

Needs and Options for a New International Instrument In the Field of Business and Human Rights Executive Summary

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EXECUTIVE SUMMARY

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Introduction

The UN Framework *Protect, Respect, Remedy*, adopted in 2008, and the *Guiding Principles on Business and Human Rights*, adopted in 2011 by the UN Human Rights Council, are important additions to the existing body of standards for responsible business conduct such as the OECD Guidelines for Multinational Enterprises and the UN Global Compact. However, the normative, institutional and operational international framework for the protection of human rights in relation to the activities of business enterprises still remains underdeveloped.

Against the background of frequent and numerous demands from civil society organizations, independent experts and States for a stronger and more effective approach in the field of business and human rights – including a joint statement of States and regional groups during the September 2013 session of the Human Rights Council and a global call by civil society for an internationally binding instrument in the field of business and human rights – the ICJ conducted research and consultations involving a number of stakeholders with a view to: (1) identifying existing gaps; (2) elucidating the need for a new international legal instrument; and (3) outlining options regarding the nature, scope, elements and forum for a new international instrument without limiting the potential form of other options. The report addresses these issues by: reviewing recent developments in global legal standards relating to business and human rights; analysing the main gaps in the international normative framework and its effective implementation; and focusing on available options to address the deficiencies in the business and human rights protection framework. This report assumes that any future international instrument in this field will coexist and mutually reinforce the *Guiding Principles*.

Part I: Outstanding issues in the international legal framework concerning business and human rights

The international legal framework, comprising treaties and customary norms, affirms the obligations of States to protect those within their territory and jurisdiction against human rights violations, including human rights abuses perpetrated by third parties. This obligation, restated in the *Guiding Principles*, is a general one that has not received homogenous application across jurisdictions and tribunals. Hence, new instruments have been created since the adoption of the *Guiding Principles* to address perceived shortcomings in the existing framework.

Recent developments in the international legal framework as applied to business enterprises

At its forty-sixth session in 2011, the Committee on Economic, Social and Cultural Rights issued a statement on the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) regarding the corporate sector and economic, social and cultural rights. It clarified that States' obligation to respect entails ensuring that companies demonstrate due diligence and that, as part of the obligation to protect rights, States should take steps to prevent human rights contraventions by corporations under their jurisdiction.

Further, in January 2013, the Committee on the Rights of the Child adopted its General Comment 16 on State obligations in relation to business impacts on the rights of the child. It provides guidance to States for ensuring that business operations do not adversely impact on the rights of children, on creating a supportive environment for business to respect children's rights across business relationships, including global operations, and on ensuring access to effective remedies and reparation. Besides spelling out the requirements under the three levels of obligations "respect, protect, fulfil", the Committee's General Comment provides concrete recommendations as to the measures that States should adopt.

On 28 September 2011, a group of experts in international law and human rights adopted the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. Principles 23-27, which refer to States' obligations to protect, are particularly relevant. They outline, *inter alia*, the obligation of States to ensure that non-State actors do not nullify or impair the enjoyment of economic, social and cultural rights; and adopt and enforce measures to protect economic, social and cultural rights through legal and other means with regard to business enterprises under their jurisdiction.

Judicial decisions

While human rights advocates have used domestic courts to claim redress for people allegedly harmed by the conduct of business enterprises, these decisions have often resulted in significant setbacks in attempts to hold corporations legally accountable for harm caused by their subsidiaries.

In a ruling from April 2013, in *Kiobel v Shell Co.*, the US Supreme Court held that the Alien Tort Statute, which has been widely used to file legal suits against individuals and companies for serious human rights abuses committed abroad, cannot be invoked for the adjudication of cases where the underlying conduct did not have sufficient connection to the US jurisdiction, regardless of whether the alleged perpetrator was a US national. This decision has significantly narrowed the options for this form of redress for victims of corporate abuses. Another more recent decision of the US Supreme Court, in *Daimler AG v Baumann*, further reduced the scope of personal jurisdiction in the US by exempting in practice certain large multinational companies from the jurisdiction of national courts. The UK Court of Appeals, in *Chandler v Cape Plc*, while rejecting blanket responsibility of parent companies for all torts committed by their subsidiary found responsibility of the parent company, but in another case, a Dutch District Court, in a ruling concerning the case against Shell Plc and its Nigerian subsidiaries, ultimately cleared the parent company from civil responsibility for the harm caused by its Nigerian subsidiary. The case has been appealed.

