## Third draft of UN business and human rights treaty launched

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Published on 17 August 2021, the third draft of the UN's business and human rights treaty[1] is ambitious in scope, deploying an arsenal of legal, fiscal, and policy measures to holistically tackle corporate human rights violations.

### Who's involved?

The text has been prepared by the open-ended intergovernmental working group ('OEIGWG') on transnational corporations and other business enterprises[2], established on 26 June 2014 by the UN Human Rights Council to develop a binding legal instrument to build on the soft law foundation laid over the past decade by the UN Guiding Principles on Business and Human Rights[3] ('UNGPs').

To date, the working group has met for six sessions, with the seventh scheduled for 25 – 29 October 2021. During the last round of negotiations in October 2020, when the second draft of the treaty[4] was debated, participants acknowledged Covid-19's role in exposing 'the inequities and fragility of global supply chains'[5] and stressed the need to move 'beyond voluntary standards' to ensure corporate accountability and access to justice for victims. Resultantly, the third draft has a broad reach, and the legal framework it presents is robustly supported by practical implementing mechanisms.

### Broad scope

First, the treaty's remit is far-reaching, requiring that all businesses, irrespective of size, are human rights compliant [PP11]. Those able to seek redress are referred to as 'victims', a term widely defined to encompass any (group of) persons, who have individually or collectively suffered human rights abuses.

Article 3 discusses the scope of the treaty in more detail. Whilst it applies to all business activities [3.1], States can differentiate how businesses discharge their obligations 'commensurate with their size, sector, operational context or the severity of impact on human rights' [3.2]. At present, although hard law human rights instruments targeted at businesses recognise that the burden on companies should be proportionate to their size, this often means smaller organisations are unregulated. For example, the French corporate duty of vigilance[6], adopted in 2017, applies only to companies with over 5000 employees, whilst Part 6 of the UK's Modern Slavery Act 2015[7], which calls for transparency in supply chains, just governs companies with an annual turnover of £36 million or more[8].

Further, in foregrounding that States – the classical duty-bearers of human rights – retain the 'primary obligation to respect, protect [and] fulfil' [PP7] such rights, the text makes clear that responsibility for business activities lies with both private and public actors. Article 16.1 asks States to 'take all necessary legislative, administrative and other action […] to ensure effective implementation' including (per Article 12 on state cooperation) the designation of central authorities that shall have responsibility and power to receive requests for mutual legal assistance.

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[1] https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf
[2] https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx
[3] https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
[4] https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf
[5] [2], 'Report on the sixth session […] [A/HRC/46/73] ('Report') https://undocs.org/A/HRC/46/73
[6] https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf
[7] https://www.legislation.gov.uk/ukpga/2015/30/part/6/enacted
[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf

**Grounded in reality**

The treaty's wide reach is complemented by its considered attention to material barriers to justice.

The drafters explicitly recognise the cost of both litigation (for all parties) and of implementing human rights due diligence ('HRDD'). Article 6.4.f calls for HRDD costs to be integrated into business contracts, and Article 8.5 requires that States make sure that businesses 'establish and maintain financial security, such as insurance bonds or other financial guarantees, to cover potential claims of compensation'. Article 15.7 also requests that States establish an international fund for victims, to provide legal and financial aid to those who would otherwise not be able to access remedy. At the sixth-session, some NGOs suggested that contributions towards the fund ought to be made by certain corporations as well.[9]

Significantly, Article 6.4.e seeks public and periodic reporting on non-financial matters, including information about group structures and suppliers. This matters because the opacity surrounding such details places an immense burden on claimants, who have to decode complex, often offshore, corporate structures - an expensive and technical task.

Such deciphering is frequently necessary to both evidence claims and identify the correct defendant(s). This latter reason was well illustrated in the 2021 judgment of the UK Supreme Court in *Okpabi*[10] (a Leigh Day case). In considering whether the claimants had an arguable case against Royal Dutch Shell Plc, a UK domiciled parent company – and ultimately finding that they did – the court noted Shell's complex organisational structure, remarking that 'proper disclosure' was required to establish the involvement of Shell in the activities of its subsidiary[11]. That such details had not already entered the public realm, despite the progression of a jurisdictional issue to the nation's highest court, demonstrates the present difficulty of accessing non-financial corporate information.

Moreover, obstacles of forum and limitation are briskly dispensed with. See Article 9, on adjudicative jurisdiction, which leaves open to victims multiple fora in which to try their claims, despite concerns raised at the sixth-session that such breadth may pave the way for 'forum shopping'.[12] Additionally, Article 10.1 removes limitation for the most egregious of human rights abuses (the parameters of which are currently undefined, though one may assume this would encompass jus cogens crimes such as genocide), and requires that only reasonable limits be applied to lesser abuses.

