

**EXPERT ROUND TABLE ON ELEMENTS OF A
POSSIBLE BINDING INTERNATIONAL INSTRUMENT
ON BUSINESS AND HUMAN RIGHTS**

University of Notre Dame London Gateway

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Summary Report

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I. Introduction

On 26 June 2014, the Human Rights Council adopted Resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.¹ It established an open-ended intergovernmental working group with a mandate to elaborate such an instrument. The working group's first two sessions were to be dedicated to conducting "constructive deliberations on the content, scope, nature and form of the future international instrument." The Chairperson-Rapporteur of the working group was assigned the task of preparing "elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group." With the working group's third session due to take place in October 2017, this document is currently being drafted.

With a view to assisting in this process, an expert round table was convened to consider possible elements of a binding international instrument on business and human rights. The meeting took place on 16 May 2017, hosted by the University of Notre Dame London Gateway and co-sponsored by Notre Dame Law School, the Business & Human Rights Resource Centre, the British Institute of International and Comparative Law, and the University of Essex Business and Human Rights Project.

The purpose of the round table was not necessarily to achieve consensus among the participants with regard to the various issues discussed, nor to develop a position statement on what the elements of the proposed treaty should be. In making their contributions, participants were invited to be guided by two key criteria. The first was the value of a particular approach in contributing to the protection of human rights in the context of business activities. The second criterion was that of diplomatic viability: participants were invited to reflect on how to define elements that could plausibly gain support from a meaningful number of States Parties. It was equally recognised that there would inevitably be differences of opinion as to how both criteria should be understood. On many points, participants disagreed as to the optimal approach to be adopted. The diversity of viewpoints expressed is reflected in this report.

This report provides a summary of the discussions that took place at the expert meeting. It was agreed prior to the meeting that the Chatham House Rule would apply, in the interests of encouraging candour. Therefore, while the report outlines the principal issues discussed and the viewpoints expressed during the meeting, no specific statements are attributed to particular individuals.

The report summarises the discussions under broad thematic headings, with a view to identifying possible elements of the eventual treaty and the positions taken thereon by the various participants. Nonetheless, many of the issues discussed are necessarily interrelated: for instance, questions of liability are inextricably linked with the issue of which rights are to be protected, while discussions as to the extent of national jurisdiction are connected to problems associated with the corporate form.

¹ Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) UN Doc A/HRC/RES/26/9.

The participants at the round table were as follows:

Elodie Aba, Business & Human Rights Resource Centre

Michael Addo, United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

Roger Alford, Notre Dame Law School

Isabella Bunn, American Bar Association Center for Human Rights and Business & Human Rights Project

Douglass Cassel, Notre Dame Law School

Nadia Bernaz, Middlesex University London School of Law

Nicole Bigby, Berwin Leighton Paisner LLP

Bahaa Ezzelarab, Business & Human Rights Resource Centre

Peter Hall (*by video conference*), International Organisation of Employers

Sheldon Leader, University of Essex Business and Human Rights Project

Rae Lindsay, Clifford Chance

Carlos Lopez, International Commission of Jurists

Robert McCorquodale, British Institute of International and Comparative Law

Maddalena Neglia, International Federation of Human Rights (FIDH)

Gabriela Quijano, Amnesty International

Luis Espinosa Salas (*by video conference, during portions of the meeting*), Minister, Mission of Ecuador to United Nations in Geneva

Catie Shavin, Global Business Initiative on Human Rights

Suzanne Spears, Volterra Fietta

Israel Taye, former staff attorney, African Commission on Human and Peoples' Rights, Working Group on Extractive Industries, Environment and Human Rights Violations

Salil Tripathi, Institute for Human Rights and Business

Daniel Uribe (*by video conference*), South Centre

Monica Vargas, Transnational Institute

Rapporteurs:

Ruth Cormican, LL.M. graduate 2017, Notre Dame Law School

Anna Dannreuther, Trainee Solicitor, Berwin Leighton Paisner LLP

II. Strategic Considerations

Before turning to the specific elements of an eventual treaty, the participants discussed the broad objectives that should govern the treaty-making process, as well as the diplomatic and political constraints likely to affect the scope of the treaty. The principal strategic considerations to be borne in mind were as follows:

A. Potential States Parties

Given the resistance and even hostility expressed by some States towards the idea of elaborating a treaty on business and human rights, consideration was given to the question of how many States could plausibly be expected to ratify such a treaty. In particular, participants discussed whether a ‘South/South treaty’ would have better prospects of being successfully negotiated than one which sought to achieve support from developed countries in the Global North.