Outstanding issues and the need for standard-setting

The research and consultations carried out by the ICJ identified the most acute challenges and needs in the area of business and human rights.

The first outstanding issue relates to the deficit in ensuring access to effective remedies and reparation for victims of business related human rights abuses and in accountability of business enterprises. Practice shows that there are

significant practical and normative obstacles affecting people's access to non-judicial (administrative bodies, parliamentary commissions and similar bodies) and judicial remedial mechanisms, particularly in cases of a transnational nature. More specific standards are needed to guarantee this right. For administrative processes to provide an adequate and effective remedy they must at a minimum: enjoy independence; have the competence to adjudicate complaints applying fair hearing standards; be capable of making declarative determinations as to whether a violation impairing rights has occurred; and order appropriate redress, including, but not limited to, compensation. Recourse to judicial bodies, which must be available in all situations of human rights violation and abuses, even if only as an avenue of last resort, requires implementing legislation that recognizes rights and provides protection for them. Access to judicial mechanisms, and non-judicial mechanisms if provided, should be afforded to anyone who claims that his or her rights have been infringed.

The accountability deficit is illustrated by the fact that there are only few examples of businesses being held to account. This is due to limited available legal avenues and institutions of accountability and the lack of an international legal regime on corporate liability for human rights abuses, besides Art. 3.4 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography. While the International Labour Organization system is very relevant on the substance of standards applicable to companies, enforcement and especially accountability and remedies have not been optimally developed. Likewise, the value of the *Guiding Principles* as an accountability mechanism is limited.

Second, national legislation to protect rights against abuses perpetrated by third parties is generally insufficient and widely diverse, which results in a patchy system of legal accountability. In addition, actual lack of implementation and enforcement leads to protection gaps that are more acute in certain jurisdictions than in others.

Third, protection gaps are particularly acute in the area of gross/serious human rights violations. Further standard-setting in relation to business corporations is therefore highly desirable as the law and practice of many States diverges and the international legal regime remains incomplete. This could best be advanced either through a Special Procedure with specific competence to address this or by an intergovernmental working group.

Fourth, more clarity in the definition or application of standards is needed with regard to the "extraterritorial" dimension of the State duty to protect against human rights abuses by third parties. To avoid or mitigate the risk of conflicting requirements in different jurisdictions, and to facilitate monitoring and enforcement of due diligence obligations, it is necessary to have: a set of common standards for all States; a system that assigns responsibilities or rights to regulate and create a framework for cooperation among States; and an international system of monitoring and supervision.

Lastly, an efficient system of international cooperation and mutual assistance in legal matters is needed both for investigation and for the execution of judicial decisions in order to respond to the challenges of guaranteeing access to effective remedies and reparation for victims.

Part II: Options for an international instrument

Analysis and consultations show that there are a number of arguments in favour of enhancement, clarification and development of international standards and institutions in several areas. An international instrument would help to codify and crystallise national progressive legislation and practice providing clarity and more certainty to States and business enterprises. The issues that emerge as suitable subjects for standard-setting broadly point to the need to enhance accountability of business enterprises and remedies and reparation for the potential victims. These issues can be addressed by a combination of international approaches and instruments.

In any case, such an international instrument should contribute to increased convergence of legal standards and approaches in order to avoid uncertainty about the level of liability to which business actors may be exposed in different jurisdictions. Most stakeholders favour an international instrument that would focus on additional specific obligations for States to regulate and make business enterprises accountable. Nevertheless, a new legally binding instrument may pave the way for the eventual imposition of obligations upon companies.

