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Should the UN develop a treaty on business and human rights?

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**Executive Summary**

This paper seeks to investigate the proposed development of a treaty on business and human rights by the UN through evaluating the effectiveness of the Guiding Principles. This report reveals that where the Guiding Principles fail to deliver, the treaty will ensure measures to prevent or sanction any violation of human rights. For example, the treaty proposes to solve the accountability issues encountered by the Guiding Principles by eliminating legal obstacles to corporate liability and creating parent company liability. Likewise, advocates of the treaty argue that by adopting a model similar to that of the United Nations Convention against Corruption and by establishing an international court, victims would be able to access remedy which the Guiding Principles fail to achieve. Nevertheless, this report reveals that despite its good intentions, the treaty faces a number of drawbacks including the difficulty in developing one set of detailed treaty obligations, the debate over whether a treaty is actually necessary, the possibility of states ignoring their duty to protect human rights and corporate misconduct by smaller business going unnoticed. This paper concludes by suggesting that further clarification on treaty proposals is required before one can confidently agree to the development of the treaty.

On 6th July 2015, negotiations regarding the development of a treaty on business and human rights began when the UN Human Rights Council Open-Ended Intergovernmental group had a meeting (Business and Human Rights Resource Centre, 2017). Since then, debate regarding the development of such a treaty has continued. With such ongoing debate occurring, we are prompted to reflect on the role of business activity on human rights. It is for this reason that this paper will attempt to address the following question: should the UN develop a treaty on business and human rights?

In order to address this question, firstly, clarification regarding the reason as to why corporate misconduct is happening, is required. To begin, according to Ruggie (2008), increasing globalisation has led to what he calls ‘governance gaps’, which present the opportunity for corporate misconduct by companies for which they are not punished. The worst cases of violation of human rights often occur where governance gaps are most pronounced, namely, in states with low income, in countries which are experiencing or have just recently experienced conflict and in states which have poor governance and where corruption is rife (Ruggie, 2008).

Given the existence of such violations of human rights, we must question any previous attempts to prevent such wrongful actions. It is true that there have been several attempts to close the aforementioned governance gaps. An example includes the “Protect, Respect and Remedy” Framework which was developed by the Special Represetative of the Secretary-General (SRSG), John Ruggie. According to Ruggie (2008: 192), “The framework…can assist all social actors – governments, companies, and civil society – to reduce the adverse human rights consequences of these misalignments.” It proposes that the state has a “duty to protect against human rights abuses by non-state actors, including business, affecting persons within their territory or jurisdiction” (Ruggie, 2008: 193). Additionally, it states that corporations have a responsibility to respect human rights, or rather, “to do no harm” (Ruggie, 2008: 194). Likewise, the framework proposes that corporations must establish due diligence, or rather, steps that the company can adopt so as to not commit any violations to human rights of others. Lastly, it argues that states must provide access to a remedy for victims of violation of human rights (Ruggie, 2008). Ruggie put his framework into use by forming viable recommendations in his report of the “Guiding Principles on Business and Human Rights” (Blitt, 2012). The objective of the Guiding Principles (GPs) was to offer an established global criterion to be utilized in order to deter any wrongful actions regarding human rights on the behalf of states and corporations (United Nations Global Compact, 2011). In 2011, the year that the SRSG released his report on the GPs, The UN Human Rights Council endorsed them (Malone, 2013). Despite the development of the framework and the GPs, there still exists gross corporate misconduct and violation of fundamental rights. For instance, to present day, child labour remains a very serious problem with around 260 million children currently working in the world. In fact, Nestle were recently sued in 2009 by previous child slaves who were also victims of trafficking (Odyssey, 2017). This calls for alternative measures to be put in place.

Advocates of the treaty on business and human rights propose that where the GPs fail to deliver, the treaty will ensure measures and mechanisms to prevent or sanction any violation of human rights. To begin, there is widespread agreement that the GPs fail to offer accountability mechanisms. Firstly, Wettstein (2015: 166) argues that, by giving states the authority to enforce obligations on corporations regarding human rights, “the GPs fall prey to the very problem they were supposed to fix”. Alternatively stated, in the past, states have been unwilling to enforce such obligations onto corporations, therefore, they are hardly likely to do so nowadays. One of the principal reasons for their resistance is the concern of losing foreign investment (Zamfir, 2017). Consequently, governance gaps continue to exist and human rights abuses by transnational corporations still occur. Additionally, there exists the issue of the ‘corporate veil’ with the GPs. To illustrate, many transnational corporations can blame their jurisdictions for any violation of human rights. As Amnesty International reported, this is a result of the doctrine of the parent company and its subsidiaries being construed as distinct legal entities. The parent company, therefore, is not liable for the wrongful actions of its subsidiaries (Zamfir, 2017). Additionally, Bilchitz (2014) reiterates this idea of a lack of accountability with the GPs. Given that the GPs fail to realise that corporations are legally bound to any violations of human rights, this implies that the state is the only one who can be held accountable for such actions. Thus, even though it may be the corporations who have committed such violations, they avoid any sanctioning. This is particularly problematic when the state cannot be held responsible as no party will therefore be punished for such abuses. This lack of accountability prevents violation of human rights victims from accessing any sort of remedy (Zamfir, 2017).

