

## For a Treaty on Business & Human Rights

Prof. Chip Pitts

Does the world need a treaty on business and human rights? Yes -- but it must be the right treaty, after the right process, at the right time.

The world's diverse and inconsistent laws and enforcement, combined with the utter lack of corporate accountability in *most* cases of business human rights abuse (according to the [Business & Human Rights Resource Center](#) among others), sufficiently justify a treaty. Indeed, a treaty is arguably *required* by the state duty to protect read with the requirement of effective remedy, given the prevailing corporate impunity.

Businesses currently have legally enforceable rights globally, including intellectual property rights (under the [TRIPS](#) agreement) and rights as investors to sue states directly in arbitral tribunals established by bilateral investment treaties ([BITS](#)). Human victims abused by rights and environmental violations by such businesses have no standing and cannot sue. That's an obviously unfair imbalance requiring correction.

A treaty is also in the interests of businesses and states dealing with the mistrust, recurring instability, unpredictable outcomes, and unfair competition under the status quo, where a few bad businesses violate human rights to the detriment of the reputations and stakeholders of businesses everywhere. More uniform standards under the global Rule of Law -- shoring up the playing field at a higher level -- would enhance compliance, reduce firm and systemic risk, and be good for everyone . . . including the integrity and coherence of the global human rights and business systems themselves.

The legal elements for such a treaty are largely in place. Numerous soft-law standards have converged in recent decades around the business duty to respect human rights reaffirmed by the [UN Guiding Principles](#) ("GPs") developed under the Ruggie mandate. Business liability for serious harms is a universal state practice amounting to what [international law scholars](#) have identified as a [general principle of law](#) and what I've called a "[new customary global law](#)." Sometimes it's civil liability (tort or delict), sometimes criminal, but corporate liability including for significant human rights violations exists at least in theory across the world.

To mistakenly consider the business duty or the GPs simply "voluntary" downplays the obligatory nature of both the ethical and legal aspects and their significant positive influence and potential. The [OECD](#), the [International Standards Organization](#), the World Bank's [International Finance Corporation](#) and others have joined many states and businesses in beginning implementation.

For [various reasons](#), however, actual legal remedies remain elusive. Some of those reasons (e.g. awareness and understanding among judges and state agencies; legal clarity, barriers, and differences; cooperation and technical assistance; legal forum; extraterritorial jurisdiction) could be usefully addressed in a treaty; others (e.g. corruption; legal aid) are probably best left to complementary efforts. As valuable as they are, it's unlikely that the GPs or soft law standards alone will make sufficient progress at scale any time soon. Prof. Ruggie noted in his recent [book](#), most multinationals probably haven't even heard of the GPs.

It's entirely normal for soft law standards like the GPs to move toward harder law treaties. And as a former Chief Legal Officer charged with ensuring corporate compliance with standards, I can assure you that executives are more inclined to comply with hard law (like a treaty) -- whereas they often will ignore or seek ways around soft law. Treaties have a more compelling expressive function.

Some view continued global legal evolution and the GPs as an either/or proposition. But that is a "false dichotomy," as Prof. Ruggie has repeatedly noted. Ruggie [urges](#) an intergovernmental process to deal with "gross abuses, potentially amounting to international crimes" in conflict areas "where the human rights regime cannot be expected to function as intended."

For business abuses, however, the system isn't functioning as it should *anywhere*. True, states can and *should* improve laws and enforcement now; but in the real world there are many reasons they don't, ranging from fear of losing foreign investment, to corruption, to lack of resources, to inertia. It's a classic [collective action](#) problem – one where the clearer, harder law norms and enforcement of a treaty would help.

Without a treaty, strange and erroneous decisions are possible, as with the [Kiobel Second Circuit opinion](#) attempting to immunize corporations (the US Supreme Court [dismissed](#) the case on other grounds) or last year's French [AFPS](#) decision purporting to immunize corporations even for potential war crimes. Treaties, by contrast, can help establish accountability -- as where local incorporation of the [ICC treaty](#) creates corporate liability (even though the treaty doesn't require it) or where EU then Netherlands incorporation of the [Basel Convention](#) helped prosecutors [successfully settle](#) their Trafigura case.

As Prof. Ruggie [cautions](#), a treaty would cover many complex areas of law and require addressing many questions. Any treaty body would have to deal with [many potential corporate perpetrators](#). And ratification prospects in many states would be remote. But many treaties have faced similar complexities and numerous perpetrators. Even without a treaty, the existing treaty bodies have [already begun](#) to [address](#) this area, and many treaties (including e.g. the Geneva Conventions) start with relatively few states before ratifications expand.

Calls for a treaty have already been heard from a significant number of [states](#) and hundreds of [NGOs](#). It would be wrong and fruitless to try to shut down discussion. But rushing to just any "treaty" would be similarly irresponsible. Careful and judicious exploration of the issues and options with expert assistance is warranted. And it's *vital* to preserve both the consensus surrounding the business obligation to respect and vigorous implementation of the GPs at every level, from national action plans to widespread business uptake.

It will thus be necessary, even more than usual, to focus the treaty discussions with an express frame of reference. Any treaty and accompanying process must (i) complement and build on and certainly not retreat from the GPs, (ii) be evidence-based, not an ideological anti-corporate political effort, (iii) employ a careful and deliberate, transparent and inclusive process which includes civil society (NGOs plus businesses too) as well as states, to continue to build consensus for the right treaty at the right time.