

GUEST ESSAYS CIVIL SOCIETY & THE PRIVATE SECTOR

PROGRESS TOWARD A TREATY ON BUSINESS AND HUMAN RIGHTS

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The increasing sway of markets and businesses over our lives in recent centuries has been counterbalanced by demands for corporate social responsibility (CSR) and now business and human rights (BHR). Both concepts and movements contemplate obligations to respect human rights not only on the part of states, but also by private actors, such as corporations. Classically, international law focused overwhelmingly on the obligations of states, but the growing power of private actors and multilateral corporations in particular has resulted in decades of dynamic legal evolution and some notable progress in seeking to constrain harm by such actors. Recent movement toward an international treaty governing BHR, to make firmer and clearer the existing business obligations to respect human rights, thus makes much logical sense if economic development is to be truly socially and environmentally sustainable.

Indeed, given the typical status of businesses as ‘legal persons’ with rights, but few if any duties, under trade, investment and other treaties and laws, CSR/BHR endeavours may be viewed as attempting to redress the balance by including businesses as part of ‘civil society’, as good corporate citizens subject to laws and social norms instead of acting as outlaws. Citizenship demands such basic respect and compliance, unless there are positive grounds for civil disobedience against intolerable and immoral laws or norms. As universal human rights values have been defined as laws and

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norms at the global² and regional as well as national levels, in treaties as well as customary law, global citizenship demands basic respect for and compliance with such human rights laws and norms.

ELEVATED EXPECTATIONS, INCLUDING LEGAL EXPECTATIONS

There has been tremendous normative development in the CSR/BHR field in recent decades, reflected in a proliferation of company and industry codes of conduct, and 'soft law' (largely non-binding law) standards and institutions ranging from the Organisation for Economic Co-operation and Development's (OECD) [Guidelines](#) for Multinational Enterprises with their related National Contact Points, to the United Nations (UN) Global Compact with its related [Integrity Measures](#) and requirements on companies for Communications on Progress, and to the International Labour Organization (ILO) [Declaration](#) on Fundamental Principles and Rights at Work, and the UN [Framework](#) and Guiding Principles (GPs) for BHR. These have all elevated expectations for human rights compliance by businesses.

Yet the ongoing human rights harm caused by some corporate activities, exploitative corporate arbitrage of legal standards (the 'race to the bottom'), the imbalanced investor-state dispute resolution process that gives rights to corporations but not victims, and the significant gap remaining between standards and practice all highlight the need for stronger regulation at the global level of these globally active non-state actors.

The existing soft law measures cumulatively have achieved tremendous, if imperfect, consensus around the basic notion that businesses have independent human rights responsibilities in addition to those of states, and, as articulated by the GPs, should not cause, contribute to, or be directly linked through business relationships to human rights harm. The GPs describe this as a business responsibility to respect human rights that requires due diligence to avoid infringing on such rights and to address adverse impacts.

It may be strongly argued that, contrary to some understandings, this business responsibility to respect human rights is not merely voluntary, discretionary, or aspirational. As noted for example in the [Recommendation to Member States](#) of the Council of Europe's Council of Ministers, Member States should require businesses operating or domiciled in their jurisdiction to apply due diligence throughout their operations, and ensure civil liability for human rights abuses within their jurisdiction, as well as consider, in some circumstances, extraterritorial jurisdiction and, for international crimes and serious human rights offenses, criminal liability.³

² As in the Universal Declaration of Human Rights, the two widely ratified Covenants which with it constitute the 'International Bill of Rights', and the related network of treaties and instruments applying those rights in specific contexts. For the International Bill of Rights, see the UN compilation, <http://bit.ly/2bQRAZj>.

³ At III., 20; IV.a.i.32-43; and IV.a.ii.44 of the Recommendation to Member States.

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'The GPs, moreover, in no way disclaim existing hard law standards, such as the jus cogens - the fundamental principles of international law from which no derogation is permitted - and the expanding international criminal liability standards noted in multiple contexts. Further, the GPs are already contributing to the progressive legal development they envision via use by the UN Treaty Bodies⁴ and Special Rapporteurs,⁵ legislation,⁶ agency regulations⁷ and judicial⁸ and quasi-judicial⁹ decisions, among other aspects of the 'regulatory ecosystem'. The GPs, along with other existing legal CSR and BHR standards, in their individual and cumulative impact interact with and complement traditional harder law civil and criminal legal remedies to provide redress and accountability in certain specific cases.

