Business & Human Rights Resource Centre

Compilation of Commentaries on the "Zero Draft"

October 2018

This is a compilation of blogs originally published by the Business & Human Rights Resource Centre as part of our Zero Draft Blog series, which features commentaries from diverse thought-leaders on the "Zero Draft" of the proposed legally binding Treaty on business and human rights.

We present this compilation in view of the 4th Session of the Open-ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights, as part of our work to highlight key developments and opportunities for change. We aim to empower advocates in civil society, governments and businesses with evidence and guidance to help define their position and engagement in the treaty process. We believe this initiative is complementary to the implementation of the UN Guiding Principles, and that an inclusive and open debate is crucial to ensure these initiatives deliver for everyone, and that the business & human rights movement continues its 'unity in diversity'.

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Another Step on the Road? What does the "Zero Draft" Treaty mean for the Business and Human Rights movement?

Phil Bloomer and Maysa Zorob, Business & Human Rights Resource Centre

"The continued implementation of the UNGPs and the development of a binding Treaty can and should advance simultaneously, and both stand to benefit from doing so."

While the UN Guiding Principles on Business and Human Rights (UNGP) continue to be the primary international reference point on business and human rights, over the past four years the Treaty process has consolidated action, spurred cooperation, and stimulated healthy debate among international and local human rights and corporate accountability groups. In the few weeks since its release on 16 July 2018, the first official draft of the legally binding Treaty on Business and Human Rights has rekindled this debate. The so-called "Zero Draft" marks a key milestone in a complex and lengthy process, against the backdrop of a political context which has become increasingly challenging since the UN Human Rights Council voted by majority to begin negotiations in June 2014.

Where We Stand

In the last year, the Business & Human Rights Resource Centre has sought responses from companies in relation to over 400 allegations of corporate abuse. What have we learned? Affected communities rarely receive adequate remedies, and only a small cluster of responsible companies makes efforts to learn from their failure to comply with human rights standards and incorporate this into their due diligence processes. It is this reality that is driving the efforts to develop a Treaty on business and human rights.

As an organization, we believe in the complementarity of the proposed Treaty and the continued implementation of the UNGP. Notwithstanding this position, this blog offers reflections on the first draft instrument, which we hope will be read in the spirit in which they are intended – one that encourages further debate on diverse strategies for driving human rights at the heart of business.

A Global Treaty in the Current Political Context?

By definition, successful international treaty making demands collective and effective action by states. After the heady days of the post-Cold War era, the global economic crisis has ushered in a wave of chauvinist nationalisms which governments are either responding to, or catalysing (*Make America Great Again* in the U.S., *Au nom du peuple* in France, to name two). In this sense, 2018 is not a propitious year to issue a draft text for an international Treaty on business and human rights. However, to get past narrow nationalisms, we need stronger visions of shared international prosperity and security, and the means to get there – of which a Treaty could certainly be a part.

A positive shift in our context is the slow but inexorable rise of socially responsible investors, some of whom have come out in support of national legislations on modern slavery or on duty of vigilance. For example, investors with over US$ 2 trillion assets under management have called for the establishment of a Modern Slavery Act in Australia, following a similar act in the UK. In a similar vein, the French Sustainable Investment Forum (Forum pour l'Investissement Durable)

expressed their support for the French *Devoir de Vigilance* (due diligence) law. Their support for a Treaty could provide a boost for the negotiations. Will their increasing concern about non-financial risks provoke any leaders to speak out?

Scope and Scale of Proposition

The draft Treaty is rightly ambitious in scope and scale. Given the magnitude of corporate abuse and impunity that we record each day, it is clear that human rights protections currently available under many regional and national instruments are not sufficient. Equally, the text needs ambition in its inception, as it will face ruthless intransigence from vested interests that gain financially and politically from the status quo. That wall of 'realpolitik' has to be countered if the Treaty is genuinely to consolidate and advance steps taken under the UNGP.

The draft Treaty's focus on corporate human rights due diligence is a key point of complementarity with the Guiding Principles and builds on international trends to consolidate mandatory transparency and due diligence in a binding instrument. Modern slavery legislation in the US, UK, and Australia (in preparation) has focused on mandatory transparency, but also exposed the need for mandatory due diligence. And the French due diligence law is recognised by French businesses and internationally as a useful step towards building back the lost public trust in global markets.

For those who will see this draft text as a glass half empty, we can reflect that the provisions in this draft would be a substantial advance for affected individuals and groups in all jurisdictions. This breach between the Treaty's ambition and the reality of current business regulation highlights the scale of inequality and impunity that victims face in global markets.

Nevertheless, the proposed scope of the Zero Draft falls short in several key areas. A contentious area of the Treaty's scope is its exclusive focus on "business activities of a transnational character." While this conception is a welcome widening of scope from the previous exclusive focus on transnational corporations, it falls short of the coverage suggested by the UNGP, which apply to "all businesses." As noted by Carlos Lopez from the International Commission of Jurists in his recent blog, such a restrictive definition risks denying access to remedy for victims of human rights abuses committed by national companies. From the experience of Business & Human Rights Resource Centre, allegations of corporate abuse are made against both national and international companies and national laws currently too often provide no adequate protection or remedy from either source of abuse. Including national companies in the Treaty's scope is key in driving concrete improvements for the vulnerable and victims of abuse.

Another area of contention is the lack of primacy of the proposed Treaty over existing and future trade and investment treaties, as noted by Doug Cassel, Emeritus Professor of Law at Notre Dame Law School, in his recent blog. Similarly, the weak language on gender has attracted criticism. While the draft acknowledges that women face "heightened risks of violations of human rights within the context of business activities", women's groups are demanding stronger language to prevent gender-based discrimination and special measures to address gender-specific risks. As rightly noted by Felogene Anumo and Inna Michaeli at AWID, a transformative framework to end corporate abuse requires a transformative shift in "in the way that gender equality, women's human rights and gender justice concerns are articulated."

Finally, and much to our regret, the draft instrument fails to acknowledge the particular risk of human rights abuses faced by human rights defenders and other activists including land rights and environmental defenders. Advocates who inform on and speak out against corporate abuse are

not only vulnerable to, but often the very target of corporate human rights abuses. Any treaty that purports to "strengthen the respect, promotion, protection and fulfilment of human rights" within the context of business activities, must at the very least acknowledge the positive contribution of human rights defenders who monitor and help companies respect human rights and the critical need to protect and support these defenders.

Strategies for Progress

No Treaty will emerge quickly, if it ever does, and we are still a very long way from a final instrument, ratified by nations, that affected communities and victims could use to protect themselves and find remedy for corporate abuse. In the meantime, advocates for business and human rights need to be strategic to identify where advances can be made. Inevitably, some will choose not to engage in the debate and to invest their efforts elsewhere; those active in ensuring the implementation of the UNGP have used the 'threat' of a Treaty to spur action, whilst Treaty-supporters have worked on national legislative advances and continue to learn from discussions generated around the implementation of the UNGP. This 'unity in diversity' has highlighted the complementarity of the two approaches to optimise our movement's impact. The continued implementation of the UNGP and the development of a binding Treaty can and should advance simultaneously, and both stand to benefit from doing so.

This draft text, warts and all, represents an important step forward. No party will find their dream Treaty here, but many will find elements of both substance and scope that could potentially be powerful in addressing irresponsible corporate practice and legal impunity, representing a substantial step forward for victims of abuse. The draft instrument builds on the emergent positive trends in business and human rights and deserves to gain substantial, if qualified, attention from states, responsible companies and their associations, investors, and civil society. All these actors will also use this draft to press now for advances in national regulation and company policy that further embed due diligence and remedy. In this sense, the draft text is useful to all our movement's actors, no matter their leaning in the debate.

The "Zero Draft" Treaty: Is it Sufficient to Address Corporate Abuses in Conflict-Affected Areas?

Shawan Jabarin and Maha Abdallah, Al-Haq

> *"The focus on conflict-affected areas in the Treaty is an absolute necessity, considering the sharp rise in conflicts around the globe in the 21st century."*

On 16 July 2018, the zero draft legally binding instrument to regulate under international human rights law the activities of transnational corporations and other business enterprises (hereinafter Zero Draft Treaty or Treaty) was released by the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights. The release of the Treaty marks a significant milestone for the evolving global business and human rights framework, aiming to ensure corporate accountability and reduce the culture of impunity, during both peace time and situations of conflict. The Zero Draft Treaty and its current provisions do indeed provide a necessary development and a potential alternative avenue for individuals, communities and peoples affected by corporate abuses, especially in conflict-affected areas.

Over the years, and for those continuously subjected to human rights violations and affected by corporate abuses in situations of conflict and occupation, including in the Occupied Palestinian Territory (OPT), the traditional methods of accountability and redress have proved to be insufficient, mainly due to the international community's lack of political will. As a result, civil society organisations in this context have been eager to explore and push for the business and human rights approach, encompassing the UN Guiding Principles on Business and Human Rights (UNGPs) and the Zero Draft Treaty, among others, in order to ensure corporate accountability, and end the ongoing disregard for international law and human rights standards. Within the business and human rights framework, there is an aspired likelihood to guarantee accountability for corporate unlawful commissions of, and involvement in serious human rights abuses and violations.

In its current format, the Zero Draft Treaty attempts to maintain a complementary approach with the UNGPs – a necessary requirement for the continuation of a unified universal approach in countering corporate abuses. The Treaty, while focused on various pertinent issues, including corporate human rights due diligence, fails to shed light on the importance of requiring stringent due diligence by both the state and corporate actors in situations of conflict. As such, a provision under Article 9 on Prevention requiring enhanced due diligence specific to conflict-affected areas to avoid adverse human rights impacts by corporate activities and/or their relationships, is rather essential. Nonetheless, the minimal discussion and provisions allocated within the Treaty on conflict-affected areas is disappointing, especially when compared to the UNGPs' more elaborate undertaking on potential corporate involvement in gross human rights abuses and crimes.