**Legally radical**

Doctrinal barriers to the courts are also addressed. Article 7, on access to remedy, calls on States to remove legal obstacles, including the principle of *forum non conveniens* [7.3.d] (which, post-Brexit, may prove a sizable barrier to cases brought in the UK[13]) , and to allow judges to reverse the burden of proof where such reversal is necessary to ensure victims' access to remedy [7.5]. Such measures are not without their critics. For instance, during the sixth-session, the Philippines voiced concerns that such reversals 'could contravene the presumption of innocence or fundamental provisions of due process protected under domestic and international law'.[14]

Case law principles established in the recent past are embedded into the text. Consider Article 8.6, which essentially requires that tortious principles, such as those articulated by the UK Supreme Court in *Vedanta*[15]

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[9] [41] Report.
[10] https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf
[11] [158], Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3.
[12] [33] Report.
[13] https://corporatejustice.org/news/ngos-and-legal-experts-call-on-eu-to-allow-uk-accession-to-lugano-convention/
[14] P52, Annex to the report on the sixth session […] [A/HRC/46/73] ('Annex')
< https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-6th-statement-compilation-annex.pdf>
[15] https://www.supremecourt.uk/cases/uksc-2017-0185.html

(another Leigh Day case), are built into States' domestic law, with businesses to be responsible for the acts and omissions of their subsidiaries.

Moreover, Article 8.8 mandates that States shall ensure that their domestic law provides for the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offences under international human rights law, customary international law ('CIL'), or domestic law. The reference to CIL boldly cements the principle first espoused in the landmark 2020 Canadian case of *Nevsun*[16], which held that in principle, a Canadian mining company could be found in breach of CIL. On 7 September 2021, France's Court of Cassation similarly held that cement company Lafarge could be held legally responsible for funding armed groups, such as ISIS, during Syria's civil war, thereby perpetuating crimes against humanity.

**International reactions**

Though on record as having voiced support for business and human rights regulation, the British government has been reluctant to progress hard law standards. In 2014, it was one of the States Parties, along with nations such as France, Germany, and Ireland, which opposed UN resolution 26/9[17] to establish the OEIGWG.

In its comments during the sixth session, the UK delegate cited 'fundamental flaws' with the treaty, principally that it was incompatible with several key principles of international law, sovereignty, and due process, that its scope was too vague to be workable, and that it placed unrealistic burdens on businesses.[18] The UK instead voiced a national preference for reliance on the voluntary UNGPs. These concerns echoed those expressed by EU delegates, who maintained that the text required much work to 'become a basis for a legally sound, implementable, and enforceable instrument.'[19]

Recent comments by Conversative politicians suggest an ongoing hesitancy to engage with binding regulation. During a Parliamentary debate on HRDD on 20 July 2021[20], Lord Moynihan (Con) opined such HRDD should not be mandatory, given the UK's existing – and arguably piecemeal – modern slavery and supply chain regulations. Lord Callanan (Con), the Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy, concurred, stating that the government would prefer for businesses to follow the voluntary UNGPs, and to avoid imposing 'undue burdens, particularly on small businesses.'

Placing the validity of such concerns to one side, the debate over the treaty and its associated instruments is an education in the global power imbalances which implicitly determine the legal preferences of States. As the world's fifth-largest national economy, reliant on foreign manufacturing, it's clear why the UK has espoused an arguably laissez-faire and pro-business position to transnational corporate regulation. Conversely, Palestine – one of the world's smallest and most straightjacketed economies – has pushed for stronger measures, suggesting during the sixth-session that the treaty's criminal liability provisions be strengthened by explicitly referencing sanctions companies could face, 'such as the withdrawal of licenses' and 'termination of contracts'[21]. It was perhaps unsurprising then that the morally authoritative Holy See, in its capacity as a UN observer state, was best placed during negotiations to express the normative goals of the treaty:

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[16] https://www.leighday.co.uk/latest-updates/blog/2020-blogs/canadian-supreme-court-gives-green-light-to-claims-of-human-rights-abuses-at-eritrean-mine/
[17] https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9
[18] P19-20, Annex.
[19] P21, Annex.
[20] https://hansard.parliament.uk/Lords/2021-07-20/debates/5F00DDB9-24F9-4691-BAB4-5670FF5EC286/HumanRightsDueDiligence?highlight=business%20human%20rights#contribution-CD75AB2B-2EFD-4A8B-A4D6-2A7BCAD9210E
[21] P59, Annex.

> "An exclusively profit-driven system must not remain unchecked […] The prevailing consideration, never to be forgotten, is that we are all members of one human family. The moral obligation to care for one another flows from this fact, as does the correlative principle of placing the human person, rather than the mere pursuit of power or profit, at the very centre of public policy."[22]

Whether people or profit will win out when the working group reconvenes in October remains to be seen, but the text provides a hopeful framework for a more regulated world, where corporations are held accountable for human rights abuses.

[22] P24, Annex.