

The scope of a legally binding instrument on business and human rights: Transnational corporations and other business enterprises

May 2015

In June 2014, the United Nations Human Rights Council adopted Resolution 26/9 establishing an “open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” with the mandate to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (OP1).

Resolution 26/9 also establishes a road map for the work of the new OEIGWG, deciding that the first two sessions will “be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument” (OP2) and the first meeting will collect inputs on “possible principles, scope and elements” of such instrument. The Chairperson-rapporteur should prepare elements for a treaty for negotiations to start at the third annual session (in principle, in 2017).

The first session of the OEIGWG will take place on 6-10 July 2015. With a view to contributing to the discussions on content, scope and form of the future instrument, the ICJ will periodically prepare briefing position papers elaborating its views and analysis on certain key issues as they arise. The present submission is the first of them and it is dedicated to a discussion about the scope of the legally binding instrument, especially in relation to transnational corporations (TNCs) and other business enterprises.

The International Commission of Jurists supports the objective of establishing an international legally binding instrument on transnational corporations and other business enterprises, including by ensuring access to effective remedies for human rights abuses by businesses. There is a substantial international protection gap to be filled in this respect, on which the ICJ has previously commented extensively.¹ It is with a view to closing this gap and ensuring that international human rights law can optimally fulfill its protective function that the ICJ is engaging in the present treaty process.

This document:

1. Explains why the provisions of the future treaty should generally address the human rights issues arising out from the activities of all business enterprises whether they have transnational operations or relations or not. In particular, the document:
 - a. Describes how this “full scope” coverage is the most consistent with the approach followed to date by the United Nations and also with the original aims of ensuring legally binding human rights duties for business enterprises.

¹ ICJ, Needs and Options for a New International Instrument in the field of business and human rights, Geneva, June 2014, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf

- b. Provides examples of how businesses without transnational operations can have similar human rights impacts to other kinds of businesses.
 - c. Analyzes the effect of a footnote inserted in the preamble of Resolution 26/9, stating that “other business enterprises” denotes “all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law”.
2. Explains how the future treaty could include provisions applicable in principle to all businesses with separate legal personality whether of a transnational or other character, while at the same time allowing measures of implementation to be sensitive to the size, context and type of particular kinds of businesses.

1.(a) The “full scope” approach taken by the United Nations to date

The two most significant standard setting initiatives preceding the treaty process at the level of the United Nations have been, first, the work by the Sub-Commission on the Protection and Promotion of Human Rights (a subsidiary body to the former Commission on Human Rights), and second, the work by the Special Representative of the Secretary General on the issue of Transnational Corporations and other Business enterprises and Human Rights appointed at the request of the Human Rights Council (the successor to the Commission on Human Rights). Both produced instruments addressing all business enterprises, both TNCs and businesses without a transnational element.

Between 1997 and 2003 the Sub-commission undertook work to define a set of human rights standards applicable to TNCs and other businesses, through an internal working group of five experts (chosen from among members of the Sub-Commission and respecting geographical representation).² The work of the Sub-Commission on the topic concluded with its adoption of the set of *Norms on the Responsibilities of Transnational Corporations and Other Business enterprises with regard to Human Rights* in 2003,³ which it forwarded to its parent body, the Commission on Human Rights. Neither the Commission nor subsequently the Human Rights Council took further action on “the Norms” (as the instrument came to be known), and certain elements of the instrument proved to be contentious. Nonetheless, the Norms inspired further work in this field within the United Nations which can be arguably seen as a continuation of the Sub-Commission’s work.

The Norms apply to all business enterprises. The Norms define “other business enterprises” as follows:

“any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership,

² A full overview of the work done by the Sub-Commission and the process can be found at Weissbrodt, D, and Kruger, M, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to human rights*, AJIL Vol. 97, N° 4, pp. 901-922

³ *Responsibilities of Transnational Corporations and Other Business enterprises with regard to Human Rights*, Sub-commission Resolution 2003/16, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003

or other legal form used to establish the business entity; and the nature of the ownership of the entity.” (para. 20)

The Norms also affirm for clarity that they are “presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security...” (para. 20)

