



Amnesty International USA's Recommendations Concerning the U.S. National Action Plan for Responsible Business Conduct

April 2015

Amnesty International USA (AIUSA) welcomes the initiative announced by President Obama on 24 September, 2014 to launch a consultative process for developing a National Action Plan for Responsible Business Conduct (USNAP) consistent with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.¹

A representative of AIUSA² attended the launch of this consultation hosted by New York University Stern School of Business on 15 December, 2014. In preparation for the consultation in Washington DC on 16 April 2015, AIUSA submits the following set of preliminary comments and recommendations concerning the NAP consultation process and the content of the USNAP. This paper is intended as the first in a series of interventions by AIUSA in the consultation process and is structured as follows:

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¹ Altschuller, Sarah. *United States to Develop National Action Plan on Responsible Business Conduct*. September 27, 2014. http://www.csrandthelaw.com/2014/09/27/united-states-to-develop-national-action-plan-on-responsible-business-conduct/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (accessed March 27, 2015)

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I. Preliminary Considerations

AIUSA welcomes the commitment of the U.S. government to elaborate a comprehensive NAP to ensure business respect for human rights, and is committed to engaging in and contributing to this process.

While fully supporting this process, AIUSA would like to note that the development of a NAP should in no way impede or delay immediate action to investigate allegations of business-related human rights abuses, hold businesses who are found to have caused or contributed to human rights abuses accountable, and provide victims of such abuses with effective remedy. It should neither impede nor delay other policy or legal reform processes dealing with specific issues or challenges concerning business and human rights.

The U.S. government must also ensure that while developing and implementing its NAP on business and human rights, it does not, at the same time, take any action or adopt any measure in any realm of policy or law which could undermine its ability, or the ability of other states, to protect human rights in the context of business activity.

II. Recommendations Concerning the Consultation Process

The consultation process for the USNAP should be multi-stakeholder and transparent and provide opportunities for input and dialogue between all relevant actors, including in particular individuals and organizations with human rights expertise, or expertise in specific areas of human rights such as indigenous peoples', women's or children's rights.

It is particularly important that the consultation process encourage and facilitate the participation of individuals and communities impacted by or at risk of impacts from business activities, and/or their legitimate representatives, both domestically and outside of U.S. territory. This is crucial to ensure the process is legitimate and grounded in the real life experience and needs of those for the benefit of whom the USNAP is developed.

AIUSA supports the recommendations contained in Chapter 6 of the joint ICAR-DIHR publication “*National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*” (the ICAR-DIHR NAP Toolkit) regarding the criteria to help design and plan a robust NAP.³ In particular, the USNAP should:

- Clearly identify and publicly communicate leadership and ownership of the NAP development and implementation process within the government. All relevant government departments, offices and agencies must be involved in the development of the NAP and be held accountable for the effective delivery of their respective responsibilities and commitments under this plan.
- There should be a designated independent agency of the U.S. government in charge of ensuring the adequate implementation of the USNAP as well as monitoring policy coherence across the U.S. government. This agency should work in close coordination with all relevant government departments and external stakeholders. At the same time, an interdepartmental working group could be set up (and its mandate, membership and individual responsibilities publicly disclosed) to oversee the NAP process. In addition to the State Department, this group should include representatives from the Departments of Commerce, Justice, Labor and Treasury, among others.
- The convening agents should devise and publish terms of reference and a timeline for the NAP process.
- Adequate resources should be allocated to the NAP process, from its elaboration through implementation monitoring to its review and update.
- To ensure meaningful and effective participation by all relevant stakeholders, the conveners should consult on and publish the results of a stakeholder mapping indicating all relevant actors to be included in the process; offer capacity-building to those who

³ The International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR), [National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks](http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf) (June 2014), Chapter 6, available at: <http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>

might need it in order to participate in the process more effectively, and regularly disclose all relevant information in an accessible and timely manner.

