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Business response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft Treaty") and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol") Annex

October 2018

UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS

Executive summary

The business community is firmly committed to respecting human rights across the world in line with the UN Guiding Principles on Business and Human Rights (UNGPs). It is actively engaged in many initiatives that promote implementation of the UNGPs and similar Government-backed standards, including the OECD Guidelines for Multinational Enterprises and the ILO MNE Declaration. It also carries out numerous activities to support business to make a positive contribution to the Sustainable Development Goals (SDGs) at the international, regional, national and local level.

The following organisations - the International Organisation of Employers (IOE), Business at OECD (BIAC), Business Europe and the International Chamber of Commerce (ICC) - which collectively represent millions of companies around the world, have actively participated in and closely followed the work of the Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises (IGWG) since its inception in 2014.

This document provides their joint response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft Treaty") and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol"). These texts were released by the Chair of the IGWG - the Government of Ecuador - for States to negotiate on at the IGWG's fourth session (15-19 October 2018) and its fifth session scheduled for 2019.

The Zero Draft Treaty and the Draft Optional Protocol raise issues of significant and genuine concern to the international and regional business community and they do not provide a sound basis for a possible future standard on business and human rights. Both texts incorporate inconsistent provisions that would greatly undermine countries' development opportunities and they would create a lopsided global governance system that would result in significant gaps in human rights protection. Taken as a whole, the legal regime that the Zero Draft Treaty and Draft Optional Protocol would create is legally imprecise; divergent with established standards and laws; incompatible with the aim of promoting inclusive economic growth and investment; at risk of enabling politically-motivated prosecutions; and - crucially - not capable of serving all victims of human rights abuses.

Furthermore, the business community is profoundly concerned with the process that has led to the release of a Zero Draft Treaty and a Draft Optional Protocol. It has repeatedly stressed that it wishes to contribute meaningfully to the business and human rights debate. However, it is concerned that no real effort has been made to ensure a robust, transparent and open process that fully draws on the expertise and experience of all stakeholders. The way in which the UNGPs were developed highlights the overarching value of meaningful private sector engagement. The business community encourages all participants in the IGWG to enhance dialogue with business in tackling such complex human rights issues.

The business community's comments to the Zero Draft Treaty and Draft Optional Protocol are summarised as follows:

A. Overarching concerns with the Zero Draft Treaty

i. Diverges with and undermines the UNGPs:
- The text takes a narrower scope to the UNGPs by focusing on activities of transnational corporations and excluding national companies completely and SOEs for the most part from its ambit.
- It disregards the accepted notion that a company can either be involved in a human rights harm through its own activities (cause and contribution) or through its business relationships (in situations of direct linkage) and that they should not be held liable for involvement in the latter.
- It does not follow the UNGPs' four-step approach on human rights due diligence.

ii. Does not encourage States to address human rights challenges in their jurisdiction:
- By seeking enhanced liability on global business and vastly expanding the application of extra-territorial jurisdiction, the Zero Draft Treaty would not give States the impetus to address underlying challenges in their jurisdictions.
- The text also does not include "sticks" to accompany the "carrots" (under international cooperation etc.) or other measures to bring peer pressure between States to ensure action to address domestic human rights challenges.

iii. Will harm countries' investment, development and efforts to realise the SDGs:
- The Zero Draft Treaty disregards the reality of complex global supply chains and the huge positives derived from trade and foreign direct investment.
- It does not take appropriate consideration of the established fact that a company's ability to influence the supply chain depends to a large degree on the number of suppliers it has, the structure and complexity of the supply chain, and crucially the company's market position.
- Its punitive approach and the uncertainty generated by its inconsistent legal provisions risk disincentivising foreign direct investment. The text may ultimately encourage companies to "cut and run" instead of "staying and improving" to help address a country's complex and endemic issues and achieve the SDGs.
- Questions are also raised about the potential adverse impact on local SMEs trading - or seeking to trade - internationally.

B. Specific text concerns with the Zero Draft Treaty

iv. The scope, scale and definitions:
- It is not clear that direct international human rights obligations would apply only to State Parties, and not business.
- Limiting the scope to "business activities of a transnational character" (which has no accepted definition) excludes domestic companies. A further narrowing of the scope to profit-driven activities ignores the impact of SOEs. As such, the Treaty will not serve most victims and there appears to be no incentive for States to lead by example.
- There are major concerns about how the Treaty's scope could be implemented and enforced in a principled and practical way.
- The terms "all human rights" and "all international human rights" are unclear and have no legal basis.

- Focusing obligations on "natural or legal persons" is far reaching and it creates tremendous legal uncertainty and risk.
- It is not clear how the inclusion of "environmental rights" would apply to the treaty or what the term "omissions" means.

v. Prevention:
   - The Zero Draft Treaty's formulation of human rights due diligence is unclear and unworkable by establishing it as a standard of outcome. This is not consistent with the UNGPs approach and its four-step process which is now being adopted widely by the private sector.
   - The link between human rights due diligence and liability for non-compliance exposes parent companies, buyers and retailers to legal liability regardless of their involvement in the harm, which is illogical.
   - The requirement for due diligence laws poses many practical challenges and the draft text would not encourage a proportionate, risk-based approach by national legislatures.

vi. Definitions and application of legal liability:
   - The Zero Draft Treaty contains many vague and broad terms and would ultimately and unreasonably hold parent companies, retailers and buyers legally liable for harm caused anywhere in their supply chain.
   - Many provisions around civil liability are unclear, expansive and incompatible with well-established concepts of corporate separateness.
   - The provisions on criminal liability include many unclear terms, do not consider the inconsistent approaches national courts would take to determine criminal liability, and raise problems about universal jurisdiction and secondary liability.

vii. A misguided focus on extra-territorial jurisdiction (ETJ):
   - The focus placed on expanding extraterritorial jurisdiction does not respect national sovereignty and the principle of non-intervention in the domestic affairs of other States.
   - The provisions take the focus off the need for States to improve victims' access to effective remedy at the domestic and local level.
   - They ignore the practical and procedural shortcomings of ETJ.

viii. The rights afforded to victims:
   - The Zero Draft Treaty's vague provisions on the rights of victims do not explain how the various forms of reparation would relate to companies and States.
   - The provisions may also encourage frivolous litigation and bad-faith actions being filed against companies by stating that "in no case shall victims be required to reimburse any legal expenses of the other party to the claim."

C. Concerns with the Draft Optional Protocol (Annex)

The sudden and unexpected release of a Draft Optional Protocol, which contains more Articles than the Zero Draft Treaty, is unhelpful. This document cannot be considered a mere Annex and it raises many questions about substance and regulatory legitimacy.

A concluding point

The business community does not support the Zero Draft Treaty or the Draft Optional Protocol. Both texts would take the business and human rights agenda backwards by undermining the UNGPs and exacerbating the failure of States to meet their existing obligations. They create a risk that companies may choose to "cut and run" from high-risk countries, not enter other high-risk markets and postpone investments in vital projects to achieve development and the SDGs. Companies would also need to adopt stricter policeman-like policies in their cross-border supply chains that would exceed their current abilities and powers in order to ensure their business partners act responsibly. Worryingly, this approach would further undermine the role of the State, given that some of its traditional functions and powers - such as carrying out inspections and awarding penalties of business partners - would need to be transferred to global business. All these unwanted outcomes would hugely undermine the development and partnership model espoused under the SDGs.

A. Overarching concerns with the Zero Draft Treaty

The business community has three overarching concerns with the Zero Draft Treaty.

i. Diverges with and undermines the UNGPs

One of the key reasons the business community engages in the IGWG process is to ensure that any possible new UN instrument does not diverge with or undermine the UNGPs, or similar Government-backed and consensus-based international standards. Regrettably, the Zero Draft Treaty (like the 2017 "elements" paper before it) does both.

First, by focusing its provisions on "all persons with business activities of a transnational character" and by defining such "activities" as "for profit", the Zero Draft Treaty excludes the countless millions of national companies and many State-owned enterprises (SOEs), which are not strictly profit-driven, from its ambit. This goes against the UNGPs that instead stipulates that the responsibility to respect human rights applies to "all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."

