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**Joint business response to the  
Revised Draft Legally Binding  
Instrument to Regulate, in  
International Human Rights Law, the  
Activities of Transnational  
Corporations and Other Business  
Enterprises ("Revised Draft Treaty")**

**October 2019**

**UN TREATY PROCESS ON BUSINESS  
AND HUMAN RIGHTS**



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# Part 1: The business community's commitment to respecting human rights – in context

## An overview of company and business association efforts

Respecting human rights is a priority for the business community. It is leading and actively engaged in many initiatives to implement the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) and other relevant Government-backed standards, notably the [OECD Guidelines for Multinational Enterprises](#) and the [ILO MNE Declaration](#). It also carries out numerous activities to make a positive contribution to the Sustainable Development Goals ([SDGs](#)) at the international, regional, national and local level.

Individual companies around the world are developing a wealth of experience in translating the UNGPs into practical and impactful action on the ground, alone and in partnership with other organisations. More and more companies are actively identifying and responding to their human rights risks including by embedding a clear policy commitment within the company, by conducting human rights impact assessments, by actively engaging with a range of stakeholders and affected communities, and by providing/participating in remediation processes. Respecting human rights has become a core part of corporate activity and companies are continuously improving their efforts in this regard.

Equally, representative employers' and business organisations play a key role in promoting uptake of the UNGPs in the following ways:

- Providing leadership within the business community on the importance of the authoritative standards on responsible business conduct;
- Raising awareness on the content and expectations of such standards to their members, which include sectoral associations and all types and sizes of companies;
- Leading and supporting in-country capacity-building efforts and trainings for business and other stakeholders;<sup>1</sup>
- Facilitating the sharing of experiences in a safe space for different company functions through conferences, workshops, webinars and individual advice;<sup>2</sup>
- Building coalitions comprising business actors and other relevant stakeholders to address systemic human rights issues;
- Bridging the work of TNCs and local suppliers (and the many layers in between); and
- Promoting policy coherence so that authoritative standards are not undermined in different policy-setting initiatives by Governments, international organisations and private actors.

Of course, there is room for improvement. However, uptake of the UNGPs and other authoritative instruments by the business community (and other stakeholders) has been swift and deep and the progress achieved by the mix of soft-law and voluntary standards should not be undermined.

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<sup>1</sup> The IOE developed (with GRI) a three-part course that helps SMEs to communicate on their sustainability issues (available in [English](#), [French](#) and [Spanish](#)). This course follows the UNGPs' approach on the responsibility to respect human rights.

<sup>2</sup> In April 2019, the IOE also held a [workshop](#) with a group of SMEs to understand their experiences, challenges and needs in implementing the UNGPs (together with Shift).

## Why the approach established under the UNGPs (and mirrored in other authoritative standards) works

The UNGPs are delivering positive impact for a number of fundamental reasons:

- i. **Achieved political (and broader stakeholder) consensus:** The UNGPs were developed through widespread State engagement across all continents and they were unanimously "endorsed" by States in the UN Human Rights Council (a first for such a UN standard). At the same time, the business community and other non-State actors, including NGOs, trade unions and academics, actively participated in their development and remain committed to their implementation.
- ii. **Clear and implementable language:** Somewhat uniquely, the UNGPs were developed not by States but by an independent Special Representative (appointed by the UN Secretary-General) through a process of rigorous stakeholder consultation including with business. As a result, they were drafted with end users firmly in mind.
- iii. **Adopts a principled pragmatic approach:** The UNGPs are realistic and balanced. This is a central part of their ongoing success. For example, the UNGPs:
  - a. Delineate the role of States vis-à-vis business. They clearly articulate the distinct role of States as duty-bearers alongside the responsibility of all business enterprises under the UN three-pillar "Protect, Respect, Remedy" framework.
  - b. Apply to *all* companies. They stipulate that the responsibility to respect human rights applies to "all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."
  - c. Recognise that there are three different ways in which a company can be involved in a human rights harm and that its responsibility can differ somewhat depending on this. For example, a company may (i) "cause" or (ii) "contribute" to an adverse impact through its own activities, or (iii) adverse impacts may be "directly linked" to its operations, products or services by its business relationships.<sup>3</sup>
  - d. Provide a practical blueprint for action by companies to respect human rights - framed not in coercive terms but as an ongoing exercise in risk-management - in a way that reflects their size, the reality of their operations and the underlying country context.<sup>4</sup>

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<sup>3</sup> For example, the commentary to [UNGP 22](#) recognises that companies should only provide for or cooperate in remediation processes for those harms they have caused or contributed to, not necessarily for adverse impacts directly linked to its operations, products or services by a business relationship (although they "may take a role in doing so"). Furthermore, the [OECD MNE Guidelines](#) supports this by explaining in its "general policies" that when an adverse impact is directly linked to an enterprise's operations, products or services by a business relationship, "[t]his is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship."

<sup>4</sup> Relevant UNGPs text:

- **Size:** UNGP 14 says that "the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts." The commentary to UNGP 17 adds that "where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence."
- **Reality of their company operations:** UNGP 19 and its commentary make clear that human rights due diligence is not a black and white process, noting that "appropriate action will vary according to: (i) whether the business enterprise causes

## What is urgently needed as the business and human rights agenda moves forward

Much of the success of the business and human rights agenda can be attributed to the many initiatives and creative energy of various stakeholders, including businessmen and women, to put the UNGPs into practice.<sup>5</sup> For its part, companies are committed to respecting human rights in their operations and finding sustainable solutions to complex human rights-related challenges, especially in high-risk environments, through partnerships and stakeholder engagement.