As such, the Treaty fails to adequately address its relevance to and implementation in situations of armed conflict and occupation. Article 15(4) of the Zero Draft Treaty requires that "special attention shall be undertaken in the cases of business activities in conflict-affected areas," with an attempt to set obligations to "identify, prevent and mitigate" human rights abuses incurred by the activities or the relationships of business enterprises. The focus on conflict-affected areas in the

Treaty is an absolute necessity, considering the sharp rise in conflicts around the globe in the 21st century, particularly since 2010, affecting millions around the world.[1]

Yet unfortunately, "special attention" remains insufficient to address the increasing role of corporations in the commission of and involvement in grave breaches of international law, as well as their significant role in protracting and sustaining conflicts, particularly those relevant to the arms industry and natural resources. In fact, the Treaty neglects the detrimental ramifications of corporate activities on the rights of peoples, particularly the fundamental right to self-determination and permanent sovereignty over natural resources, including in situations of conflict. In the case of the OPT for example, multinational and national Israeli corporations have been playing a significant role in supporting, facilitating and financing Israel's prolonged occupation and settler-colonial enterprise.[2] Similar cases can be identified throughout history in various geographic parts, necessitating that the Treaty not only focus on individual rights, but also those of peoples' and the collective.

The Treaty further falls short of adopting the required language and specific legal framework pertinent to conflict-affected areas; i.e., international humanitarian law, which sets obligations and protections for state and non-state actors, including business enterprises, in situations of conflict. Such failure will have serious repercussions on the implementation of the provisions of the Treaty in related contexts, including by stripping away rights from protected persons in situations of occupation for example. In light of this, the Treaty should require states to acknowledge the applicability of both international human rights law and international humanitarian law, potentially by amending Article 7 of the Treaty on Applicable Law thereby including a provision specific to conflict-affected areas.

Lastly, it is worth noting that the Treaty further undermines the role of human rights defenders, including those advocating for land rights and environmental justice relevant to corporate abuses. In this regard, the Treaty fails to address relevant fundamental issues and risks against human rights defenders within this sphere (exemplified in attacks, intimidation, threats and criminalization) and to ensure their protection and safety by the state. This is especially relevant to situations of conflict, where the rule of law and human rights standards are often deliberately undermined, while human rights defenders, activists and civil society are an earmarked target for their work in documenting and exposing human rights violations, including those carried out by private actors.

[1] World Bank Group, Conflict and Violence in the 21st Century – Current Trends As Observed in Empirical Research and Statistics, https://www.un.org/pga/70/wp-content/uploads/sites/10/2016/01/Conflict-and-violence-in-the-21st-century-Current-trends-as-observed-in-empirical-research-and-statistics-Mr.-Alexandre-Marc-Chief-Specialist-Fragility-Conflict-and-Violence-World-Bank-Group.pdf

[2] Al-Haq, Business and Human Rights in Palestine, 2016, http://www.alhaq.org/publications/publications-index/item/business-and-human-rights-in-palestine?category_id=10

Human rights defenders and corporate accountability– Is there a place for them in a treaty on business & human rights?

Carlos Lopez, International Commission of Jurists

"The treaty's drafters thus have a dual interest in making a place for human rights and environmental defenders to ensure its success but also to guarantee its own effectiveness in implementation."

The recent release of the zero draft of a treaty on transnational corporations and other business enterprises with regard to human rights is no doubt a significant landmark in the process towards achieving a final treaty. One of its visible impacts is that it is helping to shift the focus of the official UN discussions, hitherto largely aimed at procedural and political issues, onto the content and scope of the treaty.

The fundamental choices taken by the Chair in the draft to address remedies for the victims, prevention of business abuses, and making States the main duty bearer under the treaty are watershed steps that should be preserved and encouraged. Those choices are right not only because they render the treaty politically and operatively more feasible, but mainly because they make it more likely to be effective. The zero draft contains a promising outline of most of the most significant issues in the business and human rights equation. Yet, the draft is notable for its lack of precision and clarity, and its weakness in relation to international monitoring and adjudication. The need for stakeholders who take seriously the idea of the treaty to engage critically, realistically and robustly with the zero draft is a necessary step towards its tenability.

One of the absences in the zero draft that should be pointed out in a critical assessment relates to the protection of human rights defenders that work in the area of corporate accountability. A place for those who devote their lives to defend the rights of others, especially of marginalised and vulnerable local communities and indigenous people, deserves consideration. Human rights and environmental defenders are increasingly at risk or actually face growing intimidation and attacks. For 2017 alone, the organization Global Witness reported that "at least 207 land and environmental defenders were killed" trying to protect their homes and communities from mining, agribusiness and other destructive industries, although "severe limits on the data available mean the global total is probably much higher." This number of course is only in the field of land and environment, excluding other attacks, such as death threats, arrests, intimidation, cyber-attacks, sexual assault and lawsuits, which probably sum up to the thousands.

It is well known that the impetus and support for the current process towards a treaty on business and human rights comes largely from a broad alliance of civil society organizations, mostly human rights, labour rights and environmental defenders. Their constant presence and action, in the hundreds, for every session in Geneva and in each country, has arguably helped to shield the process against constant attack from opponents.

But the main reason why a place for human rights defenders should be considered is because as part of the broader civil society groups, defenders stand to be indispensable to a treaty's successful implementation. Without them, human rights treaties would be left entirely to the whim of State bureaucracies whose main objective and interest is not always the protection of human rights. Without action by human rights groups to subject them to scrutiny and hold them accountable,

authorities may have little incentive to move towards meaningful action. The treaty's drafters thus have a dual interest in making a place for human rights and environmental defenders to ensure its success but also to guarantee its own effectiveness in implementation.

Regrettably, the zero draft makes limited space for human rights defenders, marking in that way no difference with preceding human rights instruments. Some provisions in Article 8 get somewhat closer but fall far short of what is needed. For instance, article 6.11 provides for States to protect "victims, their representatives, families and witnesses" from "unlawful interference", "intimidation" and "retaliation" in the context of court proceedings. Article 6.12 calls for human rights guarantees to the same groups.

In the first place, the provisions do not seem to cover the category of defenders who are not necessarily "victims" "representatives", "families" or "witnesses". Defenders do not necessarily operate only during court proceedings (before, during or after). Many of them simply investigate, organise, raise awareness, with the purposes of empowering the interested communities without substituting themselves to community leaders or acting as their representatives.

Similar gaps can be observed in the Draft Optional Protocol to the zero draft. The work of the National Implementation Mechanism proposed in the Draft Protocol does not provide expressly for participation by civil society. It could have, at the very least, borrowed language from the Disabilities Convention:

> Article 33.3
>
> Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

The global rising threat against human rights and environmental defenders calls for appropriate response. It seems only logical that a treaty on business and human rights whose very existence and conditions for success rests heavily on the work of those defenders contain provisions that aim to enable and protect them.

One source of inspiration for an appropriate provision could be the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted in Escazú, Costa Rica, on 4 March 2018, and soon to be opened to ratification. Its Article 9 provides for strong protection of human rights defenders in environmental matters, as follows:

> 1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.
>
> 2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.

> 3. Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.

The Escazú Agreement is the only treaty so far that contains a dedicated provision for human rights defenders. It would be logical for States from Latin American and Caribbean region to propose a similar provision given the strong connections between the matters under regulation, but it would also be an ethical imperative for those States who are the usual stated defenders of human rights defenders to be explicit. It would be an inexcusable omission if they fail to do so.

The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps along the Irresistible Path to Corporate Accountability

Charlie Holt, Shira Stanton and Daniel Simons, Greenpeace

"Looking at the zero draft through the lens of how such an instrument can contribute to a green and peaceful future, there are still limitations that must be addressed."

This is a story about power; who has it and how they use it. The growth of corporate power over the decades has changed how governments make policy and what they prioritise. Corporate power has guided states' involvement in the international sphere, including how international human rights law is agreed upon and how it's implemented (or not).

The discussion around a legally binding instrument on business and human rights are part of this power play. Civil society's tireless efforts to get it on the public agenda, campaigning for states to constructively debate it, and ideally to come to an agreement that can be effectively implemented is an inspiring example of people power.

Greenpeace has been calling for such an instrument since 2002, to which governments committed in principle. Harm to the environment and to human rights are often two sides of the same coin; like when forests are cleared without the consent of Indigenous People, when illegal fishing operations depend on slave labour, or when extreme weather fuelled by climate change threatens basic rights to food, water and shelter. We welcome the arrival of the zero draft of the instrument, even as it serves to underscore just how far we are from an international agreement that fully addresses the gaps in human rights and environmental protection caused by corporate power.

The governance gap caused by corporate power has been well-documented, with an unfortunate number of examples to choose from. At Greenpeace, we often see examples of businesses avoiding enforcement because of their transnational character, the imbalance of power with the host state where they operate, or because international rules, such as trade and investment treaties, tie policymakers' hands. A well-known example is the failure to hold Trafigura to account for dumping toxic waste in the Côte d'Ivoire. Closing this governance gap through legally binding measures is the only way forward.

The zero draft version of the treaty, to be discussed in the fourth session of the open-ended intergovernmental working group, goes some way to address this gap. For example, it requires companies to undertake due diligence to prevent human rights violations within their business; it opens parent companies up to liability for what their subsidiaries and even suppliers do; and it allows corporations to be sued both where they operate and where they are based.

Looking at the zero draft through the lens of how such an instrument can contribute to a green and peaceful future, there are still limitations that must be addressed.

The most obvious is that it only applies to transnational corporations (TNCs), though this extends to any business activity of a "transnational character" (which is defined broadly as activities involving actions, persons or impacts in two or more jurisdictions).

More significant, however, is that the treaty does not prescribe direct obligations for businesses corporations, failing to genuinely innovate beyond existing principles of public international law, contrary to suggestions made during earlier consultations. This is a testament to the power struggles at play, and how the private sector has so far succeeded at changing the original idea. This draft does not significantly depart from the UN Guiding Principle framework of a state's duty to protect, a corporate responsibility to respect, and access to remedy. It does not even attempt to define exactly which human rights corporations must respect.

