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The Risk of Regulatory Ritualism

Proposals for a Treaty on Business and Human Rights

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The Risk of Regulatory Ritualism: Proposals for a Treaty on Business and Human Rights

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Abstract

This working paper is the first to analyse whether insights into problems of 'regulatory ritualism' might inform contemporary debate on the merits and content of any new treaty-based mechanism on the human rights responsibilities of business and financial actors. In 2015 a controversial inter-governmental working group held its first meeting towards negotiating a future treaty. However, treaty proponents have not tied their arguments to any theory of regulatory effectiveness, nor addressed empirical arguments questioning the effectiveness of human rights treaties. This is problematic since some treaty proposals raise the spectre of state 'compliance' patterns marked by formalistic, empty rituals of verification. In setting up that possibility, the paper explores the status of debate on the merits or viability of a 'treaty path', canvassing the range of treaty options being proposed. Treaty opponents may over-state aspects of their case, such as the opportunity costs of drawn-out negotiations. Yet even assuming consensus is possible, treaty proponents have not shown how state acceptance of binding treaty obligations would necessarily address the 'governance gap' here. Proponents may confuse regulatory aims with the means for achieving these, placing undue faith in the preventative and remedial potential of binding international legal instruments.

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1. Introduction

This working paper considers one area of growing debate in the global governance of economic actors and activity. The 'business and human rights' field concerns the now-recognised responsibility of corporate, financial and business enterprises to at least exercise due diligence in preventing and remedying human rights violations reasonably attributable to them, and the related regulatory and remedial expectations of states, including their duties under international law.[2] The topic under consideration here is not the source, nature and extent of the (evolving) substantive normative standards involved. It is the significant contemporary puzzle of how best to give practical and institutional effect to these values.

Last year, formal inter-governmental discussion began around a future legally binding comprehensive instrument in this sphere. The discussion was mandated by a divisive, narrowly adopted 2014 resolution in the United Nations human rights system. **Section 2** briefly sets out this background. Given the 2014 mandate, much debate now seems to have turned from whether to pursue a treaty at all, to what form that treaty or treaties should take. This paper engages with that debate on form by way of framing the paper's main contribution. However, it does so from the premise that the preferable question -- both conceptually and as a matter of human rights policy – is not 'what form of treaty would best promote business respect for human rights?' Instead the main question should still remain 'what actions would best promote prevention and remedy of business-related adverse human rights impacts?' A treaty process is only one option, or one possible element of a comprehensive approach (Ford, 2015).

It will become clear that the paper advances an overall sceptical view of arguments being advanced in favour of pursuing, in particular, a single overarching comprehensive treaty in this area at this time. It sees these arguments as reflecting the largely under-theorised nature of many important aspects of the business and human rights field. In regulatory terms this field is marked by plural sources of public and private mandatory, voluntary and other governance initiatives, but no overarching distinctive negotiated and universal legal regime. Some proposed theoretical underpinnings of a more multi-faceted approach to narrowing the business-human rights 'governance gap' (Ruggie, 2013: xxiii)[3] are explored in more detail in forthcoming work (Methven O'Brien and Ford, 2016). This working paper has a narrower ambition. It aims to contribute to both scholarship and policy perspectives on what might work best in promoting sustained human rights-compliant business conduct (and remedial possibilities) at both national and transnational levels. It does so by addressing one under-explored consideration relating to the current 'treaty question'.[4]

That consideration is whether institutional activity around the treaty question and any resulting instrument might become at risk of a dangerous or at least unproductive 'regulatory ritualism'. **Section 3** describes this possible problematic pattern, identified in existing

[2] *Protect, Respect, Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008 (adopted A/HRC/RES/8/5, 18 June 2008). On operationalizing the framework, see the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, 21 March 2011, adopted by the Human Rights Council on 16 June 2011 (A/HRC/RES/17/4, 16 June 2011 (6 July 2011)).

[3] See UN Doc. E/CN.4/2006/97, 22 February 2006, [9]-[19], [20]-[30] (the 'Ruggie process', see section 2).

[4] The term 'treaty question' is fairly widely used in this context, but notably is the sub-title of a forthcoming book by Claire Methven O'Brien (2016, drawing on Methven O'Brien 2009).

scholarship in international human rights law but not yet explored in relation to the 'business and human rights' treaty and global governance question. **Section 4** then briefly considers current proposals for a treaty or treaties. This mapping exercise may itself be a useful contribution at this stage in debate, but is mainly intended to contextualise **Section 5**. That section attempts to address the following question: *would the negotiation of, in particular, a conventional single overarching human rights instrument create a real risk of largely empty procedural ritualism in state compliance, resulting also in a false sense of reassurance about states' substantive rights promotion and protection activities?* The paper then (**Section 6**) makes explicit its more general reasons for scepticism about the treaty path, related to the ritualism problem. The paper concludes (**Section 7**) with some general provisional reflections on whether the focus on achieving a binding international instrument risks confusing the means (international legal instrument) with the ends (greater enjoyment of human rights). Such approaches place unfounded expectations on international legal instruments as effective regulatory phenomena.

2. Tracing the 'treaty path' debate

What is the 'treaty question' in this field? Many existing state treaty obligations apply in this area, but the perception and reality of a governance gap testifies to the piecemeal regulatory landscape briefly adverted to above.[5] In this context the 'treaty question' is whether it is desirable or necessary, in order to deal effectively and appropriately with the many ways that business actors and activity might affect human rights, for states to negotiate a specific and dedicated international legal instrument/s binding themselves (and, some say, business actors directly) to regulate and remediate business-related breaches of recognised human rights norms. A subsidiary question is what form such an instrument/s could or should take. The questions are of course related since whether a sufficient body of states think a treaty or treaty process is desirable or necessary will normally turn heavily on the treaty's proposed form and content. In parallel are policy questions about what implications the treaty negotiation and implementation processes, and later on-going compliance, might have in the scheme of efforts towards the overall regulatory objective of promoting business respect for human rights in a balanced, viable but principled way. These strategic calculations are not unique to business and human rights: this section's brief timeline provides some necessary context for how the question has arisen in this particular field.

2.1 The Ruggie process and previous legacies

The 2014 resolution mentioned above belies the fact that the treaty question has not simply emerged in the last few years. Since the 1970s, proposals driven mainly by states from the 'global South' for some overarching binding international legal instrument on the human rights responsibilities of multinational corporations (and/or states' related duties) have been marked at the inter-governmental level by ideological, conceptual and strategic stalemates (Ford, 2015b). The predecessor to the UN Human Rights Council oversaw one effort, between 1998 and 2004, to facilitate agreement on substantive international human rights standards of potential applicability to business actors. One characterisation of this process -- not a treaty negotiation process as such -- is that it sought in effect to make a raft of existing international human rights conventions directly applicable to corporations (Mares, 2012; Cassel and Ramasastry, 2015: 2-3). However, the resulting 2003 (draft) norms were never adopted due to a significant lack of state consensus.[6]

For roughly a decade following -- from about 2004 until about 2014 -- the treaty option was progressively put aside as the foremost way to address the business-human rights governance gap. In 2005, Professor John Ruggie was mandated by the UN Human Rights Council (HRC) to act as the Special Representative of the UN Secretary-General on 'the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (see generally Mares, 2012; Ruggie, 2013).[7] The Ruggie process explicitly steered away from taking a treaty path (Ruggie, 2008). Instead its focus was on obtaining comprehensive

[5] For one recent review of the gaps in international and national legal and governance frameworks in this area see ICJ, 2014: 15-34.
[6] *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.
[7] A repository of Ruggie's work under these mandates is available at http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights.

state endorsement, and then national-level implementation, of the 2011 UN Guiding Principles on Business and Human Rights ('UNGPs') and their related 2008 normative framework.[8] The treaty-eschewing choice partly reflected what Ruggie maintained is the reality of a decentralised (or 'polycentric': Ruggie, 2015) global governance system, in which international law and state legal measures are only one source of governance effects and only one component of an ideal 'smart mix' of measures to incentivise and ensure human rights protection and remediation (Ruggie, 2013).[9] Treaty options had no special claim to priority in Ruggie's pragmatic approach, which overtly privileged 'what works' in promoting substantive human rights protection over any fixed view on preferred modalities for achieving this goal.[10] It might be unfair to Ruggie to suggest that he thereby unjustifiably downplayed the significance of international law (Ruggie, 2007, 2013; Mares, 2012; Ford, 2015). Moreover, in endorsing the UNGPs the Human Rights Council expressly noted that it was not 'foreclosing any other long-term development, including further enhancement of standards' and that further efforts to bridge governance gaps were necessary, *including at the international level*.[11] Nevertheless, Ruggie's recommendation to states in the Council was to avoid attempting a treaty process at that time. For various reasons states were roundly content, in 2011, to accept that approach.

