



fidh

**Legally binding instrument to regulate,
in international human rights law,
the activities of transnational corporations
and other business enterprises**

PRELIMINARY COMMENT ON THE “ZERO DRAFT” CONVENTION

Cover photo: AFP

TABLE DES MATIÈRES

INTRODUCTION	3
SCOPE	4
ACCESS TO JUSTICE	7
Jurisdiction.....	7
Applicable Law.....	9
Complaint Mechanism.....	10
RIGHTS OF VICTIMS	12
Human Rights Defenders	13
PREVENTION	14
Conflict Affected Areas	15
LIABILITY.....	16
Civil Liability.....	16
Criminal Liability	18
CONCLUSIONS	20

INTRODUCTION

Four years after the adoption of Resolution 26/9 which established the Open-ended intergovernmental working group (IGWG), with a mandate to elaborate an international binding instrument on transnational companies and other business enterprises with respect to human rights, the release of the “Zero Draft” of an international binding Convention on transnational companies and other business enterprises and human rights is certainly an important step towards more substantial debates. In this respect, it is expected that session IV of the IGWG, which will take place in Geneva next October 2018, will offer an opportunity to have a meaningful discussion between States’ delegations and should represent a concrete improvement in the negotiation process.

This contribution summarises the position of the International Federation for Human Rights (FIDH) regarding the text released by Ecuador: it is a preliminary comment on the text as it has been presented. It follows the structure of the draft and focuses only on some of its articles; it draws on FIDH’s experience as an international federation of human rights organisations around the world: we hope that it can provide useful inputs and feed into the discussions during the negotiation process.

Preamble

The proposed draft clearly builds on the existing international framework protecting human rights from corporate abuses: this has been clarified by the list of documents that supported the drafting process published by the Chair.¹

However, **it is important for the future instrument to explicitly underline in its Preamble such complementarity with the international instruments that have set the framework for business accountability in terms of human rights violations.** The Preamble should therefore mention the UNGPs, the OECD Guidelines and the ILO Declaration on MNEs as significant developments of international law governing corporate behaviour towards human rights. As many CSOs and scholars have already observed, complementarity of the treaty with existing instruments and mechanisms is key to ensure coherent implementation of the different provisions and avoid the temptation for States and companies to stop implementing the UNGPs while treaty negotiations are in progress.²

The Preamble should also reaffirm the importance of the Universal Declaration of Human Rights as the reference standard for the interpretation of its provisions. We suggest to this purpose the following wording:

“Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive to promote respect for human rights and freedoms and to secure universal and effective recognition and observance, including equal rights of women and men and the promotion of social progress and better standards of life in larger freedom”

¹ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ListDocuments.pdf>

² See for example the written and oral submission sent in occasion of the third session of IGWG consultations and available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>

SCOPE

To which companies will the future treaty apply?

While some States have stressed that the treaty should focus exclusively on transnational corporations, others requested that the discussion on the scope of the treaty be left open, insisting that further analysis should be done regarding the different ways in which the scope could be defined. FIDH has always advocated in favor of a broad interpretation of the scope of the future instrument based on the concrete experience that human rights violations are linked to activities of all kinds of companies (not only those with transnational character) and victims bear the burden of existing gaps in access to justice and remedy, independently of the nature of the corporation itself. "From the perspective of individuals and communities whose human rights are infringed by corporate operations, it is of little consequence if the corporation that violated rights is a TNC or not".³ **This underlines the need for a future instrument that recognizes that all enterprises shall respect human rights, while taking into consideration the specific challenges posed by transnational corporations.**

The elements for a legally binding instrument presented by Ecuador in September 2017 (later, "Elements") already focused on the transnational character of the activities rather than on the companies themselves; this was a positive step to solve the issue. The Zero Draft presented by Ecuador, while recalling in the preamble that "all business enterprises, regardless of their size, sector, operational context, ownership and structure, shall respect all human rights", follows a similar approach to that of the Elements. The definition of the subjective scope in the draft includes "human rights violations in the context of any business activities of transnational character".⁴ Despite the advantages that this approach presents in comparison to the narrow approach of Resolution 26/9, it is essential that the recognition of a general duty for business enterprises to respect human rights be **set in the operational part of the text rather than only in the Preamble**. This duty has previously been reaffirmed by the General Comment N° 16 of the Committee on the Rights of the Child, by the General Comments N° 23 and 24 of the Committee on Economic, Social and Cultural Rights, and by the Guiding Principles on Business and Human Rights.

Moreover, the treaty would benefit from the introduction of a more specific reference to the necessity to avoid differences of treatment between corporations, as can be found in the OECD Guidelines on Multinational Enterprises, for example.⁵ This would ensure equal levels of protection, in line with the rule of law, between individuals and communities affected by the activities of TNCs abroad and in their home country and those affected by the activities of purely domestic corporations.

The Zero Draft tries to provide a more specific definition of "business activities of transnational character". As suggested by FIDH in its preliminary observations on the Elements, such definition shall be explicitly indicative and flexible in order to adapt and evolve with the changing nature and structure of businesses and to avoid companies escaping their obligations through new corporate law constructs.⁶

Business activities are defined as "any for-profit economic activity, including but not limited to productive or commercial activity" by article 4.2. This definition excludes non-profit activities as those of associations or NGOs may be. However, as it has been underlined,⁷ this definition could be interpreted as excluding state-owned enterprises from the scope of the treaty.

³ FIDH and ESCR-net, Ten Key Proposals for the Treaty (October 2016), p. 28, available at: https://www.escr-net.org/sites/default/files/attachments/tenkeyproposals_final.pdf

⁴ Such an approach reflects the proposal included in FIDH and ESCR-net's Ten Key proposals for the Treaty, supra, which mentioned that a binding instrument should « prioritize addressing the complex regulatory challenges posed by transnational corporations (TNCs) while affirming that all corporations are required by international human rights law to respect human rights », p.27.

⁵ OECD Guidelines for multinational enterprises, 2011 ed., I.5 « The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both. »

⁶ FIDH, Written Submission to the third session of the IGWG (2017), available at <https://www.fidh.org/en/issues/globalisation-human-rights/fidh-advocates-for-the-adoption-of-an-international-legally-binding>

⁷ See, John Ruggie's article on the Zero Draft treaty on Business and Human Rights Resource Centre's blog <https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights>.



The drafters need to make clear that State-owned enterprises are included in the scope of the future instrument since these kind of companies are heavily involved in huge projects at national and international levels and are often directly linked to severe human rights abuses.⁸

In order to fill this gap the drafters could, for example, explicitly define the meaning of "economic activity" in a way that it is not limited to private undertakings but includes all types of undertakings (whether state-owned or not) which fulfil economic functions.⁹

As FIDH highlighted in its preliminary observations on the Elements,¹⁰ it is important that the definition of the scope of the treaty *ratione personae* capture broadly the activities of transnational corporations. Nevertheless, one should bear in mind that transnational companies do not exist as a legal category as such, since all transnational corporations are nothing more than a sum of national businesses part of multinational groups of more or less closely interconnected companies.

To define transnational character, the draft treaty proposes various criteria.¹¹ According to the Zero Draft, economic activities are considered transnational if they :

- **Take place in two or more jurisdictions**
- **involve actions in two or more jurisdictions**
- **involve persons in two or more jurisdictions**
- **impact two or more jurisdictions**

Firstly, it is important to underline that in order for the scope to be adequate these criteria should be understood as **alternative and not cumulative criteria**. Secondly, it is necessary to delve into each of these criteria to identify the concrete situations they might cover.