What this would mean in practice is unclear. With direct obligations, *"corporations could no longer hide their failure to act behind the alleged shortcomings of states".* The way it is currently framed displaces or distorts corporations' responsibility for human rights abuses. It also addresses the reality of states unwilling to do something about such abuses, but does not address those states unable to - those, for example, with weak or non-functioning legal systems. The fight for parent company liability, for example, is driven as much by the inability of the state to hold local subsidiaries to account as it is by the inability of those subsidiaries to adequately compensate victims. Take the efforts of the federal high court of Nigeria, which in 2005 declared Shell's gas flaring to be a violation of human rights and ordered the company to stop the practice. Shell has still not complied with the order, and legal counsel for the plaintiffs reported in the following year that the judge had been removed and the file of the case could not be located.

It also completely ignores the power that transnational corporations already have as actors in international law, for example via investor-to-state dispute settlement (ISDS)mechanisms. Their disproportionate rights must be countered with clear human rights obligations commensurate with their role and influence in the world. This is not unprecedented; the 1969 International Convention on Civil Liability for Oil Pollution Damage holds ship owners (including companies) liable for oil pollution damage. The 1982 UN Convention on the Law of the Sea forbids not only states, but all natural and juridical persons, from appropriating the seabed and/or associated resources.

Greenpeace, our supporters, and our allies use the law to take action to hold our governments and corporations to account. Whether the treaty in its current form advances the movement towards global corporate accountability remains to be seen. So much will depend on how States engage in October in Geneva around discussions of this zero draft. Will they use their power to not only acknowledge the power corporations already have and the destructive outcomes this can lead to? Will they engage around the shortcomings in the human rights system and constructively work together to address them?

If all this seems like a tall order we should take stock and remember how far we've come. That we're discussing a draft treaty to regulate TNCs at all is impressive: in a 1992 report to the General Assembly, for example, UN Secretary-General Boutros Boutros-Ghali declared that "no consensus was possible" on a code framework on TNC activities and hence "the final nail was driven into the code's coffin".

> However much corporations resist, it's inevitable that global rules for global players will eventually be agreed upon.

Patience is wearing thin and pressure for legal reform on both an international and domestic level is building. We should feel emboldened by the progress we've made to lobby governments, join local coalitions, and help accelerate the movement for change. At times, the strength and power of corporations can seem overwhelming; but if this draft treaty shows anything, it's that by raising our collective voice, our power can rival theirs.

Comments on the "Zero Draft" Treaty on Business & Human Rights

Professor John G. Ruggie, Harvard University

"A truly foundational challenge for the proposed treaty is how to define and operationalize "business activities of a transnational character."

Consultations on the 'zero draft' business and human rights treaty will be getting underway soon, with formal negotiations due to start in Geneva at the October session of the Intergovernmental Working Group.

The zero draft proposed by Ecuador is a considerable improvement over the "draft elements" it released last fall. The new document not only has the look but also the feel of a serious text, addressing the issues of prevention and remedy without standing international law on its head. "Not that the new text is ready for signing tomorrow," Doug Cassel states in his commentary. "Issues of both concept and language remain. If not satisfactorily resolved, they could derail the treaty process."[3] Carlos Lopez in his blogs adds several reasons why that's the case.[4] I largely agree with their reservations but will avoid unnecessary repetition, or at least take a somewhat different tack.

I first note some sources of strength in the draft, and then address critical issues related to scope, scale, and liability.

Strengths

Any business and human rights treaty should begin with prevention, and this draft does. Some of its provisions on prevention are broadly consistent with the UN Guiding Principles on Business and Human Rights (UNGPs). But the draft embellishes on them in ways that are likely to prove unhelpful. As Lopez puts it, "both businesses and governments will find it hard to comply or monitor compliance respectively with such far reaching and imperfectly defined obligations of due diligence."

Whether intentionally or otherwise, the draft posits human rights due diligence as a standard of results: it requires business "to prevent" harm. This is an extremely tall order for any due diligence requirement, which typically is expressed as "seek to prevent," suggesting a standard of conduct. Moreover, "mitigating" the risk of harm generally is also called for, but is omitted from this text. It may be worth considering sticking with the endorsed language of the UNGPs.

On remedy the zero draft echoes some of the recommendations of the Accountability and Remedy project carried out under the auspices of the UN Office of the High Commissioner for Human Rights, particularly the provisions on mutual assistance and cooperation among states. These address real gaps. Here too it would prove useful to draw on some of the particulars of that

[3] Doug Cassel, "At Last: A Draft UN Treaty on Business and Human Rights," *Letters Blogatory,* posted August 2, 2018

[4] Carlos Lopez, "Towards an International Convention on Business and Human Rights," (Parts I and II), *Opinio Juris,* posted July 23, 2018

initiative, which have been extensively vetted by experts and received multiple mandates from the Human Rights Council.

Scope

From the outset of this process four years ago, the universal criticism has been the exclusion of national enterprises from the scope of the proposed treaty, irrespective of their size or impact on human rights. This was baked into the resolution establishing the Working Group, which was adopted by a mere plurality in the Human Rights Council, not a majority. The zero draft seems to make a modest move to address this restriction by defining the treaty's scope as "business activities of a transnational character," whether conducted by natural or legal persons (more on that below). But at the same time the new formulation further limits the proposed treaty's scope to "for profit" economic activities.

As a result, it could well exclude state-owned enterprises (SOEs) engaged in transnational business activity whose mission is not strictly profit-driven. As we know from practice, SOEs can serve as ATM machines for governments or as instruments to advance governments' geopolitical interests abroad, for which the SOEs may be subsidized and thus not be "for profit" at all. In either situation the SOEs may be in a joint venture relationship with private sector transnational enterprises, in which case under the terms of the treaty only the private enterprise might be held responsible for harm. SOEs constitute a non-trivial – and growing – fraction of global business, so the "for profit" stipulation adds another limitation to the treaty's scope.

Lopez correctly points out that the zero draft also "pays scant attention" to states as economic actors, the subject of Pillar I of the UN Guiding Principles. Moreover, whereas a decade ago "corporate complicity" in human rights abuses committed by the state was a major focus of attention, including in the resolution establishing my mandate as Special Representative of the UN Secretary-General for Business and Human Rights, neither the term nor the underlying conduct appear in the zero draft (legal liability seems to be limited to "persons with business activities of a transnational character").

In fact, it is not entirely clear which human rights the proposed treaty would cover. The stated intent is to include "all international human rights" and "those rights recognized under domestic law." The former category has no legal pedigree; perhaps it was meant to say "all internationally recognized human rights." Yet even that would need clearer definition. The second phrase, regarding human rights recognized under domestic law, requires elucidation of how possible tensions and contradictions between international and national standards are to be addressed, as they are in the UNGPs.

Finally, a truly foundational challenge for the proposed treaty is how to define and operationalize "business activities of a transnational character." To my knowledge, this phraseology is nowhere defined in the law or the social sciences, so it would have to be constructed de novo—difficult in the best of circumstances, let alone in this highly contested treaty negotiation. But whatever the definition, even more daunting is operationalizing it for the purposes of monitoring and attributing legal liability, given the expanse and complexity of global supply chains (more on that below).

In short, the zero draft further narrows the scope of the proposed treaty in the direction of a specific subset of actors: all we know for certain is that it would cover transnational private enterprises (or 'activities'). But even there the meaning of the terms is unclear. The same is true regarding human rights violations for which private sector actors involved could be held liable. These are highly

problematic bases for a treaty. The framing is reminiscent of the bias and fuzziness that doomed negotiations on the UN Code of Conduct on Transnational Corporations, which dragged on from 1976 to 1982 and in the end did not yield so much as an agreed set of voluntary measures.

Scale

From the outset of this initiative, treaty proponents and their supporters have discounted or ignored altogether the issue of scale: the magnitude of the task at hand in seeking to regulate transnational business enterprises or 'activities'.

The reason the scale of transnational business activity is of critical importance is that it significantly affects—and perhaps even determines—the feasibility of actually implementing any particular international regulatory instrument. This is *not* an argument against treaties. It *is* an argument for effectiveness in treaty design, with implementation uppermost in mind.

Consider just a few indicators of scale. There are somewhere between 70,000 and 80,000 transnational corporations (precise numbers keep changing because of mergers and acquisitions, among other factors). According to the ILO, one out of seven jobs worldwide is global supply chain-related, not counting "informal" and "non-standard" work. According to UNCTAD, 80 percent of global trade (in terms of gross exports) is linked to the international production networks of transnational corporations. World trade in intermediate goods ('transnational business activities') is greater than all other non-oil traded goods combined.

Or take a couple of concrete examples. The components of my iPhone 6 (I am a technology laggard) were produced by 785 suppliers in 31 countries, several of which were transnational corporations in their own right. None of the entities involved were Apple subsidiaries. For its part, the consumer products company Unilever has reported having 50,000* *first-tier* suppliers, and that its ultimate supply chain includes 1.5 million small holder farmers.

No international economic system like this has ever existed. Therefore one would wish to ensure that the instrumentalities for monitoring and provisions for attributing legal liability are up to the magnitude of the task. The zero draft assigns international monitoring (in the treaty body sense, but lacking their already limited authority) to a body of 12 experts, based on reports submitted by states and other stakeholders. Thus, virtually by definition meaningful international monitoring is set to be severely constrained. Other commentators have noted significant issues with the zero draft's provisions for attributing legal liability, both civil and criminal.[5] I address only the most basic: who should be held liable, and how that is to be determined.

Liability

Article 10.6 of the draft, on civil liability, is poorly worded. Two points here. First, Cassel seems to assume that it has parent companies in mind. He warns that the language needs "to make clear that the actionable act [sic] or omission must be that of the company itself…if the treaty is to avoid clashing with the entrenched national law doctrines that limit piercing the corporate veil." The blog by a Hogan Lovells team reflects the same assumption. But if their reading is correct then 10.6 would effectively leave out so-called "lead" companies like Apple, which do not hold equity in their

[5] See Cassel and Lopez, above; and Alison Berthet, Peter Hood and Julianne Hughes-Jennett, "UN treaty on business and human rights: Working Group publishes draft instrument," *Hogan Lovells Focus on Regulation,* posted July 26, 2018.

business partners, as well as Unilever's many contractors. This is unlikely to have been the intent of the proposed treaty. But if expert lawyers are possibly misreading this key Article, then clearly the text needs further work before it can be set loose on the world.

