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SYMPOSIUM ON SOFT AND HARD LAW ON BUSINESS AND HUMAN RIGHTS

TRANSCENDING THE BINARY: LINKING HARD AND SOFT LAW THROUGH A UNGPS-BASED FRAMEWORK CONVENTION

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Achieving respect for human rights by businesses requires not making the "right" choice between hard and soft law but establishing an architecture to sustain a constructive dialectic between the two. This essay argues that a business and human rights treaty modelled as a framework convention and centered initially on the UN Guiding Principles (UNGPs) offers such a structure while avoiding the shortcomings of treaty proposals advanced to date.

False Dichotomies

Positions taken around the business and human rights treaty initiative[1] are often characterized as cleaving along the lines of conventional binaries. To caricature this Manichean view, but just a little, the treaty pits emerging against industrialized economies, and is buoyed by activists, while businesses are irreconcilably opposed. Anything less than unreserved enthusiasm for recent drafts, or the Open-Ended Inter-Governmental Working Group (OEIGWG) process, moreover, is often read as implying a hard-baked preference for "voluntarism," corporate social responsibility and soft law, supposedly embodied by the UNGPs,[2] over a treaty or indeed business and human rights laws as such.

Yet such stark dichotomies are not borne out in reality today, if they once were.[3] Support for the UNGPs does not correspond automatically to a rejection of business and human rights legislation. Amongst the UNGPs' keenest advocates are European states that have already adopted due diligence laws. In 2019, the Netherlands passed a Child Labor Due Diligence Act that requires companies to investigate and develop action plans relating to child labor, and that carries at least a prospect of criminal convictions.[4] France's *Loi de Vigilance* permits parties harmed by failures of due diligence to initiate civil claims for damage.[5] Proposals for similar schemes have been tabled in

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[1] Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

[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: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (Mar. 21, 2011).

[3] Khalil Hamdani & Lorraine Ruffing, United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest (2017).

[4] *Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid)*, Stb. 2019, 401.

[5] *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*

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Switzerland, Finland, and Germany, while the UK Modern Slavery Act 2015, EU non-financial reporting, and conflict minerals laws[6] countenance a range of administrative and potentially also criminal sanctions for failures to comply with disclosure obligations. "Even" the United States has established binding human rights obligations for companies when acting as suppliers to government,[7] as well as penalties for the use of forced and child labor in supply chains imposed via customs and border controls.[8]

Neither does a notional North-South divide serve as a reliable guide to attitudes on "hard v. soft" regulation. At the OEIGWG's Fifth Session, for instance, Colombia reiterated its support for the UNGPs, and suggested there was still a need to demonstrate the "value added" of a treaty. China, reflecting its dual identity as both capital importer and exporter, identified the need to balance human rights and development but also sought restraint in addressing home states' extraterritorial obligations.[9] While it is true that a groundswell of grassroots organizations continue strongly to back the Geneva process, prominent human rights advocacy organizations have at times appeared equivocal.[10] If it remains hard to imagine businesses rallying in support of a treaty,[11] business advocacy of due diligence legislation at the national level and on a sector basis has surprised many.[12]

Diagnosing the Deficiencies of the Current Approach

Yet the OEIGWG process does appear stuck.[13] If this cannot be explained away via old tropes, then what is the problem? States' interventions at the OEIGWG's Fifth Session disclose a range of real and substantial flaws in treaty proposals advanced to date.

First, these proposals fail to recognize and apply foundational international legal principles such as legality and predictability, as well as established rules relating to such matters as jurisdiction[14] and international legal responsibility.[15]

Second, they have ventured a level of detail about how states must implement the envisaged obligations that is almost unknown in the arena of international human rights treaties. The obligation to secure effective remedies for business-related human rights abuses, for instance, is translated, in the Revised Draft Legally-Binding Instrument

[6] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas 2017 O.J. (L 130) 1; 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 Text with EEA Relevance, 2014 O.J. (L.330) 1.

