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Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights**Amnesty International's Preliminary Observations and Recommendations**
20 October 2017

On 2 October 2017 the Chairperson-Rapporteur of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) published the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (the “elements”).

Amnesty International welcomes the publication of the elements which provide a strong starting point for negotiations during the third session of the OEIGWG from 23 to 27 October 2017. The OEIGWG’s meeting next week will provide a unique opportunity for states to engage in a constructive dialogue on ways of addressing and breaching existing gaps in accountability and remedy for corporate human rights abuses. Amnesty International calls on all states to participate and engage constructively in these discussions with a view to establishing a strong international regulatory framework for the effective protection of human rights in the context of corporate activity.

Amnesty International particularly welcomes the focus of the elements on the following aspects:

- Prevention (both in terms of the state duty to prevent and obligations placed on corporate actors to prevent), and the need to make corporate human rights due diligence legally binding as a means of achieving this goal;
- The need to ensure the legal accountability of corporate actors implicated in human rights abuses, access to justice and remedy for victims, and international cooperation;
- The need to ensure the primacy of human rights law over trade and investment agreements;
- The reiteration of the key principles of state responsibility for failures to effectively protect (through prevention, investigation, punishment and remediation) against abuse by corporate actors and for abuses by private actors that are attributable to the state;
- State duties beyond territorial borders;
- The understanding that all human rights abuses should be covered by the future

legally binding instrument.

These are all critical elements that must be preserved and form the basis and skeleton of the draft treaty going forward.

Amnesty International has been conducting investigations and research into instances of corporate human rights abuse for a number of years. Based on this research, the organisation would also like to highlight to all states participating in the OEIGWG specific areas that should be further elaborated or clarified in future texts to ensure the treaty effectively meets its objective of breaching protection and accountability gaps. Amnesty International would be willing to provide more detailed recommendations as the process advances and the draft text is further refined.

Amnesty International's preliminary observations and recommendations

1. The State Duty to Respect

The organisation welcomes the reference to the State duty to *respect* human rights, alongside its duty to protect and promote (or, rather “fulfil”), but notes that specific elements that elaborate on the contents and implications of this duty in the context of business activity are largely missing. Amnesty International recommends that more focus be placed on the state duty to respect human rights when it operates as an economic actor (for example, in relation to State-owned or controlled enterprises), when it transacts with corporate actors or when it elaborates and implements programs, policies, projects or laws related to economic activity. General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities of the Committee on Economic, Social and Cultural Rights (General Comment 24) can provide useful guidance in this regard.¹

In connection to this point, subsequent drafts should also focus on government-based processes and institutions that regularly interact with companies or deal with corporate activity such as export credit agencies, public pension funds and securities' regulators, in order to align their mandates, policies and procedures with both state and corporate duties under the treaty. The elements already do this in relation to public procurement and contain a general statement in relation to states' legal and contractual engagements with transnational corporations (TNC) and other business enterprises (OBEs). This should be further developed, and expanded to cover other state bodies and processes as stated above. It should be another express objective of the treaty to embed state and corporate duties under the treaty in all legal and institutional processes and activities that regulate and/or shape corporate practices. The Council of Europe Recommendation on Human Rights and Business adopted by all 47 Council of Europe member states in 2016 contains relevant provisions in this area that could be used as guidance.²

¹ UN Doc. E/C.12/GC/24, 10 August 2017. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en.

² In particular, Rec.22. See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4

2. Jurisdiction

Amnesty International welcomes the reaffirmation in the “Purpose” that states’ obligations to protect human rights do not stop at their territorial borders. Domestic measures designed to prevent, investigate, punish and redress corporate abuses to human rights committed beyond a state’s borders as well as international cooperation in these areas are pivotal to the achievement of the treaty’s objectives and should therefore be a core aspect of its operative provisions.

In this regard, there is some lack of clarity at times as to what state is required to meet the obligations the elements describe. Future draft texts should more clearly and consistently articulate the obligations of states in whose territory TNC or OBE have their “centre of activity, are registered or domiciled, are headquartered or have substantial activities” in relation to prevention, accountability and remedy. States can find useful guidance in General Comment 24 in this regard.

3. Subjective Scope

Amnesty International appreciates and welcomes the primary focus of the elements on measures to address existing gaps in protection and accountability associated with the transnational nature of corporate activities. As suggested above, this should be a core objective of the treaty. However, the treaty should also reaffirm the existing duty of states to protect human rights against abuse by all companies, and these companies’ responsibilities in relation to human rights. It should demand consistency in relation to the regulatory, accountability and remedial measures it prescribes in connection with both TNC and OBE and purely domestic companies to the extent that the latter are insufficiently regulated under national law. This would ensure equal levels of protection between individuals and communities affected by the activities of TNC and OBEs and those affected by the activities of purely domestic corporations, consistent with the fundamental principles of non-discrimination and equal protection of the law that the elements rightly invoke.

