

Towards a binding international treaty on business and human rights

SUMMARY

With its extended value chains, economic globalisation has brought numerous opportunities while also creating specific challenges, including in the area of human rights protection. The recent history of transnational corporations contains numerous examples of human rights abuses occurring as a result of their operations. Such corporations are known to have taken advantage of loose regulatory frameworks in developing countries, corruption, and a lack of accountability resulting from legal rules shielding corporate interests.

This situation has created a pressing need to establish international norms regulating business operations in relation to human rights. So far, the preferred approach has been 'soft', consisting of the adoption of voluntary guidelines for businesses. Several sets of such norms exist at international level, the most notable being the United Nations Guiding Principles on Business and Human Rights. Nevertheless, while such voluntary commitments are clearly useful, they cannot entirely stop gross human rights violations (such as child labour, labour rights violations and land grabbing) committed by transnational corporations, their subsidiaries or suppliers. To address the shortcomings of the soft approach, an intergovernmental working group was established within the United Nations framework in June 2014, with the task of drafting a binding treaty on human rights and business.

After being reluctant at the outset, the EU has become involved in the negotiations, but has insisted that the future treaty's scope should include all businesses, not only transnational ones. The 'Zero Draft' published in July does not reflect the EU's position on this point. It has been welcomed by experts for its more precise focus on prevention, on effective remedies and access to justice for victims, and on companies' liability for their subsidiaries and suppliers in third countries. The European Parliament is a staunch supporter of this initiative and has encouraged the EU to take a positive and constructive approach.

This is a further updated edition of a [Briefing](#) published in April 2018.



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List of acronyms used

ILO	International Labour Organization
OBE	Other business enterprises
OECD	Organisation for Economic Co-operation and Development
OEWG	Open-ended intergovernmental working group
TNCs	Transnational corporations
UNGPs	United Nations Guiding Principles on business and Human Rights
UNHRC	UN Human Rights Council

Background

Human rights abuses committed by businesses have been a cause of serious public concern for decades. [Examples](#) of such abuses include: use of forced and child labour, lack of respect for labour rights, including the right to associate and form unions, poor safety and health conditions at work, land grabbing, including from indigenous communities, unlawful violence perpetrated by private security staff, pollution and destruction of the environment, including of water sources, to name but a few.

What makes such abuses particularly problematic is that access to justice and means of redress are often insufficient, due to multiple factors. Identifying the competent court the victims should address is particularly problematic when dealing with transnational corporations (TNCs). Another aggravating factor is the lack of codification of certain human rights abuses in penal codes. Many obstacles to access to justice persist, particularly when victims search for justice abroad. These include high costs for representation and the complexity and length of proceedings. In developing countries, corruption among state officials can undermine legal proceedings. Victims and the defendants of their rights can face intimidation, violence and even murder, commissioned by the businesses involved, with the acquiescence of corrupt state authorities. Alongside judicial remedies, appropriate non-judicial remedies are also of crucial importance. As concluded by a recent [opinion](#) issued by the EU Agency for Fundamental Rights, the EU also needs to address numerous obstacles that make access for victims to remedies in cross-border cases difficult on the internal market. To remedy the situation, numerous international, regional and national-level initiatives have been launched, which have privileged a soft approach based on voluntary standards.

Five 'internationally recognised standards'

- 2011 [United Nations Guiding Principles on Business and Human Rights](#) (hereafter referred to as the UNGPs) are guidelines to prevent, address and remedy human rights violations committed in business operations.
- 2000 [United Nations Global Compact](#): this is the world's largest voluntary corporate sustainability initiative encouraging businesses to align their strategies and operations with universal human rights, labour, environment and anti-corruption principles, and take actions that advance societal goals.
- 1976 Organisation for Economic Co-operation and Development ([OECD](#)) [Guidelines for Multinational Enterprises](#) (last revised in 2011) are [recommendations](#) addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The [OECD] Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting¹.
- Launched in 2010 by the [International Organization for Standardization](#), the [ISO 26000 Guidance Standard on Social Responsibility](#) provides [guidance](#) on how businesses and organisations can operate in a socially responsible way. This means acting in such an ethical and transparent way as would contribute to the health and welfare of society. As the standard provides guidance rather than requirements, it cannot be certified, unlike other ISO standards.
- The [International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#), adopted in 1977 and last amended in March 2017, offers guidelines to multinational enterprises, governments and employers' and workers' organisations in areas such as employment, training, conditions of work and life, and industrial relations. This guidance is based mainly on principles laid down in international labour conventions and recommendations.

