

Corporate Accountability: An Analytical Study of the Legally Binding Treaty on Business and Human Rights

Sarah Almunif

Prince Sultan University, Kingdom of Saudi Arabia

saramunif@outlook.com

سارة المنيف

جامعة الأمير سلطان، المملكة العربية السعودية

Abstract:

The paper begins with a brief analysis of the relationship between transnational corporations and human rights, emphasizing the importance of protecting human rights in the context of global business.

The paper then provides an in-depth background analysis of the "Legally Binding Treaty on Business and Human Rights". The paper proceeds to analyze the provisions of the treaty in detail, examining scope, applicability, enforcement mechanisms, and access to remedy.

The paper highlights the challenges that may arise in implementing the treaty. It concludes with emphasizing the importance of effective mechanisms for holding corporations accountable for their actions and ensuring the protection of human rights in the context of global business.

Overall, this paper analyzes the relationship between transnational corporations and human rights, with a focus on the legally binding treaty on business and human rights. The paper provides valuable insights for policymakers, academics, and stakeholders working in the field of business and human rights.

Key Words: United Nations, The Legally Binding Treaty on Business and Human Rights, Transnational Corporations, Human Rights.

Background of the Study

1. Introduction

The field of international human rights law continues to evolve, with the primary reference to such laws being the UN Guiding Principles on Business and Human Rights (UNGPR) endorsed in 2011 by the UN secretary-general, Professor John G. Ruggie, which is made up of three pillars, namely: "the state duty to protect human rights, the corporate responsibility to respect human rights and access to remedy for victims of business-related abuses"¹. However, human rights offences remain prominent due to the commanding corporate power over human rights which resulted in the introduction of the legally binding treaty on business and human rights

The Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (OEIGWG) is a United Nations (UN) body established in 2014 by the Human Rights Council with the mandate to examine, review, and formulate a legally binding treaty for the improvement of the accountability of transnational corporations and other business enterprises for human rights. The OEIGWG operates under the control of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and is composed of member states, civil society organizations, and business representatives².

The OEIGWG is tasked with identifying and clarifying the roles and responsibilities of transnational corporations and other business enterprises with regard to human rights, as well as developing possible legal and other measures to enhance their accountability. It has held a series of meetings and consultations over the years, and has produced a number of reports and recommendations on issues related to the impacts of human rights on business activities and as of recently, has published the third revised draft of the treaty in 2022.

The OEIGWG has faced criticism for its slow progress and lack of concrete results, as well as for its failure to adequately address the concerns of affected victims and the responsibility of transnational corporations. However, it remains an important venue for the discussion of human rights and business, and has the potential to make significant contributions to the promotion and protection of human rights in the context of business activities.

The outcome of this study will mainly address and fill the current existing gaps in this proposed treaty and contribute towards the development of the business and human rights hard law frameworks from a legal perspective and explore the arguments of both supporters and critics of the treaty.

2. Relationship between Transnational Corporations and Human Rights:

Transnational Corporations (TNCs) play a vital role in the global economy and are influential actors in various sectors. However, their activities can negatively impact human rights, including labor rights, environmental degradation, and indigenous communities³. The lack of legal accountability mechanisms for TNCs poses a significant challenge to addressing human rights abuses. Initiatives such as the United Nations Guiding Principles on Business and Human Rights and corporate social responsibility initiatives have been developed to prevent and address human rights abuses⁴. There have also been high-profile cases, such as the Doe v. Nestle USA, Inc.⁵, where TNCs have been held accountable for human rights abuses. The development of international legal norms and the use of legal frameworks to hold TNCs accountable are important steps in ensuring that TNCs respect human rights in their operations and supply chains.

3. The Legally Binding Treaty on Business and Human Rights:

The Legally Binding Treaty on Business and Human Rights was a product of the international community's need for an enforceable set of laws that States and TNCs will have to abide by subsequent to the previous attempts such as the UN Norms and the UNGP⁶. It seeks to address the issue of human rights violations by businesses in a comprehensive manner⁷. It also recognizes the important role of businesses in promoting sustainable development, but also the potential for businesses to cause or contribute to human rights abuses⁸.

