

### **OEIGWG has come in from the cold: Will the EU do the same? Position paper on the zero draft of a binding treaty presented by the open-ended intergovernmental working group on transnational companies and other business enterprises**

Niebank, Jan-Christian; Schuller, Christopher

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Position Paper

# **OEIGWG has come in from the cold. Will the EU do the same?**

Position paper on the Zero Draft of a binding treaty presented by the Open-Ended Intergovernmental Working Group on Transnational Companies and Other Business Enterprises

**October 2018**

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# 1 The binding treaty on business and human rights

The German government, along with the governments of a number of other countries in Europe and further afield, is currently working to implement its National Action Plan on Business and Human Rights.<sup>1</sup> The common framework for all of these National Action Plans is the UN Guiding Principles on Business and Human Rights (UNGPs). In parallel to these processes, an intergovernmental UN working group on transnational corporations and other business enterprises (OEIGWG) is developing an instrument designed to serve as a binding treaty governing the activities of transnational corporations and other businesses as they impact human rights.

The German Institute for Human Rights issued a position paper in October 2017 responding to the “Elements” paper published by OEIGWG as a preliminary to a first treaty text.<sup>2</sup> In this paper, the Institute urged the OEIGWG to concentrate on particularly urgent topic areas in the hope of achieving a swift and significant impact for rightsholders impacted by the activities of business enterprises. The Institute emphasized that any binding treaty must emerge both in form and substance from the established international consensus, especially as it is reflected in the UNGPs, and that the treaty would ideally represent a useful further development of the Guiding Principles.

In July of this year, Ecuador as chair of the OEIGWG published a zero draft of the text of the proposed binding treaty and subsequently the text of an optional protocol. The texts are to be discussed in the fourth round of OEIGWG negotiations from 15–19 October 2018. This present position paper of the Institute focuses on the zero draft and the optional protocol, how they are to be evaluated, which aspects of the draft conform to human rights standards and which can be improved.

## 2 Evaluating the zero draft

Overall, the zero draft represents an improvement upon the Elements published in October 2017 and can be called a step in the right direction. A number of commentators from civil society, academia, international organizations, and business organizations consider it capable of achieving broad diplomatic support and suitable for addressing protection gaps, especially in transnational supply chains.<sup>3</sup> A more focused orientation on the UNGPs has been helpful in this regard, as has a shift in focus onto the most urgent problem areas: prevention of human rights violations and access to effective civil- and criminal-law remedy for rightsholders. The shift away from notions of transnational companies as direct duty-bearers under international law is also a positive development. Instead, the draft goes further toward making more concrete the state duty to protect from business-related human rights violations and correctly bases the logic of this protection on state-imposed obligations on companies to conduct human rights due diligence backed up with civil and criminal enforcement. These positive developments compared to previous iterations of the treaty process should be

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<sup>1</sup> A continuously updated overview of NAP processes is available at <https://globalnaps.org> (last accessed on 28.09.2018)

<sup>2</sup> Niebank, Jan-Christian / Schuller, Christopher (2018): Position Paper: Building on the UN Guiding Principles towards a Binding Instrument on Business and Human Rights. Berlin: German Institute for Human Rights

<sup>3</sup> cf. Business & Human Rights Resource Center, Reflections on the Zero Draft, <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty/reflections-on-the-zero-draft>.

recognized and rewarded by the international community and the UN member states, especially those who are also members of the European Union.

The future stages of the treaty process must serve to address and overcome the current weaknesses of the draft: many of the articles must become more specific; there are inconsistencies between important provisions of the draft (see part 3.2 of this paper); some provisions are problematic from a human rights perspective (3.3); and some aspects of the business and human rights discussion that could lead to significant improvements for rightsholders are neglected by the draft (3.4). Below, we discuss the positive aspects of the draft in part 3.1, with weaknesses covered in parts 3.2–3.4.

## 3 Content and scope of the zero draft

### 3.1 Positive aspects

The zero draft largely builds on the language of the UNGPs and their core concept of human rights due diligence. This should put an end to the criticisms of the treaty process as a distraction from or cannibalization of processes of UNGP implementation that are in many countries still in the early stages.<sup>4</sup> Building on the UNGPs and developing them further in order to close gaps in human rights protection is the approach required in order to win the widespread approval of UN member states for the treaty itself.