The EU has shown commitment to the international business and human rights governance regime and has undertaken various actions¹ under the main instruments mentioned above. Of all these, the EU has been [most engaged](#) with the UNGPs. It has supported their development and considers them the overarching instrument in the field. The EU is, together with many of its Member States, at the forefront of the UNGPs' implementation, for example with regard to establishing the required national action plans.

Increased recognition for the relationship between human rights and business

The issue of human rights and business started receiving increased public attention in the 2000s. Consequently, an explicit reference to human rights was introduced to the OECD and ILO standards mentioned above. The adoption of the UNGPs in 2011 marked a decisive step forward. Today, these principles enjoy quasi-universal recognition, being unanimously endorsed by the United Nations Human Rights Council (UNHRC). They impose commitments on both states and businesses and put special emphasis on remedies for human rights abuses committed by corporations. Nevertheless, according to a 2017 [study](#) for the European Parliament, although much progress has been achieved in implementing the UNGPs (for example, the OECD Guidelines have been aligned to the UNGPs and new tools have been developed), human rights abuses by corporations persist. According to critics, this is possibly due to the absence of a central mechanism to ensure their implementation, and to their non-binding character.

A binding international treaty could address these issues. A first attempt towards such a treaty was the [draft United Nations Norms](#) on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. However, this, failed in the United Nations Commission on Human Rights in 2004. It contained obligations for TNCs to respect and protect the whole array of internationally recognised human rights and to provide remedy in case of violations.

The need for a binding international instrument

Timeline of events relating to the binding treaty initiative	
June 2011	The UNGPs were adopted unanimously by the UNHRC.
September 2013	Ecuador called for a new binding treaty to be negotiated.
June 2014	Ecuador's resolution on a binding treaty was adopted in the UNHRC by a simple majority. A parallel resolution tabled by Norway reaffirming the importance of the UNGPs and calling for an examination of the benefits and limitations of a binding treaty was unanimously adopted
October 2015	First session of the open-ended intergovernmental working group (OEIGWG) tasked with drafting the new treaty
October 2016	Second OEIGWG session
October 2017	Guiding document entitled 'Elements' for the draft binding treaty published
October 2017	Third OEIGWG session
March 2018	The UNHRC endorsed the 'Elements' and authorised the OEIGWG to continue its work.

July 2018	Release of Zero Draft treaty and draft optional protocol
15-18 October 2018	Fourth OEIGWG session

When, in September 2013, Ecuador proposed the creation of an open-ended intergovernmental working group to negotiate a treaty instrument in the United Nations (UN) framework, its initiative won strong support from civil society organisations. However, support from the UNHRC members was moderate. Ecuador's resolution ([A/HRC/26/L22](#)), tabled at the 26th UNHRC Session on 26 June 2014 and co-sponsored by Bolivia, Cuba, South Africa and Venezuela, was adopted with only 20 votes in favour, 14 against and 13 abstentions. It was [rejected](#) by the industrialised members, including the EU Member States sitting on the UNHRC, while most Latin American members abstained.

The mandate provided by the resolution is to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (paragraph 1). The resolution does not define TNCs; it only explains in a footnote what is meant by 'other business enterprises' (OBEs): this concept 'denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law'.

The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights ([OEIGWG](#)), established under the above-mentioned resolution A/HRC/26/9, held its first session in October 2015 and a second in October 2016. These sessions 'were dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument', in accordance with the UNHRC mandate. On [2 October 2017](#), the OEIGWG chair published [Elements for the draft legally binding instrument](#), which were then debated at the third OEIGWG session in October 2017.

On 16 July 2018, the Permanent Mission of Ecuador, on behalf of the Chairmanship of the OEIGWG, published a [Zero Draft legally binding instrument](#) and a [draft optional protocol](#) to be annexed to it. The fourth session of the OEIGWG, held from 15 to 19 October 2018, debated this draft and marked the start of formal negotiations. There was a significant civil society presence at the session.

Impunity for corporate abuses at transnational level

While it would clearly be unfair to accuse all TNCs of committing systematic human rights abuses, it is no less true that the recent history of human rights abuses committed by or resulting from the activities of such corporations contains a number of cases of shockingly irresponsible corporate behaviour. Moreover, victims of such abuses have frequently faced huge obstacles both in accessing justice and in obtaining redress.

