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Article

The Logical Next Step:

Motivations on the Formation of a Business and Human Rights Treaty

Graham Markiewicz*

I. INTRODUCTION

The human rights movement has been hailed as humanity's last utopia. The ideals it espouses are powerful enough to bring millions out of poverty, advance equality in the face of diversity, and create more free and fair societies across the globe. In practice, however, human rights are often used as a tool by the powerful to the very detriment of those who should be helped by them.¹ The French Declaration of the Rights of Man and of the Citizen of 1789, one of the foundational documents of human rights thought, both lifted up individuals, protecting their rights,² and helped to dismantle empires. Ho Chi Minh, for example, quoted the Declaration to rally support for Vietnamese independence from France.³ He later used this independence to establish an autocratic communist state in Vietnam.⁴

Julius Nyerere, who instituted a security state⁵ in Tanzania and brought millions to the brink of starvation, said:

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1. See generally Kenneth Cmiel, *Human Rights, Freedom of Information, and the Origins of Third-World Solidarity*, in TRUTH CLAIMS: REPRESENTATION AND HUMAN RIGHTS 107 (Mark Phillip Bradley & Patrice Petro eds., 2002).

2. See Declaration of the Rights of Man and Citizens (Fr. 1789).

3. Cmiel, *supra* note 1, at 110.

4. See *Ho Chi Minh*, HISTORY, <http://www.history.com/topics/vietnam-war/ho-chi-minh> (last visited Oct. 28, 2016).

5. See Michael Kaufman, *Julius Nyerere of Tanzania Dies; Preached*

Are [Africans] going to turn round them, tomorrow after we have achieved Independence and say, "To hell with all this nonsense about human rights; we are only using that as a tactic to harness the sympathy of the naive?" Human nature is sometimes depraved I know, but I don't believe it is depraved to that extent. I don't believe that the leaders of a people are going to behave as hypocrites to gain their ends, and then turn round and do exactly the things which they have been fighting against.⁶

Such uses of human rights rhetoric diminish its importance and makes accomplishing progress less likely. Using rights as a tool to establish other ends forces them to become platitudes and caused Professor Hersch Lauterpacht to critically denounce "the Universal Declaration [of Human Rights] as a humbling defeat of the ideals it grandly proclaimed."⁷ Therefore, while human rights have the capability to be a refuge for humanity, the motivations behind them must also be examined. Without due diligence in examining motivations and intended policies, human rights can, counter-intuitively, be harmful.

Despite a sinister history of abuse, the global human rights campaign continues to advance. In 2011 the United Nations published the Guiding Principles on Business and Human Rights ("UNGP").⁸ This soft-law document provided a framework for multinational corporations ("MNC")⁹ and other

African Socialism to the World, N.Y. TIMES (Oct. 15, 1999), http://www.nytimes.com/1999/10/15/world/julius-nyerere-of-tanzania-dies-preached-african-socialism-to-the-world.html?_r=0 (detailing that as President, Nyerere gave sweeping powers to the military which in turn enforced heavy taxes, collectivization, and nationalized industry).

6. Andreas Eckert, *African Nationalists and Human Rights, 1940s-1970s*, in HUMAN RIGHTS IN THE TWENTIETH CENTURY 283, 298 (Stefan-Ludwig Hoffmann ed., 2011).

7. Samuel Moyn, *Human Rights in History*, THE NATION (Aug. 30/Sept. 6 2010), <https://www.thenation.com/article/human-rights-history/>.

8. John Ruggie, Special Rep. 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*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

9. An MNC, also referred to as a Transnational Corporation ("TNC"), is a large, typically Western business operating in foreign countries, usually early in the supply chain, such as material sourcing or manufacturing. See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 91 n.3 (2002); see also Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for*

non-state actors to interact with and support human rights globally. Following the passage of the UNGP, the next logical step is for the adoption of a legally binding instrument that would hold multinational corporations accountable for human rights violations they are involved with regardless of the jurisdiction. Strangely, as discussed below, proponents of a Business and Human Rights (“BHR”) treaty are some of the worst human rights violators, while those who would ostensibly have the most to gain from this treaty are against it.

