



**International legally binding instrument  
on TNCs with respect to human rights:  
An opportunity for greater corporate  
accountability in India?”**

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**Cividep India**  
Workers' Rights &  
Corporate Accountability

Cividep India is an NGO based in Bangalore, India, which works to ensure that businesses comply with human rights, labour rights and environmental standards. With this objective, Cividep studies the effects of corporate activities on communities and the environment and educates workers about their rights.

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## **1. INTRODUCTION**

**Gopinath Parakuni, General Secretary, Cividep India**

The UNGPs (GPs) are five years old and yet, the National Action Plans (NAP) has not progressed much. India has not even initiated the process to put in place a NAP to implement the GPs. Access to justice is difficult even though there are domestic laws in place. There is a collective effort required to build a Business and Human Rights (BHR) framework at the national level to implement the GPs. Second, apprehensions that a binding treaty will derail the consensus built around the GPs and divert attention away from the GPs are unwarranted. The GPs and binding treaty negotiations need not cancel each other. Instead, they can be parallel processes and complement each other.

## **2. KEYNOTE ADDRESS**

**Dr. Surya Deva, Associate Professor, City University of Hong Kong and Member, UN Working Group on Business and Human Rights**



The idea of this consultation meeting was to build capacity in the global South on business and human rights. Advocates for International Development (a4id) is another organisation training lawyers on BHR.

The UN engagement on BHR goes back to 1970s. It was the same time that the International Labour Organization (ILO) started working on labour and human rights. The 1990 Code of Conduct on Transnational Corporations (TNCs) was the first initiative. In 2005, Professor John Ruggie was appointed as the Special Representative to the Secretary General on the issue of human rights, transnational corporations and other business enterprises. Ruggie's guidelines were adopted as the UN Guiding Principles on Business and Human Rights in 2011. Accordingly, the first duty of the state is to protect human rights. States are encouraged to set-up a NAP on BHR as part of its responsibility to implement the GPs. Only ten states have so far set-up the NAPs and progress has been very slow even in the states that have drawn up the NAPs.

The binding treaty is a logical extension of the GPs. Both states and corporations have an obligation to protect human rights. Moreover there has to be access to remedy if obligations are not met. These guidelines combine to become a binding instrument and solidify the obligations of the non-state actors.

### **Arguments for a Binding Treaty**

- While the GPs try to fill governing gaps, they fail in filling gaps in hard cases – ones where states lack capacity or political will to govern or regulate corporations. The binding treaty will encourage corporations to include human rights as part of their business operations.
- There is a significant asymmetry between human rights laws and trade agreements. There are no binding laws in human rights as there are in trade agreements. The binding treaty can fill this asymmetry to some extent.
- The binding treaty will make GPs more effective. GPs will work better under the shadow of the binding treaty. There's value in both voluntary and binding approaches to uphold human rights commitments.
- The binding treaty could become a source of norm creation. If the document for a binding treaty is adopted at the UN level, it can be used to trigger creation of norms or change behaviour of states even if states do not ratify the binding treaty.
- Finally, the binding treaty can empower victims. Since access to justice is the biggest hurdle, the binding treaty should prioritize the needs of the victims. The

binding treaty should empower the victims to hold the state or the corporations accountable for human rights violations.

### **Core Principles of the Binding Treaty**

- The binding treaty should conceive human rights as non-negotiable preconditions of doing business.
- The treaty should be victim-centric and should focus on what can be done to change the ways companies operate on ground level.
- The treaty should include all human rights (labour rights, environmental rights, and rights of indigenous people).
- The treaty should focus on all companies – TNCs and domestic companies.
- International law should not be overtly state-centric. International laws are capable, so they should regulate and hold non-state actors accountable.

The HRC Resolution 26/9 includes a footnote that removes local companies from the ambit of accountability. Only TNCs and companies “that have a transnational character in their operational activities” are included. In light of this footnote, it is important for us to discuss in this consultation meeting whether the treaty should include domestic companies or focus only on TNCs. Other issues that could be discussed include:

- Should the treaty cover all human rights (including labour rights, environmental rights and the rights of indigenous peoples) or should it cover only certain core human rights?
- Should the treaty control the activities of companies directly or indirectly through states?
- What should be the relationship of the proposed treaty with the GPs?
- What role should this treaty play in entrenching human rights in bilateral investment treaties (BITs)?
- What enforcement mechanisms can be envisaged under the treaty?

