UN Binding Treaty for Transnational Corporations on Human Rights

The Draft Treaty is taking clear shape and this is a key time for trade unionists to continue to engage with technical legal aspects of the drafting

Daniel Blackburn is Director of ICTUR. He is a UK qualified barrister and in 2010 received a distinction and academic prize for his MA on the legal history of business liability for human rights violations. He is the author of *Removing Barriers to Justice*, which was submitted to the Treaty process by a coalition of international NGOs and trade unions.

In July 2019, the 'Revised Draft of the Legally Binding Instrument' was released from the UN Human Rights Council's Working Group on Business and Human Rights, updating the so-called 'Zero Draft' of July 2018. Many welcomed the new draft as a step forward, but others were quick to seize upon a number of ambiguities and puzzling choices that seem to depart from the broad consensus of the UN Guiding Principles on Business and Human Rights (UNGPs). The document now has a coherent shape and focus, but fails to produce clarity on a number of technical legal points. These must be addressed if the Draft is to create a meaningful international standard. The following represent my own views (broadly starting with the highest priority points, moving towards those that are either less urgent or viable) on which changes trade unionists should consider pushing for in the Draft.

Due diligence and stakeholder issues

The continuing move towards a legally mandated form of binding due diligence can be welcomed by unions. It promises opportunities for participation and engagement, and is the only mechanism that seeks to avoid and prevent harm, rather than merely compensate for harm that has occurred. It is built upon the idea of voluntary due diligence that was central to the UNGPs. It is understood by and – more or less – supported by significant sections of the business community, at least to a degree. Properly mapped out, binding due diligence holds the potential to improve corporate planning so as to identify and avoid risks, improve communication with stakeholders, and to establish better participation for all affected by corporate activities (notably, of course, those working in their supply chains). It also backs this up with real accountability for failures to identify and avoid risks. Crucial to effective due diligence, however, are requirements for stakeholder involvement in corporate planning.

Trade unionists should consider calling for the following improvements:

- Groups identified as 'at risk' should include trade unions (Articles 5(3)b and 14(4)).
- Groups identified as 'to be consulted' should include trade unions (Article 5(3)b).
- The form that Article 5(3)b consultation takes should be better defined so as to give stakeholders a genuine opportunity to influence decision-making.
- The outcomes of consultation do not have a mechanism requiring that they be integrated into due diligence planning. This is in contrast to the outcomes of impact assessments, which are specifically integrated into due diligence planning under Article 5(3)a. An equivalent link placing consultation outcomes at least on a par with impact assessment outcomes should be established.
- There should be an *explicit* link between Article 5 due diligence for parent companies and Article 6 legal liability concerning harm arising as a result of due diligence failures (discussed further below).
- There should be a clear statement under Article 5 (and therefore linked also to Article 6(6)) to the effect that parent companies should not be able to divest themselves of due diligence obligations by simply outsourcing that responsibility to a third party monitor or by paying little or no attention to their supply chains.

Liability, jurisdiction, and applicable law

Victims of harm need access to courts and judicial processes, and effective remedies must be available that are appropriate and commensurate to the harm suffered. The latest Draft does give a useful framework around which to discuss what liability might look like under the Treaty, but there are surprising gaps and a lack of clarity concerning how and in what circumstances parent company liability towards victims overseas might arise. Changes in the following areas ought to be investigated:

- Article 6(6) outlines a civil liability track for victims. It covers situations where one company is *controlled or supervised* by another, and (in the alternative) also situations where a company *should foresee or should have foreseen* harm caused by a company with which it has a 'contractual relationship'. This second strand of liability seems to arise where the parent company fails to exercise due diligence, but there is no explicit link between the Article 6(6) concept of foresight and the due diligence framework that is mapped out in Article 5. It should be made clear that Article 6(6) liabilities to victims can arise directly against parent companies for their failure to comply with Article 5 obligations.
- The language used to refer to parent and subsidiary companies was broadened under the UNGPs to 'business relationships' between companies, but in Article 6(6) of the new Draft this has changed to a potentially narrower concept of 'contractual relationships'. Although there is in fact a reasonably broad definition given to 'contractual relationships' under Article 1(4) the concept still seems potentially narrower than

the concept established under the UNGPs. The phrasing should revert to 'business relationships' based on the conceptual understanding of this phrase from the UNGPs.