The major barrier to fully realising the UNGPs and achieving a level playing field, however, is that there are still too many areas where there is an absence of government, and/or where weak judiciaries do not enforce national laws; where conflict, poverty or corruption devastates communities; and where informality is commonplace. These situations create the conditions for human rights abuses that often occur in relation to supply chains.

**Therefore, to deepen and advance progress requires encouraging *all* States to address the human rights challenges in their own jurisdictions.**

This means focusing on achieving "implementation coherence" of international standards by *all* States at the national and local level. Three critical challenges show the pressing need for "implementation coherence" of the UNGPs on the ground to ensure the respect, protection and fulfilment of human rights in a systematic way.

- **First**, a new Alliance 8.7 report (drafted by the ILO, OECD, Unicef and IOM) on ending child labour, forced labour and human trafficking linked to global supply chains explains that these challenges "are rooted in the social and economic vulnerability of individuals, workers and their families."<sup>6</sup> It adds that preventive measures - such as accessible free public education of good quality, stronger social protection and promoting safe, orderly and regular migration - are "the necessary starting points" to end these fundamental labour rights violations. Thus, far greater domestic and local State effort is needed to address the underlying conditions that can result in human rights harms.
- **Second**, most human rights harms are already prohibited by domestic law in virtually every country. The problem concerns proper enforcement of those laws. For example, the International Justice Mission's "Justice Review" of 2018 studied the conditions that allow for forced labour around the world. It explains that "under-resourced, under-trained

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or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) the extent of its leverage in addressing the adverse impact." The commentary to UNGP 19 adds that "there are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage." In such circumstances, the company "should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so." However, where the relationship is "crucial" to the business, "ending it raises further challenges."

- **Underlying country context:** The commentary to UNGP 23: "Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard."

<sup>5</sup> The pool of stakeholders engaged in this agenda include: the State (across different ministries, agencies, enforcement mechanisms, and national human rights institutions); an ever-increasing number of companies of all sizes, sectors, structures and geographies - and across various functions at different operational levels; employers' organisations and industry associations; international and regional political organisations (such as the UN, the ILO, OECD, the EU, African Union, OAS, ASEAN, etc.); the investment community and stock exchanges; the legal profession; sports governing bodies; and a vast number of CSOs, NGOs, trade unions, human rights defenders and the media.

<sup>6</sup> Alliance 8.7 report - "[Ending child labour, forced labour and human trafficking in global supply chains](#)" (2019)

and corrupt law enforcement officials do not or cannot arrest and charge criminals who traffic and exploit laborers or gather evidence that could hold them accountable in courts of law." Why? In an illustrative case, despite top-level government commitment to address the problem, political will was "less strong in the mid- and local-level government" and "the necessary resources to combat trafficking and forced labour has not yet been allocated."<sup>7</sup>

- **Third**, linked to both points above, the immense challenge of informality does not get nearly enough attention of policymakers. Informality comprises more than half the global labour force and more than 90 percent of micro and small enterprises worldwide. In some countries, the informality rate is above 70 percent.<sup>8</sup> Yet, addressing informality does not feature in many State's national development policies, let alone their human rights priorities, even though it is a systemic human rights challenge that can disproportionately affect women and vulnerable groups such as ethnic and religious minorities, children, persons with disabilities, migrant workers and their families, and refugees.

Therefore, concerted State action to implement the authoritative standards they have voluntarily signed up to requires far greater intra-national effort and coordination *inside* each State's executive, legislative and judicial branches (and at all levels) to address adverse human rights impacts at source. In particular, more resources and better alignment and coordination are needed across law enforcement, judiciaries, and different Government ministries and agencies including home affairs, justice, commerce, labour, agriculture, education, health, immigration, etc.

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<sup>7</sup> International Justice Review - "[Justice Review](#)" (2018)

<sup>8</sup> UN Working Group on Business & Human Rights - [Statement](#) at the end of its visit to Peru (2017)

## Part 2: The business community's substantive concerns with the Revised Draft Treaty text

### Overview

The "[Revised Draft Treaty](#)" (published in July 2019) is not compatible with the UNGPs and other authoritative global standards. Its unclear scope, its coercive and punitive approach and its many confusing provisions jeopardise the crucial consensus achieved by the UNGPs and threaten its many achievements. Furthermore, it does not offer solutions to encourage States to meet their existing human rights obligations and address the human rights challenges in their own jurisdiction, which lie at the root of most human rights harms. Instead, it disregards State sovereignty and seeks transnational businesses to fill the on-the-ground governance gaps that exist in many parts of the world.

While the Revised Draft Treaty reads differently from its precursor, the "[Zero Draft Treaty](#)," it is not an improved text and it does not satisfactorily address the many substantive concerns and unclear provisions of the Zero Draft Treaty, which were comprehensively raised in the [joint business response](#) of October 2018. The Revised Draft Treaty retains many of the same problematic articles from last year's draft (albeit ordered and phrased differently) and there are many unhelpful ambiguities (some new, some repeated).

