

Principles for an Internationally Legally Binding Instrument on TNC and other Business Enterprises with respect to Human Rights

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Introduction

My focus is in the international law principles that should be taken into account in the drafting of an effective treaty. I will go through the key aspects in relation to the practical drafting of a treaty, being its purpose, scope, jurisdiction, remedies, supervisory mechanisms and other relevant factors.

Purpose

The purpose of this treaty is stated in HRC Res 26/9 to regulate the activities of business enterprises with respect to human rights. The international law principles that are relevant for the Open-Ended Intergovernmental Working Group (IGWG) in terms of the purpose - and to place in the Preamble - are as follows:

- The treaty should build on the existing international law and not to move back from it.
- The treaty should build on the advances by the UN Guiding Principles on Business and Human Rights (UNGPs) and by the Working Group on Business and Human Rights. These advances include that business enterprises have responsibility to respect human rights and that there should be access to a remedy. These are vital and important conceptual steps that have been made and accepted by most States, business enterprises and civil society organisations.
- International law includes existing international legal obligations on States with respect to human rights. This includes all human rights: economic, social, cultural, civil, political, labour, individual and collective rights
- International law also requires that, under human rights treaties there is an obligation on States to provide access to a remedy for victims and to protect against future breaches.
- The purposes of treaty should cover the gaps in current international law protection and not to create new gaps.
- In addition, human rights are an inclusive process and so there should ensure that there is special protection for those particularly vulnerable, such as women, children, indigenous people and those with disabilities.

These international legal issues could be placed in the Preamble and reflected in the treaty provisions. The treaty also be drafted from a gender perspective.

Scope: What human rights could be within the scope of the treaty

The UNGPs stated in Guiding Principle 12 that the core human rights treaty included are the UDHR, ICCPR, ICESCR and ILO Declaration on Fundamental Principles and Rights at Work. The international law principles that are relevant for the IGWG to consider in terms of the human rights to include are:

- Every State is a party to at least one of the UN human rights treaties.
- There are some widely ratified human rights treaties that are not included within the UNGPs, such as the Convention on the Rights of the Child.

- Human rights treaties do not have to include all human rights, e.g. the Convention Against Torture. A treaty could cover just some abuses or some perpetrators, such as the International Criminal Court.
- An issue is whether to include all human rights or only some. Some arguments have been made towards including only those human rights that are considered gross human rights or to limit the scope to those human rights to which State is a party. However, international law principles provide that human rights are indivisible and interdependent, so choosing some human rights to include and some not to include could run counter to this.
- There are some human rights that are not within the 4 instruments referred to by the UNGPs but are considered customary international law, such as the prohibition on genocide and possibly the rights of indigenous peoples.
- Also every State has reported under the HRC Universal Periodic Review process and this includes - expressly - their compliance with the UDHR, so suggesting that there is a Customary international law obligation to report on UDHR rights.

So there is a choice for IGWG to determine with regard to the scope of human rights within the treaty to limit human rights to those that are gross or those to which each State is a party, and so go back on advances by UNGP, or to include all human rights included in UNGP, as well as other human rights treaties to which the ratifying State is a party and customary international law obligations. The latter approach would be consistent with international law principles.

Scope: Which entities could be within scope of the treaty

The UNGPs make clear that each State has a duty to protect human rights and all business enterprises have a responsibility to respect human rights. The international law principles relevant for the IGWG to consider in terms of which entities to include are:

- International human rights law make clear that all States have human rights obligations
- States have State responsibility for actions by its own State agents and organs, including its State-owned business enterprises. There is also State responsibility for actions by anyone within its jurisdiction, including all non-state actors, such as private business enterprises that infringe the human rights of others within the State's jurisdiction.
- There should also be consideration to include international organisations within the scope of this treaty. International financial institutions, such as the IMF, World Bank, Asian Infrastructure Investment Bank and regional development banks. They should have specific legal obligations to protect human rights in this area. This is consistent with the development of international law in regard to international organisations,
- Multiple General Comments and Concluding Observations by human rights treaty bodies and by Special Rapporteurs have indicated the importance of making business enterprises responsible for the human rights abuses that they create.
- This responsibility of business enterprises could be crafted in 2 ways: through clarifying the international obligation of State responsibility for actions by anyone, including all business enterprises within its jurisdiction, that infringe the human rights of others within its jurisdiction; or by crafting direct obligations on business enterprises.