This Article examines the motives behind positions for and against the idea of a BHR treaty. It attempts to discover what a binding instrument would mean for state signatories and why they may or may not support such a treaty. It first examines the processes leading to the UNGP and looks at corporate accountability in context. Next, it determines key players and allocates them across the divide for and against the treaty movement. The core of this Article analyzes motivations behind each side’s treaty stance, with a focus on those reasons aside from a desire to respect human rights. These motivations include how a binding treaty and its drafting processes itself affect national bargaining power and reputational risks. Further motivations are increasingly underhanded; they include the desire to obfuscate, distract from human rights discourse, and shift blame away from state actors. Additionally, this Article explores how a binding instrument can counterintuitively offer more flexibility than a broad, encompassing voluntary one, and allows the reader to draw his or her own conclusion as to whether, in the face of these motivations, the path towards a BHR treaty can still lead to a net positive gain for human rights principles.

II. ANALYSIS

A. HOLDING CORPORATIONS ACCOUNTABLE

Holding corporations to account for complicity in human rights crimes goes at least as far back at the Nuremburg trials post World War II.¹⁰ Corporations in Germany benefited greatly from the forced labor and other human rights atrocities of the

Transnational Law, 83 HARV. L. REV. 739, 749 (1970). This might be done through subsidiaries in a process that is not always transparent.

10. Ramasastry, *supra* note 9, at 104.

oppressive Nazi regime.¹¹ The United States Military Tribunal tried directors from three German companies, and found them culpable for plunder, slavery, and mass murder.¹² These trials held corporate leadership as accountable for the actions of their businesses as it found politicians accountable for the actions of the state. One of the most famous cases from these trials was that of Alfried Krupp von Bohlen und Halbach, CEO of the Krupp Holding.¹³ His firm was found to have exploited forced labor from Nazi concentration camps among other human rights cruelties.¹⁴ In his defense, Alfried Krupp stated that “[w]e Krupps never cared much for [political] ideas. We only wanted a system that worked well and allowed us to work unhindered. Politics is not our business.”¹⁵ Despite the adage *nullum crimen sine lege*,¹⁶ the Alfried Krupp von Bohlen und Halbach trial shows that corporations and their directors cannot ignore basic human decency.¹⁷

In 1972, the UN formed a “Group of Eminent Persons” to look further into moral issues and regulations of transnational corporations.¹⁸ This group was extremely controversial, yet it helped lead to the creation of the United Nations Center on Transnational Corporations (“UNCTC”), which took the lead on developing a code of conduct for transnational corporations.¹⁹ This group was embroiled in antipathy between developing socialist countries and more developed economies.²⁰ The ideological debate was built on fundamental differences of interest: low-income countries wanted to increase foreign investment, while developed countries aimed to protect domestic

11. *Id.*

12. *Id.* at 105–06.

13. Anti-Defamation League, *Nuremberg Trials 60th Anniversary: The Krupp Trial*, DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES (Fall 2006), http://archive.adl.org/education/dimensions_19/section3/krupp.html#.VgMmC7T5pUQ (last visited Oct. 22, 2016).

14. Ramasastry, *supra* note 9, at 111.

15. Anti-Defamation League, *supra* note 13.

16. “No crime without a law.” BLACK’S LAW DICTIONARY (10th ed. 2014).

17. See Devin Pendas, *Law, Not Vengeance*, in TRUTH CLAIMS: REPRESENTATION AND HUMAN RIGHTS 23, 26 (Mark Phillip Bradley & Patrice Petro eds., 2002).

18. Theodore H. Moran, *The United Nations and Transnational Corporations: A Review and a Perspective*, *United Nations Conference on Trade and Development*, 18 TRANSNAT’L CORPS. 91, 92 (2009).

19. TAGI SAGAFI-NEJAD, THE UN AND TRANSNATIONAL CORPORATIONS: FROM CODE OF CONDUCT TO GLOBAL COMPACT, 89–97 (2008).

20. Moran, *supra* note 18, at 92.

enterprises.²¹ It received further criticism for exacerbating economic disparities and operating inefficiently, approaching corruption.²² Following more than 20 years of little or no progress, the UNCTC was disbanded as a spectacular failure.²³

Later, in 1999, then-Secretary General of the UN, Kofi Annan, announced the Global Compact, a set of aspirational voluntary norms to which businesses could pledge.²⁴ This attempt by the United Nations joined a variety of other independent frameworks, including the Organization for Economic Cooperation and Development (“OECD”), the International Labor Organization (“ILO”), civil society recommendations, and internal corporate codes of conduct.²⁵ By some accounts, the Global Compact was wildly successful: in less than ten years, over 4,700 businesses had signed on.²⁶ Although this seems impressive at first, the number of businesses to join comprise less than 7 percent of the 75,000 transnational corporations.²⁷ Thus, while cultural views were changing, the United Nations was doing too little, and too slowly, to ensure corporate accountability. Yet, the stage was set for the next step in formalizing corporate social responsibility.