Business consistently seeks clarity. On this topic, this means clarity on its role and responsibility alongside others (notably the State but also other firms) and clarity on what it is expected to do to comply with laws and ensure a social licence to operate. The Revised Draft Treaty offers no such clarity - in fact, the opposite. It blurs the boundaries between the State duty to protect and the corporate responsibility to respect human rights. It blurs the scope of responsibility to respect (which applies to all business enterprises regardless of their size, sector, location, ownership and structure). It blurs the accepted approach on human rights due diligence. It blurs the boundaries of legal liability and legal personality. It blurs the boundaries of State sovereignty.

The business community's points are intended to ensure that the business and human rights movement evolves along the same principled pragmatic lines of the UNGPs and does not undermine its broad consensus. As the Intergovernmental Working Group (IGWG) meets for its [fifth session](#), the business community urges States to carefully examine the totality of the Revised Draft Treaty's articles and their implications for the business and human rights agenda, as well as their impact on achieving the SDGs.



# The Revised Draft Treaty's many problematic articles

The [Revised Draft Treaty](#) has many problematic and ambiguous articles that mirror many of the business community's concerns, which [it raised](#) about last year's [Zero Draft Treaty](#).

## 1. It has many vague, far-reaching and legally imprecise provisions

A clear illustration of the overly broad and legally imprecise nature of the Revised Draft Treaty is the repeated use of the word "any" in many articles.<sup>9</sup>

For example, the definition of a human rights violation or abuse ("*any* harm"), as well as what constitutes business activities ("*any* economic activity...") and a contractual relationship ("*any* relationship between natural or legal persons to conduct business activities...")<sup>10</sup> is unclear and unlimited. Equally, there is a lack of balance when it says that "in no case shall victims...be required to reimburse *any* legal expenses of the other party to the claim."<sup>11</sup> Finally, there are two far-reaching provisions on mutual legal assistance<sup>12</sup> whereby a State must provide another requesting State with "*any* additional information or documents needed to support the request for assistance," and "*any* judgement of a court" that has jurisdiction under this Treaty "shall be recognized and enforced in *any* State Party...."

## 2. Preamble

While the preamble explicitly recognises the UNGPs<sup>13</sup> and notes the positive role that business can play,<sup>14</sup> problems remain. For example, the phrasing on the corporate "responsibility to respect" human rights is not in line with the UNGPs in two important areas. First, saying that all businesses have "the responsibility to respect *all* human rights..." raises significant questions about the range of human rights that would fall under this Treaty as the term "all human rights" has no legal basis.<sup>15</sup> Second, the word "including" implies that the responsibility to respect involves doing more than what is described in the preamble text, which is not the case.<sup>16</sup>

The preamble's description of the positive role of business is also not reflected in the corresponding articles of the Revised Draft Treaty and it remains unclear if a preamble is legally binding (academics dispute this<sup>17</sup>).

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<sup>9</sup> This is particularly notable in the Articles on "Definitions", "Scope", "Rights of Victims" and "Mutual Legal Assistance."

<sup>10</sup> Article 1 on Definitions, paras 2, 3 and 4

<sup>11</sup> Article 4 on Rights of Victims, para 12.e

<sup>12</sup> Article 10 on Mutual Legal Assistance, paras 2 and 9

<sup>13</sup> Preamble: "Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to 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, as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;"

<sup>14</sup> Preamble: "Acknowledging that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements."

<sup>15</sup> At a minimum, the Treaty should define the applicable human rights on the basis of "internationally recognised human rights" in line with UNGP 12.

<sup>16</sup> See UNGP 13.

<sup>17</sup> International lawyers continue to debate this and [Article 31\(2\) of the Vienna Convention on the Law of Treaties](#) permits interpretation on this, where it says that: "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."



### 3. Scope, scale and definitions

While the Revised Draft Treaty has dropped last year's proposal that international human rights obligations apply directly to business,<sup>18</sup> it has many other problems with its scope, scale and definitions.

**First**, the two provisions that say that the Treaty shall cover "all human rights" (in the preamble and article 3 on "scope") replicate the same mistake made in the Zero Draft Treaty. This open-ended term has no legal basis and, on a practical note, it is not clear which human rights would be covered by the Treaty or which human rights standards would be applicable, making it almost impossible for a State to implement this instrument.<sup>19</sup>

**Second**, it is still questionable if this Treaty would apply to transnational corporations (TNCs) only or to *all* business enterprises. In trying to balance the wishes of those States that want the Treaty to apply to all businesses alongside those that want a sole/predominant focus on TNCs, the Revised Draft Treaty's articles on the scope (notably articles 3.1 and 1.3)<sup>20</sup> are incoherent, and it is unclear if the problematic footnote from UN Resolution 26/9<sup>21</sup> that set up the IGWG in 2014 still applies or not. Curiously, there is also one provision (article 5, para 3 d) that stipulates the need for all persons to integrate "human rights due diligence requirements in contractual relationships which involve business activities of a transnational character," rather than applying it more broadly to "all business activities, including those of a transnational character." Ambiguity on such a fundamental point is very problematic.

Linked to this, it is also not fully clear that the current draft would apply in practice to State-owned enterprises (SOEs), whose omission in last year's text was noted by many. While the Revised Draft Treaty has not repeated the provision that business activities shall mean "any for-profit economic activity," one commentary suggests that "there remains a possible ambiguity as to whether the revised draft covers SOEs" as they "are not explicitly mentioned in the revised draft, either as included or as excluded."<sup>22</sup>

**Third**, continuing to apply the Treaty to "all business activities" including those "of a transnational character" - instead of applying it to all business "entities" on the basis of their actual involvement in a harm (as the UNGPs does) - raises the same major concerns about legal definition, applicability and enforcement that the business community described in last year's joint response.

