

Presentation to IGWG October 2017

First, let me congratulate Ecuador for producing the elements document which is a decent step in the right direction of building a business and human rights treaty. I also would like to thank Ambassador Long and the foreign minister and former Chair Rapporteur of the IGWG, Maria Fernanda Espinosa for the opportunity to address the Inter-governmental Working group. I should indicate that there are many good things about the document which address many of the most important issues but given time, I will focus on those aspects in relation to which I have questions and in relation to which there are gaps.

As a preliminary remark, let me start by saying that foremost in our minds in this process should be the fundamental rights of people whose daily lives are affected by harmful corporate activities: individuals whose environment is polluted; individuals whose livelihoods are affected; individuals whose free speech is violated. These are serious matters and, an understanding of how to help prevent and address these situations should be the basis for a consensus moving forward. It is no use simply extolling the virtues of the Guiding Principles where they are simply inadequate to address many of the challenges faced by individuals in these situations. That is why individuals from around the world have been saying we need a treaty to address gaps in international law and regulation that leave them in situations of desperation. Legal problems need legal solutions; the Guiding Principles cannot by their nature provide those.

Let us then turn first to the obligations of the state. Many useful things are said in the elements document about the obligations of the state to prevent and provide redress for human rights abuses. The usefulness of these provisions has been questioned by the International Organisation of Employers and International Chamber of Commerce. Yet, one of the key goals of the treaty is ensuring states *collectively* commit to providing solutions to the gaps in international law and affirm their commitments in this regard.

Now, the elements speak of civil, criminal and administrative liability but there is surprisingly very little focus on corporate law and how it needs to evolve in addressing the intersection between business and human rights. Corporations are creatures of statute and

corporate law regulates how they function. Suggested areas where some detail can be provided include: first recognizing that the purpose of the corporation includes obligations in relation to fundamental rights – their very purpose is not simply or solely as is commonly misunderstood to realise individual self-interest of shareholders. Secondly, providing guidance on when it is justifiable to break the separate legal personality principle (or piercing the veil) when the separate existence of a corporation is abused to enable it to commit fundamental rights abuses. Thirdly, the duties of directors – the decision-makers of a corporation - are all not dealt with and play a very important role in this area. Director's duties need to be extended to require consideration of fundamental rights in their decision-making and thus, there are important developments that need to take place in corporate law to address the obligations of businesses in relation to fundamental rights. Hopefully, as the draft of the treaty progresses, these issues will be covered.

Let us then turn to the obligations of corporations in section 3.2, where there is talk of the responsibility of TNCs and OBEs to respect all human rights. It is important that this responsibility is taken one step further than in the Guiding Principles on Business and Human Rights and recognized as a binding legal obligation. This is an important issue which flows really from the foundation of human rights which places obligations on all actors that have the potential to harm or help in the realization of rights. No individual, corporation, or NGO can claim they are under no obligations to respect fundamental rights. This is also a very practical issue: in instances where the state fails to impose obligations within its jurisdiction, is the corporation in a norm-free zone? Can it violate rights at will? In such situations, only if there are international obligations which recognise that corporations may not behave in particular ways (or are required to behave in others), can there be a basis for holding them to account both through public pressure and through the courts of another country. It is important here too that human rights can generate their own legal basis for liability even if the laws of another country do not provide for such liability.

Two further points flow from this: Section 3.2 says that TNCs must prevent human rights impacts of their activities. The term 'human rights impacts' is utilized in this document and is a result of the influence of the Guiding Principles. Yet, the term is legally vague and

imprecise. There will be impacts that are in fact acceptable and reasonable. A company may legitimately require its employees not to express their personal opinions on its corporate Twitter account. That restricts freedom of speech but seems legitimate. It may place restrictions on what may be downloaded on a company computer. That may infringe upon the privacy of employees but often be acceptable. There is a necessity in the treaty – a point that has not been grappled with adequately - to determine what is a violation - an unacceptable impact - rather than simply an impact. The due diligence obligation may require charting all impacts to understand the full picture of how corporations relate to fundamental rights. This is a first important step before recognizing what constitutes violations that are actionable. Nevertheless, corporate liability will extend only to avoiding those violations. That distinction is something that needs recognition in the treaty in its various parts.

Finally, the scope of the obligations of corporations could also be widened. The focus seems to be on avoiding violations but there is also a duty to use their influence to help promote and ensure respect for human rights. The latter obligation is interesting and is an important development yet, in my view, it is not sufficient. The focus of the document as it stands seems to be on preventing the violation of rights and providing remedies where these violations have taken place. Yet, the document here misses an opportunity to recognize the positive role corporations can play in advancing development and fundamental rights. The right to development is mentioned in the preamble but no real sense is given in the document concerning the possibilities corporations can play in this important process.

Such a result could also be achieved through outlining a series of specific provisions outlining some of these positive contributions. The IOE, for instance, in its submissions focuses a lot on the benefits businesses can bring to people's lives. Why should they object then if corporations have a duty not only to prevent violations of rights but also to consider, in both their business policies and strategies, how actively they can assist in realizing them? Such a duty does not require any business to become a loss-making entity but to integrate a concern for advancing fundamental rights into their approach to doing business. This could also link nicely to the Sustainable Development Goals and the connections between the SDGs and this treaty should be thought through more actively. The approach adopted also

need not be very radical but, for instance, reaffirm the obligations of corporations to meet in good faith their tax obligations which, in and of itself, is a way in which rights can be furthered in the countries in which they operate. This is an important change of emphasis and that places human rights as something that is always factored in, rather than something that is simply a limitation on the behavior of corporations.

Lastly, I wish to raise the important connection made in the document between recognizing obligations of corporations and states and the duty to provide victims of rights violations with access to a remedy. I would like to plead for a wider approach to be considered in relation to 'access to remedy and justice' in this area (something that may be considered tomorrow). I see these as capabilities that individuals should be enabled to access along the lines of the approach adopted by Amartya Sen and Martha Nussbaum. This means we must attend both to factors internal to individuals which prevent them from being able to access remedies as well as the way in which institutions are structured.

I would like to plead for a serious consideration to be given to both of these dimensions: the elements document does in fact recognize the need for individuals, for instance, to be educated about their rights and for a range of institutions to be provided. But, perhaps, there are other dimensions which are not adequately focused upon. In developing countries, for instance, individuals often need transport to move from rural areas to a space in which they can access remedies may be unaffordable. Similarly, institutions of state could possibly be set up along the lines of specific sections of human rights commissions or ombudspersons to take a proactive approach to engaging with individuals affected by corporate activities. If we are interested in addressing the needs of the most vulnerable, then these aspects need to be taken into account and it is therefore incumbent upon treaty drafters to think through carefully all the possible means necessary to help advance access to a remedy. The elements document, sometimes, is a little vague in calling on states to adopt all necessary measures without giving enough guidance as to those measures. It is suggested by adopting an approach that I have suggested, it might be possible to make a meaningful difference in the lives of individuals.

My critical comments are provided as a constructive intervention aiming to help improve the international framework to assist those who are most vulnerable. I believe that the elements document should be used as a catalyst to take the next significant step in human rights law of the C21: ensuring business's power is prevented from doing harm and harnessed to help create a better world for ourselves and future generations.