**International Commission of Jurists**

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

**ADVANCE UNEDITED DOCUMENT- PART III**

**4. Legal accountability of TNCs and other business enterprises**

The obligation of States to establish an effective legal framework for legal accountability of business enterprises for their causing or contributing to human rights abuses must be considered as among the most important objectives of the prospective treaty. Addressing the legal responsibility of the potential perpetrators of human rights abuses is also closely linked to the realization of the right of victims to an effective remedy and reparation. Ensuring accountability can constitute a component of reparation, as well as provide for the condition by which remedies may be achieved.

Availability and effectiveness of remedies to provide redress to those who suffer harm as a result of the acts or omissions of business enterprises is the area where there is the most pressing need for action. This is an area that has been placed as a priority area by civil society groups, including the ICJ, and also by international organizations.[[1]](#footnote-1) In 2016, the Office of the High Commissioner for Human Rights published its final report and guidance on business accountability and access to remedy and the Council of Europe’s Committee of Ministers adopted a set of recommendations that focus heavily on legal remedies.[[2]](#footnote-2) In addition, several academic research projects have made important contributions to clarify the problems and outline some possible solutions.[[3]](#footnote-3) There is thus a wealth of supportive material that can usefully feed into the deliberations of the OEWG regarding the legal accountability of business enterprises.

It is therefore necessary to define the kind of conduct that would trigger legal responsibility for business enterprises, within the terms of the treaty. The engagement of such liability would then necessarily give rise to the responsibility to provide redress to the victim.

There is currently no general international legal regime on corporate liability for human rights abuses, although it has been asserted in ATS litigation in the United States, that general international law (the “law of Nations”) already provides a subject matter basis for corporate criminal and civil liability.

Despite the importance of legal accountability and access to effective remedies against business abuses, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography’s (OPSC) Article 3(4), is the only human rights treaty that provide expressly for legal accountability (criminal, civil or administrative) of legal entities, including business corporations.[[4]](#footnote-4)

The OPSC draws on provisions incorporated in the UN Conventions on combating corruption and organized crime.[[5]](#footnote-5) There are several other conventions adopted within the framework of the Council of Europe that provide for legal liability of legal persons. These include the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health; the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; the Convention on Action Against Trafficking in Human Beings; and the Convention on Cybercrime.[[6]](#footnote-6)

These Conventions have the advantage of addressing business as legal persons with their own rights and obligations, besides recognizing the importance of individual criminal responsibility of managers and directors. At the same time, they generally adopt a flexible system of legal responsibility for these legal persons (criminal, civil or administrative) that is better adapted to the diverse approaches and national legal systems and traditions. Most of those conventions also explicitly provide that the legal liability of the legal person is without prejudice of the liability of the natural person that may be involved in the commission of the offence. However, these treaty regimes do not address clearly the reality that groups of (business) legal persons in practice operate as an economic unity, even though legally they are separate and distinct legal persons, and one enterprise within the group may contribute to the harm caused by another enterprise within the group even if each operates in different countries. What is typically known as a transnational corporation is in fact a group of enterprises - separate legal and/or natural persons- operating in a coordinated fashion as an economic unity across jurisdictions.

The Council of Europe Convention on the Protection of the Environment through Criminal Law (not yet in force) seems to adopt an approach that emphasizes corporate criminal liability (Article 9). This Convention recognizes that a number of serious offences against the environment that endanger life and physical integrity of natural persons should be criminalized under national law. [[7]](#footnote-7)

Although this Convention has been ratified by only one State of the three needed for it to enter into force, it has been influential at the level of the European Union where Directive 2008/99/EC on the Protection of the Environment through Criminal Law was adopted modelled on its provisions.[[8]](#footnote-8) The model of criminal liability chosen by this Convention is also followed in a reduced number of other conventions, including the Council of Europe Conventions on Corruption (Article 18); the African Union Convention on Cyber Security and Personal Data Protection (article 30.2); and specially the recently adopted (not yet in force) Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46C of which grants the Court jurisdiction over a series of crimes committed by legal persons including crimes against humanity, war crimes, various trafficking offences and mercenarism.[[9]](#footnote-9)

A number of ILO Conventions establish responsibilities of employers (including business enterprises), for instance in relation to health and safety, but do not explicitly provide for legal responsibility of employers as legal persons. Article 9 of the Convention 155 of 1981 on Occupational Safety and Health[[10]](#footnote-10) prescribes that the enforcement of laws and regulations concerning occupational safety and health and the working environment “shall be secured by an adequate and appropriate system of inspection” and that the “enforcement system shall provide for adequate penalties for violations of the laws and regulations”. The Convention concerning Benefits in the Case of Employment Injury,[[11]](#footnote-11)guarantees a series of entitlements for worker victims of employment accidents and injuries, but do not specifically require the domestic enactment of legal liability for business entities.

