

Policy Consultation Brief
on
the ‘Scope’ of the Business and Human Rights Treaty

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Context

In June 2014, the UN Human Rights Council (HRC) adopted Resolution 26/9 ‘to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights’.¹ The mandate of this intergovernmental working group (IGWG) ‘shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.²

The first two sessions of the IGWG ‘shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument’.³ The IGWG will have its first session during 6-10 July 2015 in Geneva.⁴ Considering that the *scope* of the proposed treaty is likely to be one of the key issues debated/discussed during the first IGWG session, this Policy Brief seeks to outline scope-related contentious aspects and develop potential options in consultation with civil society organisations (CSOs) so as to inform the IGWG’s mandate.

Unpacking the twin scope-related aspects

There are two aspects related to the scope of the treaty: the types of companies to which the treaty should apply (the ‘depth’ question) and the types of human rights⁵ that the treaty should cover (the ‘breadth’ question). These twin scope-related aspects have a direct relation to the need for a treaty as a response to the inability of existing regulatory initiatives to fill governance gaps in the area of business and human rights.⁶

The depth question revolves around the somewhat controversial ‘footnote’ in the HRC resolution, which reads: “Other business enterprises” denotes all business enterprises that

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¹ Human Rights Council, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, A/HRC/RES/26/9 (26 June 2014), para. 1, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>.

² Ibid.

³ Ibid, para. 2.

⁴ Human Rights Council, ‘First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>.

⁵ For the purpose of this Brief, the term ‘human rights’ is taken in a wider sense so as to include not only human rights, labour rights and environmental rights but also the special rights of vulnerable sections of society such as women, children and indigenous people.

⁶ The presentations made by CSOs and victims during the Chiang Mai consultation highlighted these governance gaps very clearly. See also FIDH, ‘Briefing Paper on Business and Human Rights: Enhancing Standards and Ensuring Redress’ (March 2014).

have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.⁷ The proposal for the treaty not applying to domestic businesses is rooted in the belief – held by many states in the Global South as well as by the states supporting the resolution – that a legally binding international instrument is required only to deal with business enterprises which operate at a transnational level. Many other states, mostly developed countries from the Global North, oppose the idea of imposing any such limitation: they think that doing so will not only put their transnational corporations (TNCs) at an economic disadvantage but will also be infeasible in terms of practical implementation.

The breadth question, on the other hand, is reflective of the debate about whether the treaty should be limited to ‘gross’ human rights violation or not. The debate here is underpinned by an *aspirational* desire to put in place a treaty which covers all civil, political, social, economic and cultural human rights and the *political feasibility* of negotiating a narrower set of treaty on which it might be easier to build consensus.

Potential options

There are three broad options on how to deal with the **depth** issue:

- A. Strictly follow the HRC resolution’s footnote so as to exclude domestic business enterprises from the purview of the treaty. This option may be tempting for developing countries in that it would give them leverage against powerful TNCs, while at the same time not subject local/small companies to legally binding international human rights norms.
- B. Try to negotiate a treaty which applies to all types of companies. This option – which may help in bringing developed countries to the treaty negotiation table – could be achieved by contending that the ‘scope’ of the treaty under the HRC resolution remains an open question,⁸ especially because the footnote rider does not appear in the main text of the resolution.
- C. A hybrid option which may bridge the divide between two camps may be to draft a treaty that applies to all companies, but have certain special provisions to deal with TNCs as more difficult regulatory targets.⁹

Under international law, all of the above options are feasible. It appears, however, the recent trend is more towards adopting an instrument which applies to all types of companies, rather than merely TNCs. For example, although the 1976 OECD Guidelines for Multinational Enterprises¹⁰ and the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises¹¹ were limited to TNCs, the revision of both instruments in 2000 extended their

⁷ Note 1, footnote 1.

⁸ Ibid, para. 2.

⁹ Such special provisions may, for example, relate to states’ extraterritorial obligations, the liability of parent companies for human rights abuses committed by their subsidiaries, the corporate misuse of the doctrine of *forum non conveniens*, and states’ obligations regarding mutual assistance and cooperation.