Second, and equally important, the Zero Draft Treaty's provisions on due diligence and legal liability fail to recognise vital nuances central to the UNGPs and existing good practice. The draft text ignores the fact that a company can be involved in a potential or actual harm through its own activities, on the one hand, or through its business relationships, on the other hand. As such, it does not appreciate that there are three ways in which a company can be involved in a human rights harm and that its responsibility can differ somewhat depending on this. Under the UNGPs, a company may (i) "cause" or (ii) "contribute" to an adverse impact through its own activities, or (iii) adverse impacts may be "directly linked" to its operations, products or services by its business relationships.

Third, the Zero Draft Treaty unduly amends and creates confusion with the four-step human rights due diligence process under the UNGPs[1] that is well-understood and being carried out by more and more businesses (as well as other actors such as sports bodies).

Fourth, the Zero Draft Treaty undermines the spirit and effectiveness of the UNGPs by driving the business and human rights agenda into a largely legal compliance direction that would result in one-size-fits-all, box-ticking compliance and boiler-plate reporting, instead of critical thinking undertaken by different company functions to put the respect for human rights into practice. Also, companies would likely start sourcing or operating in countries that pose a low risk of being involved in an adverse human rights impact and avoiding suppliers where harms may also be a risk. The UNGPs did not adopt a coercive and compliance-based approach instead encouraging companies to consider respect for human rights as an ongoing exercise in risk-management. As such, the Zero Draft Treaty undermines the principled pragmatism of the UNGPs, whose approach fully recognises a company's responsibility alongside others, as well as its relationship to a harm and its position within the value chain. The Zero Draft Treaty also disincentivises companies to seek flexible, collaborative and creative solutions to complex human rights challenges that are often not unique to one company.

[1] The UNGPs' four-step approach to human rights due diligence entails: (i) Assessing actual and potential human rights impacts; (ii) Integrating and acting upon the findings; (iii) Tracking the effectiveness of the company's responses; and (iv) Being prepared to communicate how impacts are addressed.

Fifth, the Zero Draft Treaty gives no consideration for the huge work that has taken place since 2011 to ensure international and regional policy coherence to embed the UNGPs and operationalise its blueprint into other applicable standards, initiatives and guidance tools. For example, the expectation that companies should exercise human rights due diligence in line with the UNGPs is carefully reflected in standards such as the OECD Guidelines and the ILO MNE Declaration. It is also relevant to many other initiatives and tools such as the International Finance Corporation Performance Standards, the UN Global Compact's 10 Principles, the Global Reporting Initiative, the Voluntary Principles on Security and Human Rights, the work of the Thun Group of Banks, etc.

Sixth, and on a related note, the Zero Draft Treaty gives no thought for the future of the UNGPs and other relevant voluntary and soft-law standards that are having a positive impact in assisting companies to prevent and respond to harms. In the event of the IGWG establishing a new UN Treaty in this field, it is unclear what would happen to the UNGPs (and other relevant standards that mirror the UNGPs). Would they become redundant or apply only to those States that do not ratify the new instrument(s)? In the latter scenario, what would be the relationship between the new Treaty and the UNGPs?

The IGWG Chair and other members say that the work of the IGWG is compatible with the UNGPs. We strongly disagree. The Zero Draft Treaty's narrow scope, its coercive and punitive approach and its confusing provisions - such as on due diligence - jeopardise the crucial consensus achieved by the UNGPs and threaten its many achievements.

ii. Does not encourage States to address human rights challenges in their own jurisdiction

First, with its provisions that introduce untold liability on global business and the provisions that expand the application of extra-territorial jurisdiction, the Zero Draft Treaty does not encourage governments to address underlying challenges in their own national jurisdictions. Such challenges include the need to strengthen their public institutions to implement and enforce domestic laws covering companies within their own domestic borders; to ensure victims have access to effective remedy through judicial and non-judicial mechanisms at the local level; to address systemic issues, such as informality, that lie at the root of many human rights harms; and to drive inclusive economic growth and skills developments.

In addition, the Zero Draft Treaty does not sufficiently appreciate the many ongoing activities and initiatives to implement the UNGPs. Their positive results can and should be further strengthened rather than discarded. The Zero Draft Treaty would undermine the many dedicated efforts of business to respect and advance human rights in their own activities and business relationships. It would exacerbate distrust in business and erode the multi-stakeholder and partnership model that exists in many initiatives to achieve principled and workable solutions that balance the perspectives of all relevant stakeholders.

Second, many provisions in the Zero Draft Treaty focus on imposing sanctions on companies on the one hand, while strengthening international cooperation and mutual legal assistance between States on the other hand. With its focus on transnational corporations and not domestic enterprises, the Zero Draft Treaty does not adequately consider how such State-to-State action will improve the situation for victims of *any* business-related harm in the jurisdiction

where the adverse impact occurred and not just lead to a two-tiered system of compliance. Furthermore, it does not propose any "sticks" to accompany the "carrots" for States or other measures to increase peer pressure between States to ensure they meet their human rights duties at the national level. Improving State performance on human rights, such as by achieving policy coherence between existing standards and national laws, is a long-standing challenge. It is not clear that this Treaty would succeed where other similar instruments have not.

iii. Will harm countries' investment and development prospects and widespread efforts to realise the SDGs

By mischaracterising the nature of global business and proposing purely punitive measures against global business, the Zero Draft Treaty risks undermining investment and development in many countries, inhibiting job creation and weakening efforts to realise the SDGs through meaningful partnerships. In addition, by excluding domestic companies from its ambit, the Treaty could be seen as a form of undue protectionism. This would create further undesirable outcomes and potentially undermine rules-based, multilateral trade cooperation.

First, the Zero Draft Treaty ignores the reality of global supply chains that are "complex, diverse and fragmented."[2] It also disregards the tremendous value of cross-border trade and foreign direct investment. Global supply chains contribute to economic growth, job creation and opportunities for millions of people, poverty reduction and entrepreneurship, and they can help with the transition from the informal to the formal economy. For good reason, they are often described as "ladders" or "engines" of development because they encourage and enhance skills development, productivity and competitiveness – vital ingredients to increase men and women's participation in the labour market, with often better work opportunities than in purely domestic markets.[3] Global supply chains also bring critical growth and development to low- and middle-income countries and they can bring benefits to domestic markets through their positive spill-over effects.

As well as ignoring the three ways in which a company can be involved in a human rights harm and the importance of mitigation and leverage, the Zero Draft Treaty fundamentally misunderstands the ability of companies to prevent and respond to adverse impacts that arise from their business relationships. It does not sufficiently reflect the reality that a company's ability to influence the supply chain is highly divergent and depends to a significant degree on the number of suppliers it has (for example, many large companies have several thousand suppliers and various tiers); the structure and complexity of the supply chain; and - crucially - the company's market position. This complexity is recognized by the UNGPs, and other standards such as the OECD Guidelines for Multinational Enterprises, which outline how a company can respect human rights in this reality. Furthermore, while there are human rights risks and impacts in some global supply chains, in the vast majority of cases these are not caused by cross-border trade, but they mirror the harms in those economies generally. The Zero Draft Treaty's failure to grasp these factors is a major point of concern.

[2] Conclusions from the 2016 International Labour Conference: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489115.pdf

[3] Research suggests that, in many developing countries, supply-chain connected firms especially those in export processing zones have better working conditions compared to alternative, domestic firms which often operate in the informal economy.

Second, the Zero Draft Treaty will have unintended consequences on flows of foreign direct investment required to drive inclusive economic growth and it will discourage companies from working with other stakeholders to gradually improve conditions for workers and communities, especially in regions with multi-faceted and complex human rights challenges. Assigning greater liability to parent companies, retailers and brands on the basis of their high-up position in the supply chain - rather than assigning liability to the business entity that is ultimately responsible for the harm - would have perverse consequences for the structure and conduct of global business. It may, for instance, encourage companies to either create increasingly complex corporate forms so that their assets sit in an entity that is not engaged in transnational activities and cannot be accessed by plaintiffs or to simplify their supply chains and withdraw activities from countries where they face considerable liability. This risks cutting certain countries off from international markets and it would discourage companies from engaging in challenging environments and working with other stakeholders to achieve sustainable development.