The zero draft contains two focus areas: (a) prevention of and (b) effective remedy for business-related human rights violations. These represent the areas in which urgent action is needed beyond mere implementation of the UNGPs. The zero draft engages directly with the question of how to eliminate hurdles to access to remedy that rightsholders face at present, including the lack of access to information about companies, the disadvantages posed by unfair burdens of proof, and the high cost of conducting proceedings before remedy mechanisms.

Despite a number of proposals to the contrary, the text abandons the idea of imposing human rights obligations directly on companies as a matter of international law. Instead, State Parties are called upon to ensure liability under their own civil and criminal law for business activities. Liability under the treaty is to be triggered by companies failing to comply with legal requirements to conduct human rights due diligence. The Institute welcomes this clarification that the treaty's goal is a further sharpening of the state duty to protect human rights rather than the creation of new subjects of public international law.

The provisions of Article 9 of the zero draft are largely in accordance with the core elements of human rights due diligence as expressed in the UNGPs, though the zero draft is significantly more concrete: companies are to be required to integrate human rights due diligence into their contractual relationships with other business entities.

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<sup>4</sup> European Union (2014): Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights. EU Explanation of Vote. [www.globalpolicy.org/images/pdfs/GPFEurope/HRC\\_resolution\\_Explanation\\_of\\_vote\\_EU.pdf](http://www.globalpolicy.org/images/pdfs/GPFEurope/HRC_resolution_Explanation_of_vote_EU.pdf); Business at OECD, FTA, ICC, OIE (2017): Response of the international business community to the "elements" for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights. <https://www.business-humanrights.org/sites/default/files/documents/Joint%20business%20response%20to%20IGWG%20elements%20paper%20-%202020.10.2017%20-%20FINAL.pdf> (both last accessed on 19.09.2018).

This can lead to the creation and intensification of a web of legally binding obligations to conduct due diligence. The zero draft also calls for requirements to conduct consultations with potentially affected groups and the setting aside of funds to pay compensation claims. Both of these developments represent a welcome strengthening of the position of rightsholders.

The zero draft also drops the suggestion contained in the 2017 Elements paper of an international tribunal for business and human rights as the enforcement body for the treaty. Moving away from a proposed further international court could be a productive step towards winning the required critical mass of ratification of the treaty by UN member states. Instead, Article 14 of the zero draft calls for a treaty body of independent experts to monitor compliance with the treaty. The Optional Protocol presented by OEIGWG is an important addition to this provision, as it expands the mandate of the treaty body and calls for the establishment of national implementation mechanisms for the promotion and monitoring of the implementation of the treaty. This combination of international and national monitoring mechanisms corresponds to the logic of other recent human rights treaties such as the Optional Protocol to the Convention Against Torture or the Convention on the Rights of Persons with Disabilities (see part 3.4 of this paper).

These instruments strengthen the hand of those seeking to investigate business-related human rights violations or seeking access to remedy. The ratification of the optional protocol would entail recognizing the jurisdiction of the treaty body envisioned in Article 14 to handle individual complaints of business-related human rights violations emerging from their own court systems (Article 8).<sup>5</sup> In addition, State Parties can confer upon the national implementation mechanism jurisdiction to receive and investigate individual complaints of business-related human rights violations.<sup>6</sup>

### 3.2 Problems from the human rights perspective

The **controversy over the scope of application** of the treaty remains unsolved. As in the Elements, the zero draft limits the application of the treaty unnecessarily by confining it to “business activities of a transnational character” (Article 3.1 and 4.2). Human rights violations by companies without transnational connections are excluded from the application of the treaty. Since very few business operate in the real world without cross-border supply chains or customer bases, this limitation does not seem especially sensible. From the human rights perspective, it poses considerable difficulty. Any such limitation must be rejected by a victim-centred approach, since effective protection must cover every potential negative impact of human rights by any kind of business activity. A binding treaty must cover the activities of all businesses, including domestic businesses and especially state-owned enterprises.