The first three criteria relate to the characteristics of the economic activity : its location or that of the person executing it. The first two cases cover the situation where a single activity takes place in two or more jurisdictions. However, the difference between "activities that take place in two or more jurisdictions" and the second criterion referring to "activities that involve actions in two or more jurisdictions" is unclear. The third one covers the case where several persons located in two or more jurisdictions participate in the economic activities. Therefore, the major issue in this case will be to determine the delimitation of the notion of "**activity**" in a specific case.



Let's take the example of supply chain relations. The import of a product from jurisdiction A to jurisdiction B requires commercial actions in the jurisdiction of States A and B. However, the question that would need to be answered is whether the transnational character of the activity will be appreciated with regard to the specific transaction of a company, or, more broadly, looking at the chain of transnational activities it needs or entails. How far does the transnational character extend? For instance, in the case of imports, would the final retailer's activity be considered of transnational character even in the case where the retailer only buys the products imported by other commercial entities located within the same jurisdiction? Or, as the transboundary exchange of merchandises is not directly linked to the retailer but mediated by the importer, would the importer be the only actor considered to have activities of transnational character?

For the treaty to avoid falling in this trap, activities shall not be defined as the specific economic or contractual transaction, but as the group of actions that are necessary for an economic activity to take place. The activity must be understood as the goal under which a chain of multiple, specific actions occur. Taking the example above, the economic activity to be considered would not only be the sales of goods between the retailer and the importer located in jurisdiction B, but also the chain of contractual and commercial relations that made possible for the final retailer to sell such products in its market.

⁸ See for example FIDH et al., The environmental disaster of the ILVA steel plant has also violated Italy's human rights obligations, (2017) ILVA report and FIDH, Corporate Accountability for Human Rights Abuses A Guide for Victims and NGOs on Recourse Mechanisms, (2016 ed.), available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf

⁹ The European Court of Justice has interpreted this notion with regard to EU competition law by adopting a functional approach and examines whether the entity fulfills the « function » of a private undertaking, consisting in the supply of goods or services in a market. From this perspective, the CJUE has considered it « encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed ». See ECJ, Klaus Höfner and Fritz Elser v Macrotron GmbH, 23 April 1991, §21.

¹⁰ FIDH Written Submission, op. Cit..

¹¹ Although the term "transnational" has not often been used in international treaties, environmental treaties often use the term « transboundary » to refer to the environmental damages that affect the territory of two or more State parties to a convention, or a water source that crosses or borders the territory of two or more States.

Finally, according to the fourth criterion an activity can also be considered of transnational character if it generates an impact in two or more jurisdictions. In the business and human rights field, the term "impact" has been used to identify the situations where a company has the responsibility to prevent, mitigate, address and remediate.¹² **However, in this context, the term should be interpreted in a larger way and shouldn't necessarily have a negative connotation.**

Natural or legal persons

Finally, the scope of the treaty would cover economic activities conducted either by "a natural or [by a] legal person". This scope might appear fairly limited considering that business operations can take a variety of forms. In fact, some investment treaties and trade agreements have used the notion of "enterprise" defined more broadly. For instance, the NAFTA defines "enterprise" as:

"any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association".¹³

This larger definition not only includes entities that enjoy a legal personality, but also partnerships, joint ventures or associations of legal persons which operate in a particular context or project but do not necessarily have a distinct legal personality. **It would therefore be important to refer to "natural or legal persons" not only in singular but also in plural.**

Furthermore, there are cases in which State bodies or agencies operate as economic actors, without necessarily being granted a legal personality distinct from that of the State.

¹² The Convention on Environmental Impact Assessment In Transboundary Context could serve as an interesting example for a definition of the concept of "impact". It defines "Impact" as : "any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors. It also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors." And transboundary impact as: "any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party". Convention on Environmental Impact Assessment In Transboundary Context, Art. 1 (vii).

¹³ North American Free Trade Agreement (NAFTA), Art. 20.1.

Jurisdiction

Which court is competent to judge a case involving a company with a transnational character?

Are courts of the home State of the parent company competent to receive cases concerning actions of the subsidiaries of that company carried abroad?

In countries where most parent companies of multinational corporations are based, a variety of systems have been used over time to prosecute multinationals for their abuses, despite the complexity of their structures and operations. Because the parent company often contributes to the alleged crime or at least makes decisions that lead to the violation, evidence is often located in the multinational's country of origin or domicile. Furthermore, assets of the company are generally located in the country where the parent company is domiciled and this makes it more likely for victims to have access to compensations if they bring the claim before courts of the country where the parent company is located. Numerous obstacles continue to prevent victims from accessing justice, including issues associated with access to information, the costs of legal proceedings, and both substantive and procedural norms.

Despite the above-mentioned situation, jurisdiction in international law is essentially intended as an expression of sovereignty. In this respect, jurisdiction has served notoriously as a doctrinal bar to the recognition and discharge of extra-territorial human rights obligations.¹⁴ In this context, the critical point has been the determination of the jurisdiction of one country over the activities exercised by their companies (or their subsidiaries) abroad.¹⁵

Jurisprudence has progressively recognised the concepts of "territory" and "jurisdiction" as two separate, non-overlapping concepts.¹⁶ For this reason, the future instrument should replace the expression "territory and jurisdiction" with "territory **and/or** jurisdiction".

With respect to the business and human rights debate, it is important to establish whether States have a duty to protect human rights outside their national territory. This question entails two subsequent aspects: i) the question of prescriptive extraterritorial jurisdiction, or whether States should adopt legislation with extraterritorial effects and ii) of adjudicative jurisdiction, or whether States should allow national courts to hear claims about situations occurred abroad.¹⁷

In general, human rights bodies of the UN have repeatedly expressed the view that States should take steps to prevent human rights violations committed abroad by business enterprises incorporated under their laws, or whose main seat or place of business is located under their jurisdiction.¹⁸ This position on the extraterritorial reach of the States' duty to protect, as stated in international human rights law, has been supported by the International Court of Justice itself.¹⁹

In 2017 the UN Committee on Economic, Social and Cultural Rights issued its General Comment 24 where it clarifies and recalls State obligations under the Covenant. The Committee reiterates that "States Parties' obligations under the Covenant do not stop at their territorial borders". State Parties are required to "take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they are incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant" (§26). By stating this, the Committee also indirectly clarifies to what extent State parties and their courts have jurisdiction over a corporation.

¹⁴ Olivier De Schutter et al., Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Right, Human Rights Quarterly, 34 (2012) 1084–1169.

¹⁵ On this specific issue for example, Principle n. 25 of the Maastricht Principles specifies the extent of the State's duty to protect with regard to corporations. ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

¹⁶ Olivier De Schutter, International Human Rights Law, Cambridge, (2002).

¹⁷ Ibid. p. 187.

¹⁸ Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/2000/4 (2000), para. 39; Committee on Economic, Social and Cultural Rights, 'General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2002/11, (26 November 2002), para. 31.

¹⁹ ICJ, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 109; and its judgment in the Case of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), judgment of 19 Dec. 2005, paras. 178–180 et 78-80.

The concepts of jurisdiction and domicile with respect to companies have also been clarified by the Council of Europe in its Recommendation of 2016.²⁰ In numerous paragraphs, the Recommendation refers to the domicile of business enterprises in the jurisdiction of Council of Europe member States.²¹

The proposed draft contributes to determine the criteria to establish a link between the corporation and the State under the jurisdiction of which it is located. Article 5 deals with the adjudicative jurisdiction and clarifies the circumstances in which States have jurisdiction over a dispute originated from the violation of the Convention (thus clarifying the extent of the States' duty to regulate its business entities as well). It provides that two categories of States should be considered to have jurisdiction over violations of human rights covered by the text:

- **The State where acts or omissions occurred**
- **The State where the "natural or legal person or association of natural or legal persons" is domiciled**

The first hypothesis institutes the normal criterion establishing territorial jurisdiction over offences committed on the State's territory. The second phrase, however, deserves a closer look in order to educe the meaning of the criterion it presents.