- Consultations on the NAP should span the drafting process, providing an opportunity for relevant actors to provide initial inputs as well as informed feedback on drafts of the plan as it develops. Summary reports of each consultation should be made public so that there can be accountability for how stakeholder inputs are factored into the ultimate content of the NAP.
- Articulate action points (i.e. commitments) within the NAP that are specific, measurable, achievable, relevant, and time-specific (SMART).
- Identify who is responsible for the implementation of individual action points within the NAP and overall follow-up. A framework for follow-up must be embedded in the NAP itself. The commitments outlined in the NAP run the risk of falling flat unless there are clear parameters for monitoring implementation. As such, the promises laid out in the NAP must be outlined along with an explicit articulation of who will be expected to deliver on those promises and when.
- Map a framework for the monitoring of and reporting on implementation of the NAP once published.

III. Specific Recommendations for the Content of the USNAP

A. General Recommendations

The NAP should be evidence-based and elaborated on the basis of a comprehensive review and assessment (also known as a “mapping and gap analysis”) of the existing policy and normative framework to identify regulatory gaps and suggest the necessary reforms to ensure effective protection of human rights in the context of business activity. The ICAR-DIHR NAP Toolkit recommends conducting “National Baseline Assessments” and offers useful guidance in this regard.

In both its comprehensive baseline review and NAP the U.S. government must take into account and seek to comply with the full spectrum of its international human rights obligations and commitments as they apply in the business and human rights context. This includes not only international frameworks specifically designed to deal with business and human rights issues, such as the UNGPs and the OECD Guidelines for Multinational Enterprises, but also international human rights law and standards which have a direct bearing on what is required of states to protect human rights from abuses by third parties, including companies.

All relevant areas of policy and law should be assessed, including commercial, corporate, administrative, environmental, labor, criminal and civil law, international trade and investment regimes, project finance regulation and other areas connected with or with a bearing on business and human rights issues.

AIUSA recommends that priority be given to the State duties to protect and to ensure access to remedy. As clarified by the UNGPs, the duty to protect against corporate-related human rights abuses must be implemented through “effective policies, legislation, regulations and adjudication.”⁴ The role of legislation and other regulatory measures is vital. The U.S. government must set the bar high and be an example to other States in this regard. The International Corporate Accountability Roundtable has already produced a “Shadow” National Baseline Assessment Report for the U.S. regarding Pillar I which should be taken into account.⁵

The baseline assessment should help identify and prioritize areas where immediate action might be needed, such as:

- Where regulatory gaps or weaknesses allow serious business-related human rights abuses to take place or continue unabated, both domestically and abroad;
- Where the absence or weakness of accountability tools allow for those abuses to go unpunished and fuel, as a consequence, further abuses;
- Where the absence or weakness of effective redress mechanisms leave the victims of those abuses without realistic prospects of securing justice and reparation.

The analysis suggested above must include an assessment of current calls and claims for accountability and remedy in the context of existing allegations of business-related human rights abuses and the response given by relevant U.S. government institutions to date.

The USNAP should contain a political statement clearly articulating the U.S. government’s commitment to ensuring business respect for human rights. The U.S. government should explicitly state it expects all businesses operating within its territory/jurisdiction and U.S.-domiciled/headquartered businesses operating abroad to meet their responsibility to respect human rights throughout their operations.

⁴ UNGP, Principle 1.

⁵ International Corporate Accountability Roundtable. *“Shadow” National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks: United States Pillar 1*. Washington DC: International Corporate Accountability Roundtable, 2015.

B. Pillar I: The State Duty to Protect

The state duty to protect against human rights abuses by third parties, including businesses, by taking appropriate steps to prevent, investigate, punish, and redress such abuses through effective policies, legislation, regulations, and adjudication.

