**SUBMISSION TO UN OPEN ENDED INTER-GOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS & OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS**

***For a business and human rights treaty based on progressive national implementation of the UNGPs and modelled after the WHO Framework Convention on Tobacco Control***

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1. **INTRODUCTION**

Despite growing consensus on the need to ensure business respect for human rights, opinion remains divided on how best to achieve this goal. While some, for example, advocate an international treaty to establish a new “hard” law regime, others urge the need to focus, instead, on implementing the “soft” standards that we already have, in the form of the UN Guiding Principles on Business and Human Rights (UNGPs).

To cut this Gordion knot, this submission argues for a business and human rights framework convention, modelled after the WHO *Framework Convention on Tobacco Control* and focused on promoting progressive implementation of theUNGPs, including via National Action Plans on business and human rights (NAPs). The submission first outlines the positive factors favouring such an approach. Secondly, it provides a brief sketch of what such a business and human rights framework convention might look like. Finally, it highlights some of the drawbacks of alternative treaty models.

1. **FACTORS IN FAVOUR OF A UNGP-BASED FRAMEWORK CONVENTION**

Amongst factors favouring a business and human rights framework convention to promote progressive implementation of the *UN Guiding Principles on Business and Human Rights* (UNGPs), including via NAPs, are the following.

1. **Existing support for the UNGPs and NAPs**

The UN Human Rights Council,[[2]](#footnote-2) as well as the European Union[[3]](#footnote-3) and Council of Europe[[4]](#footnote-4), have endorsed the UNGPs. They have also addressed requests to their member States to develop NAPs, and NAPs-related processes in which governments, business, civil society organisations, national human rights institutions and other stakeholders are actively involved are now underway in approximately forty countries worldwide, an impressive implementation effort in the short space of time since 2011 that ranks favourably by comparison with any human rights treaty. [[5]](#footnote-5) Many businesses, in addition, have committed to support the UNGPs and have embarked on efforts towards their internal implementation. These developments represent a significant investment of scarce resources across society that should be built on and incorporated into any future norm-making endeavour.

1. **Subsidiarity in business and human rights regulation**

If business and human rights norms are to be truly effective, they should penetrate every area of national policy, from food to finance, corporate governance to court procedure. Yet the details of existing domestic regulations in such areas embody balances often carefully struck between competing interests and arguments, as well as countries’ legal, institutional, historical and political particularities, which international rules and institutions may be ill-suited to overturn.

Moreover, the resulting diversity of national arrangements means that there is an inverse relationship between the specificity and applicability of international rules: the more detailed prescriptions a business and human rights treaty might make (for instance, defining the specific class of companies obliged to do due diligence) the less likely it becomes such rules can or will be universally implemented; while binding rules that are universally valid tend to add little to existing high-level norms (in this case, the UNGPs) or represent “lowest common denominator” positions.

Hence it is at the national level that detailed business and human rights rule-making should occur, informed by local contexts and priorities, but within a global framework of universal principles, in this case, the UNGPs, that can be interpreted in a way that is responsive to both a dynamic global business environment and evolving human rights discourse.

1. **A platform for policy learning and cross-fertilisation**

Because of the novelty and complexity of the business and human rights agenda, knowledge on “what works” in terms of regulatory techniques and legislative models is still emergent and sparse. Some countries have embarked on experimentation (for example, in the areas of supply chain responsibility and transparency) but we still lack a firm evidence-base on which to judge the relative strengths and weaknesses of the specifics of different approaches, much less which are the definitive “successes” and “failures”.

Accordingly, diverse national experiences represent invaluable “raw data” which may valuably inform the gradual definition, over time, of universal norms and goals. Rather than imposing, now, a single model of business and human rights regulation, across the board, a framework convention, to which additional thematic protocols can be later appended, would allow policy innovation to continue to flourish, in line with new issues, risks and technologies, as they develop.

At the same time, NAPs and a structured review process based on them would render much more visible countries’ various efforts, and their respective shortcomings and virtues, than they are at present, promoting and accelerating convergence around those capable of delivering the best results.

1. **Strengthening institutional capacity and sustaining stakeholder engagement**

Without active local support and engagement from both rights-holders and duty-bearers, the advancement of human rights proceeds falteringly, if at all. While the “message from the top” is important, ultimately, effective enjoyment of human rights requires that subordinate levels of public and private institutions gradually absorb their values into formal rules and procedures and well as informal scripts and practices.

