

3. Principles for an International Legally Binding Instrument on Transnational Corporations (TNCs) and other Business Enterprises with respect to human rights

Building on submissions prepared for the first session of the OEIGWG, the submitting organisations remind hereafter a list of principles, including general principles of international law that should govern the future international legally binding instrument. These include: human dignity¹, good faith², effectiveness³, transparency and information⁴, participation⁵, precautionary principle⁶, international cooperation⁷, due process of law and equality of arms⁸, avoiding pro-(homine) persona⁹ principle, the principle of primacy of human rights, universality, indivisibility, interdependency

¹ Charter of the United Nations (1945), first paragraph; Universal Declaration of Human Rights (1948) [Hereinafter UDHR], preamble par. 1, 4; Art. 1 equality in dignity; International Covenant on Economic, Social and Cultural Rights (1966) [Hereinafter ICESCR] Preamble, par. 1, 2; International Covenant on Civil and Political Rights (1966) [Hereinafter ICCPR] Preamble, par. 1, 2. i.a.

² Charter of the United Nations (1945) art. 2; Vienna convention on the Law of Treaties (1969), art. 31.

³ Kelsen, Hans: General Theory of Law and State, The Law Book State, 2007, p. 121; Brownlie Ian, Principles of Public International Law, 5. Ed., Oxford 1998, p. 636; Sepulveda, Magdalena, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights, Antwerpen, Oxford, New York, 2003, S. 174 ss., s. 79 ss.

⁴ On transparency in cooperation see: Vienna Declaration and Programme of Action, adopted 25 June 1993, U.N. GAOR, World Conference on Hum. Rights, 48th Session, 22d plenary meeting, art. I, par.1, U.N. Doc. A/CONF.157/23 (1993), reprinted in 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration] art. II, para.74; on the principle of transparency in trade, development and international investment see: United Nations Conference on Trade and Development (UNCTAD), Transparency, Issues in International Investment Agreements, U.N. Doc. UNCTAD/ITE/IIT/2003/4, U.N. Sales No. E. 04.II.D.7 (2004); on the right to information: UDHR Art. 19; ICCPR art. 19; Inter- American Convention on Human Rights Art. 13; On Transparency in cooperation see Vienna Declaration, supra note 3, art. II, 74.

⁵ See i.a. ICCPR Art. 25; U.N. Doc E/C.12/2001/10 (2001), CESCR: Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, Par 12; U.N. Doc. A/RES/S-27/2 (2002), G. A. Res. S-27/2, U.N. GAOR, 27th. Special Session: A World Fit for Children, adopted 10 May 2002, para. 32.

⁶ See: Commentary to Article 3 of the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the work of its 53rd Session, U.N. GAOR, Int. Law Commission, 53rd Session, at 155, art. 3, par 14; Case concerning Pulp Mills on the River Uruguay (Argentina. vs. Uruguay.), Judgment, 2010 I.C.J. 14, par. 164 (20 Apr.); Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011, para. 135 (1 Feb.) at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

⁷ See: U.N. Charter art. 56–55, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945); International Conference on Human Rights, Tehran, Iran, 22 April – 13 May 1968, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF. 32/41; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 42 (24 May); Hannum, Hurst: The Status of the Universal Declaration of Human Rights in National and International Law, 25 Georgia J. International & Comparative Law, 1995/96, p. 287, 351–52; Buergenthal, Thomas, International Human Rights Law and Institutions: Accomplishments and Prospects, 63 Wash. L. Rev, 1998, p. 1, 5–6, 8–9; Simma, Bruno & Alston Philip: The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, Year Book of International Law 1988/1989, p. 82, 100–02; De Schutter, Olivier: The Status of Human Rights in International Law, in Krause, Catarina & Scheinin Martin (eds.) International Protection of Human Rights: A Textbook., 2009, p. 39, 41.

⁸ On due process of law and fair trial see: Inter-American Human Rights Curt: Case Velásquez-Rodríguez v. Honduras, Preliminary Objections, Judgment, (ser. C) No. 1, par 91 (26 June 1987); African Commission on Human and Peoples Rights: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle C (a), DOC/OS(XXX) 247, reprinted in 12 International Human Rights Report, 2005, p. 1180; European Court of Human Rights: Case Conka v. Belgium (Appl. No. 51564/99), judgment of 5 Feb. 2002, par. 75. On Equality of arms see: Cançado Trindade, Antônio: The Construction of a Humanized International Law, Brill, Nijhoff, 2014, p. 1638.

