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A Framework Agreement in Business and Human Rights?

Surya Deva, Claire Methven O'Brien

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We are pleased to conclude our Symposium with a special treat for our readers: a double interview with two renowned scholars, **Surya Deva** and **Claire Methven O'Brien**, who are rather emblematic for different approaches and convictions regarding Business and Human Rights.

Opinions differ on how successful the OEIGWG treaty process has been so far, both in terms of diplomatic negotiations as well as a norm-development exercise. What do you think needs to happen now for the process to be successful, and how could agency for the final outcome – whatever form it may take – be achieved on the international level?

Claire: This is an excellent question, and the answer is hardly straightforward or certain. Of course, it also depends on what you think success looks like in this context.

For some, a treaty with relatively few adhering States, assumed to come from the Global South, would be a success. Even if the actual impact of such an instrument might not be extensive, on this view, it could still embody a symbolic victory. The fact that more industrialised States declined to participate would usefully spotlight what some actors see as their hypocrisy on human rights issues – promoting human rights in the public sphere but failing to accept their consequences when it comes to extraterritorial ‘externalities’ of transnational markets, production and investments. For those who take this view, judgments against TNCs resulting from litigation taking point of departure in the treaty, even if unenforced, for instance, might nonetheless have a valuable function as moral judgements, offering political capital in other settings.

I would not see this outcome as success, however, and I don't share its assumptions. Unquestionably, hypocrisies and contradictions abound when it comes to human rights. Certainly, they should be challenged; on [one view](#), their dissonances actually present discursive space essential to advancing progressive agendas. Relatedly, I believe universality remains a critical aspiration in the realm of human rights. I do not therefore think a UN human rights treaty-making initiative can self-consciously aim from the outset to exclude many billions of people, across industrialised and industrialising countries, from the ambit of its protection, or deem this an acceptable end-point. On the contrary, a human rights project must remain optimistic that all peoples, and their respective governments, can share and define some common commitments, in spite of differences of approach to their realisation.

A project without this inclusive and tolerant vision at its fundament is probably another kind of project, rather than a human rights project, I think.

Also, North-South dynamics obviously retain importance in some respects. But I think the analytical traction of North-South categories is increasingly challenged, or at least their completeness. Certainly, they do not exhaust relations of domination and exploitation in the world, or the world economy. Capital is not territorially or even materially bounded. Relationships of abuse, in the business and human rights domain, flow in all directions: intra-North, intra-South, South-North as well as North-South. Given this, it is crucial, I think, that a treaty have the capacity to facilitate the widest possible solidarities, and to identify patterns of abuse, whatever their geographical configuration. Seeing only with a North-South lens, or even a value chain lens, rather risks obscuring many problematic aggregations of power and resources, and failures of accountability, so that even [egregious](#) or [colossal](#) denials of rights may be rendered invisible or beyond reach. I also think that the subjectivities implicitly associated with a North-South binary are essentialising and reductive. (This is also why, by the way, I think the ‘unwilling or unable’ formulation generally applied to States from the Global South, in terms of the ability to provide remediation locally, is misplaced and patronising. Conversely, it may apply just as well to States from the Global North, in relation to business-related harms, though we rarely see this application practiced).

So, taking all this into account: I think a treaty, to be successful, must enjoy wide, ideally, full, or as full as possible, participation by States. Not at any expense, in terms of content. But surely, the content will need to abstract from some of the specific requirements foreseen in the OEIGWG drafts tabled to date, to accommodate a greater plurality of national positions.

As is well known, I believe a [framework-style BHR instrument](#), [bridging](#) in its primary text the concerns driving the OIEGWG drafts, and the principles and approach of the UN Framework and [UNGPs](#), but with scope to define sector-specific norms and subject-specific rules on an ongoing basis, has potential in this regard, as well as [in-principle merit](#) from a range of legal and governance perspectives (see [here](#), [here](#) and [here](#)). I also think this approach has better prospects of promoting coherence with wider climate-related and sustainability norms and objectives, which must surely be a critical concern.

