

Business and Human Rights Treaty Role Play

Explanation

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This document sets out an explanation of how the treaty role play works and then provides the role play itself.

Context

Group: Masters of Law students at the University of Nottingham, UK, though I have taught it elsewhere.

Law Degree: Vast majority of students will have a Law degree.

Students: A mixture of about 60% of student have come direct from their Law degree, and about 40% will have had work experience of some kind. Most students are in their 20s and at least 20% are older. About 25-30% are British students and the remainder are from around the world, with a significant number being from Asia (China and India in particular), and from elsewhere in Europe.

Class Size: Usually 25-60 students. If more than 30 students in a class then it is done in two separate classes.

Timetable: It is part of a Business and Human Rights option which is taught for one semester (9 weeks), with 2 hours of interactive seminars per week in one session of teaching. The role play is in the last session of the semester and lasts most of the 2-hour session.

In Person: I have only taught it in person and not virtually, as I think that it would be difficult to do it effectively when done virtually.

Role Play Preparation

Aims: The aim is to enable the students to engage in the negotiation of drafting a treaty based on their knowledge of business and human rights obtained over the semester. It is hoped that they can learn from it the difficulties of reaching consensus about key aspects of the treaty, and how to balance their personal wishes with what states may want.

Background: The students will be expected to know about the current drafting of a business and human rights treaty, which is usually discussed in an earlier session, with readings. I will also have explained my own role (as an occasional special advisor to the process) in the drafting process during the semester. They can read about previous working sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other

Business Enterprises with respect to Human Rights (Working Group on the Treaty), though this is not crucial.

- In advance:** Each student must decide which state or non-state actor they wish to represent. This is by sign-up from a **list provided by me** in advance (usually one week prior) to reduce the risk of too many students wanting to represent one state. The list is intended to represent a cross-section of states with different views on BHR, and with one industry organisation and two civil society organisations also listed. Students can ask to represent a state not on the list, which is accepted if there is a balance of other states listed. Alternatively, it is possible to allocate in advance which state/non-state actor a student is to represent.
- Preparation:** Students must each prepare a 20 second introductory speech. This should set out the general stance and arguments of the state or non-state actor that they represent. This can include legal, political, economic and moral arguments. The speech can also address in general any of the key concerns the state has about the two draft articles of the treaty. It does not need to represent the actual views (if any) of that state. They should also consider any possible suggested amendments to the draft articles that they may wish to make. Consider which other states or non-state actors who might support the arguments or amendments. Each student must make a small (but legible from the other side of the room) placard/sign with the name of the state or non-state actor that they are representing.
- Documents:** The relevant treaty articles to be discussed will be sent well in advance as part of the reading list for the class. I usually only provide two articles of the draft treaty, so as to keep it more manageable. I choose ones which are contentious and able to be discussed, such as on Prevention and on Liability.

Procedural Rules

I used to send out procedural rules for the role play in advance, though I now find that I can explain them at the start of the session, which works as well. The general procedural rules are set out in the material below.

Role Play Activities

- My role:** I play the role of the Chair-Rapporteur of the Working Group on the Treaty. I explain my role and also how the procedure works (see procedural rules above). I try to encourage discussion and ensure that no student/s dominates too much.
- Room Set-Up:** The room is set-up, if possible, in boardroom or open horseshoe style. This helps students to see each other and engage better. There also needs to be some space around the room for caucusing to occur.
- Opening:** Each student has 20 seconds to make their opening statement, which is done in alphabetical order. This is timed by the previous student who spoke (or the last alphabetically for the first speaker). I used to allow 1 minute per representative but

I found that this went too long (e.g. over 30 minutes for a class of 30 students) but the length can vary depending on the number of students.

I keep a rough note of any issues which they raise in their opening statements so that I can come back to that person during later drafting.

Caucusing: This is usually an important part of most treaty drafting, where there are discussions outside the treaty room [though held inside the classroom]. Students are encouraged to seek like-minded states to discuss the issues and potential amendments.

Caucusing occurs before each article of a treaty. In this role play, as there are two articles of the treaty, then it occurs twice. More caucusing is possible if you have time.

Drafting: The relevant provisions of the treaty are usually shown/projected on to a screen for all students to see. Students propose amendments (suitably seconded). Every change proposed is "square-bracketed", i.e. the word or phrase to be changed is "[xxxx]", with the proposed new phrase also in square brackets. This enables voting about them later. Sometimes there are multiple square brackets in a single paragraph. See example below.

Voting: Once an article has had as many amendments as proposed (and seconded), then each is voted upon. This is repeated for the second article.

There is a final vote on both treaty articles as a whole.

Conclusion: It ends with the vote on both articles. There is then time given for reflection and responses.

Treaty Drafting examples

Article 5 Prevention

1. State Parties shall regulate effectively the activities of business enterprises within their territory [~~or jurisdiction~~]. For this purpose [home/host] States shall ensure that their domestic legislation requires all persons conducting [transnational] business activities [~~including those of a transnational character,~~] in their territory [~~or jurisdiction~~], to respect human rights and prevent human rights [violations or] abuses.

Article 6 Legal Liability

4. States Parties shall adopt legal [, administrative, trade, investment] and other measures necessary to ensure that their domestic jurisdiction provides for effective [~~proportionate, and dissuasive~~] [remedies/sanctions and reparations] [to/for] the benefit of the victims where [transnational] business activities[~~including those of transnational character,~~] have caused harm to victims.

The above shows what a provision may look like after various amendments have been proposed. Every time there is a proposed amendment, the words affected - whether to be deleted or to be added - are put in square brackets. There is then a vote on each of these amendments.

