SUBMISSION TO THE UNITED NATIONS OPEN-ENDED INTER-GOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS & OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

For a consensus-oriented business and human rights treaty modelled on the State duty to protect and the French duty of vigilance law to reach legal certainty and a level-playing-field

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This position paper is aimed at delivering some recommendations on the approach and contributions that should be considered when drafting the "international binding instrument on transnational corporations and other business enterprises with respect to human rights" (Treaty). An official draft will be presented four months before the beginning of the fourth session of the negotiations, which will be held in Geneva at the end of 2018.

Summary of the recommendations:

The aim of the Treaty initiative is to fight against the impunity of transnational corporations. In order to truly enhance human rights protection and create a worldwide level-playing-field, the scope of the Treaty should be extended to all types of business enterprises. At this stage, it should also avoid controversies such as creating direct business obligations and establishing an international Court having jurisdiction over multinational enterprises. Furthermore, the Treaty should focus on the implementation into hard-law of the main aspects of the unanimously endorsed UN-Guiding Principles. Additionally, substantive clarifications to the status quo could be made. On the one hand, the treaty provides the opportunity to extend the due diligence to the entire corporate group and supply chain on a transnational level. On the other hand, it would permit to define business obligations with respect to human rights and to model them after the French duty of vigilance law.

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Introduction
The necessity for a binding treaty

State regulations and incentives are one of the main driving forces to foster change. This may sound as an evident fact, but this is at the core of the dispute in the area of business and human rights. In fact, business leaders tend to advocate for soft-law instruments and the civil society for more corporate accountability and binding regulations.

This disagreement is not yet politically settled. The resolution 26/9 of the Human Rights Council, which is aimed at elaborating an international binding instrument, is even quite controversial. Most western States voted against this latter resolution, whereas Ecuador and South Africa have initiated it and developing countries have voted in favor of it[2]. Even if the European Union (EU) delegation still does not have a mandate to support the treaty process[3], this position tends to be contradicted by the growing number of binding regulations by the EU[4] and its member States[5]. Therefore, it might be possible to find a reasonable compromise for the Treaty, which will be outlined hereunder.

Besides, some sociological surveys can underline the positive impact of regulations on business behavior. Indeed, as the study "*No more excuses*"[6] of The Economist shows, one of the major influencers for making supply chains more responsible is State legislations. Besides, the very precise and reliable results of the *Corporate Human Rights Benchmark* of 2017 demonstrate that two thirds of the 98 world biggest corporations of the agricultural, apparel and extractive industry still do not have good human rights performances[7]. Considering that, an international legally binding instrument presents itself as a great chance to tackle the pressing issue of enhancing the protection of human rights in this matter.

Additionally, a consensus-oriented Treaty could contribute widely to the harmonizing of the business rules and to their certainty. Hence, this position paper will present some recommendations on the elements that should be included or not in the draft, whereby keeping in mind the business needs and the feasibility of the project.

Regarding the opposition of the western States and the business community, an inclusive and consensual approach is necessary to ensure the feasibility of the Treaty and to reach a global level-playing-field (I). Moreover, the Treaty could give substantive contributions to the *status quo* in

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[2] Results of the vote of the resolution 26/9 of the 14 July 2014, A/HRC/RES/26/9:
In favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam
Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America
Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates]

[3] According to some NGOs, the EU delegation even tried to shut down the financing of the Intergovernmental Working Group at the UN-General Assembly; see: https://www.ldh-france.org/lunion-europeenne-tente-saboter-processus-negociation-onusien-traite-contraignant-garantissant-respect-droits-humains-les-multinationales/

[4] Directive 2014/95/EU ; EU Conflict minerals regulation 2017.

[5] Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; UK Modern Slavery Act; Child Labour Due Diligence Law for companies.

[6] The Economist, *No more excuses*, Responsible supply chains in a globalized world, The economist intelligence unit, 2017.

[7] https://www.corporatebenchmark.org/

creating extraterritorial due diligence obligations modeled after the French duty of vigilance law and applicable to the entire corporate group and supply chain (II).

