

## **A revised text covering ‘all business enterprises’ will be the basis for negotiating a UN treaty on business and human rights**

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Inter-governmental negotiations on a legally binding instrument on business and human rights will convene on 14-18 October.

A revised text was released in July 2019 by the Chair of the open-ended working group on transnational corporations and other business enterprises with respect to human rights (Working Group)<sup>2</sup>. This text will be the basis for negotiations in the 5<sup>th</sup> session of the Working Group in October. Ambassador Emilio Rafael Izquierdo Miño of Ecuador to the United Nations in Geneva is Chair-Rapporteur of this process.

[This process is rooted in the mandate of the Human Rights Council Resolution 26/9, which “establish(ed) an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights... to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”]<sup>3</sup>.

The scope of a future legally binding instrument (Instrument) has been a point of contention since the start of inter-governmental discussions in 2015. There were those who argued that the Instrument ought to focus on transnational corporations (TNCs) in order to fill gaps in national and international legal systems that currently allow for corporate impunity.

Others argued that limiting the scope to TNCs will run counter to the Guiding Principles on Business and Human Rights and might have implied that substantive obligations to be established under the Instrument, including on rights of victims, prevention, due diligence and legal liability, would be applied to business activities of transnational character and not across the board to all businesses.

Given the complexities of arriving at a viable definition of TNCs that would not become easily obsolete given the dynamics changes in corporate legal structuring and other corporate practices, the drafters chose to focus on “human rights violations in the context of any business activities of a transnational character” under the “zero draft” released in 2017.

The July revised text broadens the scope to “all business enterprises...including particularly...those of transnational character”. Despite the broadening of scope, this does not

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<sup>2</sup> For more details and to access the text of the revised draft, see:

<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>

<sup>3</sup> Resolution A/HRC/RES/26/9 of 14 July 2014, Human Rights Council Twenty-sixth session.

undermine the viability of the proposed Instrument in addressing the specific challenges arising from the ability of TNCs to evade liability through maneuvering jurisdictional limitations and gaps under existing legal frameworks. Relevant to this objective is the way the revised text approaches prevention, legal liability, adjudicative jurisdiction and enforcement of judgements and how those elements will work together given the proposed ‘definitions’.

### **Scope of the prevention obligation and legal liability**

The revised text sets an obligation on States to require, through their domestic laws, “all persons conducting business activities”, operating in their territory or under their jurisdiction, to “respect human rights and prevent human rights violations or abuses” (Article 5).

This is a reaffirmation of an existing obligation on States under international human rights law, but brings further clarity to the extra-territorial dimension of this obligation. This approach is also in line with the latest country practices in imposing mandatory due diligence on their companies, such as under the French *Devoir de Vigilance* (duty of vigilance) law 2017<sup>4</sup>, the mandatory transparency requirements set under the modern slavery legislation in the US, UK and Australia, and the European regulation on non-financial disclosure<sup>5</sup>.

The revised text proposes “sufficient control or supervision of the activity that caused the harm” and “foreseeability of risk” as grounds for attributing liability where one company fails to prevent another from causing harm to third parties (Article 6). This approach recognizes that liability could arise given the level of control that the enterprise exerts on the specific activities under scrutiny, and not merely from the legal form or the extent of shareholding by the parent in the subsidiary<sup>6</sup>.

Such grounds for liability would enable establishing direct liability of a parent company for acts that it controls and that have resulted in harm to third parties. It would provide an alternative to piercing the corporate veil, or discarding limited liability as provided for under general corporate law, because it will be tackling the direct responsibility of the parent company due to actions or omissions that it has undertaken.