Second, there is an inextricable relationship between due diligence and the attribution of liability, which the draft seems not to recognize. Under Article 9.7 States Parties shall ensure that "all persons" engaged in transnational economic activity within their jurisdiction have the specified due diligence obligations; and that these obligations should be included in "all contractual relationships." As noted earlier, the text stipulates due diligence as a standard of results. But that inevitably would hold parent and lead companies liable for any harm anywhere in their supply chains because the contractual relationships ultimately begin with them. On the other hand, if due diligence is a standard of conduct, as it should be, and a parent or lead company has ensured that the appropriate language is included in all contractual relationships, and if the parent or lead company has made good faith efforts to monitor its business relationships and is not itself involved in the wrongful act or omission, then whichever business partner was responsible for the wrong should be held liable. Due diligence and liability must be more closely aligned than they are in this draft.

Carlos Lopez has noted several critical issues with the draft treaty's provisions on criminal liability, to which I have nothing to add.

Lastly, the provisions for extraterritorial jurisdiction (Article 5.1) and universal jurisdiction (Article 10.11) are unlikely to be met with uniform acclaim.

Conclusion

When all is said and done, my frank assessment is that debating the details of legal liability at this point is premature. The Working Group has had no serious discussion of the issues of scope and scale, and whether they require a strategic mix of different regulatory interventions rather than a single treaty instrument. Now that an actual draft exists perhaps the need for such a discussion will become clearer, and perhaps the Working Group's new Chair might consider having it.

The "Zero Draft": Access to judicial remedy for victims of multinationals' ("MNCs") abuse

Richard Meeran, Leigh Day

"If effectively translated into national laws, the provisions of the Zero Draft would lower the legal and procedural barriers to MNC parent company liability."

Introduction

The 2018 "Zero Draft" of the proposed binding treaty on business and human rights seeks to build on the 2011 UN Guiding Principles on Business and Human Rights (UNGPs). Whereas the UNGPs are not legally binding on business, the Zero Draft includes provisions designed to increase victims' access to effective judicial remedies in their national courts. It applies to businesses with "activities of a "transnational character", which means it covers MNCs but not businesses whose activities are exclusively national. The question considered briefly here is whether, if implemented, a treaty reflecting the Zero Draft would significantly improve access to justice in practice?

Practically effective national judicial remedies are important first, to provide redress for harm suffered by individuals whose rights have been violated, and secondly, as a deterrent. But cases involving harm arising from MNC operations are beset by negative factors, namely: the power imbalance between individuals and MNCs; the variable quality and accessibility of national legal systems in MNC home and local courts; the legal and factual complexity and novelty of these cases. The last of these factors will be readily appreciated by considering cases involving large-scale environmental pollution or corporate complicity in human rights violations around mining operations by public or private security bodies. Victims require specialist legal representation and technical experts to pursue such cases, which are invariably very costly and resource-intensive and have uncertain prospects of success.

Current barriers

At a national level, key specific, interrelated, barriers to victims' access to an effective remedy include the following:

- Virtually insurmountable difficulties in obtaining justice in most MNC host state courts
- The lack of jurisdiction of MNC home state courts over claims against MNC local subsidiaries even when local justice is unachievable
- The *forum non conveniens* doctrine, applied in the US, Canada and Australia (but not in the European Union) resulting in the court declining to deal with a case against a MNC parent company that is domiciled in its jurisdiction
- The "corporate veil", which protects an MNC parent company from legal liability as a shareholder in circumstances where the only realistic means of accessing justice is likely to be by suing the MNC parent in its home court. The principle of a tort law parent company

duty of care, which circumvents the corporate veil, has been developed in the UK but not yet elsewhere

- Difficulties obtaining disclosure of internal corporate documents to establish parent company control over and/or involvement in functions connected with the alleged harm. There is a striking variance between the more generous procedures in US/UK/Australia/Canada and South Africa and the very limited access allowed, for example, in the Netherlands and Germany

- The absence, in most jurisdictions, of opt-out class action legislation and procedures which reduce costs by allowing representatives to sue on behalf of a class and also avoid the need for every member of a class to institute legal action to protect their limitation rights

- Inequality of arms. Whereas MNCs can afford the best legal representation and expert assistance, victims cannot afford lawyers. Public legal aid funding for cases of this magnitude is unrealistic. The only option is for victims' lawyers to act on a contingency basis (in countries where this is lawful), however in general only the largest law firms (who will be conflicted by the interests of corporate clients) would have the financial ability to take on the risk and cash flow burden that these cases entail

- The inability to fully recover legal costs when a case is successful further dis-incentivises lawyers from acting for victims

- Damages awards based on local levels reduce the financial viability of cases. In this regard, if third party litigation funding can be obtained, lawyers' cash flow risk and risk of not getting paid if a case fails, can be eliminated thereby enabling them to act. However, litigation funders demand a percentage of damages recovered which must be a multiple of their investment. Consequently, litigation funding is only available when overall damages are likely to be high.

States responses to Pillar 3

Most of these barriers are specifically identified in Pillar III of the UNGPs. However, no steps appear to have been taken (in any country) to address them in response to the UNGPs. Indeed, after endorsing the UNGPs the UK government passed legislation, the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO"). This contained legal costs provisions that reduced the financial viability of such cases, especially those involving smaller numbers of claimants (which often comprise the most grave human rights violations). Whether the Monterrico Metals case (for 32 Peruvian environmental protesters who were allegedly subjected to torture and other mistreatment by mine security and the police), or the Thor Chemicals case (for 21 South African workers poisoned by mercury) would have been viable post LASPO is doubtful.

The Zero Draft

The following is based on the gist of the draft rather than a precise analysis of its wording.

With respect to the current barriers identified above, the most significant impositions on states in the Zero Draft are contained in Articles 9, 10.6, 8.4 and 10.4.

Articles 9 and 10.6 signal the prospect of civil liability for foreseeable harm arising from due diligence failures by an MNC in respect of operations over which the MNC had control or was

sufficiently closely related. As they are intended to be legally binding they represent a natural but critical progression from the *human rights due diligence* principles in Pillar II of the UNGPs. They potentially extend and globalise the parent company duty of care principles that to-date only apply under UK law and in states that follow English law. On the other hand, Article 9.5 allows states to exempt "small and medium-sized businesses from the purview of selected obligations" of Article 9.

Although on the face of it, a victim is relieved of the responsibility of establishing that an MNC owed a legal due diligence obligation, proving control or a sufficiently close relationship - the requirement for "proximity" under a tort law duty of care - is still required. However, Article 8.4 requires states to ensure that national laws do not unduly limit access to information, which should enhance the ability of victims to obtain evidence of control. Moreover, Article 10.4 purports to permit courts to reverse the burden of proof to fulfil a victim's access to justice. But any excitement over this latter provision is dampened by its vague and discretionary wording and that it is made expressly "[s]ubject to domestic law".

Article 8.2 refers to the right to pursue claims as a group and Article 5.3 indicates that if it can be justified, an individual can pursue a claim on behalf of a group. There is however no requirement that states should specifically allow opt-out class actions.

Article 8.5.d stipulates that victims should be exempt from liability for the costs of their opponents. This is a bonus but is of less importance to victims who are impoverished.

Article 8.7 requires the establishment of an International Fund to provide legal and financial aid to victims, but this is too vaguely worded to translate into a legal fund that would be sufficient to run protracted complex litigation against well-resourced and determined multinational opposition.

Article 13.1 requires states to act consistently with principles of sovereignty and "non-intervention in the domestic affairs of other states". It probably was not intended to encourage the principle of *forum non conveniens* but it might be interpreted as doing so, which would be a very retrograde step for victims.

Conclusion

> If effectively translated into national laws, the provisions of the Zero Draft would lower the legal and procedural barriers to MNC parent company liability.

This would in turn increase the willingness of lawyers to represent victims as this would reduce costs and increase the prospects of success. The overall effect the Zero Draft would be to significantly enhance victims' access to an effective judicial remedy.

The legal, procedural and practical barriers to justice are interrelated and additive in terms of risk. The more barriers are removed, the more likely it is that victims will secure legal representation. The position could be further improved by provisions prohibiting *forum non conveniens*, stipulating that damages should be assessed at levels of the MNC home state, and requiring states to provide for opt-out class actions.

The due diligence provision should not be confined to large businesses as this would potentially mean letting the likes of Monterrico and Thor Chemicals, and other smaller MNCs that have perpetrated serious abuses, "off the hook".

The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism

Dr Nadia Bernaz, Wageningen University

"The Draft Treaty on Business and Human Rights stays clear of controversy surrounding corporate human rights obligations and criminal responsibility *under international law."*

Last month Ecuador released the Draft UN Treaty on Business and Human Rights (the Draft), the text that will be discussed in October during the fourth round of negotiations on the treaty at the UN. I was under the impression that things would develop differently, and thus was surprised to find out that the core of the Draft includes neither direct corporate human rights obligations, nor corporate criminal responsibility under international law. Instead, the Draft covers the international obligations of states, and states only, and stays clear of controversy.

Corporate obligations under international law: what's the big deal?

The mandate of the intergovernmental working group, set up in 2014, is to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." (UN Human Rights Council, Res. 26/9 (2014), para. 1) Based on this mandate, many have advocated for a treaty directly regulating business activities in the area of human rights, as opposed to a treaty creating obligations for states only.

The distinction is important because of the classic reading of international law, under which only states, as sole full subjects of international law, can bear international obligations. In other areas of law, such as environmental civil liability, treaties already aim to directly regulate corporations. However, while some treaties such as the American Convention on Human Rights and the African Charter on Human and People's Rights mention individual duties, human rights treaties create real obligations for states only. There has been resistance against a treaty creating direct human rights obligations for corporations, a move many consider unrealistic and too radical.

