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Article

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The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations

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Abstract

In June 2014, the UN Human Rights Council established an intergovernmental working group to elaborate a treaty on business and human rights. In July 2015, the working group held its first session launching the negotiations process—the culmination of a global movement of non-governmental organizations (NGOs) that over the last four decades have called for greater corporate accountability for human rights violations. The advocacy activities of the Treaty Alliance, an alliance of NGOs that supports the development of the treaty, were pivotal to the tabling of the resolution establishing the working group. These organizations now have the opportunity to engage with the negotiations process, both formally and informally, through consultations, advocacy, and lobbying. This article considers the impact NGOs may have in the drafting negotiations of the proposed treaty. It identifies several lobbying and advocacy strategies that were successful in previous international law-making processes and discusses the extent to which they could be applied to the current negotiations. It presents the benefits of an NGO coalition, of formal and informal lobbying strategies, and of the development of a common NGOs and friendly states framework. It analyses the reasons for Western states' opposition and suggests lobbying strategies that may overcome it. Recognizing the unique subject matter of this treaty, it also focuses on lobbying corporate actors, and explores the complementarity between the Guiding Principles on Business and Human Rights and the treaty and the need for NGOs to support both. The article concludes on the necessity to compromise on essential points if a treaty is ever to emerge.

Keywords: corporations; business and human rights; intergovernmental working group; NGOs; treaty; UN Guiding Principles

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Introduction

In June 2014 the UN Human Rights Council adopted Resolution 26/9, which established an open-ended intergovernmental working group (OIWG) mandated to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (UN Human Rights Council 2014a).[1] In July 2015 the OIWG held its first session at the UN in Geneva, launching the negotiations towards a treaty on business and human rights (UN Human Rights Council 2016). The second session of the OIWG took place in October 2016.[2]

The negotiation on the treaty is the culmination of a global movement of non-governmental organizations (NGOs) that over the last four decades have called for greater corporate accountability for human rights violations.[3] Soft law instruments such as the UN Guiding Principles on Business and Human Rights (the Guiding Principles) (UN Office of the High Commissioner for Human Rights 2011) are seen as only a partial answer. For many NGOs the only way to address persistent gaps in human rights protection, corporate accountability and effective remedies for victims is a legally binding instrument.

The advocacy activities of the Treaty Alliance,[4] an alliance of NGOs around the world that supports the development of a business and human rights treaty, were pivotal to the tabling of Resolution 26/9 and the establishment of the OIWG. Many individual NGOs also welcomed the adoption of Resolution 26/9.[5] These organizations now have the opportunity to engage with the negotiations process, both formally and informally, through consultations, advocacy, and lobbying.

States have chosen an open-ended intergovernmental group to conduct the negotiations, which allows direct participation of NGOs.[6] Many NGOs have submitted written and oral contributions on possible principles, scope and elements of the treaty during the first two sessions of the OIWG. Those first sessions reflected the lack of clarity on certain core aspects of a future treaty, the absence of consensus among states, and NGOs' determination

1 At the same session the Human Rights Council adopted also Resolution 26/22, proposed by Norway, which asked for the mandate of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (an independent body created in 2011 by the UN Human Rights Council) to be extended by three years (UN Human Rights Council 2014b).

2 The OIWG aims to present a draft of the treaty by its third session in 2017.

3 In this article the phrases 'corporate human rights abuses' and 'corporate human rights violations' are used interchangeably and are intended to mean the same thing: business negative impacts on human rights. In international law literature and practice the term 'human rights violations' is often restricted to the actions of states, while the actions of businesses are usually described as 'human rights abuses' or as 'having an adverse human rights impact'. This practice is based on the argument that international law does not impose direct human rights obligations on corporations and thus they cannot legally commit violations against human rights.

4 See Treaty Alliance, Global Movement for a Binding Treaty (http://www.treatymovement.com).

5 For a compilation of NGOs' views on the proposed treaty see Business & Human Rights Resource Centre (https://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries).

6 The term 'open-ended' means that the working group is open to all UN member states, states with observer status, NGOs with consultative status with the UN Economic and Social Council (ECOSOC), as well as other actors such as national human rights institutions. These actors may participate in the working group sessions and submit oral and written statements.

to move the treaty negotiation forward. For the first time, options for a treaty on business and human rights are being discussed at the UN (Lopez and Shea 2016).

NGOs can influence the UN system of international law making in two ways: 'agenda setting' and 'norms setting' (Willets 1996). The first, agenda setting, is the determination of whether a given issue will be subject to law making. Once an issue becomes an agenda item, negotiations start in order to formulate policy approaches on such topic. NGOs have already put the treaty on business and human rights on the negotiating table. With the OIWG mandate to elaborate a treaty, NGO strategies are now focused on norms setting.

Against this background, this article considers the impact NGOs may have in the drafting negotiations of the proposed treaty. It identifies several lobbying and advocacy strategies that were successful in previous international law-making processes and discusses the extent to which they could be applied to the current negotiations. Section 1 presents the benefits of an NGO coalition, and Section 2, formal and informal lobbying strategies. Section 3 looks into the development of a common NGOs and friendly states framework. Section 4 analyses the reasons for Western states' opposition and suggests lobbying strategies that may overcome it, while Section 5, recognizing the unique subject matter of this treaty, focuses on lobbying companies and business associations. Finally, Section 6 explores the complementarity between the Guiding Principles and the proposed treaty and the need for NGOs to support both, and Section 7 concludes on the necessity to compromise on essential points if a treaty is ever to emerge out of the current negotiations.

1. The benefits of an NGO coalition

In 2013, a number of leading NGOs formed the Treaty Alliance in support of the development of a treaty to address corporate human rights abuses.[7] By 2014, the Treaty Alliance had grown to over 600 organizations. They represent a broad spectrum ranging from international human rights organizations to worker associations, environmental and development organizations, and also include local groups that represent victims of corporate human rights abuses. At the beginning of 2014, in a joint statement, 620 groups and organizations from different countries launched a call urging the UN Human Rights Council to work towards a treaty on business and human rights and to establish an intergovernmental working group to formulate a draft proposal (see Treaty Alliance 2013).