On the other hand, I think it is clear, and some contributions to this symposium ([Roorda](#) and [Klaaren](#)) help further to clarify, that the OEIGWG texts and process are unlikely to lead to that outcome. The critiques expressed in response to the OEIGWG texts have been too widely dispersed amongst States, too fundamental, and too consistent over time (reported [here](#), [here](#), [here](#) and [here](#)), I think, to allow for their dismissal as technically mistaken, male fides or purely instrumental to neo-imperialist dynamics, even if they are no doubt coloured by power, [self-interest](#) and the desire to preserve sovereignties to some extent.

Consequently, for me, ‘success’ in the treaty process assumes opening up the discussion, to encompass a wider range of perspectives and proposals besides the latest OIEGWG draft. I have not yet seen any convincing analysis to suggest

this is not possible within the scope of the resolution establishing the OEIGWG ([UN HRC Resolution 26/9](#)). Indeed, the [US intervention](#) last year, as well as comments by the EU and others, suggests otherwise. So, there is no need for a 'tabula rasa', or to expunge the texts to which [civil society and others have contributed so far](#).

A successful outcome is certainly attainable. Whether it will actually materialise, however, will depend on whether the combination of political leadership, diplomatic application, advocacy strategy and scholarly engagement on which human rights progress always depends eventuates. And that is a contingent matter that now rests in our collective hands.

In this context, I think it is long overdue that States and other relevant actors are pressed for more detail on what they would accept in a treaty text. Declining to do engage on this terrain, I think, just makes it easier for those that may rather not see any treaty at all to prolong the current impasse. So, I would rather that States and others that have voiced objections, or participated while reserving their positions, or signalled a desire for alternative approaches, are now challenged directly to articulate their positive vision for a BHR treaty. A 'no compromise' stance, on the part of treaty proponents, makes it easier, I think, for States to dismiss the entire process. Again, this may be interesting if the objective is to reveal the whole edifice of international human rights protection to be a dysfunctional sham. But I think human rights advocacy presumes greater faith in our collective ability to progress towards better norms and institutions than is compatible with that approach.

Surya: The de jure agency for the proposed treaty has been with States, in line with the predominantly State-centric architecture of current international law. However, the [Treaty Alliance](#) comprising civil society organisations and [BHR scholars](#) from all world regions have held a de facto agency. Considering the significant resistance that the treaty process faced in its initial phase from developed States and business organisations, it might not have survived without active role of these non-State actors.

While accomplishing the ultimate goal of the current [OEIGWG process](#) remains uncertain at this stage, it has already achieved certain positive outcomes. This process has, for example, forced many developed States – including the European Union (EU) – and BHR scholars to take the treaty project seriously, rather than just focusing on the implementation of the [UNGPs](#) through [national actions plans](#) (NAPs). It is not a coincidence that even some [businesses and investors](#) in recent years have realised the value of creating a global level playing field through binding rules at the regional and international levels.

The chances of securing a BHR treaty should increase if the treaty complements the UNGPs, States and other stakeholders are engaged in between annual OEIGWG sessions to build consensus, expectations of civil society organisations are managed, legitimate concerns of developing States and businesses are addressed, and a balance is maintained between specificity and flexibility.

The question as to what form a treaty in BHR should take has been the subject of much discussion, fuelled again by the recently expressed openness of the USA for a framework convention. In your opinion, is a conventional treaty or a

framework convention more promising (see [Klaaren](#)), both in terms of content and of endorsement and compliance (see [Grohmann](#)) by States?

Surya: The question about the form of a BHR treaty is perhaps not the right one to ask because it tries to put “the cart before the horse”. The primary question should be: why is a BHR treaty needed and what type of the treaty is most suitable to respond to this need? The form question is subsidiary and should be answered in relation to the primary question, rather than overshadowing the *raison d’être* for such a treaty.

We should also take the so-called US openness with a pinch of salt. The US has a chequered history concerning international treaty making generally (see [Van Ho](#)). Regarding the OEIGWG process specifically, the US has tried to derail the process both in Geneva and New York. It is also very unlikely that the US would ratify any BHR treaty that pushes the agenda on corporate accountability. In short, the US government would need to provide some tangible evidence of its good faith negotiation before being taken seriously regarding its [openness](#) to “exploring alternative instruments, binding or nonbinding – such as a legally binding framework agreement”.

