more use of strict liability regimes, where the harm is serious, the company carries out hazardous operations and the societal value to protect is especially important with a view to afford a stronger guarantee of redress to the victim of harm.  Civil responsibility of the business enterprise should be separate and independent from the civil liability of individual members or employees of the company, who themselves may also be held individually liable.  Civil liability of the business enterprise should not be made contingent upon the finding of criminal responsibility or its functional equivalent of the same actor. |

These elements should enhance the protective function of the law of civil remedies in respect to the broad range of potential human rights abuses by business enterprises, and provide causes of action to the victims of harm relating to the same rights. They find support in recommendations made in OHCHR Guidance, Policy Objective 12.1, 12.6 and 12.7. Further, the Council of Europe also recommends that human rights abuses by business enterprises give rise to civil liability under respective laws (rec. 32), and that business enterprises that are owned, controlled or otherwise have entered into commercial contracts with States to provide public services should refrain from invoking immunities to be sued in court.[[7]](#footnote-7)

*Other public law tools establishing legal liability of business enterprises*

Specific laws on consumer protection, environmental harm, employment relations also generally establish grounds of legal liability for corporate bodies, which similar to the law of civil remedies may also fulfil the function of protecting rights without using the term explicitly. Many offences under these special areas are generally dealt with through administrative procedures that may end with the imposition of administrative sanctions that typically include suspension of operations or licenses, cancellation, fines or eventually blacklisting. The sanctions are based on the breach of regulatory requirements and procedures (i.e. consultation with local communities, impact assessments, etc).

1. *Liability of Legal persons for offences in the EU*, G. Vermeulen, W. De Bondt, Ch. Ryckman, IRCP- Series, Vol. 44, Antwerpen, 2012- p. 79 and ff. [↑](#footnote-ref-1)
2. Ibid. p. 83 [↑](#footnote-ref-2)
3. Wells, Celia, “Corporate Liability Principles” paper for the ICJ Panel on Corporate Complicity (on file); Stewart, James G. Corporate war crimes, Open Society Justice Initiative, 2012. [↑](#footnote-ref-3)
4. See, for instance, Convention against Torture and other cruel, inhuman or degrading treatment or punishment (Art. 4); International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 7 and 25); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Art. 3); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Art. 4); Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Art. 5); Inter-American Convention to Prevent and Punish Torture (Art. 6); Inter-American Convention on Forced Disappearance of Persons (Art. III); and Inter -American Convention on the Prevention, Punishment and Eradication of Violence against Women (Art. 7). See also: Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 1); Declaration on the Elimination of Violence against Women (Art. 4); Declaration on the Protection of All Persons from Enforced Disappearance (Art. 4); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principle 7). The UN Human Rights Committee has affirmed in its General Comment 31 that for certain obligations under the ICCPR there is an obligation for States to criminalize, at the very least, conducted amounting a violation of the right to life (eg, extrajudicial executions), torture and cruel, inhuman or degrading treatment or punishment and enforced. 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, para 18; Human Rights Council, Basic Principles and Guidelines on Development based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Document No. A/HRC/4/18. Online Version: <http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf>; UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity (UN Impunity Principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005; Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies, available at <http://www.coe.int/t/dgi/publications/others/h-inf_2011_7en.pdf> [↑](#footnote-ref-4)
5. Corporate Complicity & Legal Accountability, Report of the ICJ Panel of Legal Experts, 3 vols, Geneva, 2008, vol. 3 Civil Remedies [↑](#footnote-ref-5)
6. ICJ, Needs and Options, Op cit note 3; Skinner; McCoquordale and De Schutter, Op Cit note 21; Human Rights in Business Project, Op cit note 34 [↑](#footnote-ref-6)
7. OHCHR Guidance, Policy Objective 12; Council of Europe Recommendation 2016/3, at 32 and 37 [↑](#footnote-ref-7)