

## Removing Barriers to Justice

# How a treaty on business and human rights could improve access to remedy for victims

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# Recommendations for the future Treaty

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# Recommendations for the future Treaty

The case studies of litigation processes in Section 1 of the full report have illustrated the multiple challenges that victims of serious human rights impacts arising from transnational business ventures continue to experience when trying to access justice and remedy in varying jurisdictions across home and host states. Section 2 analysed these barriers thematically, resulting in a grouping of barriers in the seven areas: 1. Jurisdiction; 2. Corporate liability; 3. Criminal law; 4. Regulation of business conduct; 5. Risks for human rights defenders; 6. Access to courts; 7. Enforcement. By analysing existing approaches in each of these areas, this section already started identifying potential strategies for reform that could break down these barriers. Section 3 went on to analyse how the existing normative framework created by the UNGPs addresses these barriers, and concluded that a UN Treaty could complement and strengthen these efforts. In this final section, all these ingredients are combined to recommend seven areas of reform that should be addressed by the Treaty from an access to remedy perspective.

Unless otherwise stated, it is proposed that all of the following are to be achieved by domestic law reform on the part of ratifying States, or by the direct application of the provisions of the Treaty. The ratification of a Treaty creates binding legal obligations for the State.<sup>1</sup> Treaties generally lack specificity in the proposals they lay down, setting broad principles but leaving significant leeway regarding the mode of application and implementation down to ratifying States. This recognises the different legal systems and cultures and permits States to adopt modes of implementation that fit their system and meet their requirements. Whatever mode of implementation is adopted, however, the State must fulfil the minimum requirements established by the Treaty. Treaties may establish various modes for monitoring or reporting compliance, such as the establishment of an oversight mechanisms or treaty body.

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Whether the obligations imposed on the State translate directly into the domestic legal system as actionable legal rights depends on various factors, including whether the State has a monist or dualist legal system, and whether the Treaty is ‘self-executing’, which broadly equates to whether the Treaty terms are sufficiently clear and precise as to have what would, under EU law, be known as ‘direct effect’. These concepts are typical matters for all international treaties and as such are not discussed in detail within this report. It is worth noting the implications in outline, however. Under monist legal systems, the provisions of sufficiently clear self-executing treaties normally create

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<sup>1</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>, Article 26.

immediately binding legal obligations that are enforceable within the domestic legal order and which can be relied on in judicial proceedings. Under dualist legal systems, such as the UK, ratification normally has a lesser effect within the domestic legal order, usually requiring the enactment of implementing legislation or relevant policy reform, before creating actionable rights or obligations between parties.

It is suggested that most of the reforms proposed here should be drafted in broad terms, leaving the exact modes of implementation to be determined by the ratifying States. Each of the recommended treaty elements would therefore create binding legal obligations for the State, internationally, but would require domestic legal reform by the ratifying State in order to implement the particular element and thus to create justiciable legal obligations between parties, and that – given the broad terms in which it is suggested that the elements should be drafted – this would apply in either monist or dualist systems. This need not mean that treaty elements should be reduced to vague general objectives. The outcomes required by each element can be quite specific: requiring that an exception should be introduced to the corporate veil, for example, is quite a specific objective. But the mode of implementation even for such a specific requirement can be left for ratifying States to determine.

## Recommendation 1

### Use the Treaty to make it easier to overcome jurisdiction barriers

#### ► **Create a framework for jurisdiction and choice of law**

Establish a basic consensus, supported by domestic law, for home state courts to ordinarily recognise jurisdiction over companies domiciled in those states when cases are filed against them for human rights violations occurring overseas. A presumption for choice of law must also be established (on which, see overriding mandatory provision, below). For the purposes of this framework, 'domiciled' should have a wide interpretation that would apply to, at least, countries in which companies have (or perhaps even 'recently had') their main corporate governance office, their registered office, or their main stock market listing/s.

#### ► **Joinder of host state subsidiaries**

Rules should be developed to allow local subsidiaries to be joined as co-defendants to claims against parents, which may provide for the more speedy and effective determination of claims, and avoid conflicting judgments if claims against parent and subsidiary are litigated in separate courts. The Brussels/Rome regime does not grant this right, but does not prevent it, and a number of European domestic legal systems already permit such joinder in the interests of justice.

