



University of Dundee

Claire Methven O'Brien, Submission to United Nations Open-Ended Inter-governmental Working Group on Business and Human Rights: Draft text for framework convention on business and human rights (2021)

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Note submitted to the IGWG on a Revised Draft Text for the Business and Human Treaty

Summary

The accompanying document proposes a revised and updated Draft Text for a binding international treaty on business and human rights, drawing on the draft text I published in 2020.¹

In its structure, the 2021 Draft Text resembles existing international conventions, such as the UN Framework Convention on Climate Change and WHO Framework Convention on Tobacco Control. There are thus established legal and diplomatic precedents for the adoption of this approach.

In addition, this 2021 Draft Text reflects a number of revisions to my 2020 Draft Text. The main goals of these revisions are:

- To increase alignment with and reflect elements and concerns of the IGWG 2nd Revised Draft
- To further strengthen the potential of the 2021 Draft Text to win support from states who support the UN Framework and UNGPs but whom have not actively supported or participated in the IGWG process, and thereby
- To provide a basis on which such states can enter active negotiations, accelerating diplomatic progress to deliver a binding treaty on business and human rights.

Advantages of the 2021 Draft Text

- Explicit alignment to UN Framework and UNGPs building on the IGWG 2nd Revised Draft.
- Scope for increased cross-regional and cross-stakeholder support, given wide support for the UNGPs, including by states/blocs which have not yet actively participated in the IGWG process.
- Amenability to wide signature and ratification by avoiding expressing *at the level of international obligations* detailed prescriptive rules addressed to domestic legal systems that states, due to their diverse domestic arrangements, may not be able to accept; such matters may however be addressed via subordinate instruments, model laws or formal guidance.
- Flexibility to address future as well as present business and human rights challenges.
- Focuses on securing consensus around broad principles, on which more detailed rules can be built later.
- De-couples progress towards an LBI on business and human rights from the resolution of difficult and unclear issues in public international /international human rights law (e.g. shared responsibility, extraterritoriality).

A. Summary of changes between my 2020 and 2021 draft treaty texts

Preamble

- The new Preamble adds further elements mirroring concerns expressed in existing international human rights treaties; the UN Framework and UNGPs and associated HRC resolutions; the IGWG mandate and 2nd Revised Draft.

Definitions (Art 1)

- The definitions section is deliberately modest. There are a number of reasons for adopting this approach. Other human rights instruments do not generally provide for definitions, and their operation has not suffered as a result. Definitions in framework conventions or human rights treaties are generally limited to a few technical terms (cf. UN CPRD, Art 2). Some terms in the business and human rights domain are notoriously hard to define (e.g. TNC, MNE, transnational business

¹https://www.researchgate.net/publication/342590903_Draft_text_for_business_and_human_rights_treaty_June_2020_Claire_Methven_O%27Brien

activity). Definitions have also proved highly contentious during IGWG discussions over the last years.

- “Businesses” is however defined to clarify that all businesses, not only TNCs are within the treaty’s scope, in line with the position reached by the IGWG 2nd Revised Draft, and to ensure non-regression from the level of protection envisaged by the UNGPs. The text of the definition included here is derived verbatim from the UNGPs, so should not prove contentious.

Objectives (Art 2)

- I have fine-tuned the language of my 2020 Draft Text to align further with the IGWG 2nd Revised Draft, as indicated in footnotes.

General obligations (Art 3)

- A new clause 3(2) has been added in my 2021 text to align with the main substantive goals and concerns of the IGWG 2nd Revised Draft.
- A new clause 3(4) has been added in my 2021 text to incorporate elements found in Art. 13 of the IGWG 2nd Revised Draft; and to reinforce the treaty’s potential to address emerging threats.
- The obligations in Article 3(3) of my 2021 text should be acceptable to states, also those supportive of the UNGPs who have not participated actively in the IGWG process.

General principles (Art 4)

- The UN Framework and UNGPs would be attached to the main treaty text via an Annex. Additional Annexes could be adopted subsequently: the UNGPs need not remain the “last word” in the definition or further articulation of state duties or corporate responsibilities under this treaty.

Guidelines

- It is suggested that *three draft Guidelines* could be presented at the IGWG’s 7th Session in October 2021, alongside a 3rd Revised Draft Text. In line with the main concerns of the 2nd Revised Draft, such Draft Guidelines could address: Rights of Victims; Implementation of Pillar II; Access to Remedy.
- This would conserve the emphasis and analysis undertaken through the IGWG process around these issues. By addressing these areas through Guidelines, however, the overall goal of securing a treaty on business and human rights would not be ‘held hostage’ to the very difficult (perhaps technically impossible) task of identifying universal rules applicable across all states’ domestic legal systems that still add value for victims. What is needed, rather, is a more individualised scrutiny of the gaps and weaknesses in single states, in terms of facilitating access to remedy nationally and transnationally – which the framework approach would facilitate.

Technical provisions

- Various technical clauses from the IGWG 2nd Revised Text have been incorporated.
- An independent expert treaty body is not explicitly provided for but could be established by the Conference of States Parties (Art.7).

B. Process

UN HRC Res 26/9 would provide a sufficient basis for the IGWG Chair to table a text along lines proposed here, as a basis for an inclusive compromise across states and stakeholders.

Claire Methven O’Brien, 14 July 2021