

Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty

Claire METHVEN O'BRIEN* 

Keywords: IGWG, Treaty, UNGPs, Business, Human rights, Resolution 26/9, Transnational corporations

I. INTRODUCTION

The United Nations' (UN) open-ended intergovernmental working group (IGWG) on transnational and other business enterprises with respect to human rights ('Working Group')¹ convened for its fifth session on 14–18 October 2019. This article outlines the background to the session and provides a preliminary summary of the proceedings.² It highlights emerging issues, reflects on progress achieved and concludes with brief remarks on the process ahead.

II. BACKGROUND

The Working Group was established by the UN Human Rights Council in 2014, 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.³ The mandate was controversial, polarizing emerging economies, including China and Russia, and industrialized states. The Permanent Representative of Ecuador, the resolution's main sponsor,⁴ was elected to the role of Chairperson-Rapporteur, a role Ecuador has retained subsequently.

* Danish Institute for Human Rights, Copenhagen, Denmark. This article does not necessarily reflect the views of the Danish Institute for Human Rights.

¹ Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx> (all websites last accessed 30 October 2019).

² Written versions of oral statements made by all states were not available in English at time of writing this note. See <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>.

³ Human Rights Council, Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (Res 26/9), A/HRC/26/L.22/Rev.1 (25 June 2014), para 1.

⁴ South Africa was co-sponsor.

The Working Group's first two sessions were intended to address the 'content, scope, nature and form of the future international instrument'.⁵ Broadly speaking, discussions in 2014 and 2015 covered this ground, albeit beset by interlinked diplomatic and procedural disagreements. The most prominent of these, at the first session, turned on whether 'other business enterprises' should be interpreted as extending only to those businesses besides transnational corporations (TNCs) with 'a transnational character in their operational activities'⁶ or, as maintained by the European Union (EU) amongst others, and in line with the approach of the UN Guiding Principles on Business and Human Rights (UNGPs),⁷ as encompassing 'all business enterprises'. Given their mixed attitudes towards the mandate, participation by states during this period was low.⁸

Resolution 26/9 further directed the Chairperson-Rapporteur to identify the key 'elements' of a draft legally binding instrument as a basis for 'substantive negotiations' during the Working Group's third session.⁹ While it attracted the highest level of state participation in the IGWG process,¹⁰ late circulation of the 'draft elements' paper¹¹ led to the reprise, at the third session of previous general exchanges of views, rather than the substantive negotiations called for.¹²

Nonetheless, in July 2018 the Chairperson-Rapporteur published a 'Zero Draft' treaty (ZD)¹³ and draft optional protocol providing for the establishment of 'National Implementation Mechanisms' and an individual communications procedure.¹⁴ Interventions by states and other actors at the Fourth Session in October 2018 disclosed wide-ranging reservations to the specifics of the text, as well as enduring divisions on basic parameters,

⁵ Res 26/9, para 2. See further on the Working Group's first two sessions, Humberto Cantú Rivera, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40(3) *University of New South Wales Law Journal* 1200.

⁶ Footnote 1 to Res 26/9 provides that 'Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law'.

⁷ *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011), Annex, adopted by the UN Human Rights Council: *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th session, 33rd meeting, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011; hereafter 'UNGPs').

⁸ In 2014, 59 states attended on the first day but only 35 remained midweek: Carlos Lopez and Ben Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session' (2015) 1 *Business and Human Rights Journal* 111.

⁹ Res 26/9, paras 5 and 6.

¹⁰ According to the Chair-Rapporteur, 99 states participated during the third session, compared with 60 at the first session, 80 at the second, 92 at the fourth, and 89 at the fifth: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>.

¹¹ 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', Chairmanship of the OEIGWG established by HRC Res A/HRC/RES/26/9 (29 September 2017).

¹² Douglas Cassel, 'The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2018) 3 *Business and Human Rights Journal* 277.

¹³ Zero Draft, 16 July 2018, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises,' <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (hereafter 'ZD')

¹⁴ 'Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', available at: <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgoontnc.aspx>.

such as the scope of human rights and the class of business enterprises to be addressed; the UNGPs' place in the instrument; and the balance to be struck between sovereignty and extraterritoriality.¹⁵

III. SUMMARY OF THE FIFTH SESSION

In July 2019, a 'Revised Draft' (RD) of the 'Legally Binding Instrument' was published, once more as an intended basis for 'direct substantive inter-governmental negotiations',¹⁶ and embodying numerous changes from the ZD.