Some participants suggested that it may be unrealistic to aim for the participation of major developed countries, and that trying at all costs to garner universal support could result in a much weaker instrument or in the process being blocked altogether. On the other hand, others pointed out that the negotiations are still in their early stages, and that States’ positions may evolve as time goes on. Therefore, they argued that it would be a mistake to pursue an exclusively South/South treaty at this point. Some questioned whether an instrument which seeks to fill the gaps in protection of human rights in the context of business activities could be effective if multinational corporations based in the Global North were not covered.

It was also observed that the perceived polarisation between North and South may no longer be an accurate reflection of today’s global landscape. Developing countries which adopt a relaxed regulatory environment to attract foreign direct investment (FDI) may be reluctant to accept new obligations that could damage their ‘business friendly’ image abroad. Moreover, major economies have developed in countries traditionally viewed as forming part of the Global South, including Brazil, China and India. It was suggested that it might be possible to incentivise capital-exporting countries to participate in a treaty on the basis that it would establish a level playing field for business.

Nonetheless, it was argued that even a treaty that fails to attract support from countries in the Global North would be of some value in advancing the protection of human rights worldwide. For instance, it could provide a framework for protection in countries which currently lack any domestic legislation on business and human rights. Equally, it could provide a mechanism for victims to enforce judgments from national courts in other Contracting Parties.

Finally, it was observed that the countries targeted will depend on the instrument’s envisaged purpose and the issues it seeks to address. These questions are further addressed in the next section.

B. Form and Purpose

The discussions focused on the negotiation of a separate, stand-alone treaty, rather than a protocol to any existing instrument. Such a treaty could take the form of a framework convention, similar to those agreed in the past in the field of international environmental law: the initial treaty would form an agreement on basic principles, while the specific obligations would be left to subsequent protocols. International trade agreements, which can include separate schedules of commitments for countries prepared to accept them, were also suggested as a possible model.

Some participants argued that the instrument should be as ambitious as possible, as there is unlikely to be another opportunity to negotiate a business and human rights treaty for some time. Others stressed that a single instrument cannot hope to achieve everything, and that there are provisions that, although desirable, it would not be politically feasible to include at this point in time. They pointed to the need for an awareness of the risks associated with a bad treaty, which would be counterproductive and create problems for civil society in navigating the business and human rights field. The goals of the treaty-making process must take into account diplomatic constraints.

It was also argued that a very comprehensive, ambitious treaty covering all sectors would be problematic, based on the experience of the UN Global Compact and the Guiding Principles (UNGPs): while many States might agree on the broad principles, it would be impossible to know what they required in practice. Different sectoral agreements might therefore be necessary to define meaningful obligations.

Several participants suggested that a gap-filling approach might be best suited to balancing the competing goals of diplomatic viability and substantive value. A treaty could focus on enhancing accountability and the availability of remedies for human rights violations, although it was observed that States are more likely to favour an approach focusing on prevention. One expert suggested that the instrument should focus on grave abuses of human rights, although there was also a concern that if the concept of 'grave abuse' were to be limited to the field of international criminal law it would exclude the majority of human rights violations in which businesses are implicated.

C. Relationship with UN Guiding Principles

Some participants referred to the potential for tension between the proposed binding instrument and the UNGPs, and to the need to ensure that the treaty-making process does not undermine the progress made under an instrument previously endorsed by the Human Rights Council. It was suggested that a split between countries supporting a binding instrument and those only prepared to accept the UNGPs could create difficulties from a civil society perspective.