Learning

Students: I always ask the students what they have learned from the session. Without exception the vast majority have enjoyed it.

Their main learning outcomes are often:

- How hard it is to negotiate a treaty;
- How they have to put their ideals aside to push for an agreed outcome/remember to represent the state and not themselves;
- How different terms can mean different things to different states and yet they can agree them;
- How the role of non-state actor representatives is frustrating as they cannot vote so they have to be good at caucusing;
- They need to be aware how a change in one provision can have an impact on another provision;
- How a negotiation can be for agreement on one term in exchange for agreement on another term, so they need to prioritise issues;
- That some states can promise money or technological cooperation, or threats, in exchange for agreement
- The amazement that any human rights treaty gets agreed.

Me: I love seeing the students rush around the room trying to get agreement and really enthused about it. I also like seeing them use their knowledge of BHR to put it into practice.

The terms of the articles of the treaty which are agreed at the end of the session by the students are rarely the same as what is considered in the Working Group on the Treaty. Interestingly, the final draft is often more restrictive in scope than the original draft.

LLM Business and Human Rights

Business and Human Rights in Practice

Robert McCorquodale

Summary

In this seminar we will aim to learn about the practice of business and human rights, and to put into practice some of the issues considered in the module.

The aim is to experience some of the challenges in drafting a treaty on business and human rights. In 2014, the UN Human Rights Council created an Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (OEIGWG). In this session we will discuss two of the articles of the current Revised Draft 2019: **Articles 5 and 6**.

You will represent a state or non-state actor in this session, as agreed in the previous week.

Essential Reading

Revised draft legally binding instrument on business activities and human rights (16 July 2019):

https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

Further Reading

OEIGWG, 5 working sessions:

<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>.

Preparation Prior to the Seminar

- Review the likely stance on a business and human rights treaty, if any, of the state or non-state actor, you represent.
- Prepare a **20 second introductory speech**. This should set out the general stance and arguments of the state or non-state actor which you represent. This can include legal, political, economic and moral arguments. As well, your speech should address any of the key concerns the state or non-state actor has about the two draft articles. It does not need to represent the actual views (if any) of that state or non-state actor.
- Consider any possible suggested amendments to the draft articles that you may wish to make. Consider which other states or non-state actor you would want to support your arguments or amendments.
- Please make a small (but legible from the other side of the room) placard/sign with the name of the state or non-state actor that you are representing.

Procedural Rules

1. Delegations

- a. Each state shall have one vote.
- b. A representative of a body that has observer status (for example, a non-governmental organisation) may address the meeting subject to the Chair-Rapporteur's approval [approval of which is usually given]. Such representatives may not formally sponsor amendments and may not vote.

2. Debate

- a. Each delegation must address the meeting, for a maximum of 20 seconds, at the commencement of the debate.
- b. Once all representatives have given their opening addresses, there shall be a period for caucusing (being discussions between delegations).
- c. Other than for opening addresses, representatives may only speak after raising their placard or hand and gaining the recognition of the Chair-Rapporteur.
- d. The speaking time for each delegation shall be for a maximum of 20 seconds each time.

3. Amendments

- a. A representative may seek to amend any part of the draft treaty.
- b. A lengthy amendment must be in writing and handed to the Chair-Rapporteur as soon as possible.
- c. The proposer of the amendment must have a seconder of the proposal and advise the Chair-Rapporteur of the name of the seconder.

4. When Voting Occurs

- a. After the debate on an amendment or any other motion, a representative may move that the amendment or motion be voted upon.
- b. If there is an objection to a vote being called, there shall be a vote on that objection.
- c. It is entirely in the discretion of the Chair-Rapporteur to call a vote at any time.

5. Voting

- a. Voting shall be by placard raising, except for voting on the final draft of the treaty, which shall be by roll call.
- b. A majority of representatives must vote for an amendment, a draft article in the treaty or any other motion (except as provided in paragraph c of this paragraph) for it to be passed.
- c. Decisions on the final draft of the treaty shall be by a two-thirds majority attending the meetings (in accordance with Article 18 of the UN Charter).
- d. Representatives abstaining from voting shall not be considered in the reckoning of the totals needed to determine the results of a vote.
- e. Issues resulting in a tied vote shall be considered as defeated.

6. Disputes

The Chair-Rapporteur of the meeting shall be the final authority on the rules.

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Draft Legally Binding Instrument on Business and Human Rights 2019

Article 5. Prevention

1. State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.

2. For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:

a. Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships;

b. Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships;

c. Monitor the human rights impact of their business activities, including those under their contractual relationships;

d. Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships.

3. Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to:

a. Undertaking environmental and human rights impact assessments in relation to its activities and those under their contractual relationships, integrating the results of such assessments into relevant internal functions and processes, and taking appropriate actions.

b. Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable.

c. Reporting publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards concerning the conduct of their business activities, including those of their contractual relationships.

d. Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed.

e. Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services;

4. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities, including those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.

5. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law.

6. States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.

Article 6. Legal Liability

1. State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.

2. Liability of legal persons shall be without prejudice to the liability of natural persons.

3. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.

4. States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.

5. State Parties may require natural or legal persons engaged in business activities to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.

6. States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

7. Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences:

- a. War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court;
 - b. Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;
 - c. enforced disappearance, as defined in articles 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance;
 - d. extrajudicial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;
 - e. Forced labour as defined in article 2.1 of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957;
 - f. The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999
 - g. Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement;
 - h. slavery and slavery-like offences;
 - i. Forced displacement of people;
 - j. Human trafficking, including sexual exploitation;
 - k. Sexual and gender-based violence.
8. Such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed the offences.
9. State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offence in accordance with Article 6 (7) and criminal offences as defined by their domestic law.