- The framework for applicable law and how it is chosen (Article 9) is vague and arbitrary and must be clarified. There are in my view good arguments for either home or host state law to be prioritised (many in the NGO and human rights communities express a preference for home State law), but the draft Article lacks clarity as to how and when home State laws imposing binding due diligence obligations on a parent company would be applied. If a Court were to use host State substantive law, there ought to be a mechanism to ensure that home State due diligence principles be applied. As was argued in Removing Barriers to Justice, a system to achieve these ends (analogous with the 'over-riding mandatory provisions' principle of European law (Regulation (No. 864/2007) (Rome II) Article 16)) should be written into the Treaty.
- The criminal liabilities established by Article 6(7) are welcome, but the scope for sanction to be either civil, criminal or administrative leaves open the question as to whether truly appropriate sanctions are likely to result. There should be some qualification that sanctions imposed be commensurate with the gravity of the offence and the harm caused, such that a business found to have caused (for example) 'war crimes', 'extrajudicial execution', 'slavery', etc. should be not be sanctioned merely by a trivial fine. A clear link between the reference to 'effective, proportionate, and dissuasive sanctions' of Article 6(4) and the crimes listed under Article 6(7) might address this.

Further problem areas under the Draft

There are other problems with the Draft as it stands, leaving a number of critical issues unresolved. Among these, the following areas in particular seem to warrant further development:

- The Draft does not address the problems arising under the *forum non conveniens* principle, which has been a barrier to justice in several cases, nor does it introduce a version of the *forum necessitatis* rule, requiring courts to accept jurisdiction. It would be useful if these aspects were to be addressed in the Treaty.
- The inclusion of a concept for the reversal of the burden of proof (Article 4(16)) is welcome. However, the Article says that it is 'subject to domestic law', and even then it merely notes that reversal is something that 'courts may require'. *Removing Barriers to Justice* called for institutional change to the burden of proof in two specific areas, arguing that a defendant should have to rebut a claimant's *prima facie* case concerning firstly the parent – subsidiary relationship, and secondly any technical matters specific to the case (such as the nature of materials used in industrial processes). This Article needs to be given more substance if it is to create a meaningful obligation for ratifying states.
- The moves to address statutory time limitations (Article 8) and the problem of delay (Article 12) are both welcome, but are seriously under-developed. More substance and detail is needed if the Treaty is to implement real change in these areas.
- Protection for human rights defenders introduced by Articles 4(9) and 4(15) is welcome, but it fails to provide either specific protection from libel law in cases of human rights advocacy or a model of judicial protection for whistle-blowers and human rights defenders.
- Trade unionists should be specifically recognised under Article 14(4), which lists groups 'facing heightened risks of violations of human rights within the context of business activities'.
- Consultation with indigenous communities should use the well-established model of Free Prior and Informed Consent - the standard argued for in *Removing Barriers to Justice,* which is also central to the UN Declaration on the Rights of Indigenous Peoples - and not the presumably weaker standard of 'Free Prior and Informed Consultation' *(Article 5(3)b)*.
- The establishment of an international Committee to monitor implementation (Article 13) is welcome, but this Committee must be given a more substantial mandate. It must be empowered to investigate compliance and to receive reports from stakeholders, including, specifically, trade unions. It should also be given power to comment on compliance by businesses.

Greater clarity is needed if the Draft is to create a meaningful international standard; some important elements have been omitted entirely

Elements missing from the Draft

Finally, two important liability elements are entirely absent from the Draft. Trade union advocates should be aware of the potential offered by these elements. The Treaty would be a more powerful instrument if it tackled these two very specific legal problems, variants of which are present in some form in almost every jurisdiction.

- The Draft calls for the introduction of a number of specified offences (Article 6(7)) but does not address the more fundamental problem that many legal systems lack a basis for recognising the formation of criminal intent by a business entity, which seriously limits the potential to prosecute corporate defendants for criminal offences. A call for ratifying States to adopt a model analogous to the 'corporate culture' model used in the Australian Criminal Code of 1995 (Division 12) ought to be promoted under the Draft.
- The Draft does not directly address the company law principles referred to as the 'corporate veil', which has been a major barrier to litigation against transnationals. Courts in several jurisdictions permit variations of the 'piercing the veil' principle to be applied in fraud cases, and the Draft should call for ratifying States to extend this principle to human rights cases.