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The Revised Draft of the UN Treaty on Business and Human Rights: towards the next round of negotiations

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The international community is trying to subject to more rigorous scrutiny companies' negative impact on human rights and on the environment. The need to mitigate the negative effects of global business operations and to ensure access to judicial remedies for victims who suffer human rights abuses committed by businesses is a live issue on today's international agenda. Within the United Nations, in 2014 the Human Rights Council established an open-ended Intergovernmental Working Group for the elaboration of a legally binding instrument, with the main objective of filling the gaps that exist in the legislation and in the governance of companies' transnational activities in relation to respect for human rights.

The Zero Draft of the Treaty on Business and Human Rights was published in July 2018, to permit the opening of substantive negotiations in October of the same year. A revised version of the draft was presented a year later, based on the deliberations of the Working Group at its fourth session, on the comments and suggestions of stakeholders and on the consultations held by the Chairperson-Rapporteur of the Working Group.

This policy paper has a dual purpose. On the one hand, it critically analyses the content of the Zero Draft in order to identify the improvements and innovations proposed in the revised draft. On the other hand, it reflects on the position of various stakeholders in relation to the content and the uncertain future of the document, taking as a reference their participation in the Working Group's fourth session.

Context

On 26 June 2014, the United Nations Human Rights Council (HRC) adopted Resolution 26/9 on the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights". The votes were very divided, with 20 votes in favour, 14 votes against and 13 abstentions.[1]

This process takes place in parallel with the implementation of the United Nations Guiding Principles on Business and Human Rights (hereinafter, Guiding Principles), unanimously adopted on 16 June 2011 by the HRC, through Resolution 17/4. While the Guiding Principles have a predominantly soft law approach, Resolution 26/9 lays the groundwork that could lead to the possible adoption of a hard law instrument on business and human rights.

Resolution 26/9, in addition to establishing the Intergovernmental Working Group (hereinafter, Working Group) whose mandate is to elaborate a legally binding instrument to regulate the activities of transnational corporations and other companies within international human rights law, also resolves that the first two Working Group sessions (6-10 July 2015 and 23-27 October 2017) be devoted to constructive deliberations on the content, scope, nature and form of the future international instrument.

It also resolves that the Chairperson-Rapporteur of the Working Group should prepare elements for a draft legally binding international instrument in order to undertake substantive negotiations on the subject at the commencement of the Working Group's third session (23-27 October 2017), taking into consideration the discussions held at its first two sessions. The document of elements, bringing together contributions and inputs presented orally or in writing by States and other relevant parties within the framework of the above mentioned meetings, was published in September 2017.

In July 2018, following the recommendations to the Chairperson-Rapporteur contained in the report of the third session, the Working Group published the Zero Draft Treaty on Business and Human Rights, taking as a starting point the debates and inputs from previous sessions and informal consultations with States and other relevant stakeholders that took place between May and July 2018. At the beginning of September 2018, the Draft Optional Protocol was published. The content of these first projects was discussed at the Working Group's fourth session, held on 15-19 October 2018, that brought together a large number of delegations, as well as more than 200 civil society representatives.

In July 2019, the Permanent Mission of Ecuador, on behalf of the Working Group, released a new revised version of the draft treaty on business and human rights which was created on the basis of the comments and suggestions presented orally or in writing by States, as well as of informal consultations with governments, international organisations, civil society and other interest groups, which took place during June 2019.

Analysis

The elaboration of a draft treaty on business and human rights and its optional protocol would be a historic milestone, as it would be a unique opportunity for States and other interested parties to carry out, for the first time successfully, substantive and constructive negotiations on legally binding instruments regarding business and human rights at an international level.

