



Preliminary Observations on Elements for a Draft Legally Binding Instrument on Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) with Respect to Human Rights

On the 2 of October 2017 Ecuador has released the [Elements for the draft legally binding instrument on transnational corporations \(TNCs\) and other business enterprises \(OBEs\) with respect to human rights](#). This document will constitute the basis for substantive negotiations to elaborate an international binding instrument to regulate the activities of corporations during the third session of the open-ended intergovernmental working group (OEIGWG) to be held from 23 to 27 October 2017, as provided by [Resolution 26/9](#).

Following the adoption of Resolution 26/9, FIDH together with ESCR-Net established the Treaty Initiative, to ensure the participation of grass-roots organisations across the world in the UN treaty making process. The Treaty Initiative articulated the priorities of over 150 human rights organisations and grass-roots groups. The concerns expressed by those organizations, with the collaboration of a legal expert group, were translated into the [Ten Key proposals for the Treaty](#). The present contribution continues therefore to reflect the concerns, priorities and propositions gathered through the Treaty Initiative Project.

In this context, FIDH salutes the considerable work of Ecuador and South Africa in leading the process, holding constructive bilateral and multilateral meetings and providing the Elements for the draft. The draft document reflects the inputs provided by States and other relevant stakeholders, including FIDH, during the first two sessions of the OEIGWG as well as during meetings. As such, it is **inclusive and open for elaboration**, and should continue to enable the **active participation of all Member States** around the negotiation table.

As FIDH has demonstrated and argued during these last years, the “soft law” framework provided so far for the regulation of corporate activities at the international level has proved insufficient to fill the persisting gaps regarding the prevention of human rights violations, protection of right holders and access to remedy for victims of corporate abuses¹. The adoption of an international binding instrument represents a unique

¹ i.e. see: FIDH, *Business and Human Rights: Enhancing Standards and Ensuring Redress, Briefing Paper*, available at: https://www.fidh.org/IMG/pdf/201403_briefing_paper_enhance_standards_ensure_redress_web_version.pdf ; FIDH, *Constructive multi-stakeholder exchange : Assessing the UNGPs to move forward in the protection of human rights*, available at: <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/constructive-multi-stakeholder-exchange-assessing-the-ungps-to-move> ; ICJ and FIDH, *The relation between the UNGPs and the elaboration of an international legally binding instrument on TCNs and other business enterprises*, available at: https://www.fidh.org/IMG/pdf/panel_v_complementarity_fidh_icj.pdf

opportunity to specify, monitor and enforce binding obligations on States and corporations. It is also a unique opportunity to ensure a level playing field for companies to respect human rights.

FIDH welcomes the content of the draft proposed by Ecuador, more specifically because, *inter alia*:

- It reaffirms the universality, indivisibility and inter-dependency of all human rights;
- It reaffirms the UNGPs and recognizes the **primacy of human rights law** over trade and investment agreements;
- It reasserts the **obligations of companies** to respect human rights, and reinforces the obligation of States to adopt all necessary measures and rules to regulate the administrative, civil and criminal liability of TNCs and OBEs;
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- It applies to organizations of regional economic integration, and recalls that State Parties shall strive to ensure that international organizations, including international and regional economic, financial and trade institutions, in which they are Members, do not adopt or promote any international norm or decision that could harm the objectives of this legally binding instrument, or affect the capacity of the Parties to fulfill their obligations under the treaty;
- It emphasizes the State's duty to adopt adequate measures to provide and/or ensure **prompt, accessible and effective remedies** to victims of corporate human rights violations, and highlights the necessity to reinforce international cooperation to enable this;
- It provides that States shall adopt measures to require companies to design, adopt and implement effective **due diligence policies and processes**, by adopting a vigilance plan to prevent human rights violations inspired by the French vigilance law. The French law is the first of its kind to establish a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from the activities of its subsidiaries and enterprises with whom they have an "established business relationship" throughout the supply chain;
- Moreover, FIDH finds particularly important that the draft includes a provision on procurement contracts;
- Finally, FIDH particularly appreciates the adoption in Section 7 of a broader notion of jurisdiction that recalls the General Comment n. 24 of the UN ESCR Committee, and the call upon States to adopt legislative and other measures to consider claims concerning human rights violations by companies throughout their activities and business relations with subsidiaries, partnerships, etc.

