**International Commission of Jurists**

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

**ADVANCE UNEDITED DOCUMENT- PART I**

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On 26 June 2014, the United Nations Human Rights Council (HRC) adopted Resolution 26/9 establishing an “open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” with the mandate to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (OP1).

Resolution 26/9 set out a road map for the work of the OEIWG, with the HRC deciding that the first two sessions would “be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument” (OP2) and the first meeting would collect inputs on “possible principles, scope and elements” of such instrument. The Chairperson-rapporteur was tasked with the preparation of elements for a treaty for negotiations to start at the third annual session (in principle, in 2017).[[1]](#footnote-1)

The first session of the OEIWG took place from 6 to 10 July 2015 with the attendance of a number of delegates from governments, international governmental organizations, such as OECD, Council of Europe, International labour Organization, and UNCTAD, national human rights institutions and non-governmental organizations with ECOSOC status. The Report of that session was presented to the Human Rights Council in March 2016.[[2]](#footnote-2) The second session will take place between 24 and 28 October 2016.

The International Commission of Jurists supports the objective of establishing an international legally binding instrument on transnational corporations and other business enterprises, with a focus on business accountability and access to effective remedies for human rights abuses by business enterprises. There is a substantial international protection gap to be filled in this respect, on which the ICJ has previously commented extensively.[[3]](#footnote-3) It is with a view to closing this gap and ensuring that international human rights law can optimally fulfil its protective function that the ICJ is engaging in the present treaty process.

This paper proposes a series of substantive elements that the ICJ considers will be key to an effective treaty as a contribution to the ongoing discussions about the future instrument. It does not intend to be exhaustive as to such elements. The ICJ has already published a paper focused on issues of scope of businesses to be addressed in the treaty, in particular the meaning or “transnational corporations (TNCs) and other business enterprises” a question which remains unresolved and is contentious in the OEIWG discussions.[[4]](#footnote-4) The present paper will focus on the possible content of the prospective treaty.

**1. General remarks on approach and objectives of the treaty**

There are two issues that need clarification before proceeding with proposals as to contents. The first concerns the question of which kind of entity the duties established in the treaty are to be addressed: States or businesses? The second is in relation to proposals that have arisen on the possibility of creating an international tribunal with jurisdiction over claims against business enterprises.

1.1 The nature of the obligations of business enterprises

There is considerable debate as to whether a global agreement on business and human rights should establish obligations only for States arising from their duty to protect against the human rights impacts of business enterprises (which could also be seen as entailing indirect obligations for companies), or duties that would be directly incumbent on companies themselves.

The ICJ considers this dichotomy to be misconceived and not the most helpful way in which to frame the discourse. On the one hand, any treaty surely should set out standards of conduct for businesses, as well as for States. On the other hand, the task of supervising, regulating and enforcing any such standards and providing remedies for their breach necessarily will have to fall on States. Aside from the legal, conceptual and practical difficulties that would arise, there is simply no international governance machinery that would be practically capable of fully implementing an international agreement without the concourse of domestic institutions and mechanisms. Even if proposals to establish international remedial mechanisms for abuses were to be adopted, these would likely have to complement first instance remedies at the domestic level that proved unavailable, inaccessible or ineffective.

While some have suggested that a new form of international law making is required that would directly engage the responsibilities of companies, many of the proposals offered by both States and civil society embrace an approach more in line with commonly accepted understandings of international law. For instance, a 2013 statement endorsed by a platform of 620 civil society organizations, including the ICJ, as well as hundreds of individuals called for a treaty that affirms “the applicability of human rights obligations to the operations of transnational corporations and other business enterprises”, and in which “States provide for legal liability for business enterprises for acts or omissions that infringe human rights”.[[5]](#footnote-5) This statement calls for international standards that would make human rights applicable to business enterprises without being explicit about whether those obligations would be directly or indirectly binding onto business. The statement does however make clear that States should have a key role in their domestic enactment and implementation. Therefore, the following set of proposals will focus on both obligations for States in relation to business enterprises and for standards regarding business enterprises conduct that needs to be implemented through State-based mechanisms.