Eventually, in 2011, the UN ratified the Guiding Principles on Business and Human Rights.²⁸ The UNGP are considered “soft law,” meaning that they are not binding on any member state; rather, they attempt to show a set of best practices for businesses to follow, under the understanding that “companies

21. Karl Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 J. WORLD INV. & TRADE 11, 20–23 (2015). Note that these interests are not a zero-sum, yet inability to compromise eventually led to no movement on these issues.

22. See, e.g., JULIANA GERAN, *THE CENTRE ON TRANSNATIONAL CORPORATIONS: HOW THE U.N. INJURES POOR NATIONS* (1987).

23. See LOUIS EMMERIJ & RICHARD JOLLY, U.N. INTELLECTUAL HISTORY PROJECT, *THE UN AND TRANSNATIONAL CORPORATIONS*, BRIEFING NOTE NUMBER 17 2 (2009) (explaining that though the UNCTC made significant contributions in documenting the activities of transnational corporations, it was dismantled in the face of changing UN goals from designing codes of conduct to “inviting” transnational corporations to “join a global compact to further the common good.”).

24. Carolin F Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 4 GERMAN L.J. 1065, 1066 (2003).

25. *Id.*

26. Moran, *supra* note 18, at 105.

27. Hillemanns, *supra* note 24, at 1069.

28. Ruggie, *supra* note 8, at 3–5.

do not succeed in societies which fail.”²⁹ These Principles acknowledge the state duty to protect human rights and additionally expose a corollary duty among corporations.³⁰ Functionally, the UNGP have encouraged states to develop a mutually-beneficial team relationship with corporations to ensure all stakeholders respect human rights. In 2014, the Human Rights Council at the UN pushed member states to create their own National Action Plans (“NAP”s) to implement the UNGP within their own territory.³¹ Though the Group of Eminent Persons has made significant progress, it is too soon to tell what its legacy will be. The logical next step, however, is to codify these principles into a binding resolution for all UN member states to ratify and enforce within their borders. An international BHR Treaty is an admirable goal that could do much to protect the rights of all people.

B. PROPONENTS OF THE BUSINESS AND HUMAN RIGHTS TREATY

The movement pushing for the creation of a BHR Treaty presents us with a unique challenge: the examination of principled dialogue versus political rhetoric. Ecuador, which suffers from chronic human rights violations and state constraints on freedoms, is a prime example of this challenge. According to Amnesty International, Ecuador fails to protect the rights of indigenous peoples, and continually attacks critics of the government and human rights defenders.³² There are also issues with arbitrary detention, torture, freedom of speech, and gender equality.³³

It is curious, then, that Ecuador led a coalition of nine countries and the Arab and Africa Groups in 2013 calling for the UNGP to be drafted into an international treaty.³⁴ These

29. Kofi Annan, 7th Secretary-General of the U.N., Presentation at the International Bar Association Showcase Session: Business and Human Rights (Oct. 5, 2015) (video available at <https://vimeo.com/141529821>).

30. Ruggie, *supra* note 8, at 3.

31. Human Rights Council, Human Rights and Transnational Corporation and Other Business Enterprises, U.N. Doc. A/HRC/26/L.1, at 2 (June 23, 2014).

32. Amnesty Int'l, *State of the World's Human Rights 2014/15*, AI Index POL 10/0012015, at 135 (Feb. 25, 2015).

33. HUMAN RIGHTS WATCH, WORLD REPORT 2014: ECUADOR 2–5 (2014); *see also* U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, ECUADOR 2013 HUMAN RIGHTS REPORT 1, 3, 11–12, 27–28 (2013).

34. *Global Movement for a Binding Treaty*, TREATY ALLIANCE,

countries issued a statement at the 24th Session of the Human Rights Council that read: “A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.”³⁵ Even Algeria, a state that tried to administratively eliminate the Guiding Principles,³⁶ is now pressing for the creation of a treaty.³⁷ We must therefore examine why countries such as these—in addition to Cuba, Somalia, and Chad, all of which have received the worst possible human rights scores³⁸—are clamoring for the passage of a human rights treaty.³⁹ Perhaps, as some opponents argue, the movement for a business and human rights treaty is not about protecting human rights.