Parallels can be made with the NGO coalitions that developed during the negotiations of the Rome Statute establishing the International Criminal Court (ICC), and the Convention on the Rights of the Child (CRC). The Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) met through 1998 to review the International Law Commission (ILC)'s final draft of the ICC statute (UN General Assembly 1995). Most NGOs at the PrepCom organized their activities through the NGO Coalition for an International Criminal Court (CICC). The CICC was founded in 1995 by a small group of NGOs that coordinated their work to ensure the establishment of an international criminal court. It grew rapidly from 25 to 800 NGOs from all regions of the

7 Core groups include: Coopération Internationale pour le Développement et la Solidarité (CIDSE), the International Network for Economic, Social and Cultural Rights (ESCR-Net), Food First Information and Action Network (FIAN), the International Federation for Human Rights (FIDH), Friends of the Earth International, International Commission of Jurists, Legal Resources Center, and the Transnational Institute.

world.[8] During the Rome Conference, 13 teams monitored various aspects of the statute, the final act and the preamble. The Coalition's coordination and facilitation role was essential to the development of the Rome Statute, as recognized by the Assembly of States Parties (ICC Assembly of States Parties 2003).

During the first session of the negotiations for the Convention on the Rights of the Child (CRC), a common approach had not yet been formed among NGOs, which were by no means a homogenous group (Türkelli and Vandenhole 2012: 38). NGO action became more effective and coordinated from 1983 when NGOs aligned their positions within the NGO Ad Hoc Group. The NGO coalition had a direct impact on substantive articles and procedural aspects of the CRC that is 'without parallel in the history of drafting international instruments' (Cantwell 1992: 24). At first, government delegations were suspicious of NGO participation in the CRC working group. When the Commission on Human Rights adopted the Convention, this attitude had changed and nearly every government statement in support of the CRC made complimentary references to the important role of NGOs in the drafting process (UN Commission on Human Rights 1989). This change in attitude has been attributed to the formation of an NGO alliance and to the constructive way in which the Ad Hoc Group operated (Cohen 1990: 145).

The establishment of an NGO coalition on the business and human rights treaty, the Treaty Alliance, has already proved crucial for the establishment of the OIWG. Now the Treaty Alliance's member organizations are actively participating in the OIWG sessions influencing the norms-setting process. Working in a coalition enables them to exert greater influence on norms setting than through individual efforts alone. Thomson suggests, based on his experience with the Human Rights Committee, that NGO impact critically depends on the joint lobby by international and national NGOs, and on the level of expertise of the NGO representatives (Thomson 2000: 220–1). A common characteristic of the Treaty Alliance and previous successful NGO coalitions is that they have a great deal of expertise and knowledge about the subject matter. The Treaty Alliance includes a number of NGOs that are working independently in different regions on business and human rights issues. Core groups of the alliance, such as the International Commission of Jurists, the International Network for Economic, Social and Cultural Rights (ESCR-Net), and the International Federation for Human Rights (FIDH), have years of experience in this area and also expertise in leading other NGO coalitions during treaty-making processes.[9] The Treaty Alliance will probably continue coordinating the NGO campaign and related activities in Geneva, while national NGOs lobby governments in their own countries.

2. Formal and informal lobbying strategies

Attendance by NGOs at UN open-ended working groups is determined by whether they have consultative status with the UN Economic and Social Council (ECOSOC). Formal involvement can take place through written or oral statements, jointly or individually. This

8 Since then, the Coalition's membership has increased to more than 2,500 organizations as its original goal of establishing the ICC grew to include the larger goal of guaranteeing the court's fair, effective and independent functioning. See CICC (http://www.coalitionfortheicc.org).

9 For example ESCR-Net also led the NGO Coalition established to coordinate NGO activities and positions during the negotiations of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights) (OP-CESCR).

formal involvement has gradually evolved to include informal ways of interacting with governmental delegates. Indeed, Peter Willetts considers that it is not so much the formal rules that determine the influence of NGOs, but rather 'the status, the expertise, the communication skills, and the trust established in personal relationships between NGO representatives and government delegates' (Willetts 2011: 62). Referring in particular to the case of international humanitarian law-making processes, Louise Doswald-Beck also considers bilateral contacts and government expert meetings invaluable for the creation of interest among states on an issue (Doswald-Beck 1998: 42). Claire Mahon echoes the importance of informal ways of interaction, such as meetings and consultations, conducted in parallel with the intergovernmental processes of drafting the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP–CESCR):[10]

> These events ... helped progress in the Working Group sessions, providing fora in which decision makers could debate issues and discuss concerns in depth, thus contributing to the overall speed of the negotiation process in the formal sessions. (Mahon 2088: 627–8)

The CRC Ad Hoc Group also employed both formal lobbying and informal networking techniques to influence the drafting phase of the Convention. While NGOs of the Ad Hoc Group distributed reports and delivered oral interventions during the formal negotiations, they also forged more casual links with national delegations (Türkelli and Vandenhole 2012: 39). This move was 'pivotal in forging stronger contacts with state and NGOs representatives and afforded NGOs the opportunity to present their positions in a less antagonistic and more constructive fashion' (ibid: 62), thus allowing for an alignment of frames between NGOs and some states.

The CRC was negotiated during the last years of the cold war and NGOs provided a more neutral and balanced grounding to the negotiations when the rivalling East and West texts resulted in negotiations being deadlocked (Cohen 1990: 192; Türkelli and Vandenhole 2012: 40). During the drafting of the Convention, the Ad Hoc Group refrained from being politicized in order to conserve the NGOs' special mediator status (Cohen 1990: 193). As such, NGOs were able to profoundly influence both the drafting process of the Convention and its substantial outcome.

During the drafting of the ICC Statute, 238 NGOs officially participated in the ad hoc committee's sessions and played a significant role in discussing the issues and proposing options to government delegations.[11] Several leading organizations, such as Amnesty International and Human Rights Watch, actively lobbied for the tribunal and provided legal and technical expertise (Bassiouni 1999: 455). NGOs contributed so greatly to the PrepCom meetings that they were given unprecedented access to meetings in Rome (ibid.). While the bigger groups of the CICC circulated and promoted new research and expert documents, smaller groups were more effective at networking, disseminating information, and building coalitions. Through this process, the Coalition developed an increasingly

10 The open-ended working group to elaborate the OP-CESCR was established in 2003 with an initial mandate 'to consider options regarding the elaboration of an optional protocol' (UN Commission on Human Rights 2003).