1.2 Calls for an international tribunal for corporations

Several advocates in the field of business and human rights have suggested the establishment of an international tribunal or court to try corporations for cases of human rights abuses.[[6]](#footnote-6) The idea has not been the subject of detailed elaboration or dedicated discussion either in the OEWG or other bodies of the UN Human Rights Council. The idea of an international tribunal with jurisdiction over corporations is not new and should be understood in the context of the need to fill accountability gaps that result from weak or dysfunctional national legal and judicial systems. In this respect, irrespective of whether a tribunal would be able to pursue a significant number of cases, international justice is still an important avenue to ensure justice and remedies for victims of rights violations because of the impact of an international judicial authority’s decisions on national laws and procedures that tend to align themselves with the requirements and jurisprudence generated by such tribunals.[[7]](#footnote-7)

Proposals by experts made so far include the initiative for a World Court of Human Rights, whose proponents initially suggested it would have also jurisdiction on corporate bodies.[[8]](#footnote-8) A more recent initiative has proposed an International Arbitral Tribunal.[[9]](#footnote-9) At the negotiations of the Rome Statute for an International Criminal Court France proposed an amendment, supported by some State delegations, to include corporations within the jurisdiction of the new court, but it was not successful.[[10]](#footnote-10) At the regional level, a new Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Article 46C) expands the jurisdiction of the Court to try a number of crimes when committed by corporations.[[11]](#footnote-11)

While the need and the potential contribution of an international justice mechanism to the protection of human rights in the context of corporate operations may be clear, the creation of such international tribunal faces a series of challenges that need to be tackled first. One of them is the creation of a body of international law that such tribunal would eventually apply. This is closely linked to the question of whether such a court would be one of civil or criminal nature or both.[[12]](#footnote-12) It may be argued that the treaty itself would contain such international law, but framing the discussions on the treaty with an international tribunal as main objective would entail an early choice of format that will unavoidably leave outside of the discussions a number of key issues that are addressed, for instance, in the present paper. These issues are regarded as crucial including by the same proponents of an international tribunal. Another consideration, not a minor one, is the political support that will be needed, associated also to the financial costs to be incurred. To date, there is no evident support among States for such a court. The current international environment of certain “fatigue” of international courts, as well as the fiscal austerity affecting the developed economies that are most likely to finance such judicial enterprise suggest that these debates may be suitably better postponed for a later stage after a first legally binding instrument is concluded and is in force or, alternatively, be reserved for discussions on an additional protocol to the main treaty.

1.3 The objectives of the agreement

The ICJ supports a legally binding instrument with a strong focus on legal accountability of TNCs and other business enterprises and remedies for the victims in cases of abuses.

The content of the provisions in the new treaty are likely to be influenced by content and language in existing and past instruments in the same or connected fields. Some of these instruments, although not of binding character may contain elements that reflect settled international law and/or enjoy wide support such as the UN Guiding Principles on Business and Human Rights that was adopted by consensus of the Human Rights Council in 2011, and the 2003 UN Sub-Commission Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which while not adopted or universally accepted, did garner substantial support among human rights stakeholders. Other instruments to consider include the ILO Tripartite Declaration on Social Policy and Multinational Enterprises.[[13]](#footnote-13)

There are also a number of global and regional instruments and jurisprudence that have partially addressed some aspects of business and human rights.[[14]](#footnote-14)

In terms of format, the ICJ favours a stand-alone general treaty, leaving open the possibility that additional or optional protocols addressing particular sector-specific or normative elements, or creating international justice mechanism may follow. To adequately address the main pressing issues in the field of business and human rights and, at the same time, address the wide diversity of business enterprises’ size and contexts of operation the prospective treaty will probably have to be one of general coverage while providing also for clear and meaningful obligations. This treaty should have at least the following objectives, which should be stated in the main text of the treaty:

* To affirm, as legal principles, the basic human rights duties of States and business enterprises,
* To create an international framework to facilitate national level preventive efforts tackling business human rights abuse and legal accountability of TNCs and other business enterprises,
* To enhance a system of national remedies for victims of human rights abuse perpetrated directly or indirectly by business enterprises,
* To provide for an international framework for international cooperation, including mutual legal assistance to tackle business enterprises human rights-related abuses

The proposals and commentary below outlines in a non-exhaustive manner some of the principal issues and their respective content in the treaty. They are elaborated in the form of elements and/or issues that might be addressed, but do not suggest specific textual language for treaty purposes.

