A Defining Moment for the UN Business and Human Rights Treaty Process

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A Defining Moment for the UN Business and Human Rights Treaty Process

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The ongoing process to negotiate a UN treaty on business and human rights has its 8th annual session this week in Geneva. Though embraced by many NGOs, this initiative has so far failed to secure widespread support amongst states (see e.g. here and here) with wide divergences remaining regarding the proposed instrument's objectives and design, as well as its relationship to the UN 2011 Guiding Principles on Business and Human Rights (UNGPs), an earlier soft law instrument championed by governments, businesses and international actors.

Yet there may be light on the horizon. Shortly before the next session, Ecuador, as Chair, introduced a cluster of new textual proposals relating to segments of latest iteration of the formal negotiating text. Though a belated and seemingly slight step, here we suggest why this intervention could, if seized by states and other parties, nudge the UN treaty process towards a more constructive pathway and ultimately fruitful result. By contrast, ignoring or dismissing this overture, we suggest, could further diminish the chances of strengthening international norms against business-related violations and abuses for years to come.

Context: why do we need a business and human rights treaty?

Before turning to the Chair's informal proposals, it is worth recounting the case for authoritative international rules and accountability mechanisms on business and human rights.

Though once a fringe topic, risks to human rights posed by business activity are now a mainstream concern. Modern slavery in supply chains, mass surveillance and discriminatory profiling by tech giants, catastrophic environmental devastation and the depredation of essential public services by private equity firms, to name but a few, have lately drawn public consternation.

For victims of such abuses, too often remedies are too little, too late, or entirely absent. Most perpetrators go unpunished. Many commercial actors and those in supporting professions, on the contrary, continue to make handsome gains, directly or indirectly, from conduct that obviously contravenes legal or otherwise widely-accepted ‚responsible business' standards, such as the UNGPs or OECD Due Diligence Guidance. National authorities, and indeed organised labour, appear

locked in an evolutionary battle with globalised capital and corporate interests against whom they almost never win.

Some governments have sought to give binding force to existing soft standards. France, Germany and Norway, for instance, have recently enacted national 'due diligence' laws, that oblige companies to implement effective controls over human rights and environmental risks, on pain of administrative or civil penalties. The European Union aims to pass similar legislation, as well as bans on products made with forced labour or associated with deforestation. These legislative projects would supplement existing measures tackling conflict minerals, human trafficking and privacy, for instance. The US, UK and others have established anti-slavery requirements for public as well as private buyers. 'Non-financial' corporate reporting and 'ESG' (Environmental, Social and Governance) investments are, despite recent controversies, a burgeoning trend.

Albeit better than nothing, such legislative and policy responses are still a patchwork, full of loopholes and discrepancies, that remains wide open to gaming by corporate malefactors. Such initiatives are also, so far, largely restricted to jurisdictions of the Global North, while their impacts redound 'elsewhere', on the rights and livelihoods of people who have had almost no part in their design. Yet both inclusion and coordination are as imperative in devising human rights rules for the global economy, as they will be in their future oversight, evaluation and review: principles of universality and democracy demand no less, making it hard to see how legitimacy or effectiveness can be achieved without them. The science of due diligence regulation is, further, in its infancy, with little evidence to hand regarding the merits or challenges associated with models espoused by different national jurisdictions. Without an international binding instrument, then, a global level playing field remains out of sight. The interests of responsible businesses, therefore, are equally served by a widely-endorsed global business and human rights framework.

Supply chains: illustrating the case for a common framework

National rules have limited reach. Human rights abuses linked to German firms might occur in Germany or, via supply chains, investments or other business relationships, elsewhere in the EU or in any other country. In Germany, Section 20 of the Supply Chain Due Diligence Act (GSCDDA) entails that such abuses will be addressed in collaboration with competent authorities, for example, labour protection or environmental protection authorities, in other jurisdictions. In the EU, Art. 21 of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) would require similar cooperation.

Yet without a UN instrument, no general framework would exist to support cross-border cooperation in addressing violations in third countries. The Chair's new proposals rightly foresee international cooperation between administrative authorities when enforcing due diligence obligations in Art. 12 and 13. Should, for example, a company be ordered under GSCDDA or CSDDD to address a supplier's reliance on

unlawful child labour in a third country through a corrective action plan ordered by the relevant national authority, input from and dialogue with third country authorities will be imperative in promoting measures to address root causes of such abuses, which may well lie in factors beyond the particular actors and case at hand.

Another field where joint standards and coordination going beyond single national due diligence regimes is essential concerns contracts. Recently, a proposal has been advanced to include default contractual obligations based on the ABA`s model contract clauses approach in the treaty, as a way of creating co-responsible contracts. Under this approach, buyers and suppliers based in countries that ratify a UN business and human rights treaty would have default BHR rules that they could on a case-by-case basis decide to alter, similar to the CISG. Such a regime might significantly increase legal clarity on human rights obligations in the context of supply chains. Similarly, such a regime presupposes the existence of a widely-ratified international legal instrument.

Fresh steps towards a viable vision

To date, however, the UN business and human rights treaty process has seen geographically uneven participation, with many globally and regionally significant economies notably absent. Earlier texts , moreover, adopted a prescriptive approach, seeking to legislate in close detail over matters such as civil and criminal procedure in cross-border cases. They would also have pre-committed states parties to a raft of premature design choices around due diligence laws. At the same time, they regressed from the ambition of the UNGPs to address all business activity by dropping state-businesses and small and medium-sized enterprises from their focus.