The publication of the Zero Draft Treaty was an important step for the Working Group in the complex negotiation process that has taken place over recent years within the HRC. However, it led to differences of opinion among international organisations, civil society, the academic world and business organisations, since many of the provisions proposed in this version were imprecise, incoherent and inconsistent in relation to other provisions of the same document, and there were even some that repeated general principles and obligations under international law. Specifically, the articles regarding scope, definitions, jurisdiction, applicable law, victims' rights, legal responsibility and international cooperation had technical deficiencies that necessarily required correcting.

The 2019 revised draft offers much more precise, clear and consistent language, structure and content. For example, one of the most obvious changes in the structure is that the preamble is no longer located within the operative part of the text. Likewise, the revised draft aims to reach a greater consensus and to reconcile the positions of those parties in favour of the treaty and of those that oppose a binding instrument that may affect the implementation of the Guiding Principles. The preamble to the revised draft not only uses language closer to the Guiding Principles, but also notes the role they have played in the business and human rights agenda of the HRC through the practical implementation of the United Nations Framework of "Protect, Respect and Remedy". This reference to the Guiding Principles can be seen as a call on the critics of the treaty to participate in a constructive way and to show a spirit of collaboration during the negotiations, taking into account the compatibility and complementarity between these two instruments.

The articles regarding scope, definitions, jurisdiction, applicable law, victims' rights, legal responsibility and international cooperation had technical deficiencies that necessarily required correcting.

Despite the obvious changes presented by the revised draft, it continues to maintain a distance from positions that would alter the status quo of international law, since it does not include substantive provisions that impose direct obligations on companies to respect human rights, but rather, it continues to reaffirm the primary obligation of States to, on the one hand, respect, protect and maintain human rights in the face of business activities and, on the other, guarantee that victims have effective remedies in the event of human rights violations. Nor does it include an express assertion of the primacy of human rights with respect to trade and investment agreements, as was proposed by several delegations and civil society organisations during the Working Group's sessions.

Furthermore, the revised draft continues to maintain an approach aimed at protecting against human rights abuses related to business activities, eradicating impunity and making it possible for victims to have recourse to justice. Its provisions, therefore, are mainly aimed at covering the existing legal gaps in relation to access to justice and reparation in the case of human rights abuses committed by companies.

However, the revised draft broadens the proposed scope of the treaty and adopts a hybrid approach. The scope of application proposed in the Zero Draft focused solely on human rights violations that occurred in the context of any *transnational* business activity. In the revised draft, it is proposed that the treaty be applied, unless otherwise indicated, to *all business activities,* including especially, but not being limited to, those of a transnational nature. This new broader scope seems to take up one of the recommendations that the European Union (EU) has been making since the beginning of the negotiations, not to limit the discussion exclusively to transnational companies. With this new approach, the EU and those States with similar positions have fewer arguments for not contributing to the fulfilment of the Working Group's mandate to develop a legally binding instrument in the field of business and human rights.

The revised draft maintains the four pillars on which the future instrument will be based and which will be analysed in the sections below. These are:

- The prevention of human rights abuses.
- The right of victims to access justice and effective remedies.
- International cooperation for the effective implementation of the instrument.
- Monitoring mechanisms.

Prevention of human rights abuses

States and civil society organizations (CSOs) agree that prevention is a fundamental element of the future instrument, in order to avoid the costs of complex litigation and, above all, to avoid the suffering of victims. In this regard, Article 9 of the Zero Draft collected and reinterpreted some of the elements of due diligence in the field of human rights contemplated in the Guiding Principles[2] and, in turn, as a positive aspect, introduced some new elements:

- Conduct meaningful consultations with the affected groups, paying special attention to vulnerable groups, such as women, children, people with disabilities, indigenous peoples, migrants, refugees and internally displaced persons.
- Demand financial guarantees to deal with possible compensation claims.
- Incorporate due diligence measures in all contractual relationships that involve transnational business activities.