11 These organizations included the American Bar Association, Amnesty International, the Association International de Droit Pénal, Human Rights Watch, the International Commission of Jurists, the International Human Rights Law Institute, the International Institute for the Higher Studies in Criminal Sciences, and the Lawyers Committee for Human Rights.

powerful role in the development of the draft statute. NGOs actively participated in the negotiations, especially through consultative roles with a growing number of governments.

Regional and national initiatives by the main international human rights organizations to develop position papers made an essential contribution to the development of the draft treaty text (Benedetti and Washburn 1999: 21–2). Participants developed draft definitions of the core crimes, reviewed the key issues pertaining to the international criminal court, and conducted technical discussions on general principles of criminal law. In a similar way, after Resolution 26/9 was adopted, the Treaty Alliance organized regional consultations in Asia and Latin America to gather NGOs' views on what the business and human rights treaty should include. During those consultations, a number of issues have arisen, for example in relation to extraterritorial obligations, parent company liability, and participatory rights.

While formal involvement in the OIWG sessions is important, the Treaty Alliance and individual NGOs will exercise their influence mainly outside the formal arena in side events, such as informal meetings, receptions, and workshops, during and in between sessions. Meetings and consultations provide opportunities for governments and NGOs to discuss and debate key issues of the treaty drafting. At the same time, national NGOs have to approach and lobby key government representatives in their countries. These are important to develop common approaches between NGOs and states supporting the treaty, which in turn may prove critical for the adoption of a treaty.

3. Development of a common NGO and 'friendly' states framework

The CRC marked the first time that NGOs extensively participated in an international treaty-drafting process. NGOs gained a special position in the drafting of the CRC due to their early ownership of the internationalization of the children's rights movement[12] (Türkelli and Vandenhole 2012: 62). In 1978, Poland submitted a draft Convention on children's rights (E/CN.4/L.1366) to the 34th session of the UN Commission on Human Rights and expressed hopes for its adoption by 1979, the 20th anniversary of the Declaration of the Rights of the Child and the International Year of the Child. The discussions on the draft CRC then ensued in an open-ended working group throughout the 1980s.[13] Several NGOs submitted statements to the Commission, welcoming the draft, but urging the postponement of its negotiation until results from NGO research on children's rights and on the implementation of the 1959 Declaration were available (International Council of Women et al. 1978). This marked the beginnings of a framework alignment between some states and several NGOs (Türkelli and Vandenhole 2012: 37). The Canadian and British delegations, for instance, supported NGO calls for a more gradual approach (see UN Commission on Human Rights 1978).

During the negotiations of the CRC Optional Protocol on a Communication Procedure (OP3 CRC) (UN General Assembly 2011), the NGO working group built a group of 'friendly states' that supported the presentation of a resolution to establish a working group and shared a common position on core issues of the optional protocol (Türkelli and

12 In 1924, Save the Children International Union (SCIU) drafted the first declaration of the rights of the child, which inspired the 1959 UN Declaration of the Rights of the Child (UN General Assembly 1959).

13 The working group was established by ECOSOC on 2 May 1980 by decision 1980/138.

Vandenhole 2012: 43–4). The Human Rights Council resolution of 2009 (UN Human Rights Council 2009a) then established the Open-Ended Working Group with this mandate. Similarly, during the ICC negotiations, an agreement developed between the CICC and the 'Like-Minded Group' of countries. These countries wanted a strong and specific resolution on the creation of an international criminal court, whereas the five permanent members of the Security Council wanted to send the international criminal court proposal on for further studies (Benedetti and Washburn 1999: 22). The Coalition helped the Like-Minded Group develop guiding principles to serve as the first unified position of the group before the diplomatic conference (ibid: 23).

The negotiations on and drafting of the OP–CESCR, which started in 2001 with the appointment of an independent expert, were similar to the business and human rights treaty negotiations. At first states were divided. On one side there were Portugal and some other European Union (EU) countries together with the Group of Latin American and Caribbean countries. On the other, there was a coalition of opposing states, including Australia, Canada, Japan, Poland, the United Kingdom, and the United States. The position of certain states was influenced or changed, over time, through NGO lobbying. Close cooperation with Portugal was a key factor in helping the NGO campaign for a revised mandate of the independent expert to flourish. Portugal was responsive to fears voiced by the NGOs that without some guidance the independent expert might not contribute substantially to the debate on the optional protocol (Türkelli, Vandenhole, and Vandenbogaerde 2013: 8). After lobbying in cooperation with Portugal, a mandate for the expert was decided upon, as well as the establishment of an open-ended working group, with a mandate to explore options regarding the elaboration of an OP–CESCR. Other states then aligned themselves with the common NGO–Portugal framework, and became known as the 'friends of the optional protocol'.

Resolution 26/9 in relation to the business and human rights treaty was drafted by Ecuador and South Africa. Behind the closed doors of the Human Rights Council, heated discussions took place on the initiative. The United States and the EU in particular strongly opposed the draft. On 26 June 2014 the supporters of the resolution won a crucial vote. The 47 members of the Human Rights Council adopted the resolution (see UN Human Rights Council 2014a).[14] China, India and Russia voted in favour. The United States, the United Kingdom and European countries voted against the resolution, which they thought counterproductive and polarizing, and announced that they would not participate in the treaty process.[15] For the successful drafting of a treaty, Treaty Alliance NGOs will need to

14 The votes were: 20 in favour (Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Viet Nam); 14 against (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom, United States); and 13 abstentions (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates).

15 Both China and Russia, however, emphasized the principle of national sovereignty and expressed their reservations about extraterritorial jurisdiction. During the first session of the OIWG in July 2015, Russia's position was notably less supportive of the treaty process than a year before. The Russian representative declared that he saw no urgent need to establish a legally binding instrument. He argued that the debate on the possible content of such a treaty was premature, and discussions should instead focus first on the feasibility of such an instrument. Latin American

develop a common framework with 'friendly' states supporting the business and human rights treaty. But other states need to be taken on board—lobbying Western states that at the moment are not supporting the treaty's development is critical.

4. Lobbying Western states

In a statement prior to the vote in the Human Rights Council, the United States representative described the resolution as 'a threat to the Guiding Principles' (US Mission to the UN Geneva 2014). He stated that his country was concerned about the focus on transnational corporations—to establish a truly 'level playing field' a new legal instrument would have to apply also to domestic companies. The United States opposed direct, legally binding human rights obligations for corporations. The EU shared the United States position and rejected the treaty resolution on similar grounds. Shortly before the vote, the EU issued a warning: 'If this resolution is adopted, it will divide the Council not only on the vote, but in the years to come' (European Union 2014: 3).