Due Diligence

The U.S. should take a pro-active role in implementing its duty to protect by taking regulatory measures to ensure compliance with human rights standards among businesses operating within U.S. territory/jurisdiction and U.S.-domiciled/headquartered businesses operating abroad with respect to their own activities and those of subsidiaries, suppliers, contractors and other business partners. To this end, AIUSA would like to recommend the following key measures:

- Legally require businesses to respect human rights and to undertake human rights due diligence throughout their global operations in order to mitigate risks to human rights and prevent adverse human rights impacts.⁶
- Expand the scope of regulations related to the disclosure of non-financial information by companies. Disclosure should be an essential component of an adequate human rights due diligence process. Information to be disclosed should include a company's human rights due diligence policies and procedures, risks and impacts identified and measures taken to prevent, mitigate and address them throughout their operations. This information should be available to the public. Legislative examples already exist such as the mandatory disclosure of due diligence measures relating to conflict mineral supply chains under Dodd-Frank 1502.
- Legally require businesses operating in conflict-affected or high-risk areas to undertake enhanced due diligence before investing or operating in that area and on an ongoing basis thereafter. This requirement should apply to all companies operating in high-risk sectors regardless of their size.
- Establish a specialized agency or assign specialized functions to an existing agency of the U.S. government to monitor and enforce corporate human rights due diligence and disclosure requirements. Appropriate capacity building measures should be deployed to improve compliance. Sanctions and other corrective measures should be imposed if companies fail to implement their human rights due diligence and disclosure obligations.

⁶ For examples of available legal tools see ECCJ – ICAR Human Rights Due Diligence: The Role of State http://www.corporatejustice.org/IMG/pdf/human_rights_due_diligence-the_role_of_states-2.pdf and Human Rights Due Diligence: The Role of States - update 2013 <http://www.corporatejustice.org/IMG/pdf/icar-human-rights-due-diligence-2013-update-final1.pdf>

Human Rights Due Diligence

The USNAP should articulate the key principles and parameters for adequate human rights due diligence, drawing from existing international standards and in close consultation with human rights and other experts with experience in the relevant field. It should make it clear that human rights due diligence is not about managing risks to the company's commercial interests or reputation, but is designed to enable the company to avoid causing external harms to individuals and communities, and that the main purpose and function of these processes is to prevent human rights abuses.

Therefore, an obligation of due diligence cannot be reduced to a box-ticking compliance exercise. Corporate human rights due diligence must be translated into practical action that takes account of foreseeable risks in a given context and is genuinely geared towards preventing abuse. The process would include:

- identification of key risks, related to business and geographical area of operation;
- the existence of a plan of action to prevent or mitigate risks which was based on both technical data and consultation with potentially affected people and other relevant stakeholders;
- specific actions triggered once abuses are reported;
- disclosure of specific policies and processes undertaken to identify and address key risks and impacts.

Policy Coherence

A systematic and comprehensive process of development of the USNAP that involves all relevant levels and sections of government, based on a review of all relevant areas of law and policy, will lead to a much greater understanding of the various ways in which a multiplicity of institutions, laws and policies shape business practices and have a bearing on the effective protection of human rights in the context of business activity. The USNAP should reflect this understanding in the form of concrete proposals for reform and action points for key government actors and with regards to key laws, policies, programs and activities.

- Revise and update the white paper “U.S. Government Approach to Business and Human Rights”⁷ in light of the results of the U.S. NAP process. In particular, revise the definition of Corporate Social Responsibility or Responsible Business Conduct to the actual standard of the UNGPs and the revised OECD Guidelines on Multinational Corporations.
- All relevant government officials working to implement the USNAP should receive training on human rights, on how they can play a role to help prevent abuses to human rights and on how they should respond in case of allegations of human rights abuses involving businesses.

⁷ U.S. Government Approach to Business and Human Rights. U.S. State Department, Bureau of Democracy, Human Rights and Labor. June 2013.

- Any prospective new laws, policies and programs related to business or business activities should be subject to an impact assessment prior to their enactment or initiation to identify and address possible negative human rights impacts.
- Similarly, any existing or new multilateral or bilateral trade and investment agreements should be reviewed and, if needed, amended, to ensure they do not impair the ability of either the U.S. or other states to implement their international human rights obligations and are consistent with international business and human rights frameworks.
- All government ministries, departments and agencies, not just those concerned with human rights, must be conscious of and observe the State's human rights obligations to protect against human rights abuses by business in their particular area of work and responsibility.