The general duty under various human rights treaties to ensure the realization and the protection of rights includes the duty to establish a national legal framework – including criminal law in the case of protection of the right to life - as a key element. The legal framework should in principle address also the conduct of legal persons that impair the enjoyment of human rights, but State practice is inconsistent and highly diversified. While many States have in their national legal framework provisions establishing legal liability of legal persons (including business corporations), many others do not or provide for it only partially. Company directors, as natural persons, in principle fall within the scope of application of criminal law, including international criminal law, but the conditions and modalities of attribution of responsibility to those individuals on account of corporate crimes remain unclear and subject to insufficient state practice.

Legal liability for business enterprises in domestic law typically includes responsibility under criminal, civil and administrative law. In certain jurisdictions, constitutional law plays a role in the protection of rights. The business liability landscape thus presents a combination of public and private law substantive and procedural elements. The protection of human rights being traditionally understood as something within the realm of public law (including constitutional, administrative and criminal law) it makes sense to assign to that branch of domestic law a leading or predominant role in upholding human rights vis a vis potential corporate abuses. However, the reality shows that those affected by business abuse, especially in certain jurisdictions, tend to use also private law (specifically the law of civil remedies –or non contractual responsibility), which is in principle ill-suited to deal with issues of public concern and interest such as human rights but may be transformed to better respond to the challenges of contemporary corporate abuse. The trends and problems in the practice of states in these areas of law have usefully been explored in various pieces of work.[[12]](#footnote-12)

1. See ICJ reports on Access to justice for business human rights abuse on various countries at <http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/> [↑](#footnote-ref-1)
2. OHCHR Report Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19, 10 May 2016; Council of Europe Recommendation 2016/3, Op cit note 17 [↑](#footnote-ref-2)
3. Human Rights in Business: Removal of Barriers to Access to Justice in the European Union, 2016, available at <http://humanrightsinbusiness.eu/> [↑](#footnote-ref-3)
4. See 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:

“Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

a. Sexual exploitation of the child;

b. Transfer of organs of the child for profit;

c. Engagement of the child in forced labour;

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

 ….

4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.” [↑](#footnote-ref-4)
5. United Nations Convention against Transnational Organized Crime of 15 November 2000, and the United Nations Convention against Corruption of 31 October 2003 [↑](#footnote-ref-5)
6. 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-6)
7. Council of Europe, Convention on the protection of the environment through criminal law, adopted on 4 November 1998, Strasburg, <http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm> (Accessed 28 March 2014). Article 9 of the Convention provides for corporate liability, as follows:

“1. Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative.

“2. Corporate liability under paragraph 1 of this article shall not exclude criminal proceedings against a natural person.” [↑](#footnote-ref-7)
8. Council of Europe, Directive 2008/99/EC on the Protection of the Environment through Criminal Law, 19 November 2008, Official Journal of the European Union, L328/28, 6 December 2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF>. [↑](#footnote-ref-8)
9. 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

“Article 46C - Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

….

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”

“Article 28A

International Criminal Jurisdiction of the Court

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:

1) Genocide

2) Crimes Against Humanity

3) War Crimes

4) The Crime of Unconstitutional Change of Government;

5) Piracy

6) Terrorism

7) Mercenarism

8) Corruption

9) Money Laundering

10) Trafficking in Persons

11) Trafficking in Drugs

12) Trafficking in Hazardous Wastes

13) Illicit Exploitation of Natural Resources

14) The Crime of Aggression” [↑](#footnote-ref-9)
10. Convention concerning Occupational Safety and Health and the Working Environment (Entry into force: 11 Aug 1983) Adopted at 67th ILC session (22 Jun 1981) [↑](#footnote-ref-10)
11. Convention concerning Benefits in the Case of Employment Injury (Entry into force: 28 Jul 1967) Adopted at 48th ILC session (8 Jul 1964) [↑](#footnote-ref-11)
12. Needs and Options Op Cit note 3 p. 17; Zerk, J Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies, 2014 <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> p. 71 [↑](#footnote-ref-12)