



**The "Zero Draft" for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises :
A Comment**

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Introduction

On 20 July 2018, the Chairmanship of the open-ended intergovernmental working group (OEIGWG) established on the basis of resolution 26/9 of the Human Rights Council (A/HRC/RES/26/9, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights") presented a draft legally binding instrument ("Zero Draft"), building on the discussions that took place during the first three sessions of the established by that resolution.

As requested by the Chairmanship, the following are comments on articles 3 and 5 of the document that shall be discussed between 15 and 19 October 2018, at the fourth session of the OEIGWG.

I. Article 3: Scope

The "Zero Draft" provides in Article 3 that

- 1. This Convention shall apply to human rights violations in the context of any business activities of a transnational character.*
- 2. This Convention shall cover all international human rights and those rights recognized under domestic law.*

Article 4 defines "business activities of a transnational character" as "any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions".

Thus, rather than to attempt to distinguish transnational corporations from other business enterprises, the scope of application of the instrument is defined by the nature of the activity concerned: only where there is a transnational element to this activity shall the instrument apply. This is a sound approach. It would be problematic to seek to establish a distinction between transnational corporations (TNCs) and other business enterprises (OBEs), or between enterprises which have activities of a transnational character and enterprises which do not have such activities (and whose activities thus are limited to a single jurisdiction). TNCs are simple networks of distinct companies (each of which is domiciled in a national jurisdiction), more or less tightly connected to one another by investment or contractual links, and that follow a global strategy under a more or less integrated leadership structure. Thus, it is appropriate to base the scope of application of the future instrument on the *transnational nature of the activity* than on the *nature of the corporation* itself: in other terms, it is to the extent that the corporation deploys its economic activities across different national jurisdictions (by investing in a outside jurisdiction, by buying shares in companies domiciled in other countries, by licensing of franchisee agreements, or by contracting with suppliers or sub-contractors located in other jurisdictions) that the future instrument shall be of relevance to those activities. This is consistent with the stated purpose of the instrument, as described in Article 2 of the "Zero Draft".

At the same time, the definition of "business activities of a transnational character" in Article 4(2) may create confusion, and could be improved. First, whereas restricting the definition to "for-profit economic activity" alone stems from a sound intention (to avoid the instrument being used against charities or non-governmental organisations), it may be interpreted as excluding from the scope of application of the instrument all state-owned enterprises (SOEs) since, in many contexts, SOEs can continue to operate despite making losses (as the State may bail out SOEs that operate at a loss). This

would be a mistake, both because SOEs ought to be even more exemplary in their conduct, since States, as shareholders, can influence more easily their day-to-day operations, and because SOEs have gained major positions of influence in many world regions. This is true not only in areas which relate to the exercise of governmental authority -- where the acts of the SOE may be treated under certain circumstances as acts adopted by an organ of the State¹ --, or for the provision of public services in the areas of transport, water or electricity provision, healthcare or education, but also in strictly productive or commercial activities, particularly in the extractive industry.

Secondly, defining activities "of a transnational character" as activities that "take place or involve actions, persons or impact in two or more national jurisdictions", may be excessively vague. As such, this formulation may be at the same time too broad (especially by its reference to "impacts") and too narrow (since this definition does not clarify whether the activities concerned should be those of the corporation itself or could be those of a subsidiary, a franchisee, or a business partner -- in other terms, those of a distinct company with which the company concerned has an investment or contractual link). The latter consequence, based on a restrictive (but literal) reading of the current definition of "business activities of a transnational character" contained in Article 4(2), would be especially problematic, since it would be inconsistent with the important provisions on human rights due diligence (Article 9. Prevention) included in the "Zero Draft".

