**Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG)**

# Comments on
# *"Zero Draft" Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*
# *&*
# *"Zero Draft" Optional Protocol*

***Comments***

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# I. Introduction

The International Human Rights Clinic (the "Clinic") at Santa Clara University School of Law welcomes the invitation of the United Nations Open-Ended Intergovernmental Working Group on Human Rights and Transnational Corporations and Other Business Enterprises (the "OEIGWG") for input regarding the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft"), and respectfully submits its recommendations for further clarification and specificity in the treaty's ongoing drafting process. The Clinic trusts that the discussions that take place during the Fourth OEIGWG session in Geneva from 15-19 October 2018 will encourage clarification about the legal obligations of States and businesses, as well as the rights and remedies of victims. Accordingly, we strongly urge the Working Group to consider the following areas of clarification:

- explain which human rights would form the basis of this treaty;
- define which types of businesses should be held accountable, and
- concretely establish a remedy scheme for individual communications in the body of the treaty itself rather than the Optional Protocol.

# II. The Zero Draft should limit its scope under Articles 1, 3, and 4.2

Some of the definitions provided in Articles 1, 3, and 4.2 of the Zero Draft are insufficient to provide clarity in guiding States and businesses through understanding the scope of this treaty. For example, while its binding nature is unclear,[1] Article 1 ("Preamble") of the Zero Draft is needlessly broad in scope and would benefit from additional definitions with more precision and clarity. It states:

> **[A]ll business** enterprises, **regardless of their size, sector, operational context, ownership and structure** shall respect ***all human rights***, including by avoiding causing

[1] Dr. Nadia Bernaz, "The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism," *Business and Human Rights Resource Centre*, available at https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism ("[T]he 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' . . . 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").

or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur.[2] (emphasis added)

Article 3 ("Scope") of the Zero Draft is even less precise than the Preamble, stating, in its entirety:

1. This Convention shall apply to human rights violations in the context of ***any*** business activities of a transnational character.
2. This Convention shall cover ***all*** international human rights and those rights recognized under domestic law.[3] (emphasis added)

Additionally, Article 4.2 of the Zero Draft defines "Business activities of a transnational character" as "any ***for-profit*** economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact two or more national jurisdictions."[4] (emphasis added)

The language in these articles necessitates definition and refinement. Because not all human rights are relevant for this treaty, Articles 1 and 3 should identify which human rights would form the basis of this treaty. And because not all rights create obligations on businesses, Articles 1 and 4.2 need to define which types of businesses should be held accountable. Additionally, the treaty must clarify its scope. It is unclear what size businesses would fall within the scope of this treaty and why the treaty chooses to distinguish between for-profit and other enterprises, such as those that are State-owned.

## A. Not all human rights are relevant for this treaty; the treaty should identify which rights are most relevant for the purposes of holding businesses accountable for human rights violations

The Zero Draft should more precisely define the human rights for which corporations should be held accountable. The language used in the Zero Draft is deceptively simple and direct: ***all*** businesses shall respect ***all*** human rights. However, not ***all*** States have ratified ***all*** human rights

[2] United Nations, Human Rights Council, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises*, ("Zero Draft") (16 July 2018), Article 1, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[3] Zero Draft, *supra* note 2, Article 3.

[4] Zero Draft, *supra* note 2, Article 4.2.

treaties. Therefore, different States have different human rights obligations, depending on the human rights treaties ratified by each State. Accordingly, businesses that operate in particular States which have ratified specific treaties have different obligations than businesses that operate in States which have not ratified those same treaties.

The Zero Draft should therefore identify and define the rights for which businesses should be held accountable. Asserting that this treaty encompasses ***all*** human rights fails to address the reality that there is no "universal ratification" of all human rights treaties by participating States. To illustrate this point, we respectfully urge the OEIGWG to consider what would happen in a situation where a business operates in a State which has not ratified a specific human rights treaty and that business violates a right contained within that treaty. How would the Zero Draft apply to a company that *does* reside in a State that has ratified a particular human rights treaty and then conducts business with a company which resides in a State which has *not* ratified that treaty but has violated a human right within that treaty? By failing to define which human rights create corresponding obligations on businesses, the Zero Draft widens the treaty's scope unnecessarily and obfuscates businesses' obligations under human rights law.