This is mainly due to the complexities of the rules applicable to TNCs: they can easily use the most favourable jurisdiction to fend off responsibility and to shift it instead to their subsidiaries and suppliers. In a 2014 [publication](#) on corporate abuses and remedies, Amnesty International examines the negative implications for human rights protection of the doctrine of 'separate legal personality' (the 'corporate veil'): 'each separately incorporated member of a corporate group is considered to be a distinct legal entity that holds and manages its own separate liabilities. [...] This doctrine implies that the liabilities of one member of a corporate group will not automatically be imputed to another, merely because there is an equity relationship between them'. This makes it quasi-impossible to sue parent companies either in the countries where their subsidiaries operate or in their home countries. Moreover, victims who look for redress in foreign courts also face huge [obstacles](#). When criminal liability is at stake, those who have the ultimate responsibility for corporate abuses can find protection in their home state's jurisdiction or in [investment protection treaties](#).

There is thus a profound asymmetry between TNCs' rights and obligations. While they enjoy substantial rights secured through trade and investment agreements, their human rights

obligations are less clear and more difficult to enforce. Given the power of TNCs in today's globalised world, the expectation that domestic law should be sufficient to impose human rights-related obligations and to hold TNCs accountable for abuses is simply unrealistic. The long supply chains make it extremely difficult to establish responsibility and hold accountable those in the highest position of command in such chains. States hosting powerful TNCs often lack the capacity to act against them or do not take action over fear of losing foreign investment. Nor do TNCs' home states take action, to avoid placing them at a competitive disadvantage.

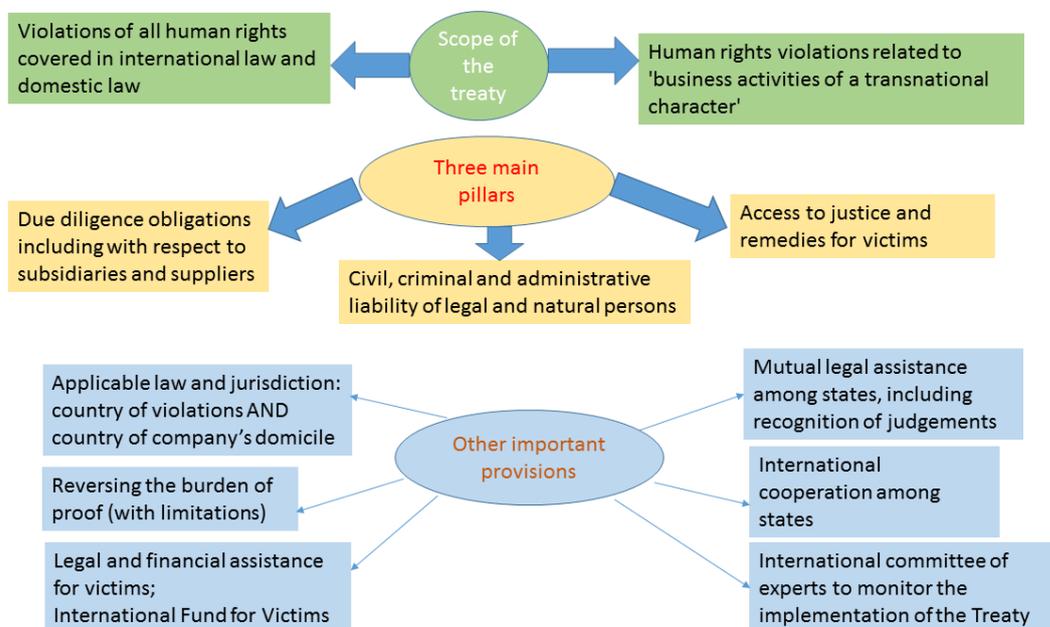
Limitations of the soft law and hard law approaches

[Dissatisfaction](#) with the slow and ineffective implementation of the UNGPs – though they were much acclaimed at the time of their adoption – has driven an initiative to draft a binding international treaty. The limits and shortcomings of the UNGPs have been widely [recognised](#) by both governments and civil society organisations. Their non-binding character has been portrayed as a particular weakness. Their defenders have responded to this criticism by pointing out that, as they have only been around for a few years, more time is needed to assess their impact.

According to defenders of the UNGPs, the pursuit of a binding treaty would risk weakening their implementation by driving public attention and resources away, and by implicitly acknowledging their limitations. However, this [concern](#) has not materialised, as there has been a lot of progress on implementing the principles, including national action plans and legislative attempts to regulate due diligence. A balanced [view](#) acknowledges that the UNGPs and the proposed treaty both have advantages and disadvantages of their own. Therefore, the best strategy may be to continue with several initiatives in order to 'enhance victims' access to remedies and to teach corporations how to pursue effective due diligence in order to prevent potential human rights abuses.

