

**Check against delivery!**

**5th session of the Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights**

**(14-18 October 2019)**

**Scope & Rights of Victims**

**Thank you Chair,**

I deliver this statement on behalf of the International Organisation of Employers ([IOE](http://www.ioe-emp.org/)). I refer participants to the [Joint Business Response](https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145680&token=9dbcc1f8414128d575cd6bef9f36b84ec106a386) to the Revised Draft Treaty, which is available on the IOE's website. That paper describes the business community's points on the scope and rights of victims in more detail.

**The "scope"**

* First, it is questionable if this Revised Draft Treaty would apply to transnational corporations (TNCs) only or to all business enterprises. For example, it is unclear if the footnote from UN Resolution 26/9 that set up the IGWG in 2014 still applies or not. It is also not fully clear that the current draft would apply in practice to State-owned enterprises (SOEs), whose omission in last year's text was noted by many.
* Second, while some interpret the large focus on "contractual relationships" in the Revised Draft Treaty as a narrowing of the scope, we think it remains broad. The definition of a contractual relationship under article 1, para 4 is wide and does not suggest a limited, direct contractual relationship. Add to this the scope under article 3, para 2. b, as well as the language on prevention under article 5, para 2 etc. and it can be surmised that the repeated use of the term "contractual relationships" may be intended to put a sharper focus on TNCs, which are often described as a bundle of contracts.
* Third, we have ongoing concerns about the approach of applying the Treaty to "all business activities" including those "of a transnational character" - instead of applying it to all business "entities" on the basis of their actual involvement in a harm (as the UNGPs does).
  + Focusing on "business activities" may avoid the problem of establishing a definition in international law of "TNC", as well as "OBEs." However, this approach creates a new challenge by requiring an accepted definition of both *these* terms, which do not appear to exist in law or social sciences.
  + It would also be extremely difficult, if not impossible, to monitor the vast array of "business activities" (listed under article 1, para 3), as well as those of a "transnational character" (under article 3, para 2), and reasonably assign liability for a harm on a practical or principled basis.

**The "rights of victims"**

* First, many have noted concerns with the definition of a victim, which we share. It is important to note the difference between presumed victims (those that have "alleged to have suffered") and actual victims.
* Second, there is also an imbalance between the many provisions on the rights of the victim and the lack of consideration for the corresponding rights of the accused (business) to ensure due process and fairness in relation to hearings, investigations, legal proceedings and access to justice.
* Third, the Revised Draft Treaty includes a number of unclear provisions. For example, it is not clear what ensuring victims' "psychological well-being and privacy" means in practice or what a "satisfactory" form of remedy means in reality.
* Fourth, guaranteeing victims' "access to information" in their pursuit of remedies is problematic and incompatible with long-established rules. It would mean that the “principle of production of evidence” would not apply in human rights cases. It also raises many questions such as what and whose information would be guaranteed to victims, on what basis?
* Fifth, the provision that "in no case shall victims… be required to reimburse any legal expenses of the other party to the claim" may also encourage frivolous litigation and bad-faith actions being filed against companies.
* Lastly, the provision allowing Courts to reverse the burden of proof for the purpose of fulfilling victims' access to justice and remedies contravenes a fundamental and well-settled legal principle of "innocent until proven guilty." It is also incompatible with other treaties, including the International Covenant on Civil and Political Rights and the European Convention of Human Rights, which safeguard the presumption of innocence in criminal cases.

**Thank you very much for your attention.**