

The Business and Human Rights Treaty Debate: Is Now the Time?

Introduction

The issue of corporate responsibility and human rights has increasingly come under public spotlight. In September 2014, as part of the “Conversation in Human Rights” series, the Duke Human Rights Center at the Kenan Institute for Ethics hosted a discussion on the evolving obligations of businesses to respect human rights. Panelists included Dr. Puvan Selvanathan (Member of the UN Working Group on Business and Human Rights and Head of Food and Agriculture at the U.N. Global Compact), Professor Fritz Mayer (Sanford School of Public Policy, Duke), Professor Aseem Prakash (Political Science, University of Washington), with Suzanne Katzenstein (The Kenan Institute for Ethics, Duke) as moderator.

One of the central questions of the conversation was whether the United Nations should move forward with a proposed treaty on transnational business and human rights, or whether it should focus on implementing the current Guiding Principles. This submission by Dr. Selvanathan shares the view he offered at the Kenan Institute on the treaty debate. It is his personal opinion and does not reflect the position of the UN Working Group on Business and Human Rights or the Global Compact.



From left to right, Suzanne Katzenstein, Fritz Mayer, and Puvan Selvanathan.

Treaty Me Right

*Puvan J Selvanathan**

I support a treaty on Business and Human Rights. I believe that a legally-binding instrument, collectively developed and agreed upon by all stakeholders involved in protecting, respecting, and remedying human rights regarding any and all business activity, will demonstrate a global commitment to fulfilling the agenda. I have three reasons: first, I believe the United Nations is where we craft and evolve our global society; second, it will deliver satisfaction and ultimately justice; and third, we must seize the opportunity to deliver a ‘next generation’ treaty.

All About That Bass

We the Peoples determined the United Nations to be a machine to process our faith, dignity and worth as equals into a global infrastructure for justice and respect that promotes social progress and a better life for all. Since the day we switched the UN contraption ‘on’ it has also been both a mirror and measure of how well we live together in peace, whether we unite in adversity, and if our international economy and society allows us all to advance. How the ‘international civilization’ handles Business and Human Rights is a true test of whether our greatest machine is designed for perpetual motion or is a friction-ridden relic.

* *Dr. Selvanathan originally expressed this personal view in September 2014, at the Kenan Institute for Ethics. It is not a position of the UN Working Group on Business and Human Rights. The Kenan Institute will share Dr. Selvanathan’s opinion on the impact and future of the Global Compact, as offered in the same original conversation, in a follow-up piece in January 2015.*

The treaty process is how the UN self-actualises. Treaties, resolutions and accords are the foundations, columns and beams of our global society. As we climb ever higher we rely on these structural elements to harness our hopes and shelter our insecurities from a fear of heights. Yes the UN is byzantine, and treaty processes are equal parts myth, method, meaning and madness. But it remains the only platform that delivers with collective legitimacy. The Guiding Principles (GPs) are valid because they are a product of the UN machine.

The innovation of the GPs is how they elegantly restate the required behaviours of all actors side-by-side with each other, yet do not profess or prescribe anything more than what everyone is respectively supposed to be doing anyway. The GPs are to Business and Human Rights what the Periodic Table is to Chemistry. As mnemonic tools for the trade both the GPs and the Periodic Table succeed wonderfully, but their value is lost on anyone who is not a chemist or a human rights expert. A legally-binding framework would observe the way the elements interact with each other; establish the conditions, catalysts and inhibitors for reactions; and calibrate the tolerances to keep our experiments with each other safe and productive. I believe a treaty is not about describing what actors do in the safety of their own boats, but about setting rules of engagement between boats in international waters.

You Oughta Know

The Guiding Principles have neither delivered satisfaction nor accelerated justice. Stakeholder expectations overpromised and realities underdelivered. The rapture of endorsement by the Human Rights Council after years of tribulation suspended disbelief in actors immediately revisiting long unkept promises. Governments were and remain aware of their duty to protect, and every business considers and then factors in the consequences of disrespecting human rights as a potential risk and cost in operations. By articulating these responsibilities adjacent to each other, the GPs delineated a fence that made for good neighbours, but didn't save the neighbourhood. Duty is ignored. Impunity persists. Remedy is remote. Victims still suffer.

Voluntary systems are suited to demonstrating goodness but not effecting global change. Those who volunteer to do more believe in worthy pursuits. They do not measure their leadership relative to laggards until they realise the laggards are not compelled to move at all. The energy of leaders will erode if society does not reinforce and reward their effort by delimiting a baseline against which all should be measured.

When delivering the *Protect, Respect, Remedy* framework in 2008, John Ruggie made reasonable arguments for why an overarching international legal agreement at that time would not have worked. We were all younger then. The endorsement of the GPs in 2011 by the Human Rights Council transformed the landscape of Business and Human Rights and, importantly, stakeholders expected changes for the better to come thick and fast. That has not happened. Uptake of the GPs has been slow, with the cottage industry of Business and Human Rights largely sidelined from the industrialised and commercial politics and policies that occupy the economics of our global society.

The GPs are an important milestone that reflected the maturity of the debate at a certain point, and by endorsing them the greater UN family banked their currency as acceptance in principle. That milestone points to the natural destination that a legally-binding instrument promises, and any treaty process will be rich in charting our contemporary social conditions: most notably that governments and businesses, each and both when operating across borders and domestically, are entirely conjoined in responsibility and accountability to our international civilization. The GPs suppose enough of a distinction between 'duty' and 'respect' that they are coded as separate pillars. Rather, I believe they exist on either side of an unselective, practically transparent and highly permeable membrane.

Age of Aquarius (Let the Sunshine In)

A treaty process beginning now, building on the genome of the GPs is a seminal opportunity to deliver a 'next generation' covenant that could be developed and ratified by all involved stakeholders. Legitimacy today is founded upon meaningful involvement and hard-won consensus among diverse and vested stakeholders.

The constructs that could be tabled today would benefit from lessons on climate change, tackling ebola, coping with natural disasters, privacy and security of data, inequity and inequality, land and food. Indeed, the litany of issues considered by a multitude of actors in crafting the Sustainable Development Goals would fuel a process that truly explores what a 'rights-based approach' should mean.

This will certainly move beyond the comfort zone of 'traditional' human rights where States are unfairly required to oblige in areas over which they retain less and less control. Some of that control has been ceded to the private sector's standards, operating procedures, codes of conduct and business cases. More interestingly, all governments now lose sleep over the cautionary tales of colourful revolutions, cultural springtimes, and occupation by have-nots who have nothing to lose. This large and amorphous bloc of 'regular' people — mostly younger, if not already highly networked than inevitably destined to be, and increasingly aware that their future trajectory is not a projection of their parents' past. Only businesses of the very near future can remain the hulking merged and acquired relics of a receding industrial age. Brands and analytics already define consumer choice and production patterns. This means that 'values' and 'information' will drive how things are made and determine if they are relevant. Digital, education, wealth and health divides will persist so parts of the world will not make such choices actively. But wherever choices can be made, they will be creating an osmotic societal pressure across the planet. A new treaty process must capture the zeitgeist.

Will the immediate validity of the GPs be diminished if we embark on a path toward a legally-binding instrument? No. The time taken until a treaty is negotiated is the 'GPs-era'. All stakeholders, businesses in particular, should be assured that actioning the GPs now is the most ready one could be for any hard-law. This prospect should catalyse the uptake of the GPs. Actors should be incentivised to apply and test the GPs, feeding findings into the treaty process.

A treaty is a hope that only the UN can provide. The UN should never deny hope.