

Statement by Beata Faracik, Polish Institute for Human Rights and Business

at the

European Parliament Sub-Committee's on Human Rights

Session on "Business and Human Rights"

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CHECK AGAINST DELIVERY!

Dear Madam Chair, Ambassador, Members of Parliament,

I would like to express my gratitude for the invitation to this meeting and the opportunity to share my views on the most recent initiative concerning development of a legally binding international instrument on business and human rights.

Indeed, it is the more important for me, as my interest in the business and human rights, that resulted in the recent establishment of an independent think tank, the Polish Institute for Human Rights and Business, started in the stormy days of polarized discussion concerning the Draft UN Norms on Business and Human Rights, which I had opportunity to follow closely as a member of the Polish delegation to the Commission on Human Rights for several consecutive years.

It is this experience and memories that make me approach the new initiative both with eagerness, but also with caution.

I do share conviction that there is a need for stronger international legal accountability for corporate involvement in rights violations. I also share the view that not enough has been done to regulate business behaviour and ensure its accountability for human-rights related violations, as well as frustration with the slow progress of change in the attitude of business and states.

On the other hand, it is difficult not to notice that the endorsement by Human Rights Council of the Guiding Principles on Business and Human Rights (to which I will refer subsequently as GPs) has generated a wide array of implementation measures of the GPs at various levels by individual governments, the EU (through a new CSR Policy) and international organizations (OECD, IFC, ASEAN), business associations (various user guides) and civil society. Three years seems a lot, particularly for those affected adversely by business. Yet for those who had chance to experience the pace of public administration work or that of the UN, three years is

(unfortunately) not much. When we look at business – those companies that wanted to take GPs seriously could dedicate more significant budgets to it only in 2012 with the results of first attempts only starting to be more visible in 2013. Thus I am convinced that the GPs should be given more time, before one starts to assess whether they work or not.

Does it mean that we should not move forward with a binding treaty? It depends.

The GPs were not developed as a substitute for a binding treaty – rather, bearing in mind lack of clear mandate from the Human Rights Council to develop a binding document, after the failure of the UN Norms they were meant at the best to clarify the legal status quo and start the global governance processes that with time would result in ensuring respect for human rights. Their implementation and promotion is certainly not contrary to any new initiatives. One thing is certain - at the moment the vast majority of business is simply not aware of their existence and the processes as the human rights due diligence. So any work done to educate business on hr and GPs will contribute towards any potential binding treaty that might be developed.

Professor Ruggie was fully aware of the potential and limitations of the GPs, when he mentioned in his final remarks to the UN Human Rights Council in March 2011 that the endorsement of the Guiding Principles would not bring business and human rights challenges to an end, but -by providing an authoritative global normative platform and policy guidance for all stakeholder groups to build on - it would “mark the end of beginning”. Or “the first step” that provides the building blocks both in the sphere of prevention and remedy to further advance the work, in the words of the statement initiating the discussion on the binding treaty.

Key questions.

When initiating the negotiation process of the new binding instrument it is crucial to have clarity as to:

- what such instrument needs to achieve, and
- whether indeed a new, binding instrument is needed to achieve it, or whether it would be enough to apply existing mechanisms more persistently and with more dedication to achieve our goal.

The statement setting out the current initiative to develop a binding treaty delivered at the HRC session last autumn raises two main sets of issues that should be addressed by the new instrument, i.e.:

- 1) Clarification of the human rights obligations of TNCs and
- 2) Establishment of the remedial mechanism.¹

¹ Additionally, as summarized by Dr. Addo at the recent workshop (March 2014), various stakeholders expressed also expectations that the treaty will result in developing:

- a) Legal obligations to force States that have so far been reluctant or ineffective in meeting their obligations under existing human rights treaties to protect against human rights violations by 3rd actors and act towards implementation of the UN GPs , to adopt appropriate prevention and remedy policy and regulatory framework, including overcoming legal and practical barriers to judicial remedy; and

Knowing what is to be achieved it is necessary to consider also the form of such new instrument, as well as, in the first place – whether there is a real need for a new treaty, or are we simply not doing using existing tools to their full potential.

Generic treaty or a set of treaties addressing specific issues?

The statement seems to call for a general treaty on Human Rights and Business. I am rather skeptical about the need and value of a generic treaty in this area as due to complexity of issues to be covered, it is likely to take long years to develop and many more still to ratify it (as was the case of Convention on the Rights of Migrants or Optional Protocol to ICESCR), and yet will be too abstract to really have any legal bite. Hence why it might be wiser to consider development of the binding instrument(s) focused on specific issue(s). Both options however do require a thorough assessment to be conducted prior to their development to identify where the GPs have brought a change and where the gaps remain and need further clarification and strengthening in the form of a binding treaty.