C. OPPONENTS TO THE BUSINESS AND HUMAN RIGHTS TREATY

A comprehensive study conducted by Oona Hathaway tracked the status of human rights, covering over 45 years and 166 countries, to see if human rights treaties had had the desired effect.⁴⁰ Her study found that not one treaty had a positive effect on human rights, and surprisingly, some actually made the situation they governed worse.⁴¹ This sentiment is echoed by Eric Posner, who states that “there is little evidence that human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties.”⁴² Posner likewise takes a careful look at data collected by Freedom House and determines that “[s]ome evidence

<http://www.treatymovement.com/history> (last visited Sept. 17, 2016).

35. Statement on Behalf of a Group of Countries at the 24th Session of the Human Rights Council (Sept. 2013), <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>.

36. JOHN RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xlix (2013).

37. *Global Movement for a Binding Treaty*, *supra* note 34.

38. *Freedom in the World: Aggregate and Subcategory Scores, 2015 Subcategory Scores*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world-aggregate-and-subcategory-scores#.VSkGiLqJdUQ> (last visited Oct. 23, 2016).

39. *Global Movement for a Binding Treaty*, *supra* note 34.

40. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002).

41. *Id.* at 1940.

42. ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 7 (Geoffrey R. Stone ed., 2014).

suggests that certain authoritarian regimes actually engaged in more violations after ratifying human rights treaties.”⁴³

With this counterintuitive phenomenon, perhaps it is understandable why some of the most outspoken critics of a BHR treaty include John Ruggie, drafter of the UNGP,⁴⁴ and powerful modern countries which traditionally support advances in human rights, such as the United States and the United Kingdom. These developed Western countries have a great deal to lose in the treaty-creation process and eventual adoption of a binding instrument. As described below, considerations of bargaining power and political capital must be addressed. But Western countries may also be taking a pragmatic approach, opposing the BHR Treaty because of the negative effect it could have on human rights.

D. BARGAINING POWER

As shown above, the human right of self-determination is a strong bargaining chip. The human rights movement is essentially one of equality, and thus may be viewed as a rebalance of power. Although human rights are normatively thought of as a Western device, they have gained support in transitioning nations. Posner points out that “many treaties, while heavily influenced by Western norms, were actually initiated by groups in developing countries who hoped to improve rights in those countries and sought outside support.”⁴⁵ But again, one needs to examine the motive behind this shift to understand if states are acting out of altruism or self-interest. The double-edged sword of human rights can be used by low-income states to gain power over more developed countries.

Part of this perverse incentive would be to use the treaty as a way for developing governments to discriminate against foreign MNCs. The current drafting of the BHR treaty would only limit the behavior of large interstate corporations and would not affect domestic companies.⁴⁶ This would allow

43. *Id.* at 76.

44. Christen Broecker, “*Better the Devil You Know*”: *Home State Approaches to Transnational Corporate Accountability*, 41 N.Y.U. J. INT’L L. & POL. 159, 176 (2008).

45. Posner, *supra* note 42, at 22.

46. Toby Webb, *Business and Human Rights, Back on the UN Agenda*, SUSTAINABILITY = SMART BUSINESS (July 11, 2014), <http://sustainablesmartbusiness.com/2014/07/business-and-human-rights-back-on-un/>.

domestic corporations to comply solely with local law and continue to abuse human rights while foreign companies would be hamstrung by comparison.⁴⁷ A less pessimistic view within this similar vein of reasoning is simply to state that this treaty is but an attempt by developing governments to attain some modicum of control over transnational corporations.⁴⁸ One might think that governments would have enough bargaining power to contract MNC's into a beneficial arrangement; however, many developing countries are so desperate for Foreign Direct Investment ("FDI") that they often give such MNCs wide latitude for operations.⁴⁹ Professor Ruggie explains, "[s]tates that host multinationals compete for foreign investment; home states are concerned that their firms might lose out on investment opportunities abroad to less scrupulous competitors."⁵⁰ This could be understood to mean that developing countries are attempting to level the playing field so as to keep their local businesses competitive. However, there is a clear concern that without corresponding local regulations, the disadvantaged would trade one abuser for another.⁵¹