The State-Business Nexus

The USNAP should clearly articulate the U.S. government's commitment to not support or condone human rights abuses caused or contributed to by businesses. This is particularly relevant with regard to State-owned enterprises and in the case of companies that receive substantial financial and other support from U.S. government agencies or through International Financial Institutions (IFIs) of which the U.S. is a member.

The USNAP must include measures to ensure that state-owned enterprises, businesses receiving substantial support and services from State agencies (such as the Overseas Private Investment Corporation) and enterprises enjoying other commercial benefits and advantages (i.e. trade missions, diplomatic services) conduct adequate human rights due diligence. Government agencies should implement their own human rights due diligence requirements to ensure they do not support or in any way become involved with companies or projects that fail to respect human rights.

The USNAP should promote the establishment of clear reporting requirements for these businesses and establish or strengthen existing accountability mechanisms to ensure compliance. Non-compliance should lead to consequences such as the suspension or withdrawal of financial or other support and the termination of contracts.

The baseline assessment referred to above should also include an examination of the extent to which the U.S. meets its international human rights obligations when acting multilaterally through IFIs. To adequately implement principle 10 of the UNGPs, the U.S. government should commit to doing everything in its power to ensure IFIs of which the U.S. is a member respect human rights in their lending and other activities. The U.S. government should strive to ensure IFIs' policies are in line with and explicitly refer to international human rights law and standards,

that they publicly commit to respecting human rights in all their activities and adopt robust human rights due diligence policies and procedures.

Public Procurement

The USNAP should include measures to require government suppliers to respect human rights through adequate human rights due diligence processes, and establish effective and credible tools for effective implementation and monitoring.

Government procurement contracts with private companies should include requirements that they carry out human rights due diligence and report on their due diligence policies and practices. They should also include clauses providing for the suspension or termination of contracts based on non-compliance. Companies that are directly or indirectly linked to human rights abuses should become ineligible for public procurement contracts. Models for this kind of policy are the 2012 Executive Order for Strengthening Protections Against Trafficking in Persons in Federal Contracts,⁸ and Title XVII of The National Defense Authorization Act (NDAA) of 2013 — Ending Trafficking in Government Contracting.⁹

Foreign Policy

The USNAP should highlight the role of the U.S. embassies in raising awareness among companies about the risks that their activities can pose to human rights and the steps they should take to prevent or mitigate them. Embassies' personnel should be adequately instructed and trained regarding the procedure in case of allegations of human rights abuses involving U.S. businesses, and the support they should provide to human rights defenders. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms should be used as guidance in this regard.¹⁰

C. Pillar III: Access to Remedy

The state duty to provide access to effective remedy includes taking appropriate steps to ensure that State-based domestic judicial mechanisms are able to effectively address business-related human rights abuses, and removing barriers that prevent victims from presenting their cases.

⁸ Executive Order – Strengthening Protections Against Trafficking in Persons in Federal Contracts, September 25, 2012. Web: <https://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>. Accessed 4/10/15.

⁹ U.S. Government Approach to Business and Human Rights, Op. Cit.

¹⁰ UN Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. G.A. Res.53/144. 9 December 1998. Web: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>. Accessed 4/10/15

The U.S. government must ensure victims of corporate human rights abuse can exercise their right to effective remedy. The USNAP should include a clear commitment from the U.S. government to facilitate access to remedy for individuals and communities whose human rights are affected by business activities. The comprehensive baseline review recommended above should include a careful examination of existing obstacles to remedy for victims of such abuses. This analysis should also draw from extensive research and analysis already conducted either specifically regarding the U.S. context or more broadly across a number of national jurisdictions.

AIUSA would like to emphasize two critical points:

- Under international human rights law remedy is a human right in and of itself;
- Under international human rights law, remedy must be provided by an independent, impartial and competent authority established by law. Remedial mechanisms must have the capacity to provide remedy and to enforce this remedy. They must be affordable and accessible, they must guarantee equality between the parties both in access and throughout procedures, and a fair trial.