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<sup>18</sup> A fundamental concern for business about last year's Zero Draft Treaty was that it suggested that international human rights obligations should apply directly to business. Changes in the Revised Draft Treaty (first, the change of the sentence that "all business enterprises... shall respect all human rights" which appeared early on in last year's Zero Draft Treaty; and second, the inclusion in this year's draft of the term "abuses" alongside "violations") makes the text more consistent with the practical convention of Governments. For example, it is understood that States "violate" internationally recognised human rights and business can "abuse" them.

<sup>19</sup> As explained in the [joint business response of 2018](#) (page 10): would "all human rights" mean those rights that are recognized as *jus cogens*, all rights under customary international law, or any hard or soft law standard and its corresponding interpretation text and guidance that could be judged relevant?

<sup>20</sup> Scope:

- Article 3.1: "This LBI shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character."
- Article 1.3: "'Business activities' means any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means."

<sup>21</sup> The footnote of [Resolution 26/9](#) (2014) says: "'Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law." Thus given the IGWG's mandate, the Treaty's focus is on TNCs not on all business enterprises.

<sup>22</sup> [Doug Cassel](#), "Five ways the new draft treaty on business and human rights can be strengthened" (Sept 2019)

- Focusing on "business activities" (including those of "a transnational character") may avoid the problem of establishing a definition in international law of "TNC", as well as "OBEs." However, this approach creates a new challenge by requiring an accepted definition of both *these* terms, which do not appear to exist in law or social sciences.
- It would also be extremely difficult, if not impossible, to monitor the vast array of "business activities" (listed under article 1, para 3), as well as those of a "transnational character" (under article 3, para 2), and reasonably assign liability for a harm on a practical or principled basis.
- Finally, a major fault line that gets overlooked is if companies were to be held liable for "any" human rights harm in the context of "all business activities", including of a transnational character, they would need far greater capabilities and powers to manage this huge burden. For example, they would need open access to inspect relevant sites and information concerning a business activity linked to their operations in any jurisdiction (including that of SOEs) and unfettered movement into and inside the relevant country and territory. They may also need the ability to issue fines and penalties, as well as other incentives, at will. This would lead business to assume many traditional State functions in terms of regulatory oversight and enforcement.

**Fourth**, while some interpret the large focus on "contractual relationships" in the Revised Draft Treaty as a narrowing of the scope, in fact it remains extremely broad. The definition of a contractual relationship under article 1, para 4<sup>23</sup> is wide and does not suggest a limited, direct contractual relationship. Add to this the scope under article 3, para 2. b,<sup>24</sup> as well as the language on prevention under article 5, para 2<sup>25</sup> etc. and it can be surmised that the repeated use of the term "contractual relationships" may be intended to put a sharper focus on TNCs, which are often described as a bundle of contracts.

**Fifth**, the business community wishes to re-state its concerns about a number of other problematic provisions carried over from the Zero Draft Treaty. For example:

- The definition of "victims" is too broad and does not reflect common civil law traditions. Victim status, and the corresponding rights afforded under this Treaty, should not apply on the basis of an allegation. Similarly, the language concerning the "immediate family or dependents" does not reflect many civil law traditions which cover such victims and damages only under certain conditions. Moreover, it is unclear if the protections offered to the "immediate family or dependents of the direct victim" would apply if none of their human rights are abused.

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<sup>23</sup> Article 1, para 4: "Contractual relationship' refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State."

<sup>24</sup> Article 3, para 2. b: "... A business activity is of a transnational character if: (b). It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State;"

<sup>25</sup> Article 5, para 2: "... State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows: (a). Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships; (b). Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships; (c). Monitor the human rights impact of their business activities, including those under their contractual relationships; (d). Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships."

- The definition of a “human rights violation or abuse” is equally problematic. Defining a violation or abuse as "any harm" committed through "omissions" (as well as "acts") is too vague and would unduly broaden the scope of companies' liability while creating legal uncertainty. It is unclear what "omissions" means. It is also unclear what is meant by "emotional suffering" and "substantial impairment of their human rights" and how they would be interpreted, especially given the Treaty's use of the ill-defined term "all human rights." Lastly, the inclusion of "environmental rights" (and later "environmental remediation and ecological restoration") demonstrates the IGWG exceeding its mandate.<sup>26</sup> Environmental rights are not defined in international human rights - thus their inclusion creates uncertainty about how they would be applied under international human rights law and national jurisdictions.
- Furthermore, the definition of business activities as "any" means of economic activity “undertaken by natural or legal persons” including by "electronic means” is extremely vague and far-reaching. It is understood to have no precedent in other treaties and it creates huge legal uncertainty. Among its impacts, it would allow for a piercing of the corporate veil without any qualifications (the new language on "including activities undertaken by electronic means" can be understood as a further attempt to bring shareholders under the Treaty's ambit). The draft also does not answer fundamental questions, such as: Under what circumstances would a violation/abuse under this Treaty be judged to be the responsibility of either a natural or legal person (or both), and on what legal grounds? If the former category, which natural persons specifically would be held liable and for what alleged violations/abuses? How would such a sweeping approach manage the likelihood of multiple parallel lawsuits on the same case, perhaps in different jurisdictions, with the possibility of competing and contradictory judgements?