The position of States and CSOs with regard to this provision was positive. However, the discussion around this article concerned the need for greater precision and scope for the due diligence requirements in the field of human rights, as well as greater convergence with the concepts and terminology of the process of due diligence within the Guiding Principles or in the sector guides of the Organization for Economic Cooperation and Development (OECD), since some of the stages of due diligence in the Guiding Principles were not present in Article 9 or had been modified. In relation to compliance, it was suggested that this provision ensure that States establish an independent supervisory body which ensures that companies implement measures for due diligence and to prevent infringements of human rights. Likewise, doubts arose about the possibility that it offers for states to exempt small and medium-sized companies from certain obligations contained in that article, since this is contrary to the spirit of the second pillar of the Guiding Principles which applies to all companies in accordance with their capabilities.

In the revised draft, the prevention provision, now covered by Article 5, is much clearer. The new text reflects the concerns expressed by the different stakeholders and is thus more in line with the second pillar of the Guiding Principles: it imposes on States the obligation to ensure in their domestic legislation that all persons who carry out business activities within their territory or jurisdiction, including transnational ones, respect human rights and prevent violations or abuses of human rights. Likewise, this new provision incorporates literally the stages of the due diligence process in the field of human rights contemplated in the Guiding Principles, while maintaining and improving the new elements proposed in Article 9 of the Zero Draft, which positively complement companies' due diligence processes. However, the scope laid down for these due diligence processes is limited to companies' "business activities", including "contractual relationships", rather than the "business relationships" covered by the Guiding Principles. This creates the risk that companies may not address some of the impacts that can be generated throughout the supply chain. On the other hand, Article 5 of the revised draft reformulates the possibility of exempting small and medium-sized enterprises and, instead, provides that States may offer incentives and other measures to facilitate these companies' compliance with the obligations of due diligence without causing an undue additional burden. This new provision is closer to what is laid down in the Guiding Principles.

The potential of the future treaty's prevention provisions is that they give a clear form to companies' due diligence obligations. Due to the non-binding nature of the Guiding Principles, there is no standardised practice regarding companies' implementation of due diligence in the field of human rights; what predominates is the social expectation that the measures necessary to prevent human rights abuses will be adopted. Therefore, by virtue of this possible provision, States would be required to introduce mandatory due diligence in human rights matters in their internal legislation, as a mechanism for preventing corporate abuses affecting the enjoyment of human rights. This would make it possible to consolidate regulatory frameworks similar to the French corporate duty of vigilance law or other similar legislative initiatives proposed in Austria, Belgium, Finland, Germany, the Netherlands and Switzerland, among others.

Access to justice and effective remedies

The novel contributions of the Zero Draft included the provisions relating to victims' rights (article 8) and the legal responsibility of companies with transnational activities (article 10). These provisions were aimed at adapting national legal systems to current economic and commercial practices. Therefore, the purpose of these articles is to eliminate or reduce practical and legal obstacles to accessing justice and to give effect to corporate responsibility.

Article 8 of the Zero Draft enunciated some of the rights of victims, as follows:

- Fair, effective and prompt access to justice and remedies (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition).
- Appropriate access to information relevant to the pursuit of remedies.

- Proper and effective legal assistance throughout the legal process.
- Exemption from the costs of litigation.
- Access to an International Fund for Victims.
- Access to appropriate diplomatic and consular means.
- The right to benefit from special consideration and care to avoid re-victimisation in the course of proceedings for access to justice and remedies.

During the fourth session several comments and recommendations were made to improve and clarify the wording of the elements contained in article 8, with the aim of achieving effective application by national courts and avoiding the reiteration of norms that are already accepted in international law. Furthermore, some reasonable reservations have arisen regarding the provisions of article 8. For example, it was requested that references to group claims be eliminated, since collective actions are not contemplated in all States' legal systems. On the other hand, objections were raised to the fact that it is contemplated that in no case will victims be required to reimburse the legal expenses of the other party to the claim, since for some States this provision raises concerns about a possible increase in the number of frivolous and unsubstantiated cases. Similarly, States have expressed some reservations about the International Fund for Victims, given the possibility that States themselves may end up paying for the abuses committed by companies. For their part, CSOs suggested that this article should integrate a gender perspective and make an explicit reference to the protection of human rights defenders.