In order to take into account these concerns, and consistent with the overall purpose of the instrument, the scope of application clause could therefore be reworded as follows:

This treaty applies to the activities of all corporations, irrespective of their size, mode of creation or control or ownership. Its scope of application is limited to business activities that have a transnational character.

and the definition of "business activities of a transnational character" could be reworded as:

Business activities of a transnational character are activities that a corporation conducts in another jurisdiction than the jurisdiction where it is domiciled
(i) directly;
(ii) through branches, subsidiaries, or affiliates; or
(iii) through business partners with which the corporation has a continuous business relationship,
thus affecting human rights of individuals or groups located outside the jurisdiction where the corporation is domiciled.

This latter definition would not extend the scope of application of the instrument to situations in which the transnational character of the business activity results simply from the fact that a company sources certain supplies from abroad on an occasional basis (i.e., without having a long-term business relationship with the supplier), or sells certain goods or provides certain services to customers or clients located in a foreign jurisdiction. Though this limitation could be challenged, it is intended as a means to define realistically the scope of application of the instrument, particularly if one of the requirements imposed on companies is that, as part of their human rights due diligence, they include human rights clauses in their contractual relationships with their suppliers or buyers (see Article 9(2)(f) of the "Zero Draft"). While such clauses may of course be inserted in all contracts, only in the

¹ It follows from the Articles on Responsibility of States for internationally wrongful acts adopted in 2001 by the International Law Commission, that the conduct of a corporation shall be attributable to the State where such corporation 'is empowered by the law of that State to exercise elements of the governmental authority [provided that entity] is acting in that capacity in the particular instance' (Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chap.IV.E.1, article 5). This seeks to avoid that the State will escape liability merely by privatizing certain public or regulatory functions (James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge Univ. Press, 2002, p. 100). What constitutes 'governmental' functions remains unspecified, however; it will depend on a set of circumstances, including "the particular society, its history and traditions" (id., p. 101).

context of continuous (or long term) business relationships shall it be possible, in practice, to monitor compliance with such a clause.

II. Article 5: Jurisdiction

The Zero Draft proposes that alleged victims of human rights abuses should be allowed to file claims before the courts of:

- a) the State "where such acts or omissions [having caused the violation] occurred" (art. 5(1)(a)); or
- b) the State "where the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled" (art. 5(1)(b)), the "domicile" being understood as the place where "the legal person or association of natural or legal persons" has its statutory seat, its place of central administration, a substantial business interest, or a "subsidiary, agency, instrumentality, branch, representative office or the like" (art. 5(2)).

This provision calls for the following comments:

1. Legal persons and natural persons

The justification for referring, not only to a legal person (i.e., the corporate entity conducting a business activity of a transnational character with a profit-seeking motive), but also to a natural person and to an "association of natural or legal persons", is unclear. While natural persons should not benefit from any sort of impunity for human rights abuses, it may create confusion to include provisions relating to natural persons' liability in this new instrument, not least since this would require a delicate assessment of how the future instrument would relate to the duties of States under the Rome Statute establishing the International Criminal Court.

2. Associations of natural or legal persons

Nor is it clear whether a reference to an "association of natural or legal persons" is fully justified. The intention behind such a reference seems to be that not only individual companies, but also transnational corporations as "groups of companies", should be subject to control by States and imposed human rights duties. This intention is sound, but the consequences problematic, for the reasons highlighted above: transnational corporations have no legal personality of their own; the expression refers, rather, to networks of separate legal entities, and the challenge is precisely to ensure that the separation between such legal entities does not result in creating obstacles to victims' ability to seek reparation for the harms they have been inflicted.

The Zero Draft contains useful suggestions on the preventive and remedial dimensions of civil liability within groups of companies, by imposing due diligence obligations as a preventive device (article 9) and by providing that a company shall be liable for any human rights harm that is caused by its own activities or by activities conducted by its subsidiaries or business partners within transnational supply chains (article 10(6)). These suggestions are important, since they should allow to overcome both the so-called "corporate veil" problem in groups of companies, in where impunity may result from the parent company denying that it is responsible for the activities of its subsidiaries ; and to sanction the failure of the lead company in global supply chains to use its influence in order to ensure that the conduct of its business partners shall be consistent with human rights. The provisions concerning prevention and civil liability, however, render redundant the reference to "associations of natural or legal persons" in the other parts of the Zero Treaty, and the coexistence of these two logics -- both of which seek to respond to the same challenge, but through different legal techniques -- can only be a source of confusion.