As a middle ground, some commentators, including me, have advocated for the inclusion of international corporate criminal liability for international crimes in the treaty. This would send the message that corporations may and do commit gross human rights violations while remaining within known international legal territory. Individuals can be subject to international prosecution, and there is no reason why corporations shouldn't.

What does the Draft say?

The Draft could have included corporate responsibility grounded in international law, but it doesn't. Instead, the Draft's preamble (confusingly titled Article 1) talks about State "obligations and primary responsibility to promote, respect protect and fulfil human rights and fundamental freedoms." A few paragraphs down, the Draft reads as follows:

"Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure shall respect all human rights, including by avoiding causing or

contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur."

This could be read as an international obligation, because of the use of "shall", but it is in the preamble. While there is some debate about this among international lawyers, it is generally believed that only the core part of a treaty is legally binding, while the preamble is not. Instead the preamble may be used to provide context in treaty interpretation as per Article 31(2) of the Vienna Convention on the Law of Treaties.

This is the only mention in the Draft of something resembling corporate human rights obligations under international law. The core of the draft only mentions corporate liability under domestic law and aims to get states to strengthen domestic mechanisms for such liability. Of course this is important, and indeed it is a welcome move given the often-mentioned weakness of the Third Pillar of the UN Guiding Principles on remedies.

Moreover, staying clear of corporate obligations under international law will probably facilitate wider acceptance of the treaty. Given how the negotiations started, it is a good idea to try and secure support, in the name of realism. But the idealist in me can't help feeling a bit disappointed. Fifteen years ago, the Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises were released. They included direct corporate obligations and caused uproar among international lawyers. Despite undeniable progress in the field of business and human rights, the Draft is a reminder that there is still a lot to do.

Justice not "special attention": Feminist Visions for the Binding Treaty

Felogene Anumo and Inna Michaeli, AWID (Member of Feminists for a Binding Treaty)

"Without a transformative shift in the way that gender equality, women's human rights and gender justice concerns are articulated, a truly transformative framework to end corporate abuse will not be achieved."

We acknowledge the efforts of the Chair of the Intergovernmental Working Group (IGWG) for the sense of urgency and determination shown in advancing the process to elaborate the elements of a legally binding treaty to regulate Transnational corporations (TNCs) and other business enterprise (OBE) with regards to human rights. However, we are greatly concerned that without a transformative shift in the way that gender equality, women's human rights and gender justice concerns are articulated, a truly transformative framework to end corporate abuse will not be achieved.

In August 2015, Luisa Lozano, a Kichwa woman from the Saraguro people joined an indigenous mobilisation to defend their right to land from corporation takeovers and demand increased protection of indigenous rights. It is during these protests, that military and police "beat a pregnant woman with truncheons, dragging her about 30 meters and spraying her with pepper gas." Soon thereafter, Luisa Lozano was arrested for defending the pregnant woman and was sentenced to 4 years in prison alongside other women.

Corporate abuse is a key area in the struggle to overcome systemic and structural barriers to gender, social and economic justice. However, the structural causes of women's economic inequalities and human rights violations remain unaddressed. A feminist approach that challenges the current economic model, which promises growth and progress yet favours huge multinational corporations and concentrates wealth in the hands of a few global elites, is needed now more than ever to push for economic and gender justice. The Binding Treaty has the potential to address systematic corporate power and development that contributes to widening social inequalities, massive extraction and exploitation of natural resources through the regulation of transnational corporations (TNCs) and other business enterprises (OBEs), thus ending decades of corporate impunity and ensuring access to justice for affected communities.

In the recently released zero draft text, there are two instances where women are mentioned alongside other groups. In article 9 on Prevention which highlights the need to carry out meaningful consultations with affected groups giving "special attention to those facing heightened risks of violations of human rights within the context of business activities such as women (…)" and Article 15 on final provisions where States parties shall address specific impacts of business activities while giving "special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women (…)." In Article 15, the text also includes a provision on business activities in conflict-affected areas, which mentions paying "special attention to both gender-based and sexual violence."

While this is a starting point, the proposed text positioning women as a vulnerable group falls short of feminist demands for gender justice because:

It fails to acknowledge the complexities of corporate power and how they often act in collusion with the State, as seen by the roles of the military, police and judicial system in Luisa Lozano's arrest and conviction.

The text calls for meaningful consultation yet some of the violations to free, prior and informed consent (FPIC) are due to TNCs and other businesses' ability to influence processes that are often created to manufacture consent. Thus, there is a need to acknowledge power imbalances and substantive, procedural and practical barriers that women and girls in particular face as relates to FPIC and access to justice.

As the process advances, we envisage that the final text of the Treaty will not just pay "special attention" to women but will have language that addresses the power imbalances, challenges corporate power and advances gender justice. These should be informed by key suggestions from the Feminists For A Binding Treaty coalition who highlight for example the need to:

Include strong and clear language to ensure non-discrimination based on gender. Thus, explicitly state that gender impact assessments shall be conducted by an independent entity chosen, or agreed upon, by the communities and the women from whom information will be gathered, in a process of free, prior and informed consent (FPIC).

Take into account the impact of corporate operations on gender roles and gender-based discrimination, women's health including prenatal and maternal health, gender-based and sexual violence, gendered division of labour on family and community levels, and access to and control of social and economic resources. Thus, explicitly elaborate on the specific measures that will be taken to address these gender-specific and identity-based risks and create an enabling environment for Human Rights Defenders and whistleblowers.

It is imperative that feminist governments and progressive States who are supporters of women's rights not only support the Treaty discussions but also actively propose and endorse language that challenges corporate power and advances gender justice.

Finally, while we welcome the Binding Treaty process and the advances made to have a legally binding framework in the near future, we know it will take a lot more than political discussions to tackle corporate greed and impunity. The Binding Treaty is but one avenue on the road to gender justice and corporate accountability. Feminists and Women Human Rights Defenders have been on the frontlines of the struggles, and will continue to demand corporate accountability. Injustices inflicted by the current economic system, from exploitative working conditions to corporate land-grabbing, forced displacement and environmental pollution, often hit women and historically oppressed groups the hardest. But we are not only on the affected side - we are also at the forefront of pursuing justice as part of shaping our feminist realities[6] and the futures we want. We support the Binding Treaty as a necessary step towards realising these feminist realities. Aluta continua!

[6] Feminist realities - At AWID, we understand feminist realities both as current, existing practices that movements are already creating and living, that are critical both to sustain hope and push back against oppressive systems. (*Co-creating Feminist Realities*, AWID Strategic Plan 2018 -2020)

The Zero Draft of the Proposed Business and Human Rights Treaty, Part I: The Beginning of an End?

Surya Deva, City University of Hong Kong

> *"Neither voluntary initiatives alone nor measures merely at national level will ever be adequate to regulate effectively the conduct of today's businesses."*

In September 2013, when Ecuador expressed its intent to initiate a process to negotiate a legally binding international instrument, not many in the business and human rights (BHR) field would have thought that there would be a draft of the proposed instrument in less than five years. If the unanimous endorsement of the Guiding Principles on Business and Human Rights (GPs) by the UN Human Rights Council was hailed as "the end of the beginning", the release of the zero draft by the Chairperson of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) could be regarded as "the beginning of an end". It is the end which requires and enforces compliance with human rights norms as a pre-condition for doing business. Respecting human rights must neither be discretionary for business nor should it be dependent on the so-called business case.

There is legitimate scepticism about the value of human rights treaties generally. In the specific BHR context, doubts are also expressed about the political feasibility of negotiating a treaty. These debates are likely to continue and remain unresolved. However, as long as we have a system of international human rights treaties, we are well past the time to ask whether we need a BHR treaty.

Not only is a BHR treaty needed, it is doable at this point of time in history. As compared to previous two attempts (i.e., the Code of 1990 and the Norms of 2003), the current treaty process has a better chance of success for several reasons. First, the current treaty process has a "springboard" of the GPs. The broad consensus around the GPs means that there is no going back for states from doing everything that is needed to ensure that businesses actually respect human rights, not merely claim to be doing so. Second, an unprecedented civil society mobilisation has not only put pressure on states to walk the talk on human rights but also operated as a bulwark against corporate capture of the process. Third, states have started to face the brunt of corporate misdeeds – from tax evasion to interference in democratic processes, triggering internal conflicts, and claiming millions of dollars in investment arbitration awards. Fourth, there is a growing realisation that neither voluntary initiatives alone nor measures merely at national level will ever be adequate to regulate effectively the conduct of today's businesses.

Despite these positive factors, the resistance to binding rules remains at all levels. Creative diplomacy and innovative drafting could, however, help in navigating through this resistance at the international level and bring us closer to the end which has proved to be elusive so far. And the zero draft provides a "concrete" reference point for further discussion and refinement of the provisions of a BHR treaty. Any meaningful analysis of the zero draft should be informed by two broad considerations: (i) the role of a BHR treaty, and (ii) the key objectives that such a treaty ought to achieve.

Regarding the role of the proposed treaty, there should not be any illusion that it would fix all the existing regulatory gaps or end completely the current state of corporate impunity. This treaty would be only an additional regulatory tool to ensure that businesses comply with human rights

norms. As businesses are complex regulatory targets, multiple regulatory tools should be employed in tandem to achieve some level of regulatory efficacy. Neither existing regulatory initiatives nor the proposed BHR treaty should be taken as the last word on the subject: additional regulatory initiatives, including treaties, might be needed in the future to deal effectively with ever-growing threats to human rights from the state-business nexus.

As I have argued elsewhere, the proposed BHR treaty should try to achieve several objectives. I will outline below four such objectives and will then assess, in Part II of this blog, how far the zero draft is geared towards achieving these objectives. First, the treaty should nudge states to act collectively and thus lay out a blueprint for a "global action plan" in the BHR field. The collective action could, for example, entail making human rights due diligence mandatory, creating economic incentives for responsible companies, and establishing a mechanism to facilitate international cooperation and mutual assistance among states.

Second, the treaty should address the existing asymmetry between the rights and obligations of businesses, which is exacerbated by international investment agreements (IIAs). Addressing this asymmetry would require recognising legally enforceable human rights obligations of companies, protecting human rights defenders from persecution by both states and businesses, and managing the adverse human rights impacts of IIAs.