Zero Draft treaty – key content and controversial issues

Figure 1 – Main elements of the Zero Draft treaty



Source: EPRS, 2018.

A major challenge for the drafters of the treaty has been to select from among the huge range of relevant issues those that are the most relevant and capable of securing the necessary final consensus. While the 'Elements' were very ambitious in scope, covering a very broad range of issues, the Zero Draft published in July 2017 has a narrower and more precise focus. The 'Elements' caused

significant criticism and opposition from various quarters. The Zero Draft has been characterised as a compromise proposal, and as 'a considerable improvement over the draft elements'.² On the other hand, it has been criticised for its lack of precision and clarity.³ The focus of the Zero Draft is on providing access to justice and remedy for those who have allegedly suffered human rights abuses by business enterprises, and on the liability of companies for abuses in transnational activities. The most important issues addressed include those listed below.

- The obligation for companies to demonstrate **due diligence** is at the heart of the Zero Draft. It has however been criticised for not using the tested definition and framework of the UNGPs and OECD Guidelines. This risks creating divergence with these other two important instruments. In contrast with these, the due diligence obligations in the Zero Draft have been characterised as too far reaching and vaguely defined.⁴
- Strengthening **corporate liability**: parent companies become liable for what their subsidiaries and suppliers do; they can be taken to court both in the country of operation and in the country where they are based. States are required to enact civil, criminal or administrative legal liability for human rights violations committed in the context of transnational business activity. The liability applies to both legal and natural persons.
- Provision of **effective remedies and access to justice**: the right to effective remedies is central to human rights law and to the UNGPs; nevertheless, in practice victims of corporate abuses have difficulty getting access to remedies. The Zero Draft requires states to guarantee access to justice and effective remedies. States also have to guarantee a right of access to appropriate information for victims, provide effective legal assistance and reduce barriers to justice, for instance through waving costs. An international fund for victims is also envisaged to provide victims with legal and financial.
- The Zero Draft imposes an obligation on states to provide each other with **mutual legal assistance** to the greatest extent possible. Relevant court decisions will be recognised in another states.
- **International cooperation**: promoting effective technical cooperation and capacity-building, and sharing best practices and information are among the means envisaged for strengthening international cooperation.
- **Monitoring and enforcement mechanisms** at international and national level: the Zero Draft is less ambitious than the 'Elements', which had proposed an international court on transnational corporations and human rights and special chambers in the frame of existing international and regional courts. The Zero Draft provides for the establishment of an international committee composed of experts, which would provide guidance on understanding and implementing the treaty, would receive regular reports by state parties and provide recommendations based on these reports. On the other hand, the protocol annexed to the Zero Draft contains numerous provisions concerning a national implementation mechanism.

Most controversial aspects

So far, the most controversial point of the debate has been the scope of the envisaged treaty. The first aspect of this debate refers to whether the envisioned treaty should be limited to TNCs and OBEs involved in transnational operations, or should also cover local companies. The EU has insisted that it should cover all business enterprises, and holds firm on this position. The treaty would otherwise be incoherent, as many human rights violations are committed by purely local companies. Also the treaty would put transnational companies at a competitive disadvantage in relation to their local competitors, which could commit certain human rights violations with impunity. Contrary to the EU's position, the 'Elements' clearly limited the scope of the treaty to TNCs and OBEs involved in transnational operations. Given the persistent disagreement, the Zero Draft proposes a middle ground as a compromise solution. The preamble acknowledges that all

companies have to respect human rights. According to article 3, the scope of the treaty is more narrowly circumscribed as covering only those human rights violations committed in the context of 'business activities of a transnational character'. These activities are defined as 'any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions'. This formulation 'neither limits the scope to transnational corporations, nor does include all business enterprises', according to John Ruggie. Given the scale and complexity of global supply chains, the Zero Draft formulation will cause a lot of legal uncertainty, according to the same expert.

Some analysts believe that there are substantial reasons for drafting a treaty only applicable to TNCs and other business enterprises with transnational operations, as provided for in the OEIWG mandate, and not for local companies. They argue that the treaty would fill a gap in the international rules on determining the liability of parent or controlling companies beyond the jurisdiction of the state where the violations occurred. At present, TNCs benefit the most from this governance gap. According to a [South Centre](#) policy advisor, limiting the scope of the proposed treaty to TNCs and business enterprises with transnational activities would not be discriminatory towards these in relation to domestic companies, but would put them on the same footing. TNCs are often able to avoid responsibility because of their transnational structure. According to a different [view](#), the Zero Draft may lead to the 'absurd outcome that egregious criminal conduct (for instance crimes against humanity) may not be punishable if committed by businesses acting only within one jurisdiction'.

