



The Global Initiative

for Economic, Social and Cultural Rights

Submission to the UN Office of the High Commissioner for Human Rights on the Zerk Report on Corporate Liability for Gross Human Rights Abuses May 2014

1. Introduction

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international non-governmental human rights organization which seeks to advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens. The vision of the GI-ESCR is of a world where economic, social and cultural rights are fully respected, protected and fulfilled and on equal footing with civil and political rights, so that all people are able to live in dignity. See also www.globalinitiative-escr.org.

We welcome the opportunity to comment on the issues discussed in the report by Dr Jennifer Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies* (the Zerk Report), prepared for the Office of the UN High Commissioner for Human Rights.

Given our areas of expertise and interest we will comment on the following aspects of the report:

- a. Definition and limitations of gross human rights abuses (section 2);
- b. Role of civil society organisations (section 3)
- c. Extra-territorial aspects of the State duty to protect (section 4);
- d. Extra-territorial jurisdiction as a barrier to corporations' home State law enforcement (section 5); and
- e. Treaty-based initiatives (section 6).

2. Definition and limitations of 'gross human rights abuses'

The Zerk Report is prefaced on the notion that the focus of efforts should be on gross human rights abuses. We query the focus on this term which purports to narrow the field of violations being considered.

The term seems to have emanated from the recommendations of Professor John Ruggie in his paper on recommendations for follow-up, apparently as a means of segmenting



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the enormous field of human rights abuses to a more manageable size and perhaps to a less controversial category which is more likely to receive universal support. As discussed in the Zerk Report, other UN bodies and commentators have also used this term to delimit a category of human rights. These are important political considerations, however we perceive two inter-linked problems with this: definition and scope.

Such limited language was clearly rejected in drafting and adopting the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. There the drafters opted for a comprehensive approach to violations of human rights, in particular since the justiciability of all aspects of such rights has now been clearly demonstrated at both the national and international level. Also because violations of all degrees of economic, social and cultural rights often disproportionately affect already marginalized or vulnerable groups, and any limitation to gross violations may inadvertently and needlessly create impunity for violations that impact such groups. Indeed, it is often marginalized or vulnerable groups that are disproportionately affected by corporate activities, whether through forced eviction and land grabbing, exploitation of labor, destruction of the environment or land required for sustainable small-scale agriculture, or pollution of ground and surface water sources needed for drinking, hygiene and other domestic or small-scale agricultural uses.

If, however, the scope is limited to gross human rights abuses it will be critical to properly define this term in order to know what situations are being addressed and which are not. As stated in the Zerk Report and the OHCHR Interpretive Guide to the Guiding Principles on Business and Human Rights (UNGP), there is no agreed uniform definition of the term.

This term was used in the 2005 UNGA Basic Principles on Right to Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law but again no definition is provided. The term grave or systematic violations in the Optional Protocol to CEDAW is used to delimit the types of cases that are open to the initiation of the Inquiry Procedure by the Committee for the Convention on the Elimination of Discrimination Against Women (CEDAW). There is some jurisprudence from the CEDAW Committee on the meaning of this term which may be of use in this context.

In defining the scope of the term gross human rights abuses the question we are particularly interested in is, whether and to what extent economic, social and cultural (ESC) rights are included? Civil and political rights are generally included in any definition of gross human rights abuses but it is less clear whether and to what extent ESC rights are included. ESC rights are rarely enumerated in suggested definitions of the term.



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The OHCHR Interpretative Guide to the UNGPs in its discussion of this term provides a non-exhaustive list of civil and political rights and then states *“Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.”*¹ The inference is that whilst ESC rights are not excluded they are not necessarily included fully and their remains uncertainty about the extent to which ESC rights are or can be gross human rights abuses.

