**International Commission of Jurists**

**Proposals for Elements of a legally binding instrument on Transnational Corporations and other Business Enterprises**

**ADVANCE UNEDITED DOCUMENT- PART VII**

**6. International cooperation for investigation and enforcement**

The general obligation of international cooperation to assist States to better promote and protect human rights is one running throughout international human rights law, beginning with the UN Charter itself. Articles 55 and 56 of the Charter state a general pledge of all Members “to take joint and separate action in cooperation with the Organizations” to achieve certain purposes, including “universal respect for, and observance of, human rights and fundamental freedoms….” Particular obligations of international cooperation appear throughout international human rights law instruments.

The need to guarantee people’s access to justice and remedies in cases of alleged violations of their rights with the involvement of business enterprises raises a number of practical issues relating to investigations, trial and sanctions across jurisdictions. To effectively investigate allegations of human rights abuses committed abroad it will often be necessary to obtain the cooperation of police and judicial authorities in the territorial State. An effective investigation in accordance with international standards is essential to determine if prosecution is appropriate and likely to be successful. Gathering the necessary evidence in the context of transnational offences is particularly challenging. Cooperation among States in this field is thus essential, as it is in the context of other transnational crimes such as the bribery of foreign public officials.

In the area of international legal and judicial cooperation and mutual legal assistance, there are a number of instruments of regional and international scope but they constitute at best a patchy system of rules that so far has not enabled efficient cooperation across the board.

The International Covenant on Economic, Social and Cultural Rights, in article 2(1) requires that each State Party Covenant “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical” to realize the rights in the Covenant. The Convention on the Rights of Persons with Disabilities also requires that States “undertake appropriate and effective measures” of international cooperation. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States parties to provide each other “the greatest measure of assistance in connection with criminal proceedings” relating to torture, including “the supply of all evidence at their disposal necessary for the proceedings”. A similar obligation is contained in the International Convention for the Protection of all Persons from Enforced Disappearances. The first two Optional Protocols to the Convention on the Rights of the Child also oblige States party to cooperate in order to prevent and punish the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict. [[1]](#footnote-1)

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, determines that States parties must co-operate in connection with investigations, or criminal and extradition proceedings in relation to the offences set forth in the Protocol, “including assistance in obtaining evidence at their disposal necessary for the proceedings”.[[2]](#footnote-2) In addition, under Article 6(2), States must fulfil their obligations arising from other treaties of mutual legal assistance that may exist between them.

The UN Convention against Transnational Organized Crime, the UN Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials contain extensive provisions on State cooperation and mutual legal assistance that are useful precedents to take into account. Such cooperation extends to areas relating to exchange of information and data, judicial and administrative proceedings, gathering and securing evidence.

Beyond State cooperation and mutual legal assistance for investigation, international cooperation is also essential for the execution of civil judgments, or criminal orders for forfeiture and the like. Once prosecution has concluded and a conviction has been secured, or a civil suit has been successful, the resulting orders need to be enforced so that plaintiffs and victims obtain redress. Enforceability of judicial decisions is an essential element of an effective judicial remedy.

There are some international instruments on mutual legal assistance and judicial cooperation in the enforcement of foreign judgments that have been concluded in the framework of The Hague Conference on Private International Law,[[3]](#footnote-3) although none of these have entered into force. The 1971 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, which provided that any judicial decision adopted by a Court of a Contracting State shall be entitled to recognition and enforcement in another Contracting State if the court issuing the decision has jurisdiction and if the judgment is final.[[4]](#footnote-4) The Convention has been ratified only by Cyprus, Netherlands, Portugal and Kuwait. The *Brussels I* regulation has in practice superseded this agreement in relation to the three ratifying States that are members of the EU.

Negotiations in 2001 led to the conclusion of The *Hague Convention on Choice of Court Agreements*.[[5]](#footnote-5) Under Article 8 of this Convention, a judgment given by a designated court of a Contracting State shall be recognized and enforced in other Contracting States without any other review of the merits of the case and the judgment. This Convention only applies to civil and commercial matters, excluding, for instance, interim measures of protection from its purview. Currently, only Mexico has acceded to it. The United States and the European Union signed the Convention in 2009 but are yet to deposit instruments of ratification.[[6]](#footnote-6)

Other international instruments contain obligations for States to cooperate with other States in the recognition and enforcement of judicial decisions and procedures. For example, the *Convention on Civil Liability for Oil Pollution Damage* (1969), replaced by the Protocol of 1992,[[7]](#footnote-7) provides that a final judgement in a contracting state shall be recognised in any other contracting state unless it was obtained by fraud or fair trial rules were not respected.