The first session of the 'Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' ("IGWG") was in July 2015⁹. It signified the initial step towards the creation of a binding international treaty, paving the way for an in-depth discussion about the scope, nature and substance of the proposed treaty, as well as the possibility of its political and legal feasibility. Around 60 countries

(including eight EU member states), intergovernmental organizations and NGOs attended the inaugural session¹⁰.

The session provided the first opportunity to begin a well-organized debate about a variety of topics, including the treaty's jurisdiction over specific issues and individuals, countries' responsibilities regarding transnational corporations' overseas actions, the possibility of incorporating regulations for corporate legal accountability into the new treaty, and the establishment of a worldwide structure to address misconduct¹¹.

The Legally Binding Treaty on Business and Human Rights (hereinafter, **the Draft Treaty**) operates on the premise that commercial entities bear an obligation to uphold human rights. This obligation requires them to abstain from participating in or instigating any human rights violations and to remedy any unfavorable outcomes that may arise from their actions. This is a significant advancement since it acknowledges that businesses must fulfill their duty to safeguard the human rights of individuals who are impacted by their undertakings, including workers, communities, and consumers¹².

The principal contentions presented by Ruggie and other individuals who may disparage the treaty can be classified into the subsequent categories: i. contentions related to the scope and nature of the proposed treaty; ii. the political argument, specifically, the potential negative consequences of initiating the prolonged negotiation process for an international instrument; and iii. the adoption concerns, which pertain to the challenges of overseeing and implementing a legally binding business and human rights treaty¹³.

The Draft Treaty also recognizes the important role of states in protecting human rights in the context of business activities. States are expected to prevent and remedy human rights abuses by businesses, and to provide access to effective remedies for victims of such abuses. The treaty also includes provisions related to the extraterritorial obligations of states, which means that states have a responsibility to protect human rights beyond their own borders¹⁴.

Furthermore, a significant aspect of the Draft Treaty is its emphasis on the access to remedy. The Treaty acknowledges that individuals who have been subjected to human rights violations by corporations frequently encounter

substantial hindrances in obtaining justice, thereby perpetuating a culture of impunity for such abuses. The treaty comprises clauses regarding the right to an effective remedy, implying that victims of corporate human rights misconduct have the entitlement to pursuing and acquiring a remedy, judicial or non-judicial mechanisms¹⁵.

Moreover, it comprises clauses concerning corporate responsibility that mandate businesses to undertake measures aimed at preventing and rectifying human rights violations in their operations and supply chains. This encompasses the implementation of human rights policies, due diligence procedures, and the provision of adequate redress for those harmed by human rights violations¹⁶.

The Draft Treaty represents a significant advancement in acknowledging the accountability of corporations to respect human rights and the duty of states to safeguard human rights within the framework of business operations. The Draft Treaty has the capability to substantially contribute to the progression of human rights and corporate accountability, as well as the encouragement of sustainable development. Nevertheless, the success of this treaty will rely on the readiness of states and businesses to enforce and implement its provisions, and to guarantee that it generates a significant impact on the safeguarding of human rights.

4. Analysis of the Draft Treaty

4.1 Scope:

The treaty's scope is considered to be quite broad, including businesses which are registered, hold operations and/or have business relationships in several jurisdictions¹⁷. This section will look at the treaty's scope and the ramifications of its adoption.

One of the treaty's most important elements is that it applies to all corporations irrespective of size or ownership structure. This is a considerable change from past approaches to corporate governance, which have mostly targeted large multinational businesses. The UN hopes that by broadening the reach of the treaty to include every business, it will create a more equal competitive environment in which every business is subject to the same standards of human rights safeguarding.

Moreover, although certain nations sought to encompass all types of corporations, irrespective of whether they were national or transnational in nature¹⁸. In the Ecuador Resolution, a footnote provides clarification that the phrase "other business enterprises" in the title of the resolution refers exclusively to enterprises that exhibit a transnational character in their operational activities¹⁹. The footnote explicitly excludes local businesses that are registered in accordance with relevant domestic laws²⁰. Thus, the notion of "other business enterprises" as mentioned in the draft is unnecessary and has no role in the resolution.

One noteworthy aspect of the Draft Treaty is its emphasis on due diligence. According to the treaty, corporations are required to comply with human rights due diligence, which involves identifying, preventing, mitigating, and accounting for the impact of their operations on human rights²¹. This represents a significant departure from current practices in which businesses frequently evade accountability for human rights abuses by claiming ignorance of the consequences of their actions²². The treaty is poised to create a culture of human rights respect in the business world by mandating that firms take a proactive approach to protecting human rights.