The second criterion points out the pivotal point of article 5 of the proposed draft: **the concept of "domicile of a corporation"**. The treaty establishes that a claim against a corporation for human rights violations could be raised in the court of the State where the company is **domiciled**.



Historically, different concepts of domicile have been considered by different legal systems in private international law. In general, common law systems have privileged the criteria of incorporation in order to establish the domicile, and consequently the jurisdiction and applicable law, of a corporation.²²

The civil law approach diverges partly from the one chosen by the United States and it is well illustrated by Brussels I (Recast) and Rome II EU regulations that set the principles of jurisdiction and applicable law to civil disputes. These regulations define the term "domicile" as being the business' "statutory seat", "central administration" or "principle place of business".²³ Thus, under article 6 and 63 of Regulation n° 1215/2012 (Brussels I), a foreign person, for example a worker whose rights have been violated by a multinational corporation, may bring an action before the court of a Member State if the principal place of business, registered office or statutory seat of the parent company in question is located in that court's territorial jurisdiction. On this legal basis, between 1997 and 1999, South African workers and citizens filed several claims with English courts against Cape plc, a British company which worked with Asbestos in South Africa.²⁴

Moreover, article 7§5 of Brussels I regulation affirms that a person domiciled in a Member State may be sued in another Member State: "(...)as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated".

The Court of Justice has held that the terms "branch, agency or other establishment" do not refer to specific legal situations, but imply:

- the secondary establishment's dependence on the parent company, and
- the secondary establishment's involvement in the conclusion of business transacted.²⁵

Furthermore, it is worth noting that in EU competition law, the ECJ clarified that it is possible to attribute the acts of a subsidiary to the parent company when that subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given by the parent company.²⁶ In the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company exercises an actual decisive influence over its subsidiary.²⁷

The proposed draft **sets four alternative ("or") criteria to define the domicile of a corporation**. The first three criteria are the ones stated by Brussels I regulation and by the Committee on Economic, Social and Cultural Rights: the statutory seat, central administration or principle place of business.

²⁰ COE, Recommendation CM/REC(2016)3 of the Committee of Ministers to Member States.

²¹ Ibid. par 13

²² See US Supreme Court, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) and US Supreme Court, Daimler v. Bauman, 571 U.S. (2014)

²³ Art. 63 EP Reg 1215/2012 Regulation. A company or legal person's domicile is considered to be its registered office, central administration or principal place of business.

²⁴ FIDH Accountability Guide, op. Cit., p . 250

²⁵ ECJ, A. De Bloos SPRL v. Société en commodité par actions Couyer, Octobre 1976 , case n.14/76

²⁶ ECJ, ENI Spa v. European Commission, July 2011, case n. T-39/07

²⁷ Geert Van Castefel, The Role of Private International Law in Corporate Social Responsibility, ELR November 2014, No. 3.

The draft further enlarges the concept of jurisdiction by including subsidiaries, agencies, instrumentalities, branches and representative offices in the list of criteria that define the domicile of a legal person. The addition of the phrase "and other establishment" will allow even further flexibility of such a provision. While this enlargement is not applied in the domain of human rights so far, it is already well known and used in other branches of law (EU competition law for example).

However, it is not clear from the proposed draft if this expansive understanding of the "domicile" of legal persons will be sufficient to establish the liability of the company, since other obstacles - such as the "corporate veil" doctrine in the event of abuses committed by subsidiaries - will remain.²⁸ It is therefore essential that article 5 be directly linked and recalled by article 10 on liability.

In addition, the text could have better clarified that domestic courts of State parties are able to exercise jurisdiction over claims concerning business-related human rights abuse even when the defendant enterprise is not domiciled within the jurisdiction of the State, if no other effective forum guaranteeing fair trial is available and if there is a sufficiently close connection to the State concerned. In other words, it should explicitly recognize the *forum necessitatis* doctrine as a consequence of the duty of all States to ensure that victims of transnational human rights abuses are not deprived from accessing a judicial remedy.²⁹ Ten European Member States already have a national provision on *forum necessitatis* and this could serve as an inspiration for the future instrument (Netherlands, Austria, France, Poland, Germany, Luxembourg, Belgium, Portugal, Estonia, Romania).³⁰

Finally, where a member State owns or controls a business enterprise or contracts with a business enterprise to provide public services, it should ensure that civil claims in connection with human rights abuses by such enterprises may be brought before domestic courts, and that the State will refrain from invoking any privileges or immunities.

The proposed draft puts forth a broad concept of jurisdiction based on the most recent interpretations of legal doctrine and on a coherent reading of other branches of law that may be applied. This represents a big step forward in the effort to reduce legal gaps in access to justice in cases of violations of human rights perpetrated by companies.

However, in order to be effective, the future instrument needs to address the barriers to access to justice that are linked to the application of the 'corporate veil' doctrine in cases of human rights violations linked to corporate activities.

One of the ways to reduce such gaps, as it has been put forward *inter alia* by the General Comment n° 24 of the UN Committee on ESCR, would be to impose a duty of care on the parent company and thus create a parent-based extraterritorial regulation imposing a direct liability on the parent company for its failure to prevent violations committed by companies that are part of its value chain.³¹ For this reason, this provision needs to be read in tandem with article 9 on Prevention and needs to be explicitly referred to by article 10 on Liability (see below).

Applicable Law

Once jurisdiction is determined, which law should the court apply to the dispute?

Usually, each country determines the applicable law according to its own rules of private international law.³²

²⁸ O. De Schutter in P. Alston, Human Rights and Non-State Actors, OUP (2005), p. 276.

²⁹ The European Commission suggested the inclusion of a *forum necessitatis* provision in the reform of Brussels I regulation in 2010. This proposal was then rejected by Member States. See [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com\(2010\)0748/com\(2010\)0748_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com(2010)0748/com(2010)0748_en.pdf) article 25 and 26.

³⁰ See http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf

³¹ See UN Committee of Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, August 2017, E/C.12/GC/24. and O. de Schutter, Towards a New Treaty on Business and Human Rights, Business and Human Rights Journal, Cambridge, 1(2015), p. 51-52.

³² In the EU, the Rome II Regulation (EC) No 864/2007, addresses this question for non-contractual obligations and states that, as a general rule, the law of the State where the direct damages occurred is applicable (*lex loci damni*), with 2 main exceptions : i) When the parties are habitual residents of the same countries; ii) When the circumstances indicate that the tort is manifestly more closely connected with another country. Experience with this provision has shown that it can be difficult and sometimes impossible to determine with accuracy the place where the direct damage occurred (*lex loci damni*). Furthermore, the victim may be more familiar with the law of his/her country of residence or that of the location of the event giving rise to damage than with the law of the place where the damage occurs, i.e. the law of the place where the effects of the violation were felt. Finally, determining the direct and indirect consequences of the harmful event, as mentioned in Article 4(1) of the Rome II regulation, presents a certain difficulty of interpretation because direct damage may occur in several States at once.



The draft does not indicate a general rule for the choice of applicable law (with the exception of procedural rules) which will mean that national provisions on private international law will apply, as it is normal in other international human rights treaties. These rules generally refer to the law of the place where the direct damage occurred or to the law where the act or omission that caused the damage has been committed.

However, in the aim of protecting the victims and because of the shortfalls of the application of lex loci damni and lex commissi delicti, the draft also sets out an exception and allows victims to request the court to apply the law of the State where the company is domiciled.