Only nine out of the 28 EU member states, and the EU delegation, were in the room on the first day of the OIWG first session. The session immediately stalled after a proposal by the EU to amend the scope of the working group's mandate to include all business enterprises, not only transnational corporations. This proposal was predictably going to cause strong divisions between states and did not meet with a majority. The EU and European countries boycotted the remaining sessions. Actually, many NGOs support the validity of the EU's suggestion to expand the scope of the treaty. However, as the European Coalition for Corporate Justice (ECCJ) points out, raising this issue 'as a pre-condition rather than in the session specially dedicated to the issue of scope, made it look like a manoeuver to derail the process' (ECCJ 2015).

Between the first two OIWG sessions, NGOs campaigned and lobbied EU member states to participate constructively in the working group discussions. NGOs believe that the criticisms by EU countries of the OIWG mandate could be more effectively addressed from within the working group. In the run up to the second session of the OIWG, the Treaty Alliance lobbied their governments to participate in the working group. They released a petition to the President of the European Commission demanding that EU governments participate in good faith in the discussions in Geneva.[16]

In December 2015, the European Parliament recommended that the EU and its member states 'engage in the emerging debate' on a business and human rights treaty within the UN system (European Parliament 2015: 56). Arguably, some of the NGO advocacy work contributed to a change in the EU engagement during the second session of the OIWG in

countries did not look united: Venezuela supported Ecuador's proposal, but other countries in the region, including Brazil, Chile and Mexico abstained—Brazil, however, announced that it was willing to collaborate constructively with the OIWG and to conduct inter-ministerial consultations with actors from government and civil society to coordinate its position. During the first session of the OIWG other countries in the region, among them Bolivia, Cuba, El Salvador and Nicaragua, supported the treaty.

16 WeMove.EU petition (https://you.wemove.eu/campaigns/stop-corporate-abuse). A number of Treaty Alliance members (Bread for the World, Friends of the Earth Europe, CIDSE, and Centre for Research on Multinational Corporations—Stichting Onderzoek Multinationale Ondernemingen (SOMO)) also organized a legal seminar in May 2016 bringing together NGOs and representatives of EU institutions.

October 2016. Although the EU still adopted a conservative position and emphasized that a treaty must not undermine the implementation of the Guiding Principles, it unconditionally welcomed the working group's programme for the coming year.

States in the OIWG commended the EU's willingness to participate in the discussions. No states walked out of the OIWG's second session and differences were tabled and discussed.[17] It is possible, however, that the EU has participated in the process in order to weaken the draft. Once it is clear that a legal document will be drafted and adopted, opposing states become more interested in engaging in the process in order to prevent unfavourable terms. For example, some states that fiercely opposed the adoption of the OP–CESCR nevertheless participated extensively in the debates in order to weaken it (Türkelli, Vandenhole, and Vandenbogaerde 2013: 44).

NGOs now need to focus their energy to align, as much as possible, EU and other Western states with NGOs' goals. Previous business and human rights negotiations suffered from Western state opposition. For example, the effort to draft a comprehensive set of rules governing multinational corporations was unsuccessful (Coonrod 1977; Muchlinski 2000; Wang 1975; Weissbrodt and Kruger 2003). In the 1970s, the now defunct UN Commission on Transnational Corporations attempted to elaborate a Code of Conduct on Transnational Corporations (the Code of Conduct) (UN Commission on Transnational Corporations 1976: 10–17) and presented a draft in 1982 (UN Commission on Transnational Corporations 1982). During the negotiations, developing and socialist countries sought to impose international rules regulating corporations, including respect for local priorities and laws and reinvestment of profits in the host countries.[18] They maintained that the Code should take the form of a legally binding multilateral agreement, which Western states opposed (UN Commission on Transnational Corporations 1984: para. 91). As a result, these host country efforts collapsed and the work on the code was abandoned in 1992 (Stephens 2002: 69).

Views of home and host countries diverged during the negotiations of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms) (UN Sub-Commission 2003a). After several successive drafts, in 2003 the UN Sub-Commission eventually approved the Draft Norms and transmitted them to the UN Commission on Human Rights (UN Sub-Commission 2003b).[19] The Draft Norms were a controversial document, mainly because they provided for direct human rights obligations for corporations.[20] During the debate regarding the Norms at the Commission, certain countries, most notably the United States and Australia, adopted the approach advocated by the corporate lobby that there should be no human

17 Other Western countries, including the United States, Canada and Australia, were absent.

18 In this article the terms 'host state' or 'host country' refer to a country where a multinational company invests or operates; the term 'home state' refers to the country where a multinational company is headquartered.

19 In 1999, the UN Sub-Commission had asked Professor David Weissbrodt to prepare a draft code of conduct for multinational corporations (UN Sub-Commission 1999: para. 32).

20 The arguments for and against the Norms were discussed during the consultation process undertaken by the Commission in 2004. For the first time, representatives of business, NGOs and academia met under the auspices of the UN to table their views on the subject. The NGO campaign culminated in a 194-strong joint statement asking the Commission not to take any action that might prematurely undermine the Norms (Human Rights Council of Australia et al. 2004).

rights obligations for corporations at the international level (Kinley and Chambers 2006: 15). In 2004, a decision, requested by the British government and adopted by consensus, led to the Commission resolution stating that the Draft Norms had 'no legal standing' (UN Commission on Human Rights 2004).[21]

The Commission on Human Rights never approved the Draft Norms, but 'enough governments from various regions believed that the subject of business and human rights required further attention' (Ruggie 2014a: 6). In 2011 the UN Human Rights Council endorsed the Guiding Principles, the result of the mandate of John Ruggie, the former UN Special Representative on business and human rights. Yet Western states did not show strong engagement at the beginning of the Ruggie mandate. In 2006, Ruggie's team sent a survey to each of the UN's 192 member states, but only 29 responded, and of those only few responded to all the questions (UN Human Rights Council 2007: paras 4–10).[22] EU member states were generally supportive of the Guiding Principles, but only three countries and the EU provided explicit public comments during the consultation on the draft principles.[23] After the consensus vote, Western states' engagement with the Guiding Principles became more focused. The United Kingdom and a few other European countries are now among the handful of countries that have developed National Action Plans (NAPs) to implement the Guiding Principles.[24] The British government, which had expressed some reservations on the content of the Guiding Principles during the drafting and consultation (Government of the UK 2009, 2011), has been the first country to launch a NAP to implement them (Government of the UK 2013).