Additionally, the treaty provides mechanisms for seeking remedies and damages, which are critical in ensuring that victims of human rights violations can pursue justice. The treaty obligates States to provide effective remedies to individuals affected by their actions, including compensation, restitution, and rehabilitation²³. This is a crucial step in rebalancing the power dynamic between businesses and their stakeholders, and ensuring that anyone impacted by corporate operations has access to legal redress. However, the mechanism in which these processes must be approached remains unclear, which creates another ambiguity within the draft.

An additional obstacle is presented by the issue of compliance. Even if the treaty is deemed valid, there is no assurance that enterprises will adhere to its provisions²⁴. To remedy this situation, the United Nations must work together with corporations to establish feasible guidelines and assistance to ensure conformity.

4.2 Applicability:

The Draft Treaty is raising some major concerns, particularly when it comes to its application to corporations that operate in multiple countries. Critics are worried that enforcing the treaty may be difficult in countries with weak legislative systems or a history of human rights violations²⁵. This could create situations in which corporations are able to commit human rights violations in certain areas of the world without repercussions, which would significantly reduce the effectiveness of the treaty²⁶.

Moreover, commentary highlights the ambitious attempt to widen jurisdiction by exercising judicial remediation on the basis of the victim's nationality or domicile, which is not the customary in private international law. Based on the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, this sort of practice is to be considered prohibited in which the judgement might not be recognized and/or enforced²⁷. Currently, there is no state that practices jurisdictional grounds based on a claimant's domicile²⁸. Furthermore, the third draft has widened the scope of 'domicile' in comparison to the second draft. As stated in the third draft, domicile may include '*place where the principal assets or operations are located*'²⁹. As per Germanic traditions, this may be used as exceptional grounds for jurisdiction; however, it can never determine domicile. Thus, this is also in conflict with what is customary in private international law³⁰. In addition, Article 11 of the Treaty bases jurisdiction on a victim's domicile notwithstanding where the harm and/or action has occurred, which contradicts what is applicable in *lex loci delictus* rules that offer jurisdiction to where the tort is committed³¹.

Another concern raised by opponents is the potential for the treaty to undermine existing human rights mechanisms. For example, the International Chamber of Commerce (ICC) argued that the treaty could "create confusion, duplication and contradiction with existing international and national frameworks, including those already in place to protect human rights"³². The ICC also expressed concerns about the potential impact of the treaty on the investment and trade policies of states, as well as the potential for the treaty to create uncertainty and risk for businesses³³. Furthermore, The International

Organization of Employers (IOE) also expressed concerns about the potential impact of the treaty on the ability of businesses to contribute to sustainable development and economic growth³⁴.

To have the desired outcome from this treaty, it must apply to all corporations which hold business operations in a globally. This would necessitate cooperation and coordination among many national legal systems. Furthermore, the issue of conflict with national legislations, particularly in nations with weak rule of law is a major concern. In certain circumstances, special rules and processes for upholding the treaty may be required.

To resolve these issues, stakeholders must engage in a collaborative consultative process. It may be necessary to hold consultations with corporations, civil society organizations, and governments to ensure that the treaty is pragmatic and effective. This could also involve the establishment of a specialized board to supervise the implementation and enforcement of the treaty³⁵.

4.3 Enforcement Mechanisms:

Enforcing a legally binding treaty on business and human rights is a complicated undertaking that necessitates a thorough understanding of the underlying elements that contribute to human rights violations committed by companies, as well as the many tools that may be utilized to hold corporations accountable. In this section, we will look at these aspects and consider possible solutions to the problem of implementing the proposed treaty.

Insufficient legal provisions and mechanisms to ensure accountability can contribute to violations of human rights in the context of business activities³⁶. Despite the existence of a foundation for human rights protection under international human rights law, significant gaps in the legislative framework exist when it comes to regulating business operations³⁷. As a result, companies may exploit these gaps and operate in a legal grey area with limited risk of legal consequences³⁸.

Given these underlying issues, it is clear that effectively addressing business-related human rights violations requires a comprehensive approach that addresses their fundamental causes.

