



Deutsches Institut
für Menschenrechte

Position Paper

Building on the UN Guiding Principles towards a Binding Instrument on Business and Human Rights

Comments on the 'Elements for the Draft Legally Binding Instrument' of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises

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1 The time has come for a binding treaty

Globalized economic structures have led to gaps in human rights protection. Transnational corporations have steadily gained power and influence as globalisation has intensified. They use complex supply and value chains, placing the different segments of their operations in the most cost-effective location. Profit-oriented business models do not inherently include awareness of human rights risks, and companies frequently lack this basic knowledge. States, for their part, often fail to supervise and regulate effectively or to take adequate countermeasures against human rights abuses. Their inaction has led to a governance gap with regard to human rights protection and accountability. Overall, the risk of companies violating human rights has increased.

Many TNCs operate in host states that lack governance structures to effectively enforce human rights. Many countries lack the capacity and the political will to effectively protect rights-holders. For political decision-makers, economic considerations generally take precedence over human rights obligations. This leads to inadequate local laws and deficient enforcement mechanisms. Those affected by corporate human rights abuses have no access to effective grievance mechanisms.

The home states of transnational companies do not consider themselves responsible for the regulation of the conduct of their companies when they operate abroad. So far, only a few legal initiatives have been taken in the field of corporate reporting on human rights due diligence efforts. Home state governments consider regulation a last resort. In order to avoid imposing any burden on businesses they tend to restrict themselves to formulating expectations and favour incentives and guidance on human

rights due diligence. The National Actions Plans on business and human rights launched so far have not adopted the “smart mix” of voluntary and binding measures envisaged by the UN Guiding Principles.

But the necessity of closing gaps in human rights protections along global supply and value chains is no longer a matter for discussion. The UNGPs have made clear that host States must protect rights-holders against human rights abuse within their territory or jurisdiction by business enterprises. They are required to take measures to prevent, investigate, punish, and redress such abuse through effective policies, legislation, regulations, and adjudication. Whether such obligations also exist for home states is regrettably still disputed. Without such obligations being enshrined in international law, the existing gaps in protection cannot be closed. All states along supply and value chains need to oblige companies to comply with human rights due diligence requirements.

Given this situation, an overarching international legal framework would be helpful and needed to clarify the state duty to protect in connection with the activities of companies and to bring about significant improvements for rights-holders, particularly in the area of effective remedies. The approach of stopping short of binding measures and relying instead on corporate self-regulation has failed to deliver significant improvement for rights-holders. The time has come to move from voluntary standards to hard law.

2 The Institute supports the proposed treaty elements

In June 2014, the UN Human Rights Council agreed Resolution 26/9, setting up an Open-Ended Intergovernmental Working Group (OEIGWG)¹ to develop a binding international instrument for the regulation of transnational corporations and other business enterprises with respect to human rights. This working group met for its third round of negotiations in Geneva in October 2017, and discussed Elements for the eventual draft text of such a treaty.

The German Institute for Human Rights supports the treaty process and welcomes the “Elements for the draft legally binding instrument on transnational companies and other business enterprises with respect to human rights”² issued by the Open-Ended Intergovernmental Working Group in September 2017.

The draft elements restate and clarify extraterritorial state obligations in the field of business and human rights and aim to strengthen international cooperation to prevent, monitor and remedy the adverse effects of corporate activities on human rights. At the same time, they attempt to dissolve the discrepancy between the ever-increasing regulatory density in the field of bi- and multilateral investment protection and the lack of regulation in the area of human rights. Importantly, they have the potential to prevent a race to the bottom with regard to legislation and enforcement.

¹ See <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx> (retrieved 16.03.2018).

² See http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBES.pdf (retrieved 16.03.2018).

The draft elements are a good basis for further intergovernmental negotiations. However, they must become clearer and more precise during the negotiation process. Rather than attempt to solve all of the issues in the realm of business and human rights, the effort to achieve a binding instrument should focus primarily on issues that are particularly urgent and issues that will likely gain the necessary support among states to bring immediate and significant improvements for rights-holders along the global supply and value chains.

For the existing governance gap to be effectively closed, the partially ideological divide between home and host states of transnational companies (TNCs) needs to be overcome. This can only be achieved by identifying potential areas of agreement within the international community. The proposals to introduce direct international law obligations for companies or create a new international tribunal are counterproductive in substance and unlikely to serve as the basis for agreement among states. Instead, the draft elements should show by their adoption of standards, terminology, and content that they complement and build on the existing moments of international consensus on this issue, above all the UN Guiding Principles on Business and Human Rights (UNGPs) and their implementation through National Action Plans.

3 Elements of the draft treaty

3.1 Scope of application

Transnational business activities should be the focus of the agreement, because it is precisely here that the governance gap and urgent necessity for action exist. However, the starting point for all considerations must be to improve the situation of all rights-holders along global supply and value chains. This needs to be reflected in the scope of application of the proposed treaty. Effective protection requires that any kind of adverse impact on human rights from corporate activities is covered.

It is not clear that the distinction in the Elements between “transnational” and “other” companies can be maintained. The text seems to propose a distinction based on the transnational character of the company, but “transnational” is not further defined. Given that few, if any, companies have supply chains or subsequent customers without any cross-border connections or elements at all, this distinction does not appear particularly helpful.

In order to create a truly level playing field globally, a treaty must apply to all business enterprises, including those that operate in a national context (especially state-owned companies). The aim should therefore be to ensure consistency with the UN Principles of Business and Human Rights (“all companies, irrespective of their size, the sector to which they belong, their operating environment, ownership and structure”³). The treaty cannot lag behind the UNGPs, the current global reference framework, if it is to make any real progress.