Nevertheless, the treaty presents the opportunity to overcome these issues of accountability. Firstly, the treaty acknowledges that businesses are legally bound to obligations of fundamental rights (Zamfir, 2017). In other words, by eliminating legal obstacles to corporate liability and creating parent company liability, corporations can be held accountable for wrongful actions, allowing victims access to remedy (Leeuw, 2017).

On a similar note, despite the GPs intentions to provide access to remedy for victims, it still proves rather difficult for victims to access these remedies. By way of illustration, victims of corporate misconduct often worry about their safety by claiming against wrongful actions of companies and therefore, do not access remedies (Leeuw, 2017). Moreover, victims often face the obstacle of scarce financial resources (Leeuw, 2017). In addition, the issue of weak governance, or rather, states whose laws are not implemented well and whose governments lack independence, often inhibits victims from accessing remedies (Bilchitz, 2014). These issues coupled with the problem of the corporation as a separate legal entity, create numerous obstacles in allowing justice to be achieved. To expand on the issue of the corporation as a separate legal entity, this paper offers an example of the access to remedy problems that can arise. For instance, an American company with headquarters in the US may have operations in the Democratic Republic of Congo (DRC). If any violation of human rights takes places in DRC, by claiming that they are a separate legal entity from their jurisdiction, the corporation in the US shifts any responsibility of misconduct onto their DRC subsidiary (Bilchitz, 2014). However, a possible solution to this accountability issue would be to sue those states who have offices or headquarters for human rights abuses in their jurisdictions, therefore discouraging any violations and allowing victims a remedy (Bilchitz, 2014). Nevertheless, there exists the problem of collective action to proposing such a solution. In other words, single states would be unwilling to pass these laws as they could lose potential investment. However, this law could be enforced if all states were willing to pass such a law. Likewise, suing the corporation who have offices or headquarters could result difficult to carry out as victims may not receive sufficient representation in the home country to access remedy (Bilchitz, 2017).

However, advocates of the treaty propose that the development of a treaty could provide access to remedy for victims that the GPs have failed to achieve. On the one hand, it is suggested that the treaty could adopt a model similar to that of the United Nations Convention against Corruption. This convention ensures that states prosecute those who have committed human rights abuses, even outside their country. If the treaty were to adopt such measures then this would solve the aforementioned issue of collective action. All states would have to pass the law and help with any problems that occur, such as victims not receiving sufficient representation (Bilchitz, 2014). Conversely, the treaty also proposes to offer victims the opportunity to access remedy by establishing an international court in which claims against the misconduct of corporations, would be settled, regardless of the state in which the violations occur (Bilchitz, 2014). Therefore, justice for victims could be achieved and less corporations may commit human rights abuses should a treaty with such mechanisms be developed.

The GPs also fail to compel transnational corporations to protect human rights by employing the term ‘responsibility’. Whilst the GPs claim that states have a ‘duty’ to protect human rights, corporations are said to only have a responsibility to protect such fundamental rights (Wettstein, 2015). Not only does this suggest that there are distinct levels of expected dedication to protecting these rights, however, it also creates the opportunity for discretion on the behalf of companies. Otherwise stated, the use of the term implies that corporations can choose whether or not to respect human rights (Wettstein, 2015). Additionally, International law states that “the duty to respect requires that actors ‘refrain from interfering directly or indirectly with the enjoyment’ of human rights” (Blitt, 2012). Therefore, the GPs use of the term responsibility suggests that respecting human rights is not already a duty that the International law obliges corporations to follow (Blitt, 2012).

The development of a treaty can provide a way for corporations to realise that they are legally bound to protecting human rights. The treaty acknowledges that protecting these rights is “owed by all of us to everyone at all times and to the fullest extent. It is not merely a standard of expected conduct but a duty of justice” (Wettstein, 2015: 169). That being said, under such a treaty, corporations would be legally bound to fundamental rights obligations (Leeuw, 2017), therefore presenting the opportunity for less violation of human rights.

