

Part 4

September 2016

7.2.2 Extraterritorial obligation to protect of home States and all States in a position to regulate TNCs and other business enterprises

The extraterritorial obligation to protect human rights from the adverse impact generated by the conduct of TNCs and other business enterprises of home States of TNCs and other business enterprises, or of any other State concerned under the definition of Maastricht Principle 25, requires them to take administrative, legislative, investigative, adjudicatory and other measures, to ensure that TNCs they are in a position to regulate do not impair human rights abroad. This obligation includes home States to open up their legal systems (including offering legal aid) to individual and affected communities of abuses committed by TNCs and other business enterprises abroad. This legal avenue should not require the “exhaustion” of remedies in the State of the affected individual or communities. Victims shall be free to choose in which State they want to sue the corporation.

In accordance with the UN Charter, all States in a position to influence the conduct of TNCs and other business enterprises, without being in a position to regulate such conduct, should exercise their influence, through international diplomacy or public procurement system to protect human rights from the conduct of TNCs and other business enterprises.¹

7.3 Obligation to fulfil

As expressed in the Maastricht Principles on the extraterritorial obligations of States, principle 29, “States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, inter alia:

- a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;
- b) measures and policies by each State in respect of its foreign relations, including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially”

These obligations also apply to States with regards to the regulation of TNCs and other business enterprises.

8. Determining corporate legal liability

The lack of clear rules to determine the liability of the diverse legal entities involved in human rights abuses is one of the main hurdles to ending impunity and achieving remedy. The cases which have been developed under heading 4. “Overview of impacts” of this present written submission have highlighted the complex nature of global supply chains as well as the web of global actors which can lie behind the operations and human rights abuses of TNCs and other business enterprises. It should therefore be one of the main aims for the legally binding instrument under discussion to set out clear standards for the national and international legal liability of TNCs and other business enterprises involved in human rights abuses.

¹ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principles 26.

We reiterate here that under their obligation to protect human rights, States must regulate and monitor TNCs and other business enterprises as to ensure that they do not impair the enjoyment of human rights. Under this obligation, States must also create liability mechanisms under their national civil, administrative and criminal laws as to achieve remedies for those affected who have their human rights affected by TNCs and other business enterprises.

Below are some examples of rules with regards to the determination of liability which we believe the future treaty should provide for:

- The future legally binding instrument should clearly define which conduct of TNCs and other business enterprises impairing human rights they will be held liable for under States' national civil, administrative and criminal laws.
- The treaty shall require States to oblige groups of enterprises (also recognized in some legal systems as economic units or undertakings) to declare their existence and the enterprises confirming the group or the specific supply chain, in order to facilitate the determination of liability of all enterprises jointly harming the enjoyment of human rights.
- The treaty shall clearly define situations where the corporate veil shall be lifted or where a rebuttable of the presumption of control should be incorporated in the national legislation in order to determine full liability for crimes and offences committed by TNCs and other business enterprises which impair the enjoyment of human rights. Mechanisms used in other fields of law as for example in competition, tax or labour law should be explored and its inclusion in the treaty should be at least considered during the negotiations.²
- Mechanisms that ensure the liability of parent companies or other companies whose specific subsidiary or related company impair the enjoyment of human rights shall be explored. To this aim, the OEIGWG should explore theories and models existing in diverse legal systems to determine criminal liability, including the theories of "directing mind", the "respondent superior" or the "corporate culture". The norms included in this respect in the treaty should be developed in light of the good faith (bona fides) and effectiveness principle. This allows tackling the mentioned challenges in the diverse legal cultures different States in a way that provides the most effective protection.
- The burden of proof regarding for instance the due diligence of parent or controlling companies should be on TNCs and other business enterprises as to ensure equality of arms and due process for the affected individuals and communities. While due diligence procedures can be useful for prevention and in the context of establishing liability, such procedures cannot exhaust the determination of liability. Legal liability has to be based on the real impact on the affected individuals and communities. Every case has to be considered starting with this perspective – and taking into consideration whether the company did everything to avoid this harm that was reasonable in this situation – beyond precautionary procedures of due diligence. Using due diligence to define business liability, would be contradictory to the goal of enhancing accountability and effective remedy for victims, especially taking into account the risk that companies misuse the due diligence tests to escape their accountability in order to protect their profit interests.
- The legally binding instrument should include clear norms which define complicity in order to determine the criminal liability of parent or controlling companies when involved in human rights offenses committed by their subsidiaries or contractual related legal entities.