If the victim brings the case before court A he/she could also ask that the law of the country B be applied. This, in short, means that the law of the country where the company is domiciled could almost always be applied, at the victim's request, when it is more protective for the victims' rights, even when the victim brings the claim in another jurisdiction (which might be easier in terms of knowledge of the system, representation, language and finances).

The inclusion of the possibility for the victims to chose the applicable law is a positive aspect of the proposed draft in line with the pro-homine principle: it will concretely give to the victims the possibility to choose the most protective legislative framework in case of a dispute, while keeping the case in the judicial system they are more familiar with, but needs to be clearly coordinated with existing international treaties.

Complaint Mechanism

How will the monitoring and enforcement of the instrument be ensured?

One of the major and most widely recognised gaps in the current international framework regulating corporate activities is the absence of effective access to justice and remedy both because of legal and practical obstacles.³³ This has been attributed, *inter alia*, to the lack of an effective international remedial mechanism with investigative and sanctioning powers or of an international court able to hold companies and States accountable for failure to comply with their respective duties and responsibilities intervening when States are unwilling or unable to provide remedies for the injuries suffered by the victims.

Many international organisations and social movements have seen the current process towards a binding instrument as the opportunity to fill this gap.

FIDH in particular has repeatedly stressed the need for any future instrument to include an international mechanism that would effectively monitor compliance with the States' duty to protect and with the authority to act in complementarity with national and regional systems, to investigate allegations of corporate abuses with the power of making country visits, to receive communications on specific cases and to issue binding and enforceable decisions.³⁴

The proposed draft aims at creating a committee of experts in charge of monitoring the effectiveness of the treaty implementation by State parties. The functions of the committee according to article 14 will be to:

- **make comments on the implementation of the Convention**
- **provide observations and recommendations on reports submitted by third parties**
- **provide support to State Parties in compilation and communication of information**
- **submit an annual report to the General Assembly (UNGA)**
- **possibly recommend to the UNGA to undertake specific studies on issues**

Furthermore, the Chair has issued a draft of an optional protocol to the proposed Convention focused on enforcement and implementation of the Convention.³⁵ It further extends the role of the Committee and creates a National Implementation Mechanism to promote compliance with the instrument at national level.

³³ FIDH and ESCR-net, Ten Key Proposals for the Treaty, op. cit.

³⁴ Ibid., Statements and Submissions

³⁵ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>

Firstly, the fact that such provisions are situated in an Optional Protocol gives States the opportunity to “opt out”. With respect to the aforementioned need to fill the gap in access to remedy in cases of corporate abuses, **we consider this to be a serious weakness in the current draft.**

The establishment of such National Implementation Mechanisms could represent an innovative aspect put forward by the Chair for an implementation of the instrument. However the instrument should establish a clearer reference and should rely entirely on the Paris principles in order to avoid that States stop their effort to implement those Principles. Furthermore, it is important for the instrument to guarantee a full (and not only a functional) independence of the Mechanism. Moreover, some of the language used seems weak in several points; it appears that States will be put in the position to choose if they implement a national mechanism or not (article 6 uses the weak expression of “States parties may recognise”).

The Optional Protocol grants the Committee the power to receive individual communications and to make confidential inquiries. While this is a very positive addition to the first draft of the treaty inspired by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, provisions on interim measures and on the whole procedure of examination of the communications and follow up are missing (article 8 and 9 and 12 of the OP-ICESR). This absence needs to be filled since the current design of the mechanism is not able guarantee any follow up for individuals or organisations submitting a communication, which will considerably undermine the effectiveness of the Committee itself.

The proposed draft also provides for the creation of a Conference of State Parties (CSP), a monitoring organ of the treaty. The draft does not contain any terms or provisions on the representatives to the CSP. This is unfortunate, since most other treaties creating CSPs do provide this direction. It is typical for each representative to be accompanied by advisers and experts. It is also not clear how the CSP will evaluate the credentials of representatives. It is frequent practice of international organisations to form a sub-committee for this purpose or to delegate this function to the Committee.

No clear provisions about observers and rules of procedure of the CSP are included in the proposed draft. During the whole IGWG process, NGOs and social movements have occupied a central place. They have been pushing for the process to move forward and for State delegations to participate in good faith and to meaningfully contribute to its work.³⁶ In particular, participation of affected communities and their representatives in the process has been a significant element of the discussion, since it allowed their voices to be heard by delegations in Geneva. In order to further institutionalise such participation, the drafters should value this trend and include consultations with organisations representing affected victims and communities as a requirement for the CSP. An inspiration could be the UN Convention on the Rights of Persons with Disabilities, the instrument could then state that “States Parties shall closely consult with and actively involve individuals and communities affected by activities of companies with transnational character through their representative organisations”.

The powers of the CSP are also only very vaguely described in the present draft: “in order to consider any matter with regard to the implementation of the Convention including any further development towards fulfilling its purposes”. FIDH believes that the future treaty should further specify and detail the powers of the CSP in order to make its work effective and meaningful. For example; the CSP could not only monitor the implementation, but could also assess state compliance with the Convention on the basis of the annual report of the Committee and consider and adopt recommendations regarding the implementation and operation of this Convention, with specific remedies available in case of non compliance.

³⁶ C.f. various Treaty Alliance open letters and other submissions available at <http://www.treatymovement.com/resources/>

RIGHTS OF VICTIMS

How will the instrument grant protection and access to effective remedy to victims?

The proposed draft rightfully puts the rights of victims at the heart of the future instrument and the definition of victim of article 2 refers *verbatim* to principle 8 of the UN General Assembly "Basic Principles and Guidelines on the Right to a remedy".³⁷

As FIDH stressed in the *Ten Key Proposals for the Treaty* it is crucial for the future instrument to build on the UN Basic Principles on the Right to Remedy and on the evolution of international law and to detail the substantive notion of remedy as a large concept entailing reparation, restitution, rehabilitation, satisfaction, compensation and guarantee of non-repetition. It is worth noting that the proposed draft not only recalls such proposal but goes beyond and includes a specific reference to environmental reparation and ecological restoration as part of the right to remedy under the treaty. **The future instrument should also clarify that reparation should be victim-oriented, non-discriminatory, and gender-responsive. This has important implications for gender and reparation that should be taken in account by courts and other bodies.**

Article 8 of the proposed instrument also further details procedural rights of victims that are particularly important in business and human rights cases, where the power imbalance between the two parties is very high and victims have limited means to gather the necessary evidence to bring complaints before judicial bodies. The provision requiring States to provide victims with access to information is particularly important, since this is key in many business and human rights cases. In addition, the protection granted to victims and their families and representatives by §11 and §12 of the proposed draft is significant and much needed in a context where companies and authorities often threaten or further victimise affected communities, individuals and their families who raise concerns about the legality of their operations.

In general, article 8 of the proposed draft is a positive step towards a greater consideration of affected individuals and communities in the business and human rights debate. Many of these provisions, if correctly implemented, will contribute to fill the existing gaps and to eliminate the barriers in access to remedy and justice in this specific area.

However, the language used by the drafter is in some occasions very weak and risks undermining the impact of these provisions. Wording needs to be reinforced in order to grant effective protection to victims of corporate abuses. For example, "facilitate access to information and international cooperation" in §4 should become "ensure access to information and international cooperation", at the same time "States shall provide effective mechanisms for the enforcement of remedies" in §8 should be "States shall effectively enforce remedies".

In addition, because victims' rights can only be completely enforced by independent and impartial national tribunals and/or by an individual complaint mechanism at the international level, the draft should complete the provisions set forth by article 8 and include a reference to States' obligation to set independent and impartial judiciary and a safeguard clause if this is not the case.