The second part of paragraph 20 of the Norms which states the Norms “are presumed to apply... if the business enterprise has any relation with a transnational corporation” may lead some people to infer that the Norms applied only to enterprises with transnational links. Such an inference would be incorrect. The Norms were clearly addressed to all “Transnational corporations and other business enterprises”. Each of its 13 substantive paragraphs starts with that phrase. At the same time, the authors of the Norms were very aware of the difficulties of applying them to small local businesses. The Norms were therefore intended to and have been interpreted to apply to all business enterprises in principle, but de-emphasize their implementation by local businesses as a matter of practice taking into account a particular business’ size and resources.⁴

The same approach is followed in the UN Guiding Principles on Business and Human Rights, elaborated by the Special Representative of the Secretary General on Business and Human Rights (which worked between 2005 and 2011) and endorsed by the UN Human Rights Council in 2011.⁵ The general principles opening the Guiding Principles clearly provide:

“These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”

At the same time, the Guiding Principles does not adopt a “one-size-fits-all” approach requiring all business enterprises to implement the Principles at the same pace and in the same way. On the contrary, similar to the Sub-Commission’s Norms, it adopts a pragmatic and differentiated approach to the practical implementation of standards.

This idea is expressed in a number of guiding principles. Foundational Principle 14, for instance, provides:

“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 explicitly present in guiding principles 15 and 17.

A legally binding instrument should build on or be inspired by non-binding standard setting work so far achieved in the UN in the area of business and

⁴ Weissbrodt, Op cit. note 2 p. 910-911

⁵ Guiding Principles on Business and Human Rights : Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, annexed to Report A/HRC/17/31

human to create a more robust legal instrument. To remove from the protective ambit of the treaty an entire category of businesses and a substantial part of business activities would be inconsistent with that idea.

1.b. Examples of human rights abuses by business enterprises without transnational operations

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 victims of human rights abuses committed directly or indirectly by businesses are unlikely to distinguish whether the business enterprise that causes them harm has transnational ownership or operations; nor are victims likely to excuse abuses they suffer from a "local" business simply because the entity lacks a transnational element. From the point of view of the victims, the key consideration is not the formal character of the business entity, but instead the victims' practical access to effective remedy and reparation for the harm they have suffered.

If a treaty is going to take the view 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 corporations, 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.

The examples of abuses by domestic or local companies below are merely an illustrative sampling of cases which would fall out of the protective ambit of a treaty were it to address only TNCs. Abuses allegedly committed by these companies range from failure to respect applicable domestic labour law to the commission of serious human rights abuses such as slavery and forced labour, and incitement to child sexual abuse, among others.

Box 1

Correction Corporation of America

This company is headquartered in Nashville, Tennessee, the United States of America. Its main activities involve the management of correctional or detention facilities in the United States. It is not known to have any operations outside the United States. The following description of the company and its operations is taken from Bloomberg:

"Corrections Corporation of America, together with its subsidiaries, owns and operates privatized correctional and detention facilities in the United States. It owns, operates, and manages prisons and other correctional facilities; and

provides inmate residential and prisoner transportation services for governmental agencies. The company also offers various rehabilitation and educational programs, including basic education, religious services, life skills and employment training, and substance abuse treatment, as well as food services, work and recreational programs, and healthcare services, such as medical, dental, and mental health services. In addition, it leases its facilities to third-party operators. The company serves federal, state, and local correctional and detention authorities. As of December 31, 2012, the company owned and managed 47 correctional and detention facilities; and managed 20 correctional and detention facilities, which it did not own. Corrections Corporation of America was founded in 1983 and is based in Nashville, Tennessee.”⁶

This company has been criticized in relation to its treatment of prisoners and employees: the companies’ profit-increasing strategies may be creating a vicious circle where lower wages and benefits for workers, high employee turnover, insufficient training, and chronic understaffing can lead to mistreatment of inmates, increased violence, security concerns, and riots. They are also accused of using jailed migrants as grossly underpaid cheap labour.⁷ Prisons, where individuals are deprived of their liberty and therefore in a position of inherent vulnerability, by their very nature are particularly susceptible to human rights violations. The national or transnational character of a private company operated them or providing services to them is not a determinative factor in their need for international protection.