The draft construes the term “transnational business” very widely, however, since the cross-border element necessary to trigger the application of the treaty can be constituted by actions taken by the company, by reference to the persons involved, or

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<sup>5</sup> As in other human rights treaties, exhaustion of domestic remedy channels is a prerequisite for approaching the treaty body with an individual complaint, cf. Article 9.4 of the optional protocol.

<sup>6</sup> The job of the national implementation mechanism (NIM) is designed to be the promotion of awareness of the treaty among state authorities, companies, and rightsholders. The NIMs should make recommendations to their governments, but also have their own investigatory powers. They are designed to be able to monitor companies' carrying out of human rights due diligence e.g. by demanding information or conducting inspections of the sites of business operations. Provisions are made for transnational cooperation among NIMs from other States Party (Art. 3–9 of the optional protocol).

in circumstances where human rights violations extend across jurisdictional boundaries. Doug Cassel points out<sup>7</sup> that this definition would encompass almost any company of relevant size. It ought therefore to be that much simpler to extend the scope of application to all businesses in line with the UNGPs.

A second significant human rights problem is the **omission of the state-business nexus**. Whenever states support companies as part of their foreign trade promotion or when they purchase from companies via procurement processes, they should ensure as part of their duty to protect that these companies provide proof that they have conducted human rights due diligence. This argument was developed as part of the UNGPs and formulated as one of the demands made of national implementation processes. Even if the treaty process lacks the ambition to develop these policy areas further, it should not fall back below the standard of the UNGPs on this question (see GPs 4, 5, and 6).

**Exemptions for small and medium-sized businesses** from human rights due diligence requirements, as foreseen by Article 9.5 of the zero draft, are not acceptable. The responsibility to respect human rights covers all businesses regardless of their size (cf. UNGP 14). Disproportionate burdens on small and medium-size businesses are avoided under the UNGPs by limiting the due diligence demanded of them to processes that are appropriate relative to their size and circumstances (UNGP 15).

### 3.3 Elements requiring further clarification

The current description of the **substantive human rights covered by the treaty** in Article 3.2 of all international human rights conventions and rights recognized under national law is insufficiently clear and requires further precision. The substantive human rights engaged should be listed as concretely as possible in order to enable states and businesses to orient their actions toward the scope of protection afforded by these rights. At a minimum, the draft must, in line with the UNGP, make reference to the Universal Declaration of Human Rights, the CESCR and ICCPR, and the ILO Declaration on Fundamental Principles and Rights at Work.

The area of **remedy for victims** requires clarification as to the definition and form of remedy that states and companies are required to provide. The UNGPs name apologies, restitution, financial and non-financial compensation, and penalties (both civil and criminal, including fines) as well as prevention of damage through e.g. injunctions or guarantees of non-repetition as forms of remedy. It would be desirable here to incorporate the Policy Objectives of the first phase of the OHCHR Access to Remedy Project at this stage, or at least to make reference to them as practical guidelines for making remedy more effective and accessible that have been repeatedly mandated and adopted by the Human Rights Council (Resolutions 26/22, 32/10, and 38/13).<sup>8</sup>

The **proposed rules on civil liability** also require further precision. It is not clear from the text whether culpable conduct or omission on the part of the company itself is

<sup>7</sup> Cassel, Doug (2018): At Last: A Draft UN Treaty on Business and Human Rights. <https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/> (accessed on 19.09.2018)

<sup>8</sup> cf. the "Policy Objectives" of the final report of the ARP I Project, A/HRC/32/19. An overview is available at <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx> (last accessed on 28.09.2018)

required to trigger liability or whether such conduct or omission by another entity can be ascribed to a company. The draft proposes that control, close relations, or foreseeability be treated as independent heads of secondary liability for misconduct by subsidiaries or business partners. Human rights require that this system be designed in such a way that mere separate legal personalities or opaque networks of supplier relationships are not enough to allow companies to wash their hands of liability for human rights abuses in their supply chains.