In addition, future draft texts should more clearly define the subjective scope of the treaty or the “target” of regulation. As currently drafted, this is unclear. Although not fully consistent throughout the text, the focus appears to be certain type of *activity* that is transnational in nature. It is not clear what gives the activity its transnational character and whether human rights abuses must be the direct result of this activity. If so, not many human rights abuses would be captured. Most corporate human rights abuses are the result of highly localised activities, for example, the unlawful displacement of a community by local law enforcement to make way for an industrial development. These issues must be looked at carefully and clarified going forward.

4. Special protection measures

Amnesty International welcomes the emphasis in the “Principles” on the need for special protection of certain human rights such as effective remedy, participation and non-discrimination. Because of their special status as “enablers” to the effective protection of other human rights, or because of their cross-cutting nature, the organisation recommends future texts expressly reference and elaborate on the implications of the principles of transparency and access to information; the rights of

Indigenous peoples, including free, prior and informed consent and land rights; the rights of persons belonging to ethnic, religious and linguistic minorities; the need for a gender-responsive approach to all protection measures; and measures to both facilitate the work of human rights defenders and protect them from retaliation and abuse for their work in the context of corporate activities.³ Future draft texts should also include ethnic, religious and linguistic minorities in all provisions dealing with the particular rights and needs of specific groups of rights-holders.

5. Scope of corporate due diligence

Amnesty International welcomes the inclusion of elements concerning state measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent human rights abuses throughout their supply chains.⁴ This is a welcome start. However, subsequent draft texts should clarify that due diligence measures to avoid human rights abuses should cover the entire corporate group (including subsidiaries and other controlled entities)⁵ as well as subcontractors and the entire “value chain”. Due diligence obligations that address the “value chain” – as against the “supply chain” – would cover not only suppliers (that is, where products or services come from and the way in which they have been sourced, manufactured or provided), but also clients (that is, where or to whom products or services go and how they are utilised).⁶

6. Corporate disclosure

An important aspect of due diligence that is insufficiently reflected in the elements is corporate disclosure and reporting. As a principle, corporate disclosure should be required in relation to all information that is relevant for the effective protection of human rights, such as human rights risk/impact assessments.⁷ Non-financial reporting

³ For examples of the particular risks and needs of human rights defenders working in the context of corporate activity, see Amnesty International, *We are defending the land with our blood: defenders of the land, territory and environment in Honduras and Guatemala*, September 2016, <https://www.amnesty.org/en/documents/amr01/4562/2016/en/> For gender-specific impacts and needs in the context of the agroindustry, see Amnesty International, *Palm Oil: Global brands profiting from child and forced labour*, November 2016, <https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/> For an illustration of the impacts of corporate activities on the rights of Indigenous peoples, see Amnesty International, *Don't mine us out of existence. Bauxite Mine and Refinery devastate lives in India*, February 2010, <https://www.amnesty.org/en/documents/asa20/001/2010/en/>

⁴ For examples of human rights abuses occurring in supply chains and ways of addressing supply chain responsibilities, see Amnesty International and Afrewatch, *"This is What We Die For": Human Rights Abuses in the DRC Power the Global Trade in Cobalt*, January 2016, www.amnesty.org/en/documents/afr62/3183/2016/en/ and Amnesty International, *Palm Oil: Global brands profiting from child and forced labour*, November 2016, <https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/>

⁵ For an analysis and recommendations on parent company due diligence responsibilities and liability, see Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy*, March 2014, <https://www.amnesty.org/en/documents/pol30/001/2014/en/>, (Injustice Incorporated), pages 115 to 127 and 143 to 151, and Amnesty International and Business & Human Rights Resource Centre, *Creating a paradigm shift: Legal Solutions to improve access to remedy for corporate human rights abuse*, September 2017, <https://www.amnesty.org/en/documents/pol30/7037/2017/en/> (Creating a Paradigm Shift), Chapter I.