Furthermore, not all human rights impose a corresponding obligation on businesses. For example, it would be difficult to imagine a situation where businesses have an affirmative obligation to provide an attorney in a criminal trial, grant citizens the right to vote, or ensure the right to run for office, as enumerated in articles 8.1 and 23.1 of the American Convention on Human Rights ("ACHR") or articles 14 and 25 of the International Covenant on Civil and Political Rights ("ICCPR"). Yet the treaty's scope is conveyed in such a way that all these and other obligations would be imposed unnecessarily upon businesses, leading to confusion and the potential for lack of State support for the treaty.

Arguably, limiting the scope of the treaty in this way would encourage corporate cooperation rather than create obligation loopholes. Thus, defining which human rights are most vital to the international community in the context of business activities would guide companies to more fully understand the scope of the treaty as well as their role in complying with it. As such, we encourage the OEIGWG to identify or reference in the Zero Draft the specific human rights that create obligations directly on businesses.

Notably, the following language included in the Guiding Principles on Business and Human Rights reflects where we might look to establish a concrete foundation for this treaty:

> Depending on circumstances, business enterprises may need to consider additional standards [than those found in the International Bill of Rights or the eight core ILO conventions]. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, **United Nations instruments have elaborated further on the rights**

> **of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families**. Moreover, in situations of armed conflict enterprises should respect the standards of **international humanitarian law**.[5] (emphasis added)

We therefore agree with Carlos López from the International Commission of Jurists; without specific guidelines that establish the core rights and obligations of businesses, it is "difficult to see how a State could even go about implementing a treaty with as open ended a prescription as article 3.2."[6] Shirking such nuances in the treaty will come at a cost; failure to articulate exactly which types of businesses will be held accountable for exactly which human rights obligations results in uncertainty and confusion. More importantly, this lack of clarity will thwart widespread support by States where corporations are unable to determine the extent of their human rights legal obligations.

## B. Not all types of businesses should be subject to obligation under the treaty; the treaty should define more clearly the types of businesses covered by the treaty

The Zero Draft allows too much flexibility in determining which business enterprises fall within its scope. Without clarifying which types of businesses would be subject to the obligations outlined in this treaty, the scope would reach enterprises which are not the treaty's intended participants, businesses whose livelihoods may have little transnational effect but would otherwise suffer severe financial hardship as a result of mandatorily implemented self-monitoring systems.[7] In an increasingly globalized economy, coupled with the rapid facilitation of technological advancements, the size of the business no longer dictates whether the business conducts any of its activities transnationally.[8] For example, a family-owned business which purchases goods from a company in another State, would not have the same obligations as that of an economically-privileged multinational corporation.

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[5] United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (United Nations, 2011), available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[6] OpinioJuris*, Towards an International Convention on Business and Human Rights (Part I)*, July 23, 2018, available at http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/.

[7] Zero Draft, *supra* note 2, Article 9

[8] Acs, Z.J., Morck, R.K., & Yeung, B, *Entrepreneurship, globalisation, and public policy*, J. OF INT'L MANAGEMENT, Vol 7, 235-51, 236 (2001) ("As economies become more interconnected with global trade and investment patterns, small- and medium-sized enterprises (SMEs) are becoming increasingly important pillars of the economies of the major trading partners.")

Although the Zero Draft provides some clarification with regard to allowing States to exempt "small and medium-sized" companies, it fails to define what constitutes small or medium in this context. Would this be up to State parties to decide entirely? Or should there be some universal scale -- a minimum "floor" -- by which States can measure when drafting domestic legislation? On the other hand, confining this provision to "large businesses" could potentially lead to a lack of accountability for smaller transnational enterprises which commit human rights violations, simply because their State's domestic provision has exempted them.[9]

Furthermore, pinpointing economic activity that is "for-profit" ignores companies that conduct economic activities which are not otherwise characterized as such, most importantly State activity. As Professor John Ruggie explains:

> [State-owned enterprises ("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.[10]

The implied assertion that only "for-profit" enterprises might be responsible for committing human rights violations "fails to acknowledge the complexities of corporate power and how they often act in collusion with the State."[11]

Additional definitions would be useful in addressing some of these limitations and providing clarification to the international community, both business- and human rights-focused. For example, the document on Rules of the Responsibilities of Transnational Corporations and Other Companies with Regard to Human Rights, which was adopted in 2003 by the former