But the present draft must clarify whether and to what extent it seeks to regulate the relationship between parent company and subsidiary, especially in Article 10.6. Carlos Lopez argues<sup>9</sup> that it does and sees the danger of incentives being created for parent companies to distance themselves from or obscure their relationships to subsidiaries. John Ruggie, however, argues<sup>10</sup> that the draft merely seeks to regulate the relationship between parent and subsidiary but not between so-called “lead companies” such as Apple (which holds no shares in its suppliers) or Unilever (which works with an extremely broad network of suppliers) and their business partners. This discussion highlights the need for further clarification of these provisions.

Similarly, the **provisions on criminal liability** need to be further revised. It is not precisely clear what forms of accessory or participatory involvement in criminal conduct can give rise to liability alongside primary involvement as offender. Hogan Lovells has warned that the current language of the provisions could lead to the same conduct being subject to criminal prosecution in one state but not in another. The Institute supports the idea of a close parallel with the rule in Article 25 of the Rome Statute of the International Criminal Court in the area of secondary liability so that the same rules apply in all State Parties.<sup>11</sup>

In the area of **jurisdiction** (Article 5), clarification is needed in order for the provision to effectively establish which state has responsibility for proceedings. There are arguments to be made that home-state courts are only properly seized of human rights violations in host states when the legal system of the host state cannot in law or fact deliver an appropriate standard of protection. It may be useful here to introduce the concepts of home and host state into the treaty along with the concomitant nature of protection duties attaching to each. On the other hand, there are situations in which the primary jurisdiction of a home state’s courts over a human rights violation is called for by the facts themselves, as when the conduct resulting in the harm took place on the home state’s territory. These fact patterns ought to be contemplated during the further development of this provision.

### 3.4 What’s missing

The draft pays **little attention to vulnerable groups**, and it does not contain adequate consideration of gender perspectives. Feminists for a Binding Treaty have rightly called for incorporation of gender-based justice, women’s rights, and gender equality into the treaty text. Structural causes of discrimination and violence,

<sup>9</sup> Lopez, Carlos (2018): Towards an International Convention on Business and Human Rights (Part II). <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-ii/> (last accessed on 19.09.2018)

<sup>10</sup> Ruggie, John G. (2018): Comments on the “Zero Draft” Treaty on Business & Human Rights. <https://www.business-humanrights.org/es/node/175772> (last accessed on 19.09.2018)

<sup>11</sup> Hogan Lovells (2018): UN treaty on business and human rights: Working Group publishes draft instrument. <https://www.hlregulation.com/2018/07/26/un-treaty-on-business-and-human-rights-working-group-publishes-draft-instrument/> (last accessed on 19.09.2018)



asymmetries of power, and particular hurdles for women and girls (especially in the areas of participation and remedy) must come further into the foreground of the treaty process.<sup>12</sup> The same must happen for other groups in need of protection, such as human rights defenders and indigenous peoples.

Unlike the Elements document, the zero draft stops short of demanding a primacy for human rights over **trade and investment treaties** in international law. Instead, states are merely encouraged not to enter into any new trade or investment obligations that conflict with a business and human rights treaty. Existing and future trade and investment agreements are to be interpreted in such a way as to minimize conflict with a treaty on business and human rights. Some commentators such as Surya Deva have criticized this position as doing little to challenge the current **imbalance between human rights protection and trade and investment protection**.<sup>13</sup> The need for a clarification of the relationship between the human rights and trade and investment regimes in the long term is evident from the position that human rights courts and investment arbitration panels each take on their own legal primacy over the other.<sup>14</sup> Current applicable law and the UNGPs both mandate that states, in making trade and investment agreements, preserve adequate political flexibility to fulfil their duty to protect human rights, and the zero draft should not fall below this global consensus. Though it would undermine the political achievability of the treaty to attempt to regulate this area too extensively, some improvement must be made in this area. For example, states should be obligated to conduct human rights impact assessments before the finalization of trade and investment agreements.