This is not the place to chronicle that process, but some brief points are necessary to adequately contextualise later discussion of possible ritualistic rhetorical recitations of duties in any future treaty. The premise of the 2011 UNGPs and accompanying 2008 framework was that along with an emerging societal consensus that business actors had some form of 'responsibility' to respect human rights, states do have and accept some duties regarding the human rights impact of business actors subject to their jurisdiction. These reflect the state's well-recognised duty to protect against and remediate human rights violations by third parties. The UNGPs were not a 'voluntary' mechanism, as is too-often stated. They comprised guidance to states and others on operationalizing existing obligations. The UNGPs idea was that such operationalization at the national level was a priority and held most regulatory promise. In this vision, no particular overarching international instrument was necessary for states to begin such activities, including enforcing existing national laws. Any 'treaty' would simply reiterate what states were already obliged to do, obligations implicitly accepted by states when endorsing the framework and UNGPs. The 2011 resolution, on this view, had a treaty-like role of signalling state recognition of the significance and priority of the issues involved; the 2003 'draft norms' outcome suggested that consensus on any more onerous standards (above a restatement of existing duties) was unobtainable in a foreseeable time. For the present contextual purpose, it suffices to note that states through the Council have recently (2011) and unanimously reiterated their relevant obligations in respect of business-sourced human rights violations (the content of which may of course shift over time partly on the basis of the practices of states themselves).

[8] See n. 1 above.
[9] See para [3] of the UNGPs (A/HRC/17/31, described below).
[10] See the early 'Interim Report' during his mandate, UN Doc. E/CN.4/2006/97, 22 February 2006, [81].
[11] A/HRC/RES/17/4, [4] and preambular para [6]; also A/HRC/17/31, [13].

2.2 The twin Geneva resolutions in 2014

The 1970s-plus legacy of division and uncertainty on agreeing any instrument relating to business and human rights helps to explain the near-universal welcome for the Council's 2008 and 2011 unanimity in endorsing the UNGPs and their related framework. This had the effect, at least for the first foreseeable years after 2011, of clearly shifting the focus away from seeking any multilateral overarching treaty solution or directly binding norms, in favour of promoting national-level awareness and uptake of the UNGPs. However, by at least late 2013 it was evident that this consensus on the treaty question had partly evaporated. Some developing country states and civic actors began to revive calls for a treaty negotiation process. The division over strategic direction in this field manifested more fully at the Council in Geneva in June 2014.

The reasons for this revival have been extensively debated elsewhere (e.g. Ford 2015b; IHRB, 2014-; ICJ, 2014: 2-7, 44-5). Nevertheless they are relevant to later sections' analysis of the faith being placed in a treaty negotiation process. Briefly, various arguments were erected against the prevailing view that the priority was national-level UNGPs activity and that it was too soon after the 2011 resolution to re-open the treaty question. Some treaty proponents had never relinquished their desire for a binding instrument: the UNGPs were a parallel interim development or, at worst, were fatally displacing enthusiasm for a treaty. Some re-emerging treaty proponents (e.g. Shetty, 2015) were contingent UNGPs supporters who, already by 2013, had become disillusioned with state apathy and inaction after 2011's fanfare. They sought to 'force' states to 'comply' with UNGP elements;[12] for such players 2011 was characterised as having delivered 'consensus without content' (de Schutter, 2013: xviii). Others expressed concern that remedial transnational litigation avenues to ensure corporate accountability in first-world forums were in fact becoming more difficult to access (Cassel and Ramasastry, 2015: 7). For others, treaty advocacy has long been somewhat ideological in nature, sometimes entangled in far bigger narratives about economic globalisation, private power, inequality and under-development. The 'ideological' label is fair (Ford 2015b) because such proponents focus disproportionately on large Western branded firms operating transnationally. They do not necessarily display a considered interest in what would work best in preventing or remedying abuse in aggregate terms.

This revival and breakdown in consensus manifested in two resolutions at the June 2014 Council meeting. Full consideration of these is also beyond this paper's scope. The first, Norwegian-drafted resolution was adopted unremarkably. It focused on pursuing national-level UNGP-related actions but held back, in its final version, from mentioning pursuit of a legally binding instrument.[13] Nevertheless it requested a consultative process to explore 'the full range of legal options' and practical measures to improve access to remedy for claims of business-related rights abuse. The other resolution, sponsored by Ecuador and South Africa,[14] passed narrowly.[15] It revived the treaty question by mandating an 'open-ended intergovernmental working group' (IGWG) to 'elaborate an international legally binding instrument' to regulate the human rights-related activities of transnational corporations and

[12] See 'Joint Statement: Call for an Internationally Binding Instrument' Peoples' Forum on Human Rights and Business, Bangkok, 7 November 2013.
[13] UN Doc. A/HRC/26/L.1, Rev.1, Geneva, 27 June 2014 (as orally amended and adopted without a vote, finalised as Resolution 26/22 (A/HRC/26/22, 15 July 2014).
[14] UN Doc. A/HRC/26/L.22/Rev. 1, 24/26 June 2014; co-sponsored by Bolivia, Cuba and Venezuela.
[15] 20 votes for (including the BRICS countries, minus abstaining Brazil), 14 against (mainly OECD countries), and 13 abstentions; see for example Ford, 2015b.

other business enterprises.[16] The resolution's supporters did not offer a detailed, let alone theorised, rationale for a treaty process or for the choice to narrow its scope to 'transnational' firms -- a move perceived as enlivening previous decades' ideological stalemates. The IGWG is to engage in 'constructive deliberations on the content, scope, nature and form of the future international instrument' and 'prepare elements for a draft legally binding instrument' for substantive negotiations in what appears to be a highly ambitious timeframe. The IGWG held its first meeting in July 2015.[17] This paper returns to the IGWG in mapping various treaty options being advanced, and in reflecting on the implications of division in the Council for the wider treaty question. First it is necessary to lay out the problematic pattern the risk of which is arguably raised by the IGWG's proposed treaty process and product.

[16] The resolution defines 'other business enterprises' as enterprises with a 'transnational character' expressly excluding 'local businesses.' This highly artificial distinction was maintained at the IGWG's first meeting.
[17] See http://business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/.

3. The 'ritualist compliance' critique

What are the risks that a new human rights treaty dealing with business and human rights might, contrary to what re-emerged proponents see as the promise of galvanising significant state action, simply give the false reassurance of an appearance of concerted and diligent action, while potentially displacing other opportunities for substantive progress? Here the focus is mainly on the operation of a potential regime once agreed, although the insights may also be apposite to the treaty negotiation process. In a recently completed multi-year project, Charlesworth and others (2010-2015) have explored how the multilateral human rights system might be strengthened by reducing what they diagnose as patterns of 'ritualism' in state compliance with treaty and other obligations. Is there a reasonable risk of this problem materialising in relation to a treaty on business and human rights in whatever form is likely to garner sufficient state support?