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[9] Richard Meeran, "The 'Zero Draft': Access to judicial remedy for victims of multinationals' ("MNCs") abuse," *Business and Human Rights Resource Centre*, available at https://www.business-humanrights.org/en/the-%E2%80%9Czero-draft%E2%80%9D-access-to-judicial-remedy-for-victims-of-multinationals%E2%80%99-%E2%80%9Cmncs%E2%80%9D-abuse?utm_source=Business+%26+Human+Rights+Resource+Centre+Updates&utm_campaign=89568d0f68-EMAIL_CAMPAIGN_2018_09_04_09_06&utm_medium=email&utm_term=0_c0049647eb-89568d0f68-182068045&mc_cid=89568d0f68&mc_eid=632b9cde1f

[10] John Ruggie, "Comments on the Zero Draft Treaty on Business and Human Rights," *Business and Human Rights Resource Centre*, available at https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights.

[11] Felogene Anumo and Inna Michaeli, "Justice not 'special attention': Feminist Visions for the Binding Treaty," *Business and Human Rights Resource Centre*, available at https://www.business-humanrights.org/en/justice-not-%E2%80%9Cspecial-attention%E2%80%9D-feminist-visions-for-the-binding-treaty.

Subcommittee on the Promotion and Protection of Human Rights,[12] defines "transnational company" and "another business enterprise," respectively, as:

> **Transnational company:** [A]n economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively,[13] and;
>
> **Another business enterprise:** [A]ny business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, ***the impact of its activities is not entirely local***, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.[14] (emphasis added).

Providing clearer definitions like these would contribute towards a better understanding of the concept and scope of which companies *should* be affected by this treaty, as well as which international obligations those companies owe to the human rights community.

## III. The treaty should include an individual communications provision in the body of the treaty rather than in an "opt-in" optional protocol

The Zero Draft needs to include a language for individual communications in the main body of the treaty itself. Despite placing a heavy emphasis on remedies for victims, the Zero Draft fails to include a provision permitting individuals to submit claims to the Committee. Indeed, only the separate Optional Protocol includes the following provision:

> "A State party to the present [Protocol] recognizes the competence of the Committee established under Article 9 of the LEGALLY BINDING INSTRUMENT (hereafter referred to as the Committee) to receive and consider communications from or on behalf of individuals or group of individuals[.]"[15]

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[12] Subcommission on the Promotion and Protection of Human Rights, *Rules on the responsibilities of transnational corporations and other companies with respect to human rights*, E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003).

[13] Rules on responsibilities of transnational corporations, *supra note 12*, Art. 20.

[14] Rules on responsibilities of transnational corporations, *supra note 12*, Art. 21.

[15] United Nations, Human Rights Council, *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises,* (19

Thus, States must ratify the Optional Protocol in order for the Committee to hear individual petitions from participating States, essentially "opting in" to this remedy scheme.

We urge the Fourth Intergovernmental Working Group to instead include an individual communications provision in **the main body of the treaty** itself, rather than in an Optional Protocol. We propose that States be required to "opt-out" from this individual remedy scheme. Additionally, we suggest that the following language be included in the main body of the treaty:

1. Each State party may, at the time of signature or ratification of the present Convention or accession thereto, declare that it does not recognize the competence of the Committee to receive individual communications as provided for in the present article. No communication shall be considered by the Committee if it concerns a State Party that has made such a declaration.

2. Any State party having made a declaration in accordance with paragraph ** of the present article shall nevertheless provide effective civil, criminal, administrative or other remedies to redress violations of the present Convention and shall include information about such remedies in the State Party's periodic report to the Committee, pursuant to article ** of the present Convention.

3. Any State party having made a declaration in accordance with paragraph ** of the present article may, at any time, withdraw this declaration by notification to the Secretary-General of the United Nations.

# IV. Conclusion

While the Zero Draft provides a welcome framework for developing a legally binding treaty to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, particularly with victims' access to remedies, its failure to adequately define the overall scope and several vital terms in its text has far-reaching implications. The Zero Draft, as it currently stands, could threaten the ability to build State consensus for purposes of ratification and may impose a negative impact on smaller businesses, whose role in this context is murkily defined. This treaty would largely benefit from several simple clarifications: (1) explain which human rights would form the basis of this treaty, (2) define which types of businesses should be held accountable, and (3) concretely establish a remedy scheme for individual communications in the body of the treaty itself.

July 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf.

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In solidarity,

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