3. The duty to provide courts with the competence to adjudicate situations that occurred outside the national territory: extraterritorial jurisdiction

Beyond the reaffirmation that the State where the human rights abuse has taken place should ensure

access to effective remedies for victims (art. 5(1)(a) of the Zero Draft), a reaffirmation that should be unproblematic, article 5(1)(b) provides for a rather expansive definition of the exercise of so-called "extraterritorial jurisdiction" by States, understood here as the range of situations for which, although they occur outside the national territory, the courts of a State may grant access to remedies to victims.

This provision is consistent with the requirements of international law. As stated by the Permanent Court of International Justice in the famous Lotus Case of 1927,² the principle is that:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

While that judgment is a weak precedent to build upon,³ and scholars disagree as to the weight of the authority of the passage quoted, three considerations should be kept in mind.

First, **the principle according to which a State may allow its courts to adjudicate claims filed against its nationals for human rights abuses committed abroad is uncontroversial** : this is sometimes referred to as the "principle of active personality" to justify extraterritorial jurisdiction. As regards corporations, though States do not have a consistent approach in this regard, "nationality" is traditionally defined by the place of incorporation (where the corporation has its statutory seat), the central administration, or the principal place of business.

Indeed, **to the extent that States impose duties on corporations domiciled under their jurisdiction, it could be argued that there is no extraterritorial jurisdiction involved at all, although such duties may also relate to situations located outside the State's national territory.** This was the position adopted by the Committee on Economic, Social and Cultural Rights in General Comment No. 24, where it addressed the problem of the corporate veil, suggesting that the most effective way to address this potential obstacle that victims face in seeking to access to remedies is to ensure that each State imposes on the companies under its jurisdiction (domestic parent companies), who have an investment nexus with companies outside its jurisdiction (foreign subsidiaries), are imposed a duty of care, obliging the parent company to take measures to ensure that its subsidiaries shall not commit, or be involved in, human rights abuses. This, the Committee on Economic, Social and Cultural Rights noted, did not imply extraterritorial jurisdiction:

In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to

² The *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment No. 9 of 7 September 1927, *P.C.I.J. Reports* 1928, Series A, No. 10.

³ The case concerned a collision that had occurred on 2 August 1926 on the high seas between the French mail steamer S.S. Lotus, proceeding to Istanbul, and the Turkish collier S.S. Boz-Kourt. The Boz-Kourt was cut in two and sank, and eight Turkish nationals who were on board perished ; ten other shipwrecked persons could be saved. After the Lotus arrived in Istanbul on August 3rd, the Turkish authorities put both Mr Demons, the officer of the watch on board the Lotus at the time of the collision, and the captain of the Boz-Kourt (one of those who were rescued from the shipwreck) under arrest, on a charge of involuntary manslaughter. The question submitted to the Permanent Court of International Justice was whether Turkey had violated any principle of international law in establishing its jurisdiction over the French officer of the Lotus. The passage quoted from above are *obiter dicta*, since there were at least two factors clearly connecting the situation to Turkey (in addition to the fact that Mr Demons had been arrested while on Turkish territory) : not only were the eight victims of the collision Turkish nationals; but, moreover, the Boz-Kourt was flying the Turkish flag, and the collision – the effect of the criminal offence for which Mr Demons was prosecuted – thus was considered to have taken place on Turkish territory, in accordance with the fiction that the national territory of a State extends to vessels flying its flag.

identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located. The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned.⁴