The revised draft addresses most of the concerns raised during the Working Group's fourth session regarding the provisions about victims' rights. Article 5 of the revised draft eliminates references to group claims. In turn, it stipulates that in no case will victims granted remedy or redress be required to reimburse any legal expenses of the other party to the claim, adding that in the event that the claim fails to obtain appropriate redress or relief as a remedy, the alleged victim shall not be liable for such reimbursement if such alleged victim demonstrates that such reimbursement cannot be made due to the lack or insufficiency of economic resources on the part of the alleged victim. The International Fund for Victims is deleted from this article and is moved to Article 13 on institutional arrangements. In addition, one of the most important advances is that the 2019 Draft includes a new provision declaring that States Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment, so that they are able to act free from threat, restriction and insecurity.

For its part, Article 10 of the Zero Draft addressed the legal liability of companies for violations of human rights undertaken in the context of their activities. This provision adopted a flexible position to give States the freedom to determine the best way to apply the article, noting that States parties will ensure through their domestic law that natural and legal persons may be held liable — through criminal, civil or administrative procedures— for human rights violations committed in the context of transnational business activities. For this purpose, the article contained specific provisions on civil and criminal liability. Likewise, the provision added that said responsibility will be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, according to the domestic law of each State. Therefore, the power was granted to States to choose the sanctions they deem appropriate to fulfil the objectives of the treaty, thus giving rise to possible divergences between jurisdictions. Although this is a frequent mechanism in international treaties, it may allow companies to choose their place of operations strategically, so as to avoid those States that have stricter sanctions.

The provisions of Article 10 of the Zero Draft generated quite a lot of discrepancies between States because the treatment of legal persons' liability varies between different legal systems. In this regard, it was requested that this article establish a greater connection with the prevention provisions of the future instrument. Most CSOs asked for clearer provisions about the need to pierce the corporate veil, while companies argued that the project disregarded the existence of separate legal personalities. It was also considered that the provision on the reversal of the burden of proof was too broad and could lead to the breach of guarantees of due process and of other defendants' rights.

In relation to the criminal liability provisions, some delegations raised serious concerns regarding article 10 because, as they interpreted it, it required the imposition of criminal responsibility on legal entities, which was not possible under their legal systems. In the same vein, many delegations expressed concern about the inclusion of universal jurisdiction in the project, since this was a very controversial issue which, in the past, had been abused by some States. Finally, it should be noted that despite the reference to administrative liability the Zero Draft did not contain any specific provisions that would lead States to demand liability of this type. In this sense, it disregarded the potential of some administrative sanctions, such as excluding companies from participating in public procurement procedures, from obtaining state subsidies or export credits and from obtaining public guarantees for investments or export credits.

The article on legal liability is among those that at first sight present more changes in the revised draft (Article 6), although it continues to maintain a flexible approach and to offer specific guidance for civil and criminal liability. The provision on the reversal of the burden of proof is transferred to the article on victims' rights. The reference to universal jurisdiction is deleted. In turn, a provision is included that establishes that States 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. This provision was previously included in the prevention article of the Zero Draft and some delegations had asked for a clearer indication of what was expected with this provision.

The most significant advances in article 6 of the revised draft are, on the one hand, a stronger relationship with the prevention provisions, since it offers more concrete and precise language in relation to the liability of a company for its failure to prevent another natural or legal person with whom it has a contractual relationship from causing to third parties harm that it should foresee or should have foreseen in the conduct of business activities, including those of transnational character, regardless of where the activity takes place. On the other hand, in accordance with the recommendations of the experts, Article 6 lists clearly and specifically a series of crimes recognised under international law, including crimes under the Rome Statute, which will give rise to companies' liability for acts that constitute attempt, participation or complicity in a criminal offence contemplated in the future instrument. This list of crimes strengthens the text of the treaty, as it gives it greater legal certainty. However, States still maintain their discretionary powers to choose the type of responsibility according to the principles of their domestic law. This approach reduces the possibility of States expressing reservations to this provision.