A second issue relating to the scope concerns the human rights covered. The international human rights regime includes numerous rights – such as certain social and economic rights – some of which are more difficult to enforce in a court of law. Article 3 of the Zero Draft explicitly provides that the treaty 'shall cover all international human rights and those rights recognised under domestic law'. According to critics, such a broad coverage could push the treaty to such a level of abstraction that would make it practically ineffective. In order to avoid overwhelming judicial systems, one solution would be to restrict remedies to the most severe human rights abuses, such as crimes against humanity, forced labour, sexual violence, and the worst forms of child labour.⁵ The draft does not explain either how to deal with possible conflicts between international law and national legislation on human rights. Moreover, the formulation of the draft treaty is very imprecise. 'All international human rights' can be defined in various ways (by reference to treaties or customary law, or by taking into account states obligations under international law),⁶ which would make implementation by states difficult.

Another important aspect that has been very controversial refers to the kind of duties imposed by the treaty and their bearers. A first point here is the recognition of the extra-territorial obligations of states with respect to human rights and business. The UNGPs state that, 'At present, states are not generally required under international human rights law to regulate the extra-territorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a jurisdictional basis'. On the other hand, international law contains the principle that a state should not allow the use of its territory and its jurisdiction to cause damage in the territory or jurisdiction of another state. Some human rights treaty bodies recommend that states take steps to prevent abuse abroad by businesses within their jurisdiction. By providing that jurisdiction for human rights violations should vest both in the courts of the state where they took place and in the courts of the state where the natural or legal persons accused of committed the violations are domiciled, the Zero Draft enshrines the principle of extraterritoriality. However, the draft is also careful to protect state sovereignty 'States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States' (art. 13.1).

A second point of the duty-related controversy refers to who should be responsible for fulfilling the obligations defined under the treaty. The 'Elements' had proposed that they include, in addition to states and international organisations with an economic remit, TNCs and OBEs, as well as natural

persons. According to [critics](#) of this approach, this move to hold corporations directly liable under international law for their human rights abuses would have been unprecedented. It would have contravened the traditional approach of international law to holding states accountable for human rights abuses committed by corporations in their territory.⁷ The Zero Draft [steers clear](#) of this controversy. It has reverted to the traditional approach and imposes obligations on states only to prevent and provide remedies for human rights abuses committed by corporations.

A point of criticism emphasised by several commentators and organisations⁸ refers to the fact that the treaty does not mention human rights defenders working on corporate abuses.

Binding legal initiatives at EU and Member State level

EU level

Existing legal initiatives could serve a path-finding role in the drafting of the treaty, as already recognised in the preparatory OEIGWG debates. At global level, there are several [examples](#) of such initiatives, with the EU and a few of its Member States being among the frontrunners in the area.

The EU's Non-Financial Reporting Directive ([Directive 2014/95/EU](#)),⁹ which entered into force in 2014 and whose transposition deadline was 6 December 2016, lays down obligations for companies operating abroad to disclose their compliance inter alia with human rights norms. The directive incorporates the concept of due diligence in EU legislation (Article 19a(b)), and human rights are among the issues to be covered under the due diligence reporting obligations it sets. Around [6 000](#) large companies listed on EU markets or operating in the banking and insurance sectors will be expected to publish their first reports (for the 2017 financial year) in 2018. As the application of this directive is in an incipient phase, assessing its impact on the extent to which businesses respect human rights will take some time. Another legislative initiative imposing due diligence obligations on EU companies is the recently adopted [Conflict Minerals Regulation](#), which will take full effect on 1 January 2021. Importers of four minerals (tin, tantalum, tungsten and gold) into the EU will be obliged to check the likelihood that the raw materials could be financing conflict or could have been extracted using forced labour.

