

Introduction

- Greetings
- It is an honour to be able to present to the Intergovernmental Working Group deliberating on a binding Business and Human Rights instrument.
- I wish to make three broad points regarding the (i) context of these discussions; (ii) the importance of norm development in international human rights law; and (iii) the benefit of this process for multinational corporations who strive to achieve human rights standards.

Context

- Currently there exists a perceived binary between the UN Guiding Principles on Business and Human Rights, on the one hand, and the pursuit of a binding instrument, on the other.
- I submit that this binary is both incorrect and destructive. The Guiding Principles, National Action Plans to implement such principles, and developments towards a binding instrument are part of a continuum of norm development that we have seen many times in international law.
 - o The guiding principles constructed a formulation to achieve human rights compliance. That was, in the words of the Former Representative of the Secretary General on business and human rights, 'the end of the beginning' and not the beginning of the end.
 - o The next step is to galvanise governments to devise and implement national action plans to ensure that there is no immunity for corporate malfeasance.
 - o National action plans are in fact the perfect precursor to the adoption of a binding instrument. Almost all international human rights instruments require states to adjust their internal laws and policies to comply with the treaty in question. This is usually done through the creation of a national action plan to become compliant with the treaty. The NAPS process, therefore, is in fact preparation for a binding instrument.
- Therefore, in terms of process, there is an important continuum of work from the adoption of the Guiding Principles, to the development of National Action Plans, to the adoption of a binding instrument.

- I urge the working group to work hard and swiftly along this continuum. We should not be patient in the face of continued violations. For in our delay, we are complicit.

Importance of norm development in international human rights law

- In addition to the integrity of a continuing process I describe above, there are important substantive principles regarding the development and specification of norms in international human rights law.
- One of the questions that arises in the debate about a binding instrument is whether international law needs to be developed at all to harness and address the harm caused by some multinational corporations. The answer is yes.
- We are all acutely aware of the 'governance gaps' caused, in part, by the income inequality between the so-called Global North and Global South. And while the Guiding Principles impose obligations on all states to protect against corporate abuses, this injunction does not take into account the reality of certain developing states' need to attract foreign direct investment by keeping their labour costs low and their regulatory systems weak.
- This creates a gap – the cause of which may be the subject of much debate – but the result of which is that hundreds of thousands of people experience human rights violations with no access to justice.
- So the development of international law is necessary if we are serious about attenuating human rights violations that remain unaddressed because of this gap.
- There is precedent for such norm development and specification in international law.
 - o A key example is the Convention on the Elimination of all forms of discrimination against women (CEDAW). For decades prior to the adoption of this convention, the international community resisted the development of a women's convention on the basis that the existing international human rights framework was sufficiently generic to ensure the protection of women's rights.
 - o Through the development of reasoned principles and arguments, the international community finally agreed that the human rights violations experienced by women at the hands of both state and non-state actors, was similar to – and different from – the experience of men. There was thus a need for the specification of such violations, with the concomitant identification of specific and proportionate remediation. This resulted in CEDAW.

- There are other examples: the rights of the child; the prohibition against racial discrimination and the array of binding instruments relating to the global slave trade.
- We are at such a moment where there is a need to develop specific and proportionate international law principles – both because there is a subset of people who experience the same – and different – human rights violations (namely people in the Global South) and because the harm permeates borders, allowing a mobility of transnational companies to escape liability while retaining profits – and this is one of our greatest global crises.
- The response cannot simply be one of voluntarism and encouragement. We need to move towards the highest standards of human rights protection and obligations.
- At a minimum, we need to acknowledge that the focus of international human rights law is not who is bound; but on who is protected. As a result, at a minimum this process must consider the role of the following repositories of power in causing harm:
 - o Home states with corporations operating abroad (described by De Schutter as parent based extraterritorial obligations);
 - o Host states which host the operations of multinational corporations; and
 - o Multinational corporations operating outside the jurisdiction of their home state.
- How this working group decides to approach the legal regulation of these repositories of power will be the substance of debate for the next several years. But the project of a binding instrument must acknowledge the role of all three repositories of power that contribute to a lack of corporate accountability for human rights violations.

Benefit

- Apart from the need to address governance gaps and the consequent human rights violations, it is also important to note that a binding instrument will benefit corporations and other business entities that *do* comply with human rights standards; that *do* advance social and economic wellbeing in their business operations, wherever they may be operating; that *do* address violations when they occur with the rigour that justice requires.
- But such corporations may be undermined and undercut by deviant corporations, whose operations are cheaper and harmful. This is anti-competitive and places ‘good corporate citizens’ at a disadvantage in the global marketplace.
- A binding instrument will create a level playing field where corporations compete to achieve the pinnacle of human rights protection, rather than the current status quo where the responsibility to respect may be abrogated unfairly by non-compliant multinational corporations, often with no consequence.

Be patient Mantra

Therefore continuum; importance of developing specific human rights principles; also ensure benefit for those who are human rights champions.