Secondly, **the kind of "extraterritorial jurisdiction" which the Zero Draft envisages to codify is "adjudicative", rather than "prescriptive" or "executive"**: article 5 defines before the courts of which State victims of human rights abuses should be allowed to file claims, but this is without prejudice to the applicable law, which shall depend on the rules of private international law of the forum State (although article 7 of the Zero Draft provides, in addition, that the victim may choose to rely on the law on the State in which the defendant company is domiciled). "Adjudicative" jurisdiction is allowed in a broad set of circumstances in general international law: although it is a form of extraterritorial jurisdiction, it is more respectful of the sovereignty of States and of the equality of all States than the other forms of extraterritoriality. Indeed, as an additional safeguard, article 13(1) and (2) of the Zero Draft precludes that the new instrument shall be abused to justify the exercise of forms of extraterritorial jurisdiction that would be in violation of the principles of sovereign equality and territorial integrity of States or of the principle of non-intervention in the domestic affairs of other States.

Thirdly, adjudicative extraterritorial jurisdiction would be exercised here **in order to contribute to the protection of internationally recognized human rights**. It may thus be justified in the name of international solidarity : whatever the reasons are for the territorial State not effectively protecting human rights, the exercise of extraterritorial jurisdiction by other States, in particular the home State of the corporation having a transnational activity, in order to ensure such a protection, may be seen as a means to facilitate the compliance of the host State with its international obligations under the international law of human rights. This distinction between the two broadly defined justifications for extraterritorial jurisdiction is essential.⁵ In contrast with situations where States exercise extraterritorial jurisdiction in order to promote their own, sovereign interests,⁶ where extraterritorial jurisdiction promotes solidarity between States, it should be considered as valid in principle, although as a matter of course any risks of conflict with the territorial State should be avoided to the fullest extent possible even in such cases.

Moreover, the preservation of human rights has occasionally been referred to as of interest to all States, even in the absence of any more specific link between the State and the situation where human rights are violated. Although the significance of this *dictum* in the *Barcelona Traction* judgment referring to this specific character of international norms relating to 'the basic rights of the human person'⁷ has been widely debated – and its consequences probably exaggerated by some commentators

⁴ In para. 33.

⁵ It is no exaggeration to say that this distinction is central to the work by the Select Committee of Experts on Extraterritorial Jurisdiction set up within the Council of Europe by the European Committee on Crime Problems, and which benefited, in particular, from the contribution of professor Rosalyn Higgins. See *Extraterritorial Criminal Jurisdiction*, Report prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set up by the European Committee on Crime Problems (CDPC), Council of Europe, 1990, pp. 25-30.

⁶ On the basis, for instance, of the principle of protection of the fundamental interests of the State, of the passive personality principle, or of the effects doctrine.

⁷ The International Court of Justice declared in the *Barcelona Traction* judgment that 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection. They are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character'. International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, para. 33-34.

–,⁸ the *erga omnes* character of internationally recognized human rights may justify allowing the exercise by States of extraterritorial jurisdiction, even in conditions which might otherwise not be permissible, where this seeks to promote such rights.

Thus, to the extent that it affirms the duty of States to ensure that their courts shall be empowered to receive claims filed against companies domiciled under their jurisdiction where such companies have allegedly committed human rights abuses, article 5 should not be seen as derogating from already well-established grounds of jurisdiction under international law.

It is true that this provision goes beyond stating that States *may* allow their courts to adjudicate claims files against corporations domiciled under their jurisdiction: it would establish a *duty* of States in this regard. However, by stipulating such a duty, article 5 of the Zero Draft merely reaffirms what human rights treaty bodies have been stating since a number of years. These bodies have long recognized the extraterritorial implications of the instruments that they are tasked to supervise. Thus for instance, in its 2011 Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights reiterated that States Parties' obligations under the Covenant do not stop at their territorial borders, and that States Parties are required to take necessary steps to prevent human rights violations abroad by corporations which they can control, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.⁹ The Committee has also addressed specific extraterritorial obligations of States Parties concerning business activities in General Comments relating to the right to water,¹⁰ the right to work,¹¹ the right to social security¹² or the right to just and favourable conditions of work.¹³ Similar positions have been adopted by the Committee on the Rights of the Child,¹⁴ as well as by other human rights treaty bodies.¹⁵