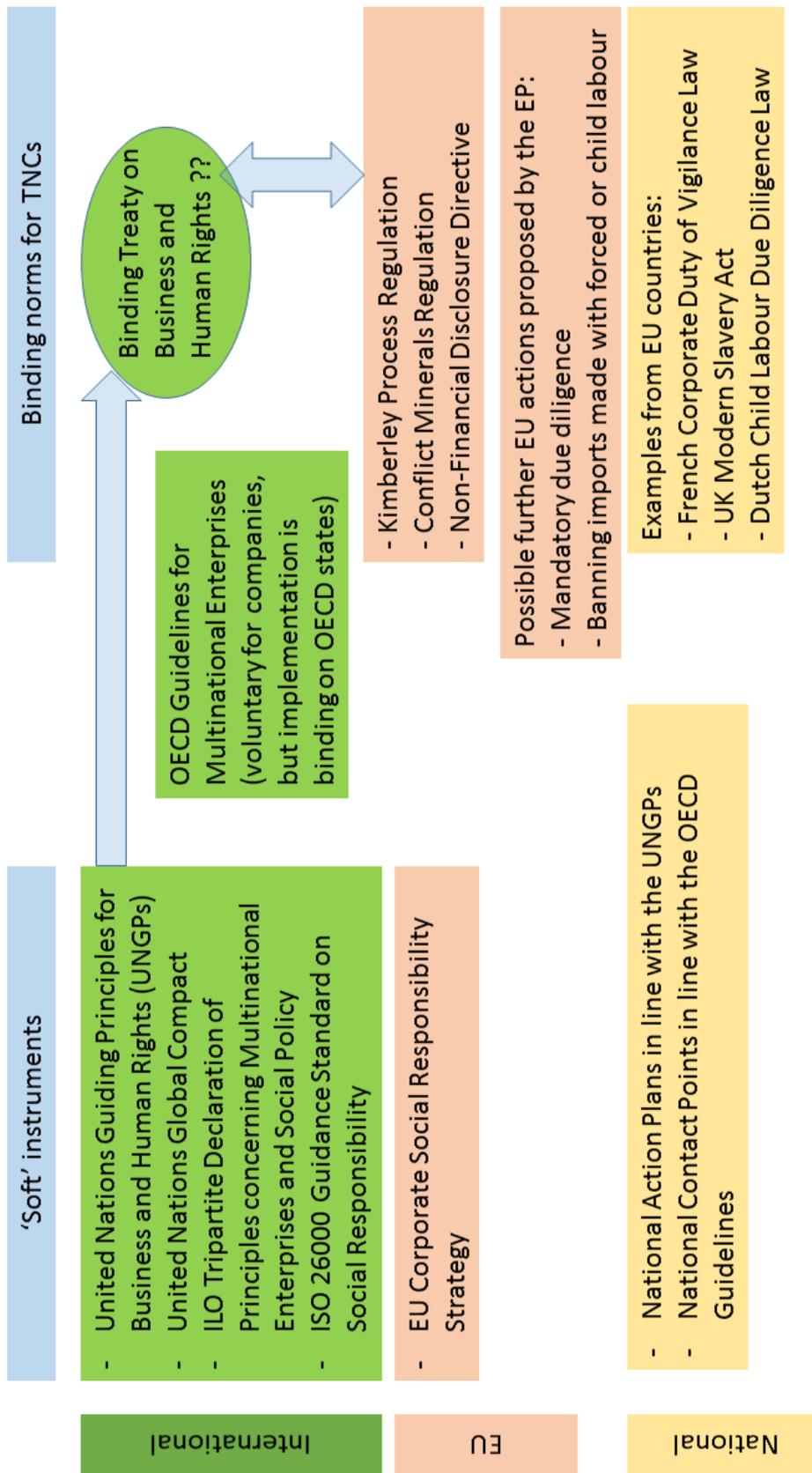
EU Member State level

In March 2017, France adopted a [law on the duty of vigilance](#) of parent and subcontracting companies, imposing on large French companies the requirement to assess and prevent the negative impacts of their activities and of those of their subsidiaries, suppliers and subcontractors on the environment and on human rights. Businesses' failure to comply with this legal obligation entails payment of compensation. [Civil society organisations](#) hope this law could serve as a model for EU-wide legislation, in line with the precedent set by the French law on non-financial reporting, which preceded the above-mentioned EU directive on the subject.

Inspired by the French move, eight EU national parliaments have expressed support for a [green card initiative](#), namely the parliaments of Estonia, Lithuania, Slovakia and Portugal, the United Kingdom House of Lords, the Dutch House of Representatives, the Italian Senate, and the French National Assembly. The initiative calls for a duty of care towards individuals and communities whose human rights and local environment have been affected by the activities of EU-based companies. Nevertheless, the European Commission's [response](#) has been that it has 'no plans to adopt further legislation at this stage, but is carefully monitoring, in close collaboration with the main stakeholders, how the situation is evolving in the Member States and in the international bodies involved in the corporate social responsibility process'.