Charlesworth's research applied ideas of regulatory ritualism, originally developed in domestic regulatory settings, to the human rights treaty system (2010-2015; 2011) and especially the Human Rights Council's 'Universal Periodic Review' of state obligations (Charlesworth and Larking, 2015). This section explores that research, conscious of the existing treaty effectiveness debate in relation to the human rights treaty system (e.g. Keith 1999; Cassel, 2001; Hathaway, 2002; Neumayer, 2005; Cole, 2012). That mainly sociological and socio-legal studies empirical literature was not the subject of Charlesworth's cross-disciplinary ritualism study. The context includes the problems of effectiveness and implementation seen to accompany the proliferation not only of instruments and institutions but of findings and recommendations of treaty bodies, thematic special rapporteur mechanisms and other Geneva human rights regimes.[18] Some of the treaty effect literature may not adequately account for a theory of expectations (Neumayer, 2005) by reference to which 'effectiveness' can be judged. My own approach is not necessarily 'realist' in the sense of the international organisations literature, but is nevertheless grounded in a clear-eyed sense of the limited emancipatory and participatory promise of a state-based system of international human rights law. I return to this in section 5 below in expressing an important caveat built into the ritualism critique.

The 'ritualism' concept relates to formalistic participation in a regulatory system, engaging in the institutional processes created to achieve substantive regulatory goals but taking these verification and reporting processes as the point of the exercise, while losing all focus on the goals themselves.[19] In the human rights system, this involves states 'complying' with formal reporting and review requirements but taking these requirements -- rather than substantive compliance with and progressive realisation of human rights -- as the point of the regulatory exercise. Regular state participation in the treaty mechanism reporting and review mechanisms can become an elaborate 'embodied performance' where the participants' focus is on the highly stage-managed, cyclical, calendared and formalised procedural requirements of the performance rather than on its regulatory significance and objective (Charlesworth and

[18] For the present purposes of a working paper I do not purport to explore analogous insights on treaty effects outside of the human rights sphere (e.g. Chalamish, 2011), nor traverse the extensive wider literature on the effectiveness and enforcement and limits of international human rights law or international law generally (e.g. Goldsmith and Posner, 2005).

[19] The study drew among other things on ideas of regulatory ritualism in domestic systems explored by Braithwaite et al 2007. For an early account of ritualism in the global governance of human rights, see Oberleitner 2007.

Larking, 2015: 9). A state might presumably become ritualistic about its human rights obligations unwittingly or by calculated design (to be seen as 'complying'), being either indifferent or reluctant (Charlesworth and Larking, 2015: 10), or perhaps incapable, in relation to pursuing improvement on the underlying human rights issues themselves.

Charlesworth's research considered among other things the repetitive vocabulary used in human rights treaties and resolutions, as well as the responses that states gave to human rights reviews and recommendations. It preceded on the basis that *ritualism*, rather than rituals, may be problematic in the international human rights system (Authers et al, 2015: 4). Rituals may transmit social meanings and express community aspirations as well as embody power relations in fundamental ways (Authers et al, 2015: 1). While rituals and symbolic performances may have certain regulatory or transformative power, or significance for building community consensus or social cohesion, ritualism is more problematic. The studied avoidance of substance or the 'learned ignorance' of shallow rituals of verification (Braithwaite et al, 2007: 220, 227-30) are symptomatic of this problematic ritualism. The pattern can afflict even supposedly enlightened regulatory projects intended to embody empowerment and participatory strategies (Braithwaite et al, 2007: 258-9). In addition to participants losing sight of (or being able to obscure) the overall goal of promoting human rights standards, is an accountability paradox. This is that highly process-based systems ostensibly designed to publicise information, facilitate peer review and engender continuous improvement may in fact tend to obscure accountability. In relation to recommendations issued by human rights treaty bodies and other mechanisms, Oberleitner has questioned how to avoid follow-up actions by states becoming repetitive and formalistic 'self-serving exercises in ritualism' (2015: 1, 4), allowing states to accept norms perfunctorily and to participate in formalised legal procedures without necessarily making any substantial commitment to human rights.

The framing of human rights regulatory schemes as (potentially or empirically) 'ritualistic' partly resonates with, or must at least be seen in the light of, other work to date on the substantive regulatory significance of, and motivations for, state participation and performance in human rights treaty systems. Early work mainly in the sociology of law explored treaties as 'myths' (Meyer and Rowan 1977; see later Cole 2012) in the sense that their efficacy and legitimacy was taken as given without any particular evidence of their impact. Later Hafner-Burton and others explored the extent to which state ratification of human rights instruments was 'ceremonial' since it appeared to have little impact on practices (Hafner-Burton and Tsutsui, 2005, 2007; Hafner-Burton, Tsutsui and Meyer, 2008).

One ritualism-related aspect of this is that formalist, conformist participation becomes 'decoupled' (Hafner-Burton and Tsutsui, 2007; Jamali, 2010) from what states do internally in respect of promoting and protecting human rights. States' formal responses to mandatory procedures take on a formalistic, ceremonial quality and begin to become the point and totality of their activities under that regime. Moreover, treaty process and membership is said to displace the space, momentum and will for substantive change, giving the appearance of 'doing something' (Evans and Hancock, 1998) while not in fact acting on commitments. In this sense, ceremonialism is seen as having the character of 'empty promises' (Hafner-Burton and Tsutsui, 2005), implicit in which is a false sense of reassurance that the treaty mechanism will resolve rights issues.

Properly understood, the ritualism critique is best seen as slightly different in perspective from some of the existing critical analyses in the human rights treaty effectiveness literature.

It is not necessarily premised on isolating determinants or tracking variables that might explain or predict treaty effects (cf. Neumayer 2005). Some critical analyses (notably Hathaway, 2002, 2007) have emphasised both scepticism over the motive of states entering these regimes, and the assumption that their negotiation and adoption will at least do no harm to the cause of promoting human rights. Such studies are intended to show that ratification by states not only fails to produce substantive effect beyond the ceremonial aspects, but may worsen human rights performance. One vector for this, for example, may be the role that ratification plays in offering states party to those instruments a form legitimating cover, itself achieved through ceremonial and conformist but undemanding 'compliance'. Others' research (e.g. Neumayer 2005) has pointed to the highly contingent nature (Cole, 2012: 1132) of positive treaty effects, depending on the pre-existing quality of democracy and the rule of law in ratifying states. For Hathaway, the 'expressive' function of ratification and participation, a public declaration of commitment, can be sincere or not (2002: 1941). Hathaway notes that states can be rewarded for rhetorical *positions* adopted rather than substantial *effects* noted, in ways that harm the human rights project because the pressure the state might otherwise be under is off-set by pointing to its record of participation in the procedural aspects of international regime membership.

This has some resonance with the essence of the ritualist critique. Yet that critique does not necessarily attempt empirical evidence of the net negative or indifferent impact of treaty participation. What appears central to the ritualism idea is that while the possible convening, socialisation, rhetoric-to-obligation effects of treaty participation may hold some regulatory promise, that risks being over-shadowed, over time, by the scope for repeat performances of formal procedures to become seen as the point of the overall exercise, to give false reassurance that states are acting substantively on their obligations, and to occupy the political space for articulating these issues.

4. Mapping proposed instruments

Informed by the work of Charlesworth and others, let us proceed on the assumption that the IGWG will continue its mandate, and / or that some other process towards elaborating an international instrument will continue. What forms of new treaty regime are being suggested? A working assumption might be that not all regimes carry the same ritualism risk. What follows briefly aggregates the IGWG's initial moves, along with treaty options advanced by various reputable institutions (the International Commission of Jurists, American Bar Association, and Law Council of England and Wales), and some academics in this field.[20] Given that their views are at some distance from the content of mainstream international law or reflect misconceptions about its current nature, like others (ICJ, 2014: 35) I do not cover the input of those academics in this field (e.g. Deva and Bilchitz, 2013) who move beyond state duties to propose somehow negotiating a generalised instrument, not limited only to 'gross' violations, creating directly binding international law duties on corporate actors.