CONTINUED IMPUNITY PROMPTS CALL FOR NEW TREATY

Nevertheless, the relative softness of the standards, their emphasis on self-regulation, lagging enforcement and implementation, and the consequent persistent corporate impunity in many cases have rightly been unacceptable to victims, their civil society defenders and many states. The undeniable progress in business awareness of the issues, and in policy frameworks and due diligence procedures, has by no means been matched by progress in actual business compliance in respecting human rights or in effective access to remedies, whether formal or informal, legal or non-legal, or judicial or non-judicial.

As a result, following years of alternating hope and dissatisfaction regarding the progress achieved thus far in human rights compliance by businesses, diverse governments proposed a resolution at the UN Human Rights Council (UNHRC) in 2014 to begin negotiations toward a binding international instrument in the field of BHR, such as a treaty, as opposed to yet another non-binding softer law instrument.

The chief sponsors were the governments of Ecuador and South Africa, formally joined by China, Russia and a number of other states. Russia later retreated from support, and China's support seems to remain tentative. Western European states preferred to give the softer law UN Framework and GPs, which had been passed only in 2008 and 2011 respectively, more time to work before turning to a harder law instrument such as a treaty. The USA echoed this objection, but raised several others as well. Over a thousand civil society organisations (CSOs), including those in the [Treaty Alliance](#) umbrella, have joined the call for a treaty.

Feelings ran high at the 2014 session of the UNHRC, with some supporters of the UN Framework and GPs deeming the states supporting the treaty resolution to be motivated by anti-western or anti-business sentiment, and some

⁴ E.g., Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16 (17 April 2013), paras. 7, 71.

⁵ E.g., 'Report of the Special Rapporteur on trafficking in persons, especially women and children', J Ezeilo, UN Doc A/67/261 (7 August 2012), paras. 25-27, 50.

⁶ E.g., European Union (EU) Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 No. L 330, in force 6 December 2014.

⁷ 'Closing Plenary Remarks', J G Ruggie, Third United Nations Forum on Business and Human Rights, Geneva, 3 December 2014, p.3, <http://bit.ly/2prWT9A> (referring to the establishment of the Peruvian Superintendency of Banks, Insurers and Private Pension Funds).

⁸ E.g., *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414; *Adolfo Agustin Garcia et al v Tahoe Resources Inc*, Notice of Civil Claim, filed 18 June 2014, <http://bit.ly/2r7tYE9>.

⁹ E.g., UK National Contact Point, 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd', 28 August 2008, <http://bit.ly/2qzjXDA>.

supporters of the resolution deeming those opposed to a treaty insincere about genuinely wanting businesses to respect human rights in practice.

The upshot was that the resolution in favour of establishing an open-ended intergovernmental working group (IWG) to elaborate an internationally binding instrument or treaty to regulate the activities of transnational corporations (TNCs) was passed at the UNHRC by a narrow plurality.¹⁰ A resolution supporting stronger GPs implementation by all stakeholders, including through National Action Plans, also passed, by consensus.¹¹ Both resolutions note the important role of civil society in promoting corporate accountability for human rights harms.

The two IWG meetings since that time considered the content, scope, nature and form of a possible new treaty.¹² Although both meetings were boycotted by the USA, those present at the second meeting reached a high degree of consensus that the treaty project could potentially complement, and in any event did not oppose, the GPs, and that any such instruments should cover all human rights and not merely some vulnerable subset, such as labour or indigenous rights, given that businesses can and do affect all human rights. If the treaty was limited to 'gross' violations, it would exclude most violations by businesses. At the time of writing, the IWC Chair, Ecuadoran Ambassador María Fernanda Espinosa Garcés, is drafting a set of elements for the treaty, to be discussed at the third IWG meeting in October 2017.

