**Reflections on the proposal on the binding treaty on business and human rights, August 2016.**

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The proposal on the binding treaty on business and human rights has a number of advantages and disadvantages. Proponents of the treaty often name several arguments for the adoption of the treaty. Bilchitz, for instance, lists four: ‘Bindingness, Norm Development, Competing Obligations, Access for Remedies’.[[1]](#footnote-1) Arguably, access to justice is the principal area any potential treaty on business and human rights or any other initiative shall and should concentrate on. However, even though such arguments in favour of the treaty are valid and strong, they include some weaknesses. The main objection to the development of an international treaty on human rights and business is that it is not very clear what added value it would bring to the protection of individual’s rights against business activity. There are many international treaties that have not created added value for the everyday lives of individuals as they depend on the consent of states. It is also doubtful that the creation of the treaty would enhance or simplify the access of individuals to courts, as such a change would again depend on the good will of state parties. Even established treaties such as the International Covenant for Economic, Social, and Cultural Rights[[2]](#footnote-2) only recently had their complaint procedures established with the coming into force of the Optional Protocol,[[3]](#footnote-3) which at the time of writing has only 21 ratifications.[[4]](#footnote-4) However, positive examples also exist. For instance, in the little over two years since it was adopted, the Arms Trade Treaty has already acquired 84 ratifications.[[5]](#footnote-5)

Even if a treaty on business and human rights would achieve a high number of ratifications and become binding on a large number of states, it would still impose obligations to protect individuals’ human rights against human rights impacting activities of corporations primarily on *states*. However, it is already generally accepted (not least as a result of the Guiding Principles, which promote themselves as a mere restatement of international law) that states have obligations to protect human rights. Therefore, again this objection of added value comes to light. The complaints procedure could, at best, be established in the form of quasi-judicial or quasi-legal procedure such as now exists before the UN Human Rights Committee and other UN human rights bodies. However, it would be futile to expect that the UN could ever effectively monitor the activities of thousands of corporations if it has problems monitoring the activities of less than 200 states.

*Actor-related scope*

The actor-related scope of the proposed treaty should not limit itself to transnational corporations, but must cover any kind of corporations, whether foreign, domestic, transnational, private or state-owned. It is not entirely clear why the Ecuadorian proposal omits all corporations which are not transnational. Possible reasons may be found in the domestic problems with ensuring effective human rights protections in their domestic settings. The treaty on business and human rights should include and cover all corporations, not merely transnational corporations. Several disadvantages have been identified against focusing only upon the activities of transnational corporations. Ruggie has argued that ‘a growing number of local companies conduct business across borders, and thus may be said to have a transnational character’.[[6]](#footnote-6) One can concur with the above references as the human rights of individuals are affected on a daily basis by the business operations of both local and transnational corporations. A UN treaty would nonetheless be welcomed as it would provide an incentive for states to improve the regulation of domestic, foreign and transnational corporations. Their regulation nonetheless depends upon - and goes hand in hand with - the quality of domestic protection of human rights, including: the domestic rules; the independence and impartiality of the judiciary, and; the fight against corruption. However, it would be utopian for any international convention to expect that it would effectively address corporations if the domestic system is not capable of addressing any other kind of violations.

*Subject-related scope*

Which rights should the treaty cover? Business activities are often complex and affect all areas of human activity. It seems logical, then, that the treaty would also cover every aspect of human rights that corporations can infringe upon. As has been previously argued, business can negatively affect all human rights from civil and political to economic, social and cultural rights; from individual to collective rights. As corporations are artificial entities, some limitations may arise concerning certain rights, particularly when a corporate culture has been developed within large and structured corporate structures, in which no individual can be identified. If the interested groups proceed with idea of the treaty, it would be best that it covers wide-range of potential human rights abuses, rather than focusing only on a limited set of rights. Therefore, it seems clear that the treaty should include internationally recognised human rights stemming from recent UN human rights conventions, such as the Convention on the Rights of Migrant Workers and their families. To select only a few rights would render any treaty futile and open to arbitrary discretion. By concentrating only on the most heinous human rights abuses, the treaty would locate itself in a never-ending discussion about the hierarchy of rights in international law and the status of peremptory norms, which would get the treaty nowhere. It would also mean that few states would be prepared to consent to its adoption, and later sign and ratify it. At this stage of development, the potential contents of such a treaty are highly speculative as no comprehensive document to this effect is available.[[7]](#footnote-7) International human rights treaties traditionally focus on protecting a certain right or rights, such as, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[[8]](#footnote-8) or protecting certain vulnerable groups, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[[9]](#footnote-9) It seems that any treaty on business and human rights would not be able to follow any of the traditional approaches as it would cover a highly complex subject area involving many different rights and fundamental freedoms. Any proposed treaty would therefore have to employ a wide range of strategies and would (as noted above) include many (but not all) human rights, and would apply to all individuals and vulnerable groups. As such, it would be appropriate to employ a holistic approach with regard to the drafting of such a treaty, concentrating on rights, individuals and groups concurrently and identifying novel approaches. It is not clear whether this is the preferred strategy of proponents of a treaty as obligations traditionally derive from the imposition of rights to their holders, namely individuals.[[10]](#footnote-10) At least at this stage, concentrating only on the obligations of corporations would be far-fetched, and therefore such proposals (if they indeed exist) have to be taken with pinch of salt. It seems unclear which duty-holders the proposed treaty would include. It is highly improbable that the treaty would focus directly on corporations, but would most likely impose obligations on states to, in turn, impose obligations on corporate actors in their domestic legal orders. If the treaty were to focus only on corporations, further difficulties would arise concerning the enforcement of the rights it contained against those duty-bearers. As the traditional method of enforcement is currently implemented through a solely state-based system, eliminating states from the equation would be very complicated.