### 3. SESSION ONE: UNGPS, BUSINESS AND HUMAN RIGHTS



#### **Babu Mathew, Professor, National Law School of India University**

Access to relief and remedy should be at the core of any discussion on business and human rights. While the idea of flexible labour and anti-labour policies has multiplied, there has also been a fracture in globalization. The ideological roots of flexible labour has to be critiqued through the fracture that globalization has suffered. There is need for a parallel discourse on how to develop laws from the bottom-up as against the traditional top-down approach. International laws cannot be created only at national/global levels; there should a bottom-up approach to create international laws as well. In India, it is imperative to reform labour laws. The draft industrial relations code bill kills the trade union movement and collective bargaining. We have to come up with a counter model to govern the informal sector, one that attacks the modern day slavery. There is a fear of globalization at the global level as indicated by the exit of Britain from the EU and the Trump campaign in the United States. This crisis of globalization has been building up since the financial meltdown in 2008. While Obama has called in for improving labour conditions and while there is also an international debate on labour protection, what is the relief that an ordinary worker gets on the ground? It is

therefore important that there are parallel mechanisms that support labour reforms. International laws should be created from below and should not just be a top-down approach.

**Dev Nathan, Visiting Professor, Institute of Human Development**

A large part of international trade is carried out through global value chains. This is estimated to be around 60 percent. At the same time there is also a global governance gap. For example, minerals used in electronic goods come from the Democratic Republic of Congo. The Rana plaza disaster in Bangladesh also raises the issue of holding international companies accountable. Some companies like Zara have entered into an agreement with IndustriALL Global Union to protect the interests of the workers. Yet, there are no dispute settlement mechanisms across board. We need a new global architecture – a tripartite system of human rights mechanisms at the international, national and local levels. This global architecture should aim to bring the brands, suppliers, and the state together on human rights and labour conditions.

**Ranja Sengupta, Senior Researcher, Third World Network**

There should be more awareness and discussion on business and human rights. It is necessary to regulate and control the behaviour of TNCs since a lot of them exploit trade agreements. The state on its part will bypass the need for establishing a binding treaty. For example the EU blocked negotiations on binding treaty despite emphasizing on protection of human rights. The EU maintained that UNGPs are sufficient to implement a BHR framework. However, the GPs by itself are not enough to have a strong BHR framework. A binding treaty is essential especially for hard cases such as the Rana plaza incident. Since governments are not regulating corporations effectively, it is necessary to establish both the GPs and binding treaty. This is especially needed to protect land, water and rights of indigenous people. The scope of the binding treaty should eventually include all companies including TNCs, their subsidiaries and all supply chains. It is worthwhile to remember that the need for a binding treaty came into force because of the lack of regulation of corporations by the state. There is a strong case therefore to regulate their behaviour. The financial power of the TNCs grants them impunity and the freedom to move from country to country. They are also notorious for blackmailing states if they are regulated stringently. So for the time being the focus of the binding treaty should be on TNCs and eventually expanded to include all companies.

**3.1. Discussion - Questions**

1. The UN as an institution has not been very effective. Will a binding treaty be any more effective than the other treaties established under the UN system? How will this make a difference?



2. How can the binding treaty completely bypass the state?
3. Ruggie principles have achieved gospel status. Why hasn't there been more discussion on its weaknesses?
4. There's lack of clarity on the application of international law and enforcement has been weak. How do we address this?
5. There have been some successful cases through judicial action. Should the focus be on having access to remedy instead of setting up binding or non-binding instruments?
6. What has been India's position on the treaty?

### **3.2. Discussion - Responses**

1. It is true that binding instruments in international law are ineffective. The question that follows this line of argument is - should they be abolished or do we need to fix the gaps? Binding instruments don't work because we don't want it to work. Respecting and protecting human rights should be taken seriously and it should be non-negotiable. For that both binding and non-binding instruments are required. Binding treaty will enhance the leverage of CSOs to engage with corporations.
2. The binding treaty will not bypass the state; however, it will go beyond the state. The binding instrument is additional to state mechanisms, not in lieu of the state.
3. The UNGPs have certain weakness. But there weren't many who pointed it out or confronted Ruggie on it. There should be more critical engagement on the GPs.
4. If states/companies have obligations to protect human rights then anything that is binding should not be contested.
5. Regulatory frameworks in LDCs are very weak. Therefore a supportive instrument along with the GPs and binding instrument is required.
6. The main treaty can focus on TNCs and other companies that have characteristics of TNCs. An additional protocol can then include all other companies, including domestic ones.
7. India voted in favour of HRC resolution 26/9. However, it was not an informed position.