We note that most of the discussion and case studies presented in the Zerk Report relate to civil and political rights violations and very few involve prosecutions or private law claims for ESC rights violations. Interestingly for many of the case studies the underlying disputes relate to ESC rights violations but the violations for which redress is sought are civil and political rights violations. An example of this is the Kiobel case which arose from serious and large scale violations of the rights to water, the environment, health and indigenous people rights. This is explained in part by the relatively low level of protection of ESC rights in domestic legal systems and the less developed state of ESC rights litigation at both national and international levels. We think this is also partly due to the misperception that ESC rights violations are inherently not gross, that is they generally don't amount to the severity or gravity of civil and political rights violations.

The indivisibility and non-hierarchical nature of rights was resoundingly reaffirmed in the Vienna Declaration and Programme of Action so that the historical and misconceived division between civil and political rights on the one hand and ESC rights on the other, has largely been eradicated from human rights discourse today. Therefore the creation of a new category of rights (for considering corporate liability for human rights abuses) that does not specifically include ESC rights would appear to encourage a step backwards.

Our view is that ESC rights are equally capable of description as gross violations and in fact the most common rights violations in connection with business actors are ESC rights violations. Further we contend that the most common rights violations occurring on a large scale (or impacting the largest numbers of people) involving business actors are violations of ESC rights. For example, large scale forced evictions in contravention of international law or environmental damage that pollutes waterways and has significant health impacts on local communities.

¹ UNOHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, HR/PUB/12/02, available at <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>



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We would like to offer a couple of specific examples of what in our view constitute gross violations of ESC rights involving corporate actors.

Case Study A: Forced Evictions and Land Grabbing - Uganda

In 2001 residents of the villages of Kitemba, Luwunga, Kijunga and Kirymakole in the Mubende District of Uganda were forcibly evicted from their homes and lands to make way for a coffee plantation operated by Neumann Kaffee Gruppe, a German corporation. The residents lost not only their homes but access to productive land necessary for their livelihoods. Today they live in extreme poverty.

In 2011 and 2012, the Human Rights Committee applied the principle of indivisibility and interrelatedness of rights in considering the extra-territorial obligations of Germany under the ICCPR, including violations of the obligation to protect, or ensure, human rights by failing to regulate Neumann Kaffee Gruppe, for failing to investigate and appropriately sanction Neumann for its complicity in the forced evictions and by failing to provide access to accountability and remedies for those evicted.

The List of Issues drawn up by the Human Rights Committee in 2011, specifically addressed the Uganda forced evictions. The resulting Concluding Observations, adopted in 2012, include a broad acknowledgement of the extra-territorial application of the ICCPR, including the extra-territorial obligation to protect, or to ensure in the language of the ICCPR, by regulating and holding accountable transnational corporations, including for violations related to forced eviction and land grabbing. Germany was encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It was also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.

Case Study B: Trafigura – Toxic waste dumping in Cote d'Ivoire

In 2006 the Dutch multinational Trafigura dumped several hundred tons of petrochemical hazardous waste at open air sites in urban Abidjan, Cote d'Ivoire. The highly toxic waste resulted in 17 deaths and serious health impacts with approximately 108,000 people requiring medical treatment. The incident involved clear violations of the right to health and to a healthy environment.



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The scandal was the subject of legal proceedings in the Netherlands and the UK. In 2008 criminal charges were filed by Dutch prosecutors against Trafigura, and others for breaches of environmental and export laws and for forging official documents. Trafigura was convicted of illegally exporting the waste from the Netherlands and concealing the dangerous nature of the waste aboard the ship and was fined " 1 million by the Dutch Court. The proceedings continued and new charges were filed against Trafigura's founding director Mr Claude Dauphin in 2012. The parties settled in 2012 with all the charges being withdrawn in return for Trafigura's payment of " 300,000 compensation and a fine of " 67,000.

No proceedings were instituted in Cote d'Ivoire since Trafigura paid " 152 million to the Cote d'Ivoire government (for clean-up and to form a compensation fund for victims) for immunity from prosecution in Cote d'Ivoire and to have its staff released from prison in Cote d'Ivoire.

Civil proceedings were also instituted in 2006 the UK by 30,000 victims and the parties settled in 2009 with victims receiving approximately USD1,500 each.