## 4. Rights of Victims

Mirroring last year's draft, references to the "rights of victims" make up the bulk of the Revised Draft Treaty. With its definition of a "victim", its 16 provisions on their rights (under article 4, which has been elevated) and its many other references concerning legal liability, jurisdiction and an international fund, the Revised Draft Treaty is markedly different from other UN Human Rights Treaties that do not address a specific category of rights-holders.

The business community has the same concerns raised in last year's joint business response, as well as new ones. Beside the aforementioned problem with the definition of a victim, many provisions in the Revised Draft Treaty are vague and problematic:

- As a general point, there is an imbalance between the many provisions on the rights of the victim and the lack of consideration for the corresponding rights of the accused (business) to ensure due process and fairness in relation to hearings, investigations, legal proceedings and access to justice. Also, no distinction is made between presumed victims (those that have "alleged to have suffered") and actual victims, which creates tremendous legal uncertainty. Furthermore, it is unclear how the various forms of reparation listed would apply to companies and/or to States, as well

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<sup>26</sup> UN Resolution 26/9 makes no reference to environmental considerations.

as how they would relate to the different types of remedy mechanisms and legal regimes.

- The provision that victims' "psychological well-being and privacy shall be ensured" is completely unclear; there is no explanation on what this means in practice, or who would "ensure" this and how.
- It is not defined what a "satisfactory" form of remedy means in reality.
- The inclusion of "environmental remediation and ecological restoration" opens the door to a different body of law under this Treaty without answering the many unresolved questions about the relationship between the environment and human rights.
- Guaranteeing victims' "access to information" in their pursuit of remedies is very problematic and incompatible with long-established rules. While some courts (i.e. in Latin America) have ruled in favour of a right to information for gross human rights violations, the provision in this Treaty is overly broad and unclear. It would mean that the "principle of production of evidence" would not apply in human rights cases (for example, in civil lawsuits it is for the parties to adduce evidence of the facts of the case). At the same time, the provision does not address the necessary practical considerations, such as: what and whose information would be guaranteed to victims, on what basis (for example, allegations of a harm occurring to "all human rights"?), and who would determine what information would be shared and how? This is especially relevant because victims can seek a remedy in many ways - through the court, through non-judicial mechanisms, and through company-level grievance mechanisms. The provision on access to information also contradicts other laws and principles governing corporate conduct, such as on anti-competition, intellectual property and data protection, which justify the need to keep certain sensitive commercial information confidential.
- The provision that says that "State Parties shall investigate all human rights violations and abuses... and where appropriate, take action against those natural or legal persons found responsible..." is unclear and raises implementation concerns. One would expect the "competent authorities" (such as public prosecutors within a State) to carry out prompt and impartial investigations, not "State Parties" (in an undefined way). Equally, there is no explanation of the type of "action" State Parties would be expected to take against the responsible persons. As phrased, this provision risks enabling politically motivated prosecutions and other measures that undermine due process.
- The provision that "in no case shall victims... be required to reimburse any legal expenses of the other party to the claim" may also encourage frivolous litigation and bad-faith actions being filed against companies. It also gives no consideration for a situation whereby a claimant wins part of their case but not all and, therefore, may be required to reimburse the other party's legal costs for the part that they lost. Finally, it is incompatible with some civil lawsuits whereby a case can be lost due to the "limitation period" rule, which can limit the time that a claim can be brought to three years for example. In such cases the losing party *de lege lata* must bear the costs.

- Finally, a provision allowing Courts to reverse the burden of proof for the purpose of fulfilling victims' access to justice and remedies is deeply problematic and unacceptable. On the surface, it contravenes a fundamental and well-settled legal principle of "innocent until proven guilty" and the notion that "he who asserts must prove." Indeed, requiring that the accused party prove its innocence violates due process principles and fundamental notions of fairness in most jurisdictions. It is also incompatible with other treaties, including the International Covenant on Civil and Political Rights<sup>27</sup> and the European Convention of Human Rights,<sup>28</sup> which safeguard the presumption of innocence in criminal cases. Furthermore, in other non-business and human rights discussions, some have posited that the presumption of innocence should have the status of a fundamental human right.<sup>29</sup> Looking at this provision alongside other requirements in the Revised Draft Treaty, such as on mandatory human rights due diligence, means all persons conducting business activities would have to prove that they carried out the due diligence process in full, including to "prevent" a harm from occurring. This is unfair and frankly impossible to achieve, notably for natural person and small and medium-sized enterprises (SMEs). A further difficulty is that, by necessity, whoever has the legal burden of proof also carries the evidential burden of proof as one cannot be discharged without the other. Like its predecessor draft, the Revised Draft Treaty also offers no explanation on the types of "needed" situations to merit the reverse onus clause ("where needed"). Lastly, this provision would similarly come into conflict with other fields of corporate governance, such as anti-competition practices and data protection laws.

## 5. Prevention

At first glance, the Revised Draft Treaty appears to have modified its predecessor's incorrect proposal that human rights due diligence is a standard of "result" not "conduct." For example, the relevant provision on prevention calls for all persons conducting business activities to "take appropriate actions" to prevent human rights violations or abuses.<sup>30</sup> However, reading this text alongside a subsequent provision on a "failure to prevent" in the article on legal liability<sup>31</sup> suggests that the "standard of result" still applies in relation to contractual relationships. Furthermore, it omits the expectation that companies take steps to "mitigate" and "seek to mitigate" adverse human rights impacts.