Box 2

Distillery Araguaia (formerly Distillery Gameleira)

Distillery Araguaia is located in the municipality of Confresa, in the state province of Mato Grosso, Brazil. Confresa is 1,100 km from the state capital, Cuiabá. Its main activity is the production of alcohol out of sugar cane. It belonged to Group EQM (Eduardo Queiroz Monteiro), a powerful economic group based in Pernambuco, Brazil, with important links in economics and politics.⁸

In November 2009, Brazilian authorities of the public ministry mobile unit found at least 55 workers that had been held in working conditions analogous to slavery. The workers were released and the company was given a fine and was required to sign a written commitment to bring their conduct into compliance with Brazilian labour law that prohibited slavery-like working conditions. The same company had been fined before, and had also signed previous commitments. In addition, the company was placed in a public “dirty list” of companies who used slave labour, which would deprive the company from having public funding and contracts but not from carrying on commerce with other private companies. In

⁶ Source: <http://www.bloomberg.com/research/stocks/snapshot/snapshot.asp?ticker=CXW>

⁷ See press release of the New-York Times: http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html?_r=0.

⁸ The relevant information on this case can be found at : International Commission of Jurists, Acesso à Justiça: violações de Direitos Humanos por Empresas- Brasil, p. 68 ff <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Brazil-human-rights-abuses-corporations-report-2011-por.pdf> ; *Destilaria Araguaia explora trabalho escravo pela 4ª vez em 8 anos* <http://www.agrolink.com.br/saudeanimal/NoticiaDetalhe.aspx?codNoticia=100296> (accessed 3 May 2015)

other four previous inspections Distillery Araguaia a total of 1406 workers in conditions analogous to slavery had been freed. A series of civil actions were also initiated by public interest organizations but judicial proceedings were taking very long, which brought additional harm to affected workers. During that time, many of them were threatened to withhold salaries from workers leaving the company following action by the authorities.

Box 3

Mercadona

Mercadona is a Spanish retailer company, financed entirely by Spanish capital and family owned. The company owns 1,530 supermarkets in 48 provinces and 11 Autonomous communities in Spain (by May 2015). It is incorporated in Valencia and controls 14.4 per cent of the Spanish market of food. It employs some 74,000 employees.⁹

In January 2015 the news emerged that Mercadona had been ordered to pay two former female workers nearly 75,000 euros as civil damages for failure to adequately control a manager who had subjected the two workers to sexual harassment and sexual assault, penalized under Spanish criminal law. The events had taken place several years before, and the tribunal held that the incidents were not punctual episodes but were prolonged over a period of time without the company taking action.

Other examples that are frequently mentioned in the debates include the human rights abuses committed in the context of the collapse of the Rana Plaza factory building, in Bangladesh. A whole building housing more than 3,000 workers collapsed, leaving 1,134 people dead and hundreds of injured people.¹⁰ The factories housed in the Rana Plaza building were direct suppliers to international commercial brands, but they in turn had their own second-level suppliers who had no direct link with the international brand. All these companies, as it was highlighted, provided conditions to their employees below international standards: long working hours, limited rest and holiday periods, underpayment, and were subject to hazardous conditions of work that ultimately caused the death of many workers.¹¹

The above examples show cases of national companies operating wholly or predominantly in the state where they were established or incorporated, accused of committing human rights abuses, some of them of a serious nature. Human rights abuses are by no means committed only by transnational companies or companies with transnational operations. Companies established operating only or mainly within domestic markets can be sizable and their operations can also potentially lead to human rights abuses.

Failure to address the conduct of such enterprises operating only in the domestic market on account of the perceived sufficiency of national law to deal with them,

⁹ <https://www.mercadona.es/corp/esp-html/empresa.html> (accessed 04/05/2015)

¹⁰ <http://www.ranaplaza-arrangement.org>

¹¹ <http://www.globallabourrights.org/campaigns/factory-collapse-in-bangladesh>

as opposed to transnational corporations whose operations escape from national jurisdictions, is ill founded. In practice, the main problem is precisely that national laws show important gaps and deficiencies or are inadequately enforced permitting the perpetuation of impunity for local and transnational business alike.

