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## Third Revised Draft Treaty on Business and Human Rights: Comments and Recommendations

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# THIRD REVISED DRAFT TREATY ON BUSINESS AND HUMAN RIGHTS: COMMENTS AND RECOMMENDATIONS

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The [3<sup>rd</sup> revised draft](#) of the *legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, was published in August, by the Intergovernmental Working Group (IGWG), established in 2014 by the UN Human Rights Council, under [Resolution 26/9](#), for the elaboration of the treaty. The text is based on a series of consultations and inter-State negotiations that have taken place since 2014. This policy brief is written as an external contribution to the new round of negotiations over the text taking place in the Human Rights Council in Geneva, from 25 to 29 October 2021. It is in part informed by an expert exchange between academics and civil society organisations held on 7 October at the Asser Institute in The Hague.

The current brief is not an exhaustive response to the various revisions made in the third draft but focuses on three questions at the heart of treaty: prevention and due diligence; liability and regulation; and access to remedy. While numerous political controversies surround the treaty, our focus is on analysing its utility, were it adopted, in responding to corporate human rights abuses. As we believe that the main parameters of the treaty are relatively settled, our feedback focuses on suggestions consistent with the current paradigm. The first section of the brief focuses on the areas of incoherence within the third revised draft. The second section proposes recommendations going forward.

## **1. Areas of Improvements in the Third Revised Draft**

### **A. Due Diligence and Remediation: Re-Inventing the Wheel**

Corporations are predominantly expected to prevent the occurrence of human rights abuses through undertaking human rights due diligence (HRDD) (art. 6.3). This builds on the U.N. Guiding Principles on Business and Human Rights (UNGPs) developed by Prof. John Ruggie and unanimously endorsed by the U.N. Human Rights Council. While much remains unknown about the actual implementation of HRDD processes by businesses and the effectiveness of this mechanism to curb the adverse impacts caused by transnational economic activities, it is clear that the notion of HRDD has come to dominate the regulatory agenda in the BHR field. This is reflected in particular in the multiplication of national HRDD legislative initiatives, and the preparation of an EU Directive on HRDD.

The third revised draft incorporates some UNGPs language in its drafting of the due diligence obligations expected of business enterprises. At the same time, it also engages in creative rewriting of the content of HRDD. First, instead of focusing on avoiding and addressing adverse human rights impacts, HRDD is directed at human rights abuses, thus narrowing the type of impacts that are subjected to it. Second, the draft does away with ‘severity’ as a criterion to determine the complexity and nature of the HRDD process needed for a given human rights impact. Thirdly, the draft diverges significantly over the steps required to implement HRDD with regards to 1) identification and assessment, 2) integration, 3) appropriate action, 4) ‘accounting for’ or communication; and 5) remediation:

1. In the UNGPs, the identification and assessment phase is directed at any adverse human rights impact “with which they [the business enterprises] may be involved”, while the draft of the Treaty refers to

human rights abuses “that may arise from their own business activities, or from their business relationships”. The concept of involvement in the UNGPs refers to a link – causal or non-causal – between business activities/relationships and a particular harm. In the treaty, “arising from” points rather at a causal link between a particular activity/relationship and a particular harm. Thus, the current formulation of the draft could be read as more restrictive in terms of the business activities and relationships it would cover.

2. Following identification and assessment, the UNGPs require integrating, and acting upon, the findings of identified human rights risks/impacts. Integration requires responsibility for addressing impacts to be assigned to particular departments/individuals and to have internal decision-making, budget allocations and oversight processes. The treaty omits integration entirely, focusing only on actions needed to respond to (potential) human rights abuses.
3. Whereas the UNGPs distinguishes between actions required in cause, contribute, and directly linked situations, the draft treaty lumps causing and contributing together and offers no clarity as to how appropriate action varies between cause/contribute scenarios and directly linked scenarios. By focusing on a corporation’s connection to harm rather than conduct it is required to take, this may encourage a corporation to focus on whether their supply chains are ‘clean’, encouraging cut-and-run tactics by more powerful firms, leaving workers worse off. This increases the burden on the least powerful parts of supply chains, which could result in less security, lower wages, or the encouragement of fraudulent behaviors in order to comply with the demands of powerful buyers. Ideas within the UNGPs such as ‘leverage’ and responsible disengagement would help improve the current formulation.
4. Communication in the UNGPs requires that business enterprises how they address their human rights impacts. The draft focuses on communicating to stakeholders, while the UNGPs mentioned external communication and formal reporting in specific situations. Thus, the latter provided for a much wider target audience of the communication.
5. Remediation, while discussed separately from HRDD in the UNGPs, is required where a business enterprise causes or contributes to an adverse human rights impact. The draft, however, only describes the need for corporations to prevent and mitigate abuses. This means there is no clear, articulated basis for when a company’s wrongful conduct could give rise to the need to provide for remediation or access to remedy.

