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# Towards Treaty on Business and Human Rights: Key Areas of Agreement

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## Abstract

Current legal framework does not properly address the impact that transnational corporations have on human rights. In response to that in 2014 the UN Human Rights Council established an open-ended intergovernmental working group with a mandate to elaborate an international legally binding instrument to regulate activities of transnational corporations and other business enterprises. Although this decision was strongly contested and initially there was very little consensus on what such a treaty should entail, much effort has been invested to improve the content of the proposed treaty and gather the necessary support for its adoption.

The aim of this article is to analyse the progress made in negotiating the treaty and to find any essential areas of agreement between different stakeholders. To achieve that aim, historical and analytical research methods have been primarily used. The study finds that two crucial areas of agreement exist – on the regulatory targets and regulatory model – that allows for real negotiations to begin.

*Keywords:* consensus, human rights, transnational corporations, treaty on business and human rights.

## Introduction

The impact of business on human rights and corporate human rights violations are well documented (Amnesty International, 2014). Victims face significant challenges when seeking remedy in cases where transnational companies are perpetrators of human rights abuse or are complicit in violations committed by state actors (Birģelis, 2019, *343–349*). It is argued that international law is not currently equipped to properly deal with such challenges (Joseph, 2004). Therefore, an understandable reaction to this situation is to

argue that there should be more specific regulations in place that would bind all businesses under a common set of standards protecting all human rights. Because customary norms cannot be merely created at will (Dumberry, 2016), seeking to establish binding international standards in the field of business and human rights means that an international treaty should be negotiated, regardless of whether the treaty would impose obligations on states or on companies directly. Civil society has long been advocating for such a treaty and there appear to be several good reasons for that (Birģelis, 2021, *97–103*). It can, for instance, help address the issue raised above through clarifying human rights standards applicable to companies, removing obstacles to access to justice in transnational litigation, and promoting initiatives that would enhance corporate accountability for human rights violations. Eventually the work towards a binding treaty on business and human under the auspices of the UN has begun.

In 2014, three years after the Human Rights Council (HRC) unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGP), the HRC adopted resolution 26/9 by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (Human Rights Council, 2014). It should be noted that the mandate of this open-ended intergovernmental working group (OEIGWG) initially started on quite uncertain grounds as the said resolution was far from unanimously welcomed, with 20 states voting in favour, 14 against and 13 abstaining (Human Rights Council, 2014). Powerful home states such as the USA had refused to engage with establishing such treaty from the very start (Delegation of the United States of America, 2014). Similarly, to the previous efforts to regulate transnational corporations by the UN (Muchlinski, 2021, *212–226*), primarily developing countries and civil society members supported the development of the treaty while developed countries and large businesses did not. Nevertheless, the process of developing a binding instrument has significantly moved forward.

The first session of the OEIGWG took place in July 2015. It was not well attended and delegates from the EU and EU member states walked out of the meetings on the second day (Ruggie, 2015; Cassel, 2015). There was very little consensus on what exactly should the instrument entail. To be of practical use, the treaty has to go beyond a simple restatement of obligations that states and businesses already have. Therefore, the first and second sessions of the OEIGWG were dedicated to increasing the participation of states and conducting more concrete deliberations on the content, scope, nature and form of a future international instrument (without yet beginning to draft the treaty text itself) (HRC, 2016; HRC, 2017). During the third session, the OEIGWG discussed elements for a draft legally binding instrument (Elements for the Draft Legally Binding Instrument, 2017) prepared by the Chairperson-Rapporteur of the OEIGWG based on the discussions held during the first two sessions (HRC, 2018). During the fourth

session, the discussions focused on the very first draft which was named as "zero draft" (Legally Binding Instrument, 2018) of the treaty, as well as a zero draft optional protocol (Draft Optional Protocol to the Legally Binding Instrument) to be annexed to the zero draft legally binding instrument. Then during the fifth session, a revised draft (Legally Binding Instrument, 2019) of the legally binding instrument served as the basis for negotiations, while during the sixth session, a second revised draft (Legally Binding Instrument, 2020) of the legally binding instrument was evaluated. Ahead of the seventh session, the Permanent Mission of Ecuador prepared a third revised draft (Legally Binding Instrument, 2021) of the legally binding instrument which is the most up to date version of the treaty so far. Third revised draft maintains the structure, scope and the balance of content and approaches of the previous drafts, improving in drafting and clarifying certain ambiguities (López, 2021). Undoubtedly, these draft versions of the proposed treaty maintain progressive development.

