IRISS-CNR Written Statement to Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises

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IRISS-CNR, *Institute on Research on Innovation and on Services for Development*, is a research organisation of the Italian National Research Council. IRISS research programme on *Corporate human rights and environmental due diligence and the promotion of COrporate REsponsibility (CORE)* performs interdisciplinary study and analysis in the field of corporate responsibility and human rights. Current researches also address the process launched under the Open-ended intergovernmental working group (OEIWG) towards a binding treaty on business and human rights.

CORE research team welcomes UN Human Rights Council efforts towards the adoption of an international treaty on business and human rights and highlights the need for the OEIWG to complement rather than compete with 2011 UNGPs. Also, we believe that even though an international binding legislation regulating the impact of business sector on human rights is highly desirable, this process should be firmly rooted on flexibility and on compromise in order to afford to the Treaty the widest consensus possible on pivotal issues.

1. Allocation of responsibilities and the State-business nexus

In the first place, the treaty process should not abandon one of the major outputs of the Ruggie's work: the co-existence of the State duty to protect with the corporate duty to respect (human rights). Indeed, it may be agreed that contemporary international legal system

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underwent an enlargement of the scope of international human rights law, which has entailed the elevation of sub-State interests at international law level and, hence, the enlargement of the entities *participating* to the international legal system[1]: there are no reasons to suppose that corporations have to be set aside from this process. However, it is undeniable that, notwithstanding the increasing influence of corporations, States still are powerful actors *vis-à-vis* the greatest majority of businesses operating worldwide. Therefore, States remain the prime duty-holders within this system. In effect, when reasoning on what are nowadays the modalities for enforcing human rights obligations of private economic actors, it must be admitted that, according to the contemporary degree of the evolution of the international human rights legal system, this enforcement may only be realized through the filter of national legal systems. In other words, States remain the …'engine' of any legal mechanisms aimed at protecting human rights from corporate abuses.

The treaty process should take into account this situation and should also be framed in the sense that corporate responsibility should not be perceived as a substitute of States' duties to fulfil their human rights obligations.

2. The *ratione personae* scope of application of the Treaty: which kind of corporations should be regulated?

Secondly, the exclusion of the national business sector of the host States from the Treaty scope do not place sufficient emphasis on a key issue: the lack of will, or capacity, of many States to effectively regulate not only big transnational corporations but also their own local companies, especially the largest and most influential amongst them. From this perspective, it is a matter of fact that national corporations too beneficiate from the shifting of powers from States to private sector entities which is caused, *inter alia*, by the deregulation of many economic activities. So, why exclude them from the scope of an international instrument aspiring to restore a fair balance between private business activities and human rights protection? This exclusion would be a major departure from what appeared to be an already

[1] See W. FRIEDMANN, *The Changing Structure of International Law*, London, 1964, p. 5-19, p. 45-71, and p. 368; similarly see also R. HIGGINS, *Conceptual Thinking about the Individual in International Law*, in *British Journal of International Studies*, 1978, p. 1 ff. and in particular p. 5; from the same author see, also, *Problems and Processes. International Law and How We Use it*, Oxford, 1995, p. 50.

crystallized principle in previous UN attempts of codification in the subject matter and, in particular, in the 2003 Norms (see para. 20 of the Commentary to the Draft Norms) and in the 2011 UN Guiding Principles on Business and Human Rights (see the Commentary to Principle 14 which explicitly acknowledges that «the responsibility to respect human rights applies fully and equally to all business enterprises»). Moreover, narrowing the *ratione personae* scope of application of the future Treaty by excluding domestic corporations would paradoxically impair both the principle of the effective protection of human rights and the principle of equality and non-discrimination. The risk there is, indeed, that by limiting this scope only to transnational corporations, they would restructure their corporate form so as not to fall within the Treaty definitions.

3. Should extraterritorial jurisdiction on corporate activities be admitted?

In the third place, the *ratione loci* scope of the Treaty should be carefully weighted.

Under the international human rights legal system a general obligation on States to exercise extraterritorial jurisdiction with the aim of assuring the protection and promotion of internationally recognized human rights outside their national territory does not exist. However, the fact that certain forms of extraterritorial jurisdiction are not binding under conventional or customary international law does not imply that they have to be regarded as prohibited[2]. Thus, from a theoretical point of view it would seem reasonable to admit that States should be allowed to exercise extraterritorial jurisdiction either, under the principle of universality, in order to contribute to the universal repression of certain international crimes as well as, under the principle of active nationality, when they seek to regulate the activities of their nationals abroad, whether these are natural or legal persons.