I. For an inclusive and consensus-oriented approach in order to reach a level-playing-field

As the first contributions of the European Union (EU) and the International Business Community suggest, the Treaty should focus on the implementation of the UN-Guiding Principles on Business and Human rights (1) and should include all types of business enterprises (2). In addition, previous attempts at regulating multinational corporations show that imposing international direct obligations on businesses is controversial and should not therefore be taken into consideration at this stage (3).

1. Developing the main aspects of the UNGPs into hard-law

The UN-Guiding Principles (UNGPs) were unanimously endorsed in 2011 and are since considered as the worldwide applicable standard in the area of Business and Human Rights[8]. Following this development, the EU and International Business Community have stressed many times their willingness to continue the implementation of the UNGPs. This international legally binding instrument project is an opportunity to make mandatory the main aspects of the UNGPs for States in order to accelerate the pace of its implementation and to contribute to legal certainty and worldwide level-playing-field.

The implementation process of the Treaty could also be monitored by an international Committee and binding National Action Plans (NAP). Nevertheless, the Treaty could bring substantive clarifications to the UNGPs and the status quo (see below, II).

2. Extending the scope to all human rights and all types of business enterprises

As the EU and the international business community recommended, the scope of the Treaty should be extended to all human rights and to all business enterprises. This is already admissible by international law if the direct duty bearers are the States.

In fact, it is not necessary to restrict the subject matter of the treaty to "gross" human rights abuses since States already have to respect, protect and fulfill the different international human rights obligations and to act with due diligence to avoid transnational harm, especially when it is related to human rights. It would also be very useful to specify that environmental prejudices which subsequently infringe human rights are covered by the Treaty. It could namely allow to include the increasing interrelationship between climate change and human rights when the Treaty will be implemented.

From an international point of view, there is no legal hurdle to include *all* types of business enterprises. This should be clarified in the interpretation of the notions of *transnational corporations* (TNCs) and *other business enterprises* (OBEs)[9]. The expression "TNC" should not exclude publicly

[8] UN-Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04; UN-Office of the High Commissioner of Human Rights, The Corporate Responsibility to Respect Human Rights, An interpretive Guide, 2012, HR/PUB/12/02.

[9] The question whether or not a new resolution of the Human Rights Council is needed in order to extend the scope to all business enterprises must be clarified very soon. A new resolution could provide the opportunity to bring some reluctant States such as the EU-Member States into the negotiation process.

traded firms, and "OBE" should include all types of business organizations, regardless of their size and their transnational character, because of:

- The pursue of equality:

The rules should be the same for every business enterprises. Disrespecting human rights is not an option, even for small organizations.

- The protection of victims:

The type and size of organization behind the abuse is not relevant for victims. It seems also quite important from a statistical point of view to include all business enterprises. Indeed, according to the contribution of the international business community which quoted the ILO World Employment Social Outlook 2015, only 20 per cent of the global workforce is linked to transnational value chains[10].

- Difficulties to distinguish between business entities with or without a transnational character:

As the EU stated in its first contribution, "*there are complex and volatile connections between transnational corporations and a vast number of other enterprises operating at the domestic level*". In fact, how should one consider the last entities of a large international supply chain which only do business with each other in their own national context?

3. Refraining from drafting *direct* obligations for businesses and the creation of a new international court

A realistic and consensual approach that could lead to the achievement of an international agreement, requires in these first instances to avoid creating direct obligations for transnational corporations (TNCs) or other business enterprises (OBEs). It does not appear feasible to establish a new International Court that has jurisdiction over them, even though it would certainly be the most desirable option from a victim-oriented perspective. Evidence can be found by the rejection of the former treaty project on TNCs of 2003 (which focused on direct obligations)[11] or by the decline of the French proposition to extend the jurisdiction of the International Criminal Court to legal persons[12].