Article 18 of the United Nations *Convention against Transnational Organized Crime* in turn provides that State Parties have the obligation to afford one another the necessary co-operation and mutual assistance in investigations, prosecutions and proceedings in relation to the offences covered by the Convention. Although the Convention does not directly refer to the recognition and enforcement of judgments, under Article 16(12) a State Party shall consider the enforcement of a judgment imposed by another Party when a request for extradition, submitted with the purpose of enforcing a sentence, is refused because the person sought is a national of the requested State Party.

These instruments form a patchy framework for international cooperation in the investigation, prosecution and enforcement of judicial sentences. This system is in clear and pressing need of improvement to respond to the challenges of guaranteeing access to effective remedies for victims in business-related human rights abuses caused or contributed to by business enterprises.

Under the foregoing and other bilateral arrangements, some States have developed useful and effective practices that should be considered as a basis for replication or adaptation. These practices include frameworks for exchange of information and expertise between law enforcement and judicial bodies to detect and evaluate risks, cooperation in joint bodies of peer review of regulations, technical assistance and capacity building.[[8]](#footnote-8) To complete the existing international legal framework and take advantage of the good practice in several related areas of work, the prospective treaty should contain a number of provisions on international cooperation, mutual legal assistance, and recognition and enforcement of judicial decisions.

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| The following elements should be included and developed in the treaty:  The general obligation of States party to cooperate with and provide the necessary and mutual legal assistance in respect to identification, investigation, prosecution and enforcement of relevant judicial orders in cases of human rights abuses committed by or with the participation of business enterprises under their jurisdiction.  States should enter into bilateral or multilateral arrangements to enable and facilitate the request and lending of mutual legal assistance between their law enforcement bodies and to enable the latter to carry out joint or coordinated cross-border investigations when necessary, or the gathering of evidence for use in civil claims proceedings.  States party should establish mechanisms, jointly or in a coordinated fashion with other States party, to facilitate the exchange of information and the request and provision of legal assistance,  States should provide adequate training, information and support to their law enforcement agencies and judicial bodies to make efficient use of arrangement for mutual legal assistance, through the establishment of networks, holding of workshops and other initiatives. |

1. Universal Declaration of Human Rights Articles 22 and 29; Convention on the Rights of People with Disabilities-CRPD, article 32; CAT article 9(1); CESCR (articles 2(1); 11(1), 22); among others. [↑](#footnote-ref-1)
2. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002, article 6. Available Online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>. [↑](#footnote-ref-2)
3. For example the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958), and the Convention on the Choice of Court (1965). [↑](#footnote-ref-3)
4. The Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Concluded on February 1971, art. 4. Available Online: <http://www.hcch.net/index_en.php?act=conventions.text&cid=78> (accessed 28 March 2014). [↑](#footnote-ref-4)
5. Hague Conference on Private International Law, Convention on Choice of Court Agreements, concluded 30 of June 2005. Available Online: <http://www.hcch.net/upload/conventions/txt37en.pdf> (accessed 28 March 2014). [↑](#footnote-ref-5)
6. See: <http://www.hcch.net/index_en.php?act=conventions.status&cid=98> (accessed 28 March 2014). [↑](#footnote-ref-6)
7. Article 10:

   “1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

   (a) where the judgment was obtained by fraud; or

   (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

   “2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.”

   Convention on Civil Liability for Oil Pollution Damage, adopted 9 November 1969; Entry into force: 19 June 1975; replaced by 1992 Protocol: adopted 27 November 1992; Entry into force: 30 May 1996. Available Online: <http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf> (accessed 28 March 2014). [↑](#footnote-ref-7)
8. OHCHR Report Improving Accountability and Access to a Remedy, Addendum A/HRC/32/19/Add.1, paras 36-38 [↑](#footnote-ref-8)