**International Commission of Jurists**

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

**ADVANCE UNEDITED DOCUMENT-PART IX**

**ANNEX**

**CONSOLIDATED SET OF RECOMMENDATIONS FOR ELEMENTS OF A TREATY ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES**

**1. Objectives of the treaty**

This treaty should have at least the following objectives, which should be stated in the 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

**2. 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.

**3. The responsibility of TNC-OBE 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.
* 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.

**4. Legal liability of TNC-OBE**

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.

*Criminal responsibility*

* 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.
* 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.

*Civil responsibility*

* 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.

**4.1 Responsibility of the parent company and the supply chain**

States should adopt measures to make possible the civil liability of business enterprises based in their jurisdiction for their contribution to human rights harm caused by business corporations under its ownership or control. To that end:

* Incorporate in their statutes relating to civil proceedings a rebuttable presumption of control by the parent company of the subsidiary’s operation that caused harm. This presumption would operate in situations where the parent exercises general control in the sense of tax, accounting or competition law (control of majority of shares or voting rights, right to appoint the majority of managers, or the power to exercise dominant influence).
* Incorporate in their laws an obligation for business enterprises under their jurisdiction to conduct human rights due diligence that covers at least the operations of business enterprises domiciled in other countries and that are under their ownership or control.

States should adopt measures to ensure that their national legislation on corporate criminal liability contemplates liability for accessory responsibility, including various forms of participation in the crime committed by another agent, including “complicity”. The corporate liability for complicity should not be made contingent to the existence of the equivalent substantive criminal law in the country where the principal perpetrator committed the crime.

**5. Access to justice and effective remedy**

* States must provide in law for prompt, accessible and effective remedies, including judicial remedies, as against both State authorities and businesses, for those who claim that their rights have been violated or infringed. The right of action must arise in relation to all rights guaranteed under international law and should also extend to those provided for under the domestic law of the concerned States.
* In cases where a State or a State agent is accused of having participated in or otherwise of complicity with the abusive conduct of a business, the principle that the victim has a right to an effective remedy and reparation from the State should be given effect, in accordance with the principal human rights treaties and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.
* Consistent with basic principles of State responsibility, the responsibility of the State will also be engaged and subject to remedial action in circumstances where a business is acting on the instructions or under the direction or control of the State; or where a business is empowered to exercise elements of governmental authority and has acted in such capacity when committing the abuse.
* In respect of remedies for abuse or misconduct by businesses, judicial remedies must always be provided where the misconduct rises to the level of a serious crime and other public law offences. For less serious misconduct, non judicial remedies may be provided, including company grievance procedures or similar mechanisms in the first instance that are fully compatible and do not prejudice the right to an effective judicial remedy.
* The State must provide for access to a judicial remedy, or, at a minimum an impartial administrative remedy the decisions of which must be subject to judicial review.

Civil remedies

* States should ensure in law that judiciaries are afforded the necessary jurisdictional scope to consider civil claims concerning human rights abuses alleged to have been committed by business enterprises, including in their global operations. To this end, States should ensure that their laws:
* Grant domestic courts jurisdiction over claims concerning business enterprises domiciled within their jurisdiction.
* Grant domestic courts jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of companies domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.
* Ensure that their domestic courts are able to exercise jurisdiction over civil claims concerning business-related human rights abuse against business enterprises not domiciled within the jurisdiction of the state if no other effective forum guaranteeing fair trial is available and there is sufficiently close connection to the state concerned.
* States must take effective measures, including legislative measures, to ensure effective access to remedial mechanisms, overcoming existing barriers. To this end, States should grant the wider possible right to bring legal suits to individuals and groups, including minors and developing collective complaints.
* States should ensure that their legal systems guarantee the principle of equality of arms, including in proceedings concerning civil claims against business enterprises over which their domestic courts have jurisdiction. This should include the provision of legal aid.
* States should ensure that their civil procedures allow access to information in the possession of the defendant if such information is relevant to substantiating claims of business-related human rights abuses against enterprises under their jurisdiction.

**6. International cooperation for investigation and enforcement**

* The general obligation of States party to cooperate with and provide the necessary and mutual legal assistance in respect to identification, investigation, prosecution and enforcement of relevant judicial orders in cases of human rights abuses committed by or with the participation of business enterprises under their jurisdiction.
* States should enter into bilateral or multilateral arrangements to enable and facilitate the request and lending of mutual legal assistance between their law enforcement bodies and to enable the latter to carry out joint or coordinated cross-border investigations when necessary, or the gathering of evidence for use in civil claims proceedings.
* States party should establish mechanisms, jointly or in a coordinated fashion with other States party, to facilitate the exchange of information and the request and provision of legal assistance,
* States should provide adequate training, information and support to their law enforcement agencies and judicial bodies to make efficient use of arrangement for mutual legal assistance, through the establishment of networks, holding of workshops and other initiatives.

**7. National bodies for promotion, implementation and monitoring**

The prospective treaty may require states to establish a national authority with cross-sector and social representation (or entrust this functions to existing bodies or institutions) with, inter alia, the following functions:

* Review, advise and assist with the adoption by business enterprises of a human rights policy or code of conduct that conforms with internationally recognized human rights standards (a 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)
* Carry out in depth research, promote training and other capacity building of relevant stakeholders
* Receive information and communications regarding the human rights impact of business enterprises in the country, and carry out inquiries especially where systematic or widespread patterns of abuse are manifest
* Provide advice on accessing legal aid and other support to people who have a claim to make before the judiciary or law enforcement agencies,
* Lead in the development and establishment of national action plans on business and human rights, and on its periodic evaluation and update.
* Report periodically to relevant international bodies and mechanisms, including the supervisory system of the present treaty

The establishment of a national action plan for the implementation of the prospective treaty, taking into account other existing international obligations and commitments.

**8. International Supervisory and Monitoring Mechanism**

* The creation of a Committee of experts (approx. 10 persons), appointed by States parties in the conference of States party, by proposals from States, NGOs with ECOSOC status.
* The Committee should receive periodic reports from States party about their implementation of their obligations under the treaty. The Committee may request both comprehensive and/or focussed reports on specific areas of concern.
* The Committee may also receive reports from business enterprises that have adhered to the Code of Conduct annexed to the present treaty and wish to have their implementation reviewed by the Committee.
* The Committee (or a sub set of it) can carry out country visits to evaluate the implementation of the treaty, assess the challenges and issue tailored recommendations with specific timeframes.
* The Committee, among other functions, should be given the competency to receive and consider communications containing information about serious abuses of human rights caused or contributed to by business enterprises and, where a particularly serious, widespread or systematic problem seems evident, it may establish an inquiry with in-country fact finding and reporting with recommendations. The Committee should be given the possibility and resources to have recourse to external expertise and advisory services to carry out this mandate.

States must implement in good faith the findings and recommendations of the Committee and shall adopt the necessary measures to enforce them at the domestic level.