

6. Scope of the future instrument

Human Rights Council Resolution 26/9 is clear with respect to the mandate of the OEIGWG. It shall “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. We believe that discussions regarding the coverage of the future treaty should not deviate from this mandate conferred to the OEIGWG by a resolution adopted by a majority of States at the Human Rights Council.

Our experience, as illustrated by the cases presented above, furthermore demonstrates the importance of focusing on TNCs and interpreting other business enterprises in the sense of this focus. The case on tea plantations highlights how TNCs drive most of the global economy and control many of the domestic businesses. The cases we presented in our study to the European Parliament also show the web of different actors which are involved in the human rights abuses committed by TNCs.

A scope of coverage which focuses on TNCs and other businesses enterprises should therefore be interpreted in a way as to take these complex realities into account and cover all those business enterprises involved in transnational operations, linked to TNCs through cross cutting investments, participating in TNCs’ supply chain or having a contractual relationships with TNCs and other business enterprises (including credits, franchises and other).

Due to their flexibility, complex structures, power and the fact they are almost always in a different jurisdiction as the individuals and communities they affect, TNCs’ parent or controlling companies have been able to escape liability, leaving affected individuals and communities without any remedy. New international law is therefore required in order to fill the current protection and accountability gap to deal with these cross-border crimes and human rights abuses committed by TNCs and other business enterprises.

It is frequently almost impossible to prove the interdependency of the national companies connected to an international web due to the strategies used by these economic units operating abroad. These legal units which belong to TNCs are national legal persons and in various opportunities affected individuals and communities have denounced the impunity they face due to the lack of existence or implementation of national laws. In this context, the treaty can stipulate in specific clauses the need for national regulations for national companies or reaffirm the obligation to implement national existing laws for other business enterprises.

With regard to the human rights to be covered under the future instrument, the submitting organisations reiterate the principles of interdependency and indivisibility of human rights and therefore call on the instrument to cover all human rights. When referring to criminal accountability, the submitting organizations emphasize the need for the future legally binding instrument to cover crimes which impair the enjoyment of economic, social and cultural rights. We welcome the recent decision of the International Criminal Court to give particular attention to crimes involving environmental destruction, land grabbing and illegal exploitation of natural resources¹.

7. States’ obligations

Taking into account the complicated structures and webs of businesses of transnational character as well as the strategies used by diverse units involved in investments webs, the future legally binding instrument should spell out clear human rights obligations for all states involved. To this end, the instrument should first set out to clearly define what is understood as a Home and a Host State. The definition of a Home State could, for instance, take inspiration

¹ See: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

from Principle 25 (c) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights: “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.” Under such a definition, it is important to emphasize that TNCs and other business enterprises can have several home States.

As for all human rights instruments, the future legally binding instrument should follow the respect, protect and fulfil typology of States’ human rights obligations.²

7.1 Obligation to respect human rights

We reiterate the importance for the future legally binding instrument to clearly define States’ territorial and extraterritorial obligations to respect human rights with regards to the policies and conducts they have relating to the activities of TNCs and other business enterprises. This should provide for affected individuals and communities to hold States to account for the cases in which States are complicit in the abuses committed by TNCs and other business enterprises.

States’ obligation to respect requires them to refrain from any conduct which could nullify or impair the enjoyment of human rights within or outside their territory.³ In the context of the discussed instrument, this obligation requires all States to avoid establishing laws and policies favourable to harmful investments by companies within their jurisdiction or abroad, therefore acting in complicity with the involved TNCs. The future instrument should clearly specify that this obligation applies to States when signing trade and investment agreements, in the context of the design and implementation of international development cooperation as well as more generally in their diplomatic work.

In the framework of this instrument, it should also be stipulated that States’ obligation to respect requires them to refrain from conduct impairing other States or international organisations to comply with their respective obligations regarding the activities of TNCs and other business enterprises.⁴ This obligation furthermore requires States to refrain from aiding, assisting, directing, controlling or coercing other States or international organisations to breach their human rights obligations in knowledge of the circumstances of the act.

We reiterate here that the legally binding instrument should make clear that States’ human rights obligations to respect, as well as to protect (developed below) apply when acting in the context of intergovernmental organisations, including international financial institutions. It should be made clear that States’ acts within these organisations shall be in compliance with the States Parties obligations under the future legally binding instrument, that is, that they shall take all reasonable steps to ensure that the relevant organization does not assist or facilitate human rights abuses by TNCs and other businesses in harming human rights, and that – on the contrary – the organization protects the enjoyment of human rights from being impaired by TNCs and other business enterprises. Such obligations have been reiterated by the Committee on Economic, Social and Cultural Rights in a recent Statement.⁵

7.2 Obligation to protect

States’ obligation to take separate and joint action, through international cooperation, to protect human rights from the adverse impact generated by activities of TNCs and other business enterprises territorially and extraterritorially should be clearly spelled out in the treaty, following the jurisprudence of different treaty bodies and the work of various special procedures⁶. Beyond the differentiation between the obligations of Home States and a Host States, Principle 25 of the

² E.g: General Comment No. 12 on the Right to Adequate Food, CESCR, U.N. Doc. E/C.12/1999/5.

³ Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principles 19 – 21.

⁴ See supra note 23.