In February 2017, the lower chamber of the Dutch Parliament adopted a Child Labour Due Diligence [Law](#) for companies. Once effective the law will oblige companies to determine not only whether there is a 'reasonable suspicion' that their first supplier is free from child labour but also – where possible – whether child labour occurs further down the production chain.

Figure 2 – The proposed treaty in the current business and human rights governance system



Source: EPRS, 2017.

Stakeholders' positions

Numerous civil society organisations are very supportive of the project and have been strongly involved in the UN process. A broad alliance of civil society organisations ([the Treaty Alliance](#)) has been built in order to support the treaty negotiation process. They have published statements urging states to support the process. To support its campaign, civil society has usually pointed to the inefficacy of voluntary standards and the need to oblige companies to respect human rights, in view of the numerous violations committed with the complicity of transnational corporations. It hails the new treaty as the dawn of the new era that would see an end to corporate impunity at transnational level.

Several influential organisations of employers, such as the International Organisation of Employers (IOE), Business at OECD (BIAC), Business Europe and the International Chamber of Commerce (ICC) have followed the negotiation process closely. For example, at the earlier stages of the process, the International Organisation of Employers expressed reservations about a binding treaty, pointing out that it would undermine the UNGPs. In a [statement](#) delivered at the second OEIGWG session, it stated that the problem is not the governance gap at the international level, but the lack of capacity at the national level to implement and enforce laws effectively. Inappropriate working conditions and negative impacts on the environment are due to 'a high prevalence of informality, ineffective governmental inspection, a lack of governance frameworks, high levels of corruption, and ineffective judiciary systems' at national level. Global supply chains most often have a positive impact on local working conditions by setting higher standards. In general, employers organisations have not flatly rejected the treaty concept, but pointed out that the jurisdictional scope of the treaty must include all business enterprises; the UN treaty process should build on the UN 'protect-respect-remedy' framework defined in the UNGPs and respect the established division of roles between states and companies; and that access to remedy must be local to be effective (according to a [joint advocacy paper](#) for the second OEIGWG session submitted by the organisations named above). In response to the Zero Draft, the same organisations published a [statement](#) highlighting important concerns about the text. More specifically, they find the draft text inconsistent and legally imprecise, they consider that it diverges from and undermines the UNGPs and that does not encourage states to address human rights challenges in their jurisdictions.

In Europe, various stakeholders such as [academics](#), [politicians](#), [global justice campaigners](#) and [NGOs](#) have expressed strong support for the treaty. European civil society organisations have [come](#) out strongly in favour of the treaty calling on the EU and its Member States to engage in the discussion on the content of the treaty, for example at the fourth OEIGWG session in October 2018. The European Network of Human Rights Institutions (ENNHRI) made a similar [call](#), and stressed the positive role the treaty could play in preventing business-related human rights abuses and providing access to remedy. On the other hand, the ENNHRI highlighted the fact that the scope of the treaty and the due diligence provisions in the Zero Draft are not aligned with the UNGPs.

Support for the treaty has also been building at national level. For example, in France, civil society organisations, together with a significant number of [parliamentarians](#), have urged their government to support the UN process.

European Union position

After dropping its initial reluctance, the EU has been constructively involved in the UN process for drafting the treaty, represented by its delegation to the UN in Geneva. The EU has observer status in the UN Human Rights Council, the body overseeing the drafting process. The positions defended by the EU delegation in the UN framework are agreed beforehand among all Member States.

The EU has set two main requirements for a legally binding international treaty: first that the scope of the discussion must not be limited to TNCs (see page 6), and second that the treaty should be firmly rooted in the UNGPs, making sure that their implementation is not undermined. The EU insists

that the UNGPs have allowed for tangible progress on better protecting human rights in relation with business activities and they provide an efficient framework, which needs to be implemented.

The EU requirements have not been taken into account in the Zero Draft. The scope does not cover all corporations and there is no reference to the UNGPs. Moreover, the EU has repeatedly stated its reservations about the way the process has been conducted, without any serious attempts at consensus building by the two initiators – Ecuador and South Africa. At the third session in October 2017, the EU questioned the possibility of extending the OEIGWG's mandate beyond its third meeting and called for the adoption of a new resolution by the UN Human Rights Council. During the informal consultations in July 2018, the EU proposed the creation of a group of experts to work with governments and civil society organisations – another proposal that has been ignored. Although the Zero Draft does not reflect the EU's basic requirements at all, the EU was present at the negotiations at the fourth working group in October 2018, where it adopted [a reserved stance, avoiding](#) making comments on the Zero Draft. The EU's insistence on its basic requirements for the content of the future treaty has been interpreted by some civil society organisations as an [attempt to obstruct the process](#). Such criticism does not however seem to take into account the fact that the EU has to balance human rights concerns with legitimate economic interests.