Case Study C: SERAC/CESR v. Nigeria (Royal Dutch Shell)

The case of SERAC and CESR v. Nigeria² before the African Commission on Human and Peoples' Rights demonstrates accountability for violations of economic, social and cultural rights by a transnational corporation. This case involved the destruction by Royal Dutch Shell of land and water used by the Ogoni people for their livelihood, including use for food and water. Members of the Ogoni were also forcibly evicted from the lands in order to make way for Royal Dutch Shell's oil exploration project.

The Commission found violations of several explicit and implicit social rights in the African Charter on Human and Peoples' Rights, including the right to health, the right to adequate housing, the right to food, the right to a healthy environment, the right to a general satisfactory environment favourable to development, and the right of a people to freely dispose of their wealth and natural resources.

If it is decided to persist with narrowing the focus of the project to gross violations of human rights we consider it critical that the ambit of the term be clarified and that ESC rights are expressly included. We do not suggest that there must be a definition that enumerates a list of rights, but recommend an agreed description of how the category is

² The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2001). Available at www1.umn.edu/humanrts/africa/comcases/155-96.html



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being contained (ie. gravity, severity, systematic)) which expressly includes ESC rights violations.

We think it is also important that the development of the law on ESC rights at the national and international levels is not left behind any further and that at least at the conceptual level solutions are developed that acknowledge and encompass the large number of serious ESC rights violations involving corporate actors.

A project to address business involvement in human rights violations which excluded all or most ESC rights violations would be excluding a very large proportion of the problematic cases and may begin to lack credibility and relevance as victims and advocates look for other avenues to pursue their legitimate claims for justice.

3. Role of civil society organisations

The role of NGOs in identifying, investigating and pursuing accountability for violations of human rights involving business entities is vital to any effective system of accountability and remedies. Rarely do individual or groups of victims have the resources or technical knowledge to navigate the possibilities for redress, particularly cross-border options. In section 2.1.5 the Zerk Report discusses the role of civil society organisations (CSOs) in relation to criminal prosecutions. It concludes that *the involvement of CSOs seems a key factor in whether a matter is brought to the attention of law enforcement authorities or not*³ The same can be said of private law claims. A close examination of private law claims will reveal that the majority are brought with the assistance of CSOs, including pro bono lawyers groups.

It is therefore very concerning that the silencing of human rights defenders and CSOs, including those working specifically on corporate accountability, is on the rise. We are seeing a growing number of countries introducing laws restricting the activities of CSOs or placing onerous administrative and financial burdens on them and restricting their funding sources.⁴ We are also seeing growing instances of attacks, raids, intimidation and harassment of human rights defenders, CSOs and their staff.⁵ Defenders working on

³ Zerk Report p 52

⁴ See US State Department, '2013 Human Rights Reports', 27 February 2014, Introduction, available at www.state.gov/j/drl/rls/hrrpt/2013/frontmatter/220077.htm This report identifies 'a continued crackdown by governments on civil society and the freedoms of association and assembly' as the number 1 'notable human rights development' in 2013.

⁵ See Global Initiative for Economic, Social and Cultural Rights, Issue Brief: The dangerous work of defending rights to land, housing and productive resources', 2014, available at <http://globalinitiative-escr.org/wp-content/uploads/2014/03/Issues-Brief-1-Defenders.pdf>



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land, property and environmental issues (which all relate to ESC rights) are among the groups most at risk.⁶

Therefore part of the task of ensuring corporate accountability for human rights violations at the domestic level is to enable and ensure a healthy and vibrant civil society at both the domestic and international levels.⁷ This means removing restrictive laws and surveillance of civil society groups, strengthening human rights protection laws and investigating and prosecuting those responsible for attacks and harassment. This is particularly important in ~~most~~ countries where many violations are occurring. States should be encouraged to reduce unnecessary and draconian regulation of CSOs and to improve legal systems to protect human rights defenders.

It is equally important to ensure an enabling environment in ~~home~~ countries where victims are often pursuing remedies in the justice system. Home States should be encouraged to remove barriers to accessing courts by foreign plaintiffs seeking accountability and remedies from home state corporations responsible for or otherwise complicit in human rights violations abroad.