The draft provides interesting elements through which an **inclusive debate could build** towards an international instrument that complements and fills the gaps of the existing framework.

FIDH hopes that the upcoming IGWG session in Geneva will serve to further discuss and clarify some points of the existing draft in order for it to be in line with the national, regional and international jurisprudence that

has developed to recognize the legal obligations of States, enterprises, and the rights of victims, as well as respond to existing legal gaps that have prevented them from seeking redress.

As such, corresponding areas of clarification include the following aspects:

1. General Principles

- The Principles of the future instrument should explicitly recall the wording of the UN Guiding Principles on Business and Human Rights, General Comment No. 24 of the Committee on Economic Social and Cultural Rights, and General Comment No. 16 of the Committee on the Rights of the Child emphasizing that the respect for human rights is requested in **all activities of business entities**, whether they operate at a transnational level or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure, thus avoiding legal gaps or corporate law constructions that would enable companies to escape accountability;
- Reference has also been made to the respect of domestic law. In that regard the future instrument should specify that domestic law must be in line with international human rights law. Dedicated mechanisms should be set up to ensure this compliance;
- In order to guarantee a constructive complementarity between the binding instrument, existing initiatives and mechanisms, in order to ensure that all initiatives and bodies will continue making progress in a collaborative way to improve access to justice in the context of corporate abuse, the draft elements should incorporate a specific cooperation clause, as essential principle for the interpretation and implementation of the binding instrument.

2. Scope

- Regarding the scope, the future instrument aims at protecting all internationally recognized human rights. Considering the state of ratification of international conventions, the instrument should require parties to ratify core human rights conventions;
- When focusing on Transnational Companies and Other Business Enterprises with a transnational character, the future instrument should provide an indicative definition of the expression “activities with transnational character” in a way that captures broadly those local business enterprises that have some transnational elements (e.g. offering products or services outside the country of incorporation, sourcing from overseas, having investors or directors overseas). Such a definition should be flexible and able to evolve and adapt to the changing nature and structure of business in order to avoid companies escaping from their obligations through new corporate law constructs.

3. State obligations

- The text should reaffirm States' duty under international law to **protect, respect and fulfill** (instead of promote) the human rights of all individuals and groups, which require specific actions, measures and mechanisms to guarantee that the conduct of third parties, including businesses, does not violate human rights;
- Although the draft elements of the future instrument includes reference to the relation between public procurement contracts and human rights, FIDH recommends that the language is revised in order to guarantee that the respect for human rights is a condition *sine qua non* of such agreements, and the failure to comply with human rights obligation triggers specific procedure for sanction of the business actor and remedy for right-holders;
- The future instrument should also reaffirm with clearer and stronger language States' obligation to protect **human rights defenders** in the context of business activities and elaborate on the UN Declaration on Human Rights Defenders (A/RES/53/144), the UN Resolution on the protection of women human rights defenders, reports of the UN Special Rapporteur on the situation of human rights defenders, and other relevant international instruments. As mentioned by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities "States Parties should take all necessary measures to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work"². We recommend therefore to include in Section 3 the obligation of States to:
 - adopt legislative provisions that prohibit the interference by TNCs and OBEs, including through their use of public or private security forces, with the activities of any person who seek to exercise their human right to peacefully protest against and denounce abuses linked to TNCs and OBEs activity, including by fully respecting their human rights to freedom of expression, association, and assembly, and freedom from being subject to cruel, inhuman or degrading treatment;
 - establish specific measures to protect human rights defenders against any form of criminalization and obstruction to their work, addressing in particular the gender-specific violence against women human rights defenders;
 - set up enhanced protection and dissuasive sanctions against corporation abuse of rights in suing human rights defenders and whistle-blowers;
 - Finally, States must protect human rights defenders from all these forms of attack and refrain from criminalizing their legitimate work via restrictive or ambiguous laws, such as those relating

² UN Committee on Economic, Social and Cultural rights on General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and cultural Rights in the Context of Business Activities. E/C.12/GC/24. Para.48, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en.

to national security, counter-terrorism and defamation to inhibit the work of human rights defenders.