Inclusive, participatory and deliberative NAPs processes should create multi-site, repeat opportunities to strengthen the buy-in, knowledge and capacities of national and local actors on business and human rights; to engender new cross-actor networks and partnerships; and, where affected communities and workers and their representatives are adequately involved, to let those whose rights have been abused claim their rights and speak truth to power.[[6]](#footnote-6)

By contrast, and though the picture may in some respects be improving, existing human rights treaty implementation processes have too often given precedence to form over substance, failing sufficiently to involve the actors who should be their principal concern.[[7]](#footnote-7) A NAPs-based treaty, therefore, presents a golden opportunity, which should be seized, to extend the circle of active participants in business and human rights implementation efforts, and their scrutiny, in much needed ways.

1. **SKETCH OF A BUSINESS AND HUMAN RIGHTS FRAMEWORK CONVENTION**

Taking inspiration from the WHO *Framework Convention on Tobacco Control*,[[8]](#footnote-8) a business and human rights framework treaty built around the UNGPs and NAPs could comprise the following amongst its main elements:

1. ***Clause on relationship between the Convention and other agreements and legal instruments***, for example: “In order to promote implementation of UN Framework on Business and Human Rights, Parties are encouraged to implement measures beyond those required by this Convention and its Protocols, and nothing in this instrument shall prevent a party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law”
2. ***Statement of overall objective***, for example: “To promote the effective implementation of the state duty to protect, the corporate responsibility to respect and the right to effective remedy with regard to business activities, by providing a framework of measures to be implemented progressively by the Parties at the national, regional and international levels”
3. ***Statement of Guiding Principles***, for example: “To achieve the objective of this Convention and to implement its provisions, the Parties shall be guided by and promote the UN Guiding Principles on Business and Human Rights, set out below…”
4. ***Statement of states parties’ general obligations***, for example:
   1. Each Party shall develop, implement, periodically update and review comprehensive multisectoral national action plans on business and human rights, in accordance with this Convention and the protocols to which it is a Party.
   2. Towards this end, each Party shall, in accordance with its capabilities:
      * Establish or reinforce and finance a national coordinating mechanism or focal points on business and human rights
      * Adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing, and enhancing effectives access to remedy in relation to, business-related human rights abuses
   3. The Parties shall cooperate in the formulation of proposed measures, procedures and guidelines for the implementation of the Convention and the protocols to which they are parties
   4. The Parties shall cooperate, as appropriate, with competent international and regional intergovernmental organisations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties
   5. The Parties shall, within means and resources at their disposal, cooperate to raise financial resources for effective implementation of the Convention through bilateral and multilateral funding mechanisms.
5. ***Development of the Convention***: provisions allowing for the amendment of the Convention and adoption of annexes to the Convention, such as protocols or other procedures.

Within this architecture, states parties could, as they have done under the Tobacco Convention, adopt additional protocols addressing specific issues (for instance, business involvement in human rights abuses amounting to violations of international criminal law, measures to promote or require human rights due diligence and corporate human rights reporting), as well as more detailed general guidelines for implementation, in line with demand from stakeholders and insights on effective practices, as these emerge.

1. **DRAWBACKS OF OTHER TREATY MODELS**

A further advantage of a framework convention based on progressive implementation of the UNGPs is that it avoids a number of pitfalls affecting other treaty proposals.

1. **Duty of home states to regulate extraterritorial activities of transnational corporations**

Although it has been suggested that a treaty could oblige home states to protect against the human rights impacts of transnational corporations (TNCs) abroad,[[9]](#footnote-9) there is no settled basis in international human rights law for such a duty,[[10]](#footnote-10) and principles for apportioning the respective contributions of home and host states, or other actors, as joint tortfeasors, to international law violations are also currently lacking.[[11]](#footnote-11) Treaty models incorporating this element might thus in practice fail to deliver effective remedies to victims through legal uncertainty, while such a duty could also “open the floodgates” to cases for whose adjudication any new treaty body, or indeed existing ones, would not be well-suited or sufficiently resourced in practice. Finally, in the present climate of “re-bordering”, with the supervisory mandates of many human rights bodies being questioned, the extension of new and wide-ranging extraterritorial human rights duty on states would seem unlikely to be able to secure political backing.

