

Working Group on Business and Human Rights
Comments at the 8th Session of a Legally Binding Instrument on Business and Human
Rights, 24 October 2022

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A. Introduction

1. Thank you, Chair-Rapporteur, and excellencies and all distinguished delegates and participants. My thanks for inviting the UN Working Group on Business and Human Rights to participate in this session.
2. It is my honour to speak on behalf of the Working Group for the first time, though I have attended almost every one of the legally binding instrument sessions prior to being on the Working Group.
3. I have been asked to speak about three matters: the value of having human rights treaties generally, a reflection on the process of the legally binding instrument to date, and to offer comments from the Working Group on the Chair's recent draft. I speak on relation to the first two matters in my personal capacity.

B. Value of Human Rights Treaties

4. Why have a human rights treaty? States find them annoying, civil society find them frustrating and no-one agrees as to what many of the terms mean.
5. However, after many decades as a human rights lawyer, my view is that human rights treaties are an important part of development in international law to clarify that States have legal obligations with respect to human rights. Not just moral or social obligations but legal ones. This is extraordinary, especially as today every State in the world is party to at least one of the major global human rights treaties. Thus human rights treaties are part of the acknowledgement by States that they and every other State has human rights obligations under IL.
6. Of course there is a considerable difference between having these international human rights treaty obligations and implementing them. It is also the case that such treaties are made by States for States and with, usually, limited enforcement.
7. Yet, having a human rights treaty does mean that other States, as well as business and civil society, can legitimately raise concerns that a State is not implementing its own international legal obligations to which it agreed. This removes it from purely a bi-lateral, political engagement. It can also assist with domestic law and courts use of international law.
8. In addition, a human rights treaty body can interpret the treaty in line with the dynamic changes in the international legal system.
9. It might be considered that a treaty is unnecessary. Indeed, there are examples of international instruments which have had profound impacts on international law without being a treaty, such as the Declaration on Rights of Indigenous Peoples, and the International Law Commission's Draft Articles on State Responsibility. Yet, in

most instances, they were drafted in legal terms and raised issues of obligations within them.

10. Putting concepts, ideas, and action about human rights in a treaty can make a difference. Undoubtedly CERD helped publicly acknowledge the need to change from the colonial mindset of practices which are unacceptable, and both the CEDAW and the CRC been part of new understandings of the importance of these rights. More recently the Convention on Rights of Persons with Disabilities has highlighted vital issues in this area and helped Ss and business understand concerns of people with disabilities, and civil society to have a focus.
11. I have seen this in my work with government officials, businesses and civil society worldwide. In many instances, the engagement has been helped by reference to a human rights treaty. Of course, in other situations a human rights treaty was ignored.
12. A human rights treaty offers an international standard, it can provide some global coherence and consistency and, as Patricia Williams once wrote, human rights gives a language for victims to speak to power, and to change the relationship of victims with those which have all types of power. One of those types of power is economic power, which brings me to the business and human rights treaty and a reflection on its process.

C. Business and Human Rights Treaty Process

13. There have been many positive aspects of the process by which the legally binding instrument has developed over 8 years.
 - a. First, it has been inclusive of civil society and business associations directly and transparently. Some of them are in this room and applaud them for all their fantastic contributions. Civil society have provided a voice – often directly of rights holders affected by business – and civil society and some business associations have offered usually sensible and well-thought-through suggestions and drafting. This inclusion of non-state actors is a very good practice in human rights treaty drafting, as it is vital in business and human rights process generally.
 - b. Second, it has enabled some states to provide comments on the draft and suggest changes to it. Hopefully this has increased knowledge about business and human rights and their regulation within those states.
 - c. Third, it has, I hope, been helpful in the increased awareness that environmental damage has human rights impacts. Climate impacts may, hopefully, eventually follow in inclusion in due course.
 - d. Fourth, I have been impressed by the mazing work of the Ecuadoran mission, a mission which has few resources, and yet have kept this process operating over 8 years.

14. There are, though, aspects of the process which could have been better, in my view. These include:
- a. First, there has not been as much activity between sessions by states to move the draft forward. The creation of the Friends of the Chair is a very good way forward if it operates fully and with more members. It could even include some experts from non-state actors.
 - b. Second, the fact that there have been too many repeated statements by some stakeholders, may indicate a lack of knowledge by the stakeholder or a lack of hearing by others.
 - c. Third, too few states and businesses have been attending to offer their constructive criticism or support. Both are needed.
 - d. Fourth, the too rapid dropping of the idea of direct responsibilities of businesses under IL for human rights abuses was disappointing. With the awareness that human rights abuses can occur by other actors than States it seemed an appropriate time to have more detailed consideration of this. Indeed, few major businesses today dispute that they can have adverse human rights impacts in their activities.
15. Finally, I am aware that the treaty process has both raised and dashed expectations. Yet I hope that it has been a part in the changed practices beginning to occur – as we see with increased national and regional legislation on business and human rights issues, and with related case law.
16. This process has also, I hope, changed minds. Indeed, in the very first day of the first session, I happened to be standing between two senior diplomats as they argued around me – quite strongly - about a core matter in this treaty. I claim no role in mediating a solution, but one was found. Without the diplomats being here, with the power of the voices of civil society and of some business's associations in this place, there is unlikely to have been any solutions offered at all.
17. For the sake of both businesses who want clarity and rights holders who want remedies, it is essential that these discussions continue with as many as possible in the room where it happens.