AIUSA believes that the mechanisms best suited to meet these requirements are State-based mechanisms of redress and for this reason, recommends that the U.S. government focus its attention on these mechanisms in the elaboration of the USNAP.

Identifying Barriers to Remedies

Amnesty International has conducted extensive research and analysis of obstacles to remedy prevalent in cases of corporate-related human rights abuses. In its publication "[Injustice Incorporated: Corporate Abuses and the Human Right to Remedy](#)"¹¹, the organization points at a number of particularly critical hurdles, many of which are relevant to the U.S. context. These include:

- The use of the doctrine of *forum non conveniens* to defeat legal claims in U.S. courts for alleged human rights abuses involving U.S. businesses.
- The corporate law doctrines of separate legal personality and limited liability applicable between different members of a corporate group, including between parent companies and their subsidiaries, and their implications for effective corporate accountability and remedy.

¹¹ Amnesty International, "[Injustice Incorporated: Corporate Abuses and the Human Right to Remedy](https://www.amnesty.org/en/documents/pol30/001/2014/en/)" (March 2014), available at: <https://www.amnesty.org/en/documents/pol30/001/2014/en/>

- The lack of or poor access to information vital for the effective protection of human rights and to secure effective remedy in specific cases of corporate abuse (often because this information is under corporate control).
- The huge influence and impact of corporate lobbying on government officials bearing directly on the nature of the regulatory environment in which companies operate or the course and outcome of court proceedings.
- The lack of or poor international cooperation and assistance in criminal, civil or other proceedings related to human rights abuses committed by or involving multinational companies and their effect on the effective prosecution, punishment and redress in this type of cases.

We recommend that the U.S. government specifically incorporate a review of these issues as part of the broader baseline assessment. However, the list above is by no means exhaustive. Many other hurdles to effective remedy exist, such as the widely recognized high and often prohibitive costs of pursuing litigation against a corporate defendant.

Addressing Barriers to Remedies

The U.S. government must commit to assessing and taking measures to alleviate all identified obstacles. Since they are affecting victims of alleged business-related human rights abuses today, these measures should be considered of high priority.

In its publication “[*Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*](#)”, Amnesty International proposes a number of concrete measures to alleviate the obstacles identified in this work, which AIUSA would like to recommend be considered in the USNAP as part of a broader program of reforms to improve access to remedy:

- Eliminate the use of the *forum non conveniens* doctrine, at least in cases concerning extraterritorial corporate-related human rights abuses (or, until eliminated, apply it restrictively and with the effective exercise of the human right to remedy as an overriding weighing factor).
- Place U.S. parent companies under an express legal duty of care towards individuals and communities whose human rights may be or are affected by their global operations, including by the activities of their subsidiaries (domestic or foreign).¹²

¹² These proposals do not remove the concepts of separate legal personality and limited liability, but make the concepts subject to certain limitations in the public interest.

- Define the standard of care needed to meet this duty of care by reference to international human rights due diligence standards that focus on the prevention of human rights abuses (see recommendations above on human rights due diligence).
- Establish a rebuttable presumption that the relevant U.S. parent company is legally responsible in certain serious cases such as when the alleged abuses to human rights are large-scale, severe or systematic.
- Explore and take measures to establish other modes and standards for establishing the liability of U.S. parent companies with respect to the activities of their subsidiaries, contractors and suppliers, in particular through specific criminal and civil legislation with extraterritorial effect.
- Increase transparency of corporate involvement in policy-making e.g. through laws on disclosure of corporate lobbying, laws that requires politicians and civil servants to disclose and make publicly available all meetings with corporate actors, including corporate positions and issues discussed.

The mandatory disclosure requirements on companies recommended above should also help alleviate hurdles to remedy associated with the lack of or poor access to information. This should be complemented with civil procedure rules on discovery that facilitate ample access to relevant information by plaintiffs.

Corporate Criminal Liability

In addition to the above recommendations primarily designed to remove or alleviate hurdles to civil redress, AIUSA would like to recommend the U.S. government conduct an assessment of existing barriers to effective corporate criminal accountability for businesses operating within U.S. territory/jurisdiction and U.S.-domiciled/headquartered businesses operating abroad that commit human rights abuses that amount to crimes.