Despite Western states' historical opposition to binding obligations for corporations at the international level, their support would make the treaty process much more likely to succeed. The development of an international legal instrument requires a degree of consensus and commitment to implementation. To be effective, the treaty would require the support of both host and home states (Loots 2014). If the treaty comes into force after ratifications only by host countries, it will be of limited efficacy. Parallels have been made with the UN Migrant Workers Convention, which entered into force in 1990, and which has received 51 ratifications, all from migrant-sending countries.

21 The decision was requested by the United Kingdom on behalf of Australia, Belgium, the Czech Republic, Ethiopia, Ghana, Hungary, Ireland, Japan, Mexico, Norway, South Africa and Sweden.

22 The respondents were: Bahrain, Belgium, Bosnia Herzegovina, Canada, Chile, Colombia, Croatia, Cyprus, Ecuador, Finland, France, Germany, Guatemala, Honduras, Italy, Japan, Jordan, Lebanon, Mexico, Netherlands, Poland, Portugal, Romania, Rwanda, Spain, Sweden, Switzerland, Tunisia and the United Kingdom.

23 Norway, France, and the United Kingdom, See Submissions to consultation on draft Guiding Principles released on 22 November 2010, Business & Human Rights Resource Centre (https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/submissions-to-consultation-on-draft-guiding).

24 The only non-European country is Colombia, which launched a NAP in December 2015. In addition to the UK, other countries with a NAP are: the Netherlands, Italy, Denmark, Spain, Finland, Lithuania, Sweden and Norway. There are, however, a number of other countries that are in the process of developing a NAP or have committed to doing one. See UN Office of the High Commissioner for Human Rights (OHCHR), State national action plans (http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx).

Arguably, if only host states ratify the treaty and decide to better regulate companies operating on their territory, this would still have a positive impact on their territories. The treaty that those host countries are pushing for, however, is to regulate only transnational corporations. To do so properly, home states also need to be on board. A related point is whether the treaty will include extraterritorial obligations, in other words whether home countries will have to regulate the operations of their corporations abroad and hold them accountable. If this were to be the case, then the lack of home countries' ratifications will be problematic.

NGO advocacy must persuade Western states that the treaty would ensure a level playing field in terms of human rights enforcement across jurisdictions for all companies and all states (Deva 2014: 6). Daniel Aguirre, an Expert Panellist at the second session of the OIWG, argues that companies from Western states are increasingly held responsible by active civil societies while companies in host states do not come under the discerning glare of civil society (Aguirre 2016). Western companies are much more likely to be held legally responsible or forced to divest as a result. NGOs can argue that it is in the developed home state's interest to level the playing field by creating binding standards for all.

National application and enforcement of business and human rights norms vary, and companies face differing requirements that can advantage the most irresponsible companies. This approach is out of pace with the reality of increasingly complex global corporate structures and business relationships. Levelling the playing field is key to enhancing legal predictability and stability over the variations of human rights responses within different jurisdictions. This type of reasoning was also significant in the development of international labour rights in the nineteenth and early twentieth centuries (Follows 1951: 10).

5. Lobbying companies

One of the key, and controversial, aspects of the negotiations has to do with whether or not the treaty will impose direct obligations on companies. The message of the Ecuadorian delegation as well as other supporters of the treaty is clear: business enterprises, multinational corporations in particular, should bear direct human rights obligations under the proposed treaty. Academics such as Bilchitz, Deva, and Weissbrodt view the treaty as a way to expressly recognize these obligations (Bilchitz 2013: 111–14, 2016: 209; Deva 2014; Deva and Bilchitz 2013; Weissbrodt 2008, 2011: 13; Weissbrodt and Kruger 2005: 553). Deva argues that every entity that can violate human rights ought to have corresponding obligations—the focus should be on the bearers of rights and not on violators, 'because it matters little for victims whether their rights … are infringed by states or other non-state actors' (Deva 2014: 12). Bilchitz makes a similar argument. Fundamental rights, he says, are articulated from the perspective of 'recipience': of those who are entitled to those rights (Bilchitz 2013: 74). Companies, which at the OIWG are represented by business associations, do not share these views.

In the run-up to the vote on the treaty resolution, the lobby of international business representatives actively attempted to prevent a majority. After the vote, the International Organisation of Employers (IOE) 'deeply regret[ted]' that the adoption of resolution 26/9 had broken the unanimous consensus on business and human rights achieved with the endorsement of the Guiding Principles. They considered the vote a 'genuine setback' to the efforts of improving access to remedy on the ground, and warned that this decision meant a 'return to approaches that have failed before' (IOE 2014a).

After the IOE's lobbying efforts proved unable to prevent the establishment of the OIWG, the organization performed a 'tactical U-turn' and announced that it would follow the treaty process and constructively participate in OIWG discussions (Martens and Seitz 2016: 23). During the first two OIWG sessions, the IOE provided oral and written statements. The organization feared corporations'and Western states' opposition to the process could potentially lead the OIWG to quickly decide on a treaty (IOE 2014b). An IOE strategy paper advocates developing a vague instrument, written in the form of a declaration of general principles, without any direct obligations for corporations, or any form of extraterritorial obligations (ibid.). A great part of the discussion during the OIWG's second session was an exploration into means for applying international human rights obligations directly on corporations. The business side, represented mostly by the US Council for International Business and the IOE, confirmed their views that only states should have such obligations.

The development process of the Draft Norms prompted similar corporate reactions. Business vehemently opposed the Norms. In 2004, the prospect of an international regulatory framework under which companies might be held liable for abusing human rights 'sent shockwaves through business communities around the world' (Kinley and Chambers 2006: 2). The Norms faced vocal opposition from business groups such as the International Chamber of Commerce and the IOE. These business alliances lobbied governments, including those of the United States, the United Kingdom and Australia, with the message that the Commission on Human Rights should make a clear statement disapproving the Norms. The corporate lobby was effective. When the Norms came before the Commission at its 60th Session, they encountered a 'frosty reception from member states already primed with the concerns of the corporate sector' (ibid.).