A further element which contributes to enhancing access to justice for victims of corporate human rights abuses is ensuring that funding for litigation is available to victims and/or their supporting CSOs. It is often difficult for NGOs to obtain funding for litigation and related activities, perhaps in part because of the uncertainties identified in the Zerk Report and the long judicial processes. However, the funding of litigation activities is vital to achieving accountability through domestic justice systems and for the development of corporate accountability law and legal systems.

4. Extra-territorial aspects of the State duty to 'protect'

Section 3.2 of the Zerk Report which addresses the extraterritorial aspects of the State ~~duty to protect~~ points out the position taken in the UNGPs on this question: *States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction*⁸ We take issue with this characterisation of the state of the law in relation to extra-territorial obligations and believe that it needs updating.

The UNGPs are based on, and intended to be consistent with, international human rights law, including treaty body jurisprudence. Therefore the UNGPs should be informed by

⁶ Global Witness, 'Deadly Environment: The dramatic rise in killings of Environmental and Land Defenders', 2014, available at <http://www.globalwitness.org/deadlyenvironment/>

⁷ See this interesting New York Times article on Chinese investment in Africa and the need for a strong and vibrant civil society http://www.nytimes.com/2014/05/17/opinion/into-africa-chinas-wild-rush.html?_r=0

⁸ Zerk Report p 55



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and reflect developments in that law. There are a number of treaty body conclusions and statements affirming that the States' duties to respect and protect rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) encompass obligations to regulate corporate entities domiciled in their State but operating and impacting human rights abroad. This includes the obligation to ensure effective remedies are available for victims. Importantly, in circumstances where host States and their judicial systems are weak, it means ensuring that victims may pursue accountability and remedies in the home State courts.

The extra-territorial application of State obligations under human rights treaties is well established in international law: it is supported by the UN Charter,⁹ the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts¹⁰ and the International Court of Justice.¹¹

Both the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRs Committee) have recently confirmed the obligation on States (pursuant to the ICESCR and the ICCPR respectively) to take measures to ensure that business entities domiciled in the State but operating outside its territory, do not nullify or impair the enjoyment of human rights of persons outside its territory affected by the entity's operations.

The CESCR has affirmed that State obligations under the ICESCR extend to the extra-territorial operations of domiciled corporate entities, in its Concluding Obligations in respect of Germany,¹² Austria¹³ and Norway¹⁴ and in its General Comments and Statements.¹⁵ For instance in relation to Austria CESCR stated:

The Committee is concerned at the lack of oversight over Austrian companies operating abroad with regard to the negative impact of their activities on the enjoyment of economic, social and cultural rights in host countries (art. 2).

⁹ Charter of the United Nations, Art. 55 & 56, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

¹⁰ See, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 1, 2 and 3 (adopted by the ILC in 2001).

¹¹ International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004).

¹² EC/C.12/DEU/CO/5 of 2011, paragraph 10

¹³ E/C.12/AUT/CO/4 of 2013, paragraph 12

¹⁴ E/C.12/NOR/CO/5 of 2013

¹⁵ See: E/C.12/2002/11, General Comment 15 (2002) on the Right to Water; E/C.12/GC/18, General Comment 18 (2005) on the Right to Work; E/C.12/GC/19, General Comment 19 (2008) on the Right to Social Security; and E/C.12/2011/1, Committee on Economic, Social and Cultural Rights' Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (2011).