E. POLITICAL CAPITAL

Opposing the treaty movement are modern democracies like the United States and the United Kingdom, both of whom likely have more to lose from ratifying a BHR treaty. Ironically, countries that already take measures to respect human rights are not greatly inhibited by additional treaties. "So, in one sense the human rights treaties do not require the developed countries to do anything different from what they have done in the past."⁵² If this is true, why, then, would states object to an instrument which may not actually inhibit them? Professor Hathaway's research also shows that countries with a poor human rights

47. *Id.*

48. Scott Jerbi, *Business and Human Rights at the UN: What Might Happen Next?*, 31 HUM. RTS. Q. 299, 302 (2009).

49. *Id.* at 303.

50. Ruggie, *supra* note 36, at xxii.

51. See Doug Cassel, *Treaty Process Gets Underway: Whoever Said It Would Be Easy?*, BUS. AND HUM. RTS. RESOURCE CTR., <http://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy> (last visited Oct. 23, 2016).

52. Posner, *supra* note 42, at 31.

record are more likely to ratify human rights treaties because they have less reputational capital to lose.⁵³

Furthermore, under the UNGP system, countries and corporations have the opportunity to choose to respect human rights and be rewarded for it, while a treaty would force entities into compliance and punish them for misbehavior.⁵⁴ The dichotomy of volunteerism to mandatory compliance could have the negative effect of parties meeting just minimum guidelines. Meanwhile, the benefit for state compliance comes more so from signing the treaty rather than following its parameters. As Hathaway explained: “[C]ountries are rewarded for positions [on human rights] rather than [their] effects.”⁵⁵

The United States’ standpoint is that the current arrangement is more beneficial than a binding instrument.⁵⁶ Any treaty would necessarily need to be narrow enough to win broad support. This unfortunate consequence could actually require states to do less for the human rights agenda than the UNGP.⁵⁷ The United States is not only boycotting the current intergovernmental working group on a treaty, but it is urging others to do the same.⁵⁸ The United States Representative to the UN Human Rights Council, Stephen Townley, explained: “[W]e have not given states adequate time and space to implement the Guiding Principles . . . this resolution is a threat to the Guiding Principles themselves.”⁵⁹ His statement expresses the fear that a treaty path serves as a distraction to making effective changes and finding workable solutions.⁶⁰

53. Hathaway, *supra* note 40, at 2013.

54. Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 285 (2009).

55. Hathaway, *supra* note 40, at 1941.

56. Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 926 (2005).

57. Mantilla, *supra* note 54, at 295.

58. Carey Biron, *Contentious Start for UN Process Toward Business and Human Rights Treaty*, MINT NEWS PRESS (July 10, 2014), <http://www.mintpressnews.com/contentious-start-u-n-process-toward-business-human-rights-treaty/193731>.

59. *Id.*

60. JOLYON FORD, BUSINESS AND HUMAN RIGHTS BRIDGING THE GOVERNANCE GAP 23 (2015).

F. BINDING NATURE OF THE INSTRUMENT

Although human rights discourse is predated by most colonizing efforts, the great civilizing missions echo much of the same ideas as modern human rights goals. As novelist F. Sionil Jose poignantly said: “Colonialism subdues in many dulcet guises. It conquered under the pretext of spreading Christianity, civilization, law and order, to make the world safe for democracy.”⁶¹ In addition to revolutionaries using human rights to establish oppressive regimes, modern democracies may be using human rights as a structure around which international law is created and imposed on others. This use of human rights begs one to question if human rights have now come to symbolize what they had previously been used to destroy; more specifically, are international human rights laws a form of neo-colonialism?

It must be noted that a business and human rights treaty is in some ways cultural imperialism. The great debate in human rights thought is universality of rights versus cultural relativity.⁶² A BHR treaty could be an indirect way for the West to put pressure on the developing world. If human rights are universal, then one may argue that human rights are not bounded by international law *per se*. Rather they are a law unto themselves. Ruti Teitel asserts that “[b]y grounding the protection of persons and people in the ‘association that binds the human race,’ the ‘law of humanity’ gives persons and people a legal and ethical status that is not entirely dependent on their membership in a particular political community.”⁶³ This is as much as saying that there is a natural law that supersedes

61. F. Sionil Jose, *Rosales and Pangasinan: Roots – Why They Matter*, THE PHILIPPINE STAR, <http://www.philstar.com/arts-and-culture/2014/03/17/1301139/rosales-and-pangasinan-roots-why-they-matter> (last updated March 17, 2014).