Similarly, the GPs have also been criticised as they focus on negative obligations of corporations as opposed to positive obligations. In other words, the GPs state that corporations should do not harm to the fundamental rights of people. Positive obligations are only seen to be realised when a corporation carries out a responsibility out of their own good will (Bilchitz, 2014). Therefore, the GPs are often criticised for misinterpreting the purpose of a corporation. Alternatively stated, companies are generally construed as social institutions that have a social purpose or as Donaldson states: “The raison d’être for the productive organization turns out to be its contribution to society” (Wettstein, 2015: 170). Therefore, by simply requesting that companies “do not harm”, the GPs seem to misunderstand the role of companies as social institutions (Wettstein, 2015).

Nevertheless, the treaty proposes a solution in order to clarify and expand on the human rights obligations of companies. For instance, similar to The International Covenant on Civil and Political Rights which has “General Comments” to elucidate on what is meant by human rights obligations by corporations, the treaty could also offer such clarification. Therefore, the treaty proposes to encourage corporations to effectively engage in the protection of human rights by making it explicit what they must do to achieve this (Bilchitz, 2014).

Despite such promising proposals that the development of a treaty brings, the treaty still encounters drawbacks, forcing us to question its effectiveness. Firstly, with the treaty arises the issue of the human rights covered. Business and human rights entails a wide range of national and international law from human rights law, trade law to consumer protection law. Given the wide diversity of these laws and any potential conflicts of interests that could occur with regard to the laws between different states, it would be extremely difficult to form one singular set of detailed treaty obligations (Ruggie, 2014). In like manner, the treaty would further experience difficulty in deciding the human rights covered. As Zamfir (2017) argues, the treaty could take two options. The first option would be to consider the UN international human rights instruments, however, this would still involve numerous and varied human rights, thus making it very difficult to develop one set of detailed treaty obligations. Conversely, the treaty could adopt a more limited approach by concentrating on “basic human rights”, however, this would restrict the success of the treaty in preventing various human rights abuses (Zamfir, 2017: 7). Ruggie (2008: 43) reiterates this point as he states that the standards of the treaty ““would not match the highest likely voluntary standards today, but most likely reflect the lowest common denominator”.

Another obstacle inhibiting the development of a treaty is the debate on whether we actually require one. In first place, Ruggie (2014) highlights that if states have already signed human rights treaties, then they are already obliged to protect human rights by either deterring or punishing a violation of human rights by non-state actors, including corps, whether they occur within their state or jurisdiction. This notion therefore implies that a treaty would be a duplication, or rather, that there is no need for a treaty. Secondly, a treaty may seem futile given that states who have not signed any UN or ILO human rights treaties will most likely be unwilling to be in favour of implementing treaty obligations (Ruggie, 2014).

Other problems facing the treaty, to mention but a few, include the shift of responsibility from states to corporations and the debate over whether the treaty is solely limited to transnational corporations. The shift of responsibility from states to companies means that corporations would be accountable for any violations of human rights. Whilst this may seem a positive step towards increased accountability, it may serve as excuse for states to ignore their duty to protect human rights (Zamfir, 2017). Moreover, the treaty appears to concentrate on imposing obligations on transnational corporations, therefore creating the opportunity for human rights abuses by smaller businesses to go unnoticed (Lea, 2017).

In conclusion, it is evident that despite their good intentions, both the GPs and the treaty encounter drawbacks. Where the treaty is seen to solve issues faced by the GPs, it fails in other ways. For instance, as illustrated, the treaty proposes to solve the issue of a lack of accountability encountered by the GPs by acknowledging that businesses are legally bound to human rights obligations and by creating parent company liability. Nevertheless, the treaty fails to deliver effective proposals, such as which human rights will be covered in the treaty. Therefore, before we can definitely answer whether a treaty should be developed, the issues that the treaty faces, firstly must be resolved. Otherwise stated, effective solutions must be provided and strategies stating how they would overcome these obstacles must be created. However, what we do know is that current measures of protecting human rights are not working effectively given that there still exists major violation of fundamental rights by corporations. This calls for further clarification on treaty proposals and immediate action - at the end of the day “To deny any person their human rights is to challenge their very humanity” (The New York Times, 1990).

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**Appendix 1**

The original assignment brief:

Essay topic 3- Should the UN develop a treaty on business and human rights?

The UN Guiding Principles on Business and Human Rights (GPs) were proposed by UN Special Representative on business & human rights John Ruggie, and endorsed by the UN Human Rights Council in June 2011. The GPs are the most authoritative statement on the human rights duties and responsibilities of states and corporations adopted at UN level. Further, the GPs have been widely endorsed by business organizations, non-governmental organizations (NGO) and states. Despite the success of the GPs – they have not been without criticism, leading to recent calls for a harder law UN treaty on business and human rights. Drawing on the relevant academic literature, as well as other available sources, assess the arguments for and against a treaty – and offer conclusions on whether the UN should develop a treaty on business and human rights. The following link provides a useful entry point into the issues:

 <http://business-humanrights.org/en/debate-the-treaty>

<https://business-humanrights.org/en/binding-treaty>