## 4. SESSION TWO: TREATY AND LEGAL MECHANISMS

Shalini Bhutani, Legal Researcher and Policy Analyst



Discussion on the need for a binding treaty stems from the idea that it is legally binding. However, we have to look at where law stands today in addressing human rights and justice before exploring the idea of a legally binding treaty. Is law becoming an instrument which the TNCs exploit to further themselves? Law has been corrupted by economic clout and power. Are we then bringing the binding treaty within the present status of law? How much do we invest in another legal instrument? Therefore, merely focusing on legal instruments without social and political reforms is problematic. TNCs have been allowed to become as powerful as they are today through the existing legal system. Consequently, regulating the TNCs through the same system through which they have become powerful is problematic. Even the idea and conception of human rights is Euro-Western centric. There are alternative ideas of living and what constitutes dignity of human beings. The Euro-Western concept of human rights has to be critiqued since human rights as an idea has been individualized. The collectiveness of human rights is lost when we address human rights through the individual notion. The value of collective gains is lost and therefore the collective notion of human rights should be reinstated and celebrated. Further, we should not focus on establishing the binding treaty within the UN system only but also through other multilateral forums. Respecting

and protecting human rights as an obligation of the TNCs has to be integrated into existing business laws. Are we then looking at the right places for establishing a legally binding instrument? Are we looking at alternative histories to learn about what is it to live a meaningful life? If we have to do an honest job on this process, it is important to look into the structures and mechanisms that TNCs are preemptively setting up for self-regulation.

**Rashmi Venkatesan, Assistant Professor of Law, National Law School of India University**

The binding treaty is not in lieu of all other mechanisms. So it is important to strengthen domestic laws. Binding instrument therefore is not an end but it is the beginning of a process. What can we expect realistically from a binding instrument? First, the treaty will bring in a different set of actors within the human rights framework which is the TNCs. Second, even though extra territorial obligations are not new to human rights law, there is no clarity on where and how these laws could apply with regards to the binding treaty. Third, human rights treaties are notorious for lack of enforcement/sanctioning mechanisms. These issues have to be explored in detail. However, the one place where human rights treaties have worked well is in standard building exercise. CEDAW has been a good example in setting standards and is a point of reference for judicial pronouncements. The important question therefore is to explore if we can and if we should work within the broader UN system or to what extent can we push it beyond the UN system, and how? Similarly, the UNGPs reiterate existing principles and maintain the status quo to a large extent. The GPs stand on accepted international human rights laws. If the binding treaty is building on the UNGPs, then to what extent is the process going to be bound by the GPs? Can we move away from the GPs?

#### **4.1. Discussion**

1. Human rights treaties are notorious for not having sanctions. Therefore, it may not be the right way to enforce human rights in business.
2. While it is true that the present legal system has allowed TNCs to become as powerful as they are, we have to continue to use what we have (legal system) and expand that space. Law cannot be banished because it is biased or weak. It has to be strengthened and made more effective.
3. The binding treaty should not replicate the UNGPs. It has to instead fill in the gaps of UNGPs. It should expand and clarify where states have rights to enforce.
4. Extraterritorial obligations of the state should be discussed more thoroughly. In trade agreements, while everything else is binding, protection of human rights is non-binding.

Hence further discussion is necessary on whether the treaty should clarify and impose extraterritorial obligations on states.

5. The binding treaty should ask for fundamental changes in enforcement mechanisms. It is important to find more creative ways to achieve enforcement.