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The Committee urges the State party to ensure that all economic, social and cultural rights are fully respected and rights holders adequately protected in the context of corporate activities, including by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations.....¹⁶

In relation to Norway, the Committee said:

The Committee recommends that the State party ensure that investments by the Norges Bank Investment Management in foreign companies operating in third countries are subject to a comprehensive human rights impact assessment (prior to and during the investment). The Committee also recommends that the State party adopt policies and other measures to prevent human rights contraventions abroad by corporations that have their main offices under the jurisdiction of the State party.....¹⁷

In its ~~Statement~~ Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rightsqCESCR says:

States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.¹⁸

The Human Rights Committee has also addressed this issue recently in its Concluding Observations on Germany where it encouraged Germany to ~~set out clearly the~~ *set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations.*¹⁹ The Committee also called on Germany ~~to take appropriate measures to~~ *strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.*²⁰

The extra-territorial obligations of States in relation to non-State actors domiciled in its territory but operating outside the Statesqterritory have also been recognised by the Committee on the Elimination of Racial Discrimination in its Concluding Observations on Canada (2007)²¹ and the US (2008).²²

¹⁶ *Op cit.* Note 15

¹⁷ *Op. cit.* Note 16, paragraph 6

¹⁸ E/C.12/2011/1, paragraph 5

¹⁹ UN Doc. CCPR/C/DEU/CO/6 (31 October 2012), paragraph 16

²⁰ *Id.*

²¹ Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, UN Doc. CERD/C/CAN/CO/18, paragraph 17 (25 May 2007).



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The extent and nature of States' extra-territorial obligations have been helpfully summarized in the Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights.²³

We contend that there have been developments in international law and it is now clear that States do have extra-territorial treaty obligations pursuant to, *inter alia*, the ICESCR and the ICCPR, including to take measures to ensure that the overseas activities of domiciled corporate entities respect human rights and to provide access to accountability and effective remedies in the event of violations. The UNGPs should be updated to reflect the current state of international law on this issue.

5. Extra-territorial jurisdiction as a barrier to domestic law enforcement

As discussed in section 4 above, there is a responsibility on home States to take measures to ensure that their business entities operating abroad are not violating human rights and that victims of human rights violations have access to effective remedies either in the host or home State. In many instances there will be little prospect of an effective remedy in the host State due to under-developed legal systems, corruption, lack of resources for the criminal prosecution of business entities and so on. Therefore the only effective domestic remedies will be via non-judicial mechanisms or the home State legal system.

The current trend in home States to limit attempts by foreign victims to pursue business entities accused of human rights abuses in a host State is having the effect of excluding the possibility of remedies and accountability entirely. This is creating a situation where very few victims of corporate human rights abuses have any avenue for redress.

Given that the financial benefits of the overseas operations of business entities are frequently enjoyed in home States,²⁴ that the home State was responsible for creating the entity and that many decisions having direct impact on human rights in other countries are taken in the home State, there are very strong moral and economic arguments for the home State taking responsibility for the adverse impacts of those activities.

²² Committee on the Elimination of Racial Discrimination, Concluding Observations: United States, UN Doc. CERD/C/USA/CO/6, paragraph 30 (8 May 2008).

²³ See http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 The Maastricht Principles are a restatement of law based on existing conventional and customary international law. They were adopted in 2012 by leading experts from around the world, including a former member of the Human Rights Committee and members and former members of other treaty bodies. Drawn from international law, the Maastricht Principles clarify the content of extra-territorial State obligations to realize economic, social and cultural rights but also explicitly apply to the full spectrum of civil, cultural, economic, political and social rights.

²⁴ Both in terms of the profits of the activities and the products resulting from those activities.



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Whilst we agree that both extra-territorial and local solutions have a role to play in achieving accountability for corporate liability for violations of human rights²⁵ and it is very important that resources and efforts be redoubled to strengthen domestic legal systems²⁶ and capabilities, this is a long-term project which will have no impact on the victims of human rights violations occurring today. Therefore, in the meantime, changes need to be made by home States to ensure access to redress through their legal systems, for foreign victims. For instance *forum non conveniens* barriers should be removed, standing laws should be broadened, prosecutorial and law enforcement authorities should be empowered and funded to assist foreign States to pursue criminal prosecutions of corporations.