#### B. Remedy: Mismatched Obligations and Rights

‘Remedy’ acts as an umbrella term for various actions that can be undertaken to ‘put right’ or ‘make good’ a human rights abuse. We loosely delineate between four types of remedy:

1. *Access to remedy*, as described in the UNGPs, generally revolves around making recourse mechanisms available, through reducing barriers to accessing judicial mechanisms and improving the availability and effectiveness of non-judicial mechanisms.
2. *Reparations*, and associated categories of remedy such as satisfaction, compensation, rehabilitation, restitution – concern making the victim whole again.

3. *Sanctions*, such as penalties, convictions, and punitive damages aim to punish and/or deter wrongful conduct.
4. *Remediation*
  - 4.1. Corrective action such as injunctions, decrees for specific performance, a settlement regarding future practices, guarantees of non-repetition, and amendments of policies, practices and/or governance – seeks to prevent future abuses.
  - 4.2. Environmental remediation seeks to restore the environment which cannot be accounted for solely in anthropocentric terms.

The treaty's attitude to remedy is primarily expressed both in its articles on the rights of victims (art. 4), and the obligations of states with regard to access to remedy, legal liability, and adjudicative jurisdiction (arts.7-9). Victims' rights cover the right to *access to remedy* – 'fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice' – *reparations* – restitution, compensation, rehabilitation, reparation, satisfaction... – and *remediation* – 'guarantees of non-repetition, injunction, environmental remediation, and ecological restoration' (art.4.2.c). The third revised draft now recognizes the victims' right to 'individual and collective reparation' (art.4.2.c).

States' obligations focus primarily on *access to remedy* – art.7 describes the reduction of barriers to accessing recourse mechanisms and art.9 describes new grounds of adjudicative jurisdiction. Article 8 on liability is the closest article to matching the expansive rights of remedy in terms of obligations, however legal liability should not be confused for an obligation to provide remedy. Two types of remedy are relevant to article 8: *sanctions* and *reparations*. *Sanctions* are expected in cause/contribute but not directly linked situations (art.8.3). *Reparations* are described in tautological terms: where a business is found liable to provide reparations then it should provide reparations (art.8.4). Combined with the absence of any connection between corporate conduct and remedy in article 6, which is the only article which stipulates what obligations should be placed on corporations, there is no articulation of when a corporation should be required to provide *reparations*. *Remediation*, including corrective action and environmental remediation, is omitted entirely from article 8.

Given that the treaty guarantees the rights to reparations and remediation in art. 4, it might not be so much of the problem that the treaty lacks the exact articulation of obligations by which those remedies are provided. However, the regulatory language in which it is written encourages a compliance-to-obligations mindset over a fundamental shift in principles.

### C. The Orientation of the BHR Treaty: Principles-based Treaty or Rules-based Regulation?

The business and human rights treaty is fundamentally eccentric to other human rights treaties in that most human rights treaties have provisions divided by the type of right and enumerate obligations required to guarantee each right (e.g., prohibition of discrimination, the existence of certain types of public services etc.). They are largely principle-based, leaving a margin of appreciation to the specific conduct states adopt meet certain obligations and to guarantee each right. They do not specify legislation that must be adopted but the objectives that legislation, alongside a broader array of state action, must be achieve. The business and human rights treaty is fundamentally different. It needs to be fundamentally different for two reasons: a) it is managing the conduct of non-state actors not states and b) it is taking an explicitly transnational approach to dealing with transnational problems no individual state can resolve. It therefore

delves into types of issues not dealt with in much detail in other human rights treaties, particularly jurisdiction but also applicable law, international cooperation and transnational liability regimes. It does not invent (many) new rights, but it does invent new obligations for states beyond their borders.

However, the movement of the treaty toward less principles-centric language – around what rights must be guaranteed and how best to achieve them – towards rule-based language over which actor is responsible for which part of a given issue has been marked by a regulatory type of language mimicking the EU Brussels-I bis Regulation. This regulation-like language comes with inherent dangers to any future treaty's feasibility, political viability, and coherence; each page-long article from articles 8-12, whether consciously or not, tries to resolve a myriad of private international law disputes. These private international law disputes have each been the subject of dedicated codification efforts primarily by the Hague Conference on Private International Law – which have generally failed entirely and have never come close to universal acceptance.

Perhaps more importantly, while other attempts to transnational issues have sought to delineate who does what, the treaty has continued to expand its scope to ensure as many States have a role to play in each case as possible, this is likely to create more tensions and potential jurisdictional conflict, without resolving actual problems or lowering barriers for victims.

