



## **Submission to the OEIWG to inform the first draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises**

By FIDH and SOMO

### **Summary**

On 1st February 2019 FIDH, SOMO and The Asser Institute organised an expert roundtable discussion aiming at contributing to the ongoing discussions on the draft of a ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’. The objective of this roundtable was to bring together experts to reflect concretely on the provisions of the zero draft and nourish CSOs and delegations’ contributions with concrete proposals to improve the draft treaty (See agenda attached).

To do so more effectively, we decided to focus our discussion on two specific themes: human rights due diligence (HRDD) and civil liability. HRDD is currently enshrined in Article 9 (Prevention) while civil liability is dealt with under Article 10 (Legal Liability) of the Zero Draft. We have selected these issues due to their particular salience for the business and human rights discussion.

The meeting was held under Chatham House Rules in order to foster a genuine and substantive discussion among experts and participants.

At this point, FIDH and SOMO feel the need to summarize some **important inputs** that emerged during the discussion and that, **in our opinion**, should be taken into further consideration by the drafting team. In doing so, we hope to contribute to the wider reflection by CSOs, governments and academics on the possible content of an international treaty on the issue of business and human rights.

**Please note that this is a summary made by the FIDH and SOMO: it does not represent a full report of what has been discussed during the meeting.**

**We warmly thank all the experts that accepted our invitation and engaged so constructively and substantially in the debate as well as all participants who contributed to the richness of the conversation.**

### **Purpose of the treaty**

- A reflection on the purpose of such an instrument will considerably help states to further fine-tune the provisions that it should contain and guide them in making important decisions in the negotiating phase.

- This treaty should aim at solving the current situation of impunity for corporate human rights abuses linked to business operations in today's global world, provide solutions to weaknesses of national legal systems and the lack of access to effective remedies.
- The treaty should therefore : i) provide a global regulatory standard that leads to more effective domestic business and human rights legislations ii) improve enforcement, access to remedy and redress for victims of human rights abuses by corporations (for instance by making access to courts in home state countries easier).

### **On the scope of Due Diligence**

- The expression « business activities of transnational character » contained in the current zero draft requires further clarification. This lack of clarity is linked to the difficulty to precisely define which kind of activities can/should be considered transnational and therefore fall into the scope of the treaty and which can/should not. Different interpretations are possible on this point: a broad interpretation of the word 'activity' could go as far as to consider that having access to internet and using it for business purposes constitutes a transnational activity; such broad interpretations may lead to unintended consequences, as we have witnessed with the notion of 'interstate commerce' in the US. In order to prevent such challenges, different solutions can be considered: the treaty could further define which activity it considers as transnational and exclude 'ad hoc' business relationships for example. It could also decide to focus on "transnational impacts" rather than on "transnational activities". Both these solutions also have their downsides: it would on the one hand be challenging to define what constitutes an "impact"; on the other hand, companies could start to rely more on ad hoc business relationships to avoid being subject to the treaty.
- **To solve the difficulties with the scope, the treaty could consider that it is more effective to completely avoid such definition and opt for a large scope that would include all businesses while better defining in art. 9 on prevention the notion of "control", which clarifies the scope of HRDD and of the related liability.**

### **On liability linked to HRDD violations**

- Art. 9 on prevention and art. 10 on liability should be better articulated, it should be clear that non-compliance with HRDD provisions should entail specific forms of liability.
- There is a need to define specifically what is expected of companies and what we could call effective due diligence.
- On the forms that this liability can take there are different possibilities. The company could be held liable if it has not implemented HRDD. The company would thus be sanctioned for having failed to take measures that would have prevented violations. Some interim or injunctive measures could also help in achieving this result more effectively in situations where the risk of a violation is imminent.
- However, if the company is only responsible for not having implemented HRDD, this may have the undesirable side effect of making HRDD a mere "ticking-box exercise" to avoid liability, rather than an in depth strategy to prevent human rights violations. Additionally, at times prevention is not enough or is not achievable: when harm has been done, this approach would hinder access to

justice and to reparations for victims since. Due diligence is not only about prevention but also about mitigation and remedy: this should be reflected in the liability mechanism.

- A solution would be to adopt a double approach and to add another kind of liability for violations occurring in the supply chain or the corporate group, even if prevention was carried out. Having these two parallel liabilities in the instrument would be an incentive for companies to go further than a ticking-box approach. It would be national courts' duty to assess if, in the event of a violation, there is liability despite the existence of solid due diligence mechanisms.
- The link between the corporate conduct and the violation that will trigger liability will require further consideration, since substantial differences exist between different legal systems in this respect.
- This double approach has the merit of acknowledging that having HRDD in place is often not enough to prevent violations from occurring and that mitigation and reparation are also crucial elements of HRDD that companies have to perform.
- It could also be useful to consider that public authorities and courts as well as public and administrative law can have a role to play, especially in some jurisdictions, to define the criteria of the HRDD and oversee compliance. This could avoid to reason merely according to rules and criteria of corporate and civil law.