4.1 Activity in the IGWG

The IGWG's first meeting in 2015 revealed (Lopez and Shea, 2015; Cassel, 2015)[21] the scale and complexity of the challenge of elaborating a binding international instrument dealing with as complex an issue as the global governance and remediation of the social impact of private economic actors. On a strict interpretation the IGWG is only mandated to explore, and is pursuing, the idea of a *single* international instrument, intended to be complementary to the UNGPs.[22] It also seems tolerably clear that those driving the working group have in mind a single, broad, comprehensive human rights instrument. Indeed some sponsors of the process reveal the scale of their ambition by calling for the draft convention to include 'environmental principles, inherent dignity, freedom, justice, peace … the polluter-pays principle,' problems ranging from toxic fertilizers to breast-milk substitutes produced by commercial actors, and other very broad concepts and issues.[23]

The high expectations and extent to which some proponents see a very broad agenda for the IGWG is revealed, for example (ECCJ 2015), by a representative of the International Trades Union Confederation articulating at a treaty-related event some so-called 'simple' demands that in fact range over a vast terrain of employer-employee relations, social security and other issues of modern global economic life. This very broad agenda for a treaty may be natural or even desirable, on some views, for a first meeting of an organ such as the IGWG. Nevertheless, the meeting (and mandate) reveal a very considerable problem of scope in relation to a proposed single instrument (see too Lopez and Shea, 2015: 113-114). This is especially so in relation to the nature of commercial enterprises to be regulated, but also on other issues such as the scope of rights to be covered and whether only to focus on certain kinds or degrees of violation, the nature of state obligations and of any indirect corporate liability, and access to remedy issues. I return to these issues in section 6 below.

[20] A civil society 'Treaty Initiative' has been established, comprising among other things an expert group to develop proposals for the content of a treaty see https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative.
[21] 'Report of the Inter-Governmental Working Group' UN Human Rights Council 31st Session, Geneva, 10 July 2015 (unpublished).
[22] IGWG Report, [20]. On this point see Cassel and Ramasastry, 2015: 15.
[23] IGWG Report, [20].

4.2 Treaty options being advanced

Beyond the IGWG process itself, various experts are canvassing options that the IGWG (or some other process, including under the other June 2014 resolution described in section 2 above) might take.[24] The survey that follows is not comprehensive but intended to ground discussion of the possible scope for problematic ritualism. One can begin the survey with the recent offering of a leading scholar in this field, de Schutter (2015). This comprises four broad suggestions for the scope, nature and content of a treaty. First, he proposes an essentially declaratory instrument 'clarifying' the scope of the state's duty to protect human rights from business-sourced violations, including abroad. Fulsome discussion of this idea is beyond the scope of this paper, but two things can be said of this position. One is that if an instrument is merely declaratory, one must question its necessity so soon after the Council's 2011 endorsement of the UNGPs declaratory propositions of state duties. The other is that de Schutter may not in fact be advancing a merely declaratory instrument, but rather proposing one that would require negotiating a more onerous duty, than currently exists in international law, on states to regulate business extraterritorially. De Schutter does not view this as onerous or beyond the declaratory because he erroneously adopts a view that states are already obliged (rather just able) to regulate business human rights impact extraterritorially. His view is, among other things, not grounded in anything approaching evidence of sufficient state practice (Ford, 2015: 18-20). Indeed de Schutter can be seen as conceding that such a treaty would not be merely declaratory: he correctly notes that the duty the instrument would declare is 'highly controversial' [2015: 66], that is, not clearly established in international law. De Schutter's language of 'imposing' an instrument or duties on states is unsatisfactory since states in general create or agree to new legal duties, rather than having these imposed upon them by some supposed higher authority.

De Schutter's second option is a 'framework convention' that might make obligatory the adoption of national action plans on business and human rights. He sees this as enabling a 'systematic exchange of information between states parties … thus increasing accountability … policy coherence … accelerate[d] collective learning … and gradual convergence on certain practices …' (de Schutter, 2015: 56-7). He acknowledges that this requires 'robust follow-up mechanisms' at the international level. De Schutter's third option is an instrument agreed by states creating direct human rights obligations on corporations, provided that this dealt only with 'serious' violations (2015: 58, 60-62). Finally, he proposes a 'subsidiary' instrument on mutual legal assistance and legal cooperation between states in providing effective remedies to claimants (2015: 63-4). He notes that such a new instrument could 'usefully list the duties of states' in this regard. In the light of the ritualism critique, Section 5 below reviews the utility of an instrument that simply reiterates state duties.

Another source of models and options is the 2014 report of the International Commission of Jurists (ICJ, 2014: 34-46; Annex I). It selects these by reference to its perceived priority, which is national-level legal convergence on protection and remedial standards. For instance, it considers how one might narrow the proposed single instrument's scope by dealing only with 'gross' violations; by expanding the International Criminal Court's jurisdiction (as one component of a response); by reaching a 'framework' convention (see de Schutter, above); by attempting an instrument modelled on the *United Nations Convention against Corruption* or the *Convention on the Protection of the Environment through Criminal*

[24] In addition to Methven O'Brien 2016, another forthcoming work dedicated to the treaty question is Deva and Bilchitz 2016. The editors are openly in favour of a comprehensive treaty on this question.

Law; or by negotiating optional protocols to the widely-ratified twin 1966 *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*. For this paper's purposes, what is notable is that the ICJ paper does not really engage with the rationale for a new instrument by reference to whether or not it might secure the underlying regulatory objective. It proposes monitoring and supervisory mechanisms to support and inform state implementation (2014: 37), acknowledging scepticism about treaty mechanisms and the capacity or interest of states in implementing obligations. Yet it simply concludes that a new instrument should be able to address this by 'creating or reinforcing duties and mechanisms to facilitate domestic implementation' (2014: 43) and that 'useful lessons can be drawn' for a new instrument that 'has clear potential to be effective' (2014: 41). It does not explore the empirical or conceptual basis for this presumed effectiveness. Indeed, it even talks of 'decoupling' the treaty process from the process of states implementing their existing obligations in following the UNGPs process. I return to the ICJ's proposals in section 5 below.

Cassel and Ramasastry (2015) have also mapped some 'illustrative options' for a treaty. These range from a relatively weak or undemanding treaty requiring states to mandate public reporting by large companies, to a 'strong' treaty with full civil and criminal remedies in national and international judicial forums, or even a special court for such purposes. The 'new' instrument could also, in their view, comprise merely a protocol to an existing treaty. In relation to a truly new instrument, they have advanced a typology of four broad kinds of treaty, noting overlap between these types:

A 'national action' treaty. This would require states to require corporations of a certain scale (headquartered, listed or operating?) within their jurisdiction to report their performance on social impact issues that include human rights. The model here appears to be current EU directives on non-financial reporting, and draft French laws on mandatory due diligence in this area. The authors include in this type a possible instrument wherein states agree to initiate and pursue a national action plan consistent with the UNGPs; alternatively or in addition, they posit treaty commitments to undertake actions consistent with the three pillars of the UNGPs framework, including some form of state and business activity (it is not clear what) on remedial avenues. Included under this head is also a possible treaty model focussing on domestic criminalisation and related international cooperation duties, based on the OECD anti-bribery convention regime. Another model would see states commit to facilitating access to civil remedies in national courts for transnational and other claims. They also consider a more comprehensive national protection treaty to 'make explicit' the state's existing duties to ensure human rights are protected (2015: 26). This is similar to the idea of a 'clarificatory' or declaratory instrument raised by the ICJ report (2014: 9, 43-44) and by de Schutter (2015).

Under this head Cassel and Ramasastry, like de Schutter, include the model of a 'framework' treaty that is not too demanding, that is intended to gather swift and widespread participation and to 'set in motion an on-going process of review and elaboration of additional standards over time' (2015: 21). They rightly note that aside from having deficiencies as a remedial model for particular violations, a framework convention might just as easily displace enthusiasm for further action on more demanding obligations as create momentum for on-going elaboration of standards.

An 'international enforcement machinery' treaty. In this category the authors set out models, or elements of other schemes, that relate to familiar human rights treaty processes requiring progress reports on implementation, shadow reports, expert committee reviews, and recommendations or observations from these treaty bodies. Other potential features are individual complaints mechanisms, where possible. They note here, again, the prospect of a 'comprehensive treaty' (2015: 34) combining some or all of the elements of national and international action models. They include within this category the possibility of some new forum or forums for international civil adjudication or arbitration of remedial claims for business-related rights abuse allegations. In general the authors are sceptical about the prospects for new institutional mechanisms of this sort (2015: 29-32) or for any amendment to the jurisdiction of the International Criminal Court in some way.

