



ZERO DRAFT of the Legal Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the Binding Treaty)

Trade Union Comments

The Trade Unions welcome the publication of the zero draft for a Binding Treaty and for an Optional Protocol by the Chairmanship of the Open-ended Inter-governmental Working Group (OEIGWG). This is a critical step in achieving progress towards the fulfillment of the mandate of Resolution 26/9 to deliver an internationally legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises. In working towards addressing one of the most important gaps in international human rights law, we call on all governments to engage in constructive discussions during the upcoming 4th session of the OEIGWG session starting on 15 October 2018. Governments must now come forward with substantive comments on the zero drafts based on consultations with trade unions, business and civil society members at the national level. We denounce and reject attempts to undermine the efforts of the OEIGWG by challenging the very clear and straightforward mandate of resolution 26/9.

Throughout this process, we have advocated for the following key priorities to be included in the Binding Treaty:

- A **broad scope** covering all internationally recognised human rights, including fundamental workers' and trade union rights, as defined by relevant international labour standards.
- The **coverage** of all business enterprises regardless of size, sector, operational context, ownership and structure.
- **Parent company-based extraterritorial regulation** and access to justice for victims of transnational corporate human rights violations in the home State of transnational corporations.
- Regulatory measures that require business to adopt and apply **human rights due diligence** policies and procedures.
- Reaffirmation of the **applicability** of human rights obligations to the operations of companies and their obligation to respect human rights.
- A strong international monitoring and **enforcement** mechanism.

Based on these expectations, we provide the following comments on the zero draft:

Article 1. Preamble includes very important and relevant principles. We welcome in particular the reaffirmation of the universal, indivisible, interdependent and inter-related nature of all human rights, as well as the reference to equal and effective access to justice and remedies, which is rightly the core of the Binding Treaty. The text can be strengthened with the following amendments:

- adding a reference to the UN Guiding Principles on Business and Human Rights (UNGPs), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and the Sustainable Development Goals (SDGs);



- reaffirming the primacy of human rights over business and trade by recalling Article 103 of the UN Charter on the primacy of the Charter.

Article 2. Statement of purpose referring to the objective of strengthening human rights in the context of business activity, ensuring effective access to remedy and international cooperation on these issues reflects our broad expectations from the Binding Treaty. We therefore strongly support this text. The text can be strengthened with the following amendments:

- The text under article 2.1.a. should be realigned with the tripartite formula of “respect, protect and fulfil human rights” in order to avoid potential difficulties with interpretation.
- The text under article 2.1.c. should include a reference to mutual legal assistance, which is critical to international cooperation.

Article 3. Scope focuses on business activities of transnational character and not on the transnational nature of companies ensuring a broad scope, which we welcome and support. However, we believe that it is problematic that:

- the state-business nexus is not specifically addressed; and
- there is no adequate definition of the extent of “business activities of a transnational character” and the scope of the term “in the context of”. Further clarity may be needed to prevent potential difficulties with implementation at the national level.

In addition, we propose some further language and conceptual precision for this article:

- The term “violation” should be replaced with “adverse impacts” or “abuse” of human rights to ensure alignment with the UNGPs.
- Article 3.2 refers to “all international human rights and those rights recognized under domestic law”, which does not lend sufficient clarity about the scope of human rights covered. This deficiency could be addressed under article 4.

Article 4. Definitions should be expanded in order to provide the clarity needed for the understanding of the Binding Treaty. The following definitions should be added to this article:

- Definition of what constitutes “business activities of a transnational character”. Inspiration could be drawn from the United Nations Convention against Transnational Organized Crime under article 34.2, which states that offences established in the Convention shall be established in the domestic law of each State Party independently of the transnational nature of the business activity, except to the extent that the nature of the crime would require the transnational element.
- Definition of the actors, including parent companies, subsidiaries, subcontractors, etc. to ensure a consistent understanding throughout the entire text and avoid inconsistencies.
- Definition of what constitutes a violation. We propose the term “adverse human rights impact” to align the Binding Treaty with the UNGPs.

We also propose amendments to the existing text:

- Replacement of the term “victim” to “rights-holders” to ensure that trade unionists and other human rights defenders are captured.



- Deletion of the notion of “for-profit economic activity”, which could potentially exclude state activities.

Article 5. Jurisdiction provides a broad choice of competent jurisdiction to victims to enable them to access remedy. We propose the following amendments to strengthen the text and to ensure that remediation is provided either through the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence.

- In article 5.1.a., “or” should be replaced by “and” to reflect the multiple choice of competent jurisdictions offered in the draft treaty.
- Article 5.2 should include provisions to allow for local subsidiaries to be sued in courts of the domicile country or at least be joined to claim(s).

Article 6. Statute of limitations can be potentially very useful in ensuring that barriers to access to justice are overcome in practice. However, the article would require further clarity as to when limitations can be considered as “unduly restrictive”. Moreover, it is unclear why the article highlights specifically “violations occurred abroad” given that the Binding Treaty addresses business activities of a transnational character.

