

The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity

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In 2014, the U.N. Human Rights Council (UNHRC) established an open-ended working group to develop “an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”¹ The UNHRC initiated the treaty process in response to a call from Ecuador and other states that were impatient with what they saw as slow and limited international progress on business and human rights.²

This proposed treaty is the indirect result of a U.N. initiative that began in 2005 with the appointment of Professor John Ruggie as a Special Representative on “transnational corporations and other business enterprises with regard to human rights.”³ Professor Ruggie’s work led to the 2008 U.N. Framework on Business and Human Rights, followed by the landmark (and unanimous) adoption of the 2011 U.N. Guiding Principles on Business and Human Rights.⁴ These non-binding Principles, known as the “GPs,” were met with widespread support from states, businesses, and civil society.

However, a mere two years after the GPs were adopted, and before much progress could be achieved, Ecuador proposed a new, binding treaty on the same issue.⁵ The proposal was

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¹ G.A. Res. 26/9 (July 14, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>.

² Business & Human Rights Resource Centre, *Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council* (Sept. 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

³ See Human Rights Council Res. 2005/69, U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005), http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc; Human Rights Council Res. 8/7, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008), http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf.

⁴ Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

⁵ The treaty was co-sponsored by South Africa, Bolivia, Cuba, and Venezuela. Business & Human Rights Resource Centre, *Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council* (Sept. 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

adopted in 2014 through a sharply divided vote.⁶ The negotiations are, at present, proceeding in tandem with implementation of the GPs. On all sides of the debate, there are many who would like to see both the treaty *and* the GPs succeed. But while the general goals of the treaty are certainly admirable, serious challenges already plague the process. Left unaddressed, they may derail both initiatives.

First, the direct enforcement of human rights norms against corporations, rather than states, represents a fundamental theoretical departure from traditional human rights practice. The proposed treaty would hold corporations directly liable under international law for violating human rights.⁷ International law has historically held states accountable for their own human rights violations and for violations committed by individuals and corporations within their borders. The GPs are an example of this principle as historically applied. They are based on the “protect, respect, remedy” framework: states protect against third-party abuses through legislation and enforcement; corporations are independently responsible for respecting human rights; and states ensure that victims of human rights violations have access to effective remedies.⁸

The treaty proposes to abandon this framework, without offering a clear division of responsibility or an articulable standard to replace it.

Opponents, including human rights activists, have argued that states will use the treaty to excuse their own refusal to protect human rights. They point out that the treaty co-sponsors and many of their state supporters have thus far done “little if anything” to act on the GPs.⁹ The treaty co-sponsors have also been criticized for their own less-than-stellar human rights records. For example, in its 2015 World Report, Human Rights Watch criticizes the co-sponsors for a number of serious violations, including, *inter alia*, their targeting of human rights defenders, protesters and journalists; placing severe limitations on freedom of expression; legalizing of child labor; arbitrary detention; and lack of judicial independence.¹⁰ This and other reports are certainly not dispositive. However, they have led opponents to question whether, having failed or refused to protect human rights themselves, some states may use the treaty to shift the human rights onus (and the blame) onto corporations.

Many treaty opponents accept that some form of corporate responsibility is needed. But it should be clearly delineated, and should only be a supplement to—never a substitute for—the states’ duties to fulfill their human rights obligations.

Second, the lack of a clear treaty objective may prove fatal. The idea of establishing a single international standard of corporate human rights responsibility is admirable—but in

⁶ Business & Human Rights Resource Centre, *UN Human Rights Council sessions*, http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions#twenty_six_session (there were twenty votes in favor, fourteen against, and thirteen abstentions).

⁷ Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

⁸ Human Rights Council, *supra* note 4.

⁹ John G. Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty* (July 8, 2014), http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf.

¹⁰ Human Rights Watch, *2015 World Report* (2015), <https://www.hrw.org/world-report/2015>.

practice, the treaty has done nothing of the sort. The treaty fails to answer important questions about the content and limits of the proposed corporate responsibility. Will corporations be liable for ensuring all human rights enumerated in the core international instruments? Is it plausible that states will agree on a single standard for every human right? If not, which rights will the treaty cover, how will they be selected, and who will decide how they are implemented on a case-by-case basis?