Others expressed the view that a binding instrument could achieve complementarity with other initiatives, while further developing international law in this area. From this perspective, the proposed treaty is just one of a number of approaches to regulating the area of business and human rights, all of which must receive continued attention.

D. Stakeholder Participation

Some participants felt that the traditional approach of State-to-State negotiations was not appropriate in this area, and that a business and human rights treaty would not be credible unless all relevant stakeholders were involved in its negotiation. They suggested that one of the lessons to be drawn from previous initiatives on business and human rights was that business representatives should be included in the negotiation process. Others, however, reported that business organisations had thus far proved unwilling to engage with the treaty-making process when approached. It was suggested that corporate participation could be enhanced by emphasising the ‘business case’ for human rights: the advantages associated with establishing greater clarity in the law in this area and a level playing field for all corporations.

III. Substantive Elements

A. General Issues

(i) *Which Rights?*

It was suggested that the treaty focus on the rights of the victims to be protected from human rights abuses by business. However, very different views were expressed on the question of which international human rights should be regulated by the proposed treaty. Some participants felt that the treaty should adopt the same approach as the UNGPs, which state that the business responsibility to respect human rights refers “to all internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”² It is also stated that “[d]epending on circumstances, business enterprises may need to consider additional standards.”³ At the meeting, some participants felt that it would be difficult to provide a principled reason for adopting a more restrictive definition of human rights under the proposed treaty. It was also suggested that the expansive definition of human rights adopted under the UNGPs has not been a problem in practice.

Others pointed to areas where a new treaty on business and human rights could go further than the UNGPs. Such a treaty could, for instance, make explicit reference to the rights of indigenous peoples, which are often at risk in the context of business activities. In addition, the proposed treaty could recognise labour rights beyond those referred to in the UNGPs. It was suggested that limiting the protection of labour rights to those recognised under the eight core ILO conventions could cause States to neglect their obligations under other labour conventions that they have previously ratified. However, there was also a view that companies might resist a treaty that requires them to respect labour rights that have not yet achieved universal acceptance among States.

On the other hand, several participants argued that the expansive definition of human rights adopted under the UNGPs was only possible because of its status as a non-binding, ‘soft law’ instrument. Therefore, a binding treaty would need to take a more restrictive approach in order to achieve meaningful support from States. The treaty could limit its definition of human rights to all those recognised in treaties previously ratified by the State or in customary international law. This would provide States with greater certainty as to the content of their international legal obligations on ratifying the new treaty, and would limit those obligations to the rights they are already required to protect, at least in theory. Yet this approach could create difficulties in situations involving two or more States, where at least one has not ratified the instrument in question.

² Human Rights Council, ‘Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31, Guiding Principle 12.

³ *Ibid.*

Others maintained that a treaty could be most effective by adopting a more selective approach, strategically choosing rights on which action is most necessary. The rights to health and water were cited as examples of human rights considered particularly significant in the context of business activities. Alternatively, the treaty could define a category of ‘grave abuses’ of human rights, to include violations that are particularly relevant to corporations such as the exploitative use of child labour.

However, it was also suggested that a targeted treaty would be most likely to focus on slavery and gross human rights violations, to the exclusion of other human rights affected by business. Another participant considered that a stand-alone treaty would not be necessary to address only specific human rights issues: the rights of children in the context of business activities could more appropriately be addressed by an additional protocol to the Convention on the Rights of the Child, for instance, while labour rights could be dealt with through the ILO.

Finally, it was recognised that a treaty need not adopt one single definition of human rights, but could provide different definitions for its different components. The concerns around adopting an expansive approach largely stem from a fear of imposing unlimited liability on business. However, this would not be an issue to the extent that a treaty imposes only reporting or due diligence obligations: for these provisions, an inclusive definition of human rights would be less contentious. A more restrictive definition could be adopted in relation to civil liability, providing sufficient precision to satisfy rule of law requirements, while even greater precision would be necessary to the extent a treaty imposes criminal liability on corporations.