#### ► **Overriding mandatory provisions**

A critical factor for any choice of law regime that ends up applying host state law is to emphasise the possibility for a scheme of overriding mandatory provisions, which is envisaged in the Rome Regulation<sup>2</sup> as a vehicle under which certain aspects of home state law can be applied to defendants on trial in their home forum, despite the fact that the case is to be

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2 Regulation (No. 864/2007) (Rome II), Article 16.

judged according to host state law. Such an exception would allow the home state to apply, for example, the requirements of a home state due diligence law, thus holding the company accountable to home state standards of planning and accountability, while still basing its assessment of the legality of conduct in the host state against host state law.

► **Abolish Forum Non Conveniens rule**

The *Forum Non Conveniens* rule would conflict with the principle jurisdictional rule proposed here, which would establish grounds for home state jurisdiction. The rule should therefore be abolished or dis-applied in transnational human rights cases involving corporate actors. The reforms proposed above, together with the abolition of *Forum Non Conveniens*, could decrease the likelihood of lengthy jurisdictional battles, ensuring that cases will proceed to trial of substantive matters more quickly.

## Recommendation 2

### Use the Treaty to remove legal barriers to corporate liability and to place upon corporations a broad duty of care

► **Corporate entity/limited liability exception**

Statutory reforms could permit courts to apply an exception to the traditional legal concepts of separate legal personality and limited liability. This would be a mechanism for making the parent liable for the subsidiary's conduct and to require a parent to pay a subsidiary's debts to human rights victims in the event that the subsidiary defaulted or was unable to pay. Such a reform would require courts to apply 'agency', 'enterprise', 'shareholder' or 'vicarious' models of liability as a presumption in human rights cases and to ignore the traditional statutory barriers to these liability models. This could encourage local (host state) litigation against local (i.e. – subsidiary) companies, even where there were fears that the subsidiary might be wound-up, or lacked the assets or insurance necessary to meet a successful claim. Victims successful in host state litigation would be able to pursue compensation from the parent if the local company was unable to meet its liabilities.

► **Parent company duty of care**

A duty of care introduced by statute could require a parent company to be responsible for the conduct and impacts of its subsidiaries. This could cover just those subsidiaries it 'controls', or supervises closely (a relatively weak '*Chandler*' style duty of care), or the duty could be extended to all of its subsidiaries (avoiding the situation in *Bebe*, where Shell divested itself of responsibility following a corporate restructuring). As this would be a statutory model the duty could be limited to the company's own subsidiaries or applied throughout its supply chain more generally. Violations of this duty of care could be the basis for private, victim-led legal actions, such as negligence suits. This has a significant overlap with 'due diligence' (discussed below).

### Recommendation 3

## Use the Treaty to promote convergence of criminal law around basic modern approaches to corporate liability

▶ **Make corporations generally indictable for crimes**

All legal systems should move towards a basic criminal law position for corporate offenders under which they may be prosecuted for crimes generally, though specific corporate crime offences could be retained alongside this model.

▶ **Introduce corporate culture model**

All legal systems should move towards a basic criminal law position for corporate offenders based on the corporate culture model for the assessment of the *mens rea* (intent or recklessness/negligence) of corporate offenders.

▶ **Introduce appropriate sanctions**

See recommendations on enforcement (below).

### Recommendation 4

## Use the Treaty to improve corporate responsibility by giving binding legal force to the due diligence framework from the UNGPs

▶ **Binding due diligence**

A legally binding requirement should be introduced requiring companies to prepare detailed reports on all aspects of their predicted (forward looking), and actual, human rights impact throughout their supply chain. The approach to due diligence could be based on the approaches outlined in the UNGPs, with the crucial additional requirements: stakeholder verification and binding legal force. There is a need for stakeholder input and verification of reports. Local and global unions (perhaps meeting certain membership or representative criteria) and ILO or UN accredited human rights NGOs should have a right to contribute to or comment on the annual report. This could include a right to trigger administrative, investigation and sanction processes that would, where appropriate, support enforcement actions by regulatory bodies and prosecution services. It is critical that due diligence be binding, not voluntary, if it is to be effective, and that sanctions and liabilities constitute a meaningful deterrent, relative to the turnover of the company.

## Recommendation 5

### Use the Treaty to affirm and extend protection for human rights defenders

▶ **Libel law reform**

Introduce protection for human rights activists, journalists and NGOs from libel law in the context of sincere human rights advocacy.