In comparison, piercing the corporate veil would allow for establishing indirect liability of the parent company for the acts of its subsidiary. This doctrine has been developed in common law jurisdictions as an alternative theory under the corporate law doctrine, allowing for establishing derivative or indirect liability. However, generally, courts have been cautious in applying this doctrine and have availed of it on exceptional basis, particularly in cases of fraud, for example

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<sup>4</sup> See: Phil Bloomer and Maysa Zorob, “Another Step on the Road? What does the “Zero Draft” Treaty mean for the Business and Human Rights movement?”, Business & Human Rights Resource Centre

<sup>5</sup> See: Directive 2014/95/EU of the European Parliament and Council, of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>6</sup> This approach appears to be similar to that adopted by the UK Supreme Court in tort claims involving parent companies of UK multinational corporations, such as the case of *Vedanta Resources PLC and another v Lungowe and others* (2019) UKSC 20.

where a “corporation is something less than a bona fide independent entity”<sup>7</sup> and in some cases of “inequitable and wrongful” conduct<sup>8</sup>.

Yet the scope of the proposed prevention obligation on businesses, as well as the grounds for attributing legal liability, are linked to the ‘contractual relationships’ of the business entity (Articles 5 and 6). While the definition proposed for ‘contractual relationship’ provides for a non-exhaustive listing of business relationships, the definition might have its potential shortcomings too, especially if contractual relationship is argued in a narrow restrictive way to cover only the direct parties to a contract.

For example, as proposed under the revised text, the ‘human rights due diligence’ obligation is linked to a natural or legal person’s “own business activities” or “their contractual relationships” (see for example Article 5.2). A strict reading of “contractual relationships” could lead to a conclusion that the obligation extends to the direct contractual relationship that a business enterprise undertakes. Consequently, in the context of a corporate or value chain, such an approach would lead to cutting off the obligation of prevention at the level of the direct contractual relationships that a business enterprise has.

The broad approach adopted in defining ‘contractual relationship’ under the revised draft (Article 1.4) is useful. However, there is nothing explicit in this definition that would defend against such a narrow reading. There is also nothing to assert that the term ‘contractual relationship’, as used, stands for the entirety of contractual relationships within a corporate or supply chain.

The proposed Instrument is expected to provide the needed clarity in this regard, which ought to be at least aligned, and not inferior, to the latest State practices that recognize that the obligation to identify and prevent adverse human rights and environmental impacts by a parent company should extend to activities of companies it controls, as well as activities of its subcontractors and suppliers. Such is the case with the French Duty of Vigilance Law<sup>9</sup>. A reconsideration of the use of the term ‘contractual’, and potentially replacing it with another term, could avoid unnecessary challenges to approaching the scope of prevention and liability.

## **Access to information**

Access to information, including internal company documents, is crucial in assessing and proving the relationship of control upon which liability could be attributed under the proposed

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<sup>7</sup> See for example: *United States of America, Allied Products Corporation, Appellees, v. TIC Investment Corporation, TIC United Corporation, and Stratton Georgoulis*, United States Court of Appeals, Eighth Circuit. See also: *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir.1986) (NEPACCO ) (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir.1978)), cert. denied, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

<sup>8</sup> David S. Bakst, “Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive”, page 6, 19 B.C. Int’l & Comp. L. Rev. 323 (1996), <http://lawdigitalcommons.bc.edu/iclr/vol19/iss2/4>

<sup>9</sup> See for example: European Coalition for Corporate Justice, “French Corporate Duty Of Vigilance Law”, available at: <https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20FAQ.pdf>

Instrument<sup>10</sup>. The Committee on Economic, Social and Cultural Rights had already recommended that “States parties should facilitate access to relevant information through mandatory disclosure laws and by introducing procedural rules allowing victims to obtain the disclosure of evidence held by the defendant”. The Committee also opined that “[s]hifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant”<sup>11</sup>.

The revised text addresses access to information in multiple provisions under the Article pertaining to “rights of victims” (Articles 4.6 and 4.11). Further clarity would be crucial in the process of operationalizing such access. This would be very important given procedures for discovery (of documents) are not broadly available in many jurisdictions.

For example, the proposed Instrument could facilitate the access to information pertaining to human rights due diligence through requiring States to set an obligation on the business enterprise to publish details related to ‘human rights due diligence’, including impact assessments. Another consideration to facilitate this aspect of the victim’s journey towards access to remedy is including the possibility, in some cases, for a rebuttable presumption of ‘control’, which would put the onus of providing the information on the corporation itself, which is supposed to have such access if the evidence is actually available.