The U.S. government should assess in particular the extent to which existing criminal laws that could be used to hold corporate actors accountable for such crimes are being enforced effectively and/or whether new laws are needed. The assessment should include an analysis of existing practical and systemic barriers to investigation and prosecution, such as potential impediments related to a lack of prioritization, resources, expertise and international cooperation.

On the basis of this assessment, the USNAP should recommend measures to ensure existing criminal laws are enforced effectively, including by addressing underlying obstacles such as those referred to above. It should also recommend the adoption of new criminal laws where these are missing, ensuring they also apply to crimes committed abroad.

With regard to both civil and criminal liability, international judicial cooperation will often be essential. The U.S. government should proactively engage in dialogue with other states with a view to putting in place guidance, mechanisms and protocols to facilitate cross-state collaboration and assistance in cases concerning human rights abuses by multinational corporations.

State-based Non-judicial Remedies

The U.S. government should devote particular attention and resources to strengthening competent state-based administrative and other non-judicial bodies capable of providing effective remedy for business-related human rights abuses. Many existing bodies already regulate and adjudicate aspects of corporate activity such as consumer and environment protection agencies, labor inspectorates, anti-trust and fair trading regulatory bodies, etc. Lessons can be drawn from the strengths and weaknesses of these bodies in order to put in place effective State-based non-judicial mechanisms in the area of business and human rights. This might mean extending the mandate of existing bodies or creating new ones with the capacity to receive and adjudicate complaints of business-related human rights abuses and afford reparations to the victims.

The U.S. still does not have a National Human Rights Institution (NHRI). In consideration of the urgent need for monitoring of business-related human rights impacts as well as a myriad of other pressing human rights issues, it is time for the U.S. government to create its own NHRI.

IV. Supra-national Efforts

Taking action to strengthen protection against business-related human rights abuses at the domestic level should go hand in hand with parallel complementary efforts at regional and international level. The U.S. government should commit to supporting and participating in OAS and UN-led processes to develop and strengthen standards on business and human rights, including the UN Human Rights Council process to develop an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises. A carefully developed international binding instrument can reinforce national and regional protection systems, both in terms of prevention and remediation of business-related human rights abuses.

V. Concluding Comments

AIUSA welcomes the commitment of the U.S. government to elaborate a comprehensive NAP to ensure business respect for human rights and is committed to contributing to this process. The consultation process now in course must be fully transparent, inclusive and provide meaningful opportunities for input and dialogue between all relevant actors, including individuals and organizations with human rights expertise and critically, individuals and communities affected by business activities.

To ensure transparency and accountability, the government agency or agencies responsible for driving the development of the USNAP as well as for its effective implementation, review and update must be clearly and publicly identified. All relevant government departments, offices and agencies must be involved in both the development and implementation of the USNAP and be held accountable for the effective delivery of their respective responsibilities and commitments under this plan.

The USNAP should be elaborated on the basis of a comprehensive review of the existing policy and normative framework to identify regulatory gaps, areas requiring immediate action, and the legal and policy reforms needed. Consistent with international human rights law, priority must be given to the State duties to protect and to provide remedy. To meet these duties, the U.S. government must take effective regulatory action to enforce human rights due diligence requirements and strive to strengthen and improve access to State-based mechanisms of redress.

In particular, the U.S. government should take measures to legally require businesses to respect human rights and to undertake human rights due diligence throughout their global operations. It must furthermore require comprehensive disclosure of companies' human rights due diligence policies and practices. These requirements should be monitored and enforced by a specialized agency of the U.S. government. Furthermore, the U.S. government must commit to examining existing obstacles to remedy for business-related human rights abuses and to adopting concrete measures to remove or alleviate them. Measures should also be taken to ensure effective corporate criminal liability for human rights abuses that amount to crimes, either by enforcing existing criminal laws or enacting new ones where these are missing, ensuring that they also apply to crimes committed abroad.