A further worrying element in article 8 of the proposed draft is the recurrent reference to domestic law (par. 4 and 5) as this reference subjects the recognition of victims' rights to domestic law provisions and allows States to make exceptions in granting such rights in a completely discretionary manner. This needs to be corrected in the context of the negotiation process or it will risk to undermine the strength of the obligation and the usefulness of such instruments in protecting victims of human rights abuses. States' obligations towards victims as defined in international law should be reaffirmed as a guarantee of an effective protection and promotion of victims' rights. The treaty provisions should guide domestic law, rather than be subject to it.

We recall that in a consequent number of cases, domestic laws have been adopted in order to favour economic operations violating human rights. This could happen in various ways, for example through requiring confidentiality in business operations, preventing victims from accessing information and even criminalising the work of their representatives and of human rights defenders.

³⁷ UN GA Res. n. 60/147 of December 2005, <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>

Subjecting such provisions to domestic laws is one of the most significant weaknesses of the present instrument and may undermine its entire purpose.

Of course this does not apply in cases where domestic law is more protective than the treaty. In this respect, the treaty could simply include a general clause stating that "the provisions contained in this Convention are without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."³⁸

In addition, while putting victims at the centre is certainly an important step, the future instrument should not forget those individuals who are potentially affected by corporate activities but do not have suffered a concrete harm yet, otherwise this risks to lead to a restricted application of such rights and of the protection granted by the treaty.



Human Rights Defenders

Before last year's session, FIDH also advocated for the future instrument to reaffirm with clearer and stronger language the States' obligation to protect human rights defenders in the context of business activities and to elaborate on the UN Declaration on Human Rights Defenders (A/RES/53/144), on the UN Resolution on the protection of women human rights defenders, on reports of the UN Special Rapporteur on the situation of human rights defenders, and on other relevant international instruments.

As mentioned by the UN Committee on Economic, Social and Cultural Rights in General Comment n° 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, "*States Parties should take all necessary measures to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work*".

While it has a specific focus on the rights of victims, it is **deeply regrettable that the proposed draft does not contain any specific reference to human rights defenders**. As previously mentioned by Phil Bloomer and Marya Zorob on the BHRRRC blog, human rights defenders will not entirely fall into the definition of victims contained in the proposed draft.³⁹ Those in particular who support victims of human rights abuses, investigate and report on violations, help in ending them and work to prevent their repetition will fall outside of the scope of the proposed treaty.

FIDH believes that the future instrument must transversely recognize and enable the work of human rights defenders, including whistle-blowers, by acknowledging the fundamental role they play and by recalling States' obligations to:

- **establish specific measures to protect human rights defenders against any form of criminalization and obstruction to their work, addressing in particular the gender-specific violence against women human rights defenders ;**
- **set up enhanced protection and dissuasive sanctions against corporation abuse of rights in suing human rights defenders, including whistle-blowers;**
- **protect human rights defenders from all these forms of attack and refrain from criminalizing their legitimate work via restrictive or ambiguous laws, such as those relating to national security, counter-terrorism and defamation, which inhibit the work of human rights defenders.**⁴⁰

See Integrating protections for human rights defenders elaborated by FIDH and other organisations in the framework of ESCR-Net.

³⁸ GA Resolution n. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987).

³⁹ <https://www.business-humanrights.org/en/another-step-on-the-road-what-does-the-zero-draft-treaty-mean-for-the-business-and-human-rights-movement>

⁴⁰ UN Committee on Economic, Social and Cultural rights on General Comment No. 24, op. Cit, Para.48,

PREVENTION

How to prevent such violations to occur?

The consensus generated around the concept of human rights due diligence (HRDD) has stimulated some change in corporate behaviour and in legislative instruments (see for example the French Law *Devoir de Vigilance*).⁴¹ and represents a useful tool through which States and businesses can identify, prevent and mitigate and account for the harm they cause, contribute to or are directly linked to.⁴²

The responsibility of businesses to put in place HRDD mirrors the duty of States to require businesses to adopt such HRDD as implementation of their own duty to protect human rights under international law. The UNGPs already clarified that HRDD refers not only to the company's own activities but also to the activities of the company that are part of its supply chain and that constitutes a "business relationship" on which the company has some leverage.

Article 9 of the released draft sets out the obligation on States to adopt mandatory due diligence legislation over companies domiciled in their territory and/or jurisdiction. The proposed draft further clarifies the obligation of States to regulate the activities of their own businesses also occurring abroad (see above paragraph on *Jurisdiction*) and makes HRDD a part of the State's duty to protect human rights from third parties' conduct. Moreover, the provision reaffirms and strengthens what has been already stated in the UNGPs: HRDD needs to identify risks of actual or potential violations of human rights linked to business activities, but these risks are risks for the individuals and communities, not risks for the business (nevertheless, the language needs to be more coherent and the draft talks at the same time about "human rights violations" and "impacts").

The draft makes a step forward compared to the Elements presented in October 2017 and it reflects the recommendations FIDH made in its submission to the 3rd session, where it had underlined the importance to include all businesses part of the business relationship and not only the subsidiaries in the scope of HRDD. The draft specifies the scope of due diligence, which includes the activities of the subsidiaries and of those entities that fall under the (direct or indirect) control of the company or are directly linked to its products, operations or services. This directly recalls the notion of "business relationship" put forward by the UNGPs and by the OECD Guidelines and is interpreted as including the whole value chain (contractors and subcontractors).

Moreover, the draft establishes a link between the failure to comply with the HRDD provision and liability and compensation. The existence of adequate sanctions and liability for non compliance with HRDD is fundamental in order to make the HRDD provision effective.

Nevertheless, the current text could be more explicit when making the link between failure to comply with due diligence obligations and the liability of the company: it could explicitly link article 9 to article 10.6.c., for example.

A positive note in the proposed draft is represented by the inclusion of pre and post impact assessments as part of HRDD, as well as by a requirement for businesses to undertake meaningful consultations with potentially affected groups. On this point however, the text should clarify that consultations can also involve individuals and human rights defenders and that, in order for them to be "meaningful", the positions expressed during the consultation process need to be transparent and taken into account by the company when making its decisions.

On the specific need to include a gender dimension in impact assessments and consultations, see more in detail the contribution by Feminists for a Binding Treaty, co-signed by FIDH.

The draft completely fails to address the remedial component of HRDD which is necessary for it to represent an effective tool able not only to prevent abuses from occurring but also to mitigate, stop and remedy those that have already occurred.

⁴¹ Law n. 2017 – 399, adopted in March 2017 <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>

⁴² UN Guiding Principles on Business and Human Rights, (2011) Principles n. 17-21; R. McCorquodale, Human Rights Responsibilities and Due Diligence, in S. Deva, D. Bilchitz (eds), *Bulding a Treaty on Business and Human Rights*, Cambridge, (2018) p. 216 e ss.; FIDH and ESCR-net, *Ten Key Proposals for the Treaty*, op. Cit., p. 56. The UNGPs did not contain a precise definition of the concept of human rights due diligence, but Principle 17 clarifies its main elements : assessment of actual and potential impacts, integration of and actions to the assessment, monitoring of responses to integration and assessment, communication on how impacts are addressed, ensuring that it is an ongoing activity.