Are we using the full potential of the existing mechanisms/tools?

We should not mistake the fact that not as much has been done as we would have wished since the adoption of the GPs three years ago, with the lack of means to do so. Therefore it is so important that both national parliaments and European Parliament do exert pressure and hold to account the governments of the Member states - which committed in Council Conclusions in 2012 to develop National Action Plans (NAP) for the implementation of the UN Guiding Principles on Business and Human Rights by end of 2013 but, except for a handful of countries, have done nothing towards this goal since.²

While considering whether it is the right time for a legally binding instrument, it is important to keep in mind several other issues, to make sure that our efforts to improve situation in the end do not lead to negative outcomes.

First issue to bear in mind is that the GPs derive from the current international public law standards, not least because the Secretary General Special Rapporteur on Business and Human Rights was not given the mandate by states to actually develop new ones. In this context there are two questions:

1) will there be a widespread political will to start such process now, and

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- b) Clear terms of cooperation between home and host States, especially with regards to corporate liability issues.

System that will ensure that existing bilateral and multilateral investment treaties and the arbitration courts will be obliged to take human rights obligations of states into consideration

² Poland being one of the countries where the process towards advancing – not even Human rights and business, but more generic CSR agenda, was in fact reversed with the decision of the Prime Minister to dissolve the multi-stakeholder, inter-ministerial Group on CSR, which was the sole circle in which development of NAP had been raised)

2) how the new treaty would overcome factors that impede State implementation of the already existing obligations under human rights treaties and current implementation gaps.

States have ratified the international human rights treaties and are obliged to protect against human rights violations by 3rd parties, as confirmed by human rights treaty bodies. If states were serious about their commitment, there is not much to stop them from developing relevant domestic legislation already now, without waiting for a new treaty.

Yet, even within the EU we see that many countries are doing little, despite the commitments in the strategic documents and political declarations. Furthermore, both states which already developed National Action Plans (like UK) and those who did not (like Poland), were working towards watering down the draft of the Non-financial Reporting legislation at the European level.

Second thing to bear in mind is that it should not be assumed that the GPs implementation has achieved everything it could. Certainly, the swift and widespread uptake of the GPs and their impact on international standard setting by different bodies, governments, businesses, workers' organizations and civil society is very impressive, yet, this could be misleading.

We are still in the early days of the education, awareness raising and capacity building of all actors. With regards to business, much more attention should be given to SMEs, as this group while contributing most to the economy of many states not only in Europe, often lacks resources to engage additional employer or even a consultant to assist them in weaving in human rights into their strategy and operations. They also need much more guidance – one guide by EC is not enough to address this need.

Given the low level of human rights education and CSR / Human Rights & Business awareness, more time and efforts should be dedicated to really see the results of the GPs implementation, before we start allocating our time and resources to several action areas, in an attempt to develop a more advanced instrument, when many of the actors are still not familiar with the basics.

Both companies and states need some more time to understand how human rights relate to their operations; how they can implement human rights due diligence, how to measure improvement and level of observance, etc. Luckily there is an increasing number of initiatives that will assist companies in those tasks e.g. Measuring B&HR Project Initiative from LSE. We should also ensure that current efforts, also of regulatory nature (like in the EU, e.g. non-financial reporting, regulations concerning sourcing of minerals or public procurement), are at least aligned with UNGPs and do not propose solutions that are below already existing standards (as in the case of new proposal for legislation concerning sourcing of minerals from conflict areas), but ideally go beyond.

Independent of whether work on the new treaty will start, it is crucial not to lose the current momentum that drives efforts aimed at GPs implementation. There is a risk that some actors – should the treaty negotiation process start – will use waiting for its outcome as an excuse not to do anything. Given that some – not even treaties but declarations – took over two decades to negotiate despite the fact that they addressed just one area- this can leave us in a very inconvenient situation.

My second point is closely connected to the **third one** – while there are a number of effects that GPs have spurred, there is no systematic assessment available of overall results.

Thus the direction of any further development should be based on rigorous, technical assessment and evidence of existing challenges and barriers. Before moving into regulation, we should identify where the GPs have managed to lead to major changes in policies and practices thus making the additional regulation superfluous, and where such efforts are failing short.

Fourth thing to keep in mind is that attempts to adopt a general Human Rights and Business treaty, i.e. one instrument covering all relevant dimensions, such as human rights, labour rights, anti-discrimination, tax, consumer protection, trade law, corporate law, etc, each of which has its own specifics, will most likely lead to development of a text phrased at the high level of abstraction, that hardly provides a basis for a meaningful legal action and thus of hardly any additional value.

