**International Commission of Jurists**

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

**ADVANCE UNEDITED DOCUMENT- PART VI**

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

Access to justice, including the right to an effective remedy, is the corollary of efforts to hold business accountable for human rights abuses. The prospective treaty must require measures to ensure access to effective remedies and redress for persons and groups of persons that suffer abuse arising from the conduct of business enterprises.

The treaty should make provision for access to an effective remedy for wrongful conduct against both States and business enterprises. For States, the remedy would be in respect of situations of complicity or participation in business activity or for failing to discharge their duty to protect against the conduct of business enterprises. Regarding remedies against business enterprises, these should be available to remedy abuses by businesses in States where the company, or its parent or controlling company a) has its centre of activity, b) is registered or domiciled, c) has its main place of business or substantial business activities.[[1]](#footnote-1)

The possibility for victims to initiate judicial complaints against companies directly in their domicile (whether it is in a host State or the home State) will further help to redress the inequality in rights and obligations that exist as between companies on one side and people on the other side. The growing web of bilateral or multilateral agreements on investments and free trade often grant business enterprises and investors in general the right to a very extensive set of protections including the right to sue governments before international arbitral tribunals, a right that individuals and communities do not have in relation to companies that abuse their human rights. An international treaty that guarantees an enhanced remedy system for harm caused by companies including extraterritorially would serve as a corrective instrument in this respect.[[2]](#footnote-2)

Failure to provide for effective remedies and redress, even in some cases where provided for in domestic law, has a range of causes, legal and political. These involve a complex set of factors that vary for each States but also present some common features. Among the most common problems are those related to: weakness in the fundamental rule of law (including regarding the independence of the judiciary and the work of the legal profession); difficulty or unwillingness of executive and or legislative officials to counter resistance by powerful corporate interests in seeking to address legal and governance gaps; public officials who lack knowledge or capacity to uphold the law according to international standards; prevalence of corruption; limited resources of protection mechanisms (including the judiciary); high court fees and costs of legal representation in legal suits; limited jurisdiction over events taking place abroad and involving companies domiciled within the territory, and other procedural hurdles that create a system of disincentives to litigation against companies.[[3]](#footnote-3)

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| * 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.[[4]](#footnote-4)
* 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.
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*Civil remedies*

Many claims against business enterprises use the framework provided by private law in domestic jurisdictions: the law of civil remedies, and the corresponding rules set out by private international law on jurisdiction, choice of law and recognition and enforcement of judgements in civil and commercial matters. The existing international legal instruments in this field have limited geographical and substantive scope. The Hague Conference on Private International Law’s 1980 Convention on International Access to Justice is especially relevant here but has been ratified by only 26 of the 87 States members of The Hague Conference. It covers the areas of access to legal aid, security and orders for costs, and security of witnesses and experts in judicial proceedings. Some of the provisions of this Convention will be relevant for discussion within the OEIWG, but they are not comprehensive in scope.

Jurisdictional reach of national courts or tribunals is a crucial element in access to a judicial remedy. There is diversity in approaches across countries but jurisdiction is generally based on territory, nationality (active and passive), state interests and universal jurisdiction principles. The regime created by the European Union Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters (Regulation 44/2001/EC)[[5]](#footnote-5) provides for a broad jurisdiction of European Union courts in civil and commercial matters, but operates only within the European Union. The Brussels I Regulation covers matters relating to jurisdiction, choice of law and enforcement of judgments within the EU. Although many of its principles are recognized beyond EU countries, it is binding only on EU Member States.

Private law as a means of addressing claims relating to human rights abuses offers an important avenue of redress for harm caused, potentially including harm affecting human rights, but it presents many of the inconveniences and impracticalities related to the private nature of legal actions under this regime. One of these problems is that the burden (legal and financial) to carry the claim to completion is left with the claimant or plaintiff, and procedural rules rarely take into account his or her deficiency of resources or inability to provide full evidence in proceedings. Public legal aid is generally not available, or significantly limited, in private law claims in most countries. In this context, there have been efforts to instil human rights principles into the regime of private law on responsibility for tort. The need to guarantee fundamental rights such as effective remedy, fair trial and due process is a crucial transformative element of the private law of civil remedies.[[6]](#footnote-6)

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| The treaty should contemplate the following elements: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. |

The foregoing proposals find support in various sections of General Comment 16, Maastricht Principles on Extraterritorial Obligations, Council of Europe Recommendation 2016/3, and the final results and recommendations of the EU Project Human Rights in Business.[[7]](#footnote-7)

1. Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Principle 25. [↑](#footnote-ref-1)
2. Remarks by Martin Khor in Ecuador/South Africa “Workshop of Human Rights and Transnational Corporations: Paving the way for a Legally Binding Instrument”, 11 March 2014. <http://www.southcentre.int/wp-content/uploads/2014/05/Ev_140311_Final-Report.pdf> (accessed 3 June 2014) [↑](#footnote-ref-2)
3. See, ICJ reports on Access to Justice in countries such as India, China, Philippines, Poland, Netherlands, Nigeria, among others. <http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/> [↑](#footnote-ref-3)
4. Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Articles 13 and 14 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 39 of the Convention on the Rights of the Child; Articles 25 and 63(1) of the American Convention on Human Rights; Article 7(1)(a) of the African Charter on Human and Peoples’ Rights; Articles 12 and 23 of the Arab Charter on Human Rights; Articles 5 (5), 13 and 41 of the European Convention on Human Rights; Article 47 of the Charter of Fundamental Rights of the EU; Article 27 of the Vienna Declaration and Program of Action. 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, Article 3. See alsoUN 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, Principle 31: “Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.” [↑](#footnote-ref-4)
5. Brussels I Regulation Recast, Regulation 1215/2012/EU, entered into force in January 2015. [↑](#footnote-ref-5)
6. See One recent example is the *Sophia Guidelines and Best Practices for International Civil Litigation for Human Rights Violations adopted by the International Law Association*. *Sophia Guidelines and Best Practices for International Civil Litigation for Human Rights Violations*, adopted by the International Law Association, 75th Conference, Sophia, August 2012. See also: Council of Europe, Draft recommendation of the Committee of Ministers to member States on human rights and business (Appendix III to document CDDH-CORP(2015)R4, available at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other\_Committees/HR\_and\_Business/Documents/CDDH-CORP(2015)R4FIN\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Documents/CDDH-CORP%282015%29R4FIN_en.pdf) (accessed 16 June 2015) [↑](#footnote-ref-6)
7. General Comment 16 Op Cit note 13; Maastricht Principles, Op Cit note 18; Human Rights in Business, note 34 [↑](#footnote-ref-7)