The final decision regarding whether a binding instrument is desirable and/or feasible will depend in part on its potential contents. In any event, some of the potential contents of a legally binding instrument can, with the necessary adaptation, also be incorporated in a non-binding instrument.

Legally binding instruments

International conventions are effective tools for prompting domestic legal reform and creating a framework for domestic remedies. As a general rule, these instruments have been widely ratified, and their implementation has been supplemented by a series of non-binding instruments such as Guidelines, Principles, General Comments or Model Laws.

Evidence shows that the few judicial cases of corporate human rights abuses that have ended in a positive result for victims, or that have been successfully addressed by public authorities, would not have been possible without the existence of legal frameworks enacted in response to obligations set out in international conventions.

Moreover, while business enterprises often have the right to sue governments before international arbitral tribunals under bilateral and multilateral agreements on investment and trade, the equivalent possibility for victims to directly sue business enterprises in the domicile State (whether in the host or home State) will help to balance the widely perceived inequality in rights and obligations between business enterprises on the one side and individuals and groups on the other. Hence, in relation to remedies and accountability, an international treaty can be an effective tool to enable States to enact legislation defining business enterprises' responsibilities and establishing liabilities in cases of non-compliance with obligations.

International monitoring and supervisory mechanisms fulfil the much-needed function of providing support to States to fully implement treaty obligations at

the domestic level and to identify relevant obstacles and overcome them. International monitoring and supervisory mechanisms should therefore be provided for in an international treaty. An international instrument of a legally binding nature may also create a system of international cooperation in judicial and legal matters built on the basis of the principle of shared responsibility.

International tribunals are also an important avenue to ensure justice and remedies for victims of human rights violations and abuses. The creation of an international tribunal to which individuals alleging harm caused by a business enterprise may resort to for seeking justice and remedies has been proposed by some organizations. If there is support for this idea, an international treaty will be needed to create such a tribunal. This can be done in the main treaty or in a subsequent protocol to it. However, currently no major actor has envisaged the prospect of an international court with jurisdiction over business corporations.

Models for a treaty

In all likelihood, a new treaty will have to draw from several existing treaties as models or examples of negotiation processes to follow in order to deal with the unique and complex issue in the field of business and human rights. As a follow up to his mandate, John Ruggie suggested the UN *Convention against Corruption* as a model for intergovernmental processes. However, this proposal should be taken with caution since this Convention focuses only on one single conduct, whereas: a treaty in the field of business and human rights will have to deal with a range of conduct; and there may also be important differences as to the incentives and driving forces for States to conclude a new treaty. The Council of Europe *Convention on the Protection of the Environment through Criminal Law*, adopted in November 1998, may be a more suitable source of inspiration as it provides agreed definitions of offensive conduct that are regarded by many as crucial to address in a new instrument.

One possible format for a legally binding instrument could be an Optional Protocol to either one or both of the main Covenants on human rights namely the ICCPR and ICESCR. Such a Protocol could establish the obligation of States parties to those Covenants to take preventive and protective measures and also to enact legislation that ensures accountability for business enterprises that become involved in serious abuses of the rights contained in those treaties. One of the advantages of this model would be that it already provides a set of clearly defined rights as set out in the Covenants, making the task of defining the corporate offences to each of those rights easier. In the case of the ICCPR and ICESCR, monitoring bodies already exist, whose powers could be enlarged or fine-tuned as necessary. Each instrument also has a conference of States parties, which would provide the forum for discussion of the initiative and its implementation. Difficulties in this model may derive from the possible resistance of States to draft a single Optional Protocol to what they regard as two very different Covenants, and from the fact that the two Covenants do not cover collective rights.