Companies are increasingly committed to finding workable solutions to complex human rights-related issues, especially in high-risk environments, through partnerships and stakeholder engagement. However, a punitive, legal-compliance approach threatens this. When a TNC enters or engages in a new market it understands and accepts that it is subject to national and local jurisdiction. It also recognises the responsibility to respect human rights exists over and above compliance with national laws and regulations (as specified under the UNGPs). The Zero Draft Treaty's provisions, however, create unknown legal risks that would incentivise companies to avoid trading with or sourcing from risk countries, avoid entering various jurisdictions, and "cut and run" instead of "staying and behaving." On top of this, the threat of a backlash from regulators, investors and civil society will drive companies to source or operate in countries that pose a lower risk of being involved in an adverse impact and avoid suppliers where harms may be a problem. This would leave the market open to other companies - not affected by the law - that may have less awareness of or motivation to respect human rights.

Third, the provisions on trade and investment agreements (Article 13, paras 6 and 7) create huge levels of uncertainty - not least for States - in terms of how the unclear proposals would be interpreted and implemented. Taken together, they could stifle investment and lead to excessive litigation costs for all sides if State Parties do not abide by provisions of existing trade and investment agreements in order to comply with the very broad and unrealistic provisions of this Zero Draft Treaty without recourse for business.

B. Specific text concerns with the Draft Zero Treaty

In addition to the overarching concerns, the business community wishes to make the following points about specific provisions in the Zero Draft Treaty.

iv. Scope, scale and definitions

There are many problems and inconsistencies with the Zero Draft Treaty's scope, scale and definitions.[4]

First, it is not clear that direct international human rights obligations would apply only to State Parties (i.e. those that ratify the Treaty). The language in the preamble which underlines that "all business enterprises… shall respect all human rights" is confusing because many jurisdictions have concluded that the word "shall" can mean "must" (as well as "will" or "may"). On top of this, while it is not certain that preambular paragraphs themselves are legally-binding,[5] this preamble is listed under the very first Article in Section 1 implying that it would be fully part of the Treaty. In addition, the near universal use of the term "violations" (instead of "abuses" as the UNGPs refer to),[6] especially when considered alongside the aforementioned points, could imply that companies have a direct legal international human rights obligation under this Treaty. If the Treaty is not intended to impose international human rights duties on business then, as a practical convention used by Governments, the text should adopt the term "abuse" instead of "violations" or at least state that companies would have a duty not to violate national laws that reflect the provisions of this Treaty.

Second, another major discrepancy in the Zero Draft Treaty is that although the preamble underlines that "all business enterprises" shall respect all human rights, for the most part, the draft text applies *de facto* to companies with "activities of a transnational character." As we have repeatedly stated, it is deeply problematic and illogical that TNCs, importers and exporters would be subject to the Treaty, but domestic companies and suppliers (regardless of their size or market share) would not be purely because their activities fall within national borders. Linked to this, the decision to frame the Treaty's provisions around "any" business "activities" instead of being consistent with the UNGPs and applying the responsibility to respect human rights to all business entities on the basis of their actual involvement in a harm raises many concerns about legal definition, applicability and enforcement.

- Focusing the Treaty's scope on "any business activities of a transnational character" may avoid the challenge of establishing a definition in international law of "TNC" (and "OBE"), but it creates a new challenge by requiring an accepted definition of *this* term, which does not exist in law or social sciences. Limiting the Treaty's scope to "any business activities of a transnational character" would exclude countless millions of national firms that make up the vast majority of business in the world. Furthermore, defining this as "any for-profit

[4] The term "OBEs" in the title is misleading. As it is always paired with "transnational corporations" (TNCs) it can give a false impression that this instrument would apply to all business enterprises. Given the footnote to HRC resolution 26/9 that established the IGWG, the 2017 "elements" paper and now the Zero Draft Treaty, it is clear that the IGWG Chair does not intend to apply the Treaty to all business enterprises, including those that operate domestically.
[5] International lawyers continue to debate this and Article 31(2) of the Vienna Convention on the Law of Treaties permits interpretation on this, where it says that: "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."
[6] The Zero Draft Treaty uses the term "violations" 23 times, whereas the term "abuse" – which is common throughout the UNGPs - appears twice (in Article 1 and Article 15 respectively).

economic activity" compounds the problem. It would exclude State-owned enterprises (SOEs) that operate domestically and/or are not profit-driven from most of the Treaty's provisions.[7] This would result in the absurd situation whereby an SOE in a joint venture partnership with a private sector enterprise would not be held responsible for a harm it is in involved in, but the private enterprise would be held accountable regardless of its actual involvement. Similarly, a State would not incur any liability for a harm that occurs as a result of its public procurement practices that relate to any cross-border activity. This imbalance is also striking when considering the ongoing trend towards public-private-partnerships in delivering public services. Exempting SOEs[8] and the role of the State in relation to its economic activities from most provisions is a sign that some States wish to scapegoat private business and are unwilling to lead by example.

- There is also the hugely important question of how such an approach could implemented and enforced. It would be extremely difficult, if not impossible, to assess the vast array of activities that have a "transnational character" and reasonably determine liability for a harm that involves a cross-border transaction on a practical or principled basis. In addition, from an operational perspective, given the failure to understand the three distinct ways that a business can be involved in a harm, if companies were to be held liable for a violation of all human rights in the context of any activity of a transnational character they would need the corresponding capabilities to meet such a huge responsibility. For example, they would need open access to inspect any site and information concerning a business activity linked to their operations in any jurisdiction (including that of SOEs); unfettered movement into and inside the relevant country and territory; and the ability to issue fines and penalties, as well as other incentives, at will. This could lead private business to assume many traditional State functions in terms of regulatory oversight and enforcement.

- On top of this, it is not clear how obligations centred on "business activities of a transnational character" would play out in countries that are part of intergovernmental bodies, such as regional organisations. Our preliminary understanding is that trade within regional bodies could be covered by this definition and the Treaty could have large negative consequences on these markets.

Third, the provisions that state that the Treaty covers "all human rights" (the preamble) and "all international human rights and those rights recognised under domestic law" (Article 3, para 2 on the "scope") are illogical from both a practical and legal perspective. As others have pointed out,[9] the terms "all human rights" and "all international human rights" have no legal basis and it is not clear what human rights would be covered by the Treaty or which standards would be used to define a human rights violation. Would it mean those rights that are recognized as *jus cogens*, all rights under customary international law, or any hard or soft law standard and its corresponding interpretation text and guidance that could be judged relevant?

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[7] The Zero Draft Treaty's only provision that could be understood to include SOEs is under Article 9, para: 1 on "prevention", which says: "State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties' territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities."

[8] A 2016 report by the UN Working Group on Business and Human Rights outlined concerns about the advantages enjoyed by SOEs owing to their relationship with State agencies, such as direct subsidies, preferential regulatory treatment and State-backed guarantees, leading to them being less transparent, accountable or efficient, enjoying a position of market domination and operating with higher levels of impunity. Equally, there are concerns about the apparent lack of awareness of many SOEs of their responsibility to respect human rights and their poor performance in this regard (A/HRC/32/45 - Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises - 4 May 2016).

[9] Professor John Ruggie explained that the term has "no legal pedigree" and suggests that it was supposed to say "all internationally recognised human rights": https://www.business-humanrights.org/en/comments-on-the-"zero-draft"-treaty-on-business-human-rights

This ambiguity needs to be urgently addressed because - to quote others - "it flies in the face of the principle of legality" and it is extremely difficult to see how a State could implement a treaty with "as open ended an prescription (sic)."[10] On top of this, the inclusion of the second phrase in Article 3, para 2 ("those rights recognized under domestic law") would bring tensions and contradictions between international and national standards and laws to the fore without offering any solution on how these would be addressed. It also goes against a core tenet of the UNGPs which asserts that the corporate responsibility to respect human rights "refers to internationally recognized human rights"[11] and that it "exists over and above compliance with national laws and regulations protecting human rights."[12]

- The definitions of the terms "victims" and "harm" are also unclear, too broad and they do not reflect common civil law traditions. For example, the language concerning the "immediate family or dependents" is muddled. Similarly, it is not clear what "emotional suffering" and "substantial impairment of their human rights" means or how they would be interpreted, especially given the Treaty's ambiguous use of the term "all human rights" under Article 3 on "scope."