Third, the proposed BHR treaty should respond to governance gaps in "hard cases": where there is no clear business case for human rights and the concerned state is unwilling or incapable to perform its duty to protect against human rights abuses by private actors. Various tools can be used to achieve this objective, e.g. institutionalising the role of civil society organisations in corporate accountability, harnessing extraterritorial modes of regulation, and creating international complaint mechanisms.

Fourth, the treaty should require states to remove the well-documented barriers that victims face in accessing effective remedies and in turn hold companies accountable for human rights abuses. Removing these barriers would require extensive legal reforms, strengthening international cooperation amongst states, invoking the full range of remedial mechanisms, recognising the importance of preventive, redressive and deterrent remedies, and providing special support to vulnerable or marginalised groups affected by business activities.

To what extent the zero draft meets these four objectives will be examined in Part II of this blog.

The Zero Draft of the Proposed Business and Human Rights Treaty, Part II: On the Right Track, but Not Ready Yet

Surya Deva, City University of Hong Kong

In this second part of the blog, I assess the extent to which the zero draft is geared towards achieving the four objectives of the proposed BHR treaty outlined earlier.

Nudging collective state action

The zero draft defines "business activities of a transnational character" as any "for-profit economic activity ... that take[s] place or involve[s] actions, persons or impact in two or more national jurisdictions". This definition would capture a huge range of businesses and their activities, which could not be regulated effectively by each state acting alone. The treaty should, therefore, nudge states to take collective action: this can take the form of joint action as well as individual action in pursuance of a collective goal.

In this context, advancing "international cooperation with a view towards fulfilling States' obligations under international human rights law" as one of the purposes of the treaty makes sense. Article 11 requires state parties to "cooperate in good faith" and "afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial proceedings in relation to the cases covered by this Convention". Implementing this provision would require states signing new bilateral or multilateral agreements, or amending exiting ones. To ensure some broad consistency, it may be desirable to develop a few standard templates of such agreements. Moreover, it would be crucial to secure mutual legal assistance, under other existing arrangements, even from non-state parties to the BHR treaty.

Multi-facet international cooperation envisaged by Article 12 should also facilitate collective action, as not all states would be equally-equipped to implement the proposed treaty. Building capacity, sharing challenges as well as good practices with peers, and collaborating with civil society will prepare the groundwork for states to take necessary measures to achieve collective goals.

Article 9 of the zero draft expects state parties to introduce domestic legislation requiring mandatory human rights due diligence (HRDD) as a preventive measure. This is a step in the right direction. However, the "minimum" due diligence steps proposed in Article 9 should be aligned with the four-step HRDD process under the GPs and be also informed by evolving good practice recommendations in this area. Otherwise, there would be a risk of different state parties enacting uneven and/or hollow HRDD legislation, which might prove either too costly for businesses or illusory in terms of impact.

The zero draft relies exclusively on sanctions to ensure that business activities of a transnational character are consistent with human rights norms. While disincentives are critical, equally vital would be for state parties to create economic incentives for responsible businesses, not merely in domestic public procurement policies but also in all commercial dealings (e.g., contracts, loans, export credits) of a transnational nature.

Addressing asymmetry between rights and obligations

The zero draft of the treaty tries to address the asymmetry between the rights and obligations of businesses by proposing to attach legal consequences for human rights violations. Article 10 provides that "State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights". Legal liability

presupposes breach of an obligation. However, it is odd that the zero draft does not explicitly impose an obligation on businesses of a transnational character to respect human rights. The closet it comes to doing so is in the Preamble, which underlines that "all business enterprises, regardless of their size, sector, operational context, ownership and structure shall respect all human rights".

The current formulation will not work. The proposed treaty should state explicitly the obligation of businesses to respect all internationally recognised human rights. Doing so would be a "logical extension" of the GPs, as businesses already have a responsibility to respect human rights, the breach of which triggers an access to effective remedy. The BHR treaty would also need to specify with some precision the contours of this corporate obligation. For example, what does "all international human rights" actually mean under Article 3? Is the obligation merely to respect human rights, or would this also include an obligation to protect against violation by other entities which a business controls or has a sufficiently close relation?

It is worth noting that this preambular declaration relates to all business enterprises, while the substantive treaty provisions focus only on the "business activities of a transnational character". There are two elements of this creative approach, which tries to overcome the stalemate around the controversial footnote of Resolution 26/9. The first element is adopting a "soft hybrid" approach: whereas most of the treaty provisions focus on transnational activities of companies, the Preamble acknowledges that all business enterprises have an obligation to respect human rights. The second element is to shift the focus of regulation from "actors" to "activities" – all business enterprises are covered so long as their for-profit activities have a transnational character.

Article 13(6)/(7) of the zero draft requires states to address an asymmetrical nature of existing trade and international investment agreements (IIAs). Future IIAs that states negotiate "shall not contain any provisions that conflict with the implementation of this Convention and shall ensure upholding human rights in the context of business activities by parties benefiting from such agreements". Moreover, states should also ensure "that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention". These provisions, which are in line with Principle 9 of the Guiding Principles on Business and Human Rights (GPs), do not go far enough or in precise details as to what is needed to humanise IIAs. Nevertheless, these provisions could push states to reform their IIAs to ensure that investors do not castrate governments from taking necessary steps to protect human rights. In addition, the Committee envisaged under Article 14 of the zero draft could unpack what upholding human rights would entail for investors seeking protection of IIAs.

The proposed BHR treaty should also try to address another asymmetry: protect human rights defenders (HRDs) from persecution by businesses directly or in connivance with state agencies. Article 8 outlines at length the rights of victims, but does not make any explicit reference to the rights of HRDs. Similarly, while the definition of "victims" in Article 4 is quite wide, it may not capture the full range of HRDs, e.g., those who are assisting affected communities. These gaps should be addressed. Moreover, the treaty should require both states and businesses to ensure that domestic legal processes are not used to target legitimate activities of HRDs.

Responding to governance gaps in "hard cases"

The zero draft should be alive to the sad reality that some states and/or some businesses are unlikely to do what is expected of them. In such situations, the victims should not be without any

remedial recourse. Apart from effectiveness concerns related to the working of a potential international body, establishing such a body – even for egregious corporate human abuses – may not be politically feasible at this stage. The zero draft does well not to include such a proposal, but at the same time leaves open the possibility of "any further development needed" to implement the treaty (Article 14(5)). The proposal to establish a Committee of Experts is welcome. It is disappointing, however, to see that the Committee is not given a mandate to accept complaints, at least in selected emblematic cases or subject to the requirement of exhausting local remedies. Accepting selected cases would allow the Committee to develop concrete guidance for similar futures cases or situations.

Extraterritorial regulation is a "necessary evil" in today's world, including to deal with hard cases in the BHR field. The zero draft tries to strike a compromise (at least on paper) on this front: while provisions related to prevention and legal liability under Articles 9 and 10 are expected to go beyond one's territory, Article 13(1) reminds state parties to operate "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States". A similar balancing attempt is visible between liberal criteria for jurisdiction under Article 5 and a declaration under Article 13(2) that nothing in this treaty "entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law". The crucial oiling to manage unavoidable tension in exterritorial regulation could be provided by provisions on mutual assistance and international cooperation and the Committee clarifying rules of engagement to guide state behaviour. The proposed BHR treaty should, however, have a provision to manage multiplicity of proceedings in cases where several state parties could have jurisdiction over a dispute.

Removing barriers in access to effective remedy

Ensuring "an effective access to justice and remedy to victims of human rights violations" is one of the declared purposes of the proposed BHR treaty. Article 8 of the zero draft acknowledges various rights of victims, including "the right to fair, effective and prompt access to justice and remedies in accordance with international law". This provision also requires state parties to guarantee these rights and overcome various barriers that prevent victims from seeking access to effective remedies. Provisions related to jurisdiction (Article 5), statute of limitations (Article 6), applicable law (Article 7), legal liability (Article 10), mutual legal assistance (Article 11), and international cooperation (Article 12) are also aimed at facilitating victims' access to effective remedies.

It is, however, odd that state obligations to remove barriers are clubbed together with "rights of victims" under Article 8. This is perhaps a result of the zero draft not containing any general provision on the obligations of states or businesses: individuals have rights and that is why both states and businesses have obligations. This is a major gap that should be fixed in future drafts of the BHR treaty. It also seems that the zero draft does not give adequate weight to preventive remedies like injunctions (though it mentions guarantees of non-repetition) despite its focus on prevention through HRDD. As no single remedy could prove to be effective, a "bouquet of remedies", including a meaningful apology, should be available to victims to achieve full reparation.

Moreover, the proposed treaty should make use of the potential of non-judicial remedial mechanisms (including national human rights institutions) in providing or facilitating access to effective remedy in business-related human rights abuses. It should also pay greater attention to dealing with corporate human rights abuses experienced differently and often disproportionately by marginalised or vulnerable groups.

The key to operationalise the treaty provisions strengthening access to effective remedy would be states making far-reaching changes to their legislation to remove barriers. The treaty could not possibly go into specific details as to how these barriers should be removed. Therefore, drawing inspiration from the OHCHR's Accountability and Remedy Project and recommendations from others such as Amnesty International and the EU Agency for Fundamental Rights, model laws should be developed to provide states concrete guidance which takes into account their specific circumstances. The Committee of Experts under the proposed BHR treaty may be given this task.

In short, despite gaps, ambiguities and structural incoherence, the zero draft of the proposed BHR treaty is a step in the right direction to obligate businesses to respect human rights. No instrument is perfect or self-sufficient to regulate effectively the conduct of globally-connected business enterprises. The proposed treaty would be a much-needed addition to reinforce existing regulatory tools.

The publication of the "Zero Draft" documents is positive news, but it calls for much further discussion

Maddalena Neglia, PhD, Head of the Globalisation and Human Rights Desk, International Federation for Human Rights (FIDH)

"[This draft] is a call that all those who have an interest in an economic development that is respectful of people and of the planet cannot miss."