Possible content

John Ruggie suggested that an international instrument should focus on the issue of "gross human rights abuses" potentially amounting to crimes under international law committed by corporate entities. The focus on offences that are likely to occur in conflict situations seems to limit them to those defined as war

crimes, and complicity with those crimes, under international law. Therefore, many human rights organizations and scholars take the position that any new instrument in the field of business and human rights should focus on the broad universe of human rights rather than on any specific set of rights or of violations thereof. They argue that focussing on "gross human rights abuses" that amount to crimes under international law would be insufficient and unduly limit the array of problems that deserve attention.

An indicative list of some of the elements of a possible treaty follows:

Prevention. Given the current emphasis on prevention and preventative measures, the inclusion of a section focussing on prevention would be highly desirable. Such a section may ideally contain some provisions concerning enterprise due diligence in their global operations and human rights impact assessments.

Accountability. Apart from an important component focussing on the definition of corporate offences, the section on accountability may also focus on provisions concerning effective remedies and reparation. Provisions concerning jurisdiction of national courts, modelled or building on existing instruments, may also be included in this section.

National and international mechanisms for monitoring and oversight. This section should build on the accumulated experience of human rights treaty bodies and in particular on the innovative models of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention against Torture in relation to national and international monitoring bodies.

International system of cooperation. This section could focus on establishing a system for cooperation in matters of mutual legal assistance for the exchange of information, investigation, recognition and enforcement of judicial decisions.

In addition, a new instrument should also be able to tackle the problem of capacity building and lack of resources in the implementation process by creating duties and mechanisms to facilitate domestic implementation.

In any event, the content of any future instrument must be discussed in a transparent manner, in a forum that is open to participation by all the relevant stakeholders.

Non-binding instruments

Non-binding instruments can be declaratory and/or recommendatory. Depending on their content and events subsequent to their adoption, they may be self-standing instruments or the prelude to a legally binding instrument.

In the field of business and human rights very few actors have suggested this kind of instrument as an option since in the eyes of many, the *Guiding Principles* already occupy the place of a non-binding instrument. Further, the added value of this kind of instrument might be limited when considering the standards already set forth in instruments of a similar nature and for the creation of

institutions and oversight mechanisms, to establish a system of international cooperation, mutual legal assistance, and to define jurisdictional issues.

However, a declaratory instrument would be a viable option in the short term, should sufficient support for a binding instrument not be achieved, to make progress in defining standards that are not sufficiently addressed by the *Guiding Principles*. In this regard, it might facilitate the conclusion of a binding instrument at a later stage.

Views of stakeholders

A large group of States have joined Ecuador in its commitment to work for a legally binding instrument primarily due to their concerns on the lack of balance of rights and obligations that accrue to transnational corporations. However, other countries oppose the idea and argue that the international community should focus instead on the implementation of the *Guiding Principles*. Some opponents also argue that it is likely that any new treaty will be ratified by a few States only, thus making it ineffective.

While a sizeable percentage of civil society supports the initiative to establish a legally binding instrument, some have expressed concerns that States will use the process as an excuse not to take immediate measures under the *Guiding Principles*. Others also believe that the discussion of a legally binding instrument will be confrontational, such that the consensus-based environment surrounding the *Guiding Principles* will be lost. Moreover all the civil society organizations consulted believe that other issues like access to justice should also be dealt with on a priority basis.

Conclusion

Despite recent progress in standards and practice, there are substantive gaps concerning the relationship between businesses and human rights that remain in dire need of international regulation, particularly in securing legal accountability and ensuring access to remedies and reparation. In this respect, international standards are powerful driving forces to effect changes in national laws and policies and move towards greater convergence and coherence. They can take the form of binding or non-binding instruments and can draw ideas from substantive accumulated experience and models at the national and international level, while still leaving room to innovate in order to address outstanding issues. Since scepticism regarding the idea of a legally binding instrument is grounded on fears that it will jeopardise the implementation of the *Guiding Principles* and the achievements accomplished as a result of their adoption by consensus, the new process of standard-setting should be carried out in such a way as to mitigate or eliminate any negative impact in this regard and should also involve all relevant stakeholders. A formula for a joint ILO-UN process could also be explored.

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