62. Professor Haque explains it thus: “[H]uman rights are *not* granted either by state or law; rather such rights are intrinsic in humanity. Every individual is born with the same rights, making human rights absolute for all human beings.” Ehsanul Haque, *Universal Human rights and Cultural Relativity: Conflict or Reconciliation?*, in TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS 19, 22 (Kyriaki Topidi & Lauren Fielder eds., 2013). While Professor Napoleon believes that “universal norms” should not be universally imposed, noting: “Since our legal orders and law are entirely created within our own cultures, it can be difficult to see and understand law in other cultures. In other words, law is societally bound – it is only law within the society that created it.” Val Napoleon, *Thinking About Indigenous Legal Orders*, in DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM 229, 232 (René Provost & Colleen Sheppard eds., 2013).

63. RUTI TEITEL, HUMANITY’S LAW 195 (2011).

national and international norms. The argument follows that right and wrong, in the context of human rights, is independent of written laws and should apply uniformly to all people regardless of culture or treaty signatories.

The current regime of human rights law is enforced through the United Nations in a system overseen by the creation of a committee for each treaty,⁶⁴ as well as through the UN Council on Human Rights.⁶⁵ The problem is particularly clear when observing the UN Council on Human Rights. The Council, previously known as the Commission, was run by some of “the worst human rights violators, including Libya, Saudi Arabia, and Sudan.”⁶⁶ These developing countries found a way to use the human rights framework to push their internal agenda and gain power. Posner says, “The human rights violators formed alliances with each other, and with other countries that cared more about diplomatic or strategic cooperation than about human rights.”⁶⁷ If this is the case at the Council and at treaty-specific committees, then the BHR treaty is an opportunity for developing countries to gain power in world politics. Furthermore, while these committees lend power and legitimacy to the participant states, they are so underfunded and under-respected that they are not given the power needed to actually enforce a treaty.

G. NARROWING THE SCOPE OF BUSINESS AND HUMAN RIGHTS

In order for the proposed BHR treaty to come into effect it will need the support of a diverse group of states, all with competing interests.⁶⁸ This will cause the eventual treaty to be narrow in scope and weak in its ability to protect human rights and hold corporations accountable. One of the most vehement opponents to a legally binding instrument is John Ruggie, drafter of the UNGP and former Special Representative to the Secretary General on Business and Human Rights. He warns, “[B]usiness and human rights is not so discrete an issue area as

64. Posner, *supra* note 42, at 40.

65. *Id.* at 43.

66. *Id.* at 44.

67. *Id.*

68. Aaron Rhodes, *The False Promise of an International Business and Human Rights Treaty*, HUFFINGTON POST (July 10, 2014, 6:27 PM), http://www.huffingtonpost.com/aaron-rhodes/the-false-promise-of-an-i_b_5575236.html.

to lend itself to a single set of detailed treaty obligations,” and that it was “hard to imagine [such a treaty] providing a basis for meaningful legal action.”⁶⁹ In sum, his fear is that a treaty would be nothing more than “largely symbolic gestures, of little practical use to real people in real places . . . From the vantage point of victims, an all-encompassing business and human rights treaty . . . is a profound deception.”⁷⁰

This has been the case with past human rights treaties. The language used is crafted in such a way that the obligations are vague and conflicting, or, in some cases, too demanding to be realistic.⁷¹ Narrow language creates a binding treaty but it does not actually force any action among ratifying states and is therefore difficult, if not impossible, to enforce.

Additionally, any language broad enough to get through the UN committees will then be subject to construal by individual states. States will have the autonomy and authority to interpret syntax on favorable terms. For example, by taking leeway with ambiguous words such as “reasonable” or “fair” in the ICESCR.⁷² To make a treaty even more impotent, countries can ratify it along with a reservation or understanding. This means a state could ratify a BHR treaty so far as it supports the values of a domestic law or constitutional framework.⁷³ Effectively, such reservations would make no new commitments whatsoever.