To impose direct human rights obligations on companies the treaty would have to overcome a number of problems, including in relation to ratifications (would companies have to ratify the treaty?) and monitoring (who would be in charge of monitoring companies' compliance with the treaty?). More likely, a future treaty will impose obligations on states that ratify it to regulate companies headquartered in their territory in accordance with international human rights standards. Either way companies should be allowed to have a formal role in the treaty negotiations. Some commentators have called for corporations to be excluded from the negotiating process (Lappin, Pedersen, and Khan, undated). As McBrearty points out, however, the calls to exclude corporate stakeholders might backfire (McBrearty 2016: 14). One-sided negotiations might give supporters short-term 'wins' in the form of stronger treaty language. But an exclusive approach would ultimately limit support for the treaty (ibid.). Corporate voices in the negotiations are essential to the treaty's final credibility.

Despite their limitations, the Guiding Principles were developed with an open, multi-stakeholder approach. Most individual companies said little about the principles and some were critical, but major international business associations such as the IOE fully participated in the process and ultimately were supportive of the Guiding Principles (IOE et al. 2011). A number of individual companies then started developing policies in line with the Guiding Principles. Ruggie recalls that 'facing escalating advocacy campaigns and lawsuits, business felt a need for greater clarity regarding its human rights responsibilities' (Ruggie 2014a: 6). Some companies are now increasingly calling for regulation and incentives to create a 'level playing field' and competitive neutrality by establishing binding international standards that apply to all businesses (Martens and Seitz 2016: 47). According to Phil Bloomer, the director of Business and Human Rights Resource Centre, companies 'want

action to prevent them being undercut by unscrupulous companies that make money from abusive exploitation of people and the environment. These progressive business voices would strengthen the outcome of the negotiation, and its international impact' (on file with authors). Yet it is not clear what role corporations may have in the negotiations. Bloomer continues:

> Many, but by no means all, business associations disqualify themselves: too many appear to represent the lowest common denominator of their members in terms of human rights and social standards. The Working Group should be careful to select companies and associations who have a track record of representing the better side of business and human rights.

Because of the peculiarities of this international human rights treaty, which does not seek to protect a particularly vulnerable group, but seek to impose (direct or indirect) obligations on companies, NGOs may have to develop distinctive lobbying strategies. In addition to states, NGOs may have to lobby companies and business organizations that may be willing to support the treaty. According to Bloomer, NGO strategy that does not include influencing business is a 'two-legged stool'. 'So, "who and where in business?" is the real question. Civil society should focus on encouraging loud voices from powerful companies that demonstrate leadership on human rights' (on file with authors).

NGOs must explain to companies that a treaty will reinforce public trust and confidence in them. As companies see binding human rights obligations coming up in the near future, they will be more likely to continue efforts to comply with their existing responsibilities. NGOs should ensure companies do so. There is no reason to believe that companies would stop adopting human rights policies due to an ongoing discussion about a treaty at the international level. During 2015 and 2016, for example, some responsible companies have participated in reporting frameworks that implement the Guiding Principles,[25] over 700 companies have provided statements under the UK Modern Slavery Act, and many others have developed policies and practices in line with human rights standards.[26] While NGOs are still likely to focus most of their resources on lobbying states, which would ratify the treaty if it were adopted, advocacy with responsible companies and business associations will ultimately be key for the successful implementation of the instrument.

6. Supporting the implementation of the Guiding Principles

Ruggie emphasizes that the Guiding Principles should be seen as the 'first step' in broader efforts to ensure corporate respect for human rights (Ruggie 2014b) and that they represented 'the end of the beginning' of an integrated and polycentric system for regulation of the human rights impacts of enterprises (Ruggie 2014c). Ruggie has recognized that as the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future developments, but he cautions as to how quickly or extensively this should happen. International legal instruments, Ruggie wrote in 2007,

25 See Shift, Human rights reporting and assurance frameworks initiatives (RAFI) (http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi).

26 See Business & Human Rights Resource Centre, Registry of company statements under UK Modern Slavery Act (https://business-humanrights.org/en/new-enhanced-registry-of-company-statements-under-the-uk-modern-slavery-act) and Company Action Platform (https://business-humanrights.org/en/company-action-platform).

must and will play a role in the continued evolution of the business and human rights agenda, but 'as carefully crafted precision tools' (Ruggie 2007: 125). He warned that a 'treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent' (Ruggie 2008: 42).

Admittedly, given the pace of negotiations at the UN level, and the challenges that the development of such a treaty entails, a treaty on business and human rights is likely going to take a decade or longer to negotiate, draft and ratify. The development of all international law takes time. Objections to the pace apply to every major treaty negotiation. Negotiating and ratifying the two covenants was also a 'painfully slow' process. The Rome Statute took more than ten years of drafts, negotiations and deliberations before it entered into force.[27] The process of codification of children's rights in the form of an internationally binding treaty lasted from 1947 to 1989. The actual negotiation and drafting of the CRC took ten years. Before adoption there are often long and arduous campaigning processes. For example, NGOs faced difficulties getting a complaints procedure for the Covenant on Economic, Social and Cultural Rights on the agenda. Actual negotiations and drafting started only after many years of lobbying. The realpolitik, which constitutes the background to any development of international law, is the 'slow and tortuous process of treaty-creation' (Kinley and Chambers 2006: 50).

In a traditional approach to international legalization[28] a treaty is a natural, and necessary, development of the business and human rights field. The international community identifies a gap in regulation and attempts to fill it. This is in line with other developments within the UN system of human rights protection (Shelton 2006). For example, the International Covenants on Civil and Political Rights (ICCPR), and on Economic, Social and Cultural Rights (ICESCR), adopted in 1966, are binding treaties that reinforce the protection afforded by the non-binding Universal Declaration of Human Rights, adopted 18 years earlier. Parallels can be made also with the negotiations of the Convention on the Rights of Persons with Disabilities (CRPD).[29]

Disability had been an invisible element of international human rights law (Kayess and French 2008: 12). During the drafting of the Convention, which involved the highest level of participation by representatives of civil society organizations of any human rights convention (ibid: 4, fn 14), NGOs persuaded delegates that disability rights were a 'missing piece' of the human rights framework. NGOs have now been able to persuade enough states that the human rights obligations of business are another missing piece of this framework.

27 The process started in 1989 when Trinidad and Tobago resurrected a pre-existing proposal for the establishment of an International Criminal Court (ICC) and the UN General Assembly asked the International Law Commission (ILC) to resume its work on drafting a statute. It was adopted at the Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which took place from 15 June to 17 July 1998 in Rome, Italy at the end of five weeks of intense negotiations. The treaty entered into force on 1 July 2002. See the *travaux préparatoires* of the Rome Statute (UN Diplomatic Conference 1998b).