Introducing the concept of a "failure to prevent" to business and human rights is misguided. It exists in a very small number of jurisdictions on issues such as anti-bribery and tax avoidance and in relation to criminal offences. As such, it should not be adopted into a broad international legal human rights regime. The business community notes two significant concerns about the Revised Draft Treaty's inclusion of this concept. First, no definition is offered on what would constitute a "failure to prevent" including of the acts or

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<sup>27</sup> [ICCPR](#) Article 14.2: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

<sup>28</sup> [ECHR](#) Article 6.2: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

<sup>29</sup> <https://www.lawteacher.net/free-law-essays/criminal-law/reverse-onus-problem.php>

<sup>30</sup> Article 5, para 2.b: "...State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows: (b). Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships."

<sup>31</sup> Article 6, para 6: "States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place."



omissions. This opens the door to countless alleged failures that, far more likely than not, would be unintentional (and perhaps unavoidable in some cases) given the myriad reasons why one business can be connected to a harm committed by another. Second, and equally importantly, it would blur the boundaries of the State duty vis-à-vis business responsibility by expanding the role of companies to carry out functions that should only be discharged by independent regulators and law enforcement.

There are other problems with the article on prevention (that mirror the points made in the 2018 [joint business response](#) on the Zero Draft Treaty). The provision that obliges "all persons conducting business activities, including those of a transnational character" to carry out human rights due diligence on their own activities and contractual relationships is completely unrealistic and not in step with the UNGPs or national laws. It gives no consideration for the size and capacity of all persons to carry out this extensive process. Equally, assigning liability to them on such a broad set of provisions - without including appropriate mitigating factors such as "safe harbour" clauses and a statutory defence of "adequate procedures" - would not encourage a proportionate, risk-based approach by national legislatures.

Linked to this, the draft text again does not consider threshold questions that are part of different regional and national debates on human rights due diligence. Equally, the Revised Draft Treaty's provision on SMEs is incoherent. The text proposes undefined "incentives and other measures" to facilitate SME compliance with the requirements on prevention and then claims that such measures would serve "to avoid causing undue additional burdens" on SMEs. However, incentives and measures to ensure compliance with laws routinely involve punitive sanctions (whether criminal or administrative, such as fines), thus making the text that seeks to limit the burdens on SMEs meaningless. Even if the text offers exemptions to SMEs, it also gives no assurance that this would happen in reality and it provides no clarity as to how such exemptions would be applied. SMEs and micro-enterprises face distinct challenges in meeting their responsibility to respect human rights, not least because of resource and capacity constraints. They should be better supported to respect human rights, through capacity-building efforts, and not face unrealistic burdens and unworkable requirements.

In other ways, the Revised Draft Treaty is inconsistent with the UNGPs on prevention. Despite many requests for the text to mirror the UNGPs' four-step human rights due diligence process, the Revised Draft Treaty continues to take a different approach.<sup>32</sup> For example, it does not include the step about integrating and acting upon the findings of a company's risk assessment(s). Also, its proposal for all persons conducting business activities to "monitor" their human rights impacts is not the same as the UNGPs' expectation that businesses "track the effectiveness of their responses."

Requiring all legal persons to undertake "environmental impact assessments," as well as report on "environment and labour standards," shows the IGWG going beyond its mandate. As mentioned, there remain unsettled questions on the link between the environment and human rights under international law and it is also unclear what

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<sup>32</sup> Difference between the UNGPs and Revised Draft Treaty on the human rights due diligence process:

- UNGPs' four-step process: i. Assess human rights impacts; ii. Integrate & act upon findings; iii. Track effectiveness of responses; & iv. Be prepared to communicate how impacts are addressed.
- Revised Draft Treaty;s proposed process: a. identify & assess; b. take appropriate actions to prevent violations or abuses; c. Monitor impacts; & d. Communicate & account for policies/measures adopted to "identify, assess, prevent and monitor" violations/abuses.

environment and labour standards would be relevant to this instrument (most labour standards do not meet the level of a human right).

Equally, requiring "meaningful consultations" through "appropriate procedures" poses many legal, definition and practical implementation challenges. All persons conducting business cannot be expected to carry out a legal obligation to consult with an undefined and unlimited number of "stakeholders" in a manner that is unclear. The draft Treaty text would overburden business, not necessarily help companies to understand their human rights risks, and it would inhibit trust between the stakeholders. In addition, the provision disregards the fact that it can be difficult for companies to identify relevant stakeholders to consult with to help it identify and respond to its human rights risks in a way that understands the viability of the business. There may also be a lack of credible stakeholders to engage with (for example, in some regions government-organised NGOs and non-independent trade unions dominate civic space), or even circumstances where NGOs do not act in good faith.

The provisions obligating all persons (natural and legal) to communicate their due diligence efforts and report on financial and non-financial matters shows the Revised Draft Treaty's overreach into areas beyond human rights and pays no attention to other regulatory standards and practices governing corporate conduct. For example, such obligations would come into conflict with anti-competition practices, data protection laws and other customs that justify the need for companies to keep certain, sensitive commercial information confidential.

Lastly, the Revised Draft Treaty ignores vital nuances on due diligence that exist in the UNGPs. Its provisions do not recognise that human rights due diligence will "vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations" (UNGP 17). It also ignores that "appropriate action will vary according to: (i) whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; and (ii) the extent of its leverage in addressing the adverse impact" (UNGP 19). These essential elements of the human rights due diligence process must not be disregarded.

