

The UN Human Rights Council Intergovernmental Working Group for an International Instrument on TNCs and other Business Enterprises

Introduction

The character of transnational companies (TNCs) poses various difficulties for their regulation by States in discharge of their obligation to protect human rights individually and through international cooperation. There are very few countries that address the legal regulation of TNCs even for domestic crimes – let alone for TNC action abroad, as required by States extraterritorial obligations and obligatory international cooperation. Enforcement at national level also remains a challenge.

Over the past decades there have been numerous attempts to jointly regulate TNCs in the context of the UN, but so far these have not been successful. The reasons behind these failures are, among others, to be found in the resistance of the corporate sector and a number of powerful states which place profit before human rights. The adoption of binding international agreements to regulate TNCs and other business enterprises, beyond mere voluntary standards, however, remains to be of critical importance to the communities and persons threatened and affected by human rights abuses and violations and for many States as well. For this matter it is no surprise that the issue was brought up in the Human Rights Council.

In line with the calls of civil society organizations, social movements and communities, the UN Human Rights Council (HRC), at its 26th session, in June 2014, established an “open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (res 26/9).

There is a large and growing group of human rights organizations, social movements, affected communities, and other civil society organizations involved in the process towards an international binding instrument for regulating TNCs in relation to human rights. The strong mobilization at the time of the HRC decision gathered more than 600 signatures (from at least

90 countries) in support of a joint statement¹ and ensured the presence of numerous national and international organisations in Geneva. Several organisations from the Global Network for the Right to Adequate Food and Nutrition (GNRtFN) have been part of this process from the beginning and have joined the Treaty Alliance², formed in early 2014.

Process and Content of the Proposed Treaty

The treaty should require States to adopt legislation and other measures requiring TNCs and other business enterprises to adopt policies and procedures aimed at preventing, stopping and redressing adverse human rights impacts they have been involved in. The treaty should clarify what kind of company conduct will give rise to legal liability (civil, criminal and administrative). Moreover, it should allow people affected to access judicial remedies not only in their own countries, but in all other States that have jurisdiction over the respective business enterprise(s). The treaty should create mechanisms and procedures of cooperation between the various States involved on the basis of their extraterritorial obligations.

For the UN work around the intergovernmental working group (IGWG), the Treaty Alliance has been calling for transparency and for participation of all governments in good-faith, asking the latter to safeguard their integrity from undue influence by actors from (or related to) the corporate sector whose primary interests in the process fall outside the objective of promoting and protecting human rights.

In terms of content, FIAN and some other organisations have emphasised the issue of States' extraterritorial obligations in the context of protecting people against harm by TNCs and other business enterprises. The current state of international law on these obligations has been summarized in the 2011 Maastricht Principles on Extraterritorial Obligations ("ETOs") in the field of Economic, Social and Cultural Rights.³

Beyond establishing mutual legal assistance and cooperation between States in regulating TNCs, the Treaty must reaffirm the legal obligations of States to protect rights-holders against conduct of transnational companies and other businesses that impairs the enjoyment of human rights, and guarantee that TNCs and other businesses prevent and redress adverse human rights impacts. Moreover corporations must be held liable for such crimes and offences, including

¹ Available at www.fian.org/fileadmin/media/publications/Joint_Statement_PeoplesForumBangkok_Binding_Instrument_Nov2013.pdf

² <http://www.treatymovement.com/>

³ Available in different languages at <http://www.etoconsortium.org/en/library/maastricht-principles/>

those that victimize people outside the corporations' home countries. For this matter, States will have to adopt relevant legal and other regulatory measures in line with their international extraterritorial and territorial human rights obligations.

Safeguarding Human Rights: Human rights legitimate, instruct, and limit the powers of the State- not of enterprises or persons

It is important that the social movements and CSOs which participate in the process ensure that human rights themselves are strengthened by the Treaty process, not weakened. One central point in this context is that only States carry human rights obligations. These States' obligations, however, imply specific duties for TNCs and other business – not in human rights law, but under criminal, civil and administrative law. The duties of TNCs need to be developed first of all in national legal systems that must cooperate with each other internationally on the basis of an international treaty, ratified by as many States as possible. This may also result in the establishment of international monitoring and accountability mechanisms. The treaty process is a long overdue step in this direction.

For more information on the treaty process, visit <http://www.treatymovement.com/> and read the second statement of the Treaty Alliance on the upcoming first session of the IGWG, which has received more than one thousand signatures (<http://www.treatymovement.com/statement>).