Out of kilter with the form of most human rights treaties, this approach, perhaps unsurprisingly, drew many detractors. Participating states, often with good reason, raised incompatibilities with national constitutional commitments and court procedure, particularly in the domain of civil litigation. Many (including initially the United States) stayed away, while registering discontent or, like the European Union, either reserved positions on the whole text and remained largely silent, while nevertheless embarking on unilateral national regulatory initiatives.

Until now, it was often attempted to solve such problems by simply adding more text, in an attempt to cover all national eventualities. Yet this resulted in long and complex clauses that still failed to reflect the subsidiarity or discretion commonly afforded states in other areas.

Prevention and access to remedy: same goals, more flexible means

Optimistically, new draft clauses presented this month by the Ecuadorian Chairmanship mark a clear change of approach. While streamlining earlier proposals, they would, at least for part of the UN treaty’s proposed scheme,

establish fresh state obligations on important matters while leaving parties greater room in discerning how best to meet them.

Under the heading of prevention of business-related violations and abuses, 2021's Third Revised Draft presented a full-page menu detailing required elements of national due diligence laws. The 2022 proposals, by contrast, would require states parties "to adopt appropriate legislative, regulatory, and other measures to "(a) prevent the involvement of business enterprises in human rights abuse; (b) enhance respect by business enterprises for internationally recognized human rights; (c) strengthen the practice of human rights due diligence by business enterprises…" Though Article 6 (3), in its latest iteration, still expresses a hard obligation on states regarding 'legally enforceable requirements for business enterprises to undertake human rights due diligence', this is framed more permissively, allowing a range of existing approaches to be evaluated and built on.

Concerning access to remedy, the Chair's 2022 draft clauses require that states 'progressively reduce the legal, practical and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing such State agencies for the purposes of seeking an effective remedy' (Article 7(1)(b)), in a manner 'consistent with its domestic legal and administrative systems' (Art 7(1)). Likewise, while clearly committed to strengthening victims' rights, this would afford states parties greater space to realise contextually-appropriate solutions.

On legal liability, under the Chair's new draft Article 8 (1), states parties would have a duty to 'adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to establish the liability of legal and natural persons for non-compliance with its legally enforceable measures established pursuant to Article 6'. The Chair's latest proposals on jurisdiction and limitation periods follow a similar template, while earlier provisions on applicable law have been removed.

Grasping the olive branch

Given the above considerations, the Chair's latest proposals could herald a breakthrough. The tepid reception afforded earlier drafts by many states, and critiques advanced by at least some scholars (see, for example, here and here) urging a revised approach now appear to have been registered.

This makes the Working Group's current session a crucial one. The exact levels and dynamics of state participation, which may well this year be influenced by geopolitical considerations, remain to be seen. Nevertheless, it is expected that many significant players, including the EU, the US, China, Japan, as well as countries of the Latin American bloc who have so far been consistent participants, such as Mexico, Colombia and Brazil, will take part.

After a lengthy diplomatic stalemate, these actors should give the Chair's latest informal proposals the generally warm reception they deserve. Even if not perfect, as we have argued, they potentially mark a more feasible direction of travel. For

most states, retaining a reserved position on the entire text for now will still make sense, given the lack of clarity over its full contours and content, accentuated by the tabling of two parallel texts. Nevertheless, participants should seek to volunteer constructive suggestions around them as well as on how other elements of the 2021 Third Revised Draft, which the new cluster of clauses have not addressed, should be amended to align with their ethos.

A gateway to more effective multi-level governance?

Given undeniable pressures on states to maintain a 'friendly' environment for businesses and investors, a maximalist approach to drafting a UN business and human rights treaty might initially seem attractive. Yet for the very same reasons, getting states to commit to a regime that is both comprehensive in subject matter and deep-reaching, in terms of immediate domestic implications, may be practically elusive, particularly given the nascent character of norms and techniques in various areas of business and human rights regulation.

A potentially more feasible approach, given this, might be a framework-style business and human rights convention. Similar to Ecuador's latest proposals, this might encompass agreement on essential minimum standards as well as clear obligations on states parties to uphold them. Yet, permitting greater diversity in terms of approaches to implementation, it might also facilitate identification and incremental enhancement of best practice. Potential merits of this approach, in addition, might include enhanced scope for adoption of different kinds of subordinate instruments going beyond Protocols to model laws, formal and informal guidance, as well as for articulation with business and human rights norms generated in other forums.

For these reasons, we suggest, reflection on the virtues of a framework approach remains salient. More work is surely needed to evaluate the strengths of framework approaches, as currently pursued in relation to global plastics regulation, for instance, and how these might be captured for a UN business and human rights treaty, while avoiding their weaknesses. Art. 15(5) of the Third Revised Draft establishing the Conference of the Parties' competence to further develop the instrument could be built on to this end.

Any technical or advisory formation that is now established to support the 'Friends of the Chair', should properly explore such matters. Proponents of stronger international rules should consider if an approach, by incrementally building and codifiying consensus, may ultimately be a more sustainable and widely supported way to protect human rights. Here, the respective openness and pragmatism shown by the German Opening Statement on the negotiations might prove to be the right course.

The Chair's proposals, at any rate, have provided a new and much-needed space for consideration of such questions during the current session. As to whether they will 'make or break' the IGWG process, how states and stakeholders react to them now and in the next weeks will tell.