## **6. Legal Liability**

The Revised Draft Treaty's provisions on legal liability (especially when taken in conjunction with other articles) are extremely problematic and would vastly increase the practice of "legal personality" shopping, "legal forum" shopping and "choice of law" shopping. It is also unclear if sanctions that are imposed would be cumulative.

Overall, the Treaty's approach to liability runs counter to the UNGPs, which defined the corporate responsibility to respect human rights not in coercive terms but as an ongoing exercise in risk-management that recognises a company's responsibility alongside others, its actual involvement in a harm, and the underlying country context. Instead, the Revised Draft Treaty raises many concerns about legal definition, applicability, enforcement and - crucially for business - legal certainty, protection and defence.

The scope of liability is broad and unclear. On the one hand, the Revised Draft Treaty requires States to ensure punitive sanctions against "business activities, including those



of a transnational character" that have caused harm,<sup>33</sup> which is very general and illogical from a practical and legal perspective. On the other hand, it also assigns liability to natural and legal persons for their failure to prevent another person with whom they have a contractual relationship from causing a harm in situations where they sufficiently control or supervise the relevant activity that caused the harm (regardless of the activity's location).<sup>34</sup> Thus, this provision targets parent companies and downstream companies, such as brands, manufacturers and retailers (in the form of the companies themselves, as well as their directors and shareholders) as this is where contractual relationships are often perceived to start.

The Revised Draft Treaty takes an overly broad approach to civil liability that could foresee civil liability without causality in some jurisdictions. It also offers no safe harbour provisions for companies that are taking meaningful steps to prevent or halt an abuse in their supply chain. The provision on "foreseeability" is extremely expansive and it is not clear if the intention is to use foreseeability in its conventional legal sense to limit liability for unforeseeable impacts or to expand liability to include all foreseeable human rights violations, independent of causation. Instead, liability should only be assigned to cases where there is a clear link between the harm suffered and the business held responsible. Overall, the provisions on supply chain liability ignore situations where States are failing to meet their international human rights obligations on the ground and where systemic human rights issues occur that are not unique to one company. As such, the draft Treaty risks encouraging companies to adopt a "cut and run" approach instead of a "stay and help improve" approach to a country's complex and endemic issues. This could have unintended consequences on promoting inclusive growth.

The Revised Draft Treaty takes a different approach on criminal liability to last year's draft. Having deleted the misguided provision on "universal jurisdiction"<sup>35</sup> and language that would apply criminal liability to "intermediaries" and "principals, accomplices and accessories"<sup>36</sup>, this year's draft explicitly lists the criminal offences that would fall under its scope. Some may welcome this saying it provides greater legal certainty. However, the list will likely trigger much debate by States on the criminal offences included, their applicability to natural and legal persons, and how this provision overlaps with the earlier text that calls for a "comprehensive and adequate system of legal liability." Linked to this, assigning liability to natural and legal persons for acts that constitute "complicity in a criminal offence" in relation to the draft Treaty and domestic law raises concerns about which modes of complicity would be applicable - those under international or domestic law?<sup>37</sup> Such an instrument should avoid creating uncertainty, whereby a natural person's conduct may be lawful under the domestic law of one State but the same conduct may amount to complicity in genocide or war crimes in another.

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<sup>33</sup> Article 6, para 4

<sup>34</sup> Article 6, para 6

<sup>35</sup> The article in last year's [Zero Draft Treaty](#) (Article 10, para 11) that explicitly called for States to ensure "universal jurisdiction" over human rights violations that amount to crimes raised many legal and political complications. For example, as the principle of universal jurisdiction relies on national authorities to enforce international prohibitions, there are big questions around the impartiality of the prosecuting country towards the person facing criminal liability. There is no way to guarantee that trials would be conducted with full respect for due process and not be politically motivated. In addition, most States' national legal systems lack the necessary legal definitions and/or means to investigate and prosecute on the basis of universal jurisdiction.

<sup>36</sup> The Zero Draft Treaty's language (Article 10, para 8) that sought to apply criminal liability to "intermediaries" and "principals, accomplices and accessories" gave no consideration for the fact that "the nature and extent of secondary liability varies extensively from one state to another", which thus creates rule of law problems because "the same conduct may constitute an offense in state and not another" (see Hogan Lovells' [2018 commentary](#)). However, the provision on complicity in this year's draft text still raises those concerns.

<sup>37</sup> Hogan Lovells' [commentary](#) on Revised Draft Treaty's scope, prevention and legal liability (July 2019)

Finally, as with last year's draft, there is another problematic finance-related provision in this article. The proposal that "State Parties may require natural or legal persons engaged in business activities to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation" risks creating situations where individuals and companies are extorted for money for perceived violations of the draft Treaty (whether legitimate or not).

In short, extending supply chain liability to legal and natural persons in these ways grossly oversimplifies and misunderstands the nature of global business. At the same time, the scope of liability remains overly broad and far-reaching. Thus, two critical questions remain: who exactly should be held legally liable, and how is this to be determined?

## 7. Adjudicative jurisdiction

The Revised Draft Treaty continues the misguided focus on extraterritorial jurisdiction with provisions that would vastly increase victims' ability to bring extraterritorial claims against a natural or legal person for harms in the context of business activities of a transnational character.