### **On the notion of control**

- One crucial aspect of art. 9 and of the definitions of HRDD obligations and liability proved to be the notion of "control". To what extent does a company have to carry out DD in its supply chain? What is the corporate entity that is obliged to do it and that bears responsibility for human rights violations in the supply chain?
- The current draft refers to "entities in direct or indirect control", but it is not very clear what this means in legal terms and if it refers only to contractual relationships or not. It is important that the notion of control contained in the treaty grasps the reality of relations in supply chains and corporate groups, a notion of 'effective control' could be used in this respect;
- Useful examples of how the notion of control is understood in the case of corporate groups can be found in other jurisdictions or branches of law such as US corporate law, EU competition law (with the rebuttable presumption of control), the anti-corruption international and national legislations or UK tort law.

### **Coherence with other instruments and definition of HRDD**

- It is important to ensure a certain level of coherence between the treaty and other existing instruments or legal standards. This will build on consensus already reached around certain concepts and could therefore ease negotiations in certain aspects.
- Drafters should avoid departing completely from the HRDD concept developed under the UNGPs,, in order to align with regulatory and policy approaches that have emerged since their unanimous endorsement.
- The recently adopted OECD DD Guidance could form an interesting basis for the definition of the HRDD in the treaty since it was agreed upon at high level by OECD member states. It could provide significant inspiration (i.e. the fact that DD is commensurate with risk and not size).
- At the same time the treaty discussions offer an opportunity to depart from a western-centric perspective on these issues.
- The treaty could (probably in a separate document) list some tools that could constitute a high level guidance for states and companies and which are considered as authoritative and accepted examples of what HRDD should look like (i.e. OECD Guidelines) in order to avoid the proliferation of tools serving different objectives.
- Alignment and coherence are crucial for ensuring a level playing field.

### **Jurisdiction and applicable law**

- The issues of Jurisdiction and applicable law are crucial in the light of the discussions on liability. Art. 5 of the draft treaty refers to the concept of domicile of the defendant as an additional requirement to establish jurisdiction. This is widely recognized as a criterion to attribute jurisdiction, but the provision as it is written raised some issues.
- The concept of domicile included in art. 5 doesn't extend to connected claims against its foreign subsidiaries or business partners, even though this is desirable from an access to remedy perspective.
- The doctrine of *forum non conveniens* remains a significant hurdle for victims - it is crucial to expressly exclude the possibility for courts to decline to exercise jurisdiction on the basis that another forum would be more appropriate. Conversely, establishing specific provisions on the basis of *forum necessitatis* would allow action at the local court when no other forum is available. Nevertheless, it is important to avoid that the treaty opens the door to unwanted side effects that could be used against victims
- The big difference between common law and civil law systems in this respect should also be underlined and better taken into consideration.
- The current provision contained in art. 5 of the zero draft is modeled on Brussels I regulation: the aim of Brussels I, however, was to harmonize jurisdiction within the EU; the treaty should take into due consideration that an international instrument may have a different purpose and will have broader application.

- On the design of the provision on jurisdiction, more attention should be given to balancing Public International law principles with Private International law criteria as well as criminal law with civil law.

### **Burden of proof**

- In the French *loi sur le devoir de vigilance*, the original version provided the possibility of a reversal of the burden of proof. This is also contained in the Swiss proposal of a mandatory due diligence legislation now in discussion and included explicitly in the zero draft. It is hard to substantiate the claims for claimants about all the issues of control, links to the damages, etc, if there is no information on the internal functioning of the company; moreover, in some jurisdictions, discovery provisions are even more restrictive so lawyers have very little means to get access to fundamental documents and evidence that are in the company's possession; this is usually done with enormous costs.
- Thus the shift of the burden of proof is considered one crucial point in access to an effective remedy and in granting the possibility to entertain legal cases against corporations. This shift should be further developed in the treaty, and should include the release of documents that clarify the degree of the control of the firm over its subsidiaries and/or business partners.

### **Legal aid**

- The imbalance between companies' and victims' availability of resources to pay litigation costs is a crucial issue.
- It is important to consider that the measures on liability and HRDD obligations contained in the treaty will provide more legal certainty in this topic and thus reduce the risks linked to such types of cases.
- Another important element would be for the treaty to impose States to fund legal aid for these cases, this would help particularly in jurisdictions where such aid is not currently available.
- Provisions mandating that States introduce a class action procedure for business and human rights cases can also help in making those cases less financially risky and more accessible for victims.