1. Human Rights Council, Resolution A7HRC/RES/26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9> [↑](#footnote-ref-1)
2. See Human Rights Council, Report of the Chairperson –Rapporteur on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument (A/HRC/31/50) <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/50> [↑](#footnote-ref-2)
3. ICJ, Needs and Options for a New International Instrument in the field of business and human rights, Geneva, June 2014, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf> [↑](#footnote-ref-3)
4. ICJ The scope of a legally binding instrument on business and human rights: Transnational corporations and other business enterprises, May 2015, available at:<http://icj2.wpengine.com/wp-content/uploads/2015/07/Global-Report-ScopeBusinessTreaty-2015.pdf> (accessed 30 September 2016) [↑](#footnote-ref-4)
5. Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, <http://www.treatymovement.com/statement-2013> (accessed 20 June 2016) [↑](#footnote-ref-5)
6. See Cassell, D and Ramasastry, A (2016) "White Paper: Options for a Treaty on Business and Human Rights," Notre Dame Journal of International & Comparative Law: Vol. 6:1; Gallegos, L.& Uribe, D. The Next Step against Corporate Impunity: A World Court on Business and Human Rights? *Harvard Law Review*, 2016 vol. 57 at 7 [↑](#footnote-ref-6)
7. Needs and Options Op cit note 3, p. 38 [↑](#footnote-ref-7)
8. Novak, M et al “A World Court of Human Rights- Consolidated Draft Statute and Commentary, May 2010, available at <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf>. See also current proposals of a court without jurisdiction over corporate bodies for the moment, Swiss Initiative, Agenda for Human Rights, project on a World Court for Human Rights, <http://www.udhr60.ch/research.html>; see also International Commission of Jurists, Towards a World Court of Human Rights, December 2011, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf> [↑](#footnote-ref-8)
9. Cronstedt, Chambers, Margolis, Ronnegard, Thompson and Tyler, An International Arbitration Tribunal On Business & Human Rights – Reshaping The Judiciary, April 2014, available at: <http://www.globalgovernancewatch.org/docLib/20140430_International_Arbitration_Tribunal_BHR.pdf> [↑](#footnote-ref-9)
10. Clapham, A. ‘The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in *Liability of Multinational Corporations under International Law*, ed. Menno T. Kamminga and Saman Zia-Zarifi (Kluwer Law International, 2000), 139–96. [↑](#footnote-ref-10)
11. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Min/7(I) Rev. 1; In: The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, EX.CL/846(XXV) 20 -24 June 2014 [↑](#footnote-ref-11)
12. Cassel & Ramasastry, Op cit note 6, p. 29-33 [↑](#footnote-ref-12)
13. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, annexed to Report A/HRC/17/31; Responsibilities of Transnational Corporations and Other Business enterprises with regard to Human Rights, Sub-commission Resolution 2003/16, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003; Committee on the Rights of the Child, General Comment 16 on State obligations regarding the impact of the business sector on children’s rights, UN Doc. CRC/C/GC/16, 17 April 2013. See also, ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy at <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> ; OECD Guidelines for Multinational Enterprises at <http://mneguidelines.oecd.org/guidelines/> [↑](#footnote-ref-13)
14. Optional Protocol to the Convention on the Rights of the Child on the sale of children,   
    child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002; United Nations Convention against Transnational Organized Crime of 15 November 2000, and the United Nations Convention against Corruption of 31 October 2003; Criminal Law Convention on Corruption (ETS No. 173), the Convention on Cybercrime (ETS No. 185), the Convention on Action against Human Trafficking (ETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201), the Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS No. 210) [↑](#footnote-ref-14)