28 'International legalization' is the process of creating international law by international institutions such as the United Nations or the Council of Europe.

29 The CRPD and the CRPD Optional Protocol were adopted during the 61st Session of the General Assembly (see UN General Assembly 2006).

Up to the development of the CRPD, the UN system had attempted to deal with this invisibility problem in two ways. First, by interpreting and applying existing core human rights instruments to persons with disability, and second, by developing a series of policy documents on the needs and rights of persons with disability (Kayess and French 2008: 13). These initiatives were important developments towards the broader recognition of the rights of persons with disability, but 'they achieved very little by way of improving recognition and respect of the human rights of persons with disability' (ibid: 14). During the 1980s, there were three unsuccessful attempts to persuade the international community to develop a human rights convention in respect of persons with disability. As a compensatory alternative, in 1993 the General Assembly eventually adopted the non-binding UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UN General Assembly 1993). Such developments followed a path similar to the one which the codification of businesses' human rights obligations is taking through the two failed attempts of the Code of Conduct and the Draft Norms, and the endorsement of the Guiding Principles.

Ruggie, whose 'first official act was to commit "Normicide"' (Ruggie 2013: 54), fears that the treaty negotiations will be a replay of the Code of Conduct negotiations, 'which drifted on for years until they were finally abandoned' (Ruggie 2015b). Much has changed, however, since the 1970s. Since then, an international consensus has emerged recognizing the corporate responsibility to respect human rights and substantive standards have evolved at the international level. A number of commentators have argued that international human rights law is slowly transforming itself, from imposing obligations only on states to gradually considering that non-state actors, particularly business enterprises, have certain duties (Clapham 2006; Bernaz 2016b; Ratner 2001: 494; International Council on Human Rights Policy 2002). To a limited extent, some UN treaty bodies have started to address the responsibilities of business enterprises (e.g. UN Committee on Economic, Social and Cultural Rights 2000). In 2011, the Committee on Economic, Social and Cultural Rights issued a statement on the obligations of states parties regarding the corporate sector, stressing that corporations can contribute to the realization of economic, social and cultural rights, but also adversely affect the enjoyment of such rights (UN Committee on Economic, Social and Cultural Rights 2011: para. 1). In some of its concluding observations on periodic reports, the Committee recommended member states to ensure the legal liability of corporations domiciled in the state party's territory and operating abroad for violations of economic, social and cultural rights (e.g. UN Committee on Economic, Social and Cultural Rights 2016: para. 12). In 2013, the Committee on the Rights of the Child adopted General Comment 16 on state obligations in relation to business impacts on the rights of the child (UN Committee on the Rights of the Child 2013; Bernaz 2016a). Some UN Special Rapporteurs have interpreted their mandate as allowing them to make recommendations to private actors, such as the Special Rapporteurs on the right to health (UN General Assembly 2008) and the right to food (UN Human Rights Council 2009b). Despite challenges and legal obstacles, courts around the world have heard cases of human rights violations brought against corporations (Goldhaber 2013; McCorquodale 2013). These developments are signs of a changing legal landscape.

That said, because of the expected length of the drafting process, it is critical to keep an eye also on short-term developments and initiatives (Bilchitz 2013). In this context, the Guiding Principles may play a crucial role. As early as 2008, Ruggie warned that 'a treaty-making process now risks undermining effective shorter-term measures to raise business

standards on human rights' (Ruggie 2008: 42). Ruggie, some Western states and business associations argue that complementarity of efforts is in practice impossible and that the start of a new standard-setting process would hinder efforts to implement the Guiding Principles and other government actions, competing for scarce resources (Ruggie 2015a: 10). The debate around the treaty negotiations has become unnecessarily polarized. States and other stakeholders have focused on the conflict between the treaty negotiations and the implementation of the Guiding Principles. The processes are not mutually exclusive alternatives; they are complementary (ICJ 2014: 9).

Since the beginning of the drafting process and during their transformation from study, to normative framework, to principles, the Guiding Principles have created contention (Anderson 2010; Amerson 2012; Bilchitz 2013; Deva and Bilchitz 2013; Kamatali 2012; Letnar Černič 2010; van den Herik and Letnar Černič 2010; Redmond 2003; Weissbrodt 2014; Williamson 2011). NGOs do have concerns about the Guiding Principles. A large group of leading international human rights organizations, including Amnesty International, Human Rights Watch, the International Commission of Jurists, ESCR-Net, and FIDH, have criticized the content and implementation of the Guiding Principles (Joint Civil Society Statement 2011; Shetty 2015; Mehra 2015). Despite concerns in relation to the impact of the Guiding Principles, however, many of the same NGOs argue that further implementation of the Guiding Principles is compatible with developing a treaty. Amnesty International, for example, says that the treaty process 'does not mean disregarding or dismantling the Guiding Principles. It means building on them and making key provisions of these mandatory' (Shetty 2015). As Amol Mehra puts it, 'significant gains can be made by pursuing both' (Mehra 2015). The Guiding Principles are a useful tool and states should continue efforts to implement them at the national level during the long treaty negotiations process.

The belief that negotiating an international treaty is drawing resources and attention away from the implementation of the Guiding Principles and the broader goal of holding companies accountable for human rights abuses is not necessarily well founded. As they negotiate the treaty, governments can, for example, enact law, develop policies at the national level and develop a National Action Plan (NAP) to implement the Guiding Principles. To draw a parallel with past treaty negotiation processes, there is no evidence that while states were negotiating, for example, the CRC those negotiations slowed down the implementation of policies and laws on children's rights at the national level. Experience also shows that in international negotiations, relatively few experts are involved in the actual negotiating process. Such processes do not tie up capacities to a significant degree.

Indeed, efforts at implementation have continued at a greater pace after the adoption of Resolution 26/9. Since the vote, a number of governments have announced their plans to develop NAPs.[30] Every country that spoke during the OIWG debate, including Ecuador, stressed the importance of implementing the Guiding Principles (UN Human Rights Council 2016). Phil Bloomer observed that 'the treaty vote had acted as a political spur . . . rather than creating a "legal chill"' (Bloomer 2015). After the first OIWG session, Mark Taylor reviewed his previous fears of the dangers of the treaty process and wrote: 'I am

30 Including Australia, Chile, Germany, Indonesia, Kenya, Malaysia Myanmar, and the United States. For a full list see Business & Human Rights Resource Centre, National Action Plans (http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans).

happy to report that I was wrong (at least about the diversionary effect of a treaty process)' (Taylor 2015). He noted:

> [N]ot only is there nothing stopping all of these initiatives moving forward, but many in business, government and civil society have understood that by acting now they are laying the foundations for multilateral action at the global level. Far from being a diversion, the call for a treaty has been a catalyst. (ibid.)