A 'policy coherence' treaty. This would involve states committing to review and amend national laws and international agreements to ensure that these are consistent with the existing state duty to protect human rights from business-sourced violations.

Special sectoral treaties, or ones relating to certain kinds of violation. The authors do not develop this category of possible specialised instruments dealing with particular sectors (such as the extractive industries, although this 'sector' comprises some very different industries) or particular human rights abuses (such as human trafficking, although instruments already exist on many of these issues). Presumably this approach would involve incorporating new protocols to existing problem-specific treaties, or amending existing protocols, so to include a focus on business-related aspects of the human rights problem dealt with by that more specialised treaty.

Alongside each treaty type, Cassel and Ramasastry have carefully delineated possible advantages and disadvantages, uncertainties and complexities. Further description of these merits and drawbacks is beyond this section's scope. On the basis of this brief survey we can now turn to consider the potential of the various proposed forms to become hostage to problematic forms of routine superficial compliance, or 'regulatory ritualism'.

5. Assessing the risk of ritualism

In theory some kinds of treaty instruments might create a non-negligible risk of mere ritualistic 'perfunctory engagement' (Oberleitner, 2015: 1) by states with the issues at stake, while also potentially displacing opportunities for more effective rights protection and remediation activity. Provisionally, it might be posited that the risk will not be uniform, but will vary both in terms of different treaty models, and different states' participation in the same model. It should also be acknowledged that the risk of ritualism becoming entrenched in a new treaty regime might be real yet worth taking. That would be so if there are other beneficial consequences that the negotiation and operation of a new instrument(s) might have for substantive 'cumulative progress' (Mares, 2012) in this field of human rights.

What is evident, first, is that the risk of ritualism has already been adverted to -- although not in name -- in the business and human rights field. Consider these five examples. During his UN mandate period, Ruggie noted the 'dilemma of normalisation' that might come to accompany the growth of due diligence activities by businesses on human rights.[25] The observations were in relation to corporate due diligence processes, but arguably are apposite to state procedural obligations under some forms of treaty. Ford has argued (2015: 37) that considerable transformative value might be lost if the activity in this field becomes primarily oriented around narrow issues of technical compliance and reporting, rather than broader strategic state and commercial thinking about how addressing business human rights impact can create value or competitive advantage while mitigating various forms of risk. This insight is arguably equally applicable to the treaty question, at least issues of treaty design. Mares has already adverted to the risk that a focus on process-oriented regulation may risk a regime marked mainly by 'symbolic' or ceremonial conformity without necessarily advancing substantive protections (Mares, 2012: 28, relying on Jamali, 2010). For Mares, the pre-2005 process of seeking agreement on binding norms in a conventional instrument or process was delivering an 'illusion' (2012: 8). While unfruitful negotiation processes may hold value in terms of convergence or normative development, Mares' argument resonates with ritualism ideas since it would be that the pre-2005 process risked delivering empty outcomes under the guise of substantive progress. Meanwhile recent work has noted that state activity of 'national action plans' on business and human rights under the UNGPs, independent of any treaty, might be transformative but that equally the process, ceremony or ritual of their production or action might act as a 'fig leaf' for substantive inaction on these issues (Methven O'Brien et al, 2015: 121). Finally, Taylor (2015) has called for a focus on protection issues, rather than the (rhetorical, ritualist) 'reinventing' of norms.

On the basis of the insights of the recently-completed Charlesworth project, one question for further research, it would seem, is how to promote engaged problem-solving by states, businesses and financial organisations on business social (human rights) impact issues, rather than pursue avenues that result in routine procedural compliance. A relevant and topical business and human rights research question emerging from this provisional line of enquiry might be 'what sort of treaty regime, if any, would best address the ritualism risk?' Section 4 above set out some current proposals. How do these appear when seen through the lens of the ritualism critique?

[25] Report of the Special Representative of the Secretary General, A/HRC/14/27, 9 April 2010, 17, [85].

It is appropriate to start with the IGWG process. The main objection that Ruggie consistently held during his mandate was to an attempted *overarching* treaty (Mares, 2015: 9). While it has only met once and may yet narrow its ambitions (for example to focus on access to remedy issues only), the IGWG and its drivers and expert advisors appear to have in mind a fairly broad, comprehensive single instrument. Accepting that the process is still very undeveloped, it is difficult to escape an early impression. This is that if the IGWG process and product is to attract sufficient state participation and ratification, it runs a relatively high risk of resulting in a yet another generalised conventional report-and-review human rights regime. This may be seen as particularly highly susceptible to formalistic state compliance, and so likely to contribute to an increasing disconnect between procedural regulatory activity that counts as 'compliance', and action on the rights problem ostensibly being addressed.

What about a declaratory instrument? Arguably, quite considerable risk arises that any utility gains in simply 'listing' (de Schutter, 2015: 63-4) the existing duties of states would be offset by the potential that such a performance simply adds more white noise to the existing 'cascade of words' in the global human rights system. This would reinforce the problem of ritualism identified by Charlesworth's project, yet without adding anything not already achieved by the remarkable unanimous Council resolutions of 2008 and 2011. Section 2 noted that these state duties have been affirmed many times, notably in those resolutions. A purely declaratory instrument might enjoy consensus and so contribute further to convergence in this area, but what would it really add? An instrument that during its negotiation developed and deepened the content of states' duties in respect of business-sourced violations would be more useful, but of course also more controversial. Indeed, on the topic of the content of the state's duties, some academic arguments have taken on a form of ritualism of their own, with experts repeating circular refrains about extra-territorial obligations without real evidence that states accept such duties, as if this recitation activity alone will persuade states that a certain new level of obligation exists.[26] If on the other hand such academics accept that their position is more akin to activist than analyst, this ritualistic recitation of non-obligations is arguably a poor strategy in persuading states that they should act substantively to protect human rights abroad in relation to business activity.

A 'framework convention' option would seem, in principle, to carry a certain ritualism risk. Proponents have not really engaged with theorising the effectiveness of framework regimes when set against ritualist and other arguments. For example, de Schutter simply assumes that obliging states to submit national action plans for review will automatically increase 'accountability … policy coherence … collective learning … and gradual convergence …' (2015: 56-7). This is intuitively appealing, but hardly self-evident. Likewise while it acknowledges sceptical views, the ICJ report (2014) avoids altogether exploring the empirical or conceptual basis for the presumed effectiveness of an international instrument. Indeed it makes no reference to the literature on human rights treaty effectiveness, ritualist or other. This approach tends to vindicate Ruggie's early observation (2008: 43) that treaty proponents have not systematically or theoretically engaged with the pitfalls of a treaty process.

[26] De Schutter (2015: 55) illustrates this circularity tendency by repeating arguments for a more onerous duty on states to regulate human rights and business extraterritorially, by reference to principles (the 'Maastricht Principles', 28 September 2011) adopted by a group of academics and others, lead partly by de Schutter himself.

The ICJ report proceeds on the basis that in discussing treaty options it can simply 'set aside' issues such as 'deficiencies in the practical application of standards' (2014: 8). Yet the practical application of standards is the only thing that holds promise for human rights – why else pursue a treaty? Moreover, far from setting effectiveness deficiencies aside, the ICJ report does the opposite and proceeds on the premise that international human rights treaties *work*. It says that 'implementation gaps such as those in monitoring, supervision or adjudication are problems that international instruments *usually help to solve*' [emphasis added]. However, considerable scholarship suggests that it is far from obvious that international instruments help solve substantive problems. The ritualism critique now joins that body of treaty effectiveness scholarship. If anything, the ICJ's approval of the idea of 'decoupling' a treaty process from the UNGPs process (intended, it seems, to protect the latter's value) suggests that the resulting document could become a forum *par excellence* for human rights rituals and ceremonies of the most problematic kind. If this working paper makes no other contribution, it is to point out how current calls and options for a treaty are generally conducted in an unsatisfactory and untheorised manner without sufficiently honest reference to established and posited pitfalls of such processes and regimes.

