



International Network for Economic,
Social and Cultural Rights (ESCR-Net)
Corporate Accountability Working Group

**Joint Oral Statement on the Scope of the Legally Binding Instrument:
TNCs and other Business Enterprises**

The organizations that subscribe to this joint statement are convinced that in principle all conduct by all types of business enterprises, whether local or transnational, shall be addressed in the legally binding instrument. The footnote in the preamble should not be interpreted as limiting in any way the scope of possible discussions in the Intergovernmental Working Group or any analysis or recommendations that may be reported back to the Council on a future treaty.

Business enterprises that do not have any or any significant transnational operations no doubt are capable of and in many instances have been responsible for human rights abuses no less serious in scale or severity than those of transnational businesses. The people whose human rights are abused directly or indirectly by businesses are unlikely to distinguish whether the business enterprise that causes them harm has transnational ownership or operations; nor are affected people likely to excuse abuses they suffer from a "local" business simply because the entity lacks a transnational element. From the point of view of those whose human rights are affected by business activities, the key consideration is not the formal character of the business entity, but instead the their practical access to effective remedy and reparation for the harm they have suffered.

If a treaty is going to take the views and needs of those adversely affected by business activity as a central concern, it must address all business enterprises that can potentially carry out abuses and not only on those with transnational links.

There are a variety of reasons why abuses by transnational corporations are the most visible at the international level. First, the very fact that such businesses by definition touch on the interests of two or more States make them more likely to be a topic of discussion between States at the international level. Further, most TNCs are large, visible, powerful and autonomous, while the range of business enterprises acting only or predominantly within the domestic market and jurisdiction will generally be a mix, including some large and powerful business entities, but also many smaller businesses. However, it does not follow that large and powerful business entities operating within a single state cannot or do not also cause or contribute to severe harm to human rights. Smaller businesses are also capable of serious abuses, even if their organization is not as complex and regulating their conduct poses fewer challenges.

Defining the grounds for business' legal liability recognized under national laws is an important objective of a future instrument. But, it would be unworkable to require States to adopt laws establishing legal liability only for business enterprises that are transnational or have transnational operations. Rule of law principles require that the law applies equally to all, and especially when the law attaches legal responsibility to certain kinds of offensive conduct it would be

unacceptable that conduct by certain business is penalized while the same conduct by another kind of business enjoys impunity. A global standard that requires, for instance, all countries to recognize corporate legal liability, criminal liability in the most serious cases, can create the basis for a more uniform global approach to the problem of business abuse of human rights.

A "full scope" approach in the scope of the future instrument is consistent with the current practice and understandings within the United Nations, and addressing TNCs and all business enterprises does not mean a "one-size-fits-all" approach. The concern about the application of certain standards as a "one-size-fits-all" approach was in the mind of the experts in the former UN Sub-Commission on the Protection of Human Rights when they drafted the Norms and Principles of Human Rights ('the Norms') applicable to TNCs and other business enterprises. It was also a concern for the Special Representative of the Secretary General on TNCs and other business enterprises, John Ruggie. Both mandates made it clear that while human rights standards were addressed to all business enterprises, they would be applied in a differentiated manner.

Thus, Foundational UN Guiding Principles 14 states that:

"The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprises' adverse human rights impacts".

References to company size, context and nature of company operations and risks are also present in GP15 and 17.

Similarly, principle 1 of the Norms adopts a flexible approach of relative application to companies on the basis of their size, strength and other factors.

The new treaty should similarly adopt a flexible approach. It should address certain principles and provisions to all business enterprises, local and transnational, capable of impacting negatively on human rights. At the same time, it should provide for measures that are specifically tailored to address the particular challenges posed by transnational corporations, such as the application of limited liability and other potential sources of impunity. These include challenges posed to regulatory authorities, prosecutors, affected people and courts in asserting jurisdiction in relation to non-national companies. Certain provisions, notably those that provide for legal liability in relation to human rights abuses and the duty of the State to protect human rights against infringements by private actors, must apply universally. Others of promotional or preventative character may be graduated to the size, context and type of business operations.

Conclusion

The treaty can at the same time address general rules for all business enterprises in relation to human rights, without necessarily imposing a one-size-fits-all approach to the measures for implementation. Both the UN Guiding Principles and the Sub-commission Norms combined rules of general application, with sensitivity to context in terms of measures for implementation, taking into account size, context and type of business operations. The general approach of the prospective treaty should follow the same path.

Thank you Mme Chairperson.

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The Center for Legal and Social Studies (Argentina)
CIDSE
Colombian Commission of Jurists
Due Process of Law Foundation (USA)
ESCR-Net Corporate Accountability Working Group
Earthrights International
The Global Initiative for Economic, Social and Cultural Rights (USA)
Franciscans International
International Accountability Project
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Mining Watch Canada
National Economic & Social Rights Initiative (USA)
Project on Organising, Development, Education and Research (PODER), (Mexico)
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