- Furthermore, the inclusion of "environmental rights" in the Article on Definitions (as well as in other parts of the Zero Draft Treaty such as under the "rights of victims" and "prevention") raises many problems. It raises the risk of the IGWG exceeding its mandate as UN Resolution 26/9 makes no reference to environmental considerations. In addition, "environmental rights" are not defined in international human rights law and their inclusion creates uncertainty on how these supposed rights would be applied to international human rights law and national jurisdictions. The environment is understood as a common good that cannot belong to a single person. As such, the protection of the environment is regulated in a different way to the protection of individual rights. It should be noted that the UN Special Rapporteur on human rights and the environment acknowledges on his website[13] that many questions about the relationship of human rights and the environment remain unresolved. There is also a risk that the work of the IGWG in this area may conflict with and undermine other UN processes, including the work of the ad-hoc open-ended Working Group on the Global Pact for the Environment.

Fourth, the focus of obligations on "natural or legal persons" or "all persons" is so far reaching - it has (to our knowledge) no precedent in other treaties and it creates tremendous legal uncertainty. The Zero Draft Treaty poses, but does not answer, fundamental questions including under what circumstances would a violation in the context of a business activity of a transnational character be judged to be the responsibility of a natural or legal person, and on what legal grounds? If the former category, which natural persons specifically would be held liable and for what alleged violations? How would such a sweeping approach manage the likelihood of multiple parallel law suits on the same case, perhaps in a number of jurisdictions, and the possibility of competing and contradictory judgements?

Fifth, the use of the term "omissions", alongside "acts", in relation to harm in the context of business activities of a transnational character raises many questions, not least what does

[10] Carlos Lopez, International Commission of Jurists: http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/
[11] "Internationally recognized human rights" are understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.
[12] Commentary to UNGP 11: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[13] https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentIndex.aspx

"omissions" mean exactly? It is a very vague concept and would unduly broaden the scope of companies' liability while creating legal uncertainty.

Sixth, the Zero Draft Treaty contains other imprecise and problematic terms in the Articles that concern the "scope" and "definitions." For example, Article 6 proposes that domestic statutes of limitations "should not be unduly restrictive and shall allow an adequate period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred abroad." However, the terms “unduly” and "adequate" are very vague and the Article ignores that liability should be limited to cases where there is a predictable and causal relationship between the harm and the act or omission.

In short, it is unacceptable that an international legal instrument would apply to human rights violations in the context of any business activities of a transnational character but not to those States that do not ratify the Treaty and also not to all business enterprises. It is also unacceptable that the Treaty ignores the three ways in which a company can be involved in a harm and the corresponding action it should take as a result.[14] The business community, as well as many governments and others, has made these points many times. It is highly worrisome that the IGWG proceeds with such a problematic and narrow approach that will not result in an outcome that promotes the shared goals of advancing human rights around the world.

v. Prevention

The provisions in Article 9 on "prevention" are equally problematic.

First, the approach is not consistent with the UNGPs' four-step human rights due diligence process[15] that is expected of companies and its formulation is unclear and unworkable.

- Professor John Ruggie has noted that the Zero Draft Treaty "posits human rights as a standard of results: it requires business 'to prevent' harm"[16] rather than it following the tried and tested approach of the UNGPs, which presents human rights due diligence as a standard of expected conduct (i.e. a process) in which companies should take adequate measures to seek to prevent, mitigate and account for how they address their human rights impacts. Others observe that the proposed approach "significantly departs" from what is generally known as human rights due diligence and "could be seen as broader responsible business measures."[17] Making the due diligence duties outcome-based instead of process-based is not realistic.

- Under many of the draft Treaty's provisions, a company's due diligence requirements would be sweeping and cover "its activities", those of "its subsidiaries", those entities under its "direct or indirect control", and those entities "directly linked to its operations, products or services." This scope is not feasible or appropriate. It is not clear what "entities under its

[14] Under the UNGPs a company may: (1) "cause" negative human rights impacts; (2) "contribute" to adverse impacts; or (3) a companies' operations, products or services may be "directly linked" to negative impacts by a business relationship.
[15] The UNGPs' four-step approach to human rights due diligence entails: (i) Assessing actual and potential human rights impacts; (ii) Integrating and acting upon the findings; (iii) Tracking the effectiveness of the company's responses; and (iv) Being prepared to communicate how impacts are addressed.
[16] Professor John Ruggie: https://www.business-humanrights.org/en/comments-on-the-“zero-draft”-treaty-on-business-human-rights
[17] Carlos Lopez, ICJ: http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/

indirect control" means. A company would also need far greater powers and abilities to comply with this extremely far-reaching and badly defined approach. On top of this, it is unclear how Governments and judiciaries would - in a practical sense - go about monitoring compliance.

- Another way in which the Zero Draft Treaty is not consistent with UNGPs' four-step process on due diligence is that - except for one belated reference in Article 15 - it excludes the idea that companies should "mitigate" and "seek to mitigate" adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[18] Under current standards, in situations where a company cannot prevent a harm or where it cannot be held solely responsible, it should try and make the adverse impact less severe or painful on affected rights-holders. Ignoring the concept of "mitigation" fails victims and it does not adequately reflect the possible business involvement in a harm.

- The Zero Draft Treaty's approach also ignores vital nuances included in the UNGPs' expectation of due diligence. The provisions do not recognise that human rights due diligence will "vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations" (UNGP 17).[19] Also, it disregards that "appropriate action will vary according to: (i) whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) the extent of its leverage in addressing the adverse impact" (UNGP 19).[20] These are central elements of the human rights due diligence process that must not be undermined.

- The Zero Draft Treaty's provision for companies to report publicly and periodically on non-financial matters, including at a minimum environmental and human rights matters, shows that the Treaty's approach to due diligence would extend beyond human rights. Overall, the requirement for public and periodic reporting is not in line with the UNGPs which says that companies “should be prepared to communicate” externally how they address their human rights impacts (UNGP 21). The draft Treaty is over-reaching by taking such a broad scope to reporting. By including non-human rights matters in its ambit, it pays no attention to existing regulatory standards and practices in those fields. At the same time, it is not at all clear who would assess the severity of the potential impact and/or how to determine the information required to be disclosed. Also, limiting the focus of reporting on the severity of a potential impact and excluding consideration of materiality ignores the fact that reporting can also address "actual impacts" and the term "materiality" can, in fact, reflect a company's significant economic, environmental and social impacts (a term that covers human rights), such as under GRI standards.[21] It would make it harder for a company to

[18] See UNGPs 13, 15 and 17 (among other references).
[19] Critically, the commentary to UNGP 17 adds that "where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence."
[20] The commentary to UNGP 19 notes other important considerations that makes clear that human rights due diligence is not a black and white process. For example, the commentary adds that "there are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage." In such circumstances, the company "should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so." However, where the relationship is “crucial” to the business, "ending it raises further challenges."
[21] GRI explanation of materiality: https://g4.globalreporting.org/how-you-should-report/reporting-principles/principles-for-defining-report-content/materiality/Pages/default.aspx

be able to assess its risks and impacts and integrate the findings from its assessments into its functions and processes in a comprehensive manner.

