



**4th session of the Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights
(15-19 October 2018)**

**Article 10: Legal Liability
&
Article 11: Mutual Legal Assistance
&
Article 12: International Cooperation**

Thank you Chair,

The IOE does not support the Zero Draft Treaty or the Draft Optional Protocol and we strongly argue for preserving the approach outlined by the UNGPs. Given the short speaking slot, I refer people to the [Joint Business Response](#) as my comments now will focus on legal liability.

Legal Liability (Article 10) – overarching concerns:

As well as the problems with the liability provisions concerning the due diligence process that we touched upon yesterday, other provisions on legal liability, notably civil and criminal liability, pose many concerns.

The Zero Draft Treaty grossly oversimplifies the nature of global business and sets an unreasonable bar for creating liability on the basis of activities that is beyond a company's control.

It also ignores many key elements of the UNGPs on remediation, notably in its articulation of the three ways in which a company can be involved in a harm.

On top of this, there is a very problematic provision concerning the burden of proof. Introducing a reverse onus clause to require the accused party to prove its innocence violates due process principles and fundamental notions of fairness. Added to this, the Zero Draft Treaty offers no guidance on the situations where words "where needed" could apply.

Regarding the specific provisions on civil liability:

- The very flexible and imprecise definition of civil liability (notably under Article 10 and Article 5 on "domicile") is particularly problematic. It is incompatible with the established doctrine of separate legal personality, it would create irreconcilable conflicts between domestic corporate laws, and it provides a far broader scope for liability than exists in most current national laws. In particular, the Zero Draft Treaty's provisions blur the

boundaries of legal personality (such as by suggesting that a legal person or association of natural or legal persons can have an infinite number of domiciles); they cause huge legal uncertainty (by introducing multiple abstract terms such as "instrumentality"); and they would establish liability on very broad grounds (such as direct or indirect ownership of shares).

- In addition, it is particularly problematic that the Zero Draft Treaty foresees civil liability without causality and it assigns legal liability to situations where a harm is directly linked to a company through its business relationship without any recognition of or safe harbour for companies that take meaningful steps to try and halt the abuse.

Regarding the specific provisions on criminal liability:

- Overall, this section unfairly targets persons carrying out "business activities of a transnational character" and not domestic businesses for example. It also gives no consideration for the inevitably inconsistent approaches that different national courts would take to determine criminal liability under this instrument. In addition, it is not clear what the term "intermediaries" means or how such a broad set of "international human rights instruments" would apply in relation to criminal liability.
- Seeking to apply criminal liability to "principals, accomplices and accessories" - i.e. secondary liability - gives 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."
- Furthermore, the obligation for States to incorporate or implement within their domestic law "appropriate provisions for universal jurisdiction over human rights violations that amount to crimes" (Article 10, para 11) raises many legal and political complications. For example, because 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, many States' national legal systems lack the necessary legal definitions and/or means to investigate and prosecute on the basis of universal jurisdiction.

In response to one comment from the panel...

One important component of the UNGPs is that they are relevant to many company functions - from the Board, procurement and sustainability teams, human resources, and not just legal counsel. It is simply not true that the UNGPs do not have much value on prevention and redress

Two very quick words on Mutual Legal Assistance (Article 11) and International Cooperation (Article 12)

- Many provisions in the Zero Draft Treaty focus on imposing sanctions on companies on the one hand, while strengthening international cooperation and mutual legal assistance between States on the other hand. With its focus on transnational corporations and not domestic enterprises, the Zero Draft Treaty does not adequately consider how such State-to-State action will improve the situation for victims of any business-related harm in the jurisdiction where the adverse impact occurred and not just lead to a two-tiered system of compliance.
- Furthermore, the Zero Draft Treaty does not propose any "sticks" to accompany the "carrots" for States or other measures to increase peer pressure between States to ensure they meet their human rights duties at the national level. Improving State performance on human rights, such as by achieving policy coherence between existing standards and national laws, is a long-standing challenge. It is not clear that this Treaty would succeed where other similar instruments have not.

Thank you for your attention.