Article 5 of the Zero Draft is largely consistent with the position adopted by the Committee on Economic, Social and Cultural Rights in its General Comment No. 24, where it stated that States parties' duty to protect the rights of the Covenant :

... extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law. Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.¹⁶

The same position has been adopted by the Committee of Ministers of the Council of Europe in the 2016 Recommendation it adopted on human rights and business.¹⁷

One aspect of article 5 of the Zero Draft may be more controversial: it includes a duty of States to

⁸ For illuminating discussions, see Ian Seiderman, *Hierarchy in International Law. The Human Rights Dimension*, Hart-Intersentia, Antwerpen-Groningen-Oxford, 2001, chapter IV; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford Univ. Press, 2000.

⁹ E/C.12/2011/1 (Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights), paras. 5-6.

¹⁰ E/C.12/2002/11 (General Comment No. 15 (2002): The right to water (arts. 11 and 12)), paras. 31, 33.

¹¹ E/C.12/GC/18 (General Comment No. 18 (2006): The right to work (art. 6)), para. 52.

¹² E/C.12/GC/19 (General Comment No. 19 (2008): The right to social security (art. 9)), para. 54.

¹³ General Comment No. 23 (2016) on the right to just and favourable conditions of work (E/C.12/GC/23), para. 70.

¹⁴ CRC/C/GC/16 (General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights), paras. 43-44.

¹⁵ For example, Committee on the Elimination of Racial Discrimination, Concluding Observations: Norway (2011) (CERD/C/NOR/CO/19-90), para. 17; Human Rights Committee, Concluding Observations: Germany (2012) (CCPR/C/DEU/CO/6), para. 16.

¹⁶ At para. 31.

¹⁷ See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, on human rights and business, adopted on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, Annex, para. 13.

provide that their domestic courts shall have jurisdiction to adjudicate claims filed against companies which have a "substantial business interest" in the State concerned. This is in line with the position adopted by the Committee on the Rights of the Child in General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights.¹⁸ The Committee on Economic, Social and Cultural Rights adopted a more restrictive position in General Comment No. 24, in part because of considerations of legal certainty (the expression "substantial business interest" is broad and perhaps vague), and in part in order to avoid a too expansive definition of States' duties to protect human rights by exercising extraterritorial jurisdiction, especially as regards States that have large economies on which many corporations with a transnational activity are present.

4. The need for international cooperation: mutual legal assistance

Because article 5 of the Zero Draft is ambitious, as it seeks to ensure that victims of human rights abuses shall not be left without a remedy, it does create a risk of positive conflicts of jurisdiction: the same corporation could be sued in different fora for the same alleged violations. It would be desirable to avoid such conflicts. Article 11 of the Zero Draft goes a long way towards minimizing that risk. However, in the absence of provisions in the Zero Draft of provisions allocating jurisdiction (the various grounds of jurisdiction are not hierarchized in article 5), the conclusion of supplementary conventions might be considered desirable.

It is common for human rights treaties to refer to a duty of international cooperation, and to include in the definition of such a duty the duty to seek to conclude agreements with other States. A duty to cooperate for the full realization of human rights is included, for instance, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which 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."¹⁹ A comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.²⁰ Similarly, the Convention on the Rights of Persons with Disabilities,²¹ "recogniz[ing] the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention", commits States parties to "undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities".²² The Convention on the Rights of Child also provides that States Parties shall take measures for the implementation of the economic, social and cultural rights of the child, "where needed, within the framework of international co-operation",²³ leading the Committee on the Rights of the Child to note that "When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation."²⁴

While some instruments refer simply to a duty of international assistance and cooperation without referring explicitly to the conclusion of new international agreements, others do provide such an

¹⁸ CRC/C/GC/16 (General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights), paras. 43-44.