¹⁰ OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, *ILM*, vol. 15, 967.

¹¹ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 16 November 1977, reprinted in 1978, *ILM*, vol. 17, 422.

scope to other enterprise too.¹² The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises¹³ and the 2011 Guiding Principles on Business and Human Rights followed this trend.¹⁴

In relation to the **breadth** issue too, there may be three options:

- A. In the first instance, limit the scope of the treaty to gross human rights abuses. As there is no hard consensus yet on what the term ‘gross’ means,¹⁵ there is some leeway to interpret the term in a manner which is broader than,¹⁶ say, the crimes covered by the ICC Rome Statute.¹⁷
- B. Extend the scope of the proposed treaty to all ‘core’ international human rights conventions/instruments.¹⁸ This list would be wider than the ‘core’ list of internationally recognised human rights that the UN Guiding Principles on Business and Human Rights recommend companies to follow ‘at a minimum’.¹⁹
- C. Have an open-ended organic scope encompassing ‘all’ international human rights conventions/instruments, *existing* as well as those that might evolve in *future*.

Whichever of the above option is selected, another drafting choice would have to be made: the BHR treaty may either prescribe the human rights obligations of companies with reference to state-focal international human rights instrument (reference model) or enumerate them precisely after suitable modifications if any (enumeration model).²⁰

¹² Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012), 80, 90.

¹³ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), paras. 20-21.

¹⁴ ‘These Guiding Principles apply to all ... business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011), General Principles. See also Principle 11 and the Commentary.

¹⁵ See Jenifer Zerk, ‘Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies’, A report prepared for the Office of the UN High Commissioner for Human Rights, 25-28 (2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

Although Ruggie moots the idea of a carefully crafted legal instrument that deals with ‘worst’ human rights abuses, he does not elaborate clearly what these rights are. John Ruggie, *Just Business* (New York: Norton, 2013), 200. On another occasion, he mentioned that international crimes such as ‘genocide, extrajudicial killings, and slavery or slavery-like practices’ are obvious candidates for such a category. John Ruggie, ‘A UN Business and Human Rights Treaty? An Issue Brief’ (28 January 2014), p. 5, <http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.

¹⁶ See the online symposiums on corporate accountability: <http://jamesgstewart.com/list-of-previous-symposia/>

¹⁷ The ICC Rome Statute covers four international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

¹⁸ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

¹⁹ Commentary to Principle 12 reads: ‘An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.’

²⁰ A combination of these models may also be adopted, e.g., the 2003 UN Norms.

Subject to how the final proposals may be shaped by consultation with CSOs and other members of the Expert Legal Group, I propose that from victims' perspective the treaty should apply to all types of companies and cover the full range of interrelated, interdependent and indivisible human rights (i.e., civil, political, social, economic, and cultural). In short, the treaty should ideally be *deep* and *wide* rather than 'shallow and narrow'.

Specific questions for CSOs

CSOs are invited to provide comments/suggestions or raise questions about any issue related to the 'scope' of the proposed BHR treaty. To facilitate this process of informed engagement, a few illustrative exploratory questions are listed below:

- 1) Are human rights violated only (or mostly) by TNCs in communities where you work?
- 2) Do you feel that states find it more difficult – because of their incapacity and/or unwillingness – to regulate TNCs' activities?
- 3) Are state agencies able to regulate effectively the activities of domestic companies?
- 4) In communities where you work, do people consider certain human rights to be more important than others? If so, what are such rights?
- 5) Would a treaty focusing only on 'gross' human rights violations cover the types of human rights abuses experienced by victims?
- 6) What would prefer out of 'no treaty' or 'a treaty limited to gross' human rights violations?
- 7) Would it be possible for you to submit one-page summary of case studies outlining (i) the nature/extent of human rights abuses, (ii) the steps taken by CSOs/victims to hold the relevant companies accountable, and (iii) the outcome of such steps?