Research by the ICJ,¹² shows that legislation and enforcement action that protects rights *vis a vis* private actors such as businesses is generally insufficient, whether the company is transnational or not, and is widely diverse. In general, jurisdictions adopt a wide range of approaches, doctrines and methods to provide for the protection of rights, and in many cases there are areas where protective action is absent.

Only a limited number of States (such as Australia, the United States of America, the Netherlands, Kenya, Myanmar, Singapore, South Africa, Switzerland) provide in their national law for legal liability for corporations, other than civil liability for all or some gross human rights abuses. A smaller group of States do so for all human rights violations or abuses. Some provide for corporate criminal liability for a limited number of offences relating to economic crimes or environmental crimes (including Argentina, Brazil, China, Spain, Italy, Guatemala, Republic of Korea, Nigeria and Thailand). Other States attach to companies the consequences of criminal conviction imposed on its directors or managers, or when the crime was committed in the course of ordinary company business or to the benefit of the company, but the company itself is not subject to prosecution (including Peru and Colombia). Still others do not provide for criminal liability for corporations, but may allow other forms of responsibility such as administrative sanction. Some States do not recognize corporate liability – other than civil responsibility – at all, including Costa Rica, Poland, Vietnam and the Democratic Republic of Congo.

These findings are consistent with those of comparative research commissioned by the European Union in relation to criminal or administrative legal liability of corporate legal entities (including business enterprises).¹³ Fifty per cent of EU Member States have introduced general criminal liability in their legal systems and 41 per cent recognize criminal liability of legal entities only for specific offences. Among those States that recognize only administrative liability of legal entities, 39 per cent have introduced general administrative liability, whereas 33 per cent have liability for specific offences. Countries that adopt legal liability of legal entities only for specific offences do so mostly with regard to trafficking in human beings, sexual exploitation of children and child pornography, environmental crime, illicit trade in human organs and racism and xenophobia.¹⁴ The higher rate of provision of legal liability for these offences correlates to international conventions that explicitly require States to create liability for the offences, such as in treaties on human trafficking, child pornography and other treaties in force for States within the Council of Europe. However, the vast majority of States seem to lack legal liability for human rights abuses by business entities in their legal systems or, when they have it, do not consistently apply it across the board.

¹² See country studies on Access to Justice: Human Rights Abuses involving corporations, at <http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/> (accessed 28 March 2014).

¹³ *Liability of Legal persons for offences in the EU*, G. Vermeulen, W. De Bondt, Ch. Ryckman, IRCP- Series, Vol. 44, Antwerpen, 2012- p. 79 and ff.

¹⁴ *Ibid.* p. 83.

A treaty on business and human rights has as one of its main objectives the definition of grounds for business' legal liability to be recognized under national laws. 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 kind 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 in the most serious cases, can create the basis for a more uniform global approach to the problem of business abuse of human rights.

1.c. The effects of the footnote in Resolution 26/9

Certain controversy has arisen in relation to the footnote contained in the preamble to Resolution 26/9, which reads: "Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law."

Immediately after the adoption of the Resolution, several NGOs reacted to express concern and calling for the perceived restriction established by the footnote to be lifted. Certain States have cited the footnote as a basis for their opposition to or abstention from the resolution and, possibly, the process established by it. Independent commentators have so far had a divided attitude. Some minimize the import of the footnote while ironizing about the contradictory approach of the opponents¹⁵ and others openly criticized it.¹⁶

In fact, few have looked at the footnote in full textual context. It may be noteworthy that the footnote is placed in the sixth preambular paragraph to the resolution and not in its operative section. In addition, that preambular paragraph appears in connection to a reference made to the previous work undertaken by "the Commission on Human Rights and the Human Rights Council on business and human rights". The paragraph in full reads:

"Taking into account all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights,"*

A close analysis of both elements provides a more nuanced view that the content of the footnote does not and cannot legally limit the future scope of the treaty, or at the very least it does not have the weight that some attach to it.