The publication of the "Zero Draft" of the proposed legally binding Treaty on business and human rights and its optional protocol is undoubtedly positive news for the parties involved in the negotiation process. It provides a valuable opportunity to have a substantive and constructive debate this month in Geneva, at the fourth session of the Open-ended Intergovernmental Working Group and beyond. Moreover, not only was the draft recognized as a serious base for discussion by several experts, it also provides steps forward in the push to improve business accountability and access to justice in the cases of corporate violations of human rights. The centrality of victims' rights, the obligation to adopt mandatory due diligence, and the focus on liability all constitute interesting features of the text. Nevertheless, many discussions and clarifications are still needed, on nearly all facets for it to be a valuable addition to the existing international framework on business and human rights.

Scope

After heated debates over which corporations were to be covered by the treaty, the draft seeks to find a solution defining « business activities of transnational character » as the specific scope of the treaty. As a result, the preamble is the only part of the text formulating a straightforward, general provision for **all businesses to respect human rights**. Because **all types of companies can potentially commit human rights violations, this provision should be set in the operational part of the text** as the basic duty that businesses have to comply with and that has already been affirmed by several existing authoritative international documents.[7]Moreover, the treaty would benefit from the introduction of a more specific reference to the necessity to avoid differences of treatment between corporations, as did for example the OECD Guidelines on Multinational Enterprises.[8]

Furthermore, there is a real concern that some parts of the text may exclude certain types of corporations from the scope of the treaty, such as **state-owned enterprises, as rightly noted by Prof. John Ruggie.** We need a clear definition of "economic activities," which should include State-owned enterprises. While it is critical that the definition of the subjective scope of the treaty broadly

[7] Such as the General Comment No. 16 of the Committee on the Rights of the Child, by the General Comments No. 23 and 24 of the Committee on Economic, Social and Cultural Rights, and by the UN Guiding Principles on Business and Human Rights

[8] OECD Guidelines for multinational enterprises, 2011 ed;, I.5 “The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.”

captures the activities of transnational corporations, it must also include **national businesses whose structures or activities have a transnational element** and as such have the same potential to cause human rights harms as transnational corporations.

Jurisdiction

Given the difficulty to hold companies accountable for human rights violations in courts, the dispositions on jurisdiction in the text are of crucial importance. The draft needs to **offer further avenues to** allow for successful adjudication of violations of human rights by businesses.

The article on jurisdiction sets four alternative criteria to define the domicile of a corporation. Yet, it is not clear from the proposed draft if this expansive understanding of the "domicile" of legal persons **will be sufficient to establish the liability of the company** since other obstacles will remain in this respect such as the application of the 'corporate veil' doctrine in the event of abuses committed by subsidiaries.[9] It is therefore essential for **article 5 to be directly linked and recalled by Article 10 on liability.**

Rights of victims and human rights defenders

While the draft has a specific focus on the rights of victims, **it does not contain any specific reference to human rights defenders; moreover, the section on rights of victims repeatedly refers to the primacy of 'domestic law'**. Defenders are essential to ensure corporate accountability, but are also often the first victims of abuse and repression. This is particularly true of land rights defenders - who fight against land grabbing by businesses and states - and women, who are victims of differential, disproportionate, and often gender-specific forms of violence. The draft needs clauses that **protect human rights defenders from criminalization and obstruction of their work, from abuses of rights by corporations, and from ambiguous or repressive laws being passed by States to hinder their action**. The draft should recognize the work of human rights defenders as critical for ensuring victim's access to justice and corporate accountability.

Prevention

The draft sets out the obligation on States to adopt mandatory Human Rights Due Diligence (HRDD)legislation for companies domiciled in their territory and/or jurisdiction. Nonetheless, it fails to incorporate a remedial mechanism in its definition of Due Diligence. While the obligation to "identify" and "prevent" actual or potential human rights violations is a positive step in the right direction, it is only a starting point. Due diligence provisions should also include obligations for companies to **mitigate and take immediate remedial action against violations, without excluding the State's obligation to hold the company accountable for such violations** through civil and criminal liability**.** These are fundamental and complementary steps of corporate accountability and should be a necessary part of a HRDD.

Moreover, history shows that during situations of conflict, corporate actors tend to take advantage of grim realities for people on the ground as an opportunity for business. States have often used corporations to perpetuate their violations of international law as well. It is a positive element that after FIDH's repeated calls, the present draft addresses the link between **corporate human rights abuses and conflict-affected situations in Article 15 on Final Provisions.** However, the mere

[9] O. De Schutter in P. Alston, *Human Rights and Non-State Actors*, OUP (2005), p. 276.

calls for 'special attention' by States without further defining the perimeters of this obligation are too weak. The future instrument needs operational procedures to **identify and prevent** the risks of violations of international law in conflict affected areas. More specifically, article 9 on Prevention should require States to impose an **"enhanced due diligence" of companies in conflict-affected situations**.

The draft optional protocol

To complement the draft treaty, a draft optional protocol was released, which provides for the creation of an international remedial mechanism. This optional protocol fills a critical gap that has been pointed out by several commentators since the release of the Zero Draft treaty. However, including these provisions in an optional document – as opposed to the actual draft treaty - runs the risk of weakening these remedial mechanisms.

Moreover, the provisions of the protocol need to be further clarified. For example, articles 8 to 12 give the international Committee the power to receive communications (complaints) by individuals or groups. However, these provisions barely provide for any follow-up after reception of such a complaint, except to demand that businesses and States provide the experts "written explanations or statements clarifying the matter and the remedy" within 6 months. Then, the committee "**may"** designate members to make a "confidential inquiry and to report to the Committee urgently" on the situation, and transmit its findings to the State and to the business. Later, the committee "**may**" decide to include a summary of the inquiry in the annual report on its activities to the General Assembly. No obligations to publish these findings or even to communicate them to the individual plaintiff are featured in the text, contrary to other existing treaty bodies. The optional protocol undeniably **needs to be reinforced if the Committee is to be perceived as a trusted and efficient mechanism to remedy corporate human rights violations.**

Conclusion

While the way towards a treaty is still long and complex, this draft constitutes a valuable opportunity to have a meaningful and constructive debate at the upcoming 4thsession of the IGWG in Geneva. Delegations, especially those who have repeatedly called for substantial discussions to take place, are now expected to engage and comment on the content of the draft, to improve the existing text and to make the protection of human rights more effective when faced with corporate abuse.

It is a call that all those who have an interest in an economic development that is respectful of people and of the planet cannot miss.

FIDH will regularly inform readers with news and analyses during the fourth session of the OEIGWG in Geneva from October 15 to 19thwith its "News from the negotiation" newsletter. To sign up: http://urlz.fr/7Rdx

What can the zero draft Treaty text offer to people negatively affected by business operations?

Denise Auclair, Senior Advisor, CIDSE

"We can confidently say that the zero draft text reflects and builds upon the UN Guiding Principles, offering tools to strengthen their implementation and addressing acknowledged gaps."

Rooted in our direct work with women and men, communities and workers, for CIDSE and our members a key question is what the zero draft can offer to concretely improve the situation of people whose rights are infringed, and who stand up in defence of their territories and way of life.

Communities are feeling increasing pressure from business activities, also in the context of international trade and investment. In September, CIDSE hosted a delegation from the Pan-Amazonian Ecclesial Network presenting their Regional report on violations of human rights. Two cardinals together with indigenous leaders told policymakers of the encroachments on lands by mining, agribusiness and logging companies, and how national legislation was insufficient to protect their rights.

In May came visitors from Brazil, including a woman affected by the country's worst-ever ecological disaster caused by the burst of the Fundão dam operated by Samarco in Mariana (multimedia dossier here). Three years later justice has stalled, both nationally and regarding the responsibility of transnational actors. The report "Dirty Profits" analyses this and other investments by European banks in extractive companies linked to violations of human rights and damages to the environment. It is unclear whether the banks involved conducted their due diligence properly.

And in March, four human rights defenders from Andean countries visited while launching the report 'Defending our land and nature is our right' which aims at strengthening capacities of defenders in regions that suffer negative impacts of extractive industries and energy projects.

Listening to these realities means that those who take business and human rights seriously must take an interest in the potential of the Treaty text to strengthen international action to help stop business-related human rights abuses.

The very publication of the zero draft is a victory of sorts for people increasingly mobilizing in support of the Treaty. With multilateralism and the UN Human Rights Council having been under attack, the opening of negotiations on a Treaty text is a heartening message that the international community will not stand by immobile while people's rights are violated by powerful economic interests.

From CIDSE and our members' experience and work on business & human rights frameworks at international and national level, we can confidently say that the zero draft text reflects and builds upon the UN Guiding Principles, offering tools to strengthen their implementation and addressing acknowledged gaps. This is a helpful dynamic in view of building broad-based support and action.

The zero draft's emphasis on preventive human rights due diligence is crucial for avoiding corporate negligence or willful disregard for people and nature leading to future disasters. The text strengthens the approach of the UN Guiding Principles, making it legally binding in Article 9.2 via

national legislation. Here the French duty of vigilance law already shows the feasibility of regulation of multinationals' activities and their international supply chains. In this light the text could be further strengthened by specifically mentioning business relationships related to supply, export, services, insurance, finance and investment, reinforcing the whole value chain approach of the International Labour Conference on decent work in supply chains.

With a view to implementation, the recently published OECD Due Diligence Guidance for Responsible Business Conduct brings helpful clarity, for example requiring direct engagement with affected persons throughout the life cycle of a project. This is an essential aspect of human rights impact assessments and Free, Prior and Informed Consent, to ensure adequate space so that the realities and views of both women and men are taken into account, in support of gender equality. Further, the connection between due diligence and liability is recognized in Article 9.4, but needs further substantiation in relation to Article 10.