### **Addressing the challenges of “*forum non conveniens*”**

According to the revised text (Article 7), adjudicative jurisdiction is vested in courts where “...acts or omissions occurred; or the victims are domiciled; or the natural or legal persons alleged to have committed such acts or omissions...are domiciled” (Article 7.1). In this situation domicile is taken to mean the place where a legal or natural persons has its “place of incorporation; or statutory seat; or central administration; or substantial business interests”. These domestic courts would be vested with the ability to admit and hear claims brought by victims covered under the Instrument.

Such a broad approach is well-suited for such an Instrument whose primary objective is to ensure access to justice and remedy by victims of corporate human rights violations and abuse. This approach seems to be inspired by the 2012 European Regulation No. 1215/2012 of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This European Regulation posits jurisdiction in the Member State where the defendant is domiciled. Article 4 of this Regulation provides that “...persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”<sup>12</sup>. Furthermore, the regulation provides that domicile is understood to mean the

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<sup>10</sup> See comments by Richard Meeran during the UN Business and Human Rights forum 2017, available at: <http://webtv.un.org/search/introduction-forum-on-business-and-human-rights-2017/5658096228001/?term=&lan=English&cat=Meetings%2FEvents&sort=date&page=4>

<sup>11</sup> Committee on Economic, Social and Cultural Rights, E/C.12/GC/24, “General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities”, para. 45.

<sup>12</sup> Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215>. Article 63 of the same regulation provides that: “For the purposes of this Regulation, a company or other legal person or

place where a company has its statutory seat, or central administration, or principal place of business.

However, the revised text does not deal with the potential challenges arising from the '*forum non conveniens*' doctrine. This doctrine allows a court, whose jurisdiction is established under the applicable rules, the discretion to decline to hear a case if it finds that it is an inappropriate forum or that another forum would be more appropriate.

The Committee on Economic, Social and Cultural Rights, in its General Comment 24, had pointed out that “[i]n some jurisdictions, the *forum non conveniens* doctrine... may in effect constitute a barrier to the ability of victims residing in one State to seek redress before the courts of the State where the defendant business is domiciled. Practice shows that claims are often dismissed under this doctrine in favour of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction”<sup>13</sup>.

Consequently, a further addition in the text providing that *forum non convenience* doctrine shall not apply in cases brought on the basis of this Instrument would add more clarity in this regard.

It is worth noting that in a 2005 ruling, the European Court of Justice found that the doctrine of *forum non conveniens* is incompatible with the regime established under the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters ('Brussels Convention')<sup>14</sup>, which was carried forward in Regulation No. 1215/2012 noted above.

While the approach adopted in the revised text is similar to that adopted in the European Regulation it does not replicate it. Indeed, the revised text does not provide for an obligation that a person domiciled in a certain State shall be sued in the courts of that State. The revised text provides that the courts of the State where the person alleged to have committed the violation is domiciled would be among the courts where jurisdiction is vested, along with the courts of the States where the “acts or omissions occurred” or “victims were domiciled” (Article 7.1 of the revised text). This approach does not preclude the possibility of the court of domicile relying on *forum non convenience* to decline jurisdiction.

## **Enforcement of judgements**

Cooperation among State Parties to the future Instrument in enforcement of judgements would be essential to achieving effective access to remedy and justice. A study of barriers to accessing judicial remedy (which focused on the US, Canada and Europe) indicated that barriers facing victims include the ability to enforce a judgement in favor of the victims when the litigation includes assets located outside the forum State’s jurisdiction<sup>15</sup>.

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association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business”.

<sup>13</sup> See: Committee on Economic, Social and Cultural Rights, E/C.12/GC/24, para. 43.

<sup>14</sup> See: *Owusu vs. Jackson* C 128/02 [2005] QB 801, of the European Court of Justice ('ECJ'), particularly dealing with Article 2 of the Brussels Convention, providing that “persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State”.