For example, the U.N. economic, social and cultural rights, while laudable, are also sweeping in scope. They include rights “to an adequate standard of living for [oneself] and [one’s] family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”¹¹; “to the enjoyment of the highest attainable standard of physical and mental health”¹²; and “to enjoy the benefits of scientific progress and its applications.”¹³ These and many other rights are incorporated into a vast web of domestic laws, in different ways and to varying degrees, in every state.

Treaty opponents argue that the complex balance of public interests, domestic politics, individual rights and state sovereignty can only be established and maintained by states. States currently decide—often through the democratic process—how to protect human rights within their borders. It is surprising that human rights advocates and states would so readily cede this power to set public policy to transnational corporations.

Third, the exclusion of purely national corporations raises serious questions about the objectives of the treaty. The proposed treaty would only apply to transnational corporations, to the exclusion of purely national companies.¹⁴ This exclusion is in line with the widely-held view that the “governance gaps” disproportionately affect transnational corporations. States have argued that the treaty need not regulate domestic entities, because domestic laws are sufficiently protective.

Opponents fiercely object to this focus on transnational corporations. If the sole objective of the treaty is to hold corporations liable for human rights violations, then there is no place for such a distinction. All corporations should be equally responsible, no matter where they are headquartered or where they operate. To illustrate, if this principle were applied to the horrific Rana Plaza disaster, transnational corporations who purchased clothing made in the factories would be responsible while the local factory owners and employers would not.¹⁵

Moreover, if domestic laws actually are protective enough, as states argue, then they should be able to regulate the activity of transnational corporations within the state without the need for a new treaty. The exclusion of domestic corporations would create an uneven playing field, giving domestic and state-owned corporations significant advantages over

¹¹ International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

¹² *Id.* at art. 12.

¹³ *Id.* at art. 15.

¹⁴ Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>.

¹⁵ John G. Ruggie, *supra* at note 9.

foreign competitors, who would be held to a different and higher standard. Opponents of the treaty prefer the approach of the GPs, which apply to all corporations.¹⁶

Fourth, the calls to exclude corporate stakeholders from the treaty negotiations will likely backfire. The GPs represented a major change in the tone of the business and human rights debate. In response to the deep historical polarization between opposing groups, the GPs were developed with an open, inclusive, multi-stakeholder approach.¹⁷ This resulted in a greater shared understanding and purpose, and ensured wide multi-stakeholder support.¹⁸

Some proponents of the new treaty, by contrast, have called for corporations to be excluded from the negotiating process.¹⁹ One-sided negotiations might give supporters short-term “wins” in the form of stronger treaty language. However, an exclusive approach would ultimately limit support for the treaty and reverse the collaborative and cumulative progress of the GPs.

Moreover, corporations may be more willing to support the proposed treaty than activists believe. In a recent study, The Economist found that the overwhelming majority of executives (83%) agree that human rights are a matter for business as well as governments.²⁰ 71% say that their company’s responsibility to respect these rights goes beyond simple obedience to local laws.²¹ The study points out that this degree of agreement represents a major break with prior attitudes, even as recently as the 1990s.

Professor Ruggie has cautioned treaty proponents against “... going down a road that would end in largely symbolic gestures, of little practical use to real people in real places, and with a high potential for creating serious backlash against any form of further international legalization in this domain.”²² Given the lack of support for the treaty among key states and stakeholders, the negotiations seem to be doing just that. Unless these and other problems are addressed, the treaty may be destined to languish in protracted and increasingly bitter negotiations—like so many initiatives before it.

Treaty proponents would do well to take the opportunity to learn from and build on the successes of the GPs—before it’s too late.

¹⁶ Human Rights Council, *supra* note 14.

¹⁷ Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Recommendations on Follow-Up to the Mandate, UN. Doc A/HRC/17/4 (Feb. 11, 2011), www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.

¹⁸ *Id.*

¹⁹ See, e.g., Kate Lappin, Haley Pedersen & Tessa Khan, *Influence of corporations in treaty process would undermine affected communities’ interests*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Mar. 28, 2016, <http://business-humanrights.org/en/influence-of-corporations-in-treaty-process-would-undermine-affected-communities%E2%80%99-interests>.

²⁰ THE ECONOMIST INTELLIGENCE UNIT, THE ROAD FROM PRINCIPLES TO PRACTICE 4 (2015), <http://www.economistinsights.com/business-strategy/analysis/road-principles-practice/fullreport>.

²¹ *Id.*

²² John G. Ruggie, *A UN Business and Human Rights Treaty?* (Jan. 28, 2014), <http://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.