

G. Summing Up

Going Forward and Looking Back; On the Focus and Utility of this Commentary

CPE-Treaty Project Working Group

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The Coalition for Peace and Ethics Treaty Project Working Group holds the efforts of the Open Ended Inter-Governmental Working Group in great esteem. It admires the work and skill required to bring this treaty project forward to the place where one finds it today. The CPE-Treaty Project Working Group that the surest sign of respect for projects of this kind is to take them seriously. That requires something more than brief eclogues indicating support or opposition to its terms. We believe the Treaty project is a serious endeavor and deserves serious, and honest, engagement. We leave the politics of drafting and enactment to others. Our role is to take the Treaty as given—as a complex set of mandatory commands directed to states to make substantial alternations to their legal and constitutional orders in the face of what is perceived to be an important objective of legislation across national territories—the coherent regulation of economic activity with human rights effects. This the Treaty drafters have endeavored to do.

Our greatest regret has been that, given a mandate that is in its own way now largely out of date, neither the Treaty nor its drafters sought to more robustly interlink human rights and sustainability issues. We have come a long way from the time when human rights and environmental issues were considered separate fields, relatively unrelated. We have come even farther from the time that one could imagine human rights uncoupled in the most fundamental way from both bio-diversity and climate change. Indeed, traditional environmental concerns are difficult to separate from the larger context in which they now operate—sustainability. Bio-diversity, climate change, and all in a feedback loop affected and being affected by human activities. It is our hope that the next draft of the Treaty will contain SUBSTANTIAL revisions to move toward a more integrated approach that reflect these connections.

With these thoughts and reservations, the Coalition for Peace and Ethics is pleased to release this summary of the Special Issue of the CPE Bulletin on the Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Corporations and Other Business Enterprises (Draft LBI).

On 14 July 2014, the Human Rights Council created an Open-Ended Intergovernmental Working Group (OEIGWG) on Transnational Corporations and Other Business Enterprises with respect to human rights (OEIGWG). According to Resolution 26/9, the Working Group has the mandate to: “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business

enterprises.” The Human Rights Council also decided that the first two sessions of the OEIGWG would be dedicated to conducting constructive deliberations on the content, scope, nature, and form of the future Treaty. Following the third session, a Zero Draft of a Legally Binding Instrument (LBI) on Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) was prepared by Ecuador. In July 2018 the Ministry of Corporate Affairs of India released the draft for public comments. The Zero Draft of the Legally Binding Instrument (and a zero draft of an optional protocol to the binding instrument) formed the basis for a first round of substantive negotiations, held in Geneva from 15 to 19 October 2018. On 16 July 2019, a Revised Draft was released. This Revised Draft will serve as the basis for negotiation to be held during the Fifth Session of the OEIGWG, from 14 to 18 October 2019.

The Coalition for Peace and Ethics, as a member of that large group of interested stakeholders is pleased to make its views known to the OEIGWG. The analysis contained in the Special Issue focusses both on close textual reading, and on drawing out the larger conceptual issues and challenges that the Revised Draft presents. These issues and challenges can be summarized as follows:

1. The LBI Does Not Reflect the Views of Victims, Civil Society and Human Rights Defenders

Even though the Draft LBI is a “victims-centered” treaty, victims of human rights abuses, and more generally speaking the NGOs who represent them, played little or no role in shaping the Draft LBI. Several NGOs submitted written and oral contributions on the LBI. But, our analysis of textual changes proves how the Zero Draft was amended in response to the opinions and concerns advanced by states. The views expressed by academics and civil society organizations were side-lined or outrightly ignored. The document that will serve as the basis for negotiations to be held in October 2019 therefore reflects the views of state actors. That document is not representative of the views advanced by civil society, human rights defenders, and members of the academia.

2. The LBI Does Not Reflect the Views of Business and Industry Associations

Private entrepreneurship is a source of wealth and development for individuals and societies. Markets make man free. By providing equal opportunities to everyone, markets enable social mobility and contribute to creating societies premised on the value of justice. Industry associations expressed their views on the Draft LBI on several occasions, and yet the document that will be discussed in October 2019 did not take their views into account.

3. The LBI Does Not Reflect the Views of Religious Groups and Communities, Indigenous Peoples, Ethnic Minorities, and Local Communities

Acknowledging the dignity and equality of man in practice rather than just in words, protecting the environment through one’s deeds are values shared by all religious confessions and movements. Not all religious confessions had an opportunity to voice their views on the Draft LBI. Those who did attempted to defend the values of human dignity and respect for nature. The views they expressed, however, are not reflected in the Draft LBI. The same observations can be made for indigenous peoples, persons belonging to ethnic minorities, or to local communities.

4. The LBI Does Not Reflects the Views of Labour

Labour has undergone radical changes in the last 30 years. In both developing and developed countries, precarious forms of employment have become the norm. In the majority of developed and developing countries, individual entrepreneurship and education can no longer guarantee a moderately prosperous lifestyle, employment security, or the enjoyment of economic, social, and cultural rights. All those who fill permanent job needs, while being denied the same rights enjoyed by permanent employees did not have an opportunity to express their views on the Draft LBI.

5. The LBI Does Not Build on The 30-Years Peaceful Struggle to Improve Economic, Social, and Cultural Rights

The peaceful struggle to improve economic, social and cultural rights for everyone began over 30 years ago. Ideas of corporate social responsibility first, and business and human rights next, relied on the assumption that all actors in economic systems are autonomous. And that they have the ability to make choices and decisions that are good for themselves, and at the same time create prosperity for everyone. This is a truth that has been amply proved by practice. The Draft LBI, however, goes against this truth, and it attempts to turn back history to a time when the state was the one and only actor in the economic system.

6. The LBI encourages regulatory fracture

The most significant challenge of the LBI is the struggle to produce a document that embeds structures of coherence in the management of the behaviors that cause harm that may be connected with violations of human rights AND sustainability. There are too many sections that require careful redrafting even if solely for the purpose of aligning purpose to text. In other sections, the sacrifice of coherence in approach is a high price to pay for what might be viewed as pre-negotiated concessions for acceptance. Lastly, the Treaty and the sort of changes to domestic legal orders it encourages does little to bring law back down to the people most in need of its protection. This remains a space for elites—transnational actors to whom are entrusted the protection and operation of systems for the benefit of others. And that is the greatest potential tragedy of all—a document that purports to center “victims” effectively marginalizes victims by creating a document that could not be more remote from their everyday and effective lives.- And that may be the greatest offense to human rights that proceeds from this project. It is hoped that these challenges may be met—perhaps by transforming this project onto an effort to draft effective framework principles. But only time will tell. it has made of victims twice over.

