

Removing Barriers to Justice

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

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Executive summary

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Executive summary

Transnational businesses are extremely important actors on the global stage. Their operations can potentially create enormous benefits, but they can also cause lasting harm – both to people and the planet. There are now numerous cases involving transnational companies that have been implicated in creating, facilitating or tolerating situations leading to violations of human rights and environmental degradation. Complaints raised against major transnationals include cases of land acquisition that fail to respect the land rights of traditional and indigenous communities; the industrial use of powerful chemicals impacting on the environment; forced labour; the failure to protect workers and local communities from dangerous substances; dumping of waste; polluting of rivers; tolerance of poor safety standards and working conditions; and accounts of collaboration with State military and paramilitary groups against a backdrop of widespread violence against human rights defenders.

Given these severe international impacts, combined with the fact that dozens of companies and corporate groups are now bigger in economic terms than many individual countries, it is remarkable that they still remain largely outside of the formal regulatory system of international human rights law. The international human rights supervisory regimes are predicated on State-based systems. This raises a key question: how can businesses be regulated if they operate across national boundaries yet are only subject to the domestic supervisory frameworks of nation States?

A first step: the United Nations Guiding Principles

The adverse impacts of international businesses have long been acknowledged by the United Nations (UN). In 2005, a Special Representative for Business and Human Rights was appointed by the UN Secretary General. His mandate resulted in the 'Protect, Respect and Remedy Framework' that outlined the duties and responsibilities for states and businesses to address business-related human rights abuses. This was followed by the Guiding Principles on Business and Human Rights (UNGPs)¹ in 2011. Both the Framework and the UNGPs were unanimously endorsed by the UN Human Rights Council.

The UNGPs have garnered international consensus and support because they include real and plausible strategies for reform. However, they lacked binding force, legal compulsion and the supervisory framework needed to implement real legal change. Unfortunately, the substantive legal reforms needed to remove barriers, and to improve access to remedies, have not been implemented. This means that corporate impunity continues to this day.

1 Guiding Principles on Business and Human Rights, HR/PUB/11/04, United Nations (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (hereafter UNGPs 1, UNGP 2, etc.)

About this report

In June 2014, a ground-breaking resolution was adopted by the Human Rights Council that established an Inter-Governmental Working Group to develop an 'international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.² Such a 'binding instrument', or treaty, has the potential to take an important next step on the path towards remedy for victims of business-related human rights abuses.

Seeking to contribute to the mandate of the Inter-Governmental Working Group on business and human rights, this report provides more concrete evidence of continuing obstacles to access to remedy, reiterating the persisting remedy gap that a treaty might help to close. It also sets out arguments for practical reforms, arguing that the UN negotiations for a binding treaty offer a clear opportunity to improve access to remedy for victims.

The report focuses specific attention on policy and legal developments in the European Union (EU). It identifies whether and in what way a UN treaty on business and human rights could complement and improve policy development and action at the national level to address barriers to remedy, as well as setting the framework for harmonising key elements of law.

This report analyses five well-known cases of business-related human rights abuse, setting out the specific legal and practical problems that serve as barriers to justice in each of these cases. The cases profiled here are well-documented examples of some of the adverse impacts of business on human rights. For each example, the barriers that victims face in seeking remedy are examined. Recommendations are made for international legal reform that could potentially break down these barriers. Each analysis concludes with an overview of elements that should be included in a draft treaty to address these problems.

About the case studies

The case studies turn the spotlight on serious human rights impacts that are the result of transnational business ventures. They unpack the complexities of resulting litigation attempts around Europe, Asia, North America and Africa. They also include both criminal and civil law processes. And in one case they include an attempt by an affected community to gain a hearing before the tribunal process of the Investor-State Dispute Settlement (ISDS) mechanism³. All of these litigation processes demonstrate striking examples of the formal legal barriers, and practical challenges, that combine to deny many of the victims access to remedy. These cases reveal a clear need for effective action to enhance the protection for people, workers, farmers, communities and the environment from the harmful impacts of violations associated with transnational business operations.