Therefore, from a realistic perspective, the treaty should focus on enhancing access to justice to victims through already existing available domestic mechanisms. Important improvements can be done in this area (see below, home and host States jurisdictions II, c).

II. Contribution of the Treaty to the status quo

In order to make a significant contribution to the status quo, the Treaty should elaborate an obligation of due diligence for TNCs and OBE which would be extended to all subsidiaries and the entire supply chain (1). The due diligence obligations could moreover mirror the very promising French duty of vigilance law, which blazed a path for mandatory human rights due diligence obligations (2). Lastly,

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[10] UN-Treaty process on business and human rights Further considerations by the international business community on a way forward, First Submission, p. 3.

[11] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003 ; Approved August 13, 2003, by U.N. Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52, 2003.

[12] Rome Statute, Working paper on article 23, paragraph 5 and 6.

the treaty should clearly stipulate that States have extraterritorial obligations so that a better protection is provided for TNCs business activities (3).

1. Creating obligations for TNCs and OBE to supervise all subsidiaries and the entire supply chain

The first elements for the draft of the Treaty do not change substantially the current state of international law. The General Comment n°24 of the Committee on the economic, social and cultural rights (CESCR), which is rather progressive, already requires for the States to take the same measures as the one prescribed by the first disclosed elements of the Treaty[13]. In fact, both require implementing duties for parent companies but not for supply chains, see below:

Obligation for States to implement:	According to the CESCR General comment n°24 2017, para. 16.	According to the first draft of the UN-Treaty 2017, page 6[14]
A duty for parent companies to supervise subsidiaries	The obligation to protect entails a *positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence* in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, as well as to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.	State Parties *shall take all necessary and appropriate measures to* ensure that TNC and OBEs design, adopt and undertake human rights and environmental impact assessments that cover all areas of their operations, and report periodically on the steps taken to assess and address human rights and environmental impacts resulting from such operations
A duty for contracting companies to supervise the supply chains	States *should* adopt measures *such as imposing due diligence requirements* to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners.	States *should* adopt measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains.

The Treaty should give an additional contribution to the current state of international law and make binding requirements with a broader scope:

- Confirming the duty of due diligence of parent companies in order to supervise subsidiaries:

It should define more precisely the notion of control and extend it as much as possible to entities which are not fully controlled. For instance, neither the majority of the shares nor the majority of the voting rights are necessarily required to qualify the relationship as "controlled".

[13] Committee on Economic, Social and Cultural Rights, General Comment n°24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context Business Activities, 10 August 2017, E/C.12/GC/24.

[14] Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 (29/09/2017).

- Imposing duties to supervise the whole supply chains:

A binding requirement should be made to elaborate a duty to supervise supply chains by changing the modal verb "*shall*" into "*should*". Besides, this duty should be extended to the *whole* supply chain. This would be a very welcomed and significant contribution, since supply chains are very exposed to social and environmental risks, as the Rana Plaza disaster made it already obvious in 2013.

- What can justify that the *whole* corporate group and supply chain must be supervised?

The current *duties of care* of dominant (i.e. parent and contracting) companies under the English tort-law[15] or under the French duty of vigilance Act[16] do not require to supervise the *whole* corporate group and supply chain, although both laws probably provide the most comprehensive protection in the world. Their scope is linked to restrictive interpretations of notions such as "control" or other similar criteria which hinder the extension of the duty to their whole business operations. However, even if it is not usual, dominant companies *have the ability* to retrace the value chains. Moreover, some contractual techniques exist in order (to force dominated entities) to apply due diligence procedures throughout the supply chain. Companies like Unilever are already doing it[17]. In other words, it is not a problem of feasibility.

2. Modeling the due diligence duties after the French duty of vigilance Law

Besides, the business duties of the treaty could mirror the French duty of vigilance law. By virtue of this law, the disclosure of the risks of the corporate group and of the value chain are mandatory. The obligation of transparency is combined with a duty to implement effectively the due diligence procedures. This means that the reported risks and related prevention measures must be able to avoid the realization of the real risks of the business activities.