There are several issues linked here:

- Who would decide of the violation? States or a new international court for companies? Let me recall that at least over the last two decades there are recurring ideas concerning creation of the World Court for Human Rights coming from well-established academics, and yet I am not aware of any State that has seriously entertained this area;
- Companies are creations of national law – regulating them in an international treaty that would also address obligations of states will be quite tricky, particularly when mixed with enforcement measures.

Additionally, there is an issue of enforcement – which is one of the main shortcomings of the current system. If the states are reluctant to act now will they be ready to cede their powers to allow someone else to decide the fate of their own companies? If they were ready to do so, we would have much more efficient system of NCP OECD.

But if not general Human Rights and Business treaty, then perhaps worth considering would be development of issue-specific binding instruments and solutions around which there is a large degree of consensus.

OHCHR and UN WG seem to be moving into this direction with an effort to assess the legal and practical barriers to effective judicial remedy in the context of gross human rights abuses. Another area in need of clarification is an issue of extraterritorial jurisdiction and

extraterritorial application of national law, which was well researched during the mandate of Prof. Ruggie, also in the EU context (e.g. 'Edinburgh study'). Indeed, Professor Ruggie himself in 2011 raised the need for the intergovernmental process to clarify the applicability to business enterprises of international standards prohibiting gross human rights abuses, suggesting that such clarity could be reached through a legal instrument modelled on the UN Convention against Corruption.

There are also other proposals that might be very effective in advancing the Human Rights and Business agenda, like, for example, creation of a global fund on business and human rights. What we need now are, in Prof. Ruggie words, 'carefully constructed precision tools'. Developing treaty/ies dedicated to specific issue(s) is bound to take less time than a generic one. The chances of ratification are higher. Yet, as already stated, to be able to identify the areas where the gaps exist we first need the assessment identifying what specific governance gaps there exist, which are not addressed by other means.

Conclusions

We do not have the time to waste on developing symbolic documents that are too generic to be applied on the ground, while risking along the way alienating key actors crucial to the success of the changes.

Whatever action will be taken one needs to make sure that there is a space for constructive dialogue and that all actors are involved.

We need a solution that is adequate to the nature of challenges, to the multipolar world and use the mix of voluntary and obligatory solutions.

In the debate so far, it is difficult to come across suggestions and concrete proposals that would address not the issue of the perceived vacuum of regulatory responses but the inadequacy of the existing regulatory regimes that make it possible. If we are to have the system that really protects human rights, I am convinced that it is critical that any international regulatory initiative comes up with mechanisms, enforcement or remedy ones, that do not exclusively rely on state to make companies accountable for breaches of human rights obligations.

Yet while searching for such solutions and undertaking action to develop a binding instrument, it is crucial not to lose sight of the gains and promises that GPs brought about, and:

- to continue awareness raising and capacity building efforts aimed towards the wide and comprehensive implementation of the GPs, not least through education and awareness raising activities – a task for all stakeholders / states/ business/ civil society, and to develop tools that will be of practical assistance (like e.g. ICAR/DIHR Model NAP Project, Measuring Business and Human Rights Project),
- exert pressure on States to show their commitment by developing NAPs and educating their officers on human rights (or, in case of the EU institutions, have human rights training as obligatory as the financial training is); and

- make full use of the existing tools and start developing new ones when we have evidence where the existing ones do not work;
- call on EP to continue to put pressure on the Member States and push for specific legislation that addresses the gaps (non-financial reporting, a draft regulation setting up an EU system of self-certification for importers of tin, tantalum, tungsten and gold who choose to import responsibly into the EU) or shows how to improve some other areas (public procurement being one of the fields);
- start questioning adequacy of such well-established legal institutions/concepts as separate legal personality of companies forming a corporate group (given that separate personality does not matter when it comes to annual financial results that have impact on the value of shares on the stock exchange, by analogy it should not be an obstacle when it comes to ensuring access to justice to victims of human rights abuses by companies).

Last not least – more effort and funding needs to be injected into education and awareness raising aimed at individual people, the consumers, to empower them and provide support in resisting the infringements of their rights. For that we need smart education systems that put as much pressure on knowledge as on values, and incorporate human rights already at the primary school level. At present majority of efforts focus on educating specialists and middle management – which, in my opinion, often is just too late to change the attitude and values. This however brings us to another issue – that of human rights education and the fact that states that committed to implementing Human Rights Education are still miles from meeting it, even though it is much easier task to carry through compared to ensuring that business respects human rights.

Thank you very much for your attention.