2 Resolution adopted by the Human Rights Council 26/9. Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (2014) at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ResDecStat.aspx>

3 Fact Sheet: Investor-State Dispute Settlement (ISDS), Office of the United States Trade Representative, at: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>

Analysis of the cases reveals:

- ▶ *Jurisdictional problems* specific to transnational litigation, including attempts to bounce cases from jurisdiction to jurisdiction, and the complexity of attempting to interpret and apply foreign law.
- ▶ Legal barriers – specifically the *corporate veil* – shielding the parent company from responsibility for the debts and liabilities of its subsidiaries.
- ▶ Similarly, *barriers to criminal liability* are shown to exist in many cases, with corporations either not indictable, or a lack of effective rules for determining intent.
- ▶ The need for ‘*due diligence*’ to be placed on a solid legal footing to ensure that human rights are appropriately integrated into corporate decision-making, and to establish a duty of care rather than reliance on voluntarism.
- ▶ *Risks for human rights defenders* – individuals and communities (or their representatives) who try to bring legal cases against multinational companies may face considerable challenges themselves as a result.
- ▶ A set of problems grouped here as ‘*access to courts*’ are a crucial factor: the unequal position of rural farmers and industrial workers against giant companies is exacerbated by rules on access to information, representation, the burden of proof and the complexity of transnational corporate structures and actions.
- ▶ Problems of *enforcement*: criminal law requiring adaptation and regulatory agencies and prosecutors requiring training and renewed mandates.

The cases include examples in which many thousands of victims have been left without a remedy, even after extensive, expensive and extraordinarily time-consuming transnational litigation processes. They include cases in which victims have been excluded from tribunal processes and denied the right to a hearing. They include cases that might be regarded as ‘successful’⁴ in which technical legal challenges led to such long delays that claimants died – by the thousand – waiting for a resolution. Another case shows how assertive reputational management action by one company led to libel proceedings against the plaintiff’s lawyers, and suppressed coverage by major media organisations. They also reveal that giant companies have been willing to try to derail plaintiffs on many technical and procedural aspects of their claims, including challenging the legal title of a rural farmer plaintiff.

While settlements were awarded in some cases, and criminal sanctions were imposed in another, there remains an overwhelming tendency for the corporate defendants to evade final court rulings and to settle both criminal and civil matters with cash payments but without admitting guilt. One unfortunate outcome of this is that the companies are subsequently able to – and do – claim

4 Ultimately the Lubbe case (citation below) was settled, resulting in compensation for plaintiffs

they did nothing wrong, thereby not contributing to the articulation of norms that condemn this conduct. Another concern is that, where fines have been imposed, these have been too small to impact upon the vast resources available to the companies concerned, thus having no or a very limited deterrent impact.

Why a Treaty is needed

Barriers to remedy exist in all jurisdictions; removing these barriers requires State action. States are cautious about taking unilateral action so there are strong reasons to propose a binding UN Treaty as a basis for prompting collective movement and convergence of standards. Action is needed now to address these problems and to bring about a new level of accountability so the victims of business-related human rights impacts can receive a hearing as well as remedy for the harms they suffer.

The UN Treaty has real potential to bring about change. It represents an opportunity to coordinate policies and legal developments at the domestic level. Europe can play a hugely influential role in this process. At first some governments feared that the Treaty and the UNGPs were in opposition. They were seen as competing strategies, rather than complementary approaches. An enthusiastic supporter of the UNGPs, the EU was among those arguing that the Treaty proposal risked derailing the implementation of the UNGPs. But this has not happened so far. Far from it, in fact there are signs that support for the UNGP process accelerated after the Treaty initiative got underway. This report argues that the UNGPs and the Treaty should now be regarded as complementary strategies for achieving the same goals.

Furthermore, the EU is now participating in the Treaty process, in spite of initial reluctance to do so.⁵ Beyond this, it has the potential to play a leadership role, and can provide templates in terms of jurisdiction and choice of law (i.e. that of the Brussels and Rome⁶ legal frameworks), which should guide and inform the Treaty development process.

Summary of recommendations for the elements of a Treaty

A future UN binding instrument on Business and Human Rights could help to break down barriers to remedy for victims of business-related human rights abuse by working together with existing normative frameworks. The report closes with an overview of elements that should be part of any such Treaty in order to effectively address current remedy gaps. It is recommended that the UN Treaty should introduce the following seven areas of reform, in order to address the problems identified in this report:

5 See Section 3 the full report.

6 Regulation (No. 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) and Regulation (No. 864/2007) on the law applicable to non-contractual obligations (Rome II), herein referred to simply as the 'Brussels' and 'Rome' Regulations.

