

Enhancing the responsibility of TNCs and other business enterprises

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Excellencies, distinguished delegates, ladies and gentlemen,

Two broad arguments

A. The intergovernmental working group should build on the second pillar of the Guiding Principles. However, it should avoid the temptation of a blind complementarity with the Guiding Principles.

- Points 1-3 will show that while the proposed treaty should build on the Guiding Principles, the treaty should not adopt their deficits
- We should be mindful that the Guiding Principles are not an end in itself; rather they are merely one of the means to achieve an end of ensuring that companies comply with their human rights obligations

1) Meaning of the term “responsibility”:

- While the term “responsibility” under international law may mean liability for breach of legally binding obligations, the Guiding Principles do not use the term in that sense. So, we should be clear at the outset what we mean by responsibility
- May be preferable to avoid the term “responsibility” in the context of a legally binding international instrument. Or at least a clear definition should be provided to avoid any confusions

2) Should the responsibility of companies be merely to “respect” human rights:

- States have tripartite duties in relation to human rights, but the second pillar of the Guiding Principles limits corporate responsibility to “respect” human rights
- While respecting human rights is a basic minimum, this might not be enough in certain circumstances – a protect duty may be useful in the context of parent vs. subsidiary company or in relation to one’s suppliers; the fulfil responsibility may also be relevant in certain circumstances

3) Caution against being carried away by the process of due diligence:

- Distinction between obligations of conduct and obligations of result – whether the former is adequate in relation to one’s own conduct as opposed to the conduct of other entities

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- Due diligence in corporate/commercial context is very different in nature from how due diligence should be employed in human rights context – e.g., risks to corporations vs. risk to bearers of human rights

B. The need for the treaty to provide for “effective” remedies to the victims to ensure that companies comply with their human rights obligations.

- 1) What is effective? The twin test of preventive and redressive efficacy – *reasonable certainty* of redress in a *timely* manner and at an *affordable cost*
- 2) The treaty should make the violation of human rights a costly business by companies – a number of incentives and disincentives should be offered
- 3) Non-judicial mechanisms work better in the shadow of strong judicial mechanisms
- 4) Victims should have a say in what remedies they want to avail in particular situations
- 5) Public apology for corporate wrongs – problems with non-admission of guilt in, and the confidential nature of, settlements with companies
- 6) In particular, we need more preventive remedies like injunctions
- 7) Unlike the Guiding Principles, the proposed treaty should suggest concrete ways to overcome procedural, substantive and conceptual obstacles in access to justice
- 8) Institutionalise the role of CSOs in enforcing human rights against companies – e.g., public interest litigation; victims’ capacity building
- 9) Taking into account uncertain future adverse consequences of corporate activities (e.g., untested chemicals or technologies;), all TNCs may be required to contribute to a “victims fund” in proportion to their annual turnover or net profit

Thank you very much.