I agree with one of the underpinning rationales behind the proposal for a framework convention: the difficulty in building a consensus among significant number of States around too many substantive provisions with precise details in one BHR treaty (see [Roorda](#) and [O’Brien](#)). Hence, instead of aiming for a catch-all treaty, an incremental approach may be more practicable. What is needed is a middle path between “an empty shell” and “an overly prescriptive” treaty. This middle path could be achieved through a series of treaties by following either the conventional treaty or the framework convention approach.

The devil is in the details, rather than in the label of the form. A framework convention can contain detailed and reasonably specific substantive provisions, including on the obligations of State parties. The [WHO Framework Convention on Tobacco Control](#) is a case in point. On the other hand, even a conventional treaty could have an in-built process to negotiate future substantive elements. In fact, Article 15(5) of the [Third Revised Draft](#) already provides for this possibility: “The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the (Legally Binding Instrument), including any further development needed towards fulfilling its purposes.” Article 17(1) further notes that this treaty “may be supplemented by one or more protocols”. Therefore, we should not frame the discussion about the form of the proposed BHR treaty in a binary way.

Claire: I have partly answered this question already, in my answer to your first question. However, I also think that the question as posed overstates the differences between ‘conventional’ and framework treaties (a point that [Nils Grohmann](#)’s contribution [here](#) illustrates well). The form of a legal instrument is clearly not without any significance. Neither do I doubt the value, intrinsically or instrumentally, of ‘binding’ legal norms. But there is a wealth of scholarship addressing international (and [regional](#)) treaties, [compliance](#), implementation and the roles of institutions

that has illuminated that form and content of legal norms is not all, in explaining outcomes. The ‘hard vs [soft law](#)’ binary can be very [misleading](#). Existing human rights treaties may have more in common with framework instruments than ‘conventional’ treaties addressing [narrow](#) or technical matters. Barbara Koremenos has done some important [work](#) in this area, and we have a piece in pipeline that will look at BHR treaty design specifically.

The discussion on the treaty form has led to great tension, one might even say polarisation. Some commentators have argued that a framework convention would undermine the development of an appropriate human rights standard (see [van Ho](#)), while others have considered this treaty design option to be more viable than the detailed provisions envisaged in the current OEIGWG draft (see [Roorda](#)). Taking another perspective, it has been criticized that a shift to a framework convention would render futile the efforts of stakeholders such as civil society actors (see [do Amaral Vieira](#)) invested into several negotiation rounds. In your opinion, how could these tensions be resolved? Would it be an option to combine the two approaches, for example by simultaneously negotiating and adopting both, a framework convention with ambitious principles and institutional mechanisms and a more detailed protocol with provisions from the current OEIGWG draft?

Claire: I think it is very natural that there are different, and opposing, views on what content and model of BHR treaty should be pursued, and on the best political and diplomatic approaches to securing a treaty, as this symposium illustrates. And certainly, yes, I think it would be possible to advance a draft framework convention text in tandem with one or more draft protocols, or model laws, or sets of formal guidance on various topics that are addressed by the existing OEIGWG text, and I have suggested this approach for some time.

Surya: Polarisation is not unique to the BHR field. In any case, some resistance, and consequent polarisation, is inevitable in the BHR field because any project seeking to hold powerful business actors accountable for human rights abuses is likely to disrupt powers enjoyed by vested interests. Seen in the context, the current BHR treaty process has unmasked the “wide but thin” – rather than a “thick” – consensus around the UNGPs and contributed to positive and action-triggering tensions from the perspective of rights holders.

The OEIGWG process emerged as a response to the perceived softness of the UNGPs. However, over the years this process has rightly evolved from an “either or” to a “complementary” approach. The proposed BHR treaty should take the UNGPs as a “starting point” and not the “end point” (as I have [explained](#) in detail elsewhere). In fact, after almost five decades of discussion about binding international obligations of (multinational) corporations, adopting a BHR treaty with merely an “agreement to agree” or an agreement only on broad general principles will be a regressive step. We should not, once again, deceive the affected rights holders by handing them a hollow victory (see [do Amaral Vieira](#)). Rather, the treaty process should be used to test the seriousness of commitment made by States and businesses to implement the UNGPs and address various regulatory gaps that soft standards would never be able to fill.