## 5. SESSION THREE: INDIA AND BHR



### **Amita Joseph, Director, Business and Communication Foundation, India**

The present environment is unfavorable for the functioning of civil society organizations, non-profits and human rights organizations. The experiences of Green Peace, Amnesty India, and charges against civil rights activist Teesta Setalvad are few examples of the prevailing adverse environment for CSOs. A pro-business lobby is all pervasive. Corporate Responsibility Watch (CRW) – an initiative by fourteen non-profit organizations - did an analysis on the top 100 companies as mandated by SEBI as part of Business Responsibility Reporting (BRR). The analysis showed a rise in contract labour, high indebtedness, and large number of fines that has been levied. This raises the question of how profits are made, and not just how the mandatory 2 percent of profits are spent on Corporate Social Responsibility (CSR) work of companies. If these profits are accrued at the expense of labour and environmental rights, the 2 percent spending on CSR is miniscule. Therefore, it is important to call out the bluff of CSR. There is a need for alliances amongst workers, environmental/human rights activists, lawyers, students and the larger civil society. Most of the existing guidelines like Global Impact and Global Reporting Initiative (GRI) are voluntary reporting mechanisms and keep

regulation at bay. Such co-opting mechanisms should be disenfranchised. A binding treaty is therefore necessary for both TNCs and local companies.

**Narasimha Reddy Donthi, Member, Board/Advisory Council, Textile Exchange**

Any international law should ease the burden of the victim. We have to relook such treaties if it does not ease the burden on the individual/CSOs in their access to justice. For example, the collective effort taken to present the case of Bhopal gas tragedy has been enormous. The process of access to justice has to be eased. Similarly, the Plachimada struggle against Coca-Cola was a collective struggle. Individual efforts against companies are not possible in India. A BHR framework should therefore broaden the focus on individual human rights and also focus on violation of collective rights. Second, BHR in India should also obligate businesses at the point of violation. For example, Vedanta cannot violate human rights in Orissa and do CSR work in Delhi to redeem itself of the violations committed in Orissa. Business obligation to respect human rights should be linked to the point of violation. Third, CSR has increasingly become a brand promotion exercise even as they continue to violate human rights. Public scrutiny of CSR work should be demanded. Fourth, there is a blur between state and non-state actors. This blur is in fact a complete merger in India. Welfare or subsidy oriented public programmes (crop insurance, health etc) is increasingly using corporates for service delivery through the public-private partnership (PPP) model. The PPP model in health is very problematic. Violations of patient rights do not get adequate attention because they are not projected as business but as welfare. This blurring of lines between state and non-state actors has a huge impact on a legally binding instrument. The BHR framework in India should address these increasingly fuzzy boundaries between state and non-state actors. Moreover, a binding treaty should include provisions that facilitate the prevention of the growth of TNCs. With mergers, TNCs are growing in size and strength, and dictating terms to governments. There has to be a disabling provision that curtails the growth of TNCs. Finally, all four pillars of Indian democracy (judiciary, parliament, executive and media) have to be brought into the ambit of BHR in India since realisation of human rights is predicated on these four pillars.

**Sandeep Kumar Pattnaik, Programme Coordinator, National Centre for Advocacy Studies**

There are different people's movements protesting against land grabbing activities in India. In Orissa, there are three big corporations – Posco, Vedanta and Adani. There are 21 peaceful democratic movements against forceful displacement. For example, people have been resisting against Posco for ten years in Orissa. Companies are violating at three levels – they don't respect human rights; they don't take consent of the affected people while acquiring lands; they violate the environment. We should think about how to globalise and highlight this resistance at the international level. The complaint filed against Posco at the OECD failed to hold the company responsible for human

rights violations in Orissa. Moreover, there is a need for public scrutiny of the CSR work of corporates. Posco for example is giving CSR money towards scholarships at various universities (TISS, JNU etc) to obtain consensus and subside resistance. One way to regulate corporates and their CSR spending in India is by amending the RTI to include companies in its ambit.

### **5.1. Discussion**

1. Even if we have a binding treaty, it is up to the states to sign and ratify the treaty. States are not bound to sign treaties. So how can the treaty, if established, not be a victim of politics?
2. The treaty has to be useful to victims. Needs of the victim should be at the core of the treaty. There should be more clarity on access to remedy mechanisms. There is no point in investing resources in getting the treaty if it does not place the victim at the centre.
3. Business has an impact on various rights – child rights, labour, water, sanitation, women, environment etc. There should be an alliance building among groups that work on various rights issues to think about business impact on human rights, environmental rights and rights of indigenous people.

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