One potential solution to the challenge of implementing the Draft Treaty is the establishment of an international court or tribunal with jurisdiction over human rights violations committed by transnational corporations³⁹. Such a court or tribunal would have the power to investigate and impose sanctions on corporations that engage in human rights violations, acting as a stronger deterrent against such behavior⁴⁰. However, this would require significant political will and international cooperation, as well as a commitment from governments to providing the necessary resources and support for the court or tribunal to function effectively.

4.4 Access to Remedy:

The issue of obtaining redress under the Draft Treaty is a complex and essential matter that warrants the attention of lawmakers, corporations and non-profit organizations. The Draft Treaty aims to create an international system that will hold businesses responsible for human rights violations and provide effective remedies to the victims⁴¹.

The central element of the access to remedy discourse is how to guarantee justice and compensation for victims of corporate human rights abuses. Numerous victims encounter significant barriers to justice, such as a lack of awareness of their rights, limited financial resources, and insufficient legal frameworks. Additionally, several corporations possess skilled legal teams and extensive resources, which they may use to evade responsibility and delay sanctions for an extended period.

One of the crucial aspects of the Treaty is the creation of a binding framework that would enable victims of human rights abuses by businesses to seek effective redress. This mechanism would involve various measures, including mandatory reporting on human rights impacts, corporate due diligence obligations, and an international tribunal to address victim claims⁴².

However, implementing this mechanism will likely present some challenges. For example, given the potential influence of large corporations and governments, how can the tribunal maintain its independence and impartiality? Additionally, there is the issue of how to ensure that all victims, including those in remote or marginalized communities, have access to the system⁴³.

Another challenge is determining how to ensure the practical effectiveness of the mechanism. Even if the process is established, corporations may find ways

to evade accountability or delay justice⁴⁴. Corporations could, for instance, use legal tactics to prolong proceedings or employ their resources and power to coerce or intimidate victims.

In general, the access to remedy issue must be carefully evaluated. While the introduction of a binding framework is a significant step forward, it is apparent that more measures are required to ensure that victims of human rights violations have access to meaningful remedies. It may be possible to create a more fair and equitable world for everybody by taking a strategy that addresses the legal, economic, and social components of the problem.

5. Conclusion

In summary, there is an apparent concern regarding the Draft Treaty with respect to scope, applicability and feasibility of enforcement, which requires further development to the content of the proposed treaty.

- Findings:

- I. The Draft Treaty marks a considerable change in corporate governance, as it applies to all corporations of a transnational nature irrespective of size or ownership structure.
- II. The Draft Treaty emphasizes due diligence and mandates that corporations take a proactive approach to protect human rights, which includes identifying, preventing, mitigating, and accounting for the impact of their operations on human rights.
- III. The main obstacles to the effective implementation of the treaty are the issues of enforcement, compliance, and political will.
- IV. There is a possibility of conflicts between the proposed treaty and existing national and international laws, regulations, and treaties.
- V. The issue of jurisdiction is significant as it requires coordination among many national legal systems, and there is a possibility of conflict with national legislations, particularly in nations with weak rule of law.

- Recommendations:

- I. A stronger corporate regulation, including obligatory due diligence standards and consequences for noncompliance, could be part of legal solutions.
- II. States should exercise firmness in protecting human rights and being ready to hold corporations accountable for their actions.
- III. Effective processes should be put in place to ensure that corporations adhere to the provisions of the treaty, which may entail the establishment of an independent body to monitor conformity and implement penalties for non-compliance.
- IV. To ensure compatibility with current national and international legal systems, the treaty should be carefully developed and relevant parties should be consulted.
- V. It may be necessary to establish a specialized board to supervise the implementation and enforcement of the treaty.
- VI. The creation of a system for victims of corporate human rights violations to seek compensation should be considered.

References:

¹UN Guiding Principles. Business & Human Rights Resource Centre. www.business-humanrights.org

²United Nations' Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises. Retrieved from <https://www.ohchr.org/>.

³Centre Europe - Tiers Monde. (2012). Transnational Corporation and Human Rights. <https://www.cetim.ch/wp-content/uploads/Transnational-corporation-and-human-rights.pdf>

⁴United Nations. (2011). Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" Framework. Retrieved from https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁵Doe v. Nestle USA, Inc., 748 F.3d 1287 (9th Cir. 2014).

