

Strengthening Protection for Human Rights Defenders in the Binding Treaty on TNCs

International Service for Human Rights

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Overview

The Open-Ended Intergovernmental Working Group on the Elaboration of a Binding Treaty on Transnational Corporations and Other Business Enterprises and Human Rights (OEIGWG) will hold its third session in Geneva on 23-27 October 2017.

ISHR has engaged in this process over the period since the adoption of A/HRC/RES/26/9, including the two previous sessions of the OEIGWG. In this regard, ISHR would like to note the efforts of the lead State, Ecuador, and express appreciation for the dialogue about means of addressing in a timely manner concerns around both substance and process.

The draft elements published on 29 September 2017 are an important opportunity to react and bring conversations about general themes to a more practical level. In that regard, ISHR noted general attention to HRDs throughout plenary and panel discussion, focusing on their roles in both the prevention of, and accountability for, human rights violations associated with business-related activities. ISHR was, however, concerned that these discussions were not adequately reflected in the present draft elements.

ISHR and seven national-level organisations have therefore conducted the below, non-exhaustive analysis of the text and made suggestions to strengthen the potential for the Treaty language to advance the recognition and protection of human rights defenders working in the area of corporate accountability.

Preamble

We welcome the inclusion of the UN Declaration on Human Rights Defenders (UNGA Res. 53/144) as a key reference document.

We are, however, very concerned about the language privileging national sovereignty, non-interference in domestic affairs, and integrity of domestic law. It appears first here, and then throughout the document. This is an overarching issue in principle, but in practice could pose significant threats specifically to human rights defenders (HRDs). National laws which are incompatible with international human rights law and the Declaration on Human Rights Defenders are used to target and criminalise HRDs for their work. In some countries, HRDs are charged, prosecuted and imprisoned for national security-related crimes, including working with foreign powers to 'interfere in internal affairs'.

Principles

The Principles should recognise the vital role played by HRDs in promoting compliance with human rights obligations, and securing access to remedy, in the field of business and human rights.

The language could be further strengthened as follows:

- Recognition of special protection to victims and particularly to indigenous peoples; women; girls and children; persons with disabilities; refugees, or any group considered vulnerable according to national, regional or international applicable regulations.
- Recognition of special protection to victims and particularly to indigenous peoples; women, including women human rights defenders; children; persons with disabilities; refugees, or any other vulnerable group

Additionally, language echoing the Vienna Declaration and Programme of Action (VDPA) is welcome. It emphasizes the indivisibility and interdependence of all human rights. Efforts to alter language from the consensus-based language of the VDPA would risk undermining not only this consensus, but also those underlying principles of universality.

Obligations of States

We urge States members of the Working Group to push for inclusion of an obligation requiring States to take all legislative, administrative and other measures as are necessary to ensure a safe and enabling environment for the work of HRDs in the field of business and human rights, and in particular in efforts to guarantee access to remedy.

This is fully in line with States' commitments through the UN Human Rights Council, including its resolutions 24/21, 27/31, 31/32 and 32/31 on Civil Society Space and Human Rights Defenders. It is also a component of States' obligations under the International Covenant on Economic, Social and Cultural Rights, as per the Committee's General Comment 24, adopted at their 61st session in May-June 2017.

In the carrying out of HRIsAs and ESIsAs, States should ensure the full, transparent and informed participation of civil society organisations and defenders working in the affected area and in relation to business and human rights issues. State requirements for periodic reporting and disclosure of human rights policies and procedures should be made more clear, and include specifically indicators related to the protection of human rights defenders (as modeled in, for example, the Corporate Human Rights Benchmark).

Obligations of TNCs and OBEs

We strongly believe that these elements must recognise the important role – both positive and negative – that business enterprises can play with regard to defender protection.

To state companies ensure 'compliance with applicable laws and respect for internationally-recognized human rights' can create a contradiction when, for example, States pass laws specifically intended to suppress expression of rights and fundamental freedoms, or simply fail to protect fully the rights stemming from their international obligations and commitments. In the area of business and human rights, for example, freedom of association is a linchpin, both for practice and in many corporate policies. Yet companies continue to operate in jurisdictions, which fail in part or in full to allow workers' and other associations to function freely.