¹⁹ Art. 9 (1).

²⁰ Article 15 provides that "States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains."

²¹ United Nations, *Treaty Series*, vol. 2515, p. 3 (opened for signature on 13 December 2006 by resolution 61/106 of the General Assembly (A/RES/61/106)).

²² Article 32(1).

²³ Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, p. 3; opened for signature on 20 November 1989 by resolution 44/49 of the General Assembly (A/RES/44/49)), art. 4. Article 45 of the Convention refers to the relations that may develop between the Committee on the Rights of the Child and the specialized agencies of the United Nations, the United Nations Children Fund (Unicef), and other United Nations organs.

²⁴ Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child (CRC/GC/2003/5), para. 5.

explicit reference, where the conclusion of such agreements is seen as essential for the fulfilment of the aims of the convention. Thus for instance, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,²⁵ provides that "States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. (...)".²⁶

The duty of international assistance and cooperation is given a particular emphasis in the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the Covenant provides that the States parties to the Covenant undertake to "take steps, individually *and through international assistance and co-operation*, especially economic and technical", to the maximum of their available resources, "with a view to achieving progressively the full realization of the rights" recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in article 11(1) of the Covenant, according to which "States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which "may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant". Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action

includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.²⁷

Imposing an obligation on a State to enter into any form of international agreement or to negotiate such an agreement may seem both odd and impractical, since it can hardly be reconciled with the principle of State sovereignty -- one of the implications of which is that States cannot be forced to enter into agreements against their will. In fact however, it is not unusual for international law to impose a duty to *seek, in good faith, to conclude an international agreement*.²⁸ In general international law, an obligation to negotiate emerges in particular in situations where States are recognized to have conflicting rights, which can only be reconciled through a process of negotiation clarifying the respective rights and duties.²⁹ It is on this basis that, in General Comment No. 24, the Committee on

²⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000.

²⁶ Art. 10(1). The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, also adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, provides for a duty of States parties to "cooperate in the implementation of the ... Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations" (art. 7(1)). It is less explicit, however, on the conclusion of new agreements to that effect.

²⁷ The implication is that, for instance, in order to comply with the right to food, "States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention *and consider the development of further international legal instruments to that end*" (Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): The right to adequate food (art. 11) (E/C.12/1999/5) (1999), para. 36 (emphasis added)).

²⁸ A classic example is Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which was opened for signature on 1 July 1968 (*United Nations Treaty Series*, vol. 729, p. 161): "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".

²⁹ International Court of Justice, *Fisheries Jurisdiction Case*, 1974 I.C.J., p. 31 (negotiations are required between Iceland

Economic, Social and Cultural Rights noted:

Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress.³⁰

III. Conclusion

The provisions on the scope of application of the new instrument (article 3) as well as on jurisdiction (article 5), which this author was asked to reflect upon, are a sound starting point for the negotiation. For the most part, they are consistent with general international law, and the duty of the State to protect human rights by controlling corporations domiciled in the State concerned, in particular, constitutes a mere reaffirmation of an obligation that is already firmly anchored in international human rights law. These provisions could be improved, however, in three areas: article 3 could be redrafted in order to reduce the room for ambiguity; article 5 could provide for a more restrictive reading of the duty to accept jurisdiction, where the only link between the defending company and the forum State is that the company has a "substantial business interest" in that State; finally, the future instrument could (in line with what other human rights instruments provide) include a provision encouraging States to conclude conventions reducing the risk of positive conflicts of jurisdiction in cases that have their source in human rights abuses committed in transnational situations.

* * *

and Great Britain who both have legitimate fishing rights in certain maritime areas).

³⁰ In para. 35.