The Guiding Principles require “additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state, or that

³ UN Guiding Principles on Business and Human Rights, General Principles.

receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies.”⁴ So far the draft only addresses public procurement, leaving the remainder of the state-business nexus insufficiently covered.

The current narrow scope of application would likely increase the ideological divide between the “global north” and the “global south” and lead to a treaty unable to close transnational governance gaps for lack of widespread ratification.

3.2 Trade and investment agreements

The implementation of human rights at the national level is the highest obligation of the state, and human rights form a core of international law’s guarantee of the dignity of each person, as highlighted during the Vienna Conference on Human Rights. The German Institute for Human Rights therefore supports the primacy of human rights obligations over the obligations of trade and investment agreements and other areas of international law.

According to the UNGPs, states should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of investment and trade agreements. In reality, obligations arising from such agreements frequently limit this ability. The treaty represents a unique opportunity to regulate the relationship between trade and investment agreements and human rights and to anchor the primacy of human rights in international law. It should further require human rights impact assessments before, during, and at the end of negotiations for such agreements.

3.3 Direct obligations of TNCs and other business enterprises

The treaty should not envisage direct international law obligations for TNCs or any private-sector company. Companies should be addressed within the state’s obligation to protect and using the existing instruments of company law, civil liability, and public-law regulation of business activity rather than by making companies direct human-rights duty bearers. Governance gaps can only be closed by states. Companies lack the legitimacy and governance functions to do so, and it is not desirable to give large transnational companies state-like governance and sovereignty functions.

We underline the concern voiced by some representatives of civil society that direct obligations on TNCs could potentially further empower corporate capture of policy spaces and human rights,⁵ and we warn of the risk that states, relieved of their duty to establish an appropriate regulatory and policy framework, will simply leave these matters to companies.

3.4 Alignment with human rights due diligence

The German Institute for Human Rights supports making human rights due diligence and its core elements as outlined in the UNGPs legally binding. It will help to develop a national and, in the long run, an international level playing field. However, it should be noted that human rights due diligence includes the responsibility to provide for effective remedy. The “vigilance plan” proposed in the Elements should be more

⁴ UNGPs, Guiding Principle 4.

⁵ FIAN International (2015): Oral Statement of FIAN International to the First Session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights – Panel III, July 7, 2015 Geneva.

closely aligned with the requirements of the Guiding Principles: policy commitment, assessing risks and impacts, embedding and integration, tracking and communication, and grievance and remedy.

3.5 Integration of specific group perspectives

The treaty should pay particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized. It is important to integrate a gender approach into the treaty, emphasizing the need for gender impact assessments as well as gender sensitive justice and remedy mechanisms.

The same is true for particularly vulnerable groups within society, including indigenous people. The treaty must build on the provisions of existing frameworks such as the UN Declaration on the Rights of Indigenous Peoples and give special consideration to the challenges faced by indigenous communities when seeking access to remedy for business-related human rights violations.

3.6 State obligations to hold business liable for human rights abuses

States should hold businesses accountable for human rights abuses under administrative, civil, and criminal law and provide for adequate sanctions. Given that many host states, despite being the primary duty bearers of human rights obligations, often fail to protect rights-holders, the treaty needs to clarify the extraterritorial obligations of home states of TNCs, especially with regard to ensuring access to effective remedy. This clarification should be guided by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and the Committee on Economic, Social, and Cultural Rights' General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

3.7 Access to justice, effective remedy and jurisdiction

The treaty should focus on the most serious gaps, especially barriers to accountability and remedy for cross-border corporate-related human rights abuses. States must be obliged to remove barriers in substantive and procedural law as well as practical barriers that rights-holders face. This includes issues such as jurisdiction and liability within corporate groups. The treaty needs to clearly distinguish between state-based and non-state based as well as judicial and non-judicial remedies, clarify the relationship between these remedies, and stipulate effectiveness criteria for these mechanisms. The treaty should recognize that non-judicial grievance mechanisms can complement judicial mechanisms as long as remedies granted by them are enforceable and comply with clearly defined effectiveness criteria.

3.8 International cooperation

The proposed focus on the cooperation of judicial bodies is to be commended. The German Institute for Human Rights urges states to come to swift agreement about the many helpful and feasible proposals contained in the Elements. The focus of this section should be expanded to include cooperation between state administrative authorities responsible for enforcing the relevant national laws. In this way, capacities of national oversight and monitoring bodies can be strengthened and prevention and monitoring along global supply and value chains can be improved. National Human

Rights Institutions (NHRIs) in compliance with the Paris Principles should be involved as closely as possible, since they function as a bridge between the state and civil society, science and practice as well as national and international actors. Present in close to one hundred UN Member States, this class of institutions is well-positioned, given adequate resources and mandates, to monitor human rights situations and to promote and protect human rights in international structures that parallel the global span of supply and value chains.

3.9 Mechanisms for promotion, implementation and monitoring

At the national level, NHRIs should play an important role with regard to assessing state performance. At the international level, a treaty body monitoring the implementation should consist of independent international experts and have the mandate to interpret the treaty provisions, receive and assess state reports, conduct on-site investigations, and receive individual complaints. However, the growth of the treaty body system has not come without challenges, including uncertain funding. The UN is currently working on measures to strengthen and enhance the effective functioning of the treaty body system. Consideration should therefore also be given to whether monitoring of the treaty obligations can be taken over by existing bodies.

Establishing new international judicial mechanisms is not desirable. Instead, existing institutions, especially international and regional courts, should be strengthened through an expansion of their mandates and obligations on state parties to these courts to support their effective operation and to enforce their decisions swiftly and effectively.

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