First, the RD featured multiple additions to the Preamble, including explicit references to the UNGPs, to the principles of sovereign equality, territorial integrity and political independence of states; and acknowledgements of the contribution of business to sustainable development and to the role of human rights defenders. Second, the statement of purpose was re-oriented, giving greater emphasis to prevention, notwithstanding the retention of remediation as the primary focus overall.¹⁷

Third, the scope was revised. To avoid the question of how to define 'transnational corporation', the ZD had introduced the notion of 'human rights violations in the context of any business activities of a transnational character'. Further relaxing the focus on TNCs, the RD's scope was extended to 'all business activities, including particularly but not limited to those of a transnational character'. In addition, on scope, the ZD's proposed restriction to 'for-profit' business activities was not sustained.¹⁸

Fourth, the ZD's reference to 'all international human rights and those recognized under domestic law' was substituted by a reference to 'all human rights'.¹⁹ Fifth, while the ZD assumed that states can ensure that companies, in turn, can always prevent human rights abuses linked to their business activities through the performance of due diligence,²⁰ the RD refers rather to a state duty to 'regulate effectively the activities of business enterprises within their territory or jurisdiction'. Sixth, the RD sought to connect the scope of the business responsibility to respect human rights to 'contractual relationships'.²¹

In line with the 'Programme of Work',²² in format the fifth session consisted of introductory expert commentaries to the RD's draft articles, then interventions by states, international organizations and other stakeholders. State participation was on a

¹⁵ UN Human Rights Council, fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Oral Statements, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

¹⁶ 'OEIGWG Chairmanship Revised Draft 16.7.19, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

¹⁷ RD, Art 2; cf. ZD, Art 2.

¹⁸ RD Art 3; cf. ZD, Art 3.

¹⁹ ZD Art 3(2); cf. RD, Art 3(3).

²⁰ ZD Art 9, 9(2); cf. RD, Art 5.

²¹ RD, Art 5(2).

²² Updated Draft Programme of Work, Open-ended intergovernmental working group for the elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect

par with 2018.²³ Major economies such as China, Brazil, Russia and Mexico intervened across the session albeit other large states remained absent, notably the United States, Japan, Canada, Australia and Turkey. Participation by other regionally significant states such as Nigeria and Indonesia was marginal. The EU was present throughout, its input, however, was still limited to an initial general statement. By contrast, civil society participation, as previously, was strong, and business associations and labour unions were both represented.

Opening the session, the UN Deputy High Commissioner for Human Rights praised the RD as a ‘solid basis’ for substantive negotiations.²⁴ Yet few states publicly identified with this view.²⁵ Some opening statements complimented the RD for acknowledging and seeking greater alignment with the UNGPs, and for extending the class of businesses addressed.²⁶ More, however, signalled reservations to the RD’s overall purpose and form, as well as concerns deriving from specific provisions, including the following:

- i. Multiple inconsistencies across the text with general principles of international law, other human rights treaties and international legal instruments, and ‘inaccuracies’²⁷ relating to matters such as jurisdiction and legal responsibility.
- ii. An overly broad definition of victim, given Article 1(1)’s references to alleged victims and victims’ relatives.
- iii. The applicability to ‘all human rights’ under RD Article 3(3): while apparently scaling back the instrument’s scope of application by comparison with the ZD, states still found this formulation unclear given the failure to link it to specifically declined human rights instruments.
- iv. The overall scope and description of the state duty to protect, also suggested as over-extensive, particularly from the point of view of TNC ‘home states’, and the potential for jurisdictional conflicts arising therefrom.²⁸
- v. An overly prescriptive approach as illustrated, for instance, by the RD’s provisions on the abolition of statutes of limitations, establishment of criminal corporate liability and reversal of the burden of proof,²⁹ as well as those requiring the enactment by states of legislation requiring human rights

to human rights, Resolution A/HRC/26/9, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/pow.pdf>.

²³ Albeit attendance on the first day, at 51 states, was not higher than in 2015: cf. Lopez and Shea, note 8.

²⁴ Human Rights Council, ‘Draft report of the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’, UN Doc. A/HRC/43/xx, available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>.

²⁵ See statement of, e.g., Brazil; cf., e.g., statements of South Africa and India.