<sup>15</sup> See: Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (December 2013), “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business”.

Attention should be paid to the grounds provided under the revised text for refusing the recognition and enforcement of judgments. The revised text (Article 10.8c) provides that refusal could be sought on multiple grounds, mainly having to do with procedural irregularities, in addition to “where the judgement *is likely to prejudice* the sovereignty, security, ordre public or other essential interest of the Party in which its recognition is sought” (emphasis added).

Public policy and ordre public are usually used interchangeably in this context<sup>16</sup>, whereby “[in] practice, public policy reflects a common law origin whereas ordre public is identified with civil law and has a statutory source”<sup>17</sup>.

Existing treaties dealing with recognition and enforcement across borders usually require a strong level of violation of public policy in order to refuse recognition and enforcement. This is evidenced by the reference to “manifestly incompatible” and “manifestly contrary” or “contrary” in treaties such as the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the New York Convention on Recognition and Enforcement of Arbitral Awards and a newly proposed treaty text entitled “Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters”. This shows that offending or violating public policy (which could be implied by the use of “*likely to prejudice*”) is not sufficient as a ground to refuse recognition or enforcement of a judgement.

Furthermore, ‘security’ is not usually provided as a ground for refusal of recognition and enforcement, although public policy has been sometimes understood to encompass ‘the essential interests of the State’<sup>18</sup> and ‘sovereignty’<sup>19</sup>.

Within the context of the New York Convention, the majority of cases where recognition or enforcement of a foreign arbitral awards was denied has relied on procedural public policy, and not substantive public policy, grounds<sup>20</sup>. This includes “near-universal values or principles such

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<sup>16</sup> See for example: Ordre public (Public Policy) by Martin Gebauer, available at:

<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1448>, where it is provided that “Ordre public in private international law or conflict of laws basically is not a concept of international, but of domestic law (see also General Principles of Law ; International Law and Domestic [Municipal] Law ). Protecting the basic values of the forum law, ordre public, or ‘public policy’, as it is usually called in common law countries, is an exceptional yet necessary device to avoid unacceptable results. These unacceptable results may be a consequence either of the application of a foreign law or of the recognition and enforcement of a foreign decision...”.

<sup>17</sup> “The Traditional View of Public Policy and Ordre Public in Private International Law”, available at:

<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1964&context=gjicl>, which provides that: “Public policy and ordre public are judicially administered exceptions to the usual commitment of individual nations to recognize and give effect to foreign law in circumstances deemed appropriate by the forum. The conflict of laws doctrines of public policy and ordre public are mandated by exigent forces of local morality and social order”.

<sup>18</sup> Report on the Public Policy Exception in the New York Convention (October 2015), IBA Sub-Committee on Recognition and Enforcement of Arbitral Awards. Reference made to Cass., 18 June 2007, quoted by Pascal Hollander, *Belgium*, p. 1.

<sup>19</sup> Report on the Public Policy Exception in the New York Convention (October 2015), IBA Sub-Committee on Recognition and Enforcement of Arbitral Awards. Reference made to: China and Indonesia.

<sup>20</sup> Ibid, page 11.

as the right to be heard or due process, the sanction of fraud or corruption in the arbitral process, *res judicata*, and the independence and impartiality of arbitrators”<sup>21</sup>.

A broad approach to the grounds for refusing recognition and enforcement of a judgement could potentially undermine the effectiveness of the proposed Instrument and undermine its objectives.

### **Concluding remarks**

Given the choices set out by the drafters, the revised text could take the international community a step forward towards harvesting an international instrument that pragmatically ameliorates the conditions pertaining to access to justice and remedy for victims of corporate human rights violations and abuse.

States engaging in the Working Group meeting in October 2019 can consider:

- How the scope of prevention and the attribution of liability are addressed, given the potential implications of using the term ‘contractual’ across the text;
- Ways for enhancing access to information by claimants; and
- Ways to address challenges potentially arising from the *forum non conveniens* doctrine.

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<sup>21</sup> Ibid, page 18, conclusion.