⁹ On pro persona or pro homine principle, commonly applied in the Inter American Human Rights System see: Pinto, Mónica: El Principio Pro Homine, Criterios de Hermenéutica y pautas para la regulación de los derechos humanos in M. Abregú, C. Courtis. [Ed.]: La aplicación de los tratados sobre derechos humanos por los tribunales locales, Buenos Aires 2004, p. 163; Condä, H.Victor: A Hand Book of International Human Rights Terminology, 2004, p. 108.

and interrelation of human rights¹⁰, the principle of equality and non-discrimination of all human beings, State accountability for human rights violations related to the activities of Transnational Corporations and other business¹¹, liability of enterprises for human rights offenses¹², States obligations to respect, protect and fulfil human rights territorially and extraterritorially¹³.

Furthermore, a new principle should be integrated in the treaty to protect governance spaces and human rights bodies from undue influence from commercial and other vested interests and more generally from corporate capture¹⁴. Such a principle is needed to preserve democracy and people's sovereignty. A relevant precedent is the WHO Framework Convention on Tobacco Control, Art 5.3.¹⁵

4. Overview of impacts

In the written submissions to the first session of the OEIGWG, the submitting organizations briefly presented some of the human rights impacts of the activities and conduct of TNCs and other business enterprises, demonstrating how they can negatively affect all human rights, civil and political rights, and economic, social and cultural rights alike. Whilst reiterating these points and the need for the instrument to cover all human rights, we would like to go here in depth on some cases of abuses and impunity resulting from the activities of TNCs and other business enterprises which our organizations have been confronted with recently. They highlight the existing human rights protection and accountability gaps related to abuses committed by TNCs and other business enterprises. The cases below demonstrate how the main hurdles to stopping impunity and achieving remedy for affected individuals and communities relate to TNCs' transnational character, complex corporate and contractual structures and power. It is these hurdles, which we have identified through our experience working with affected individuals and communities which should determine the scope of the future legally binding instrument, as well as States' obligations and conditions for determining corporate liability.

¹⁰ Vienna Declaration, art. I, para. 5.

¹¹ On the principle of accountability see: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess., Agenda Item 71(a), preamble., U.N. Doc. A/RES/60/147 (2006). ("Recognizing that, in honoring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law."); Eur. Consult. Ass., Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations, 1110th Meeting, Appendix 5 Item 4.8 (2011). "Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment." The Committee of Ministers recommends that states establish mechanisms to ensure the integrity and accountability of their agents. States should remove from office individuals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating impunity, or adopt other appropriate disciplinary measures.

¹² A precedent on the recognition of legal accountability for legal entities including business entities is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 3(4) of the Optional Protocol builds on the model adopted at the same time in the UN Convention on organized crime and the Convention against corruption.

¹³ See i.a. Committee on Economic, Social and Cultural Rights, Report on the Twentieth and Twenty-first Sessions, CESCR, 20–21st Sessions, paras. 236, 276, U.N. Doc. E/2000/22, E/C.12/1999/11 (2000); General Comment No. 12: The Right to Adequate Food, CESCR, 20th Session, paras. 14–20, U.N. Doc. E/C.12/1999/5 (1999); General Comment No. 13: The Right to Education; CESC, 21st Session, paras. 46–48 (1999); Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, Office of the High Commissioner for Hum. Rights, paras 47–48, U.N. Doc. HR/PUB/06/12 (2005); Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Comm. No. 155/96, A.H.R.L.R. 60 (15th Annual Activity Report), paras. 44–48. See also Olivier De Schutter, *International Human Rights Law* 242–53 (2010); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 37–41 (2d ed. 2005).

¹⁴ For instance, analysis by civil society organizations has shown that the current trend of privatization of international cooperation – through for instance advisory sources for law drafting, humanitarian assistance, procurement i.a – has a negative impact the enjoyment of human rights. The binding instrument should adopt all needed measures to ensure that these remain exceptions and not the rule, and that ex-ante and ex-post human rights impact assessments are in place to avoid human rights harm in international cooperation or to adopt the needed corrective measures. Monitoring and recourse mechanisms should be available in the donor and recipient countries for communities and individuals threatened or affected by privatized cooperation programs or measures.