[7] Federal Acquisition Regulation (FAR), 48 C.F.R. § 101, at 52.222-50(c), (d), (e), (f), (g) (Combating Trafficking in Persons).

[8] Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307.

[9] Statements of Colombia and China, Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

[10] Amnesty International, Human Rights Watch, and the International Commission of Jurists are not members of the Treaty Alliance, for example.

[11] Int'l Org. of Employers et al., Joint Business Response to the Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Revised Draft LBI") (Oct. 2019).

[12] *See, e.g.*, *Chocolate Companies and MEPs Call For EU Due Diligence Regulation*, FERN (Apr. 10, 2019); *Companies Pushing for Finland to Adopt Mandatory Human Rights Due Diligence Legislation*, YKKÖSKETJUUN.FI (Sept. 24, 2018).

[13] Claire Methven O'Brien, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty*, 5 BUS. & HUM. RTS. J. 150 (2020).

[14] Claire Methven O'Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*, 3 BUS. & HUM. RTS. J. 47 (2018).

[15] Opening Statement of Mexico, IGWG Fifth session.

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(Revised LBI), into specific requirements to abolish statutes of limitations, establish criminal corporate liability, and reverse the burden of proof. In this respect, it is hard to disagree with the U.S. comment that the proposed instrument pursues "an unworkable 'one-size-fits-all' approach,"[16] a blunt formulation of a point dressed up in more diplomatic language by other delegations. On another interpretation, many provisions of texts tabled to date are shaped by a kind of forum error: clauses that might sit well in the private law world of The Hague are out of place in Geneva.

Third, in some areas, proposed texts have counselled radical international legal reengineering. Yet here, by contrast, detail is lacking. To illustrate, various clauses of the Revised Draft LBI conflate environmental rights and international humanitarian law with human rights,[17] and the Revised Draft LBI establishes civil "harm" as a trigger for international legal responsibility of both businesses and states. Yet the text omits qualification or elucidation in either case.

Fourth, because it aims to nail down precise yet universally applicable legal definitions, the Revised Draft LBI is forced to regress from the ambit of protection expressed by the UNGPs. Thus, for instance, due diligence duties extend only to contractual relationships, narrowing the scope of the corporate "responsibility to respect" by excluding other business relationships, along with public procurement, and state-owned enterprises.

If the foregoing analysis is correct, it is scarcely surprising that many states, after five years during which a succession of texts have been championed then chopped and changed almost beyond recognition, remain unclear as to the project's overall purpose and unconvinced of its legal and diplomatic viability.[18]

Even if a treaty along current lines gained the support necessary to open for signature, it would remain in peril of redundancy. First, such an instrument might never enter into force but still occupy the available space, perhaps in perpetuity, for international business and human rights rules. An unratified business and human rights treaty would, moreover, give succor to the UN human rights system's increasingly emboldened detractors, while betraying the victims whose suffering is mobilized in its cause.

This would also be true of a treaty that entered into force but failed to secure the commitment of major world economies. Assuming that states sustained the mandate of the UN Working Group on Business and Human Rights, soft law-making centered on the UNGPs would continue to unfold, divorced from treaty-related developments. Civil society's scarce advocacy resources would, in this scenario, be unprofitably split across two forums. At best, the normative output of a supervisory body established under such a treaty would be irrelevant; at worst it would provide a source of continuing dissonance for duty-bearers and rights-holders alike. Given recent drafts' commitment to detailed prescriptive rules, a range of further difficulties seem plausible: mass reservations; the inundation of any complaints procedure with technical questions ill-suited to the mechanism; and correspondingly low rates of remediation by states parties.

Perhaps one way to address such problems would be to narrow the scope of the subject-matter: deep-reaching rules can work, after all, in tightly delimited areas. Thus, states could restrict the treaty's focus to rights under only one or a few selected human rights instruments or to certain categories of rights-holders; to certain business sectors or classes of companies; or, as earlier recommended by John Ruggie, to "gross" human rights violations.[19] Yet the double standards countenanced by such proposals seem at variance with the universality and principles of

[16] The United States Government's Continued Opposition to the Business and Human Rights Treaty Process (*Note Verbale)*, No. 053-19, Oct. 16, 2019.