European Parliament position

Parliament is a staunch supporter of the binding treaty initiative. It has expressed its full support for the UN-level preparatory work to this effect and has argued against any obstructive actions.¹⁰ Parliament has called on the EU to show its full commitment to such an instrument and to actively engage in the debates.¹¹ It has also emphasised the need to build the principle of accountability into the planned treaty, which could be achieved by including a grievance mechanism.¹²

Parliament has also recognised the insufficiency of voluntary action. For example, in a recent legislative initiative report, [EU flagship initiative on the garment sector](#), Parliament expressed concern that the existing voluntary initiatives aimed at achieving sustainability of the garment sector's global supply chain have not been effective enough in addressing human rights- and labour rights-related issues in the sector.

In its most [recent October 2018 resolution on the binding treaty](#), Parliament expresses the view that the 'new instrument should impose on States the obligation to adopt regulatory measures requiring companies to apply human rights due diligence policies and procedures, and proposes that this obligation should be enforced by means of companies being accountable in either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence'.

MAIN REFERENCES

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Business and Human Rights Resource Centre, [Blog Reflections on the Zero Draft](#).

Carlos Lopez, 'Towards an International Convention on Business and Human Rights', ([Parts I](#) and [II](#)), *Opinio Juris*, July 2018.

[Implementation of the UN Guiding Principles on Business and Human Rights](#), Directorate for external policies, European Parliament, February 2017.

ENDNOTES

- ¹ For an overview of EU actions in the area, see the following studies: [The EU's engagement with the main business and human rights instruments](#) (Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, Frame Project, November 2015), and [Implementation of the UN Guiding Principles on Business and Human Rights](#) (Beata Faracik, European Parliament Study, February 2017, especially pp. 38-40).
- ² John G. Ruggie, [Comments on the 'Zero Draft' Treaty on Business and Human Rights](#).
- ³ See for example, Carlos Lopez, [Human rights defenders and corporate accountability – Is there a place for them in a treaty on business and human rights?](#)
- ⁴ Carlos Lopez, 'Towards an International Convention on Business and Human Rights', ([Parts I](#) and [II](#)), *Opinio Juris*, July, 2018.
- ⁵ See John G. Ruggie, [Comments on the 'Zero Draft' Treaty on Business and Human Rights](#).
- ⁶ Carlos Lopez, 'Towards an International Convention on Business and Human Rights', ([Part I](#)), *Opinio Juris*, July, 2018.
- ⁷ On the issue of state versus companies' obligations, see [Direct Corporate Obligations](#) by David Bilchitz and Carlos López.
- ⁸ See [Blog Reflections on the Zero Draft](#) at business-humanrights.org.
- ⁹ Under the directive, certain large companies are required to disclose in their management reports information on their policies, main risks and outcomes relating to environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors. Companies may rely on international, European or national guidelines (such as the [UN Global Compact](#), the [OECD Guidelines for Multinational Enterprises](#) and [ISO 26000](#)). See the European Commission's [webpage](#) on the matter.
- ¹⁰ See the European Parliament [resolution of 14 December 2016](#) on the annual report on human rights and democracy in the world and the European Union's policy on the matter 2015; the European Parliament [resolution of 25 October 2016](#) on corporate liability for serious human rights abuses in third countries; and the European Parliament [resolution of 21 January 2016](#) on the EU's priorities for the UNHRC sessions in 2016.
- ¹¹ See the European Parliament [resolution of 17 December 2015](#) on the annual report on human rights and democracy in the world 2014 and the European Union's policy on the matter; the [resolution of 12 March 2015](#) on the EU's priorities for the UN Human Rights Council in 2015; and the [resolution of 12 March 2015](#) on the annual report on human rights and democracy in the world 2013 and the European Union's policy on the matter.
- ¹² In its [resolution of 14 February 2017](#) on the revision of the European Consensus on Development, Parliament asked the EU to support the adoption of a legally binding international instrument to hold companies to account for their human rights violations. In its [resolution of 14 April 2016](#) on the private sector and development, Parliament asked the EU to support such an instrument since it would provide effective remedies for victims in cases where the domestic jurisdiction is unable to prosecute companies effectively. The inclusion of a grievance mechanism in such a binding instrument is also called for in Parliament's [resolution of 19 May 2015](#) on financing for development.

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