



Feb. 28, 2019

Submission of Access Now & Global Partners Digital re: Call for Comments and Proposals on the draft legally binding instrument

To the Chair-Rapporteur of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

A digital rights perspective on the zero draft

As discussions and negotiations over the Zero Draft continue, the undersigned organizations call on the Working Group to consider the impact the treaty could have on the communications and information technology sector and those who depend on their products and services.

Information and communications technology (ICT) companies, perhaps more so than businesses in other sectors, significantly impact human rights. As telecommunications have gone digital, and internet-based applications and services have spread along with mobile devices and broadband connectivity, innovative ICT companies create products and services that facilitate the free flow of information and ideas across borders, instantaneously. In this way, the ICT sector, which is largely privately-owned and de-regulated, enables individuals to exercise their human rights – especially the freedoms of opinion and expression, assembly and association – on an unprecedented scale.

Yet, given their vast and increasingly deep reach into our daily lives, ICT businesses can also infringe human rights, as when they limit the ability to express oneself online and when they improperly collect, process, and share personal data. When our sensitive information is exploited for commercial or political gain, and censorship limits our ability to learn about the world and improve our lives, the human rights to privacy and freedom of expression are violated. Given the digitalization of companies in varied sectors, and the inexorable march toward data- and machine-driven processes in nearly every company, we submit that an effective treaty on business and human rights must properly regulate ICT companies and protect our digital rights, and data, online as offline.

We call on the Open-Ended Intergovernmental Working Group to strengthen the draft by:



1. demanding transparency from companies on human rights impacts assessments
2. closely scrutinizing the business/state relationship to prevent private and state-owned/controlled companies from enabling states to carry out human rights abuses
3. providing effective remedial mechanisms for victims, with fair processes and adequate redress, and
4. widening the scope of application of the treaty to include domestic companies.

We also call for greater involvement of civil society in the treaty process to ensure the treaty's legitimacy and effectiveness.

Transparency

Though the draft requires companies to conduct due diligence on human rights impacts and to report on the results, it must be more explicit in calling for transparency and setting out clear standards for companies to follow. This is particularly necessary in the technology sector because it is a means of addressing the risk that ICT companies pose to the rights to privacy and freedom of expression. For instance, the multiple data breach and misuse revelations¹ in the past year have demonstrated just how much information ICT companies, especially social media companies, collect, retain, and share about their users. This is why Access Now maintains the Transparency Reporting Index², and why civil society pushes for more meaningful reporting and disclosures by tech firms on their human rights impacts.³

We are not alone in pushing for greater transparency: recently, a group of investors representing \$700 billion (USD) in assets issued a statement calling on ICT companies to align their policies and practices with the standards set out in the Corporate Accountability Index.⁴ Specifically, the investors call on companies to be transparent, ensuring that their human rights reporting includes policies on freedom of expression,

¹ See <https://www.itproportal.com/features/biggest-cyber-security-breaches-2018/>

² See the Access Now "Transparency Reporting Index" at <https://accessnow.org/tri> and Global Partners Digital, "Approaches To Content Regulation – #4: Transparency Reporting" at <https://www.gp-digital.org/approaches-to-content-regulation-4-transparency-reporting>.

³ See Ranking Digital Rights "Corporate Accountability Index" at <https://rankingdigitalrights.org>

⁴ See https://investorsforhumanrights.org/sites/default/files/attachments/2019-01/IAHR%20Statement%20on%20Digital%20Rights_Final%20%283%29.pdf



data security, and privacy. The private sector is taking notice that transparency is crucial; the treaty must do so as well.

Without demanding transparency on human rights impacts, the treaty falls behind even current legislation that requires reporting on non-financial matters like environmental, social, and governance indicators.⁵ For example, under the U.K. Modern Slavery Act and similar laws in Australia and California, large companies must publicly state their steps to prevent and cut forced labor from their supply chains.⁶

The business/state relationship

Another major issue the treaty must address is the relationship between private companies and the state. Human rights abuses involving ICT companies often occur where these companies are used as tools by states to stifle freedom of expression or to carry out massive and unlawful surveillance of individuals. Although the state must be held responsible for violating human rights, the private actor that enables the state ought to be held proportionately responsible, as well.