The material practice of the international human rights monitoring bodies discloses the tendency at enlarging the reach of human rights obligations of States, even when corporate persons are dealt with. As far as economic, social and cultural rights, the CESCR has identified

[2] As to the extraterritorial application of human rights treaties, see, *inter alia*, S.I. SKOGLY, *Extraterritoriality: Universal Human Rights without Universal Obligations?*, in *Research Handbook on International Human Rights Law*, S. JOSEPH, A. MCBETH (eds.), Cheltenham, 2010, p. 71-96; F. COOMANS, M. KAMMINGA (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp-Oxford, 2004; T. MERON, *Extraterritoriality of Human Rights Treaties*, in *American Journal of International Law* 1995, p. 78-82.)

in General Comment 14, on the right to the highest attainable standard of health, and in General Comment 15, on the right to water, certain obligations that States Parties to the 1966 Covenant owe to populations under the jurisdiction of other States when these last risk being threatened by the activities of private actors. With regard to the right to the highest attainable standard of health, the Committee observed that «States parties have to respect the enjoyment of the right to health in other Countries, and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law»[3]. With regard to the right to water, the CESCR, in its 2003 General Comment, called upon States Parties «to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries [w]here States parties can take steps to influence other third parties».[4]

In the civil and political rights realm, promising steps towards the recognition of extraterritorial application of the 'corporate responsibility to respect' may be found in statements made by the UN HRC in its 2012 Concluding Observations on the Sixth Periodic Report of Germany. The Committee, indeed, encouraged Germany «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 [and] to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad».[5]

Such an expansive approach has been somewhat confirmed in some national civil liability régimes. Under the tort law, indeed, UK courts have been applying for years a duty of care test to UK incorporated parent companies acknowledging their liability for the operation of their overseas subsidiary operations, even to the extent of piercing the 'corporate veil' obstacle and dismissing allegations of *forum non conveniens*, thus affording a certain extraterritorial scope

[3] See CESCR, General Comment No. 14 – Article 12: Right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, 11 August 2000, para. 39.
[4] See CESCR, General Comment No. 15 – Articles 11 and 12: The right to water, UN Doc. E/C.12/2002/11, 20 January 2003, para. 31.
[5] See Human Rights Committee, Concluding observations on the Sixth Periodic Report of Germany, UN Doc. CCPR/C/DEU/CO/6, 15 October-2 November 2012, para. 16.

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to this duty.[6] On the contrary, in the well-known 2013 opinion released in the case *Kiobel v Royal Dutch Petroleum Co.*, the US Supreme Court denied that the Alien Torts Claims Act (ATCA) might provide the US federal courts with jurisdiction in the so-called *foreign-cubed cases* and decided to circumscribe the ATCA scope of application.[7]

In sum this issue should be approached cautiously as any recognized principle seems having crystallized until now.

4. Civil and criminal liability of corporations and the role of corporate due diligence responsibility

The future Treaty should incorporate the obligation for contracting States to provide within their national jurisdiction for the legal liability (civil and criminal) of both TNCs and their executives (e.g. CEOs, managers, boards of directors). The principle of double indictment, (liability of both the legal entity and the individuals who take the decisions) might be also recognized. In doing so, in effect, the Treaty would simply reflect developments occurring in several States and concerning also the establishment of due diligence regulatory frameworks as a means to ensure corporations meet specified standards of behaviour in different field areas. From this perspective, States have adopted both civil liability schemes to enforce corporate human rights due diligence (e.g. Canada, UK, Germany) and criminal law liability schemes in order to impose criminal responsibility on corporations falling within their jurisdiction for the failure to properly act with due diligence to prevent certain crimes (e.g. the Canadian Section 22.2 of the Criminal Code as amended in 2003, the Italian Legislative Decree 231/2001 on administrative liability of corporations and of other private entities, the Spanish *Ley Orgánica* No. 5/2010, introducing corporate criminal liability in

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[6] See among the others, *Ngcobo and Others v. Thor Chemicals Holdings Ltd and Another*, (1995) TLR, at 579; *Connelly v. R.T.Z. Corporation Plc and Another* (1997) 2 WLR, at 251. As far as legal literature see R. MEERAN, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, in *City University of Hong Kong Law Review*, 2011, p. 1–41

[7] See USA, Supreme Court, *Esther Kiobel, et al., Petitioners v. Royal Dutch Petroleum Co. et al.*, Case No. 10-1491, *certiorari* to the US Court of Appeals for the Second Circuit, argued 28 February 2012, reargued 1 October 2012, 569 U.S. 2013, judgment of 17 April 2013. See M. FASCIGLIONE, *Corporate Liability, Extraterritorial Jurisdiction and the Future of the Alien Tort Claims Act: Some Remarks after Kiobel*, in *Diritti umani e diritto internazionale*, 2013, p. 401-435.).

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Article 31*bis* of the Spanish Criminal Code).[8] The Treaty, accordingly, might compel States to implement domestic norms requiring companies to conduct due diligence, either as a direct legal obligation formulated in a specified rule, or indirectly by offering them the opportunity to use due diligence as a defence against criminal, civil or administrative charges.

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[8] Similar developments have involved several other Countries. On this issue see M. FASCIGLIONE, *The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries*, in *Human Rights & International Legal Discourse*, 2016, p. 94 ff.

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