Article 7. Applicable law provides a very strong choice to victims to request the applicability of the law of another Party. This provision is important, particularly because multinationals frequently choose to engage in host countries with weak legal frameworks. We therefore support this article.

Proposed new article 8 on the corporate duty to respect human rights and the state duty to protect human rights. Before entering into the article on the rights of victims, it is important to reaffirm the obligations of companies and the State in order to have a clear understanding of the standard against which rights of victims arise.

Article 8. Rights of Victims incorporates some of our main demands, including:

- the enabling of class action lawsuits;
- the need to overcome jurisdictional barriers by limiting the use of the doctrine of forum non conveniens;
- measures to grant victims access to information in pursuing claims;
- granting of procedural rights to victims and the requirement to eliminate claimants’ security for costs and costs shifting from defendant to claimant;
- the establishment of an International Fund for Victims to provide legal and financial aid to victims;
- effective enforcement of judgments; and
- measures to protect victims including special consideration on avoiding repetition of rights violations.

While broadly supportive of the Article, we would like to see the following issues clarified and addressed:

- the range of civil, criminal and administrative remedies should be set out separately and include preventive measures such as injunctions and other remedies, including reinstatement and apologies; and
- the protection of human rights defenders with a focus on the gender dimension.



Article 9. Prevention requires States Parties to introduce domestic legislation requiring mandatory human rights due diligence. This is a major step in the right direction. Unions have regularly advocated for a clear state obligation to adopt regulatory measures that require business to adopt and apply human rights due diligence policies and procedures. It is vital that the following issues are explicitly addressed in the article:

- conceptual alignment with Pillar II of the UNGPs to reduce some definitional and operational ambiguities;
- clarity needs to be provided on the point that human rights due diligence is a continuous obligation and not an exercise confined to pre- and post-event assessments;
- the provisions on national enforcement procedures should be strengthened, including through the incorporation of relevant provisions of the draft Optional Protocol into the text of the Binding Treaty; and
- liability for failing to comply with due diligence obligations should not be linked to the provisions on legal liability contained in article 10 in such a way as to provide TNCs with an absolute defence against liability claims.

Article 10. Legal Liability provides a sound basis for effectively addressing existing accountability and liability gaps arising from the complex structures of multinational companies and their supply chains dominating the global economy. The article should be strengthened with the following amendments:

- Any reversal of the burden of proof in favour of a victim should be provided under domestic laws and not left to the discretion of domestic courts.
- Multinational companies should be held liable for human rights violations throughout their activities, including those by supply chain entities, irrespective of the mode of creation, ownership or control. As such, clarity is needed on the concepts of control, leverage over subsidiaries and supply chains actors, and foreseeability of harm as set out in the Article.
- The criminal offences for which a multinational company could be held liable need to be broadly defined.
- In addition to civil and criminal liability, administrative liability also needs to be covered in the article.

Article 11. Mutual Legal Assistance among States Parties is crucial for the effective implementation of the Binding Treaty. While strongly supporting the inclusion of this Article, we believe that it can be further strengthened in the following ways:

- Mutual legal assistance should also include precautionary measures, such as facilitating the freezing of bank accounts.
- The recognition and enforcement of final court decisions should be subject to Article 10 on legal liability.
- States Parties should refuse mutual legal assistance in good faith only.



- There is a need for additional measures to ensure the implementation of this Article, such as conciliation procedures where a State Party complains that another does not offer mutual legal assistance.

Article 12. International Cooperation as a general obligation of international cooperation to assist States to better promote and protect human rights is one running throughout international human rights law. We therefore strongly support this Article.

Article 13. Consistency with International Law is generally a relevant objective, which we recognise. However, there is concern that this article could undermine other gains of the Binding Treaty. We therefore call for the following clarifications:

- The provisions relating national sovereignty and territorial integrity should not be used as an excuse to decline jurisdiction on the ground of forum non conveniens.
- There is a real risk that the ability of States Parties to effectively take preventive measures under article 9 will be hindered if this Article is interpreted broadly.
- The article fails to explicitly recognise the primacy of human rights obligations over trade and investment agreements. We strongly support the inclusion of such a provision, which would build on UN Guiding Principle 9 and its commentary and General comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

Article 14. Institutional Arrangements falls below our expectations. We call for a complementary international mechanism to oversee compliance of the Binding Treaty. We are particularly disappointed about the fact that the proposal for an International Tribunal does not appear in the zero draft. As a bare minimum, the following amendments will need to be considered:

Committee

- The functions and powers of the Committee should be strengthened by, among other things, having the ability to hear individual complaints. Certain provisions of the draft Optional Protocol should be included directly in the Binding Treaty.
- It is also essential that civil society organisations and trade union organisations are fully involved in proposing and designating the Committee's experts.

Conference of the States Parties

- The draft contains no provision on the settlement of disputes, and this needs to be addressed.