We can imagine what kind of problems could arise if the binding obligations of corporations existed without any enforcement mechanism at a national or international level. It is not very common for actors other than states to become parties to international treaties and conventions. Surely, any proposed treaty could include various actors among its duty-bearers, as certain currently existing treaties already do. One example is the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which mentions several actors that would be obliged to follow its obligations.[[11]](#footnote-11) However, even this Convention employs a very traditional approach, regulating other actors through states. For instance, its Article 4 provides in paragraph 1 that :

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake … (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.[[12]](#footnote-12)

Mégret further observers that ‘[i]t would therefore be more a treaty on obligations than on rights, even though the implementation of the obligations would be presumed to lead to the fulfilment of the rights’ and he proposes that there should be a ‘regulatory division of labour between human rights treaties … and implementing instruments’.[[13]](#footnote-13) However, an alternative approach would be to move from a top-down state enforcement system to a bottom-up approach to enforcement involving civil society groups and other social movements. With such approaches, questions arise over how compatible they are with the rule of law, fair trial guarantees and the legal certainty principles of every state based on the respect of law. What is clear is that such bottom-up approaches should not cause new violations or drive foreign investment from already deprived states.

*Final observations*

Why, then, do human rights advocates insist on opening discussion for the eventual adoption of the treaty? The answer does not lie so much in the added value (which could be statistically measured) that such a treaty would bring, but more in the symbolic meaning its adoption would bring to local communities and individual victims of corporate human rights violations. Indeed, the adoption of a UN treaty on business and human rights would diminish debates whether or not corporations have binding human rights obligations; something which remains in doubt despite the fact that even some members of the UN Working Group have recently argued that the Guiding Principles are not voluntary, but binding. In this way, the Declaration on Business and Human Rights has been often mentioned as the potential by-product of the movement for business and human rights.[[14]](#footnote-14) It seems likely that the discussion on the treaty on business and human rights will finally result in a compromise, which could be reached in the form of a Declaration on Business and Human Rights of the United Nations General Assembly. Such a proposal has been aired several times before. In this light, the real question is what would be the added value of such a declaration, particularly bearing in mind the nature and scope of the UN Guiding Principles. Declarations are usually non-binding “soft law” documents, which do not initially create international legal obligations for states.[[15]](#footnote-15) After a passage of time, some of their contents could be transformed into customary international law if consent existed. However, it would remain to be seen what effect the Declaration would have on the rights of victims. For instance, the United Nations Declaration on the Rights of Indigenous Peoples has not gained recognition as a useful mechanism for the enforcement of indigenous rights.[[16]](#footnote-16) However, the fate of the latter declaration does not mean that the Declaration on Business and Human Rights would not be successful. All in all, the proposal for business and human rights treaty illustrates that corporations can no longer hide behind the window-dressing of their human rights policies, but are already at this point of time subject to fundamental constitutional principles and rules to protect human rights and fundamental freedoms.

1. David Bilchitz, ‘The Moral and Legal Necessity for a Business and Human Rights Treaty’ (February 2015). Available at: http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf. [↑](#footnote-ref-1)
2. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 3 Jan. 1976. [↑](#footnote-ref-2)
3. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. res. 63/117 (2008). [↑](#footnote-ref-3)
4. *Ibid*, <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en> (30 August 2016). [↑](#footnote-ref-4)
5. Arms Trade Treaty, adopted on 2 April 2013, 24 December 2014. [↑](#footnote-ref-5)
6. John Ruggie,‘Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors’ (9 September 2014). Available at: http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html. [↑](#footnote-ref-6)
7. FIDH has last year formed an expert group on the treaty initiative (30 January 2015). Available at: https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative. [↑](#footnote-ref-7)
8. ### Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], 26 June 1987.

   [↑](#footnote-ref-8)
9. **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), 1 July 2003.** [↑](#footnote-ref-9)
10. # See, for example, Frédéric Mégret, ‘Would a Treaty Be All It Is Made Up to Be?’ (4 February 2015). Available at: http://jamesgstewart.com/would-a-treaty-be-all-it-is-made-up-to-be/.

    [↑](#footnote-ref-10)
11. **International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR,   
    61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006),** 3 **May 2008.** [↑](#footnote-ref-11)
12. *Ibid.* [↑](#footnote-ref-12)
13. *Ibid.*  [↑](#footnote-ref-13)
14. Surya Deva, ‘Corporate human rights abuses and international law: brief comments’ (28 January 2015). Available at: http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/. [↑](#footnote-ref-14)
15. See Andrew T. Guzman and Timothy L. Meyer, Internaitonal Soft Law, 2 J. Legal Analysis 171 (2010), See also C Ryngaert, Transnational private regulation and human rights: The limitations of stateless law and the re-entry of the state, in J Letnar Černič and T Van Ho (eds.), *Direct Corporate Accountability for Human Rights* (The Hague, Wolf Legal Publishers, 2015). [↑](#footnote-ref-15)
16. United Nations Declaration on the Rights of Indigenous Peoples art. 25, U.N. Doc. A/RES/61/295 (13 September 2007), 46 I.L.M. 1013 (2007). [↑](#footnote-ref-16)