Mutual legal assistance and international cooperation

The Zero Draft Treaty incorporated provisions relating to mutual legal assistance[3] (Article 11) and international cooperation (Article 12), in order to guarantee an effective implementation of the future instrument and to strengthen States' efforts to respect and protect the human rights recognised by international law in the framework of contemporary economic practices.

By virtue of the future instrument, it is expected that States Parties shall cooperate in good faith to initiate and carry out investigations, prosecutions and judicial proceedings related to cases of human rights abuses committed by companies with transnational activities. To this end, mutual legal assistance is contemplated for the following situations, among others:

- Taking evidence or statements from persons.
- Serving judicial documents.
- Performing searches and seizures.
- Examining objects and sites.
- Providing information, evidence and expert evaluations.
- Facilitating the voluntary appearance of persons in the requesting State Party.
- Facilitating the freezing and recovery of assets.
- Giving any other type of assistance that is not contrary to the domestic law of the requested State Party.

Parties, relevant international and regional organisations and civil society in order to:

- Promote technical efficiency and capacity building.
- Share experiences, good practices, challenges, information and training programs.
- Facilitate research and studies on best practices and experiences for preventing human rights violations.

Articles 11 and 12 of the Zero Draft did not generate much controversy, since these provisions are aimed at filling the gaps in the law, in order to overcome some of the obstacles that may arise from companies' transnational activities. However, some delegations proposed the incorporation of a component of double criminality to prevent the misuse of Article 11. With respect to article 12, some delegations suggested that transnational corporations and other commercial enterprises be allowed to take part in the international cooperation. Therefore, the content of these provisions did not go through major changes in the revised draft. Perhaps the only striking change is that the requirement on States Parties to cooperate in good faith is now in the initial paragraph of article 11 on international cooperation, instead of the initial paragraph of the article on mutual legal assistance, where it had been in the Zero Draft. This change gives the text greater clarity and consistency.

Monitoring mechanisms

On the basis of the experience of other human rights treaties, the Zero Draft of the Treaty introduced in article 14 the creation of a committee of independent experts to monitor compliance with the provisions of the future instrument, thus putting aside the proposal to establish an international tribunal on business and human rights, as proposed by some CSOs and the academic world.

The functions laid down for the Committee are the following:

- Make general comments.
- Consider and provide the concluding observations and recommendations it deems appropriate in relation to the reports submitted by States Parties.
- Provide support to States Parties in the task of compiling and communicating the information required to ensure the application of the treaty.
- Submit an annual report on its activities to the States Parties and to the General Assembly of the United Nations.

For its part, the draft Optional Protocol recognises the competence of the Committee to receive from individuals or groups communications with regards to human rights violations in the context of business

activities of transnational character, under the jurisdiction of a State Party to the Optional Protocol.

Although the creation of a committee could be a positive factor for the implementation of the future instrument, we should not ignore the experience of other treaty bodies and the various recommendations made by experts and academics to improve the system of the organisms created under human rights treaties (these concern reinforcing the independence and experience of the members of the treaty bodies, greater accessibility for the submission of individual communications, simplifying the process for presenting reports, among others). In this regard, during the fourth session, several delegations expressed concerns about establishing a new committee and asked for the ongoing review of the process of strengthening treaty bodies to be taken into account.

On the other hand, the Zero Draft did not establish clear provisions to avoid historic problems in which the States select committee members arbitrarily, without their having the necessary abilities. With regard to the field of business and human rights, the members of the Committee should be capable of addressing, in their general observations and reports, complex and multidisciplinary issues in this specific area. Finally, in relation to this supervisory mechanism, doubts arose about the financing of this body, since the Zero Draft did not contain provisions on this issue.