H. OBFUSCATION

It is possible that the pro-treaty coalition is pressing for a binding instrument just to confuse and clutter up the human rights agenda: “[G]iven the tendency of abusive states to foster meaningless global human rights legislation and institutions, it can be assumed their support is part of a strategy of obfuscation.”⁷⁴ The fear is that the advocacy for a treaty will take energy away from states making progress on the UNGP.⁷⁵ While over 600 organizations have put support behind the idea of the UN progressing toward a binding treaty, at the time of Ecuador’s proposal, only one country had passed a national action plan for

69. *Id.*

70. *Id.*

71. Posner, *supra* note 42, at 31–32.

72. *Id.* at 34.

73. *Id.* at 37.

74. Rhodes, *supra* note 68.

75. Biron, *supra* note 58.

compliance with the UNGP.⁷⁶ Now, over three years later that number has risen only to ten states.⁷⁷ This redirection of civil society energy could be a reprieve for states not willing to enforce these standards.⁷⁸

A BHR treaty is also many years off from going through the UN committee review and ratification process. Even Ecuador, in 2014, estimated that any eventual vote on a BHR treaty is more than a decade off.⁷⁹ This stalling technique is comparable to the negotiations surrounding the “Transnational Corporation Code of Conduct,” which was abandoned after 22 years of dialogue.⁸⁰ If the past is any indication of how this process might go, several years will go by before a binding instrument is finally adopted. This interim period could allow for states and non-state actors to continue to violate human rights all while pointing to a lack of consensus on accountability.

A further concern is with the hypertrophy of human rights. If total energy directed at respecting and enforcing human rights protections is zero sum, then for each new right or obligation, less overall attention and resources can be paid to each. Posner points out, “The number of human rights increased from 20 in 1975, to 100 in 1980, to 175 in 1990, to 300 today.”⁸¹ As the number of rights increases, each right becomes marginalized within the public conscience. “This is why human rights keep proliferating and in this way render each other meaningless for constraining behavior.”⁸² In theory, human rights are not created; each person is born with the same set of rights as every

76. U.N. Office of the High Commissioner on Human Rights, *State national action plans*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Nov. 13, 2016).

77. Those countries are Colombia, Denmark, Finland, Italy, Lithuania, the Netherlands, Norway, Spain, Sweden, and United Kingdom. See *National Action Plans*, BUS. & HUM. RTS. RESOURCE CTR., <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans#examples> (last visited September 6, 2016).

78. This criticism of the wayward support of the treaty also echoes similar disparagement of the *2006 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.

79. John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, INST. FOR HUM. RTS. AND BUS. (July 8, 2014), <https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre>.

80. *Id.*

81. Posner, *supra* note 42, at 92.

82. *Id.* at 93.

other member of humanity.⁸³ However, in practice, governments have a limited capacity to legislate, enforce, and litigate each right. Therefore, as the vocabulary of human rights discourse continues to expand, the normative independence of each right must shrink.⁸⁴

As a very broad example, the International Covenant on Civil and Political Rights (“ICCPR”) entered into force in 1976 and provides for equal treatment of women (Article 3); prevention of torture (Article 7); and protection of children (Article 24).⁸⁵ In the years following its adoption, the UN endorsed the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), and the Convention on the Rights of the Child (1989).⁸⁶ These treaties may take a complimentary approach rather than being in opposition to one another. However, the need for additional protections after the passage of the ICCPR forces one to wonder about the effectiveness of that document. Unfortunately, though these treaties work toward the same purpose, “[t]he more human rights there are, and thus the greater the variety of human interests that are protected, the more that the human rights system collapses into an undifferentiated welfarism in which all interests must be taken seriously for the sake of the public good.”⁸⁷ Historically, it may be that “recognizing” a new right might be simpler than enforcing rights which are already understood.

83. This is why most human treaties “recognize” a right as opposed to establishing or creating a right. *See, e.g.*, Convention on the Rights of the Child, Nov. 29, 1989, 1577 U.N.T.S. 3.

84. GRET HALLER, HUMAN RIGHTS WITHOUT DEMOCRACY?: RECONCILING FREEDOM WITH EQUALITY, 147 (Cynthia Klohr trans., Berghahn Books 2012) (2012).

85. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

86. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

87. Posner, *supra* note 42, at 94.

I. BLAME SHIFTING

Multi-national corporations often balk at doing business in states with poor human rights records. Some MNCs may have chosen not to incorporate in or do extensive business dealings with certain states based on their negative treatment by civil society organizations. This can be due to official international sanctions, or it can be the effect of progressive corporate citizenship. Foreign direct investment is absolutely crucial for the success of many developing states; they are thus encouraged to increase their human rights protections. However, shifting the responsibility to protect from states to corporations could make the state appear better without making any positive difference in the human rights sector. If the human rights watchdogs no longer were so scathing of these developing countries, perhaps it would encourage more FDI.⁸⁸ This proposition is consistent with data showing that when a developing country signals it will improve its human rights record, outside investment increases.⁸⁹ This also might mean that backing a treaty could be as productive as signing the treaty itself.

Ruggie has also expressed fears that shifting the blame from countries to corporations undermines development.⁹⁰ An added benefit for these states is that by shifting the responsibility, it is possible they would be subject to fewer sanctions.⁹¹ Currently, the international community sanctions states for unacceptable behaviors. A binding legal treaty could cause some of those sanctions to be lifted. In sum, shifting responsibility to businesses allows states to avoid the responsibility to protect human rights.⁹² If this were the case, it explains why such nations would so adamantly support this treaty: it would turn the gaze from the Western NGOs to MNCs operating within their borders.

88. Jerbi, *supra* note 48, at 543.

89. Hathaway, *supra* note 40, at 2012.

90. Jerbi, *supra* note 48, at 307.

91. Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 543 (2001).

92. Jerbi, *supra* note 48, at 302.

IV. CONCLUSION

As we have seen, the issues surrounding a BHR treaty are complex and may, measured by some, even be underhanded. This Article does not take the Kantian approach that for a treaty to be morally good, it must be supported for moral reasons; rather, there is the possibility that a good thing done for the wrong reasons can still lead to positive outcomes.⁹³ However, the international community should proceed cautiously to prevent the human rights movement from becoming political rhetoric and a tool to the detriment of human rights. Simply by supporting the treaty process, states have the opportunity improve their human rights records at face value, encouraging investment. Additionally, proponents may be supportive of a possible binding instrument in the future to distract from their behavior in the present. This reprieve might pay off for mal-actors regardless of whether the treaty is eventually passed. If the treaty fails, the current non-binding instruments will have been diluted. If the treaty passes, however, it shifts responsibility from states and emboldens domestic corporations.

Adversaries of the binding instrument negotiations take issue with the likelihood of a treaty finding consensus and with the eventual effectiveness that document would have. They make the argument that valuable time will be lost in negotiations; while the UN debates the exact treaty parameters, states can use this lack of consensus as a reason to not act to protect human rights. Because of the binding nature of any treaty, many of the obligations most needed to protect human rights will be left out, losing the comprehensive nature of the UNGP. The UNGP is voluntary, a choice that creates cohesion rather than derision resulting from forced compliance.⁹⁴

It is clear that there is still much to be done to adequately protect all person from human rights abuses by corporations and countries alike. Human rights treaties have much room to grow, and one way would be through a Business and Human Rights treaty. Even for self-interested developing countries, such a treaty would benefit both country and citizen. Conversely,

93. MICHAEL SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 111 (2009).

94. Although the "voluntary" nature of the UNGP applies to states wishing to adopt its principles and create national action plans to hold corporations accountable, it does not mean human rights are optional for multinational corporations.

although Western democracies have good reasons for disapproving of the treaty process, it may fail without any of their guidance, input, and support.⁹⁵ Both sides must find common ground upon which to develop a long-term agreement that could eventually be converted into a binding legal instrument.⁹⁶

95. In 2015, the European Parliament convened an Intergovernmental Working Group to discuss creation of a business and human rights treaty. Despite its importance, only 9 of 28 member states attended. *See ECCJ Intervention at EU Parliament Event on the UN Treaty on Business and Human Rights*, EUR. COAL. FOR CORP. JUST. (Sept. 3, 2015), <http://corporatejustice.org/news/166-eccj-intervention-at-eu-parliament-event-on-the-un-treaty-on-business-and-human-rights>.

96. John Ruggie, in a presentation to University College London on February 25, 2015, suggested the BHR treaty, along with the UNGP, could be used as a precision instrument to target specific human rights abuses. *See* John Ruggie, *Embedding Global Markets: Lessons from Business & Human Rights*, Presentation at CEL Annual Lecture Centre for Ethics and Law University College London (Feb. 25, 2015), <https://www.ucl.ac.uk/laws/law-ethics/events/docs/annual-lecture-2015>.