The proposed treaty narrows the regulatory gap through broad extraterritorial jurisdiction, concrete reporting and due diligence obligations and over-arching duty on states to ensure that such obligations are fully justiciable and victims are equipped with remedies and ample access to justice (Bantekas, 2021, *662*). Although further improvements are necessary, inter alia, to provisions regarding the reversal of burden of proof, the extra-territorial obligations of states and human rights due-diligence, two fundamental milestones have been achieved that allows the real negotiations to begin. Those are: agreeing upon the regulatory targets and regulatory model.

## 1 Regulatory Targets: Scope of Business Enterprises

The first major debate during the opening session of OEIGWG was regarding the scope of business enterprises that the treaty should cover. More specifically, what the "regulatory targets" should be (Deva, 2017, *154*); whether the proposed treaty should follow the approach adopted by the UNGPs and apply to all types of business enterprises, or whether its applicability should be limited only to transnational corporations and other business enterprises with a transnational character in their operational activities.

The start of this debate has its roots in the previously mentioned HRC Resolution 26/9 which called for a treaty to regulate the activities of "transnational corporations and other business enterprises". However, presumably to gain enough votes to pass, a footnote was placed in a preamble paragraph of Resolution 26/9 stating, "*Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of relevant domestic law*" (HRC, 2014). Such footnote, if taken on its face value, does restrict the scope of the intended treaty. In that way the first real point of tension was created.

Immediately after the adoption of the said resolution, several NGOs reacted to express their concern and called for the perceived restriction established by the footnote to be lifted. In a report released before the first meeting, the International Commission of

Jurists convincingly argued that a footnote in the preamble could not limit the scope of discussions or the outcome of negotiations (International Commission of Jurists, 2015). Similarly, at the very start of the negotiations, the EU had suggested that the scope of the treaty must be more inclusive. However, the EU's proposal and subsequent tedious debate was qualified as obstructionist by some even though most NGOs, several expert panellists, and business representatives agreed that the treaty should cover all business enterprises (Carlos, 2016, *111–116*). Despite initial disagreements at the beginning of the negotiations, a certain consensus has emerged.

With the risk of some pro-treaty states withdrawing from the treaty negotiations, the draft version of the treaty is constructed in a way that it applies to all business enterprises. That appears to be in line with the increasing trend towards adopting instruments that apply to all types of enterprises, rather than merely transnational ones (OECD, 2011). In essence, it can be considered beneficial to the victims as from their standpoint it does not particularly matter whether a transnational or local company abuses their human rights, and corporations often structure their enterprise to act through locally incorporated subsidiaries. Therefore, the current draft treaty does afford some protection to potential victims against all types of corporate behaviour. Another practical advantage of this approach is that it avoids the issue of constructing an agreeable definition of "transnational corporation", a task which could prove very difficult because an entity could be considered "transnational" in view of multiple alternative variables (for instance, location of offices, operations, nationality of shareholders and directors), and neither municipal corporate laws nor international law generally recognise incorporation of a company as a "transnational corporation". Any attempt to limit the treaty's scope only to transnational corporations would potentially result in lawyers advising companies how to bypass the given definitional contours. Therefore, from a normative perspective such approach is seen more preferably.

Although one cannot theoretically exclude the possibility that states could once again renegotiate the scope of the treaty and narrow it down to "transnational corporations", that is highly unlikely considering the incremental extension of the scope of initiatives regulating corporate behaviour over the last four decades and the unanimous endorsement of the UNGPs by the HRC. Unless this treaty is seen as the first of many subsequent treaties in the field, it is safe to assume that there is a solid ground of agreement about the regulatory targets of the proposed treaty.

## 2 Regulatory Models: Direct vs Indirect Corporate Human Rights Obligations

Besides the agreement regarding the regulatory targets of the treaty, another crucial agreement was about the proper way or model to regulate these targets. David Bilchitz rightly notes that there are two main models for a treaty to regulate corporations in this regard (Bilchitz, 2017, *186*). The first model maintains focus on the obligations of

the state, which is expected to protect individuals against the violation of their rights by third parties such as corporations or to require certain actions of corporations to facilitate realisation of such rights. This model can be called the "indirect model" as it would place an international legal obligation on the state to ensure (though regulations, investigations, etc.) that corporations do not violate the human rights of individuals; however, corporations themselves would lack any obligations stemming directly from international human rights law.