6. Treaty-based initiatives

As the Zerk Report points out, the process of improving domestic remedies in many host States is going to be very long and arduous. In the context of current global land-grabbing and corporate exploitation of emerging markets in private education, health and other public services, strengthened corporate accountability is critical now. However in many host States (particularly those where land and labour prices are very low) conflict, instability, absence of the rule of law, corruption and other problems mean that there is little if any prospect of effective regulation (including an ability to monitor and enforce human rights laws) and accountability mechanisms being put in place in time to address current issues. Therefore, for a significant number of host States, they are not going to have the resources or political will to address this problem and therefore, focusing only on improving domestic remedy systems in host States is not going to prevent on-going human rights violations or deal with accountability and remedies.

In our view the solution to the problem of corporate accountability for human rights abuses will be a long-term, multi-pronged project involving extensive efforts to build domestic legal systems and capacities, increased home State regulation of business entities operating abroad, improved access for foreign victims to home State legal systems and an international instrument which imposes enforceable obligations on business entities operating across State borders. Obviously these efforts should be mutually reinforcing. For instance a treaty for TNCs is likely to assist with the process of strengthening domestic legal systems and remedial mechanisms by generating

²⁵ Zerk Report p 12

²⁶ Including by strengthening protection of ESC rights and of human rights defenders.



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guidance and implementation tools and an impetus and framework for international co-operation.

Home State extra-territorial obligations are an important element of a strategy to improve corporate accountability for human rights abuses. If home States are allowed to ignore the overseas human rights abuses emanating from their domiciled corporations and from the profits and products returning to their shores, there will be less of an imperative to move quickly towards a treaty or any substantive support to host States to strengthen domestic legal systems that can deliver effective remedies. Therefore it is important to maintain pressure on home States to take measures to ensure that:

- a. corporations incorporated within its jurisdiction, do not, through their overseas operations (including those of its subsidiaries), impair the enjoyment of human rights of persons outside its jurisdiction;²⁷ and
- b. victims of such rights violations have access to effective remedies, including in the home State.

For the elaboration and effective operation of any international treaty on TNCs, home States must be engaged and supportive, but without skin in the game they are unlikely to have sufficient political will for this. Similarly, transnational corporations are most likely to respond to financial and home State regulatory drivers, thus emphasising the existing ICESCR, ICCPR (and other treaty) obligations to do a) and b) above, may encourage the co-operation of TNCs in the design of a system of enforceable international rules to improve corporate accountability for human rights abuses.

The other benefit of this approach is that these are measures that can be adopted relatively quickly, as compared to awaiting the development and strengthening of domestic legal systems or a treaty on TNCs. Thus victims may have some improvement in accountability and justice in the short-term.

There will of course be many difficulties in pursuing a treaty on TNCs and the final document is unlikely to please everyone. Such is the history of human rights which from the very start was an ambitious project which challenged old ways of thinking about global problems. Professor Ruggie in his most recent paper on these issues agreed that *enumerating these challenges is not an argument against treaties*²⁸ Our view is that the inevitable difficulties are not insurmountable and whilst the form of an over-arching

²⁷ Which in the case of many home States are current obligations pursuant to the ICESCR, the ICCPR and other human rights treaties.

²⁸ Ruggie, J., 'A UN Business and Human Rights Treaty Update', 1 May 2014, p 1, available at http://www.business-humanrights.org/media/un_business_and_human_rights_treaty_update.pdf



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binding instrument on TNCs is currently unknown, a State-led process of discussion and elaboration, incorporating the active, free and meaningful participation of civil society, should be the first step towards a solution.

Perhaps the first initiative would be for the Human Rights Council to establish an open ended inter-governmental working group tasked with a drafting mandate. The working group could first focus on developing the content of a treaty through discussion of key questions such as the coverage of a treaty and the appropriate enforcement mechanism. Professor Ruggie dismisses this idea as *putting the cart before the horse* and suggests that the questions of *what a treaty could look like and how it might work*²⁹ should be answered prior to deciding what steps to take next. Our view is that States need to commit to a process and demonstrate their political will to solve this global problem that is creating a situation of impunity and injustice around the world. Once States are invested in the process, together with civil society and business actors, a momentum towards positive change can emerge.

19 May 2014

²⁹ *Id ib.* p 2