Regardless of its form, a BHR treaty is unlikely to solve all issues in business and human rights area from the outset, or perhaps at all. In your opinion, what are the main obstacles to aligning business activities with human rights and sustainable development? What criteria do should be used to evaluate the success of a UN human rights treaty?

Claire: This is a complex and multi-dimensional problem. But you are right, in one sense the BHR problematique is that of how to drive human society and economic activity, globally and at subordinate levels, towards more equitable, emancipating and environmentally sustainable forms. This encompasses aspects of alignment, but also of course reform and reconstitution of basic concepts and norms of trade, investment, finance, economics as well as the corporation itself. We see many legal and policy efforts today, as well as initiatives in the market domain, apparently devoted to such goals. It does not yet seem clear, though, whether they will in aggregate be adequate to discipline the negative tendencies of today's predominating systems of production and exchange, in time to avoid irreversible planetary damage.

I think my greatest concern currently, in terms of obstacles to avoiding that outcome, probably relates to finance and financialisation. Here is a shadowy continent dedicated to goals of accumulation and profit extraction that are generally inimical to social and environmental sustainability, and equality, combined with technical complexity, speed and a de-territorialised form that puts it largely beyond the reach of effective democratic control and human rights accountability, even if its impacts for human rights are profound and all-pervasive.

So, this is another reason why I favour a broad rather than a narrow-spectrum BHR treaty: I think an instrument that insists on, but gets ensnared in, hard-to-resolve issues of civil procedure risks leaving us critically exposed in other areas.

Surya: Despite all the rhetoric, rights and rights holders have not been central to the development and implementation of BHR standards so far. Nor do these standards generally respond to ground realities in the Global South. Even the UNGPs perform poorly on these criteria ([Deva 2013](#); [Meyersfeld 2017](#)). Although rooted in the [International Bill of Rights](#), Pillar II of the UNGPs turns "rights" into mere "social expectations" (an issue that I [have addressed](#) elsewhere). Moreover, as the viability of human rights due diligence was tested mostly in relation to the practice of multinational corporations ([Ruggie, Just Business, pp. 152-53](#)), the content of Pillar II pays inadequate attention to informal economy actors or unique regulatory challenges faced by States from the Global South. Non-centrality of rights and rights holders is thus a main obstacle in making a meaningful progress on the ground.

The problem of starting with a weak foundation is compounded by the [corporate capture of States](#) (see [do Amaral Vieira](#)) as well as lack of political will on the part of States to address corporate impunity for human rights abuses. For example, States such as China, India and Russia, which had voted in support of the resolution establishing the OEIGWG ([resolution 26/9](#)), have done little to strengthen the current treaty process. On the other hand, the EU's engagement with the BHR treaty process, despite securing a major concession about the scope of the treaty

covering all business enterprises (see the [2019](#) and subsequent drafts), has been lukewarm at best. Moreover, the EU has exposed itself to attacks for adopting double standards, because the European Commission's [Directive on Corporate Sustainability Due Diligence](#) applies only to big corporations. In this context, the current treaty process should also be used to build the necessary political will bottom up, because “political and economic constraints can be overcome” to boost up States' commitment ([Kirkebø and Langford 2018, p. 182](#)).

The fractured agendas of BHR, the Sustainable Development Goals (SDGs), the right to development and climate change pose another major challenge (see [Jägers 2021](#)). Moreover, it is unclear that many States are learning lessons from the COVID-19 pandemic and reorienting their laws and policies to weed out inherently exploitative or unsustainable business models. A fundamental shift is also needed in “[the existing economic model](#)” as well as in [corporate laws](#) and [international investment law](#) to create pathways for an inclusive and sustainable development.

In short, there are many obstacles in ensuring that businesses act in line with international human rights standards. A BHR treaty, while needed, cannot overcome all these obstacles, especially those which are systemic or structural in nature. Yet, any treaty should keep rights and rights holders central. It should try to fill “black spots” of the UNGPs, address asymmetries between rights and obligations of corporations, encourage collective action on the part of States and strengthen access to remedy for corporate human rights abuses.