With the beginning of the drafting process, NGOs' work should diversify. The core members of the Treaty Alliance should continue norms-setting advocacy and lobbying activities within the OIWG and between sessions. Others could continue effort at the national level to implement policies and regulations to address corporate human rights abuses, including through the development of a NAP. In 2014, for example the International Corporate Accountability Roundtable (ICAR) launched a toolkit for the development, implementation, and review of NAPs (ICAR and Danish Institute for Human Rights 2014) and is undertaking other initiatives at the national level to support governments' developments of NAPs.[31] NGOs must pressure states to revive efforts in implementing the Guiding Principles at the national level. While supporters of the treaty that have not developed a NAP should be encouraged to do so, NGOs should also continue advocacy with Western governments that have NAPs in place to update their content.

7. The need to compromise

An argument against a treaty born out of a lack of consensus between governments is that it risks reflecting the lowest common denominator, resulting in low, watered-down standards in order to ensure ratification. Ruggie predicted that with a treaty with low standards, pressure on companies would become less effective, and companies would be able to respond that they are complying with newly adopted international law—a law with lower standards than current non-binding guidance (Ruggie 2014a).

However, a coalition of like-minded states and NGOs can lead the negotiations process towards high standards, as has been the case for other treaties. For example, during the negotiations of the Optional Protocol to the CRC on the involvement of children in armed conflict, Amnesty International encouraged the majority of states who favoured a strong text to make every effort to persuade the states obstructing adoption of a broad consensus text to reconsider their position (UN Commission on Human Rights 1998: para. 45).

Despite opposition by key actors, and a lack of consensus on core elements of the treaty, agreements may develop over time. Lack of consensus in the early stages of a new instrument is common in international law (Bilchitz 2014). Some major treaties prompted significant disagreement among countries and were eventually drafted without the support of, and at times with clear opposition from, key states. The Rome Statute, for example, was adopted with seven countries, including China and the United States, voting against it. The way in which developments in international law occur suggests that the same pattern may well be followed in the field of business and human rights.

Previous negotiations demonstrate that NGOs have the potential to impact norm-setting processes when the alignment of state and NGO frameworks is strong, as for

31 For example, ICAR and a national NGO, Altsean-Burma, are working toward the development of a Myanmar NAP.

example with the negotiations of the CRC. When, instead, there are strong objections by states to norms proposed by NGOs and these objections threaten to disrupt the success of the law-making exercise, NGOs may have to compromise, 'be it for strategic or other reasons, in particular when sensitive political issues are at stake' (Türkelli, Vandenhole, and Vandenbogaerde 2013: 22).

During the drafting process of the OP-CESCR, coordination between friendly states and NGOs continued. The price, however, that NGOs paid for the alignment of positions with states was a level of compromise (ibid.). For instance, the NGO coalition chose not to press states on the issue of extraterritorial obligations, but confined itself to asserting that a mechanism should be provided to address the issue of international cooperation. NGOs chose to keep silent on this issue during negotiations in order not to jeopardize the adoption of the OP-CESCR. The Treaty Alliance may have to reach similar levels of compromise, for example on the issue of extraterritorial obligations of states in relation to business and human rights, in order to achieve enough support from states. NGOs did achieve their goal of having complaints mechanisms adopted, even if the mechanisms adopted did not incorporate many of their important policy goals. At times a pragmatic approach to human rights is needed (Dudai 2014: 391).

During the Rome Statute negotiations most of those participating in the PrepCom agreed generally on the need to internationally address war crimes, genocide, and crimes against humanity, although there was plenty of disagreement on the reach of international criminal law and its definitions and elements. (Benedetti and Washburn 1999: 25) There was, for example, a proposal to add legal persons to the jurisdiction of the ICC during the negotiations (UN Diplomatic Conference 1998a). This proposal was put forward by France, which believed that this inclusion would make it easier for victims of crimes to sue for restitution and compensation. Because of a number of concerns, no consensus was reached and finally the Working Group dropped the draft provision.[32]

Stakeholders of the business and human rights treaty negotiations agree on the need to address corporate human rights abuses. They disagree on the best way to do so. Controversy is around three key points: whether the treaty should target multinational corporations only or all business enterprises; whether it should contain extraterritorial obligations for states; and whether it should set out direct obligations for businesses (Martens and Seitz 2016: 4). These points are out on the table for negotiations. The Treaty Alliance and other NGOs will likely have to compromise in the end on some of their goals if they do not want to hinder the very adoption of the treaty. Naturally, a number of state delegations will also have to do the same. They may have to compromise on issues of enforcement, for example extraterritorial application of law and binding obligations on companies, instead opting for a traditional approach of reporting, individual complaints and general comments. They could then pursue the stricter obligations as optional protocols in the future (Pietropaoli 2016).

32 Concerns included that the Court would be confronted with overwhelming evidentiary problems when prosecuting corporations, that there was not yet a recognized standard of criminal liability of corporations and thus this international disparity would make the principle of complementarity unworkable. See the *travaux préparatoires* of the Rome Statute (UN Diplomatic Conference 1998b).

Conclusion

This article has considered the impact NGOs may have in the drafting negotiations of the business and human rights treaty. Through the reviewing of previous treaty negotiations in the area of human rights and international criminal law, several advocacy strategies that were successful before were identified. Those strategies were then discussed in relation to the negotiation of a business and human rights treaty, and different plans for action by NGOs were suggested, bearing in mind that every negotiation is different and that there is no one-size-fits-all strategy when it comes to international human rights law making.

The article has highlighted the benefits of a strong NGO coalition, the use of formal and informal lobbying and the development of common NGOs and friendly states approaches. It has proposed ways to successfully lobby those states that currently oppose the treaty as well as corporations. Finally, it has emphasized the need for NGOs to continue support for the Guiding Principles while advocating for the adoption of a business and human rights treaty, and the necessity for NGOs to compromise on some of their key demands if a treaty is ever to emerge out of the current negotiations.

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