[17] *See, e.g.*, UN OEIGWG Chairmanship, Revised Draft, Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises arts.1(2), 8(1) (July 16, 2019).

[18] *See, e.g.*, Opening Statements of India and Mexico.

[19] John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AJIL 819 (2007).

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interdependence, indivisibility, and effectiveness of human rights, as reflected in their failure to gain traction with stakeholders.

Taking Framework Agreements Seriously—Again

So how will the story end? Dysfunction is not inevitable. Still, without a change of direction, the treaty process will soon falter. Preferring model-mongering[20] to preaching *Realpolitik*,[21] I suggest that adopting a framework agreement approach could resolve the OEIGWG's current impasse while bridging the hard law-soft law divide and contributing meaningfully to advancing respect for human rights in the global market sphere.

Framework agreements define an overall purpose or common objective, in combination with high-level principles of a general or procedural nature and devices to promote implementation, such as cooperation and reporting.[22] In the late 1990s, Braithwaite and Drahos investigated international business regulation across thirteen industrial sectors and how less powerful constituencies could intervene in it to achieve environmental and social progress. One of their main conclusions was the need to "Take Framework Agreements Seriously."[23] "[B]rick by brick over the decades," they found, "vague and platitudinous" agreements delivered "remarkable specificity," in some cases evolving into punitive criminal regimes.

Explaining this phenomenon, Braithwaite and Drahos observed that "[a]greements would rarely be made if they started as enforceable bodies of rules." Narrow norms are hostage to veto coalitions. The implicit uncertainty of principles, on the other hand, allows everyone to sign on. Principles provide a pretext for sustained and structured deliberation that gradually permits the elaboration of more detailed standards, for example via technical annexes or regulations developed by intergovernmental or expert committees, without the need for repeated treaty ratification. Despite the appearance of toothlessness, "[o]ver time . . . there is a progression . . . to rules, then to enforcement of rules."

Other scholars have arrived at similar findings.[24] Koremenos, for instance, has identified human rights agreements as generally more imprecise than other international legal instruments. Yet this appears to be for sound reasons. "Large, heterogeneous groups of states with various cultures, ideologies, and institutional differences," she suggests, "can solve the underlying cooperation problems in human rights through imprecise language, reservations, and optional protocols."[25]

De Búrca likewise characterizes human rights regimes as based on open-ended principles, evolutive reasoning, and a wide margin of discretion capable of accommodating states' diverse approaches to implementation.[26] It is because of, not despite, such characteristics that human rights treaties can, at least sometimes, drive change and hold governments to account. Their broad initial formulations permit bottom-up advocacy contextualized to national circumstances. On this basis, supervisory bodies can encourage progressive regulatory measures tailored to and legitimized by struggles on the periphery—rather than dictated by the center in advance.

[20] John Braithwaite & Peter Drahos, Global Business Regulation 588-93 (2000).

[21] John G. Ruggie, *Get Real, or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business & Human Rights Treaty* (2015).

[22] Braithwaite & Drahos, *supra* note 20, at 544. *See, e.g.*, Vienna Convention for the Protection of the Ozone Layer, Sept. 22, 1988, 1513 UNTS 293; UN Framework Convention on Climate Change, Jan. 20, 1994, 1771 UNTS 107.

[23] Braithwaite & Drahos, *supra* note 20, at 619-20.

[24] *See, e.g.*, Daniel Bodansky, The Art and Craft of International Environmental Law 183 (2010).

[25] Barbara Koremenos, The Continent of International Law: Explaining Agreement Design 6 (2016).

[26] Gráinne de Búrca, *Global Experimentalist Governance and Human Rights*, 6 ESIL Reflection (2018); Gráinne de Búrca, *Human Rights Experimentalism*, 111 AJIL 277 (2016).