The draft envisages criminal liability only for individuals and does not address the issue of the **criminal liability of companies**. The German Institute for Human Rights supports such liability, however, because thorough human rights risk analysis will only become an operational necessity when companies face the threat of penalties for negative consequences that flow from investments or business operations.<sup>15</sup>

Because of the increased risk of severe human rights violations in conflict zones, states must ensure that businesses operating in these areas exercise particular human rights due diligence. The zero draft lags behind the UNGPs in this respect and deals with human rights risks in conflict areas only as one of its concluding provisions. Instead, the treaty text should devote an entire article to the issue of conflict areas that at a minimum sets out additional requirements of human rights due diligence in this area, such as addressing the risk of sexual and gender-based violence.

The zero draft's provisions on **its institutional framework** leave unaddressed the current challenges for the system of UN treaty bodies, challenges which would only be exacerbated by the addition of yet another such panel. The treaty should instead look

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<sup>12</sup> Anumo, Felogene / Michaeli, Inna, AWID (2018): Justice not "special attention": Feminist Visions for the Binding Treaty, <https://www.business-humanrights.org/en/justice-not-%E2%80%9Cspecial-attention%E2%80%9D-feminist-visions-for-the-binding-treaty> (last accessed on 19.09.2018)

<sup>13</sup> Deva, Surya (2018): The Zero Draft of the Proposed Business and Human Rights Treaty, Part II: On the Right Track, but Not Ready Yet. <https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-ii-on-the-right-track-but-not-ready-yet> (last accessed on 19.09.2018)

<sup>14</sup> Krajewski, Markus (2017): Ensuring the Primacy of Human Rights in Trade and Investment Policies. Model clauses for a UN Treaty on transnational corporations, other businesses and human rights. Study commissioned by CIDSE, S. 13-14. <https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html> (last accessed on 19.09.2018)

<sup>15</sup> see Utlu, Deniz / Niebank, Jan-Christian (2017): Calculated Risk. Economic versus Human Rights Requirements of Corporate Risk Assessments. Berlin: German Institute for Human Rights

for synergies with existing mechanisms and procedures. Since the treaty only clarifies and sharpens existing obligations rather than creating new human rights, one possibility beyond merely creating another treaty body would be for State Parties to be able to choose between reporting on their implementation of the new treaty to the CESCR or CCPR, with responsibility for individual complaints going to one body or the other depending on the case.

Implementing effective monitoring and liability provisions will require strengthening capacity at the national level. Provisions on **transnational cooperation** should be strengthened to this end. Cooperation among prosecution bodies and judicial mechanisms is essential, as is the bolstering of state monitoring and inspection authorities. The treaty should make better use of the potential of **National Human Rights Institutions**. They are already mandated to promote the implementation of international human rights treaties in national law and practice and with the monitoring of national human rights situations. In addition, most NHRIs are vested with powers to accept, investigate and resolve or forward individual complaints of human rights violations. The role of NHRIs should thus be anchored and further developed in the text of the treaty and the optional protocol.

## 4 Germany's position in the binding treaty process

The fourth round of OEIGWG negotiations takes place from 15 to 19 October in Geneva. Prior to the negotiations, the European Union will agree a common position of the member states, which it will represent in Geneva. The Institute calls on the German government to press the following points in the process of EU coordination:

The EU must recognize that the zero draft builds on and furthers the UNGPs. The EU should therefore **constructively engage with the negotiation process** by participating in the fourth round of negotiations and helping shape the content of the treaty. Failing to engage with the negotiations would deprive the EU of important opportunities to influence the development of the text.

As it has thus far, the EU should insist on a wide scope of application of the treaty. It should demand the **incorporation of the state-business nexus** into the text. The EU can also call for **increased focus on vulnerable groups** and a **better gender perspective**. At the same time, it should recognize that the **main focus of the treaty has to be transnational**, since the most serious gaps in protection and accountability involve cross-border elements.

## Contact

German Institute for Human Rights  
Zimmerstrasse 26/27, 10969 Berlin, Germany  
Phone: +49 30 25 93 59-0  
Fax: +49 30 25 93 59-59  
info@institut-fuer-menschenrechte.de  
www.institut-fuer-menschenrechte.de/en

AUTHORS: Jan-Christian Niebank, Christopher Schuller

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