- Direct obligations on business enterprises are possible both conceptually and practically. Conceptually, the protection of human rights in law is to protect infringements of the dignity, value and identity of an individual or group from abuses of power. International human rights treaties have only focussed on political power of States in regard to human rights. Yet abuses of power occur by those with other forms of power: economic power, social power and cultural power. Indeed, for many people in the world it is not State political power but economic, social and cultural oppressive power that affects their daily lives much more.
- Practically, it is possible to include those who are not party to a treaty as within its scope. For example, the International Criminal Court and individuals, boundary treaties and successor States and human rights treaties and successor States (see the ICJ decision in the Genocide in Bosnia Case).
- Indeed, in international law it is already the position that business enterprises are directly involved in international law, with international personality and participation, such as international economic law, international trade law and international financial law.
- UNGP made clear that all business enterprises are subject to responsibility to respect human rights. This includes all business enterprises with which a business enterprises is associated. All business enterprises, no matter their size and scope can abuse human rights. This was accepted by business organisations and States.
- There is a risk that if the scope is limited to some business enterprises, such as TNCs, then those TNCs will restructure themselves so as not to fall within the treaty definitions.
- It is possible to have the same obligations but different actions to respond to the obligation, as seen in the different actions required by developing and developed States under climate change and environmental treaties. Thus it is possible to make the actions by a TNC to remedy an abuse of human right to be more extensive than a domestic business enterprise. This is also consistent with the approach in the UNGPs to human rights due diligence requirements.
- If the treaty is limited to States then, as many States not currently implement their human rights treaty obligations there would be a limited advance beyond their obligations under international human rights treaties.
- The rule of law means that the law applies to all.

So the choice for the IGWG in regard to the scope of entities with responsibilities under treaty is to include just States or extend it directly to international organisations and to business enterprises. It is also a choice to extend it just to some business enterprises or, consistently with the UNGPs, to all business enterprises.

Jurisdiction: What is the jurisdiction of the treaty

All international human rights treaties make clear that the State's legal obligations extend to its territory and jurisdiction. The international law principles relevant for the IGWG to consider in terms of jurisdiction are:

- UNGP indicated that there may not be an obligation on States to extend their law to their corporate nationals operating beyond their jurisdiction. I prefer to call this "transnational jurisdiction" rather than "extra-territorial jurisdiction", as transnational is how business enterprises operate.

- There is a strong argument that States do have transnational jurisdiction, not least as there are many instances where States have had jurisdiction to deal with international actions, such as under competition law, consumer law and under the UN Convention against Corruption.
- There are also international law principles regarding jurisdiction in that the normal approach is that a State has jurisdiction over its own corporate nationals, even if they are a subsidiary of a business enterprise based in another State. Indeed, most States have their own national laws that protect against abuses of human rights and other laws by business enterprises, though some do not extend criminal law to business enterprises.
- In regard to business enterprises there are three states that may be relevant for jurisdiction: the host State (where the main activities are undertaken); the home State (being the state of the company's incorporation, its main administrative activities or of its parent company); and the State of the parent company (if different to the place of the main administrative activities). The latter will usually be the same under EU Regulations (Brussels 1 Regulation).
- These different jurisdictions can cause problems in terms of sovereignty and human rights implementation. This is seen in the requirement under international human rights law to exhaust (effective) domestic remedies, which may be inhibited in some States.
- There is a particular problem where the State is not able or willing - often for understandable economic reasons - to bring an action against a business enterprises. Yet there are treaty precedents for dealing with this: e.g. hostage's treaties where a State either prosecutes or extradites; the ICC; and bilateral arrangements e.g. with the proposal for Kenyan court for dealing with all piracy actions against any State.
- There would need to be a length of time, being a reasonable period, before the home State could act. Unnecessary or deliberate delays would not be allowed.
- States may also feel unable to act due to a bilateral investment treaty (BIT) or similar. However, there is a primacy for protection of human rights (even outside the territory), as seen in the ICJ decisions in the Genocide in Bosnia and the DRC v Uganda cases. It would be better if BITs included the protection of human rights as an express exclusion from a business enterprises' ability to bring a claim.
- Further advances in the protection of human rights of victims of human rights abuses by business enterprises have been seen in successful actions in European and North American courts for abuses occurring elsewhere. It would be a mistake for this treaty to prevent these types of actions.

There is a choice for State sin regard to jurisdiction in the treaty: to limit it to host States alone being able to act or to extend to home State (or parent company States) to act, at least where the host state is unable or unwilling to act within a reasonable period. There could also be bilateral agreements.