(ii) Subjects of the Treaty

Many participants felt that the treaty should not seek to define corporations as direct subjects of international law, as this issue remains extremely controversial and would be likely to preclude agreement on any of the issues at stake. They instead recommended that the instrument should impose obligations only on States, which would in turn be required to regulate the activities of business entities in relation to human rights. Additionally, it was argued that effective implementation of the responsibilities of business to respect human rights could only be achieved through national institutions. From this perspective, it is unnecessary to address the thorny question of whether corporations can be regarded as subjects of international law in the context of these negotiations.

On the other hand, one expert suggested that these negotiations should be regarded as an opportunity to elaborate an entirely new kind of treaty. The proposed instrument need not be regarded solely as an agreement between States, but could be considered directly binding on corporations and business enterprises as well. Such an approach would more accurately reflect the reality of international relations today. However, there is a need for further work to translate all the human rights recognised in international law into obligations for companies. Moreover, another expert warned that if corporations are recognised as having obligations in international law, they must be accorded corresponding rights the implications of which must also be considered: the decision of the US Supreme Court in *Citizens United*⁴ was cited in

⁴ *Citizens United v Federal Election Commission* 558 US 310 (2010).

this regard. It was suggested that conflicts could arise between the exercise of rights by companies (or their shareholders) and the rights of other individuals affected by those activities.

B. State Duties

(i) *National Action Plans*

The possibility of introducing an obligation for States to formulate national action plans (NAPs) on business and human rights was briefly discussed. One participant suggested that a provision inviting States to reflect on a national strategy might be one diplomatically viable way of approaching the treaty negotiations. On the other hand, a concern was expressed that the NAPs developed so far have been weak and that proposals to include such a provision might come to dominate the negotiations at the expense of other, more valuable, initiatives.

(ii) *Transnational Jurisdiction, Regulation and Effects*

Another issue which was discussed at some length was the question of whether a treaty should oblige States to exercise authority over the overseas operations of companies domiciled in their territory. It was generally felt that this would in theory be desirable, although it may not necessarily be diplomatically viable.⁵

A lack of a clear understanding of what exactly is meant by extraterritorial jurisdiction was identified as an obstacle. Concerns may arise where extraterritorial jurisdiction is perceived as a way for powerful States to dictate the rules to be applied in other countries. The participants recognised that the exercise of jurisdiction is governed by international law, which imposes restrictions on what States can and cannot do, including a general rule of reasonableness. However, regulation with extraterritorial effect is often consistent with existing international legal parameters.

Several participants stressed the importance of making a distinction between extraterritorial regulation and extraterritorial jurisdiction. Extraterritorial regulation, it was suggested, is a less controversial concept as it already occurs in a variety of contexts, for example under anti-trust regulations or the reporting obligations in the UK Modern Slavery Act. The US Foreign Corrupt Practices Act⁶ was also pointed to as an example of States regulating the extraterritorial activities of their own companies. It was suggested that these examples could be of use in demonstrating that the proposals for the new instrument are not entirely novel, but based on precedents in State practice. A number of the participants also felt that the term 'extraterritorial jurisdiction' should not be used in the context of the treaty, the label itself being vague and problematic: the term 'transnational jurisdiction' was suggested as a more accurate and less controversial alternative.

In addition, it was noted that there is a difference between extraterritorial regulation and domestic regulation with extraterritorial implications. For example,

⁵ But see note 9 below and accompanying text.

⁶ Foreign Corrupt Practices Act 1977 (FCPA) 15 USC § 78dd-1 *et seq.*

states could be obligated to enact domestic regulations to require companies domiciled in their jurisdiction to supervise their foreign subsidiaries or contractors. Such measures thus deal with the action or inaction of the company in its home jurisdiction, which could have effects in other countries.

One participant criticised the calls for extraterritorial jurisdiction as based on the assumption that countries in the Global North have better functioning court systems, an assumption that does not necessarily reflect today's world, and could set in stone an increasingly outdated dynamic. Every effort to improve host country judicial systems should be made.