The business community's concern about this chiefly relates to the provisions on the "domicile" of the natural and legal persons alleged to have committed the acts or omissions that result in human rights violations.<sup>38</sup> Any person could face prosecution in multiple jurisdictions on extremely tenuous grounds. First, there is no legal definition of "substantial business interest" as an approach to determine jurisdiction. It could potentially be applied to a small representative office in a host State or interpreted as someone who owns more than three percent of shares in a company or has more than five percent of income derived from this interest. Second, the provision offers no principles - such as foreseeability, proximity and reasonableness - to guide how jurisdiction might apply in some limited cases, such as for a parent company in relation to its subsidiary. Furthermore, given the very broad definition of a contractual relationship,<sup>39</sup> a natural or legal person could face wide jurisdictional claims for the conduct of sub-agents or other sub-contractors<sup>40</sup> that are multiple tiers down the supply chain of which it has no influence. This incorrectly assumes that a business or businessperson has control over entities several steps removed from them in the supply chain. It also greatly undermines the scope of the responsibility to respect human rights by removing any incentive for the (likely local) company that is causing or contributing to the wrongdoing to halt or mitigate the harm.

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<sup>38</sup> For example:

- Adjudicative Jurisdiction - Article 7, para 1: "Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (LBI), shall vest in the courts of the State where: (c) the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled."
- Applicable Law - Article 9, para 2: "All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where: (c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled."
- Adjudicative Jurisdiction - Article 7, para 2: "A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its: (d) substantial business interests."

<sup>39</sup> Article 1, para 4: "'Contractual relationship' refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State."

<sup>40</sup> Furthermore, a number of companies struggle with the problem of illegal sub-contracting in their supply chains.

Last year's [joint business response](#) to the Zero Draft Treaty noted other big concerns about the inclusion of extraterritorial jurisdiction, which remain. For example:

- The provisions on extraterritorial jurisdiction do not respect national sovereignty, the principle of territorial integrity and non-intervention in the domestic affairs of other States - thus making them incompatible with the subsequent provision in article 12 para 2, which should be paramount.<sup>41</sup> The Revised Draft Treaty fails to define the conditions under which the sovereignty and obligations of Host States would not be infringed.
- The provisions also take the focus away from the urgent need for many States to improve victims' access to effective remedy at the domestic and local level. Enhancing the ability of victims to file claims against TNCs in multiple jurisdictions would create a two-tiered accountability system, whereby individuals that suffer harms involving foreign-based persons receive higher standards, but the rest (victims of harms caused by purely domestic companies or SOEs) get lesser or diluted protections and remediation.
- Finally, the Revised Draft Treaty ignores the many practical and procedural shortcomings of extraterritorial jurisdiction. For example: (a) the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; (b) the huge challenges presented to national courts when they must rule according to foreign legal principles and jurisdiction; (c) the struggles that many courts have in resolving multiple objections being raised at the same time and threshold questions; (d) the challenge of "forum shopping" and the fact that courts in different countries may make different and contradictory judgements on the same case; (e) the difficulties in obtaining evidence and testimony abroad; and (f) the legal uncertainty it brings for victims, as well as companies.

## 8. Mutual legal assistance

Some parts of the article on mutual legal assistance raise further concerns, notably the list of proposed actions (under article 10 paragraph 3) to promote cooperation between States such as: "executing searches and seizures"; "examining objects and sites"; "identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes"; and "facilitating the freezing and recovery of assets." These wide-ranging examples could potentially enable politically motivated actions and prosecutions against business, as well as compound problems in relation to bad-faith actions against companies.

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<sup>41</sup> Article 12, para 2: "Notwithstanding art 7.1, nothing in this (Legally Binding Instrument) 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."

## **Conclusion: The problematic Revised Draft Treaty does not diminish businesses' firm commitment to the business and human rights agenda**

The business community would like to underscore that its many concerns with the Revised Draft Treaty in no way diminishes its unwavering commitment to act responsibly and respect human rights throughout its activities and business relationships. Identifying and responding to human rights risks has become a core part of corporate activity and companies are continuously scaling up their efforts and performance. Year on year, business is also deepening its engagement to help achieve the Sustainable Development Goals (SDGs) at the international, regional, national and local level.

As countries grapple with their myriad development challenges and as the world undergoes transformative change (driven by technological innovations, demographic shifts, populism and climate change) the many benefits that businesses provide to people and society<sup>42</sup> should not be undermined.

To ensure coherence with the business and human rights agenda and the SDGs, State measures should carefully balance the twin goals of responsible business conduct whereby companies "do no harm" and they can also "do good." An approach that recognises a company's responsibility alongside others, its relationship to a harm, the reality of its operations and the underlying country context allows for flexible, collaborative and creative solutions in a way that rigid requirements and coercive measures do not. Partnerships between all stakeholders are essential to address the many systemic human rights challenges around the world.

The Revised Draft Treaty undermines this principled pragmatic approach. It jeopardises the UNGPs' crucial consensus by blurring the boundaries between the State duty to protect and the corporate responsibility to respect human rights. It does not bring clarity to business or provide a credible path forward to address complex business and human rights issues.

The business community is committed to continuing its constructive dialogue in the IGWG and it hopes that its points raised in this response will be carefully considered and reflected in the IGWG's work.

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<sup>42</sup> Business benefits to society include generating inclusive economic growth; creating jobs for men and women; developing skills and knowledge flows; enhancing productivity and promoting entrepreneurship; driving technology transfer and innovation; and bringing essential products and services to the public. These substantial benefits contribute to poverty reduction, improved living standards for all, increased opportunities for hundreds of millions of people, help with the transition from the informal to the formal economy, and better quality of public goods on offer. This allows business to make a hugely positive contribution to the SDGs beyond also helping to provide financing to achieve the goals.