9. Challenges to access to remedy: The Mubende Case in Uganda

The Mubende case, which concerns the eviction of over 4,000 people in the district of Mubende in Uganda, illustrates the hurdles which affected people and communities of the activities of TNCs and other business enterprises face in order to access remedy. The eviction took place in 2001 by the Uganda People's Defense Force which stormed the villages of Kitemba, Luwunga, Kijunga and Kiryamakobe in Mubende, to lease land to Kaweri Coffee Plantation Ltd., a 100% subsidiary of the German company Neumann Kaffee Gruppe (NKG). The eviction was conducted in a very

² See for example: Miller, Sandra K. Piercing the corporate veil among affiliated companies in the European community and in the us.: a comparative analysis of U.S., German, and U.K. veil-piercing approaches in American Business Law Journal [Volume 36, Issue 1](#), pages 73–149, 1998.

violent manner, causing the death of three people, dozens injured and destroying amongst other things the farmers' crops and houses. In addition to these immediate impacts, the terrible conditions the community was left with after the eviction, (no shelter, no adequate access to drinking water, no health care, to mention just a few) has led to an increase in diseases and deaths. The lack of shelter, water and land has severely affected the evictees' human rights to water, housing, food, healthcare and education, guaranteed in the International Covenant on Economic, Social and Cultural Rights.

After 15 years of mobilization and legal struggle, the evictees from the Mubende district have still not seen justice and moreover continue to suffer the collateral consequences of this brutal act. In 2002, the evicted community decided to bring the case to the Nakawa High Court against the Ugandan Government and Kaweri Coffee Plantation Ltd for human rights violations and abuses. Eleven years later, in 2013, after delayed hearings and a disrupted process, the High Court ruled in favour of the affected communities. However, 396 families are still awaiting redress as the case has been sent back by the Court of Appeal to the High Court for retrial and there is uncertainty about when and if the case will move forward.

The unsuccessful attempts to seek remedy within domestic courts, led the affected communities to lodge a complaint to the German National Contact Point (NCP) in 2009 for the OECD Guidelines for Multinational Enterprises. NCP's are government bodies, most often part of trade or economic ministries and are responsible for promoting the Guidelines and handling complaints relative to them.

The complaint was filed on the basis that NKG had breached the Guidelines relative to:

- the destruction of property of the persons concerned without compensation;
- the rejection of any dialogue with the persons concerned;
- the obstruction of court proceedings and;
- the presentation of obstacles to an out-of-court settlement.

The experience at the OECD Guidelines NCP has been unsatisfactory for the evictees. It took 18 months for the first and last meeting between the representatives of NKG and the evictees to take place, without any outcome. In April 2011, Germany's NCP closed the complaints procedure and furthermore asked civil society to stop publicly criticizing NKG, leaving the communities without any remedy, 10 years after being evicted from their land and after energy and time-consuming procedures.

The case demonstrates the numerous hurdles which the affected individuals and communities have faced in attempting to access effective remedy. At the national level, the legal action undertaken by the evictees to reclaim their land and properties has been continuously obstructed and delayed. The involved company denied any contact with the affected communities, failed to support efforts for compensation and even tried to impede the proceedings. At the international level, the OECD Guidelines for Multinational Enterprises demonstrated their weaknesses, notably their voluntary nature and apparent conflict of interest, in light of the body's location in the Office of Foreign Investment's sub-department for foreign trade promotion within the German Federal Ministry of Economics and Technology. The case demonstrates the limits of voluntary standards which do not guarantee effective remedy for affected individuals and communities, and the need therefore for a binding instrument. The case furthermore illustrates the importance for the future legally binding instrument to provide for mandatory cooperation between the home and host States in regulating and monitoring TNCs and other business enterprises and providing remedies for affected individuals and communities.