1. First, the new draft adds that courts can exercise jurisdiction based on the claimant's nationality or domicile (*forum actoris*, art. 9.1 d). Likely inspired by article 14 of the French Civil Code, this principle is considered to exorbitant in private international law, at least in Europe and the US. It was included on the so-called 'black list' of prohibited grounds for jurisdiction in the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, and even in France it is rarely used. Jurisdiction based on the claimant's domicile (rather than nationality) as a general ground for jurisdiction is currently not applied by any state.
2. Second, the draft significantly broadens the concept of 'domicile' compared to the second draft. It adds 'place where the principal assets or operations are located'. Location of assets is sometimes used as an exceptional ground for jurisdiction in some Nordic and Germanic traditions, but never as a way of determining domicile. This is likely to be regarded as exorbitant.
3. Third, article 9.5 on *forum necessitatis* now outlines three possible criteria for when a case is sufficiently connected with a forum to exercise necessity jurisdiction. While somewhat clarifying, this overlooks the fact that *forum necessitatis* has developed quite differently in different jurisdictions and this harmonization is likely to be resisted by states that do not recognize all grounds for necessity jurisdiction mentioned here. At the same time, it may restrict states where *forum necessitatis* is applied more broadly than the criteria mentioned in this article.
4. The revised article 11 on Applicable Law has narrowed its exceptional ambit, however it retains the possibility of claimants invoking the law of the state where the defendant is domiciled (regardless of where the action was initiated or where the harm occurred). This is a much broader rule than is recognized in any private international law tradition, and that is in addition to the *lex causae* and *lex locus delicti* rules. In general, what these provisions demonstrate is that the draft lacks a clear problem definition, at least when identifying relevant barriers to access to remedy for victims. The rule-based approach followed here may lend itself well to solve particular, identifiable issues, but the wide net Article 9 especially tries to cast seems to suggest it is unclear what those issues actually are. Indeed, none of the proposed provisions would have meaningfully changed the outcome of transnational procedures that have taken place over the last couple of years, while likely undermining political viability

of the treaty and creating resistance with the very states whose participation is vital to the treaty succeeding.

#### D. The Elephant in the Room: We Don't Know How to Regulate Companies Effectively

The ultimate goal of the treaty is to oblige states to *effectively regulate* business enterprises to ensure corporate respect for human rights (art. 6(1)). This is in part due to two observations with which the authors of this policy brief agree with: that the current focus on voluntaristic efforts fails to regulate companies (and will likely continue to do so) and that the traditional human rights regime is not fit for purpose given the realities of transnational corporations. It hopes that by placing legal obligations on states, and in turn business, and by making international human rights law obligations transnational in scope, it can counter the current lack of political will or ability to regulate transnational companies effectively.

However, corporate crime and corporate wrongdoing are notoriously difficult to regulate effectively, even within state borders. A 2014 systematic review of legal and administrative prevention and control strategies aimed at companies and their officials/managers showed that, put positively, we do not have enough data on 'what works' in curtailing corporate crime.<sup>1</sup> Put more negatively, no regulatory strategy is clearly effective in the sense that it can prevent wrongdoing or prevent recidivism in corporations or individuals working for those corporations, even for relatively straightforward corporate crimes such as fraud or waste dumping. In other words, effective regulation of businesses to prevent and mitigate human rights abuses in the context of business activities is challenging and ambitious; it is not simply a matter of insisting that sanctions, and other legal remedies, are introduced into domestic law for transnational corporations. Governments that seek to regulate companies often experiment with a wide variety of legal and policy measures. There is no off-the-shelf solution that can be implemented should states assume responsibility for corporations domiciled in their territory.

## **2. Recommendations for the Fourth Revised Draft**

### A. Align Corporate Obligations with the UNGPs: A Strategic Plea for Coherence

The current direction of travel with regards to the various drafts of the treaty is to incorporate elements of the UNGPs. Given that the treaty is to be built around the notion of HRDD in its preventative dimension - and there is no readily apparent basis for the current divergences from the UNGPs framework - little is to be gained and a lot can be lost from the current reframing of the definition and core understanding provided in the UNGPs. Furthermore, by utilizing a concept of due diligence more embedded in the categories of responsibility in the UNGPs, there will be greater clarity and coherence between due diligence and when and how legal regimes should hold corporations liable for wrongful conduct, including grounds for reparations and sanctions.