An important caveat to the 'ritualism' critique

One remaining question is whether the risk of ritualism in a new treaty regime might be worth taking in terms (for example) of net progress and buy-in on business-related human rights protection and remedy issues. In this sense, an important caveat is needed, relating to the distinction between rituals and ritualism. Charlesworth's project recognised that rituals in international governance systems (or in any social context) were not necessarily problematic. They certainly have political implications and are riven with complex power relations, but the rituals of human rights reporting can be seen, at least in principle, as neither inherently transformative or conservative (Authers et al, 2015: 6). Likewise, processes that produce non-binding recommendations are not necessarily meaningless and empty but a form of obligation or at least expectation that might have regulatory significance (Oberleitner, 2015: 4). If all that is possible in the face of state sensitivity and sovereignty concerns is a form of 'thin justice' of international law (Ratner 2015), rituals that engage states' participation in the rhetoric of obligation may have considerable regulatory value and empowering potential, or at least some redeeming features. That would perhaps be the position of scholars (e.g. Cassel, 2001) who pointed to the incidental consequences of human rights treaties and their ratification, such as their signalling, reinforcing effect, or their effect in framing politics in a shared normative vocabulary in which non-state actors can engage and monitor the state.

Thus if some human rights rituals oblige states to act, in public forums and performances before their peers and others, as if they take their human rights obligations seriously (Authers et al, 2015: 6), this might be worth something in the scheme of things. That is, while the performance of implementation that accompanies state acceptance of a human rights treaty commitment may be or become a ritualised performance, there may be 'some power inherent in the performative moment itself' (Authers et al, 2015: 6). This is because the processes may afford rare opportunities for dialogue, reflection, sharing or learning, and pressure on abusive or neglectful state conduct. This is especially where states' participation and rhetorical commitment creates something for national and transnational civil society networks to follow up at home, including by invoking the norms to which the state has publicly given rhetorical commitment abroad (Chayes and Chayes, 1995; Risse, Ropp and

Sikkink, 2002). The ritualism critique would accept that states may commit to such regimes knowing that they are largely rhetorical, ritualistic and mainly harmless (in the sense of not threatening a state with reasons to avoid scrutiny of its human rights record). Yet they may, once on board the regime, become somewhat progressively sensitised towards the underlying regulatory objective, internalising (Koh, 1998) the substantive issues through participating even in a relatively 'perfunctory' manner in the rituals. By at least accepting and contributing to rhetorical human rights commitments, states may find it harder to avoid altogether acting on those commitments.[27] Alternatively, whatever their position during negotiations and ratification, their participation in an on-going treaty regime may be part of a process of 'socialisation' (Goodman and Jinks, 2013) during which commitment to the substantive regulatory goals may build or be built.

Another way of approaching this is that human rights treaty membership is not always predicated on myth and ceremony (Cole, 2012: 1165) but this depends on levels of commitment and the content of obligations. Still, despite the force of the ritualism critique in principle it is hard to deny that the merely ceremonial dimensions of treaty membership and participation might be improved upon where agreeable forms of evaluation, assessment, peer-review or complaint reduce the scope for disingenuous participation and raise the legitimacy risks of being shown to deviate from one's rhetorical / ceremonial / ritualised commitments. This accords with international relations scholarship on the normative and compliance-inducing effect of committing to multilateral regimes even absent a sense of sanctions for non-compliance and perhaps irrespective of the binding or non-binding nature of the commitments (e.g. Chayes and Chayes, 1993, 1998; Haas et al, 1993; Shelton, 2000). Unless one adopts a more extreme realist perspective, it is difficult to deny altogether the prospect that rhetorical, symbolic, formal, peer commitment to high standards may generate the conditions for gradual internalisation and foster peer convergence, learning and communication, capacity-building, and so on (Risse et al, 2013). However, such theories do not necessarily extend to issues of the quality of compliance, in terms of its non-ritualistic nature, or cover the mechanisms by which incremental commitment to the substantive goals of the treaty occurs as a matter of course. That is, although compliance may be the normal organisational posture associated with membership of a treaty regime that a state has gone to the trouble of engaging with (Chayes and Chayes, 1993: 179), this is not particularly encouraging if what counts as 'compliance' is the (increasingly ritualistic) fulfilment of formal procedural requirements marked by disjunction from substantive compliance. States might conform with treaty obligations without internalising their values. Ritualistic conformity may be more problematic in a regulatory project than resistance, a posture that at least conveys some degree of substantive engagement.

Charlesworth's project was partly premised on the notion that if rituals themselves were not necessarily problematic (and were potentially productive), the challenge then was to shift state participants in the human rights system towards a committed position on the substantive aims of any particular instrument or regime. In doing so, the Charlesworth project drew on Valerie Braithwaite's typology of motivational postures adopted by subjects of regulation ('game-playing', 'disengagement', 'resistance', 'capitulation', and 'commitment') (Braithwaite et al, 2007: 295; for an alternative typology of regulatory posture, see Oliver, 1991: 152). The caveat point here is important since even if one is sceptical of the utility or impact of a new general instrument on business and human rights, it is difficult to make

[27] I acknowledge a discussion on this issue (December 2015) with Emma Larking, Canberra.

categorical assertions that a treaty negotiation process, and its operation once in force, will inevitably or necessarily only produce ritualistic responses that fall short of substantive commitment. The forum created by such a regime might conceivably provide important spaces and nodes for influencing transformation in the posture of a state towards its duties to regulate in ways that substantively improve enjoyment of human rights. Presumably in order to conduct a fuller exploration of how treaty negotiation and ratification might help shift parties towards substantive committed compliance and beyond, one would need some theory or empiricism on states' varying and multiple motives for supporting and complying with treaty processes (e.g. Koh, 1996; Simmons, 2000; see too Cole, 2012: 1134-37), as well as on their variable levels of commitment and participation.

Given this caveat, and the currently largely speculative nature of analysis on a future business and human rights instrument, perhaps the most that can be offered is a warning of the dangers of potentially progressive human rights treaty rituals becoming unproductive ritualism. The caveat's importance lies in the possibilities apparent in the creation of a forum where states at least discuss their performance on business-related human rights standards, and in the potential consensus-building, deliberative and educative processes of treaty negotiation leading to the creation of that forum. Multilateral treaties come in a wide variety of forms and the risks of ritual performance may be greater in some forms than others. Yet if the ritualism risk materialises in a significant way in the design of a proposed treaty on business and human rights, that process and its outcome may have constituted a serious opportunity cost on alternative measures to promote state operationalization of the UNGPs and their related framework. For the purposes of a working paper, this seems a risk with reasonable levels of likelihood and seriousness, and so worth exploring further.

6. Explaining scepticism about the 'treaty path'

One can strongly support action to improve human rights outcomes yet oppose an attempted comprehensive treaty at this time. In advancing the ritualism critique as potentially applicable to a new treaty instrument, this paper also manifests a broader overall scepticism concerning proposals for, at least, any attempted single overarching instrument in this area. Since it relates to the ritualism problem, it is proper briefly to ventilate the gist of this wider scepticism. Ruggie's approach was that negotiating an overarching instrument was not just unnecessary and unachievable, but also an undesirable approach (Ruggie 2007, 2008). The three main related misgivings he held (2008, 42-43) are still of some substance (cf. Ruggie, 2014a). These are (a) that negotiation and implementation of a single comprehensive instrument would be painfully slow; (b) that these processes would involve unacceptable opportunity costs (sucking energy and attention from valuable nearer-term measures capable of raising business standards on human rights, and of offering remedy); and (c) that any ambitious and complex proposals to ascribe a direct general duty on business actors would not be viable or enforceable. Proponents of more comprehensive treaty ideas have largely failed to engage with the fact that the activity that a viable treaty (especially a declaratory treaty) would cover is already either open to states or required of them. Most states have already committed themselves to human rights treaties obliging them to enforce fundamental standards against violation from any source, and can also do so extra-territorially if other states do not object. How would a comprehensive treaty, vulnerable to ritualism risks and effectiveness problems, add anything -- especially if its ambitious scope led to it containing (and potentially 'freezing') only lowest-common-denominator undemanding standards? Would an alternative undemanding but inclusive and 'framework' convention necessarily galvanise greater state attention to progressive appropriate and effective legalisation in this area? Would that legalisation necessarily improve human rights outcomes, given that many countries already have adequate laws?