However, others responded that there are other justifications for imposing such an obligation on the home States of transnational corporations. Key among these is the need to end impunity, in cases where companies cannot at present be successfully sued in either their home State or the courts of the host country. Host States can encounter structural and legal difficulties in enforcing their judgments effectively. Therefore, requiring home States to regulate the activities of their companies overseas improves the prospects of providing meaningful accountability somewhere. Companies may be incentivised to improve their practices if they face a risk of being sued in courts in the Global North, where damages, including to the reputation of the company, are often much higher.

It was also suggested that the extent to which States would be required to regulate the extraterritorial activities of their companies could vary according to the nature of the obligation in question. While an expansive extraterritorial obligation could be adopted for reporting or monitoring, the range of jurisdiction might be more limited for the imposition of civil or criminal liability. On the other hand, another expert considered it dangerous to disconnect obligations of reporting and monitoring from sanctions or accountability.

Finally, one participant observed that extraterritorial regulation is less problematic where the transnational corporation itself is committing the human rights violations. However, the issue becomes more difficult where the corporation is accused of complicity in violations attributable to the host State. In these cases, a possible moral hazard is created where the company can be sued while the State itself is not held liable anywhere.

(iii) Collaboration on Judicial Matters

Related to the previous issue, participants highlighted other difficulties associated with holding multinationals accountable for their activities in host States. One is related to the enforcement of judgments: it was observed that where judgments are issued against the company in the host State, it may be impossible to enforce it there if the company is no longer present within the territory. Issues of disclosure can also complicate attempts to hold multinational companies accountable in court. The US Foreign Legal Assistance Act⁷, which allows national courts to order persons residing

⁷ Assistance to foreign and international tribunals and to litigants before such tribunals, 28 USC § 1782. For examples of the use of this statute in support of human rights cases, see

or present in the US to give testimony or produce documents for use in proceedings in a foreign or international tribunal, was referred to as a useful precedent. The treaty could require other States to introduce similar legislation. The potential for a treaty to impose an obligation for home States to support capacity building in less developed States was also suggested as a positive option, allowing national authorities to provide accountability themselves.

(iv) *Policy Coherence: Trade and Investment*

There was a general consensus among participants that a new treaty should address the issue of coherence between States' human rights obligations and the provisions of trade and investment treaties, including those relating to investor-State dispute settlement (ISDS). Due to time constraints, however, it was not possible to engage in in-depth discussions of what this would require.

C. Business Responsibilities

(i) *Which Companies?*

There was some discussion as to which companies should be regulated by a new international instrument, largely prompted by the footnote to the HRC Resolution 26/9 which defines "other business enterprises" as only those which have a "transnational character in their operational activities."⁸ There was general agreement among the participants that a treaty should not be limited solely to transnational corporations (TNCs), and that the issue was largely a political rather than a legal one. It was argued that limiting the treaty to TNCs would reduce its effectiveness, as the greatest difficulties for TNCs seeking to address their human rights impacts frequently relate to local companies with which they have business relationships. Additionally, relying on a top-down theory of change within an industry is not necessarily effective in cases where business relationships are more complex.

Alternatively, some participants suggested that a new treaty could apply only to companies of a certain size, for example defined by number of employees. This approach could prevent small businesses being made subject to burdensome human rights obligations. However, others noted that small companies can equally be involved in human rights violations, and that most abuses do not occur at the multinational's headquarters. Even companies with a relatively small number of employees can have a disproportionate impact on human rights. In addition, the small size of a company does not absolve the State of its international obligations to protect third parties from any human rights violations in which it is engaged. This is particularly significant given that most participants favoured an approach to implementation focusing on national institutions.

Another participant suggested that, since State regulation of private entities can be a controversial topic, the proposed treaty could instead focus solely on the State as an

<https://www.earthrights.org/legal/foreign-legal-assistance>. For an overview explanation, see https://www.earthrights.org/sites/default/files/fla_guide.pdf

⁸ Human Rights Council Resolution 26/9 (n 1).

economic actor, acting as an investor and through State-owned enterprises. However, others observed that some States would be more hostile to a treaty regulating State-owned enterprises than to one directed at private companies.