1. Use the Treaty to make it easier to *overcome jurisdiction barriers*; by creating a framework for jurisdiction and choice of law by domestic courts for human rights violations by their companies overseas, the Treaty could decrease the likelihood of lengthy jurisdictional battles, ensuring that cases will proceed to trial of substantive matters more quickly.
2. Use the Treaty to *remove legal barriers to corporate liability* and to place upon corporations a *broad duty of care*; in almost all situations relevant to transnational human rights cases, parent companies do not, under present company law regimes, bear the liabilities of their subsidiaries. This constitutes a profound legal blockage causing denial of access to remedy in transnational human rights cases. The Treaty could create a mechanism for making a parent company liable for its subsidiary's conduct, enabling victims to pursue compensation from the parent if the local company was unable to meet its liabilities. A duty of care could be limited to the company's own subsidiaries or applied more generally throughout its supply chain.
3. Use the Treaty to *promote convergence of criminal law* around basic modern approaches to corporate liability; the criminal law in many countries is insufficiently structured to deal with corporations as offenders, but examples of modern approaches do exist. The Treaty could help move all legal systems towards a basic criminal law position for corporate offenders. Criminal conviction and sentencing of offenders can provide moral satisfaction for the victims of serious business related human rights abuses and also public recognition that a harm has been inflicted. Furthermore penalties, if set at an appropriate level, can serve as an effective deterrent.
4. Use the Treaty to *improve corporate responsibility* by giving binding legal force to the *due diligence* framework from the UNGPs; there are problems around corporate management and the integration of social and human rights objectives, varying in severity depending on countries' company law approaches. But there are signs of significant change as due diligence concepts become more entrenched. There is scope to support and progress these existing developments, and to build on them. Due diligence would appear to have the potential to radically improve corporate planning, to avoid problems, and to encourage transparency. Significantly, it would also, in principle, establish a broad direct parent company duty of care that would help to ensure a cause of action for private claims for redress by victims.
5. Use the Treaty to *affirm and extend protection for human rights defenders*; in 2017, the UN Working Group on Business and Human note that 'There are increasing records of killings, attacks, threats and harassment against human rights defenders who speak up against business-related human rights issues, including the particular challenges faced by women human rights defenders'.⁷ The Treaty could help address this alarming trend by introducing libel law reform; introducing a model of judicial protection for whistle-blowers and human rights defenders; and by strengthening the commitment to consult with communities and recognise and to protect the rights and interests of indigenous peoples in relation to business projects.

7 UN Working Group on Business and Human Rights, Informal background note Human rights defenders and civic space – the business & human rights dimension, at: http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG_ProjectHRDsBackgroundNote12052017.pdf

6. Use the Treaty to *improve access to courts*; there are multiple problems for plaintiffs in accessing courts and receiving a hearing in cases against TNCs, including funding provision, locus standi (the right to appear before, or to make submissions to, the court), access to information, the disclosure of documents and the burden of proof. The strategies for reform that the Treaty could adopt include reversing the burden of proof, requiring disclosure of information by transnational businesses and making adequate provisions for plaintiffs and their representatives to secure a hearing and to finance their cases.
7. Use the Treaty to improve the effectiveness of *State enforcement*; at both the domestic and international levels, States face shortcomings and lack adequate processes to enforce human rights law against TNCs. Domestically these problems correspond to uncertainty over mandate, and adequate competence and resources. Internationally there is simply no current machinery dealing with corporate transnational human rights cases. The Treaty could address these shortcomings by creating international agreement on judicial cooperation and mutual recognition and enforcement of judicial decisions; affirming the role of domestic agencies in responding to transnational cases; establishing effective sanctions to be imposed by domestic administrative and criminal processes; and establishing a global oversight body on business and human rights.

There are fundamentally two levels at which the Treaty can deliver change. The first recognises that the majority of the barriers identified in this report exist at the national level, that is, within domestic law. Therefore change needs to happen at the level of domestic law reform in multiple countries if these barriers are to be effectively removed. The second approach calls for something more radical, by placing binding obligations on businesses, and backing that up with some form of monitoring, supervisory or judicial body at the global level. There are good arguments in favour of either approach. It is possible, and may be desirable, to pursue both strategies under the Treaty, calling upon States that ratify it to both amend their domestic law and to pave the way to an international supervisory regime.