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Outline of a Business and Human Rights Treaty Styled as a Framework Agreement

Principles, then, should not be underestimated. Neither should it be thought that effectiveness attaches exclusively to any particular international legal form.[27]

Besides, a UNGPs-based framework agreement would have the potential to capitalize on, rather than squander, the widespread acceptance of the UN Framework and UNGPs amongst governments, labor, business and other actors as well as substantial efforts since 2011 to implement them.[28] Yet if hardening the UNGPs would constitute a baseline, this approach would also offer scope to generate new soft and hard law standards on topics of global concern as they emerge, such as systemic human rights challenges posed by big tech, AI, and the platform economy.[29]

What would such an instrument look like? Basic elements could include the following.[30] First, the instrument should contain a statement of overall objectives, for example, "To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities; to prevent business-related human rights violations and abuses; and To ensure access to justice and effective remedy for victims of business-related human rights violations and abuses."

Second, it should include a statement of Guiding Principles. Initially these would need to track the text of the UNGPs, lest the current impasse in negotiations be reproduced in another theater. However, they might conceivably be revised or supplemented later, if incorporated via an Annex or similar device.

Third, the text should address states' general obligations. Here clauses might define states' duties to cooperate in formulating protocols, procedures, and guidelines and to engage in collective actions where relevant with competent international and regional intergovernmental organizations. Building on the growing number of UNGPs National Action Plans,[31] general obligations should also require parties to develop, implement, periodically update, and review comprehensive multisectoral national action plans or strategies on business and human rights. States could also be required to establish or reinforce and finance a national coordinating mechanism or focal point on business and human rights; to adopt and implement effective legislative, executive, administrative or other measures; to cooperate to prevent and reduce business-related human rights abuses; and to enhance effective access to a remedy.

Fourth, states should establish a mechanism for adopting subordinate instruments. Additional protocols might address key parameters of national due diligence legislation, or legal accountability for business involvement in abuses in conflict-affected areas. Formal guidelines might be an appropriate vehicle through which to address national remedy regimes;[32] human rights impact assessment per specific sectors or commodities; and corporate human rights reporting. Standards generated by technical bodies or multi-stakeholder initiatives outside the treaty

[27] Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581.

[28] Claire Methven O'Brien, *Experimentalist Global Governance and the Case for a Framework Convention Based on the UN Guiding Principles on Business and Human Rights*, *in* Navigating a New Era of Business and Human Rights: Challenges and Opportunities Under the UNGPs 204 (Matthew Mullen ed., 2019).

[29] As demonstrated by e.g. developments under the UN Framework Convention Climate Change and Montreal Protocol.

[30] Claire Methven O'Brien, *Transnational Business and Human Rights: The Case for a Multi-Level Governance Approach* (unpublished paper) (2007); Submission to UN Open Ended Inter-Governmental Working Group on Transnational Corporations & Other Business Enterprises with Respect to Human Rights (Sept., 2016); Jolyon Ford & Claire Methven O'Brien, *Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty*, 40 UNSW L. Rev. 1223 (2017).

[31] *See, e.g.*, National Action Plans on Business and Human Rights.

[32] These could build on guidance developed under the Office of the High Commissioner for Human Rights's Accountability and Remedy Project.

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framework,[33] following appropriate scrutiny and review, could also be absorbed by this route, yielding for the instrument's overall system greater band-width and responsiveness than the single channel of treaty amendment and reratification would permit.

Given its inherent flexibility, states ought not fear a treaty along such lines. In light of governments' repeated policy and public commitments to the UNGPs, responsible business, and sustainable development,[34] opposing such an instrument, if it is put on the table, could indeed be awkward. For this reason, if no other, such an approach now deserves treaty advocates' greater attention.

[33] *E.g.*, by the Organisation for Economic Cooperation and Development under the *aegis* of Responsible Business Conduct.

[34] GA Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

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