According to the first elements of the draft instrument, which already incorporated the duty to adopt a vigilance plan from the French Law, the elements which must be disclosed under the vigilance plan are the following:

> "All concerned TNCs and OBEs shall adopt a "vigilance plan" consisting of due diligence procedures to prevent human rights violations or abuses, which shall include inter alia, the risk assessment of human rights violations or abuses in order to facilitate their identification and analysis; a procedure of periodic evaluation of subsidiary enterprises throughout the supply chain in relation to their respect of human rights; actions aimed at risk reduction; an early warning system; a set of specific actions to immediately redress such violations or abuses; and a follow up mechanism of its implementation, notwithstanding other legal procedures, liabilities and remedies recognized in the present instrument."[18]

Under the French act, the persons affected by the risks have also the possibility to act legally against the business enterprises even before a prejudice arises. For that purpose, they can file a legal notice to demand the company to meet its obligations of the vigilance plan. If the company did not meet its obligations within 3 months, an injunctive relief before the judge could be filed. Both steps can

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[15] England and Wales Court of Appeal, *Chandler v. Cape* [2012] EWCA Civ 525, 25 April 2012.
[16] Loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[17] https://www.unilever.com/news/news-and-features/Feature-article/2018/we-take-a-radical-step-on-palm-oil-supply-chain-transparency.html
[18] Elements for the draft legally binding instrument, 29/09/2017, *op. cit*.

guarantee the efficiency of the prevention mechanism of the vigilance plan. In case a prejudice arises, sanctions and/or responsibility are foreseen.

The co-regulative mix-system of the French law is the most comprehensive regulative framework from a perspective of *balancing powers*. In fact, the general reporting duties, which are based on corporate inputs, provide businesses the demanded flexibility to balance trade secrets and human rights protection. In the meantime, the implementation of the vigilance plan is controlled by all stakeholders (civil society, consumers, investors and shareholders will have a watch-dog function) and by the persons potentially affected by the risks, thanks to their publicity. Therefore, businesses face with such a mandatory reporting framework significant reputation risks. The effectivity is lastly guaranteed by the State, which provides judicial sanctions and legal responsibility in case of failure.

Besides, the experience of the adoption of the French Law could be taken into account in order to avoid controversies during the elaboration of the Treaty.

- Establishing a liability regime for dominant companies based on their lack of due diligence different from lifting the corporate veil:

The accountability regime of dominant companies should be linked to their own fault, namely their failure to implement the vigilance plan. But this regime should always take into account the relatively limited control and influence ability of the parent company. Parent and contracting companies are namely separate legal entities of the subsidiaries or the supply chain. Hence, they should not be held responsible automatically for every prejudice which arises in the corporate group or in the supply chain. The treaty should therefore not require abolishing the principle of separate legal personality even if many scholars used to consider piercing its corporate veil as the only possibility to hold the dominant company accountable. However, as the French law and the English tort-law show, it is also possible to establish a liability regime for dominant companies in linking their duty of care to the control or influence capacity over the dominated companies. To that end, the Treaty should enable declaring dominant companies *proportionately* or *severally* responsible with respect to their contribution to the prejudice. This could ensure the possibility for claimants to take action even when other causes have contributed to the prejudice.

- Refraining from providing a reversal of the onus of proof:

Thanks to the disclosure of the vigilance plan and the related preventive legal actions described above (legal notice, injunctive relief), the need to *reverse* the burden of proof does not appear crucial anymore. Avoiding a reversal would maximize the chances of adoption of the Treaty because a provision on it seems highly controversial. In fact, with such a provision, companies would be compelled to demonstrate that they are not responsible each time a victim files an admissible complaint. From a pragmatic point of view, this proposal can frighten businesses because of the likely proliferation of the legal actions.