- On top of this, new human rights laws may contradict other laws, principles and incentives governing corporate conduct. For example, reporting obligations may come into conflict with other human rights-related reporting requirements,[22] as well as with anti-competition practices, data protection laws and other customs, in which partial reporting by companies can be justified by the need to keep certain, sensitive commercial information confidential. For example, in August 2015 the USA Court of Appeals for the District of Columbia decided that the labelling requirement under section 1502 of the Dodd Frank Act was considered "compelled speech," which was in violation of the First Amendment of the US Constitution. In addition, the due diligence process may not be feasible at certain times, such as when contractual relationships pose barriers for tracking clients' actions. Furthermore, there is a risk of a potential misalignment of incentives when considering human rights requirements alongside other existing corporate regulation such as on tax allowances and treatment, investment and trade, corporate purpose, directors' duties and financial reporting.

- As already mentioned, the requirement for companies to undertake "pre- & post environmental and human rights impact assessments" and report on "environmental matters" under this draft Treaty is an example of the IGWG going beyond its mandate. The phrasing in the Zero Draft Treaty also does not draw a clear link between the environment and human rights (for instance, it would be more accurate to consider environmental impacts that may lead to a human rights harm) and it would also create additional uncertainty for business.

- Companies take stakeholder engagement very seriously and recognise its huge value. However, the proposal for laws that include a requirement for "meaningful consultations" through "appropriate procedures" poses many legal, definition and practical implementation challenges. Companies are best placed to determine for themselves which individuals and organisations to engage with and how. They should not be compelled to consult with an undefined and unlimited number of "stakeholders" in ways ("appropriate procedures") that are also not understood. The draft Treaty text would overburden business, not necessarily help companies to understand their human rights risks and it would inhibit trust between the stakeholders. It also disregards the fact that it can be very difficult for companies to identify relevant stakeholders to consult with to help it determine and meaningfully respond to its human rights risks in a way that understands the viability of the business. Equally, there may be few external stakeholders to engage with in some regions, a lack of credible ones (such as where government-organised NGOs and non-independent trade unions dominate civic space), or even circumstances where NGOs do not act in good faith.

- The provision in the Zero Draft Treaty that requires "all persons with business activities of transnational character" to undertake due diligence obligations is completely unrealistic.[23] This suggests that natural or legal persons - either an individual human being who works for a business with activities of a transnational character or any type of legal entity such as

[22] Such as Section 1502 of the USA's Dodd-Frank Wall Street Reform and Consumer Protection Act (2010); the EU Non-Financial Reporting Directive (2014); Section 54 of the UK Modern Slavery Act (2015); and the French corporate duty of vigilance law in relation to human rights, health and safety and the environment (2017).

[23] Contrary to the Article 4 on "Definitions", we interpret Article 1, para 1 as requiring SOEs to carry out human rights due diligence ("State Parties shall ensure… that all persons with business activities of transnational character within such State Parties' territory or otherwise under their jurisdiction or control shall undertake due diligence obligations").

a profit-driven business that operates across borders - would be obliged to carry out this large human rights due diligence process regardless of their size and/or capacity to do so. The Zero Draft Treaty does not consider legitimate threshold questions that have been the focus of much discussion in the development of recent national laws on the human rights due diligence process. In addition, while there is a separate provision that tries to offer an exemption to SMEs (Article 9, para 5) it is wholly insufficient because it only suggests that States "may" choose to exempt "certain SME undertakings" from "selected obligations." This gives no assurance that this would happen in reality and it offers no clarity as to how these vague terms would be applied. The UNGPs take a far more realistic approach to this important process, especially by acknowledging that SMEs "may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms."[24] SMEs form the backbone of national economies and the global supply chains of large companies. They account for about 90 percent of all businesses (according to the International Finance Corporation) and they contribute up to 45 percent of total employment (according to the World Bank). Their collective contribution to society and the planet is huge. They should be better supported to respect human rights and not face unworkable requirements and potentially significant liability risks.

Second, the Zero Draft Treaty's approach to human rights due diligence and liability for non-compliance is problematic and misaligned with established best practice:

- Under the proposals, parent companies and the world's more visible buyers and retailers would likely face greater liability - regardless of whether it is involved in the wrongful act or omission - than their business partners that may, in fact, have caused a harm. The clause that stipulates that the due diligence requirements be reflected "in all contractual relationships which involve business activities of transnational character" would make parent companies and big brands and retailers liable for harms in any part of their supply chain because as John Ruggie explains "the contractual relationships ultimately begin with them."[25]

- The provisions on prevention and civil liability also potentially "extend and globalise"[26] a company's duty of care that currently exists under UK tort law and in States that follow English law. A 2017 court decision in Canada demonstrates the limitation of creating liability for companies based on concepts of human right due diligence and/or duty of care.[27] A judge in Ontario rejected a proposed class-action lawsuit against the retailer Loblaws and its parent company George Weston Ltd, which were accused of vicarious liability for the alleged negligence of their suppliers and sub-suppliers linked to the Rana Plaza garment factory in Bangladesh that collapsed in 2013. In dismissing the case, the judge said: "Loblaws' liability is based on it voluntarily assuming a duty of care by developing and promulgating ethical purchasing practices (CSR standards,) which one

[24] Commentary to UNGP 14
[25] John Ruggie: https://www.business-humanrights.org/en/comments-on-the-"zero-draft"-treaty-on-business-human-rights
[26] Richard Meeran, Leigh Day: https://www.business-humanrights.org/en/the-"zero-draft"-access-to-judicial-remedy-for-victims-of-multinationals'-"mncs"-abuse
[27] Das v. George Weston Limited, 2017 ONSC 4129: Para 536 of the Court's decision noted the problem of the plaintiff's claim that the company has a duty of care. "First, there is the prospect of indeterminate liability because there is no principled way to draw a line between those to whom the duty if owed and those to whom it is not. Apart from the Plaintiffs capping their liability by making a claim for around $2 billion, the amount of the liability is indeterminate, the temporal exposure to liability is indeterminate, and the range of claimants is indeterminate extending beyond those who were on New Wave's payroll. Second, there is the prospect of a massive extension of liability imposed on purchasers who would become responsible for the safety of their supplier's employees in foreign lands. Third, imposing a duty of care would encourage undesirable defensive tactics that would, from a behaviour modification and a social utility perspective, make the situation of the Plaintiffs worse not better."

would like to think is a good thing. But from an exposure to liability perspective, Loblaws would have been far better off if it had not developed and promulgated its CSR standards. And in the future, it and others would be far better off not doing business with Bangladesh rather than relying on CSR standards, which as demonstrated by the case at bar, do not insulate a business from liability but rather attract claims, including allegations that the duty of care was breached because the CSR standards were inadequate to protect a supplier's or sub-supplier's employees."[28]

- The problems of the Zero Draft Treaty's link between due diligence and liability are compounded when you consider the provision that says that failure to comply with the Treaty's due diligence provisions shall result in "commensurate liability and compensation" and the proceeding Article, dedicated to "Legal Liability" which says that legal liability should be "dissuasive;"[29] involve "reparation to the victim;"[30] and may require a "reversal of the burden of proof."[31] The Zero Draft Treaty's approach to due diligence is thoroughly punitive and encourages business not to engage in challenging environments where their investment and presence may help drive up standards and conditions for workers and communities, something that goes against the spirit and aims of SDGs. It is also unfathomable that a business could be liable to pay compensation to victims for not complying with every step of the proposed due diligence process (as drafted, a representative of a potentially affected group could demand reparations if a company does not meaningfully consult with him/her for example). Similarly, reversing the burden of proof in the context of human rights due diligence would mean companies having to prove that they carried out the due diligence process in full, which violates due process principles and fundamental notions of fairness in numerous jurisdictions, as well as sets an unrealistic burden on companies, especially SMEs. It would also likely come into conflict with anti-competition practices, data protection laws and other customs.

- There are other problematic finance-related provisions in this Article. The proposal for due diligence laws that "may require establishing and maintaining financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation" risks creating situations where companies are extorted for money for perceived violations of the Treaty (whether legitimate or not). Similarly, the reference for due diligence to "prevent human rights violations within the context of its business activities, including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services, including through financial contribution where needed" does not make sense. What does "the financial contribution where needed" mean and why is it included here?

vi. Definitions and application of legal liability

As well as the problems with the aforementioned link between due diligence and legal liability, other provisions on legal liability, notably civil and criminal liability, pose many additional questions and concerns.