Meanwhile, the "direct model" involves imposing direct obligations upon corporations by international human rights law independently of the obligations of states. Motivation behind the calls for direct obligation arises from the perceived weakness of the existing state-centred system where unwillingness or inability of national state authorities to adopt and enforce national legislation often fail to hold corporations accountable. Such direct obligations, possibly, even enforced by international bodies could sideline the need for state action. Bilchitz has previously argued that direct human rights obligations of companies is already contained in international human rights law and should not be regarded as a radical departure (Bilchitz, 2013; Latorre, 2020). In this respect professor Louis Henkin is often cited, who, in the context of Universal Declaration of Human Rights, famously noted that: "*Every individual and every organ of the society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to all of them*" (Henkin, 1999).

Based on a similar idea, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), drafted by the UN Sub-Commission on the Protection and Promotion of Human Rights (2003), made legal obligations for corporations its central theme. Yet in his first interim report in 2006, John Ruggie, the special representative of the Secretary-General on human rights and transnational corporations and other business enterprises (from 2005–2011), concluded that the Norms could not be a restatement of the current international human rights law because, with a few possible exceptions, this law did not bind corporations (Commission on Human Rights, 2006, *60–61*).

J. Ruggie writes: "*While it may be useful to think of corporations as 'organs of society' as in the preambular language of the Universal Declaration, they are specialised organs that perform specialised functions. They are not a microcosm of the entire social body. By their very nature, therefore, corporations do not have a general role in relation to human rights as do States; they have a specialised one.*" (Commission on Human Rights, 2006, *66*)

Irrespective of whether Ruggie's claim is fully accepted or not, the direct model would still require some guidance or mechanism to determine the nature and extent of these obligations. It is the absence of clear proposal of what direct obligations have to be imposed on corporations and what kind of institutions and mechanisms will have the task of implementing and enforcing, what appears to be problematic. For that reason, the direct model lacks the required state support. Moreover, several risks associated with the direct model would have to be mitigated.

There are risks that imposing direct human rights obligation on corporations would lead to situations where states would be justified to decrease their own positive and negative human rights obligations in all those areas where corporations have the faintest presence. Moreover, if transnational corporations were to have the same obligations as states, they could request that they were endowed with powers typically exercised by state; thus, making them even more powerful than they currently are and potentially causing more risk than benefit to society (Bantekas, 2021, *638*).

Recognising direct obligations of corporations without simultaneously setting an effective system of remedies for victims of rights violations, enforcement of those duties and guaranteeing due process may only serve at the end to undermine protection of human rights and favour authoritarian states' rule (Knox, 2008).

Consequently, the treaty discussions appear to be settled for the first model. Although in 2017, the discussion of the OEIGWG reflected in the previously mentioned document on elements for the draft legally binding instrument showed some ideas for allocating direct obligations to businesses, ever since the Zero Draft the proposed treaty establishes obligations for state parties to create a legislative or administrative measure in order to regulate companies, but it does not allocate direct obligations to businesses.

## Conclusion

The latest draft treaty is a crucial step forward in establishing a legally binding instrument in the field of business and human rights. It overcomes important objections and establishes areas of agreement. Although initially there was very little agreement on what the intended instrument should look like, a general consensus around two fundamental issues has emerged. Namely, an agreement on regulatory targets and the regulatory model has been reached.

As to regulatory targets, the treaty is expected to apply to all businesses. The victims of corporate human rights abuses are unlikely to distinguish whether the business enterprise that causes them harm has transnational characteristics or not. Also, victims are not likely to excuse abuses they suffer from a local business simply because the entity lacks a transnational element. From the point of view of the victims, the key consideration is not the formal character of the business entity, but instead the victims' practical access to effective remedy and reparation for the harm they have suffered. Many state delegates along with other stakeholders requested this balanced approach during the OEIGWG sessions, and some states, including EU members, had even justified their absence from the debates on account of the limited scope proposed instrument. The current draft takes away this objection and paves the way for a negotiation focused on the substance of the treaty provisions.

As to the regulatory model, treaty is expected to regulate corporations via the indirect model, that is, to impose direct obligations only to states which then in turn would have to further regulate the activities of business in their domestic law. One

of the main arguments in favour of direct obligations for corporations is the perception that states already often fail to discharge their duty to protect human rights under international law, leaving corporate abuses unaddressed. Therefore, imposing obligations directly onto corporations without intermediation of the national state could theoretically solve the issue. However, in the author's opinion, the proponents of this argument also fail to offer an option that will go beyond a mere declaratory instrument without effective implementation. While the notion of direct obligations for corporations may be an appealing concept, it is not yet clear how they will strengthen in practice the protection of individuals' rights without a robust functioning of state-based system for their enforcement.

Although eventually it will all come down to political will (European Coalition for Corporate Justice, 2021) and there are still aspects of the treaty and its provisions that require refinement during the process of negotiation, the draft can now be considered sufficiently clear and comprehensive so as to be the subject of serious negotiations.

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