HRDD should not only identify and prevent actual or potential human rights violations, it should also constitute the basis for the company to mitigate and take remediation action against those violations as clarified by the recently adopted OECD Due Diligence Guidance for Responsible Business Conduct.⁴³ The treaty provision should therefore take into account this fundamental component of HRDD. The purpose of identifying a human rights violation is, on the one hand to prevent it to happen but on the other hand to cease it or mitigate it when it already happened or is in course. Finally, as already argued by other experts, when the company identified that it has contributed or caused a human rights violation, it should address such a violation and provide for remedy or cooperate in the remediation process. **The adoption of provisions on mitigation and remediation by companies are important in order to allow the immediate stop of the violation. This should not undermine the preventive character of HRDD, neither exempt the company from being sanctioned for non compliance with HRDD rules.** Mitigation and remediation are fundamental and complementary steps of corporate accountability and should be a necessary part of a HRDD obligation.

Finally, the draft includes the possibility for States to exempt small and medium enterprises (SMEs) from compliance with HRDD obligations. While the provision on the possibility to grant an exemption to SMEs could be useful in certain limited cases, this cannot depend on the discretion of a single State party. Moreover, the exemption shouldn't be used by subsidiaries which are part of transnational groups to escape the obligations they have under the treaty. It will need to be specifically justified and to comply with some general and uniform criteria and procedural rules fixed by the treaty itself or by the Conference of State parties in cooperation with civil society and in line with the principle of non-discrimination.



Conflict-affected areas

History shows that during conflict situations, corporate actors may tend to take advantage of the grim realities of people on the ground to create an opportunity for business. Similarly, States have often used corporations to perpetuate their violations of international law. Several soft law initiatives already addressed corporate abuses of human rights in conflict-affected situations, including UN Guiding Principle n° 7 and 23, the Montreux Document and the OECD Guidelines on Conflict Minerals.

It is a positive element that after our repeated calls the present draft addresses the link between corporate human rights abuses and conflict-affected situations in article 15 on final provisions. However the provision is too weak to be effective since it only calls for "special attention" by States without further defining the perimeter of this obligation.

The future instrument needs to elaborate on already existing obligations under International Humanitarian Law⁴⁴ and on the principles and notions that have been agreed upon at the intergovernmental level. The instrument shall also ensure that States provide guidance to business enterprises to help them identify and prevent the risks of violations of international law in conflict-affected areas.

More specifically, article 9 on prevention should require States to impose "enhanced due diligence" by companies in conflict-affected situations. It is important to identify that enhanced due diligence requires more urgent and immediate measures to prevent business activities from engaging in circumstances where systematic and structural violations are occurring, as well as divestment or disengagement policies where there is a risk of contributing to or aggravating human rights violations in those contexts. This enhanced due diligence should also require consultations with CSOs, OHCHR and other bodies as a prerequisite to beginning and maintaining business activities in those contexts.

⁴³ Adopted in May 2018, see <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴⁴ For a more specific analysis of International Humanitarian Law and its application to businesses see https://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf

LIABILITY

Which measures should States impose on companies that violates human rights ?

Article 10.1 provides that "such liability shall be subject to effective, proportionate and dissuasive criminal and non-criminal sanctions, including monetary sanctions". **Sanctions are essential and important to make clear that such responsibility is not only symbolic but should have concrete material consequences.** However, it is important to underline that the indication of sanctions is not limitative. For example, the article could refer to sanctions "including but not limited to monetary sanctions, exclusion from public procurement and diplomatic support, dissolution of the legal personality....".

Article 10.1 should also clearly specify that States "shall exercise jurisdiction and ensure that....", thus obliging domestic courts to hear such cases.

Article 10.4 includes an element regarding the reversal of the burden of proof which is a positive introduction, as this is one of the main obstacles victims face when bringing corporate actors to justice. However, this obligation remains very general. The lack of specificity about the cases where the burden of proof should be reversed may hinder the effective implementation of such a provision.

Further specificity is needed. For instance, regarding the piercing of the corporate veil, victims usually carry the burden of proof and thus have to demonstrate that the parent company has exercised a decisive influence on the conduct of the subsidiary, even when the latter is 100% owned by the parent company. Similarly, in most EU Member States victims shoulder the burden of demonstrating a multinational company's liability for a tort, even though the body of documents and other material evidence is in the hands of the parent company.

Therefore, from the experiences of victims seeking justice and redress, the draft could draw a more specific obligation that indicates when the reversal of the burden of proof is necessary without depending fully upon domestic law specificities.

Civil Liability

Under international law some conventions have already established the civil liability of corporations.⁴⁵ Unlike these international instrument, the present convention does not cover a very specific kind of violation but aims to establish a general standard of civil liability to be implemented by States in national legislations.

In order to understand whether the treaty effectively improves victims' access to justice and remedy, it is important to analyze the criteria that the draft has identified to establish the liability of a company. In most cases, victims will try to hold liable a parent company for the violations of its subsidiary or throughout its supply chain. Consequently, this will be the test to hold parent companies accountable.

Paragraph 6 of article 10 of the proposed draft sets out the following alternative criteria for States in order to hold companies liable for harm caused by violations of human rights in the context of their operations:

- a. To the extent it exercises control over the operations,
- b. To the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim,
- c. To the extent risks have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.

⁴⁵ For example, the International Convention on Civil Liability for Oil Pollution Damage and the Paris Convention on Third Party Liability in the Field of Nuclear Energy both establish direct liability for corporations.

For a better analysis the three criteria needs to be looked at separately:

a. To the extent it exercises control over the operations

The first criterion that drafters put forward is that of control. It is the classic avenue already used by courts to engage the direct responsibility of the parent company for the acts of the subsidiaries, and this notion has received various interpretations in the different fields of international law and in national jurisdictions. Although parent company control over a subsidiary or joint venture can be evident in paper and from corporate management, only in exceptional circumstances have courts imposed liability on the parent company under this criterion.⁴⁶ This problematic reveals the need for a specific definition of control.

b. To the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim

The second criterion establishes the liability of a company "to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and there is a strong and direct connection between its conduct and the wrong suffered by the victim". Two simultaneous criteria are present in this provision and can be differentiated here:

One criteria points to the sufficiently close relation between the parent and its subsidiary or a company in its supply chain. This criteria seems to recall the first one and to refer to the US *alter ego* doctrine,⁴⁷ according to which a court would disregard the corporate veil when a unity of ownership and interest between the two companies is such that they are no longer legally separate and that the consideration of separate personalities would result in fraud or injustice and the subsidiary is relegated to the status of the parent company alter ego. Because the conditions for *alter ego* doctrine are uncertain and difficult to assemble, it has been applied only in exceptional cases, and the victim has to prove that:

- **the subsidiary does not have its own legal person-hood;**
- **the subsidiary is used to perform fraudulent, unfair or unjust acts for the benefit of the parent company or majority shareholders;**
- **a causal connection between the conduct and the injury suffered by the plaintiff.**

The terms used by the treaty will however point to a more flexible approach which would not require the lack of legal personhood but simply a close relation. Nevertheless, as already mentioned for criterion a, **further specificity would be welcomed here in order to prevent the notion of control and of sufficiently close relationship from being restrictively understood.**

The other criterion adds a level of complexity to the establishment of liability insofar as it requires the behaviour of the parent company or the company in the supply chain to have a strong and direct connection to the wrong suffered by the victim. This criterion, that seems to be complementary to the first one adds a supplementary burden of proof, as if the link between the acts of the subsidiary or the entity in the supply chain to the harm weren't enough. An additional direct and strong link would need to exist to the behaviour of the parent company itself. Such a link, if defined strictly, might rarely exist in supply chain relations and even in relation to a subsidiary. Furthermore, as the notion of control mentioned above is not defined, it is not clear when control would be enough and on the contrary, when the establishment of a link to the harm would be necessary.

c. To the extent risks have been foreseen or should have been foreseen of human rights violations within its chain of economic activity

The third and last criterion allows for the establishment of liability "to the extent the risks have been foreseen or should have been foreseen of human rights violations within its chain of economic

⁴⁶ For instance, in the so called 'Omai Case', the company argued that responsibility for the design, construction and management of the mine rested with the subsidiary (OGML) and that Cambior (the parent) did not make the principal decisions affecting the daily operations of the mine, although this did not correspond to the reality of the group's structure and functioning. Cambior had the right to appoint and modify the majority of board members and to designate the board's Chair and Deputy Chair. Cambior could carry out day-to-day managerial functions and do so in its capacity as appointed manager. Nevertheless, the Québec Court said that available evidence "might enable the court to draw certain preliminary conclusions regarding Cambior's liability as principal, for the acts of [OGML], as agent", but concluded it was not the most appropriate forum to hear the case. Quebec Higher Court, Recherches Internationales Quebec (Petitioner) v. Cambior Inc. L. (Respondent) and Home Insurance and Golder Associes LTEE, 1998.