[28] Ibid, Para 456.
[29] Zero Draft Treaty - Article 10, para 1.
[30] Ibid - Article 10, para 3.
[31] Ibid - Article 10, para 4.

While the Zero draft Treaty text is rife with vague and broad terms in relation to legal definition and corresponding liability[32], one thing that is clear is that it would as Professor John Ruggie explained "inevitably hold parent and lead companies liable for any harm anywhere in their supply chains because the contractual relationships ultimately begin with them." [33]

The Zero Draft Treaty grossly oversimplifies and misunderstands the nature of global business and sets an unreasonable bar for creating liability on the basis of activities that may be beyond a company's control. It also ignores many key elements of the UNGPs on remediation, notably in its articulation of the three ways in which a company can be involved in a harm.[34] Missing from the text is recognition of the fact that companies – under the UNGPs – should only provide for or cooperate in remediation processes for those harms they have caused or contributed to, not necessarily for adverse impacts directly linked to its operations, products or services by a business relationship (although they "may take a role in doing so").[35] The OECD MNE Guidelines supports this by explaining that when an adverse impact is directly linked to an enterprise's operations, products or services by a business relationship, "[t]his is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship."[36] Also ignored is the importance of mitigation in relation to access to remedy. The Zero Draft Treaty does not recognise that companies may need to prioritize actions to seek to prevent or mitigate severe or irremediable adverse impacts.[37] As such, the text calls on States to assign automatic liability to parent companies and those retailers and brands at the top of the supply chain rather than to any entity in the value chain that is ultimately responsible for the harm.

On top of this, the Zero Draft Treaty includes a deeply problematic provision that would allow Courts to "require, where needed, reversal of the burden of proof for the purpose of fulfilling the victim's access to justice" (Article 10, para 4). Introducing a reverse onus clause to require the accused party to prove its innocence violates due process principles and fundamental notions of fairness.[38] To add to this, the Zero Draft Treaty offers no guidance on the situations where words "where needed" could apply. When considered alongside the other thoroughly misguided provisions, definitions and scopes this Article is very concerning.

As well as these overarching and general challenges, other provisions in the Zero Draft Treaty raise specific concerns and problems.

First, regarding the specific provisions on civil liability:

- The very flexible and imprecise definition of civil liability (notably under Article 10 para 6, as well as in relation to other Articles, including Article 5 para 5 on "domicile") is particularly

[32] Unclear terms include:
- All international human rights" and "all human rights";
- "Business activities of a transnational character";
- "Natural and legal persons" or "all persons";
- "Omissions in the context of business activities of a transnational character";
- The language on "domicile", such as "substantial business interest" and "instrumentality"; and
- "Environmental rights", "environmental remediation" and "ecological restoration."

[33] John Ruggie: https://www.business-humanrights.org/en/comments-on-the-"zero-draft"-treaty-on-business-human-rights
[34] Under the UNGPs a company may: (1) "cause" negative human rights impacts; (2) "contribute" to adverse impacts; or (3) a companies' operations, products or services may be "directly linked" to negative impacts by a business relationship.
[35] Commentary to UNGP 22
[36] OECD Guidelines for Multinational Enterprises, General Policies, page 20: http://www.oecd.org/daf/inv/mne/48004323.pdf
[37] UNGP 24
[38] Traditionally, each party involved in a legal dispute needs to produce the evidence, from their own resources, that will prove the claims they have made against the other party.

problematic. It is incompatible with the established doctrine of separate legal personality,"[39] it would create irreconcilable conflicts between domestic corporate laws (of which the independence and distinctness of separate legal entities is a fundamental principle), and it provides a far broader scope for liability than exists in most current national laws. In particular, the Zero Draft Treaty's provisions blur the boundaries of legal personality (such as by suggesting that a legal person or association of natural or legal persons can have an infinite number of domiciles); they cause huge legal uncertainty (by introducing multiple abstract terms such as "instrumentality"); and they would establish liability on very broad grounds (such as direct or indirect ownership of shares).

- The text, notably Article 10 para 6, is particularly dangerous as it foresees civil liability without causality and it assigns legal liability to situations where a harm is directly linked to a company through its business relationship without any recognition of or safe harbour for companies that take meaningful steps to try and halt the abuse. This was something the UNGPs correctly avoided by calling upon companies instead to use their influence to affect changes in their business relationships. By contrast, the Zero Draft Treaty incorrectly assumes that businesses have control over entities several steps removed from them in the supply chain and it removes any incentive for the (often purely local) company that is responsible for causing or contributing to the wrongdoing to halt or mitigate the harm.

- Article 10 para 6 is also nebulous. The language on exhibiting "a sufficiently close relationship" has no meaning in law and it is not clear what is meant by a "strong and direct connection" between the conduct of all persons with business activities of a transnational character and its subsidiary or entity within its supply chain. In addition, the provision on foreseeability is extremely expansive and it is not clear if the intention is to use foreseeability in its conventional legal sense to limit liability for unforeseeable impacts or to expand liability to include all foreseeable human rights violations, independent of causation.

- The provisions on civil liability are inconsistent. In addition to our strong concerns about obliging States to assign liability to "all persons" on the basis of non-compliance with the many due diligence duties (as mentioned earlier in this response), the attribution of civil liability is also incoherent across the various Articles in the Zero Draft Treaty. The provisions on civil liability in Article 10, para 6 do not align with earlier provisions in Article 9 on how liability would be assigned in situations of a natural or legal persons' failure to comply with the Treaty's due diligence duties.

Second, the specific provisions on criminal liability suffer from similar lack of precision in their formulation that makes them hard to interpret, implement and enforce:

- Due to the Zero Draft Treaty's many unclear definitions and scope, this section unfairly targets persons carrying out "business activities of a transnational character" and not domestic businesses for example. It also gives no consideration for the inevitably inconsistent approaches that different national courts around the world would take to determine criminal liability under this instrument. In addition, it is not clear what the term

[39] Hogan Lovells, said the proposed definition of civil liability "cuts against the established doctrine of separate legal personality" – "UN Treaty on business and human rights: Working Group publishes draft instrument" (July 26, 2018): https://www.hlregulation.com/2018/07/26/un-treaty-on-business-and-human-rights-working-group-publishes-draft-instrument/

"intermediaries" means or how such a broad set of "international human rights instruments" would apply in relation to criminal liability.

- At the same time, the language on applying criminal liability to "principals, accomplices and accessories" - i.e. secondary liability - gives no consideration for the fact that "the nature and extent of secondary liability varies extensively from one state to another", which thus creates rule of law problems because "the same conduct may constitute an offense in state and not another."[40]

- Furthermore, the obligation for States to incorporate or implement within their domestic law "appropriate provisions for universal jurisdiction over human rights violations that amount to crimes" (Article 10, para 11) raises many legal and political complications. For example, because the principle of universal jurisdiction relies on national authorities to enforce international prohibitions, there are big questions around the impartiality of the prosecuting country towards the person facing criminal liability. There is no way to guarantee that trials would be conducted with full respect for due process and not be politically-motivated. In addition, many States' national legal systems lack the necessary legal definitions and/or means to investigate and prosecute on the basis of universal jurisdiction.

vii. A misguided focus on extraterritorial jurisdiction

The Zero Draft Treaty includes many provisions that would seek to increase victims' ability to bring extraterritorial claims against a company for violations in the context of business activities of a transnational character. These appear in the articles on "Applicable law", "Jurisdiction", "Rights of Victims", "Legal Liability", "Mutual Legal Assistance" and "Consistency with International Law."

As well as the dangers of the previously mentioned provision calling for States to ensure universal jurisdiction over human rights violations that amount to crimes, the Zero Draft Treaty's other provisions on extraterritorial jurisdiction (ETJ) raise many other problems and concerns:

- Giving so much attention to ETJ does not respect national sovereignty, the principle of territorial integrity and non-intervention in the domestic affairs of other States (thus making the text inconsistent with other principles mentioned in Article 13). Overall, the draft text fails to define the conditions under which the sovereignty and obligations of Host States would not be infringed.