D. Working Group Views

18. My third matter concerns the approach of the Working Group on business and human rights to the Treaty process.
19. The role of the Working Group, which is a group of 5 independent experts appointed by the UN Human Rights Council, is to promote, clarify and support the implementation of the UNGPs globally, in partnership with civil society, business and states, as well as to consider claims made by alleged victims of adverse human rights impacts of business enterprises.
20. As was stated in the Working Group's Roadmap for the next decade of action, which was approved by the Human Rights Council this year, the Working Group

acknowledges that binding regulation, such as a treaty, is needed as part of the smart mix of business and human rights initiatives. Indeed, for more than a decade, the Working Group has supported states in regulating business enterprises as part of its efforts to ensure business respect for human rights.

21. The UNGPs is the authoritative international standard on business and human rights. The UNGPs, together with the related international body of important work, such as by the OECD, OHCHR and the Working Group itself, should remain the framework – which is what it is - on which a legally binding instrument on business and human rights should be built.
22. Indeed, John Ruggie, the main drafter of the UNGPs, said in a speech in 2013 said: *‘the international community no longer regards state sovereignty as a shield behind which [human rights] abuses can take place with impunity. In my view the same surely must be true of the corporate form. Indeed, many of us thought that this was true all along. But affirmation through an international legal instrument at be required to settle the matter once and for all’.*
23. It is, therefore, in the view of the Working Group, essential that the legally binding instrument aligns with the UNGPs, not least as part of regulatory coherence. Regulatory coherence matters for businesses, as much as for states and civil society, and particularly for all those affected by the activities of businesses which have adverse human rights impacts. Further, as the Working Group states in the Roadmap: *‘it is vital to also ensure policy coherence when developing further standards in the area of business and human rights at multi-lateral level, including in relation to the ongoing discussions on a legally binding instrument on business and human rights’* (para 43).
24. In relation to the specific draft provisions before us, the Working Group have a few comments. Overall, it notes the streamlining of the Articles, and, while lacking in some previous provisions, the new draft is more in alignment with the framework of the UNGPs.
25. The proposed new Article 6 (Prevention) is based firmly on the framework of the UNGPs. We have three comments on it:
 - a. The definition of human rights due diligence is given in the new Article 1. This is very much as it is defined in the UNGPs, though the UNGPs uses the term “tracking” rather than “monitoring”, though these terms are probably to the same effect. There is, though, one omission. GP 18 makes clear that human rights due diligence should *‘involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.’* The Working Group strongly suggests that consultation is expressly included in the definition of human rights due diligence. This is in addition to the consultation provided for in 6.3(c).

- b. The previous paragraph 6.8, which stated that *'States Parties shall act in a transparent manner and protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character'*, has been deleted. In light of the Working Group's recent report to the GA, some reconsideration of this omission, albeit redrafted, should be considered.
 - c. Art 6.5 may wish to include the term "procurement" specifically as a means by which the State can provide incentives for business enterprises to comply with human rights due diligence.
26. Article 7 (Access to Remedies) is now generally well based on the framework of the UNGPs and on the subsequent reports by the Working Group and the OHCHR on access to remedies and accountability. We have four comments:
- a. The definition of "remedies" and "effective remedies", which is now revised in Art 1, should add the words that an effective remedy is a remedy *"to the victim"*, as the Working Group Report on Access to Remedies stresses. This removes from "effective remedies" sanctions such as fines or penalties given to business enterprises which are not paid to the victims but are paid to, for example, a state agency. Indeed that Working Group Report comments that *'the starting point should therefore be to provide effective remedies to the victims of corporate human rights abuses, which in turn should inevitably result in corporate accountability'* (para 17).
 - b. Art 7 does not refer to the requirement that procedures for the provision of a remedy by state agencies should be impartial, independent and protected from corruption, which is stated in the UNGPs Commentary to GP 25. This could be included in Art 7.1.
 - c. Art 7.3 does not refer to procedural obstacles to access to remedy being removed or reduced, which should be included, as they are a reality for many claimants.
 - d. There is no reference in Art 7 to the particular needs of the vulnerable and marginalised in relation to access to remedies, such as women and indigenous people. This should be amended to reflect this
 - e. We also note, as a side point, that in 7.4 (c) the word used is "company" and not "business enterprise", is used, though "business enterprise", being the term used in the UNGPs, is used elsewhere.
27. In relation to Art 8, the Working Group notes the following three points:
- a. It notes with approval that the needs of the victims regarding remedies are appropriately included in Art 8.2, which is consistent with our earlier comment on Art 7.
 - b. It notes the absence of a defence available to business enterprises when they can prove that they have conducted reasonable and appropriate human rights due diligence. There are differing views on this absence, from a

defence being unnecessary as domestic law would provide it, to a defence, even if narrowly defined, might act as an incentive for business compliance, especially where there is a fragile or conflict affected state and with limited rule of law.

- c. It is unclear as to whether state activity is included in legal liability, such as where the state facilitates, encourages or shapes business activity. This has been recommended by the Working Group in its report on the state as an economic actor.
28. The only comment which the Working Group makes in relation to Art 9 is that it is unclear as to whether the various clauses in Art 9.1 are alternatives or cumulative. The UNGP's framework suggests that these should be alternatives. For example, that there is jurisdiction provided for by a state party when the human rights abuse occurred in the territory or jurisdiction of the state party, as well as there being jurisdiction provided when the human rights abuse was carried out by a legal person domiciled within that state.
 29. The Working Group has no further comments on specific aspects of the draft, other than to note its approval for retaining international cooperation as Art 12, as being an important element for effective business and human rights international regulation.
 30. In closing, may I draw your attention to the next Annual Forum on Business and Human Rights, which will take place in Geneva from 28 to 30 November 2022 under the theme "Rights-Holders at the Centre". It will be an opportunity for all stakeholders to discuss collectively challenges and solutions in the area of business and human rights.
 31. Thank you very much, Chair-Rapporteur. I remain at your disposal to assist you and all participants here in this process.