Open Ended intergovernmental working group for the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

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Oral Statement by the International Commission of Jurists

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Both States and business enterprises (transnational or solely domestic) have their respective obligations and responsibilities independent from each other but interrelated. International human rights obligations for States are contained in the respective treaties or flow from international customary law. The human rights responsibilities of business enterprises are sparse in legally binding instruments (such as certain ILO conventions), but have been spelled out to some extent in such non-treaty instruments as the Guiding Principles on Business and Human Rights (UNGP), the ILO Tripartite Declaration on Multinational Enterprises and Social Policy (ILO MNE Declaration).

A new business and human rights treaty should affirm clearly, in a section on general principles and as a matter of law, the foundational principles of those States obligations and business enterprises responsibilities. Those general obligations and responsibilities coalesce around the State duty to protect human rights, including against business abuse, and ensuring the business responsibility to respect all human rights. The UNGP are built on three pillars: the duty of States under international law to protect human rights against abuses by third parties, including business enterprises; the responsibility of business to respect all human rights; and the need to guarantee access to a remedy for those whose rights have been impacted by business conduct. Under the duty to protect, States, in assessing, adopting and implementing protective measures, including through legislation, have to take account of all of their international human rights legal obligations.

Under international human rights law, States are required to take measures to protect persons against the impairment of human rights by non-States actors, including business enterprises. This principle is also reflected in the UNGP. State action pursuant to international obligations to protect against the abusive conduct of non-State actors involves requiring business entities to assess, prevent and mitigate risks of rights abuses during their operations and to take measures to remediate the damage when it occurs.

As part of their general duty to protect, States should regulate on a sector-by-sector basis, to enhance business enterprises’ respect for human rights in their global operations.

A crucial area regarding the States’ obligation to protect concerns discharging that obligation extraterritorially. Under international human rights law, States have an obligation to respect, protect and fulfil human rights both within their territories and extraterritorially, although the nature and scope of territorial and extraterritorial obligations are not in all contexts and situations coterminous. This dimension of the State duty to protect has been distilled in Principle 25 of the Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, underlining the obligation of States to adopt and enforce measures to protect human rights through legal and other lawful means where the corporation or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.

On the basis of, among others, the Recommendation 103/2016 of the CM of the Council of Europe:

States should ensure in law that judiciaries are afforded the necessary jurisdictional scope to consider civil claims concerning human rights abuses alleged to have been committed by business enterprises, including in their global operations. To this end, States should ensure that their laws grant domestic courts jurisdiction not only over claims concerning business enterprises domiciled within their jurisdiction, but also over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of companies domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.

Likewise, States should ensure that their domestic courts are able to exercise jurisdiction over civil claims concerning business-related human rights abuse against business enterprises not domiciled within the jurisdiction of the state if no other effective forum guaranteeing fair trial is available and there is sufficiently close connection to the state concerned.