- The Zero Draft Treaty's provisions are also inconsistent with established legal principles and existing regulation. For example, the fact that a State has jurisdiction to regulate non-State actors, does not mean that it has a duty to exercise that jurisdiction. According to the commentary to UNGP 2 “at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.” At the same time, the proposals on ETJ diverge with current laws such as the EU's Rome II Regulation on the conflict of laws, which created a

[40] Hogan Lovells: https://www.hlregulation.com/2018/07/26/un-treaty-on-business-and-human-rights-working-group-publishes-draft-instrument/

harmonized set of rules within the EU that stipulates that in general the law where the tort occurred applies.

- The provisions take the focus off the urgent need for many States to improve victims' access to effective remedy at the domestic and local level. By focusing only on allegations against multinationals, it also leaves victims of harms caused by purely domestic companies or SOEs without access to remedy.[41]

- Many of the Zero Draft Treaty's provisions are equally unclear and unrealistic. For example, the language concerning the "domicile" of a person (or association of natural or legal persons) who could face prosecution is imprecise and overreaching. There is no clear legal definition of "substantial business interest." It could, for example, be interpreted as someone who has ownership of more than 3 percent of shares in a company or than 5 percent of income is derived from this interest. Similarly, the terms "agency, instrumentality, branch, representative office or the like" are far too broad and unclear. They could apply to everything from telecommuting to contracting and they undermine applicable national corporate laws and other important consideration, such as national tax structures.

- The practical and procedural shortcomings of ETJ are also ignored in the Zero Draft Treaty. These include:
  - The tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years;
  - The huge challenges presented to national courts when they must rule according to foreign legal principles and jurisdiction;
  - The struggles that many courts' have in resolving multiple objections being raised at the same time and threshold questions;
  - The challenge of “forum shopping” and the fact that courts in different countries may make different and contradictory judgements on the same case;
  - The difficulties in obtaining evidence and testimony abroad; and
  - The legal uncertainty it brings for victims as well as companies.

- It is worth considering how this Zero Draft Treaty compares with other existing International Human Rights Conventions on the issue of ETJ. A number of States have argued that extraterritorial scope may only apply in Treaties like the UN Convention on Economic Social and Cultural Rights under “certain exceptional circumstances.” For example, the Government of Norway explained that the question of extraterritorial application "can only arise where a State exercises effective control over the territory where the business operation is carried out, or where a State exercises a high degree of authority or control over the entity in question affecting human rights abroad.”[42] This is a very limited scope that the Zero Draft Treaty does not stick to.

- Furthermore, when considering one national law that has been the subject of great debate on ETJ, a report by OHCHR on amicus curiae briefs filed by States in Alien Tort Statute

[41] Regarding SOEs, the exercise of extraterritorial jurisdiction can face the barrier of sovereign immunity making SOEs exempt from the Treaty's reach.
[42] The Government of Norway - General Discussion on the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017): https://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf

(ATS)[43] cases between 2000 and 2015[44] found that arguments against the use of ETJ centred on four considerations:

(i) Legal objections: according to the USA, the ATS was never intended to apply extraterritorially and other States (including UK, Australia, the Netherlands and Switzerland) disputed the existence of "universal civil jurisdiction."

(ii) Foreign policy objections: concerns were raised about the possible adverse implications of extraterritorial litigation for diplomatic relations and the realisations of foreign policy strategies. Others voiced concerns about the possible closing-off of foreign policy options, including economic engagement. Finally, the potential of unintended clashes between the laws of the USA and the laws of other States should ATS be extended extraterritorially were cited with concern.

(iii) Economic and legal development objections: Firstly, there were concerns about the impact on trade and investment which help "lift people out of poverty" by bringing open markets that "ignite growth, encourage investment, increase transparency, strengthen rule of law." Secondly, the UK and Dutch Governments argued that "by allowing ATS claims with little nexus with the US, some States might be given reason to down-play or even ignore their responsibilities for implementing their human rights obligations". In addition, Germany noted that "adverse pronouncements by one State on the quality of justice in another State can become 'self-fulfilling'."

(iv) Commercial and practical objections: States raised concerns on the difficulties and expenses associated with the litigation, the problems associated with gathering and presenting evidence from outside the forum State, the lack of efficiency of extraterritorial litigation, the excessive burden placed in the US courts, and issues of legal uncertainty and general unfairness. Other concerns raised include the issue of "forum shopping" and the difficulties of enforcing judgements in cases where jurisdiction is disputed.

viii. The rights afforded to victims

While some question the need for a specific Article on the "rights of victims" at all,[45] the provisions in the Zero Draft Treaty add to the many problems and queries.

- Many provisions on the rights of victims are vague and problematic: The overall definition of victim as a person(s) "alleged" to have suffered harm does not make sense as it would allow anyone to claim victim status and the corresponding rights if they allege that a harm occurred. It is also not clear how the various forms of reparation would relate to companies and States. In addition, the text does not specify how consideration for domestic and international law would be managed, especially if the two systems are incompatible. Furthermore, given the worrying provisions throughout the Zero Draft Treaty on extra-territorial jurisdiction, it is not clear which domestic legal regime would apply.

- The draft text's inclusion of "environmental remediation and ecological restoration" as a form of remedy that victims would be entitled to opens the door to another body of law

[43] The Alien Tort Statute of 1789 is a USA law that grants jurisdiction to federal courts to hear tort claims by aliens alleging violations of "the law of nations."
[44] OHCHR – " Business and Human Rights: Enhancing Accountability and Access to Remedy" (April 2015): https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf
[45] Carlos Lopez, ICJ: http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-ii/

under this Treaty without clarifying the relationship between the environment and human rights.

- The provision that stipulates that "State Parties… shall take action against those natural or legal persons allegedly responsible" raises concern because of its ambiguity. There is no explanation of the type of action State Parties would be expected to take in relation of allegations and it implies that "alleged responsibility" means guilt.

- The Zero Draft Treaty's provision that "victims shall be guaranteed appropriate access to information" in relation to the pursuit of remedies" would mean that the “principle of production of evidence” (for example, in civil lawsuits it is for the parties to adduce evidence of the facts of the case) would not apply in human rights cases. At the same time, the provision does not specify what information and whose information. It may contradict other laws, principles and incentives governing corporate conduct. For example, it may come into conflict with anti-competition practices, data protection laws and other customs that is justify the need to keep certain, sensitive commercial information confidential.[46]

- The Zero Draft Treaty also encourages frivolous litigation and bad-faith actions being filed against businesses when it says that "in no case shall victims be required to reimburse any legal expanses of the other party to the claim." Such a provision is also not justified because in some lawsuits, such as in civil law, the case could be lost due to the "limitation period" rule, which can limit the time that a civil law-related claim can be brought to three years for example. In such cases the losing party *de lege lata* must bear the costs. There is no information on what protections States would be permitted to introduce under the Treaty to protect against such risks.

- Equally, it is not clear what the inclusion of "satisfaction" as a form of remedy in this respect means in reality. Similarly, the provision that victims' "psychological well-being and privacy shall be ensured" provides no explanation on what this means in practice or how State Parties would "ensure" this.

[46] Unlike the Zero Draft Treaty, the UNGPs (under UNGP 21) acknowledge that "in all instances, communications should… In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality."

C. Concerns with the Draft Optional Protocol

The Draft Optional Protocol, which was released unannounced as an Annex to the Zero Draft Treaty, is very problematic.

First, given its content and its length (with its 20 separate Articles, it is bigger than the Zero Draft Treaty which has 15 Articles), the text can be considered *sui generis* - a standard-alone document not merely an Annex to the Zero Draft Treaty. The fact that no stakeholders were given prior notice from the Chair that it was developing such a document and would release it ahead of the planned fourth session of the IGWG raises two questions: (i) Why were its provisions not included in the Zero Draft Treaty from the outset?; and (ii) Given that there was no clear mandate to produce such a text at this point and given its late release (reminiscent of the publication of the 2017 "elements" paper), how can States and other stakeholders be expected to discuss the Draft Optional Protocol in October?