⁵ Statement on public debt, austerity and the International Covenant on Economic, Social and Cultural Rights (2016), CESCR, U.N. Doc. E/C.12/2016/1; General Comment No. 12 on the Right to Adequate Food (1999), CESCR, U.N. Doc. E/C.12/1999/5, para. 19; General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000), CESCR, U.N. Doc. E/C.12/2000/4, para. 39.

⁶ E.g: Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights (2011), CESCR, U.N. Doc. E/C.12/2011/1; - General Comment No. 16 on State obligations regarding the impact of the business sector on children’s rights (2013), CRC, U.N. Doc. CRC/C/GC/16; - Report of the Special Rapporteur on the right to food, Olivier

Maastricht Principles on the Extraterritorial Obligations of States provides for the different conditions under which States have the obligation to adopt and enforce measures, through legal, diplomatic and other means to protect human rights:

- a) if the harm or threat originates or occurs in its territory;
- b) if the non-State actor has the nationality of the State concerned;
- c) if the corporation or its parent or controlling company has its activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned;
- d) if 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. Examples of a reasonable link would be:
 - The company has assets in that country that can be seized to implement a judgment of a court.
 - There is evidence or there are eye witnesses in the country.
 - Accused company officials are present in the country.
 - The company carried out part of the incriminated operations in that country;
- e) if the abuses committed by TNCs and other business enterprise constitute a violation of a peremptory norms of international law, and also constitute a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction. This is therefore the obligation for all States, each State, no matter how distantly related to the case.

7.2.1 Obligation to protect of host States of TNCs and other business enterprises

For host States of TNCs and other business enterprises, the obligation to protect human rights against the conduct of TNCs and other business enterprise requires them to regulate, monitor, adjudicate and enforce judicial decisions in order to ensure the liability of the involved companies and enable the affected individuals and communities to access effective remedies and reparation. Under this human rights obligation, Home States are required to jointly or individually define and enforce obligations for TNCs and other business enterprises under their national civil, administrative and criminal law which include the following:

- To abstain from any conduct, project or activity threatening or causing harm to the enjoyment of human rights or leading to related ecological harm.
- To report on policies they have, in order to prevent harm to the enjoyment of human rights. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity.
- To carry out ex ante and ex post an independent human rights and environmental impact assessments and adopt the required corrective measures in order to eliminate harm to the enjoyment of human rights and to the ecology. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity. Measures should be taken to ensure that impact assessments are independent and to ensure remedy recourse mechanisms for threatened or affected communities when they disagree with the impact assessments or think these are invalid.
- To have effective and transparent information procedures for individuals and communities potentially affected by the activities or projects of the specific enterprise, without excluding their responsibilities to respect the results of prior and informed consent. This information should also allow the affected communities to identify investments and supply chains in order to ensure closing gaps when determining liability.
- To establish a vigilance plan in order to be able to identify risks of human rights and ecologic harm and to adopt the needed measures in order to prevent or stop impairing the enjoyment of human rights. These plans

De Schutter, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge, A/HRC/13/33/Add.2, para. 5; See list of standards above for a more complete list.

shall be available for the public. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity.

- To apply the precautionary principles when there is no certainty if an activity will impair the enjoyment of human rights or will harm ecosystems and climate.
- To abstain of influencing in or impeding prior consultations with affected communities or individuals carried out by states in exercise of their obligation to protect. We affirm that prior consultations are a duty of States. States should adopt all measures to ensure that consultations are not instrumentalized to divide communities.
- To abstain from harassment and criminalization of human rights defenders and whistle-blowers.
- To abstain from abusive and dilatory use of recourse mechanisms and other legal remedies thereby impeding the protection of threatened or affected individuals and communities (obstruction of justice).
- To comply prompt and effectively with the commitments acquired in negotiations carried with threatened or affected individuals and communities.
- To comply promptly and in good faith with administrative, judicial and quasi-judicial decisions protecting the enjoyment of human rights of individuals and communities that may be negatively affected by their conduct, including compliance with the ordered compensation, rehabilitation and adoption of measures to avoid repetition of the offenses.

Depending of the national context and legal culture, rules in specific fields of law such as commercial law, environmental law, competition law, anti-trust law, financial and tax law are also fields where TNCs and other business enterprises can be regulated in order to protect human rights.

States can jointly decide to include in the future instrument a list containing the above-mentioned obligations as well as other obligations of TNCs and other business enterprises to be regulated and implemented jointly and/or individually by States.

We reiterate here that TNCs and other business enterprises hold obligations under administrative, civil or criminal law and shall be held liable under such laws for the harm they do to the enjoyment of human rights. The treaty should ensure that States adapt, modify and amend the respective areas of law in line with their obligations to protect the enjoyment of human rights against TNCs and other business enterprises. Moreover judges have to interpret the law in line with the human rights obligations of their States. We reaffirm that TNCs and other business enterprises do not and shall not hold international human rights obligations under the future legally binding instrument. Human rights law mandates States to realize the human rights of their populations. TNCs and other business enterprises are mandated by their shareholders and investors, are licensed by States, and by their very nature they do not work for the public good but for private profit. Human rights are fundamental elements for democracy and the Rule of Law and States remain the only ones to hold human rights obligations, and must be held accountable for human rights violations. We reaffirm that States are and shall remain the fundamental subjects of international law and reject tendencies in international investment law, in particular in the context of investor state dispute settlement, that undermine these principles and the sovereignty of States and peoples. Moreover the treaty must guard its implementation against being blocked by such elements of international investment law. We consider many ISDS-related elements and tendencies illegitimate.