Under the current status of the draft, it is unclear whether liability would attach to the company providing such tools to a state actor. In dealings between the state and private companies, particularly where the companies are owned or controlled by the state, the government ought to exercise additional care to ensure that human rights are respected. The Guiding Principles address this issue by directing states to take steps such as specifically stating human rights obligations in the terms of their business contracts and exercising adequate oversight over the businesses' activities to ensure that those obligations are met. The treaty ought to take the same stance.

However, in attaching liability to companies for the actions of third parties, the treaty must be careful to distinguish cases when companies are used as a tool to promote or exercise rights rather than restrict them. Particularly for online platforms, there is a danger that they could be held responsible for content published by third parties that a repressive state may find to be in violation of national laws.⁷ In such cases, when

⁵ See https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en

⁶ See <https://www.modernslaveryregistry.org/>

⁷ See <https://www.gp-digital.org/publication/a-rights-respecting-model-of-online-content-regulation-by-platforms/>



platforms enable free expression or the exercise of other human rights, the treaty must not be used as a means to attach liability.

Effective remedial mechanisms

The treaty also needs clear and effective mechanisms for remedy. As it stands, the path to remedy the draft offers is the requirement that states “take all necessary legislative, administrative or other action ... to ensure effective implementation of this Convention” (Art. 15(1)). No more is said as to what would constitute effective implementation. At the international level, the draft creates a Committee to provide guidance and recommendations on the understanding and implementation of the treaty. These provisions are insufficient to provide effective remedial mechanisms or to carry out the objectives elaborated in the draft.

Rather than merely monitoring human rights impacts, companies should implement and participate in grievance mechanisms that allow individuals to raise human rights concerns. Operational-level grievance processes give the company a chance to identify and address harms before they grow more severe. However, as the Optional Protocol properly notes, individuals participating in non-judicial grievance processes, such as the new National Implementation Mechanisms envisioned by drafters, should always be allowed to take their claims to courts, as well.

Wider scope of application

Finally, to be a truly effective tool to address corporate abuse of human rights, the treaty must apply to *all* types of corporations. Currently, the scope of the treaty only extends to “business activities of a transnational character” (Art. 3(1)). This is concerning because it excludes domestic companies, holding them to a different standard than transnational companies.

The treaty also gives states the option to exempt small and medium-sized enterprises (SMEs) in order to spare them “undue additional administrative burdens” (Art. 9(5)). This provision ignores the fact that SMEs are just as capable of committing grave human rights abuses as large transnational corporations. Examples are companies such as Hacking Team,⁸ Cambridge Analytica, and NSO Group⁹ who provide

⁸ https://www.nytimes.com/2017/01/04/magazine/cyberwar-for-sale.html?smi=%20d=3Dtw-share&_r=1&mtrref=undefined

⁹ <https://citizenlab.ca/2018/09/hide-and-see-tracking-nso-groups-pegasus-spyware-to-operations-in-45-countries/>



technology to governments with weak human rights records and abusive practices.¹⁰ Because these companies are not transnational giants like Google or Facebook, they could escape liability under this treaty. Corporate accountability should be for all corporations, not just the large ones.

Greater role for civil society

Civil society has long been active in calling attention to business-related abuses of human rights. This has made human rights defenders targets of attacks, with more than 1,300 attacks since 2015 against activists on business-related issues.¹¹

To protect human rights defenders and to create a treaty that will promote rather than limit human rights, all voices must be heard throughout the treaty process. Civil society must be integrated into the deliberations and drafting process to ensure the treaty's legitimacy and effectiveness.

Prepared by:

Peter Micek

General Counsel | Access Now

peter@accessnow.org | +1.888.414.0100 x709

Isedua Oribhabor

Legal & Policy Fellow | Access Now

isedua@accessnow.org

Endorsed by:

Access Now (www.accessnow.org)

Global Partners Digital (<https://www.gp-digital.org>)

¹⁰ See <https://www.accessnow.org/open-letter-to-novalpina-capital> and <https://www.nytimes.com/2018/12/02/world/middleeast/saudi-khashoggi-spyware-israel.html>

¹¹ See <https://www.business-humanrights.org/en/human-rights-defenders-and-civic-freedoms-essential-for-profitable-business-say-major-companies>