Although the IWG discussions have referenced all business enterprises, and not merely TNCs, some controversy unfortunately persists over whether the treaty should cover all businesses, including national and domestic businesses, versus merely TNCs. Country sponsors from the global south largely favour an exclusive focus on TNCs on the grounds that the impacts of TNCs on human rights are worse, while global north powers largely join civil society, including the [Treaty Alliance](#), in rejecting such an exclusive focus. Filters based on size or impact are conceivable, and exist in many laws, but it is important to recall that many national and domestic enterprises, small as well as large, can adversely affect human rights, and TNCs can readily manipulate their form to appear as domestic rather than transnational. It would certainly be a mistake to exclude large state-owned enterprises from coverage on the excuse that they are deemed national or domestic, since, especially in the extractive sector, they constitute some of the largest TNCs around.

OPTIONS FOR TREATY CONTENT

The IWG meetings included a variety of civil society (including trade union), business, governmental and expert perspectives, exploring the problem of continued business impunity as opposed to accountability, and noting potential solutions within the ambit of a possible new treaty, ranging from the less ambitious, e.g. enhanced BHR reporting

¹⁰ Resolution A/HRC/RES/26/9 (14 July 2014), <http://bit.ly/2qccKgc>, passed by 20 votes in favour, 14 against and 13 abstentions.

¹¹ Resolution A/HRC/RES/26/22 (15 July 2014), <http://bit.ly/2pF6ntt>.

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obligations, to the more ambitious, such as enhanced civil and criminal liability of parent companies for the harmful acts of their subsidiaries, dedicated new institutions for monitoring and dispute resolution, and other institutions for BHR akin to ombuds processes, think tanks, or existing Treaty Bodies.¹³ The many reference points for this treaty include the Montreal Protocol on Substances that Deplete the Ozone Layer and the UN Convention Against Corruption, which includes helpful provisions for cooperation and enforcement.

Although institutional options include a new global court for business violations, given the limits and challenges involved with global courts, such as the International Criminal Court, the general sense was that it may be more feasible and effective to follow the more traditional approach of relying on domestic or national ('municipal') courts for greater enforcement of common international legal standards.

This path, of the domestic enforcement of global standards, is not only the dominant and usual approach of international law, but also has the advantage of embedding both norms and enforcement locally. Such local enforcement of global norms has proven an effective approach to BHR remedies historically, as in the US example of the Alien Tort Statute (the ATS), under which aliens subjected to serious human rights violations under the law of nations or a relevant treaty have been able to have their day in US federal court and achieve the occasional victory, sometimes winning substantial settlements. The US Supreme Court, in the 2013 *Kiobel et al v. Shell* case, cut back significantly on this remedy by providing that any such lawsuit must "touch and concern" the USA with sufficient force to overcome the presumption against the extraterritorial application of US legislation.¹⁴ While litigation using this route to remedy persists in some US courts when that standard is met, the practical need for expanded extraterritorial remedies is apparent, especially where governments and the rule of law are weak or absent.

Cases in other jurisdictions illustrate that victories and substantial settlements may be achieved by relying on domestic legal standards overlapping in practice with the requirements of global human rights norms, such as criminal law¹⁵ or the law of tort and delict.¹⁶ These sometimes fruitful paths to remedy demonstrate both the potential and limits of existing approaches using national courts, pointing out the need for clearer and more reliable remedies for violations, in the interests of all stakeholders concerned: governments committed under human rights treaties to ensuring that rights are protected, businesses committed under existing norms to respect rights, and victims requiring more effective remedies in practice.

Any treaty must be realistic, reasonable and attentive to the interests of all stakeholders in order to garner the

¹² See the official reports from [the first](#) and [second](#) meetings.

¹³ Some similar options are surveyed, e.g., in 'Options For a Treaty on Business and Human Rights: Prepared for the American Bar Association, Center for Human Rights, and The Law Society of England and Wales', Doug Cassel and Anita Ramasastry, May 2015, <http://bit.ly/2r8X9aF>.

¹⁴ 569 U.S. 12, 133 S.Ct. 1659 (2013).

¹⁵ E.g., 'Mitsubishi Materials Apologizes to Chinese World War II Laborers', New York Times, 1 June 2016, <http://nyti.ms/2qcSDYH>.