1. **Direct human rights duties of TNCs**

Another suggestion is that a treaty should establish a duty to respect, protect and/or fulfil human rights directly on TNCs.[[12]](#footnote-12) While TNCs and other business enterprises can impact on the enjoyment of most human rights, fixing them with duties for their protection and fulfilment is not appropriate. The whole jurisprudence of human rights assumes a state duty bearer, with all its formal powers, institutions and resources, in assessing victims’ claims and extending this jurisprudence to corporations is not possible without doing violence to the conceptual fabric and holistic logic of human rights as it has evolved over time. Few amongst treaty proponents would, moreover, wish to mandate any greater role for TNCs in the delivery of public services than they have secured to date, while besides, efforts to secure legal remedies against TNCs face challenges on grounds of attribution and causation parallel to those mentioned in relation to states, not to mention the obstacle of the corporate veil.

1. **A treaty restricted to “gross” human rights violations**

Another option canvassed would be a treaty addressing corporate involvement in abuses rising to the level of international criminal law, such as war crimes, crimes against humanity, slavery or forced labour. Although its narrower scope makes such a treaty more viable from the perspective of legal certainty, it would at the same time fail to capture corporate involvement in broader civil, political, economic and social rights abuses, while the obstacles to proving criminal intent on the part of simple business entities have been amply demonstrated in the domestic context with regard to offences such as corporate manslaughter.[[13]](#footnote-13) Though not without potential value, as an isolated measure, then, such an initiative would seem unlikely to bring about the sought-after scale of change.

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2. Human Rights Council, ‘Human Rights and Transnational Corporations and Other Business Enterprises’, A/HRC/RES/26/22 (15 July 2014). [↑](#footnote-ref-2)
3. European Commission, ‘A Renewed EU Strategy 2011–14 for Corporate Social Responsibility’, COM (2011) 681 final (25 October 2011). [↑](#footnote-ref-3)
4. Recommendation CM/Rec (2016)3 of the Committee of Ministers to member States on human rights and business *(Adopted by the Committee of Ministers on 2 March 2016* *at the 1249th meeting of the Ministers’ Deputies).* [↑](#footnote-ref-4)
5. <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>. See further C. Methven O’Brien *et al*, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’, 1(1) *Business and Human Rights Journal* (2015), pp.117-126. [↑](#footnote-ref-5)
6. DIHR and ICAR (C. Methven O’Brien *et al.*)*,* *National Action Plans on Business and Human Rights - A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (DIHR/ICAR, 2016). [↑](#footnote-ref-6)
7. J. Ford, ‘The Risk of Regulatory Ritualism. Proposals for a Treaty on Business and Human Rights’, GEG Working Paper 118, April 2016; M O’Flaherty and C Methven O’Brien, ‘Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body’, (2007) 7 *Human Rights Law Review* 141. [↑](#footnote-ref-7)
8. See <http://www.who.int/fctc/en/> . [↑](#footnote-ref-8)
9. O. De Schutter, ‘Towards a New Treaty on Business and Human Rights,’ 1(1) *Business and Human Rights Journal* (2016), pp.41-67. [↑](#footnote-ref-9)
10. C. Methven O’Brien, ‘A home state duty to regulate the extraterritorial human rights impacts of TNCs? A bridge too far’, DIHR Human Rights Research Paper (forthcoming, 2016). [↑](#footnote-ref-10)
11. See e.g. ICJ, Case concerning Oil Platforms (2003), Separate Opinion of Judge B. Simma, para.66 *et seq* and <http://opiniojuris.org/2010/09/01/apportioning-responsibility-among-joint-tortfeasors-for-international-law-violations/> [↑](#footnote-ref-11)
12. E.g. D. Bilchitz, ‘The Necessity for a Business and Human Rights Treaty’, 1(2) *Business and Human Rights Journal* (2016), pp.203-227. [↑](#footnote-ref-12)
13. See e.g. S. Tombs, ‘Still killing with impunity: corporate criminal law reform in the UK’, 11(2) *Policy and Practice in Health and Safety* (2013), pp. 63–80. [↑](#footnote-ref-13)