⁴⁷ US Supreme Court, Doe v. Unocal, 248 F.3d 915 (9th Cir. 2001), p. 926.

activity". This case is a reference to the form of "direct negligence" where parent company responsibility is based upon a breach of its own duty of care. However, the draft text should have better clarified the link between article 9 and 10. In this case, the duty of care would be established when a risk has or could have been foreseen in the economic chain of activity of the company and when the company has failed to do the due diligence.

Article 10.6.c could represent a very positive development in the field of corporate accountability since it obliges States to adopt 'parent based extraterritorial regulation' that has the merit of overcoming the problem of the corporate veil, dispensing the victims of the acts of subsidiaries from the burden of piercing the separation between the different entities and establishing a direct liability of the parent company for the failure of conducting due diligence.⁴⁸

This last passage could however rise difficulties of interpretation since the concept of "chain" of economic activity is not further defined.

All these criteria, however, will not be easy to apply to situations where companies violated human rights, if the victim is required to prove the proximity of the parent company to the subsidiary or to the wrong behaviour or the failure of the parent company to undertake due diligence. The difficulty for victims to prove such elements is one of the most recurrent barriers that impede access to justice in such cases. Article 8 and article 10.4 try to face these difficulties, by allowing better access to information for victims and the reversal of the burden of proof but in the latter case this is subject to domestic law, which could significantly undermine the scale of this innovative provision.⁴⁹

Criminal Liability

The recognition within criminal justice systems that corporations (and not solely individuals within corporations) can be held criminally liable is not uncommon in domestic legal systems, but international standards that provide a coherent approach across all States are missing. The treaty provides the (challenging) opportunity to consolidate the advances made at national level and thereby establish a consistent approach, which will strengthen the ability of claimants to seek accountability and access an effective remedy from corporations themselves. The effort done to include such elements in the treaty is a positive step forward.

Consequently, some elements may raise complex criminal law questions. First, article 10.8 indicates that criminal liability shall be established for "all persons [legal or natural] [...] that intentionally [...] commit human rights violations that amount to a criminal offense". The draft treaty thereby establishes a criminal liability that requires an intention, *mens rea*, raising a question that has created considerable doctrinal debates throughout history regarding the capacity of culpability of legal persons.

From the point of view of comparative criminal law, this approach corresponds to those cases where the intent of the legal entity derives from that of the natural person, agent of the corporation, which commits the crime with the intention of benefiting the corporation (the vicarious liability approach). However, some legal systems have opted for an organisational approach to criminal liability, considering for example the acts of high-level managers to be properly identified with the activity of the corporation. In this case, a specific intent is not necessary insofar as such individuals are considered to be acting as organs of the company. From this perspective, referring to those human rights violations perpetrated intentionally might not only limit the scope excluding those crimes where there was no specific intention, but might also not be adapted to certain legal systems. Consequently, the reference to the "intentionality" of the act may create diverse and conflicting interpretations, specifically considering that it does not establish specific types of crimes to be sanctioned (as do other international conventions). **Furthermore, demonstrating the intentionality of such acts in legal structures that are increasingly complex and decentralised might prove to be challenging.**

⁴⁸ O. De Schutter, Towards a New Treaty on Business and Human Rights, op. Cit., p. 48 et ss.

⁴⁹ See R. Meeran, The "Zero Draft": Access to judicial remedy for victims of multinationals' abuse, September 2018, available at <https://www.business-humanrights.org/en/the-zero-draft-access-to-judicial-remedy-for-victims-of-multinationals-'mncs'-abuse>.

A very specific character of this liability in the treaty is the lack of a specific definition of "crime". Unlike other international treaties concerning criminal liability of natural or legal person, the draft does not define specific crimes that States should provide for in national jurisdiction, neither does it clarify what are the crimes that will determine the liability (are they international crimes, crimes against humanity?) but refers generally to "human rights violations that amount to a criminal offense". This definition is very large, thereby allowing to cover a broad spectrum of conducts defined under "international law, international human rights instruments or domestic legislation".



However, this broadness implies as a counterpart that there is no minimum standard set regarding specific conducts in which all State parties should ensure that legal persons are liable, without preventing them from going beyond. As a consequence, such broad obligations may not be directly applicable in the case where the States are unwilling or unable to adopt the necessary legislation to implement such a provision. This is particularly true in the case of criminal liability where the nulla poena sine lege principle (no punishment without law), basis of the principle of legality, prevents any criminal liability without a prior existing law specifically defining the objectionable conduct.

The zero draft also makes reference to the scope of the criminal liability which shall extend to "principals, accomplices and accessories, as defined in domestic law". As mentioned above, this reference is positive but might have little impact in practice insofar as no specific crimes are defined and none are the types of involvement. In the cases of corporate abuse, practice has shown that there might be specific types of contribution and complicity proper to economic actors. Furthermore, the provisions fail to take in account the omissions and only refer to liability for companies that 'commit human rights violations'. Consequently, including a minimum standard of definition would contribute to achieving the objective of consolidating, at least partially, a consistent approach.

It is however positive that article 10.9 explicitly provides that "liability of legal persons shall be without prejudice to criminal liability of natural persons". This provision is inspired by other international conventions and therefore constitutes a legitimate and largely accepted wording. Furthermore, it prevents criminal liability of legal persons from becoming a shield for individuals, and particularly high-level managers to escape their personal liability.

The progress made by the articles in the zero draft concerning criminal liability could nevertheless be undermined by an exception clause that has been formulated very broadly for the moment. Article 10.12 considers that "in the event that, under the legal system of a party, criminal responsibility is not applicable to legal persons, that Party shall ensure legal persons shall be subject to effective proportionate and dissuasive non-criminal sanctions". This provision is similar to the provisions included in other treaties which contain clauses regarding criminal responsibility of legal persons, but it has been watered down in **2 elements that need to be reinforced**:

- **First, the wording of the article could be simplified, reducing the use of "shall" and stating a clear obligation to subject legal persons to non-criminal sanctions: each "party shall ensure legal persons are subject to effective, proportionate and dissuasive non-criminal sanctions".**
- **Second, although this clause is necessary to adapt this obligation to States that have a legal system that does not allow, as a matter of principle, the recognition of criminal liability – as for example those where administrative penalties are imposed to supplement the lack of criminal responsibility for legal persons (i.e. Italy, Germany, Greece, Hungary, Mexico and Sweden) -, a more limited wording would help prevent it from creating an escape door to this obligation.**



For this the treaty could be inspired by the UN Convention against Transnational Organised Crime, which provides in its articles 10:

"Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention."

It could also draw on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which provides in article 2 that:

"Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".

Specific reference to the legal principles will exclude the cases where the lack of criminal responsibility derives from a lack of political will rather than a legal obstacle.

