

Does the world need a treaty on business and human rights?

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I confess to being a sceptic - not about the need for legal accountability for human rights abuses by transnational corporations (TNCs) or other companies (indeed I believe this is absolutely essential and a key challenge for the global human rights system), but sceptical about whether a treaty, now, is the right way of going about achieving this.

As someone who works trying to ensure this kind of accountability, why this scepticism?

We know that responsible companies engage in Corporate Social Responsibility (CSR) initiatives, and (the most responsible companies) increasingly recognise the language of human rights and are signing up to policies accordingly. But the fact remains that many do not. What can we do about those without reputational damage to consider (non-household names?) or whose activities are out of the public spotlight? Many of those companies remain disinterested in CSR or the Ruggie-inspired UN Guiding Principles (UNGPs). Indeed, most business was hostile to the UN Norms on TNCs (a 2003 initiative to establish binding rules in this sphere), and campaigned against them. Has much changed since then which means that companies will be more enthusiastic about the prospect of binding rules in this area?

The recent call for a treaty came from over 80 states, a significant number. But I wonder how these states will respond to heavy lobbying against the idea of a treaty, by the companies operating in their jurisdictions? Governments generally responded negatively to the UN Norms – after all, low income states didn't want intrusive regulations, and didn't want to upset TNCs investing in their countries, and developed states felt that the norms were unnecessary or excessive, and didn't want to upset TNCs headquartered in their jurisdictions. Again, I doubt that much has changed. We should also be wary of misinterpreting the unanimous UN Human Rights Council (HRC) support for UN Guiding Principles – a set of voluntary, non-binding principles – because this does not necessarily imply overwhelming state support for binding rules.

I believe that the aspirations of some states and NGOs are very unlikely to survive a treaty negotiation process in anything like the form proposed. Much could be lost in such a process. There are a number of potential problems. For example, what rights would be included? The UN Norms were based on 56 sets of varying types of rules, and were widely criticised as being too complex and self-referential (one commentator referred to them as engaging in “self-generating normative cannibalism”¹). But NGOs have recently been calling for a wide-ranging treaty including obligations “in relation to human rights violations, economic and ecological crimes, and abuses”², and it seems highly unlikely that companies will willingly accept obligations in the area of economic, social, and cultural rights (despite them being included in the UNGPs), leave alone environmental damage. I sympathise with those who argue that a treaty based on civil and political rights is just not enough – it must

¹ U. Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights', 5 Hum Rts L Rev 1 (2005)

² See “Statement to the Human Rights Council in support of the initiative of a group of States for a legally binding instrument on transnational corporations”, available at <http://www.stopcorporateimpunity.org/?p=3830>

extend to environmental issues, economic and social rights, and recognise the poverty caused by the trade disparities between the global south and the global north. I struggle to see states or companies signing up to that.

Another potential problem is that, even if a treaty was agreed, many states would probably not ratify it. The US – which was particularly hostile to the UN Norms – has a poor record of ratifying treaties (it has the dubious privilege of standing alongside only Somalia and South Sudan in having failed to ratify the Convention on the Rights of the Child), and it is unlikely to be alone in objecting to this one.

So a treaty negotiation process would face the very real possibility of ending up with a watered-down set of rules, a treaty with few ratifications, and in the process create much hostility to the prospect of binding rules on business and human rights. In short, such a negotiation process may leave us in no better position than we are now.

So what is the answer? The global human rights movement (based on the Universal Declaration of Human Rights in 1948), is only about 60 years old, and is a 'work in progress'. The system was largely designed to protect individuals from violations of their human rights by states, and was never designed to cope with protecting individuals from violations on the part of non-state entities. The system is still far from perfect, and the area of remedies and enforcement - a strong focus of the recent calls for a binding treaty – are recognised as a particular weakness.

A new response is required, creatively harnessing the existing patchwork of rights and remedies (both on a domestic and international level). One idea would be to foster the propagation of the binding rules which already exist in this area. Perhaps states in the global south would be particularly well-placed to drive efforts to harmonise legislation and remedies at domestic and regional levels, to seek to embed binding rules in regional human rights mechanisms (historically less suspicious of economic, social and cultural rights), and to embed binding rules in their constitutions (recent constitutions in Latin America have been particularly progressive in the rights that have been recognised). They might also be well-placed to lobby for funding to enable Claimants to seek remedies in existing local and/or regional mechanisms. These ideas recognise (a) the difficulty of achieving global consensus on a treaty, and (b) the fact that it is the global south which is most impacted by some of the worst examples of human rights abuses by companies.

There is little doubt that rules, enforceable mechanisms, and accessible remedies are desperately needed in this area. However, John Ruggie recently cautioned us to "...avoid 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."³ I am not in habit of agreeing with John Ruggie, but on this occasion I do. I make a plea for *accountability*, not a treaty at any price.

³ J.R. Ruggie, 'A UN Business and Human Rights Treaty? An issues brief', 28 January 2014; available at <http://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>