4. Preventive measures

- FIDH underlines the importance of the fact that the future instrument requires due diligence policies and processes all along the supply chain and asks for clarification of Section 4 in order for the vigilance plan to include not only the subsidiaries but all the companies with whom a company has business relationship.
- Likewise, a link between mandatory due diligence and corporate liability, including civil administrative and criminal sanctions, should be clearly established, in order to guarantee the effectiveness of these regulatory measures;
- The future instrument should also recognize the particular risk of gross human rights abuses in **conflict affected areas**. It shall ensure that States provide information about the risks and role of business enterprises in those contexts, and require that “**enhanced due diligence**” is performed by businesses whose activities are directly or indirectly linked to those conflict affected areas. Likewise, the future instrument should reaffirm companies obligation to respect International Humanitarian Law, as recalled by the ICRC³. A provision in that regard could be inserted in the draft element in both Sections 3 and 4.

5. Fighting impunity

- While FIDH welcomes the introduction of a broad concept of jurisdiction in the draft we note that provisions regarding extra-territorial obligations are lacking in the document. Effective operationalization of the extraterritorial obligation to protect under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses, this include the elimination of obstacles to lawsuits involving TNCs activity in the home country of the parent company such as the doctrine of *forum non conveniens*. Consequently, the binding instrument needs to:
 - confirm that States have the obligation to respect, protect and fulfill all human rights against violations or abuses committed by third parties, including **extra-territorially**, when the company is incorporated, domiciled, registered, has its center of activities or substantial activities (these shall be alternative and not cumulative criteria) in the territory of the concerned State, when it is in a position to regulate, or can exercise influence over the relevant business activities;

³ ICRC, Business and International Humanitarian Law, an introduction to the rights and obligations of business enterprises under International Humanitarian Law, 2006, https://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf

- require states to reduce obstacles to access to justice and ensure that adequate norms are adopted to effectively respond to cases where conflicts of law and /or jurisdiction arise, including legislation to:
 - ensure applicable law comprises criminal and civil liability of legal entities;
 - provide adequate and sufficient remedy for victims;
 - provide clarification on the applicable law for cases with a cross-border character when disparities between home and host state law exist, by referring to the most protective legislation from a human rights perspective.

6. Access to information and participation in decision making

- While the existing draft recognizes in principle a **special protection for the victims of human rights abuses** committed by business enterprises and particularly to women and indigenous peoples, FIDH believes that the future instrument should further develop special safeguards in the following areas:
 - Section 4 of the binding instrument should require States to adopt legislation requiring to conduct **human rights impact assessments and environmental impact assessments** previous to initiating any activity. These impact assessments should allow for the broad and meaningful participation of rights holders and also include a gender analysis that assesses, mitigates and addresses the differentiated impacts on women and girls' rights. Such a gender impact assessment should be conducted by a third and independent party with the meaningful participation of women from affected communities and should be made public and accessible.
 - Section 4 of the future instrument should reaffirm the need of States to ensure **access to relevant information and meaningful participation** of civil society and in particular of affected communities in connection with **all stages** of corporate activity. Furthermore, it should recall the obligation to respect **free prior and informed consent** of affected populations as a fundamental element of preventing human rights violations.

7. Implementation and monitoring

- Finally, the draft proposes different options for the promotion, implementation and monitoring of the instrument:
 - At the national level, the legislation providing for the creation, reinforcement or modification of Ombudsperson and/or national human rights institutions should provide guarantees of independence, clear mandates, capacity to adopt binding decisions, and sufficient means to fulfill their objectives.
 - At the international level, FIDH considers that the best framework for the protection of victims would be to create an **international mechanism in charge of ensuring compliance with the**

future instrument and with the power of making country visits, receiving communications on specific cases and issuing binding and enforceable decisions. Access to justice is a priority at the international level as effective remedies remain non-existent for the majority of victims. The creation of such mechanism is needed especially when remedies are unavailable or inadequate.

The draft proposition tabled by Ecuador is a promising start for the upcoming third session. FIDH, which actively engaged in the Treaty process in the first sessions of the OEIGWG (see Treaty), reiterated the call made by the Treaty alliance (an alliance of more than 900 civil society organizations) in its [third collective Statement](#) for substantive, cooperative, and constructive negotiation between States. This session will play a pivotal role in ensuring a move beyond the historical North/South divide, and serve as an incremental step toward global justice. FIDH is calling on Ecuador as chair of the Working Group to ensure timely information and inclusive discussions and on the European Union and its Member States to play an active and leading role in the negotiations.

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