Finally, the obligation, where applicable, to incorporate universal jurisdiction over human rights violations that amount to crimes under international law is very positive. Nevertheless some additional clarity is necessary to clarify the scope of this obligation. On the one hand, by referring to international law, this provision seems to reinforce existing international obligations of universal jurisdiction. On the other hand, by referring broadly to "appropriate provisions for universal jurisdiction over human rights violations that amount to crimes", it goes beyond the scope of existing international instruments, thereby creating new obligations. Hence, it would be preferable to clarify that the future instrument asks States to adopt provisions in national law establishing universal jurisdiction for human rights violations that amount to crimes (that will have to be carefully defined) perpetrated by persons (legal or natural) with business activities of transnational character.

CONCLUSIONS

In the light of what has been discussed above, the draft released by Ecuador could be considered a first important step towards a more concrete discussion on wording and provisions which will form part of a future international binding instrument on business and human rights. While some elements such as the centrality of victims, the institution of the obligation to adopt mandatory due diligence legislation and the focus on liability are very positive, much discussion and careful consideration of the possible options are still needed on many if not all the provisions put forward by Ecuador. This discussion should bear in mind the principle purpose of this instrument : provide accountability and access to justice in cases of human rights violations linked to business activities.

This contribution has un-packed some of the draft's provisions (more analysis will follow in the upcoming months) and has outlined some points where further development is, in our opinion, imperatively needed, *inter alia*:

- **Reaffirm the general duty for all businesses to respect human rights in the operational part of the text**
- **Clarify the subjective scope of the treaty in order to avoid restrictive interpretation and exclusion of state-owned enterprises**
- **Include specific wording on Human Rights Defenders' protection and recognition**
- **Offer improved avenues to provide effective access to justice to individuals and communities affected by corporate abuses all along the value chain**
- **Integrate reinforced provisions regarding conflict-affected areas and integrate them to the article on prevention**
- **Make the notion of Human Rights Due Diligence more comprehensive and coherent with other existing international frameworks and clearly establish a link between due diligence and the corresponding parent or lead company liability in cases where human rights violations occur ;**
- **Establish a strong and effective monitoring and enforcement mechanism by substantially strengthening the provisions of the optional protocol**

A treaty that would not be able to give a concrete and operational answer to such problems would not add much to the existing international framework.

While the way towards a treaty is still long and complex, this draft constitutes a valuable opportunity to have a meaningful and constructive debate next October in Geneva. Delegations, especially those who have repeatedly called for substantial discussions to take place, are now expected to prepare and to engage on the content of the draft, as well as to make efforts in order to improve the existing text and make the protection of human rights more effective when faced with corporate abuse.

It is a call that all those who have an interest in an economic development that is more respectful of people and of the planet cannot miss.

Keep your eyes open

Director of publication:
Dimitris Christopoulos
Editor-in-chief:
Juliane Falloux
Authors:
Maddalena Neglia
Maria Isabel Cubides
Thanks:
Olivier De Schutter,
David Bilchtiz
Cedric Ryngaert
Sacha Feierabend
Design:
FIDH / Simon Géliot

fidh

Establishing the facts - Investigative and trial observation missions

Supporting civil society - Training and exchange

Mobilising the international community - Advocacy before intergovernmental bodies

Informing and reporting - Mobilising public opinion

For FIDH, transforming societies relies on the work of local actors.

The Worldwide movement for human rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

fidh

CONTACT US

FIDH

17, passage de la Main d'Or

75011 Paris

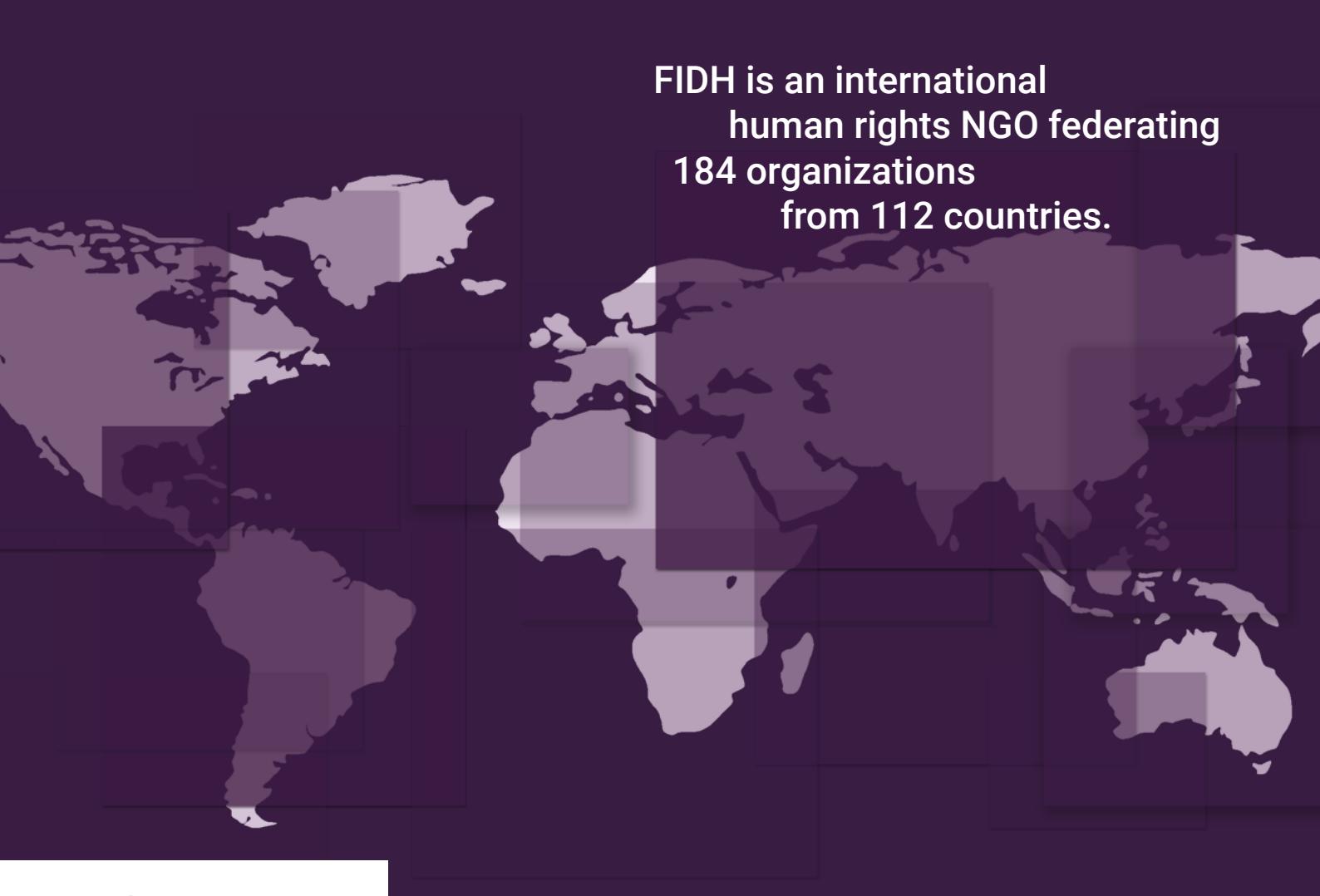
Tel: (33-1) 43 55 25 18

www.fidh.org

Twitter: @fidh_en / fidh_fr / fidh_es

Facebook:

<https://www.facebook.com/FIDH.HumanRights/>



**FIDH is an international
human rights NGO federating
184 organizations
from 112 countries.**

fidh

ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 184 member organisations in 112 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.