Much work has already been done at the UN and OECD level to develop a variety of policies and guidance (see [here](#) and [here](#)) to assist in the operationalization of HRDD as understood in the UNGPs. Modifying the entire economy of HRDD (such as with regard to the taking action step in the current treaty draft) would require duplication of such efforts. Moreover, it would also confuse the many practitioners (NGOs, lawyers, corporate staff, civil servants and judges) who are already operating under a UNGPs-informed conception of HRDD. From the point of view of the effectiveness of the Treaty it seems curious that the

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<sup>1</sup> See Simpson, S. S., Rorie, M., Alper, M., Schell-Busey, N., Laufer, W. S., & Smith, N. C. (2014). Corporate crime deterrence: A systematic review. *Campbell systematic reviews*, 10(1), 1-105.

draft would seek to establish a new consensus over the definitions of HRDD when an existing and already embraced paradigm exists, without serious justification as to why this is necessary.

#### B. Moving Beyond ‘Prevent and Punish’ Paradigms towards ‘Remedy and Governance’

*Remediation* is the missing part of the draft’s remedy puzzle. The current bifurcation between prevention *ex ante* and reparations/sanctions *ex post* obscures the possibility, available within and outside of legal systems, of taking preventative action *ex post*, including injunctions/decrees for specific performance, guarantees of non-repetition, and amendments of policies, practices, and/or governance. Legal systems can look beyond consequentialist models towards models that focus on ensuring appropriate corporate ‘character’, ‘culture’, or ‘governance’, utilizing sentencing or prosecution agreements to reform the corporation rather than just punish it. This is particularly important given the mixed evidence for the success of corporate fines and sanctions for legal persons. Recent out-of-court settlements in business and human rights litigation have included reforms to corporate governance. Indeed, the overall business and human rights agenda has often focused on improvements to corporate governance in the aftermath of human rights abuses.

#### C. Back to Principles: Greater Access to Remedy not Greater Harmonization of Legal Systems

Harmonisation is not the intended purpose of the treaty, yet the third revised draft creates ‘mini-regimes’ on issues that have not been resolved in macro-regimes by dedicated instruments, leading to inevitable conflicts of legal traditions, and on top of it adds unnecessary vagaries that will likely provoke resistance without resolving actual problems. It is submitted that the draft should adopt a principles-based approach to its outlining of state obligations, and seize to imitate legislative acts, especially instruments with a particular regional and policy function such as the Brussels Regulation. *Forum non conveniens* is problematic because it allows premature dismissal of proceedings; have a principle that premature dismissal of proceedings be prohibited. *Forum necessitatis* is necessary because states more connected to the case wrongfully dismiss it, have a principle that states shall be seized of jurisdiction in cases where no other state is wishing to do so, provided there is a sufficient connection. Specific rule-making and guidance is best left either to normative guidance from a supervisory body or additional protocols. Such a treaty would achieve its most important objective: reforming the international human rights regime and discourses around human rights from pointing to host states towards accepting transnational corporations as a transnational problem which home states are also responsible for.

#### D. Treating States as More than Legislators

The current focus of the treaty on legislation treats states as legislators and their courts as adjudicators, but States play a much greater role in human rights realization. Home states and host states are often complicit in the promotion of activities that result in human rights abuses. Domestic traditions of how to deal with corporate wrongdoing have emerged from the intersection of economic and political power, and corporate-political relations will impact the definition of legal and policy measures (and accompanying penalties) as well. Corporate involvement in human rights abuses often benefits government officials and can result from circumstances created by them, which further limits incentives for states to adopt legal and policy measures that effectively curtail corporate roles in human rights abuses. The draft would benefit from provisions which specifically prohibit the wrongful activities of states authorities in the promotion of transnational corporations.

Finally, from a criminological point of view, corporate culture (existing in a broader societal culture and consisting of corporate sub-cultures) is a key factor in the regulation of corporate wrongdoing. Corporate



culture produces and reproduces socially shared beliefs and understandings of what is wrongdoing and why certain behaviors are 'wrong' just as much as they define admissible and desirable behaviors. It produces and reproduces socially shared beliefs on regulatory requirements (including penalties) and their legitimacy. More generally, corporate culture shapes the way managers and employees see the aims and goals of the company to be as well as the appropriate (and inappropriate) means to achieve those goals. Only if respecting human rights is part of the aims and goals of a company will regulation of corporate human rights abuses (and resulting penalties) be seen as legitimate, regulation can be effective. Other human rights treaties stress not only legislative action by states but also the promotion of measures by which to change attitudes in society, whether towards women, people of different ethnic backgrounds, migrants or persons with disabilities. While these are 'softer' obligations from a legal perspective, they are also amongst the most vital actions to creating longstanding change. Having obligations for States to utilise all the means at their disposal to promote human rights within corporate culture would benefit the treaty immensely.