First, the fact that the footnote is placed within the preamble already undercuts any argument that it should be regarded as having direct legal force or otherwise limiting the possible scope of discussions within the treaty-making process. In

¹⁵ See, for example, Bilchitz, David The Necessity for a Business and Human Rights Treaty ; Nov. 30 2014, available at <http://ssrn-com/abstract=2562760> (accessed on 4 May 2015)

¹⁶ See, for example, Ruggie, J. Quo Vadis ? Unsolicited advice to business and human rights treaty sponsors, 9 September 2014, available at <http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>

general, a preamble to a resolution is meant to serve as a statement of values, principles and aspirations, or recalling the historical context in which the operative part of the resolution is adopted. As such, in relation to the operative paragraphs of a resolution, its preamble may at most serve as a source of interpretative guidance in the case of ambiguity in an operative paragraph. The overriding intent of the resolution was to establish a process in which all States could discuss a treaty on business and human rights with a view to developing a text that all States might adopt, ideally by consensus. This intent is reflected in operative paragraphs 2 and 3 which mandate an open discussion about form, "scope and content" of the treaty. It would be inconsistent with that intent to suggest that the resolution at the same time must be interpreted to limit the discussion on the scope of the treaty.

Not only is the supposed restriction of the treaty scope located in the preamble of a resolution, but in addition it is in a footnote to the preamble which further diminishes any argument that it should be understood to have binding force. Given the profound significance to the scope of the treaty of the question that the footnote addresses, it would need to be placed at the heart of an operative paragraph, rather than in a footnote in a preamble, to be clearly understood to be controlling.

Secondly, the footnote is placed not next to the term "transnational corporations and other business enterprises" in the abstract but next to a reference to the previous work and decisions by the Commission on Human Rights and the Human Rights Council. However the definition contained in the footnote substantially and squarely contradicts the work of both the Commission and the Council. As explained above, both the work of the Commission on Human Rights, through its subsidiary body the Sub-Commission, and the Human Rights Council, through the work of the SRSG (which it endorsed), clearly operated on the basis that the phrase "other business enterprises" applied to all businesses, whether or not they had any transnational element. The footnote cannot rewrite this historical context. There should therefore be an overriding presumption that the Council in adopting the resolution intended to act consistently with this previous work and to allow States the opportunity of a full discussion on the scope of the binding instrument as mandated by the operative paragraphs of resolution 26/9. As such, the footnote should not be interpreted as limiting in any way the scope of discussions or possible recommendations of the inter-governmental working group.

Furthermore, the footnote states that "other business enterprises" "does not apply to local businesses registered in terms of relevant domestic law". This adds some confusion and may be contradictory to the first part of the footnote. On the one hand, there would be no basis to exclude legally-registered "local" businesses, but include "local" businesses that are not legally-registered. On the other, it would not make sense to read the note as specifying that any business that registers under national laws is exempt because it is deemed to be "local", since almost all transnational businesses register in one way or another under local laws in all places where they operate.

The ICJ considers that the footnote contained in the preambular paragraph of the human rights cannot and should not be construed as limiting the possible scope of discussions and recommendations arising from the inter-governmental working group. If the OEIGWG were to read it in a limiting way, it would raise questions about the effectiveness and comprehensiveness of the process that might lead to protracted debate in the Council. It will ultimately be up to the Council to decide

what action to take on the basis of the discussions and recommendations that emerge from the first three OEIGWG sessions. A proposal enjoying the support of a substantial majority or consensus of the OEIGWG is unlikely to be rejected on the basis that it may have exceeded the ambiguous terms of a footnote to a preamble to the original resolution.

2. Towards a differentiated application of standards to “all business enterprises”

The concern about the application of certain standards as a “one-size-fits-all” approach was in the mind of Sub-Commission members as it was for the SRGS. Both mandates made it clear that those standards will be applied in a differentiated manner.

Thus, Foundational GP 14 states:

“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.¹⁷

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, and other large or otherwise powerful business entities with limited liability or other potential sources of impunity. These include challenges posed to regulating authorities, prosecutors, victims 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 ICJ is convinced that in principle all conduct by all types of business enterprises, whether local or transnational, shall be addressed. 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. If there is doubt, it could be beneficial however that this line of interpretation is also officially endorsed, for the sake of clarity.

¹⁷ Weissbrodt, Op. cit note 2, p. 911-912

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.