²⁶ See, e.g., statements of Brazil, Switzerland, Mexico, EU and Peru; few states called for a retrenchment of scope to TNCs (e.g., Cuba, South Africa) while some previously taking this position appeared more muted in their critique (e.g., China, India).

²⁷ Opening statement of Mexico.

²⁸ Compare, e.g., RD Articles 4, 5, 6–9. See further Claire Methven O’Brien, ‘The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A rebuttal’, (2018) 3(1) *Business and Human Rights Journal* 47.

²⁹ The United States suggested that the RD pursued an unworkable ‘one-size-fits-all approach’: ‘The United States Government’s Continued Opposition to the Business and Human Rights Treaty Process, October 16, 2019’, No. 053-19.

due diligence by all business enterprises,³⁰ criticised as failing to afford states sufficient discretion as to the manner in which they might choose to discharge the duty to protect.³¹

- vi. An assumption that human rights abuses or violations and ‘harm’ are co-extensive, and that the latter should automatically trigger international legal responsibility, whether of businesses or states.
- vii. Linkage of the scope of the corporate responsibility to undertake due diligence to contractual relationships, entailing a retreat from the level of required protection indicated by the UNGPs.
- viii. The elision of environmental rights and international humanitarian law with human rights across the RD.
- ix. Inadequate differentiation of various forms of corporate involvement in human rights abuses and their corresponding legal consequences.³²
- x. Uncertainty over the instrument’s ultimate regulatory purpose, where states’ suggestions ranged from ‘filling gaps’ in the existing normative framework, enhancing protection and ensuring a ‘level playing field for companies globally’, coordinating ‘the promotion of development and human rights’, and aiming to ensure a ‘victims-oriented’ system of effective access to justice and remedy.

Finally, some states questioned the instrument’s overall political and diplomatic viability.³³

IV. LOOKING AHEAD

To date, the IGWG process has canvassed a kaleidoscopic range of approaches to regulating business and human rights in the international legal sphere. It would seem reasonable to ask, however, whether the time has come to distinguish more deliberately the plausible from the merely possible, and to narrow down options, in light of the constraints implied by the choice of human rights law as the regulatory medium and the UN as the legislative forum. In this context, States’ views as expressed in their interventions at the Fifth Session should be seen as richly informative.

Further reflection is needed, in addition, on how a future business and human rights treaty can harness the resources already invested by governments, businesses, civil society and others in the three-pillar Framework and UNGPs. Even states currently opposed to a treaty remarked during the fifth session on measures they had taken to implement the UNGPs, for instance via National Action Plans.³⁴ A future treaty should

³⁰ RD Art 5(2).

³¹ Compare UNGP 1 (UNGPs, note 7).

³² Switzerland.

³³ For example, Opening statements of India and Mexico.

³⁴ Claire Methven O’Brien et al, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’ (2016) 1(1) *Business and Human Rights Journal* 117.

seek to reinforce, not to erase, the basis for such efforts.³⁵ Such an approach, moreover, does not deserve to be disparaged as mere ‘pragmatism’. Only a treaty that is signed, ratified and implemented by both the world’s major capital exporting economies (a group no longer confined to North America and Europe), and host states for foreign investments, can truly promise justice for rights-holders as well as effective corporate and government accountability.

Encouragingly, the Chair-Rapporteur recommended the preparation, by the end of 2019, of a compilation of concrete textual suggestions delivered by states during the fifth session, and an ‘outline of key issues’, alongside a further revised draft during 2020. Presentation of this package of materials could support a more linear, and progressive, movement towards substantive negotiations in the IGWG in future. Yet such tools can only take us so far. Ultimately, if the treaty process is to reach a positive conclusion, parties on all sides now need to show greater readiness to compromise than has been observable so far.

³⁵ Jolyon Ford and Claire Methven O’Brien, ‘Empty rituals or workable models? Towards a business and human rights treaty’ (2017) 40(3) *University of New South Wales Law Review* 1223. Claire Methven O’Brien, “Experimentalist Global Governance and the Case for a Framework Convention Based on the UN Guiding Principles on Business and Human Rights” in Matthew Mullen (ed), *Navigating a New Era of Business and Human Rights: Challenges and Opportunities under the UNGPs* (Nakhon Pathom, Article 30, 2019).