The elements should outline obligations for TNCs and OBEs, directly or as enforced through State regulation, to fully respect human rights and uphold a 'do no harm' principle. This should include:

- refraining from interfering with the work of CSOs and HRDs
- exerting influence to ensure that the privileged position of companies supports changes in law that would expand rights protections and enhance the rule of law
- speaking out when countries adopt or implement restrictive laws and policies that target HRDs and have a deleterious effect on the overall environment for civic space and fundamental freedoms.

Preventive Measures

States should ensure that TNCs and OBEs, in the conduct of due diligence policies and procedures, are required to engage meaningfully and transparently with CSOs and HRDs in the conduct of due diligence policies and processes. ‘Subsidiaries’ in the second paragraph should be read to include domestic enterprises operating as subsidiaries, to ensure the broadest scope for protection and the prevention of a two-tiered system of TNCs and OBEs (‘with transnational nature’) and domestic businesses.

Access to remedy

This section should reflect the most recent discussions of access to remedy, including by the UN Working Group on Business and Human Rights and the OHCHR Access to Remedy Project; currently, the only reference is to a UNDP document from 2004, which is insufficient. While some of the concerns raised in the section arise from State policies, many of the gaps – for example in legal aid, legal representation, and de facto protection – are frequently filled by human rights defenders. In this regard, the section should clearly identify an enabling environment for and the recognition and respect of human rights defenders as central to effective efforts to improve access to remedy (for example, through public interest litigation and the filing of class-action law suits, in the case of lawyers).

However, for this work HRDs are also stigmatized, harassed and attacked. Therefore, they should be considered to be covered by the term ‘any group considered vulnerable’ and the language related to ‘according to nationally, regionally or internationally applicable regulations’ should be struck.

The language could be further strengthened as follows:

- State Parties shall guarantee access to justice and to effective remedies to every person and especially to indigenous peoples; women; girls and children; persons with disabilities; refugees; or any group considered vulnerable according to nationally, regionally or internationally applicable regulations, taking into account their specific reality, circumstances and culture. (original)
- State Parties shall guarantee access to justice and to effective remedies to every person and especially to indigenous peoples; women, including women human rights defenders; children; persons with disabilities; refugees; or any other vulnerable group.

The following paragraph contains a critical point, and should at minimum be retained. The draft elements would greatly benefit from a strengthened formulation, as follows:

- State Parties shall adopt adequate measures to guarantee the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers, as well as proper assistance, including inter alia, legal, material and medical assistance, in the context of human rights violations or abuses resulting from the activities of TNCs and OBEs throughout their activities.
- State Parties shall take all necessary measures to guarantee the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers, as well as proper assistance, including inter alia, legal, material and medical assistance, in the context of human rights violations or abuses resulting from the activities of TNCs and OBEs throughout their activities. State Parties shall also guarantee the rights to freedom of expression, association, assembly, participation in public affairs, and access to information; the promotion, protection and fulfilment of these are essential to identify, remedy and ensure accountability for business-related human rights violations or abuses.

Safe, inclusive and accessible mechanisms for promotion, implementation and monitoring

We believe that a robust consultation with CSOs and HRDs in the process of promoting, implementing and monitoring State compliance with any treaty will be essential to its success. Were the treaty to provide various options to States parties in terms of national mechanisms, States should be requested to designate national mechanisms following open, transparent and inclusive processes which should integrate the views of all relevant stakeholders, especially human rights defenders.

Some of the most recent UN human rights treaties, namely the Optional Protocol to the UN Convention against Torture and the UN Convention on the Rights of Persons with Disabilities, foresee the establishment of national mechanisms. An increasing number of countries are also establishing National Mechanisms for Reporting and Follow up (NMRF) to facilitate the national domestication, and implementation of UN human rights treaties.

- a) The OEIGWG should carefully consider and assess existing forms of national mechanisms for promotion, implementation and monitoring within treaty bodies, as well as other international and regional human rights mechanisms.
- b) NHRIs can be important tools for assisting in this work, when they are in line with the Paris Principles and able to operate independently in their role. This should be emphasized.

Any Committee established by a treaty on TNCs and OBEs should be in line with best practices among treaty bodies with regard to independence and preventive approaches. In particular, the OEIGWG should strive to ensure that language in any Treaty addresses the issue of reprisals for any for of cooperation with the Committee or other relevant UN bodies in respect of the Treaty. Models for this language include the following:

From OP-ICESCR (Art. 13) and OP-CRC-IC (Art. 4(1)): A State party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee pursuant to the present Protocol.

From CAT (Art. 13): Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.