⁶Atabongawung, Tamo. "A legally-binding instrument on business and human rights: Implications for the right to development in Africa." *African Human Rights Law Journal* (2021)

⁷ Ibid.

⁸ Ibid.

⁹"Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights." OHCHR, <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

¹⁰Human Rights Council.(2016, February). Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument. www.ohchr.org.

¹¹ Ibid.

¹² Ibid.

¹³Macchi, Chiara. (2018). A Treaty on Business and Human Rights: Problems and Prospects.

¹⁴LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Art. 9. (2021). <https://www.ohchr.org/>

¹⁵Opinio Juris. (2021, September 3). The Third Revised Draft of a Treaty on Business and Human Rights: Modest Steps Forward but Much of the Same. <http://opiniojuris.org/2021/09/03/the-third-revised-draft-of-a-treaty-on-business-and-human-rights-modest-steps-forward-but-much-of-the-same/>

¹⁶ Ibid.

¹⁷ LEGALLY BINDING INSTRUMENT TO REGULATE IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Art. 1. (2021). <https://www.ohchr.org/>

¹⁸ Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights. (2017). UN Doc A/HRC/34/47.

¹⁹ Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' 25.06.2014, UN Doc. A/HRC/26/L.22/Rev.1 ('Ecuador Resolution').

²⁰ Ibid.

²¹Grama, Benjamin and Duval, Antoine and van Baar, Annika and Roorda, Lucas, Third Revised Draft Treaty on Business and Human Rights: Comments and Recommendations (October 25, 2021). T.M.C. Asser Institute for International & European Law 2021-01.

²² Ibid.

²³ LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Art. 4. (2021). <https://www.ohchr.org/>

²⁴Milieudefensie. (2019). COMMENTS ON THE REVISED DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS. Retrieved from https://milieudefensie.nl/actueel/writ_statement_globalcampaign_october2019_eng.pdf/@@download/file/Writ_Statement_GlobalCampaign_october2019_ENG.pdf

²⁵Zamfir, Ionel. European Parliament Research Service. (2018). Towards a binding international treaty on business and human rights. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)

²⁶ Ibid.

²⁷ van Loon, Hans. "Towards a global Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters." *Nederlands Internationaal Privaatrecht (NIPR)* (2020): 4-18.

²⁸ Grama, Benjamin and Duval, Antoine and van Baar, Annika and Roorda, Lucas, Third Revised Draft Treaty on Business and Human Rights: Comments and Recommendations (October 25, 2021). T.M.C. Asser Institute for International & European Law 2021-01.

²⁹ LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Art. 9. (2021). <https://www.ohchr.org/>

³⁰ Grama, Benjamin and Duval, Antoine and van Baar, Annika and Roorda, Lucas, Third Revised Draft Treaty on Business and Human Rights: Comments and Recommendations (October 25, 2021). T.M.C. Asser Institute for International & European Law 2021-01.

³¹ Ibid.

³² ICC. (2017). Business response to IGWG Draft Binding Treaty on Human Rights. Retrieved from <https://iccwbo.org/>.

³³ Ibid.

³⁴ Ibid.

³⁵ Macchi, Chiara. (2018). A Treaty on Business and Human Rights: Problems and Prospects.

³⁶ Ivanov, D. & Levina, M. (2021). Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights. *BRICS Law Journal*, 8(1), 135-161.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Zamfir, Ionel. European Parliament Research Service. (2018). Towards a binding international treaty on business and human rights.

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)

⁴⁰ Ibid.

⁴¹ LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, Art. 7. (2021). <https://www.ohchr.org/>

⁴² Ivanov, D. & Levina, M. (2021). Prospects of International Legal Cooperation of States Under U.N. Auspices in Developing a Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights. *BRICS Law Journal*, 8(1), 135-161.

⁴³ Milieudefensie. (2019). COMMENTS ON THE REVISED DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS. Retrieved from https://milieudefensie.nl/actueel/writ_statement_globalcampaign_october2019_eng.pdf/@download/file/Writ_Statement_GlobalCampaign_october2019_ENG.pdf

⁴⁴Zamfir, Ionel. European Parliament Research Service. (2018). Towards a binding international treaty on business and human rights
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)