⁶ See examples of “value chain” scenarios in Amnesty International, *From London to Juba, a UK-registered company's role in one of the largest arms deals to South Sudan*, September 2017, <https://www.amnesty.org/en/documents/act30/7115/2017/en/> and Amnesty International, *EU: Time to eradicate the torture trade*, October 2016, <https://www.amnesty.org/en/latest/news/2016/10/eu-time-to-eradicate-the-torture-trade/>

⁷ See Amnesty International, *Nigeria: Bad information: Oil spill investigations in the Niger Delta*, November 2013, <https://www.amnesty.org/en/documents/afr44/028/2013/en/>; Amnesty International, *Myanmar: Mountain of*

laws should also be used to improve corporate disclosure of information that is relevant for an accurate understanding of a company's risks to, and adverse impacts on, human rights and its response to these risks and impacts. Currently, corporate reporting on due diligence efforts is highly selective and insufficient.⁸

7. Cause and contribute

Certain terms used to describe the connection between the human rights abuse and the corporate actor can be equivocal and potentially too narrow. In particular, the reference to abuses “resulting” from the activities of TNC and OBE (first articulated at 1.3 – “Purpose”) can be read as signifying that only abuses directly caused by these entities are covered. The use of the terms “committed by” TNC and OBEs alone in the second bullet of this section and subsequently in the text is problematic for the same reason. It should be made clear in future draft texts that both direct causation and contribution (in its various forms) to abuses by others should be covered by the treaty. In addition, it should also be clear that “others” can be private companies and individuals as well as state actors.

8. State capacity to protect and corporate capture

Corporate actors can indirectly infringe human rights by engaging in actions that have as an effect the curtailment of the state's ability to protect human rights. For this reason, Amnesty International appreciates the inclusion of an express corporate duty to refrain from activities that would undermine the rule of law and government efforts to ensure respect for human rights. The multiple ways in which corporations unduly influence laws and public policy and institutions to advance their private interests over the protection of human rights, is often referred to as “corporate capture”.⁹ To tackle this pervasive problem, future draft texts should elaborate further on the scope and implications of this duty. It should be clear that the duty entails refraining from seeking or accepting exemptions from existing standards related to the protection of the environment, labour or human rights; entering into agreements with governments that restrain the latter's ability to strengthen the protection of human rights (for example, through stabilization clauses) and opposing legislation aimed at bringing the national law in line with international human rights standards. Other measures to guard against “corporate capture” include the adoption of transparency laws that ensure that corporate positions as well as meetings and dealing with government agencies are publicly known, mechanisms to control conflicts of interest such as those resulting from corporate donations and the “revolving doors” phenomena, and safeguards to ensure the independence of law and public policy-makers.¹⁰

trouble: Human rights abuses continue at Myanmar's Letpadaung mine, February 2017, <https://www.amnesty.org/en/documents/asa16/5564/2017/en/>; *Injustice Incorporated,* <https://www.amnesty.org/en/documents/pol30/001/2014/en/> pages 157 to 160 and *Creating a Paradigm Shift,* <https://www.amnesty.org/en/documents/pol30/7037/2017/en/> Chapter III, for problems associated with lack of access to reliable information and ways of addressing this challenge.

⁸ See *Creating a Paradigm Shift*, <https://www.amnesty.org/en/documents/pol30/7037/2017/en/> Chapter III. See also Global Witness and Amnesty International, *Digging for Transparency: How U.S. companies are only scratching the surface of conflict minerals reporting*, April 2015, <https://www.globalwitness.org/en-gb/campaigns/conflict-minerals/digging-transparency/>

⁹ See *Injustice Incorporated*, <https://www.amnesty.org/en/documents/pol30/001/2014/en/> pages 173 to 197.

¹⁰ For more recommendations on this issue, see ESCR-Net's submission to the third session of the United Nations'

9. International cooperation

As expressed above, Amnesty International welcomes the reference in various parts of the text to the need for international cooperation, including mutual legal assistance, and the inclusion of a specific chapter dealing with this issue. Future draft texts should clearly list, and to the extent necessary distinguish, state duties of international cooperation in relation to civil and criminal matters. The elements under “International Cooperation” do this to some extent, but there is a degree of overlap and confusion between the two legal fields that should be corrected going forward.