Second, we are also extremely concerned about the substance, and regulatory legitimacy of the Draft Optional Protocol, as well as how its proposed mechanisms would function in practice:

- There are many unclear provisions, such as:

  - Article 3, para 1: what is meant by "guarantee in all appropriate means"?

  - Article 4: the Optional Protocol suggests that by having the competence to request information from States on company's non-financial matters and due diligence processes this will allow National Implementation Mechanisms to "prevent" human rights violations. This does not make sense. In addition, the relationship between the Zero Draft Treaty and Draft Optional Protocol on this provision is not at all clear. The company's disclosure duties (under Article 9, para 2. d of the Zero Draft Treaty) do not align with the corresponding work of the National Implementation Mechanism (under the Draft Optional Protocol).

  - Article 4, para 3: what is meant by "sympathetic consideration to"?

  - Articles 5 add 6: providing National Implementation Mechanisms with the competence to conduct visits and inspections to business' facilities is very vague and problematic for two reasons:
    i. It is not clear what powers National Implementation Mechanisms would have and how they would operate compared to the traditional State accountability and enforcement mechanisms, such as the police, judicial authorities and courts.
    ii. Only competent national authorities should have the authority to visit and inspect company facilities. It is unacceptable for a foreign entity to have such access, not least for reasons concerning confidentiality.

    Moreover (concerning due diligence reviews), the Draft Optional Protocol does not consider the likely capacity constraints of such a mechanism to review the implementation of the due diligence obligations of all companies covered by the instrument, of which there are likely to be tens of thousands in many States. This would suggest that the mechanisms would follow the pattern of NGO and trade union

campaigns and apply a greater responsibility on certain companies based on factors such as their size, value, public profile or the location of their headquarters and not on the basis of their actual involvement in a harm or taking into consideration underlying conditions such as the use of third-party suppliers in countries plagued by weak governance. Linked to this, it does not adequately explain the criteria by which the mechanism can determine which companies it should visit. It also does not specify the types of "facilities" that would be inspected; how it would handle the information it receives, especially confidential information; or what is meant by "interim measures."

- Article 9, para 4: On what basis should the UN Committee determine if "the application of the domestic remedies is unreasonably prolonged or unable to bring effective relief"?

- Article 11: the use of the term "confidential inquiry" is confusing. It does not explain how an inquiry would be kept confidential, especially when the Committee would be able to seek the co-operation of the parties concerned. It is also not clear when the proceedings would be judged to be "completed" to allow the Committee to include a summary of the inquiry in the annual report to the UN General Assembly, and what the status or jurisprudence would be of such a summary.

- Article 12: many terms are unclear. For instance, what does "ill-treatment or intimidation" mean?

- Article 16, para 1: the text is unclear about when the Optional Protocol would enter into force. Equally, this information is missing from the Zero Draft Treaty.

- The status and functionality of the National Implementation Mechanism is not clear. Would it be intended to serve as an ombudsperson-type mechanism? What would be the criteria for the National Implementation Mechanism to inform "the competent authorities" if its recommendations are not considered and what is meant by "competent authorities"? What recourse would a company have if it does not accept the mechanism's recommendations - how could the firm appeal against further escalation of the complaint?

- The Draft Optional Protocol does not consider situations in which a complaint is received simultaneously by the UN Committee and one or more National Implementation Mechanisms. Further to this, it is not clear how the machinery envisaged in the Zero Draft Treaty and the Draft Optional Protocol would co-exist with other complaints mechanisms such as the National Contact Points (NCP) of the OECD.

- Finally, there is no explanation on what victims would do, let alone how would business should respond, to situations when a complaint exists in relation to a business activity of a transnational character in two or more States that have not ratified both the Treaty and the Optional Protocol. On top of this, if we consider an allegation involving three jurisdictions: how would the complaint be handled by the National Implementation Mechanism(s) and/or the UN Treaty Committee in situations where one State has not ratified either the Treaty or the Optional Protocol, a second State has ratified only the Treaty, and a third State has ratified both? Linked to this, what if involved States have ratified the Treaty and the Optional Protocol, but not implemented its provisions?

D. Ongoing process concerns

As in past years, the business community would like to express its deep concerns with how the IGWG process continues to be managed. Business is trying, in good faith, to engage meaningfully and constructively in the business and human rights debate. The decision by the IGWG Chair to make public - without any prior warning - a Draft Optional Protocol text as an Annex to the Zero Draft Treaty brings renewed doubt about the credibility of the IGWG process.

We regret the decision of the Chair to publish a Zero Draft Treaty as well as the Draft Optional Protocol (which the Chair itself did not communicate its intentions to do) without a clear mandate from the Human Rights Council. Following the third session, the business community urged the IGWG to focus on clarifying the many questions and re-considering the proposals raised by the "elements" paper instead of rushing to develop a Draft Treaty. The Zero Draft Treaty mirrors the "elements" paper in many ways and, thus, retains those questions and concerns as well as raises new ones. We also urged the IGWG to strengthen its communication and engagement with all relevant stakeholders, including business, on the process and substance. While we appreciate being able to participate in the sessions and consultations, there has been no meaningful discussion with business on the substantive proposals or any real recognition of the many concerns raised. We believe that this IGWG should follow the common practice of other IGWGs in the Human Rights Council by routinely engaging with all Member States on the future direction of its work. As such, the IGWG should return to the Human Rights Council to get clear terms of reference for its future sessions.

The process that drives an initiative with this level of complexity and sensitivity is inextricably linked to its substance. At a time when the global multilateral system comes under greater scrutiny, the poor handling of this IGWG process is extremely worrisome. All stakeholders, including the business community, acknowledge that victims of corporate-related human rights harms must have effective access to remedy and that efforts to achieve this should be strengthened, notably at the local and national level. What we find problematic is the attempt to undermine the globally-accepted approach outlined in the UNGPs and other Government-backed standards and the apparent attempt to transfer responsibility from States to some forms of business.

Conclusion

The business community firmly rejects the Zero Draft Treaty and the Draft Optional Protocol. It does not believe that these texts make a helpful contribution to the field of business and human rights; instead they risk undermining important progress made under the UNGPs. Furthermore, the process followed by the IGWG to date does not give business confidence that this initiative will provide a credible and workable solution to such complex human rights issues.

Assigning liability on companies with transnational activities, not those with domestic activities or SOEs, even when they are several steps removed from the perpetrator and have no control over the entity or ability to influence its conduct, undermines the practical and holistic approach of the UNGPs. The Zero Draft Treaty and Draft Optional Protocol also ignore important factors that help determine a company's human rights responsibility, such as the three ways in which a company can be involved in a harm; its size; the systemic human rights issues that may not be unique to one firm; and situations where States are not meeting their international obligations to protect human rights and implement core labour standards. Furthermore, by vastly expanding the application of extraterritorial jurisdiction the Zero Draft Treaty and Draft Optional Protocol disregards State sovereignty and ignores many States' poor human rights performance, while also looking to transnational businesses to fill those governance gaps.

By doing so, the Zero Draft Treaty and Draft Optional Protocol would exclude most victims from being able to access a remedy, it would inhibit essential foreign direct investment, and it would allow States that have so far failed as human rights duty-bearers to scapegoat and pass the buck onto certain businesses. None of this would address the challenges of globalisation and help spur inclusive economic development and social progress.

The business community would like to underscore again that its many concerns about the Zero Draft Treaty, the Draft Optional Protocol and the IGWG process in no way diminishes its commitment to act responsibly and respect human rights. Identifying and responding to human rights risks - including through impact assessments, stakeholder engagement, use of leverage and increased disclosure - has become a core part of voluntary corporate activity and companies are continuously improving their efforts in this regard. In line with this, companies do not want to conduct business, either directly or indirectly, with suppliers or business partners that are causing human rights abuses.

Since the UNGPs were endorsed in 2011, efforts to embed respect for human rights are advancing and improving every year aided by collective experience and greater clarity on how to overcome specific challenges. The business community advocates strongly for a continuation of this principled, pragmatic and proven approach to achieve real on-the-ground progress in protecting human rights.