Remedy

All States have an international obligation under human rights treaties to provide a remedy to the victim. Indeed in the UNGPs, this is one of only two times that this obligation is stated to be a mandatory legal requirement.

When considering the issue of remedy, the following international principles are relevant:

- Remedies under the UNGP include compensation for the victims and also include fines or sanctions against business enterprises. The latter are not remedies for the victims as required unless there are clear non-repetition guarantees. So this treaty must go beyond the UNGPs here.
- The State can include non-judicial remedies. However, those that operate to date, such as those under the OECD Guidelines, do not provide a remedy to the victim (barely 1% of the outcomes do this).
- The State also could legislate to ensure that business enterprises undertake due diligence and include grievance mechanisms as requirements under national legislation (which is likely to be consistent with existing national laws).
- When considering remedies the treaty should include specifically the position of vulnerable people, e.g. women, children, indigenous people and those with a disability.
- In judicial remedies it would assist victims if the courts, based on national law, provided procedural assistance, such as through disclosure of documents by business enterprises and in giving direct remedies to victims (see the book: *The Third Pillar*).
- Therefore, it is essential that any treaty includes remedy to victims: of any type of reparation, including compensation, restitution and transformative reparation.
- Any remedy would be assisted if the treaty required that business enterprises must report on compliance with treaty. This would be consistent with human rights due diligence requirements under UNGP. States would also report on all business enterprises about their compliance with human rights through national laws. This reporting requirement would also enable diversity for the size and scope of each business enterprise regarding the relevant human rights.
- One helpful way forward would be to allow a defence by a business enterprise where shows it has conducted human rights due diligence then it could be a defence to a complaint. This would include human rights due diligence in its supply or value chain. This would be consistent with much national legislation and international regulations on e.g. health and safety, anti-bribery and money-laundering.
- It could also be requirement that a business enterprises that abuses human rights cannot attain benefits of being able to bid for public procurement contracts, export credit, intellectual property or obtain a contract under a BIT.
- It might also be possible to consider joint liability of a State and the business enterprise where jointly responsible for the breach of human rights.

The choice for States in regard to remedies: to limit the remedy to that of action against business enterprises by State or to focus on reparation for the victims, with latter consistent with international human rights law.

Supervisory Mechanisms

All international human rights treaties have some form of supervisory mechanism. These include periodic reporting, and, in most cases, receiving complaints, as well as General Comments/Recommendations, that can clarify the law.

In considering the supervisory mechanisms, the following are relevant:

- Periodic reporting could be linked to National Action Plans, as suggested by the Working Group on Business and Human Rights.
- The supervisory body could have investigation powers e.g. the Committee on Enforced Disappearances and the UN Sub-Commission on Torture, which can undertake in-country investigations. It could possibly use the existing Working Group on Business and Human Rights to be the body that receives complaints and investigates.
- This could be in an Optional Protocol and the body could be an arbitration body.
- The use of General Comments would enable clarification of key terms such as human rights due diligence, grievance mechanisms and human rights impact assessment.
- A supervisory body would also assist victims to bring claims in national law.
- It might be possible to consider requiring financial contribution by business enterprises to support the work of the supervisory body under the treaty.
- The composition of the supervisory body would be important.

The choice for States is: to follow the existing human rights treaty bodies but without direct supervision of business enterprises, which is not much of an advance on existing law, or make business enterprises subject to the supervisory mechanisms.

Other Factors

There are a few other factors that are relevant to any treaty drafting:

- Reservations are usually allowed to human rights treaties but they must not be contrary to the object and purpose of the treaty. It would also be useful to disallow expressly reservations for investment, trade or intellectual property grounds, as to give priority to human rights obligations. This would also give a clear signal to business enterprises.
- Derogations are normally possible, though, as the ICJ has made clear, international law principles are that international human rights law continues to apply even in situations of armed conflict.
- While States are primarily responsible for human rights protections, it is not the only entity with human rights responsibilities. However the treaty should not enable a State which has breached human rights to escape its own responsibilities.
- Finally, the treaty should allow for capacity building support for States, perhaps using the idea of international cooperation and assistance under the ICESCR. This way the broader purpose of treaty to regulate the activities of business enterprises with regard to human rights could be achieved and it would advance international law.

I hope that this sets out some of the key international law principles that will be relevant in the drafting of this treaty on business and human rights.