- Providing State's discretion in embedding the legal actions in civil, administrative or penal law:

Leeway for States could be foreseen to a certain extent in embedding the sanctions and the business liability regimes either in penal, administrative or civil law. This is also important to avoid controversies or delays in the adoption of the Treaty because some States such as Germany do not foresee criminal liability for legal persons. However, general provisions aimed at ensuring effective

access to justice and reparation, especially from a practical point of view (legal aid for instance), could be very useful.

3. Affirming extraterritorial obligations

The Treaty should clearly stipulate that States have extraterritorial human rights obligations regarding TNCs operations. These duties arise when dominant companies, which are under the jurisdiction of the State, control and influence extraterritorial business activities. This would be a meaningful contribution since it is still not really settled yet, how extraterritorial legislation is admissible under international law.

Taking the wording of the Principle 24 of the *Maastricht Principles* on extraterritorial human rights obligations[19], States have an obligation to ensure that business organizations respect human rights when they are able to regulate them, as set out in Principle 25:

> "a) the harm or threat of harm originates or occurs on its territory;
> b) where the non-State actor has the nationality of the State concerned;
> c) as regards business enterprises, 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;
> d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;
> e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction."

In all these cases, States should be forced to implement measures to protect human rights, including imposing due diligence procedures on TNCs and their dominant companies. In the meantime, in each of the above-listed circumstances, States should be forced to provide jurisdictions to hear claims against business enterprises to protect human rights. These bases for jurisdictions are already accepted by many States (see for instance EU international private law regulations). Nevertheless, for the sake of the clarity of international law, it would be a valuable contribution to confirm this article.

As a consequence, when an activity of a TNC has given rise to a damage, more than one State jurisdictions can be competent to settle a case (at least the home and the host State). Given that, an international court is not necessarily the *only* available option to *enhance* access to justice. For the purpose of the good articulation between TNC home & host jurisdictions, the international private law *Sofia Guidelines*[20] are a good reference. Indeed, on the one hand, they recommend using the *forum of necessity* (i.e. the counterpart of the universal jurisdiction in civil law) to prevent from an international denial of justice. They also recommend enabling the claimants to act against different legal persons of a multinational corporate structure or a global supply chain when the claims are closely connected (i.e. if the defendants "*formed part of the same corporate group*"; "*if one defendant controlled another*" or

[19] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011.
[20] Sofia Guidelines on best practices for international civil litigation for human rights violations as adopted by the international law association at its 75th conference held in sofia, bulgaria, 2012.

"*if they took part in a concerted manner in the activity giving rise to the cause of action*"). On the other hand, they give judges the possibility to use with caution the *forum non conveniens* to let one better-positioned jurisdiction settle the case if it is already pending in another jurisdiction and if this latter is able to ensure the protection of human rights. In that sense, these Guidelines can enhance effectively the access to justice for victims before national courts without creating disproportionate rights which could be assimilate to a *forum shopping*. Therefore, the Treaty would give a substantial contribution to international law if it incorporates these Guidelines.

Lastly, general provisions on international cooperation can be very useful for international prosecution or for gathering evidence.

Conclusion

As the CESCR already specified in its General Comment n°24, inadequate legal provisions in the area of business and human rights may lead to State responsibility even though other causes have contributed to the occurrence of the damage[21]. Such a provision should be included in the Treaty to ensure its effectiveness.

In addition, the intention of the Treaty and the wording would have to be clear and accurate enough in order to facilitate its direct applicability into the national jurisdictions, so that it becomes also possible to act against the States for a lack of implementation.

Ultimately, a general provision to elevate human rights in the hierarchy of international law should also be considered. A more concrete provision that would confirm the overriding character of human rights (*ordre public international*) can also be useful. This could force judges and arbitrators to always take into account the protection of human rights, even if a dispute does not have a violation of human rights as the cause of action, such as in transnational investment disputes[22].

[21] General Comment n ° 24 (2017), *op.cit*., §32.
[22] Cazala, Julien, Protection des droits de l'homme et contentieux international de l'investissement, *Cahiers de l'arbitrage – Paris Journal of International Arbitration*, 2012, p. 899 – 906.