¹⁵ Article 5.3 of the Tobacco Convention states that: In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law. On conflicts of interests see: Peters, Anne; Handschin, Lukas (Editors): *Conflict of Interest in Global, Public and Corporate Governance*, Cambridge 2012.

4.1 Abuses and violations of human rights in tea plantations in India

In November-December 2015, the Global Network for the Right to Food and Nutrition conducted a fact finding mission (FFM)¹⁶ to the Indian regions of Assam and West Bengal, which together comprise for 70% of India's tea production and which are also home to the worst working conditions. After visiting 17 tea plantations and interviewing approximately 300 workers the following human rights abuses and violations were observed:

- Discrimination on the basis of gender in the enjoyment of the right to work, meaning that women almost exclusively work as tea pluckers and are barred, as opposed to men, from promotional opportunities for higher wages;
- Violation of maternity protection rights, including absence of maternity leave benefits, breastfeeding breaks, pre-natal and post-natal care and access to sanitation facilities;
- Tea plantations receive insufficient wages in order to sustain their livelihoods and often turn to money lenders to then find themselves in a cycle of indebtedness;
- Tea plantation workers live in precarious housing which is exposed to extreme weather conditions and water contamination;
- Free medication is not provided to all workers and there is a lack of adequate potable water and high risks of water contamination due to the mixing of chemicals done near water pumps and tube wells;
- All the above-mentioned violations and abuses of human rights have detrimental impacts on the workers' ability to feed themselves and their families adequately. They affect not only the nutritional well-being of the workers and the girls' growing bodies, but also that of their children, thus creating an inter-generational cycle of undernutrition.

At the other end of the global tea supply chain, a few large transnational corporations sell the overwhelmingly majority of the world tea production. They collect the profit margins of the most lucrative processes of tea production which are the blending, packaging and marketing of the tea, in a context where global tea prices are at peak levels. Meanwhile, the wages of tea plantation workers are levelled with what they were 30 years.

The Government of India holds the primary obligation to guarantee all human rights of tea plantation workers and prosecute tea garden owners failing to comply with legislation in order to ensure adequate remedy for affected workers. However, the Indian government has failed to comply with these human rights obligations and deliver justice to the tea workers.

Tea packing companies and retailers, as the leaders of the global tea supply chain, have clearly failed to adequately conduct all due diligence requirements to ensure the human rights of workers and in particular vulnerable workers and women workers are not violated. They furthermore do not pay a fair price for their tea, which would enable the tea plantation workers to earn a living wage and work under decent conditions.

Home States of global tea packing companies and retailers have also failed to comply with their extraterritorial obligations to protect human rights by putting in place regulatory frameworks that make it a criminal offence for companies to contribute to human rights abuses abroad, and enabling affected individuals and communities to access remedy.

This case illustrates the importance for a broad interpretation of the scope of coverage of the future legally binding instrument. Whilst focusing on TNCs, the future instrument should include all business enterprises linked to global supply chains, for whom international markets and cross-border relations with business partners are a central element of their business model. Such an interpretation of the scope would enable, in this particular case, for the activities of the tea gardens, the tea processing factories and the global tea packing companies and retailers to be covered under the instrument.

This case furthermore highlights the importance of States' extraterritorial obligations to protect human rights and of international cooperation between States to regulate, monitor, adjudicate and enforce judicial decisions as to put an end to impunity directly from or driven by TNCs. The case also shows the need to have clear international legal rules for the determination of liability of the different legal units participating in the supply chain and impairing the enjoyment of human rights.

¹⁶ Report of the fact finding mission: http://www.fian.org/fileadmin/media/publications_2016/FFMReport_June_2016.pdf

4.2 The involvement of European corporate and financial entities in land grabbing outside the European Union

In a recent study on the involvement of EU Corporate and financial entities in land grabbing outside the EU requested by the European Parliament's Subcommittee on Human Rights¹⁷, the Transnational Institute and FIAN point to the negative human rights impact of land grabbing and to the 'multilayeredness' and complexity of land grabbing processes which involve diverse types of public and private actors.

