**Submission on Panel on Scope and Definitions of Zero Draft Treaty**

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Thank you for the Chair-person for the opportunity to make comments on the scope provisions of the Zero Draft. This question has been one which has led to much division from the start: there have been those that assert a treaty should encompass any human rights violation by any business; others have argued that a treaty is only necessary to address violations that cross-borders. I would like to suggest, in this intervention, some basic principles which can lead us to bridge the divide – that, in turn can have a concrete impact on the draft.

First, a common starting point should be that all states are concerned to ensure that the human rights of individuals are given effect to. That starting point means that it has little bearing on an individual, in this context, whether someone who violates his/her rights is a massive transnational corporation or a smaller business. This consideration would support the recognition of a general obligation upon business not to violate human rights. Importantly, from the victims point of view, it is critical we use the same language of ‘violations’ to recognize the serious impact transnational activities can have on human rights.

Secondly, we can recognize that there are many contexts in which businesses are not held to account for violations of fundamental rights: that may be because of weak enforcement systems but also because of the intertwining of business interests with political interests. As Gabriela Quijano from Amnesty International reminded us yesterday, State are already under a duty in international law to protect individuals from harm by businesses and so a new treaty is not necessary to make this point in relation to domestic companies. But, realities are that, even in domestic systems alone, there is an enforcement gap often in relation to business. Domestic systems are often not capable alone to solve such problems. This consideration would support going beyond the state to develop regional or international accountability mechanisms to do so.

Thirdly, the fact that business crosses borders and is structured through complex global supply chains creates particular challenges for the enforcement of fundamental rights. These challenges result, for instance, from attempts to deny responsibility for the activities of business forms in other countries; the ability to take advantage of diverse regulatory regimes; and the difficulties of gaining remedies across borders. Since no one state can address these problems, this consideration motivates for an international law resolution.

I would argue that all three of these considerations have a strong pull and they provide the grounds for what should constitute the scope of an international treaty on business and human rights and provides an understanding of the shortcomings of the current draft.

Article 3(1) states that the Convention should apply to human rights violations in the context of any business activity of a transnational character. The latter phrase is defined in article 4(2) and essentially involves economic activity that takes place or involves actions, persons or impacts in two or more national jurisdictions. One major worry about this definition is that business will attempt to exploit the focus on ‘transnational character’ to find loopholes to avoid liability in terms of the treaty.

The nature of business today is such that the global transnational corporations engage intimately with a range of small businesses which are largely locally based. John Ruggie, in a recent commentary on the Zero Draft, cites the fact that Unilever reports having 50 000 first-tier suppliers with an ultimate supply chain of 1.5 million small-holder farmers.[[1]](#footnote-1) Let us consider a scenario where 1 of these farms is under a contract to supply ingredients to a local manufacturer. The farm has no direct contract with Unilever, rather the local manufacturer does. Let us then imagine that serious human rights violations take place on this farm: could this scenario be covered by the treaty to enable an action against Unilever (assuming it had acted wrongfully in some way)?

In terms of the current definition, it would appear not. The activities of the farm take place in one jurisdiction. In the ordinary meaning of the term, they involve actions in that jurisdiction, persons acting in that jurisdiction and their impact is focused on that jurisdiction. Despite the treaty later (in article 10(6)) allowing for liability, for instance, in cases where the risks are foreseen (which may or may not be the case in this instance), if the scope of the treaty does not cover this particular case, then the other operational provisions of the treaty are inapplicable. This is why it is vital to ensure the scope is correctly defined.

To address the particularities of cases such as these which are likely to be many, I would suggest that what is left out are two additional dimensions: the first is an understanding of the fact that the goods are not produced solely for a local market but for **purposes** of economic activity that crosses borders. The second aspect we need to capture is the fact that these Unilever farms are part of **chain** of business relationships which cross international boundaries. I would therefore suggest amending the definition to include two further sentences: ‘Business activity of a transnational character’ should, include economic activity which is undertaken not solely for local purposes but for contributing supply to markets that cross international boundaries’. Moreover, and, secondly, ‘business activity of a transnational character’ should include economic activity that takes place as part of a network of relationships that cross international boundaries’. The latter definition may also be able to capture the importance of considering investors and their role and responsibilities in relation to human rights violations.

These two amendments would help extend the range of the definition to cover many of the cases of concern relating to global supply chains. They also would render it harder to exploit the definition to exclude many activities that take place today. Yet, there may still be fancy footwork expended to avoid being caught within these definitions. As such, it is suggested that there be a new provision added titled General Principles of international law at the beginning of the treaty. It should include two important sections: first, it should bring the statement in the Preamble concerning corporate obligations into the operational provisions of the treaty itself and state the following: ‘All business enterprises, regardless of their size, sector, operational context, ownership or structure shall respect and contribute towards the realization of human rights’; secondly, it should recognize the state duty to ensure business enterprises meet their obligations. Laying down these provisions, would attempt to address the first two issues I mentioned. The scope provision could then say, that ‘without affecting the general principles outlined in this treaty, the scope of this Convention will focus on human rights violations in the context of business activities of a transnational character’.

In this way, it is hoped that there is a bridge that can be created between the opposing sides in the scope debate which ultimately is beneficial to human rights. The solution suggests no business enterprise may harm these rights, but the treaty focuses specifically on the transnational dimensions. The extensions I have suggested relating to the purpose of supply and the relational dimension will help capture the vast array of business activities that are part of the global market today.

1. https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights [↑](#footnote-ref-1)