(ii) Parent/Subsidiary Relationships

The corporate form and separate legal personality are important concepts in the business and human rights debate, particularly in the context of parent/subsidiary relationships. The difficulties involved in establishing accountability of the parent company for activities carried on by its subsidiaries were referred to during the course of the meeting. A proposal to introduce a rebuttable presumption of control by the parent company over the conduct of the subsidiary that caused the harm (rather than over all of the subsidiary's operations) was discussed. It was countered that the introduction of such a presumption could create perverse incentives for parent companies to exercise less control over the activities of their subsidiaries.

However, it was suggested that the risk of creating perverse incentives could be mitigated by simultaneously introducing an obligation for parent companies to conduct due diligence in relation to the activities of the whole corporate group. The recent French legislation on the corporate duty of vigilance was referred to as a possible model. While recognising that the *Conseil constitutionnel* has struck down the portion of that law that created a large fine for failure to conduct adequate due diligence, one participant observed that these provisions were considered too vague only because the penalty in question was understood to have a criminal nature. Similarly, the Joint Committee on Human Rights of the British Parliament recently recommended legislation

to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human rights abuses for all companies, including parent companies, ... This would require all companies to put in place effective human rights due diligence processes ..., both for their subsidiaries and across their whole supply chain. The legislation should enable remedies against the parent company and other companies when abuses do occur, so civil remedies (as well as criminal remedies) must be provided. It should include a defence for companies where they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate that this has been done. ...⁹

Another participant recommended caution when breaking down historic legal concepts such as separate legal personality, noting that corporate structures have developed over time for various reasons and that deconstructing them might produce unforeseen consequences.

⁹ Joint Committee on Human Rights, *Business and Human Rights 2017: Promoting Responsibility and Ensuring Accountability*, HL Paper 153, HC 443, printed 5 April 2017, pp. 73-74, par. 24.

D. Access to Remedies

The meeting concluded with a discussion of access to remedies for human rights violations in the context of business activities. Participants recognised a need to address the many legal, procedural and practical obstacles that frequently prevent access to remedy at the national level. There was general agreement that a treaty should oblige States to provide remedies for violations of human rights that cause harm to individuals, and that such remedies should primarily be judicial. The system of National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises was referred to as an example of the inadequacy of non-judicial remedies. Arbitration was also suggested as a potential avenue to secure access to remedies, whereby the New York Convention could ensure global enforcement.¹⁰

One participant stressed the importance of differentiating between proactive and compensatory forms of remedy, with prevention being in principle preferable to compensation. Where preventative approaches do not succeed, reparations would also have to be provided. It was also observed that remedies should not be thought of solely in terms of monetary damages, as other forms of reparation may also be appropriate in a given set of circumstances.

It was suggested that large companies could be required to establish a compensation fund to facilitate access to remedy for future victims of human rights violations, which would operate under the principle of strict liability. This would absolve claimants of the need to establish negligence, thereby avoiding protracted civil litigation.

At the international level, it was felt that establishing an international monitoring body would be more viable than a full court with power to issue legally binding judgments. One participant considered that the treaty should not rely solely on national authorities to ensure enforcement of its provisions, given the risk of State inaction. Instead, the international committee of experts should hear claims not only against States, but should also be empowered to enforce compliance against companies. Another participant observed that the problem of national inaction does not apply solely to the issue of remedies, but to all the provisions of the treaty, the effectiveness of which will largely depend on State uptake. It was suggested that companies may have an interest in convincing the State to act, in order to ensure a functioning national judicial system and a level playing field. Domestic legal systems could also carry out a full causation analysis which could serve as a defence for companies.

¹⁰ See Claes Cronstedt, Jan Eijsbouts and Robert C. Thompson, *International Business and Human Rights Arbitration*, Feb. 13, 2017, accessible at <http://www.i4bb.org/news/TribunalV6.pdf> (consulted July 11, 2017)