In turn, the Zero Draft proposed a Conference of the Parties (COP) to address issues related to the application of the future instrument. The COP opens the door to further negotiations for the development of new advances and mechanisms in the field of business and human rights that may be adopted in subsequent protocols. This will allow the instrument to adapt to future changes in the political and social climate of the international community.

The provisions on the Committee and the COP of the Zero Draft are reproduced almost in full in Article 13 of the revised draft. The two novelties that can be identified in article 13 are, on the one hand, an express specification that States Parties must ensure that the experts selected do not participate, directly or indirectly, in any activity that could adversely affect the purpose of the treaty. And, on the other hand, as noted above, the proposal to create an International Fund for Victims is now integrated into the provisions of article 13 of the revised draft.

Next steps and recommendations

Although Resolution 26/9 does not specify the Working Group's mandate beyond the third session, the fourth session was a historic moment as it marked the starting point for substantive negotiations on a binding treaty on business and human rights. Written contributions and informal consultations with stakeholders were important inputs for the revised draft whose structure and content bring closer together the different positions of governments, regional groups, civil society, experts, intergovernmental organisations and other interested parties.

The publication of the revised draft is another important step that gives continuity to the process of preparing the legally binding instrument, since the gaps and inconsistencies in the Zero Draft have begun to be covered. Although it is still a text that is subject to improvements, the evident progress should be a stimulus for all the interested parties with their diverse opinions to participate more constructively and proactively in the fifth session, which will take place on 14-18 October 2019, and, above all, to continue advancing in the mandate of the Working Group.

On the basis of the above, we make the following recommendations:

To the Chairperson-Rapporteur of the Working Group:

1. Invite all interested parties to participate with a constructive attitude and to work in a spirit of collaboration at the fifth session.
2. Continue working to improve the language, structure and content of the future instrument concerning business and human rights, so as to avoid inconsistencies, confusions or the creation of legal loopholes that companies could take advantage of so as to continue on the basis of "Business as Usual".
3. Continue working to ensure that the treaty guarantees access to justice for victims of abuses caused by transnational corporations and other companies, especially for those who are most vulnerable. Therefore, there should be ongoing consideration of the incorporation of provisions which eliminate or reduce the practical, legal and political obstacles faced by victims.
4. Reconsider the proposal to include direct obligations for companies to respect human rights in the operative part of the text.
5. Maintain in the final text of the treaty the protection of environmental and human rights defenders, as well as the recognition of their work.
6. Continue working to integrate a gender perspective throughout the content of the future binding instrument so that it is capable of eliminating all forms of discrimination against women and of achieving substantive gender equality. In this sense, the future treaty must be an instrument that guarantees systematic changes in discriminatory power structures, social norms and hostile environments that prevent women from enjoying equal human rights in all areas.

To the various stakeholders that participate in the Working Group's sessions:

1. Participate constructively in the negotiations at the fifth session, through comments and proposals that contribute to further improving the content of the future binding instrument. In this sense, one will expect greater commitment and participation on the part of the countries that are more reticent about the future instrument, since many of their concerns and reservations have been addressed in the revised draft.

NOTES

[1] Votes in favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Vietnam. Votes against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America. Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.

[2] In the context of the Guiding Principles, due diligence in the field of human rights constitutes a continuous management process that a prudent and reasonable company must carry out, in the light of its circumstances, to meet its responsibility to respect human rights.

[3] Reciprocal judicial assistance is a process by which States seek and provide assistance in order to receive testimonies or take statements from individuals; serve judicial documents; carry out inspections and seizures; examine objects and places; provide information and evidence; deliver originals or authenticated copies of documents and records related to the case, including bank, financial, social and commercial documentation; and identify or detect products, goods, instruments or other items for evidentiary purposes, among other proceedings.

DISCLAIMER

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