▶ **Protection for whistle-blowers/human rights defenders**

Introduce a model of judicial protection for whistle-blowers and human rights defenders, possibly based on the *medidas cautelares* ('precautionary measures') regime, used in the inter-Americas human rights system.<sup>3</sup>

▶ **Consultation with communities and the unique situation of indigenous peoples**

The Treaty should proclaim a commitment to protection of the situation of indigenous peoples, in particular acknowledging the importance of the recognition of, and legal protection of, traditional land rights, and requiring courts and tribunals to recognise and to protect the rights and interests of indigenous peoples. The Treaty should require business projects in all cases to meet the standards of Free Prior and Informed Consent (FPIC).<sup>4</sup>

## Recommendation 6

### Use the Treaty to improve access to courts

▶ **Burden of proof reversed**

There are two specific aspects where the defendant corporation should be required to provide the evidence, which it will normally have far greater capacity to address than would victims. The issues are: i) the parent – subsidiary relationship (such as the extent to which the parent has control or responsibility over the subsidiary); and ii) other technical matters specific to the case (such as the nature of materials used in industrial processes). Plaintiffs would be required to raise basic evidence setting out a claim to meet a low standard of proof (termed a *prima facie* case). It would be for the defendant corporation to rebut this case.

▶ **New rules on disclosure**

Require transnational corporations to cooperate with pre-trial disclosure rules in all transnational human rights cases. The rules could be based on common law approaches, such as

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3 About precautionary measures (web page), Inter-Americas Commission on Human Rights, at: <http://www.oas.org/en/iachr/decisions/about-precautionary.asp>

4 As advanced under the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples, 2007 (A/RES/61/295).

those set out under Part 31 of the UK's Civil Procedure Rules,<sup>5</sup> or developed specifically for the context of these cases. Establishing a basis for disclosure as a routine procedure would again reduce the need for delays and legal battles.

▶ **Funding**

Improving access to funding is a difficult request. While rural Nigerian farmers clearly need funding assistance to bring a transnational legal case against the Shell corporate group in Europe, the demand must be squared with domestic provision, where demands on resources mean that in many countries access to legal financial assistance is quite restricted. A possible solution is for the Treaty to require that signatory States or transnational corporations contribute to an insurance scheme that would assist plaintiffs.

▶ **Locus standi**

Require greater flexibility on access to the court for groups, representatives, and third parties, notably in the case of indigenous peoples, to address – at a minimum – the complete exclusion experienced by the Chimanimani at the *Border Timbers* ISDS hearing.

## Recommendation 7

### Use the Treaty to improve effectiveness of State enforcement

▶ **Agreement for recognition and enforcement of judgments**

There is a need for international agreement on judicial cooperation and mutual recognition and enforcement of judicial decisions.

▶ **Improve training, resources and mandates for domestic regulatory agencies**

The UN Treaty should affirm the role of domestic agencies in responding to transnational cases, giving agencies the confidence to take up these cases, and provide appropriate training and resources.

▶ **Increase sanctions available to domestic regulatory agencies**

Sanctions imposed by administrative and criminal processes, including fines for breach of environmental regulations, for example, but also the criminal law, must be set at a level that acts as an effective deterrent, judged against the turnover of the parent company.

▶ **Establish a global oversight body on business and human rights**

A body could be established based on the UN supervisory bodies that oversee the compliance of States with international human rights obligations. This body could receive reports from businesses, from communities, NGOs and other stakeholders, and produce authoritative statements concerning the compliance of business groups with their obligations under international human rights law, and the extent to which they meet – or fail to meet – their duty as

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5 Note, however, that these rules alone were insufficient to support the plaintiffs in the *Bebe* case.

expressed under the UNGPs to 'respect' human rights. If a more ambitious 'world business and human rights court' were to be established the procedure would be relatively straightforward for ratifying States to grant this body judicial power to exercise jurisdiction over companies based in their territory. See also proposals for a World Court.<sup>6</sup> Any attempt to exercise judicial authority over companies based in non-ratifying States, however, may raise concerns about state sovereignty.

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6 Luis Gallegos and Daniel Uribe, 'The Next Step against Corporate Impunity: A World Court on Business and Human Rights?', *Harvard International Law Journal* (Vol. 57 Online Symposium), at: <http://www.harvardilj.org/2016/07/the-next-step-against-corporate-impunity-a-world-court-on-business-and-human-rights/>; <http://www.foei.org/news/rights-people-rules-business>