The IGWG meeting reaffirmed that pursuit of a treaty draft was not incompatible with national-level UNGPs implementation (South Centre, 2015: 43; Ruggie 2014a, 2).[28] However, the 'opportunity cost' argument still holds water if an IGWG or similar process came to be seen as the primary vector for improving business-related human rights outcomes. The merits and shape of a proposed instrument and process continue to preoccupy many in the business and human rights field (see for instance IHRB 2014-, and the 'Debate the Treaty' blog series).[29] Some observers (e.g. Taylor, 2014, at that time) saw the opportunity cost as real and the treaty process as a major distraction that also could take pressure off state representatives in Geneva to explain what UNGPs progress they have made at home. Many states leading the IGWG have made little progress on national-level activities that they are already obliged to pursue and/or for which no treaty cover or commitment is required. This suggests a strong risk of ritualism about their future engagement with any resulting regime.

An IGWG process that became the vector for progress in this area could seriously retard that progress. Any comprehensive, just, effective and predictable future regulation at any level

[28] Report of the Inter-Governmental Working Group, 31st Session of the UN Human Rights Council, Geneva, 10 July 2015.
[29] See http://business-humanrights.org/en/about-us/blog/debate-the-treaty (Business and Human Rights Resource Centre, 2015).

cannot be limited either to top-down, rule-based state 'command' regulations (such as in a 'hard' treaty) or to voluntary business-driven initiatives alone (Ford, 2015). The treaty question, at least framed as 'what would best promote business respect for human rights,' sits within a much broader set of regulatory questions about what public and private mechanisms and institutions (and mix of these) would comprise an ideal legitimate, effective and coherent (Parker et al, 2004) governance regime on this issue, recognising the plural sources of influence on state or business conduct. This is how the more persuasive scholars have approached the issue (e.g. Methven O'Brien, 2009; Mares, 2012), and in effect how Ruggie approached or now describes his mandate (2013; 2015; see too Cata Backer, 2011 and Ruggie 2014a). Global governance scholars are easily reconciled to notions of plural, networked and private sources of regulatory impact (e.g. Castells 2000; Hall and Biersteker, 2002), including in business regulation (e.g. Braithwaite and Drahos, 2000; Vogel, 2008). However, the same comfort is not true of most international law scholars in the business and human rights field. As Mares has noted (2012), such scholars can tend to approach issues, including the treaty question, on the basis that state-made international law and its domestic implementation could act as a regulatory 'silver bullet' if only political will exists. Many elements of an overall strategy lie beyond the legal sphere (Ford, 2015; Ruggie, 2007: 839), but this would be the case even if one had a fulsome treaty.[30] Ruggie desires that debate be 'freed from its conceptual shackles' (2015) of mind-sets that see formal legal instruments as the only sources of regulatory influence that matter. The nature of the governance gap and the limits of top-down, state-based regulatory capacities and incentives make this strategic regulatory pluralism vital (Ford, 2015).

Even if one put scepticism, ritualism risks and other problems aside and accepted the merits of pursuing a treaty of the sort envisaged in the IGWG, such a treaty path faces significant uncertainties and complexities. On current trends the sort of overarching treaty envisaged there faces a very difficult negotiation path (Lopez and Shea, 2015; Cassel, 2015). 'Home' states of many of the world's largest enterprises did not participate in the IGWG's first meeting in 2015.[31] It is not obvious that pro-IGWG voting Council members want, or expect to see, any treaty in the foreseeable future. IGWG external experts continue to push ideas of an instrument of unworkable scope.[32] Cassel and Ramasastry have listed some of these scope problems (2015: 36-46), ranging from what companies will be regulated, what norms will be at issue, what content will be used for liability concepts such as complicity, how extraterritorial obligations will be managed, parent company liability issues, the issue of direct duties on corporations dear to activists, and the role of legal advisors. Without a strong focus on access to remedy, any process would lose civil society support (Taylor, 2015).[33]

Washington's explanation for non-engagement with the IGWG (see Cassel and Ramasastry, 2015: 8) succinctly captures these grounds for scepticism about the merits and viability of the

[30] The Ruggie process made the point that the most significant gap in business responsibility is not normative but the failure to enforce existing laws: A/HRC/14/27, 9 April 2010, [18].
[31] See http://business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/. The EU delegation scaled back its participation after disagreement over the definition of 'business enterprises'.
[32] For instance, one suggested the draft treat incorporate reference not only to all existing human rights instruments, but to future ones as well: South Centre, 2015: 9.
[33] In practical terms, there is some appeal to arguments (ICJ, 2014; Taylor, 2015) that the process focus on remedy issues to avoid would amount to renegotiation of the vast areas covered by the first two pillars of the UNGPs. To say this is probably, as things have now developed, simply to reinforce the position of states that opposed the IGWG and supported the Norwegian-drafted resolution in 2014.

treaty path as framed by the IGWG's mandate: the treaty debate's polarising effect; the 'opportunity cost' and distraction-from-UNGPs arguments; the short period since the 2011 resolution;[34] the sense that a general treaty would be undemanding or poorly-ratified and inadequate for a complex global economic governance issue;[35] that the treaty would only bind parties (the UNGPs apply generally) and the probability that the IGWG would lack non-state and business input; doubts about conceptual efforts to impose binding state-like obligations on corporations; and the unjustifiable focus only on 'transnational' businesses.

One could add here the failure of treaty proponents to engage with the generic challenges of the UN human rights treaty system even while calling (in a somewhat ritualistic recantation fashion) for yet another regime to add to that system. For one thing, IGWG experts are avowed treaty proponents, reducing the potential that IGWG members will receive objective advice on what works best in regulating and remedying complex social impact and remediation problems. Meanwhile some participation in the debate evinces significant misconceptions that bode ill for realistic negotiation of state obligations: an Amnesty representative has argued that the treaty should 'force states to do what they will otherwise not do unilaterally' (Quijano, 2015). Since only states in the unilateral act of agreeing to a multilateral instrument can 'force' on themselves any treaty obligation, this idealism is not a strategic basis on which to promote ideal human rights outcomes. Because it is somewhat decoupled from ideas for substantive progress, such advocacy also ironically becomes a form of ritualistic rhetoric in its own right.

An important caveat to treaty scepticism

The net treaty scepticism expressed here is qualified in two main respects. First, the mandated IGWG treaty-exploration process, while the offspring of an unfortunate Council division, is now underway. This fact may render somewhat less stark the pre-2014 debates and dilemmas about whether, as opposed to how, to go down the 'treaty road' (Ruggie, 2008). Second, doubts about the viability or efficacy of more ambitious treaty proposals, as well as the 'opportunity cost' concern, should be qualified. One can acknowledge that while it is probable it is hardly inevitable that a drawn-out treaty negotiation process, even on an unlikely single overarching but comprehensive instrument, would necessarily deprive the wider 'business and human rights' project of momentum. Instead it is entirely conceivable that awareness of this on-going process might serve to stimulate and inform rights-promoting activity and initiatives from various state, business and civic sources.

