

ZOOM IN

The question:

How can a treaty on business and human rights fit with international law? Assessing the development of international rules on corporate accountability and their relationship with other international legal regimes

Introduced by Angelica Bonfanti and Marco Pertile

In June 2014, the Human Rights Council established, with resolution 26/9, an open-ended intergovernmental working group (OEIGWG) with the mandate to elaborate an ‘international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.¹ Six sessions have been held so far. The latest revised draft of the instrument, released by the Permanent Mission of Ecuador on behalf of the Chairmanship, formed the basis for intergovernmental negotiations during the session of October 2020 (hereinafter ‘Draft Treaty’).²

The Draft Treaty introduces obligations on States to protect human rights from corporate activities, covering both public and private international legal issues. It takes inspiration from the UN Guiding Principles

¹ HRC, Res 26/9 (26 June 2014).

² OEIGWG Chairmanship Second Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (6 August 2020) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>. The previous drafts are: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. Zero Draft (16 July 2018) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>; OEIGWG Chairmanship Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (16 July 2019) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

on Business and Human Rights (UNGPs),³ transforming many of their recommendations into legally binding commitments.⁴

The Draft Treaty has attracted much criticism. Some consider the adoption of a legally binding instrument both unnecessary, when compared with the progress made in the implementation of the UNGPs, and dangerous, when considering the risk that it may jeopardize such progress. Others criticize its text as being abstract and demanding, both in light of the content of the state obligations and their extraterritorial reach. The Draft is also considered too restrictive, having regard to its scope of application, or too State-centric, given the absence of obligations directly binding on corporations. Others yet consider it ineffective, given the weakness of its international monitoring mechanism, and even bearer of legal uncertainty, if one considers the criteria provided for the attribution of jurisdiction and the identification of the applicable law to business-related human rights disputes.⁵

³ OHCHR, Guiding Principles on Business and Human Rights (2011) <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

⁴ On the drafting of the future treaty, among others see: D Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 Business and Human Rights J 203; O De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 Business and Human Rights J 41; S Deva, D Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (CUP 2017); J Letnar Cernic, N Carrillo-Santarelli (eds), *The Future of Business and Human Rights Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018).

⁵ On the various criticisms, see: C Methven O'Brien, 'BHR Symposium: The 2020 Draft UN Business and Human Rights Treaty—Steady Progress Towards Historic Failure' *OpinioJuris* (2020) <<http://opiniojuris.org/2020/09/11/bhr-symposium-the-2020-draft-un-business-and-human-rights-treaty-steady-progress-towards-historic-failure/>>; Id, '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' (2020) 114 *AJIL Unbound* 186-191; JG Ruggie, 'A UN Business and Human Rights Treaty?, An Issues Brief by John G. Ruggie. 28 January 2014' <<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>>. Enlightening positive and negative aspects: C Lopez, 'The 2nd Revised Draft of a Treaty on Business and Human Rights—Moving (Slowly) in the Right Direction' *OpinioJuris* (2020) <<http://opiniojuris.org/2020/09/07/symposium-the-2nd-revised-draft-of-a-treaty-on-business-and-human-rights-moving-slowly-in-the-right-direction/>>; S Deva, 'BHR Symposium: The Business and Human Rights Treaty in 2020—The Draft is “Negotiation-Ready”, but are States Ready?' *OpinioJuris* (2020) <<http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/>>; S Joseph, M Keyes, 'BHR Symposium: The Business and Human Rights Treaty and Private International Law' *OpinioJuris* (2020) <<http://opiniojuris.org/2020/09/09/bhr-symposium-the-business-and-human-rights-treaty-and-private-international-law/>>; M Fasciglione, 'A

Despite these criticisms – some of which we share – the Draft Treaty represents the most ambitious step so far towards the establishment of a comprehensive international legal regime on business and human rights, based on enhanced international cooperation and aimed at hardening and harmonizing the international standards and processes on corporate accountability and access to remedies for corporate-related human rights violations. If adopted, the contracting parties will be required, among other obligations, to: introduce, in their domestic systems, the corporate duty of human rights due diligence; grant effective access to remedies for victims of corporate human rights violations, by setting more favorable and broad jurisdictional criteria and rules for the identification of the applicable law to the arising torts; and, overall, address the extraterritorial dimension of the violations occurring throughout the global value chains.

Moreover, given the non-exhaustive definition of human rights potentially impacted by corporate activities and the broad scope of the newly established standards, a new binding instrument would necessarily interact with the treaty and customary law governing other relevant areas of international law. Potentially overlapping rules and regimes would therefore have to be coordinated and several questions answered. For example, how would the introduction of the new rules on corporate accountability and access to remedy influence the development of international law? Is the introduction of a legally binding instrument really necessary or are the seemingly new proposed rules already established under international law? Could the adoption of the treaty affect the content of state obligations based on other legal instruments, and how should these rules be interpreted and implemented? How would the new obligations interact with other relevant and overlapping international obligations? Would any conflict of law arise between the newly introduced obligations and those already existing, and how should these conflicts be solved? How would the treaty limit the introduction of new state obligations in the future?

Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?’ in M Buscemi, N Lazzerini, L Magi, D Russo (eds), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Brill Nijhoff 2020) 32 ff; N Bernaz, ‘Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty’ (2021) 22 *Human Rights Rev* 45–64.



In an attempt to answer some of these questions, the Zoom-in features three contributions focusing on three of the most important specialized areas of international law that might be impacted by the adoption of the future treaty: foreign direct investment law, international environmental law and international humanitarian law. The article on foreign direct investment law, written by Roberta Greco, seeks to assess whether and to what extent the adoption of the new treaty would affect States' obligations pursuant to international investment law and how it could interact with pre-existing and future investment agreements. As concerns international environmental law, the article by Jacques Hartmann and Annalisa Savaresi considers whether and how a new treaty could address the enforcement and remedial issues connected to environmental harms caused by corporations. To this extent it examines the domestic human rights-based case-law against businesses for environmental torts and reflects on the parallel ongoing law-making process in the EU. With relation to international humanitarian law, the article by Mara Tignino reflects on the obligations and the protection of corporate actors in conflict and post-conflict situations. Dealing with the contours of human rights due diligence in such contexts, the author draws a comparison between the 'ILC Draft principles on the protection of the environment in relation to armed conflicts' and the relevant provisions of the Draft Treaty.