In addition to what is already included in the elements, the treaty should promote the entering into mutual legal assistance agreements that allow for fast and efficient provision of evidence and other assistance, including directly between judicial and prosecuting authorities. In relation to criminal matters, the treaty should also encourage more informal channels of collaboration between law enforcement officials from different countries and the setting up of multi-jurisdictional teams and networks to collaborate in the exchange of information and investigation of cross-border corporate crimes.¹¹

10. Legal liability

10.1 Criminal liability

Amnesty International welcomes the inclusion of substantive elements addressing the criminal liability of corporate actors for abuses to human rights. However, the organisation considers that the criminal offences for which corporate actors should be held criminally accountable must go beyond what is currently envisaged. These offences should include human right abuses that amount to crimes domestically (for example, sexual offences or poisoning) or that should be criminalised under international human rights law (such as forced labour and human trafficking), as well as other illegal acts that lead to human rights abuses. The latter would include, for example, toxic waste dumping (linked to negative impacts on the rights to health or water), pollution of the environment (which impairs people’s rights to work, water or health), and handling of stolen goods (the sale of which benefits a human rights abuser). This is important because many criminal offences are not defined as a human rights abuse per se under domestic legislation, but they may have a direct link with a human rights abuse. Effective prosecution of this type of crime would be instrumental in the effective protection of the implicated human rights.

Future drafts should also address the rights of victims in the context of criminal proceedings. As well as sanctions, criminal proceedings should facilitate access to reparations for the victims of corporate crimes which include, but go beyond, financial compensation. In addition, victims should be able to participate meaningfully in

Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

¹¹ See Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases, <http://www.commercecrimehumanrights.org/> (Corporate Crimes Principles), in particular, Principle 5.

proceedings, have access to information and be adequately represented.¹²

10.2 Civil and administrative liability

Grounds for liability must be linked to the positive obligation of companies to prevent articulated early in the elements. Future draft texts should more clearly stipulate that failures to prevent human rights abuses because of insufficient or inadequate due diligence processes should give rise to liability. In this way, not only actions but also relevant omissions that lead to human rights abuses are captured. This is critical in parent-subsidiary relations and other business relations in which a company enjoys certain levels of control or influence over the conduct of another.¹³

11. Effective Remedy

Amnesty International appreciates the reference in the section on “Access to justice, effective remedy and guarantees of non-repetition” to a number of fundamental obligations associated with the human right to remedy, such as the need for remedy to be “prompt, accessible and effective”. However, Amnesty International would like to point out that these duties apply in all cases of human rights abuse, not only when abuses by TNC or OBE are attributable to the state, as the first element of this section would seem to suggest.

The treaty should expressly recognise the human right to remedy and reaffirm its fundamental substantive and procedural tenets. These include the right of access to an independent and competent authority, the affordability of remedial processes and the adequacy and enforceability of remedies granted. Some of these fundamental entitlements, such as the rights to a fair trial and equality of arms, are referenced in the text. However, Amnesty International recommends that future draft texts reaffirm these principles upfront (for example, in the “Principles”) and more systematically address their implications for state duties in the context of corporate activities in the operative sections of the treaty. Given the significant disparity in resources typically present between corporate defendants and claimants in cases of alleged human rights abuse, the need to guarantee equality of arms is particularly important. States must adopt measures to re-balance existing disparities and ensure equality of arms both in access to remedial mechanisms and throughout procedures.

Amnesty International also welcomes the requirement on states to remove barriers to remedy. However, care should be taken not to suggest a closed list of barriers that excludes, or can be read as excluding, certain critical barriers. Generic language capable of addressing all barriers to remedy (not just those of a “regulatory, procedural and financial” nature) should be adopted. States should also be called on to identify and address gender-specific obstacles and obstacles to remedy experienced by particular groups of rights-holders, such as Indigenous Peoples and children.

The enumeration of specific measures to reduce or remove some of these barriers such as the introduction of class action procedures, the facilitation of access to relevant

¹² See Corporate Crimes Principles, Principle 9.

¹³ See Creating a Paradigm Shift, <https://www.amnesty.org/en/documents/pol30/7037/2017/en/> Chapter I.

information, the reversal of the burden of proof and the adoption of measures to combat the use of “chilling-effect” strategies by companies is very useful and practical. This appropriately responds to ample available evidence of existing barriers preventing victims of corporate abuse from accessing remedy in practice.¹⁴ This evidence-based approach is welcome and must continue going forward. As expressed above, to avoid the risk of excluding critical measures to address barriers to remedy, future drafts should both include an enumeration of measures as well as adopt language capable of including all other measures necessary to effectively remove barriers to remedy.

Finally, states in whose territory TNC or OBE have their “centre of activity, are registered or domiciled, are headquartered or have substantial activities” must not only facilitate or allow their judiciaries to hear claims brought against these companies for their alleged involvement in human rights abuses as suggested in the section on “Jurisdiction”, but *require* or *ensure* the exercise of jurisdiction.

¹⁴ See case studies in Injustice Incorporated, <https://www.amnesty.org/en/documents/pol30/001/2014/en/> pages 31 to 111. See also Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable, CORE and European Coalition for Corporate Justice), 2013.