The access to land and to other natural resources is the condition for the realisation of several human rights, such as the right to adequate food and nutrition, the right to water and sanitation, the right to health, the right to housing, the right to work, the right not to be deprived of one's means of subsistence and the right to take part in cultural life. They are fundamental for the realisation of the rights of indigenous peoples, rights of peasants and also women's rights. In addition to these economic, social and cultural rights, land grabbing can also impair civil and political rights, including the right to self-determination, the right to information and the principle of free, prior and informed consent.

Among the different cases presented in the study, the case of land grabbing involving Mozambican company Chikweti Forests of Niassa in the Niassa province of Mozambique for large-scale pine and eucalyptus plantations is emblematic¹⁸. Given that the majority of the inhabitants in the project area are peasant farmers who depend on small-scale farming for their livelihood, the loss of access to water, to fertile land, and the destruction of ecosystems due to the large-scale forest plantations have impaired the realization of their human right to food and nutrition. The right to water of local communities is also seriously threatened as both eucalyptus and pine tree plantations require important volumes of water and fertilizers and pesticides risk polluting the local waters. Furthermore, the consultations undertaken with the local communities have not ensured their effective participation, a right which is guaranteed by Mozambican Law. The jobs that Chikweti Forests of Niassa promised to create for those who ceded their land have not proven to represent an alternative source of livelihood. Complaints have also related to the harsh working conditions on the plantations, delays in salary payments and lack of work equipment.

Behind the Niassa land grabbing case, there lie multiple actors and thus distinct responsibilities and related attributable accountabilities. In the context of a cooperation agreement between Mozambique and Sweden, the Swedish development agency (SIDA) set up the Malonda Foundation, whose purpose is to facilitate and promote foreign investments in forestry, agriculture and tourism in the Niassa province. The foundation facilitated the establishment of Chikweti Forests of Niassa, a subsidiary company of the Global Solidarity Forest Fund (GSFF), a Swedish-based investment fund. Investors of the fund include amongst others the National Church endowment OVF from Norway (5%), the private Dutch pension fund Stichting Pensioenfond ABP (54.5%) and the Diocese of Västerås in Sweden (5%).

The Niassa case, as the other cases mentioned in the study, illustrate the complexity of land deals which involve a web of transnational corporate and financial actors: business managers of the agricultural project; parent companies who (fully or partially) own the business managing the project (subsidiary or local branch); investors/shareholders who invest money in a company in return for shares; lenders who make loans to a project or a company (commercial banks, investment banks, multilateral development banks/IFI, investment funds (hedge funds, pension funds, private equity funds); governments who offer land to the business managing the project and allow a company to be registered and operate in their country or region; brokers who play a role in helping to secure business deals and communicating between or supporting different actors involved; contractors who carry out certain jobs on the ground on behalf of the project; and buyers who buy the produce grown or processed by the project (trading companies, processor/manufacturer, retailer).

The difficulties in the determination of liability of the diverse legal entities involved in human rights abuses is one of the hurdles in ending impunity and achieving remedy. This is due to the lack of clear rules to determine corporate liability, as for example the rebuttable of presumption of liability of a parent company, the inversion of the burden of proof and/or rules on the elevation of the corporate veil for human rights abuses¹⁹. The scope of coverage of the future instrument should therefore ensure that the existing challenges in the regulation of transnational groups or networks of

¹⁷ Borrás, J., Seufert, P. et al., (2016) Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union, EP/EXPO/B/DROI/2015/02.

¹⁸ See also: FIAN International for the Hands off the Land Alliance (2012) The Human Rights Impact of Tree Plantations in Niassa Province, Mozambique.

¹⁹ See below heading 8: Determining Corporate Legal Accountability.

companies are identified and faced. The study furthermore illustrates the importance for the instrument to enact clear rules on the determination of corporate legal liability which take into account the complex web of transnational corporate and financial entities potentially linked to human rights abuses.

5. Form of the future legally binding instrument:

The submitting organizations consider that the binding instrument should have the form of a framework treaty leaving open the possibility for the Conferences Of States Parties to revise its content and to adopt optional protocols regulating additional normative elements, as for example regarding international accountability mechanisms or sectoral regulation.