Even in the weak and non-imminent shadow of a possible eventual treaty (or through efforts to outflank or displace the need for a 'harder' treaty), such non-treaty and non-legislative activities might very well contribute meaningfully to narrowing the 'governance gap' in this sphere. If so, the treaty negotiation process might serve a purpose even if its product risks being ritualistic. This is what Taylor (2015) means by conceding of the IGWG process as a (possible) catalyst for acting on remedy issues, not necessarily a diversion. Some form of further internationally agreed regulation, especially where focused on specific governance

[34] A major report on this issue considers that most objections to an new instrument relate to 'timeliness' (ICJ, 2014: 39) and the notion that an instrument is premature given the need to follow up on the 2011 UNGPs, unanimously adopted by states only fairly recently.
[35] Treaty proponents have not effectively countered the view that the field is so broad that it seems unsuited to attempted governance through one overarching treaty framework (Ruggie, 2014a: 6).

gaps, may be both inevitable and desirable, and not necessarily undermine other activities.[36] This possibility was hardly foreclosed by the UNGPs process. Anyway the IGWG process can hardly monopolise the many governance, accountability and remedy initiatives and schemes, public and private, which might respond to pressure more demonstrably to narrow the governance gap. Moreover, it is not inevitable that a treaty instrument result in ritualism or otherwise validate sceptics' arguments. It depends on the instrument, but proponents' cases would be strengthened by engaging with existing theory and empiricism on effectiveness.

[36] EU-specific pre-regulatory moves in this general field are reasonably foreseeable.

7. Concluding observations

The 'governance gap' between corporate influence and accountability, including as it relates to human rights protection and remediation, is an enduring and objectively significant aspect of contemporary global economic governance debates. The 'treaty question' raises important generic issues about the most appropriate and effective forms of global and national-level governance of the social, environmental and governance impact of corporate and other economic actors and activity. While the 'whether to treaty' question is by no means settled in the business and human rights field, the 'how to treaty' question is starting to dominate. Despite the scepticism conveyed in this paper, on any reasonable view there is considerable scope for exploring an effective, legitimate and coherent international regime of manageable scope. One expert has called for proponents not to be trapped in models of the past (de Schutter, 2015: 43). Yet by the same measure proponents have not engaged with past insights into treaty effectiveness (and counter-productivity) that arguably apply to most viable options for a new instrument. This paper has sought to advance one set of ideas that might give pause for thought both on the 'whether' and 'how' questions currently circulating.

This paper is by no means an exploration of wider concepts on the effectiveness of international (human rights or other) treaties in their own right or relative to other forms of global public and private economic governance. It has deferred to the empiricism in Charlesworth's five-year project, but treaty sceptics need empirical arguments about ideal governance mechanisms just as they demand these from treaty proponents. This paper has not canvassed the literature on the future of the international human rights system, nor explored other ways where it may intersect with global economic governance, notably in the emerging debate on incorporation of business-related human rights standards into trade and investment treaties (Ford, 2015: 25-27). It is for other work to demonstrate more fully other non-treaty mechanisms for regulating transnational business on social goals, and what form of binding instrument might best harness and complement significant non-treaty regulatory resources. A working paper, it anticipates rather than concludes exploration on what proposed treaty model might involve the least (or most justifiable) risk of entrenched ritualism.

If the business and human rights field is something of a epistemic and advocacy 'bubble' (comprising a relatively small circle of contributors), one risk is that the treaty question is viewed in a fairly technocratic fashion disconnected from clear-eyed acknowledgments about the invariably deeply political nature of any enquiry into regulating business activity globally or locally (Taylor, 2015). The field seems to need less technology and more politics: some greater saturation both in general regulatory theory (Methven O'Brien and Ford, 2016) and by reference to the political economy of global governance attempts. This paper does not address an endemic gap in this field: the need for greater considered engagement, by treaty proponents and others, with the political economy dynamics of the inter-state regulation of the social impact of both globalised and local business and finance. This gap is problematic because much of the current debate takes place in an artificial atmosphere insufficiently infused with insights about the political, economic and market factors that might explain why states may or may not regulate or remedy certain business behaviours effectively, or at all.[37] Legal scholars in particular might struggle to justify retreating to treaty-related technical

[37] Taylor (2015) decries 'human rights technocracy' on this issue, seeing it as a form of denial of the intensely political nature of proposals, in effect, to regulate global capitalism.

issues within their disciplinary silo without at least some effort to consider how market forces might help or hinder regulatory objectives within the patchwork global, transnational and national governance of private economic actors' social impact. Yet in a way debate and scholarship needs to become *more* technical in confronting squarely 'what works' in international regulatory regimes, and the existing treaty effectiveness debate.

There is a caveat to the above criticism of legal scholars. Some positions by non-lawyers on the treaty debate and international legalisation in this area (e.g. Ruggie, 2015) may unwittingly be perceived as displaying condescension towards those who approach issues through the prism of international law or who quite reasonably seek to frame activity in this area on an explicit international legal basis. The persistence now of calls for a new instrument suggests good reasons to take seriously the factors driving those calls. They cannot be dismissed by pointing out the fact that law is only one form of regulatory influence. Nevertheless, in the same way that market and other regulatory and self-regulatory mechanisms are not sufficient to ensure protection and justice in this field (ICJ, 2014: 8), nor is an international law instrument likely to resolve the governance gap. International law may not be reducible to an instrumentalist project, but neither is it an end in itself. Even if the treaty process does gather some momentum, a treaty is only a means to the end of the business and human rights project. This view would be entirely unsurprising to global governance scholars, yet is one sometimes resisted by international negotiators and lawyers.

International law is the logical mechanism for regulating global concerns, but many treaty proponents appear to place undue faith in international law's transformative and emancipatory role. Treaty proponents 'great expectations' of international instruments (Bowden et al, 2009) are not underpinned by sufficiently persuasive enquiries into why a new binding instrument would advance our efforts to find an appropriate and workable regime in this field. On one level, a regulatory project invoking fundamental human rights standards must be grounded in international law. On the other hand, what matters is not whether a measure is voluntary or mandatory, but its capacity to engender behavioural change. Distrust, the desire for rigour and the comforting reassurance of 'harder' regulation can be misleading. It can send regulation of business responsibility down narrow corridors of lowest-denominator compliance. It can obscure a principled problem-solving approach that explores legitimate responsive ways in which businesses might protect and remedy rights impacts, without in any way subverting public law to private governance systems (Ford, 2015: 12). While coherence is a virtue in any regulatory scheme (Ford 2015b), it is not necessarily undesirable that a 'scattershot' approach is followed (Taylor, 2015). This is unavoidable, given the vast subject matter.

Despite all this, any regulatory project invoking human rights standards must have some grounding in and connection to public international law. Treaty sceptic Ruggie accepted (2008: 43) that treaties are the 'bedrock' of the international human rights system. Moreover, there is no denying that a considerable constituency exists in support of some new instrument (Cassel, 2015). The questions are inevitably about whether the process of seeking one will have unintended undesirable consequences, and whether the outcome will in fact deliver the intended regulatory impact. Some compromise may yet be arrived at between 'the perfect and the good' (Berg, 2015). This paper has sought to map the current debate while proposing one possible risk of a new instrument, especially if it seeks to be an overarching generalised human rights convention. One can be a proponent of greater corporate and state responsibility and responsiveness in this field, and yet oppose a treaty. Alternatively, one can accept that a treaty process is underway, but express caution about its

supposed beneficial outcome. This is what this paper seeks to do, as one working contribution to questions on just, achievable, effective and legitimate global governance of economic actors and activity.

Whether a treaty is desirable and viable are interlinked questions, tied to the question of what form of treaty process and obligations are envisaged. If an undemanding and uncontroversial instrument was advanced, it might be easy to secure consensus, but what would the instrument add in human rights protection terms? By contrast if the instrument sought to make the state's duty more demanding, the difficult negotiation process would make the project's viability more open to question. The process of debating the form of a treaty may have incidental regulatory effect (building consensus and refining the scope of proposed duties, for instance), but it is equally conceivable it might undermine further the 2011 Geneva consensus. Might it also result in a regime that does not necessarily hold particular promise in terms of substantive progress on human rights protection and remedy? For the purposes of a working paper, it may suffice to conclude provisionally that it seems far from obvious what value a viable treaty would add in narrowing the governance gap in this area, and not obvious that any value-adding treaty would be viable.

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