In the context of increasing killings of human rights defenders, the Treaty needs to help break new ground. The recently-signed Latin American Escazú agreement with measures for protection for defenders in environmental matters is an important regional development to build upon. The zero draft's mention of environmental aspects (Art 4.1., 8.1., 9.2.) is welcome, as many of our partner organizations experience threats while working to ensure protection of human rights related to the environment. The Treaty can go further by explicitly mentioning defenders and establishing specific measures, for example refraining from restrictive laws, protecting against criminalization and obstruction to their work, including gender-specific violence against women defenders; and fully, promptly and independently investigating and punishing attacks and intimidation.

The zero draft's focus on the rights of people affected and access to remedy is key. This can be a strong contribution towards implementation of the third pillar of the UN Guiding Principles, with opportunities for important synergies with the OHCHR project on Access to Remedy. The broad definition of jurisdiction and of applicable law in Articles 5 and 7 is positive, with its choice for victims; this a serious answer to the known legal obstacles caused by complex corporate structures and relationships. An explicit reference to extraterritorial obligations would strengthen legal certainty and reflect well the shared responsibility of host and home States in our global, interdependent world.

Several provisions to help overcome barriers to justice are important but need further specification. Among these, the requirement to avoid delays in the legal process (Art. 5c); the proposed International Fund for Victims; the provision on access to information, such as on corporate structures and activities that can substantiate claims of victims; and the reversal of the burden of proof (Art. 10), in the context of huge power and resource asymmetries between corporations and affected communities.

Article 13.6 addresses the severe conflicts between trade and investment agreements and human rights, recognizing the role of the Treaty in helping to avoid these. Many agreements give corporate actors privileged access to arbitration tribunals, allowing them to drive decisions on national regulation on labour rights, health and environment, while affected people struggle to have access to justice. However, the "least restrictive interpretation" asked in Art. 13.7 could be understood as continuing to allow these agreements to have some restraining effect on the State duty to protect. A specific clause on the primacy of human rights obligations would better clarify this relationship, adding to a stable legal environment.

Finally, enforcement mechanisms will be crucial to the success of the Treaty. International action is necessary to address important acknowledged gaps and help to strengthen national judicial systems. In this light, the number of derogations subject to domestic law (e.g. Articles 13.1-3) could severely weaken the Treaty's effectiveness, as certain existing laws may precisely represent obstacles to justice. A more balanced articulation between the national, regional and international levels of action will be needed for the Treaty to work effectively in practice.

With these observations in mind, the zero draft provides a solid basis for further constructive dialogue and advances as the negotiations begin.

What the Zero Draft and Protocol Lack: Meaningful Access to Justice – a Global South Perspective

Raphaela Lopes (Justiça Global) and Arnold Kwesiga (Initiative for Social and Economic Rights), members of ESCR-Net

"We need to establish a victim-centered system with enough clarity, and until then affected communities in the Global South and throughout the world will continue the struggle to access justice."

In Uganda, female farmworkers were poisoned by a Dutch flower-exporting farm. In Brazil, entire communities were wiped from the map and people were killed and displaced by a joint venture between an Anglo-Australian and Brazilian multinational mining company. Both face the biggest challenge, also faced by many other communities thorough the world: access to justice and reparation in cases of human rights violations committed by transnational corporations.

Any attempt to tackle this complex issue must take into account two different aspects: (1) affected people lack venues to access remedies, including low or non-existent human rights standards, and (2) corporations are granted undue access to and influence over states and their organs, a reality known as “corporate capture.” In order to address both, the treaty must also consider the power imbalances between the Global North and South, and the different needs people have based on where they are rooted.

Access to justice and effective remedies for corporate abuse remains a huge challenge, particularly in developing countries. Firstly, the weakness (or lack of political will) of the State in promoting general human rights and the realization of economic social and economic rights. It has led business enterprises to fill these gaps through voluntary principles of corporate social responsibility (CSR)—using them as a social license to operate even when their activities lead to corporate abuses. Secondly, it is the issue of state capture, as the state is often complicit in corporate human rights violations. For example, government security agencies often carry out mass evictions to make way for and attract corporate investments, which begs the question, “when the state and its agencies are entangled in corporate human rights abuses, where can victims turn to access remedies?”

Therefore, the establishing of extraterritorial jurisdiction – which is specially focused on home States – is of paramount importance to address the difficulties in the access to justice. Indeed, Draft Zero addresses this in Article 5, albeit not with sufficient precision, especially when describing what should be considered “domicile” (5.2). Furthermore, the treaty lacks a clear rule to prevent states from restricting access to their domestic legal systems by affected communities abroad who have suffered from the acts of companies domiciled in their territory.

Moreover, whereas Articles 9.3 and 4 delineate clear obligations of States Parties, they need to also be extended to include extra-territorial obligations to ensure that pursuit of effective remedies is on concurrent levels. There must be an expansive framework of extra-territorial obligations, so that home states are obligated to ensure that their persons (including business enterprises) respect human rights in all their operations abroad and that where they violate the rights, they are held accountable.

Articles 11 and 12 on international cooperation, are also examples touching on the interaction between territories, and could be critical in ensuring access to remedy. The concept of sharing of information and best practices is a step in the right direction; however, the provisions currently come off as skeletal and insufficiently mandatory. What would happen if a State does not cooperate in good will? What even amounts to cooperation in good will? Since disputes involving transnational corporations usually take on a political character, this needs to be addressed before it becomes a strategy for inaction embedded in larger international politics. For example, is a state bound to cooperate, in respect to the treaty, with a state with whom they are at war? It is important for the provisions to present a more elaborate, albeit not conclusive, list of what cooperation is and what standard has to be met. If clarity is not established, we risk states claiming national security or lack of resources to avoid cooperation. If a state refuses to cooperate, the treaty must provide some sort of remedy to hold states accountable: for example, the ability for private persons and organizations to sue states for non-cooperation.

Additionally, the National Implementation Mechanism created in the recently released Optional Protocol has the potential to undermine any advances accomplished in the treaty in terms of access to remedies. And that is, because of the way it is conceived, with no reference to civil society oversight and democratic participation, as well as having the competence of receiving complaints and solving them by the issuing of recommendations and amicable settlements. It seems that this mechanism will prevail over other venues of remediation, and offer no guarantees of effective reparation for victims, thus looking a lot like other bodies that monitor CSR commitments.

As it stands, the protection promised in the Zero Draft Treaty and its Optional Protocol is weak. We need to establish a victim-centered system with enough clarity, and until then affected communities in the Global South and throughout the world will continue the struggle to access justice.

Why the Treaty Draft is a Serious Basis for Negotiations

Ana María Suarez Franco and Daniel Fyfe, FIAN International

In summary, the draft treaty tackles many important accountability gaps highlighted by diverse social movements, victims groups and other civil society organizations demanding for the evolution of international human rights law, but there is still big room for improvement.

The draft binding instrument prepared by the chair of the intergovernmental working group on transnational corporations and other business enterprises ahead of the groups' 4thsession is a serious basis for the first round of negotiations. The draft addresses some of the existing gaps in international law, notably by expanding the judicial competence to extraterritorial abuses and establishing the right for affected people to individually or collectively access justice in the country where a company is based or has substantial activities as an international standard. It also obliges states to hold business enterprises carrying out activities of transnational character accountable under their civil and administrative laws, and opens the way for establishing a criminal liability for corporations along the value chain, which is something currently non-existent in many states. Unfortunately, this advance is limited to national law.

Another strength of the draft is the provision of international cooperation and mutual legal assistance, which will contribute to closing the accountability gap in cross-border cases involving transnational corporations (TNCs). Providing the opportunity for victims to claim their rights in the home states of the controlling companies represents an advance in international law. The inclusion of a treaty body and a complaints mechanism in the Optional Protocol is promising, even if strengthening its enforcement will be key for the effectiveness of the treaty.

The chosen format of a framework treaty with a Conference of States Parties (COP) can facilitate negotiations and provide for rapid adoption of the instrument relatively, whilst not closing the door to further legal developments and mechanisms, which the COP can adopt in the shape of optional protocols. The treaty body will furthermore provide interpretations of the treaty consistent with the evolution of the society and clarify how states should implement the treaty. The treaty will therefore be a first binding milestone for corporate human rights law but also a starting point to develop stronger legal accountability for corporate human rights abuses.

However, the fact that the draft is relatively short and minimalist is a concern. As we approach negotiations, there is a risk that it will be further weakened. There are several aspects which should be improved during the negotiations, some of them explained below.

Perhaps with the aim to convene those reluctant to the process, the draft includes in different articles (e.g. art. 8, art. 9, art. 10) phrases which limit the effectiveness of the provisions, such "in accordance with national/domestic law". Such phrases undermine the whole purpose of an international legally binding instrument if states can use their laws to escape from their international human rights obligations. Although it is understandable for the draft treaty to be sensitive to different legal systems, this should not be at the risk of weakening its effectiveness. The draft treaty should include a clause, which clarifies the relation between national law and the treaty in one place, as to avoid these weakening phrases.

Despite strong demands for a clear gender perspective in the treaty and an adequate recognition of the attacks suffered by human rights defenders advocating in abuses and crimes related to corporate offenses and crimes, the gender perspective is still very weak and lacks mention of human rights defenders. Also in the few references to vulnerable groups (for example art. 15.5), peasants and other rural communities are absent, even though the Declaration on the Rights of Peasants and other People Working in Rural Areas was recently adopted by the Human Rights Council (28 of September 2018). We support the demands by the "Feminists for the Binding Treaty". We also urge states to include specific provisions for the protection of human rights defenders vis à vis corporations infringing human rights, as well as the inclusion of references to peasants and other rural communities when dealing with groups vulnerable to corporate abuses.

A critical challenge for the victims is to avoid damages, in many cases irreparable, while they advocate for their affected human rights or during the entire judicial process. If measures to prevent the damage are not taken quickly, a judicial decision can become ineffective. Therefore, article 8 should include a clause establishing victims' right to demand precautionary measures to stop the damages or prevent the damage until the case is decided.

In summary, the draft treaty tackles many important accountability gaps highlighted by diverse social movements, victims groups and other civil society organizations demanding for the evolution of international human rights law, but there is still big room for improvement. The question is whether the community of states will respond to the expectations of their citizens and begin the long-expected negotiations in a proactive manner and in good faith.