¹⁶ E.g., 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence', Doug Cassel, *The Business and Human Rights Journal*, vol. 1, p. 179, 2016.

ratifications needed to come into force, including from powerful states and their TNCs, which are such important players in BHR. Thus far, the USA has not participated in the IWG discussions, although the European Union (EU) fully participated in the second IWG meeting, along with almost all EU governments. Under the new Trump administration, the USA remains unlikely to support the process.

In terms of substantive law, the treaty should be informed by the interlinked bodies of law relevant to international human rights, including triggers and standards for direct and complicit liability under human rights law itself, but also international criminal law envisioning individual or corporate accountability, and, when relevant, as in conflict-affected areas, the law of war (so-called 'humanitarian' law). This is akin to the recent [African treaty](#), not yet in force, creating a new section of the African Court of Justice and Human and Peoples' Rights for crimes by corporations, including, among other crimes, 'war crimes' and 'illicit exploitation of natural resources.'¹⁷ The treaty development process should also keep clearly in mind the Sustainable Development Goals.

An attractive path for a treaty could be to provide for domestic legislation hardening the existing business responsibility to respect, under the GPs and other largely soft law instruments, and to conduct due diligence, into an unambiguous legal duty, with incentives including liability for non-compliance and rewards such as defences and safe harbours for proven compliance. Broadly speaking, such approaches would draw on existing national laws such as the US ATS, the recent French '[vigilance](#)' / due diligence law and the UK [Modern Slavery Act](#). The liability and the corresponding standard therefor (the degree of knowledge or intent and standards for complicity and accessory liability) could be civil and tort-like (compensating victims), criminal, administrative, or hybrid. Individual executives should face liability as well. This approach would nicely converge with the separate Working Group promoting the GPs, including through National Action Plans that encourage and sometimes require due diligence laws and policies and human rights compliance by investors.

Tremendous questions remain regarding the form and content of any treaty, and they will require great care for the project to be achieved in a way that constitutes a genuine advance and not a regression. The complex issues involved affect international trade and investment, which must be harnessed to public benefit consistent with human rights, avoiding paths of neo-isolationism, economic and technological stagnation, and greater poverty, with all its associated human rights harms. Procedurally, this requires that controversial and difficult issues are confronted and the broadest possible range of stakeholders is involved, including powerful businesses, governments, unions and other civil society players, in order to ensure that facts triumph over ideologies and the implementation of positive change is actually accomplished on the ground.

¹⁷ 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights', African Union, 2014, Arts. 28A and 28Lbis.

CRUCIAL ROLE FOR CIVIL SOCIETY

Those in the Treaty Alliance recognise that it behoves civil society to engage with the IWG process to support it and achieve the most protective treaty possible. Engagement options range from the relatively passive, such as joining existing coalition efforts by lending organisational names or resources, to the more active, including helping to propose content, mobilise stakeholders and offer leadership for the civil society engagement.

The acute and growing challenges facing civil society generally at present, including the severe pressures generally on human rights, defenders, CSOs and the rule of law, may make it seem difficult to prioritise a long-term treaty project. Ongoing political changes in the participating states could also significantly impact on the IWG process.

Yet businesses today often affect us as much or more than nations do; if Facebook were a country, with over 1.5 billion users it would be the most populous nation in the world. Business influence, for good or ill, extends not only to whether and how we consume information, but also to vital issues such as spiralling inequality, discrimination, exclusion, health and the human rights impacts of climate change, and whether human rights and the rule of law will prosper or perish.

These realities counsel continued attention to further strengthening the legal framework in this as well as other ways. Increasing numbers of businesses are being enlisted in the struggle for human rights and the rule of law and it is important to continue that trend.

As is usually the case with law at the global level, progress will be incremental and slow. But engagement by civil society representatives presents an important opportunity to keep the treaty process on track in a high-quality fashion, educate all stakeholders and each other, and offer some measure of defence against the treaty endeavour merely becoming a meaningless ideological and political forum to bash global north states and their businesses. Indeed, the IWG [noted](#) the widespread civil society call for participating governments to act in good faith.¹⁸

The need for more effective global regulation of global businesses is evident; the frequent absence of remedy for cross-border business activity constitutes a well-known governance gap. This treaty process represents a potentially important route toward progress in constraining commercial sources of power so that they serve not merely powerful elites, but human beings and human rights more generally.

¹⁸At para. 28, p.7.