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GET REAL, OR WE'LL GET NOTHING: REFLECTIONS ON THE FIRST SESSION OF THE INTERGOVERNMENTAL WORKING GROUP ON A BUSINESS & HUMAN RIGHTS TREATY

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Further international legalization in business and human rights is inevitable as well as being desirable in order to close global governance gaps. About that there can be little doubt.¹ The critical questions are how to get from here to there, and in what direction the “there” should lie. An Intergovernmental Working Group (IGWG) was established pursuant to Human Rights Council Resolution 26/9, adopted in June 2014 on a sharply divided plurality vote, to elaborate a binding instrument on business and human rights, with no specific focus and limited to transnational corporations.

The IGWG recently held its first session, which shed no light on these questions other than to confirm that the process will be drawn out and conflicted. Attendance by states overall was poor, and fewer than ten delegations, including the initiative’s sponsors, accounted for most of the interventions. Among home countries of transnational corporations several key players were no-shows. The EU walked out on the second day. Statements by China and Brazil were circumspect. Russia, which voted for the resolution establishing the IGWG, said it does not support a treaty at this time.

If present dynamics continue, the process is likely to yield one of two outcomes: no treaty at all, or one that squeaks through to adoption but is ratified by few if any major home countries and thus would be of no help to the victims in whose name the negotiations were launched. Civil society has been and remains central to moving the business and human rights agenda forward. After the IGWG session, NGOs were quick to criticize states that did not participate at all, and the EU for walking out. The wisdom of those decisions can be debated. But I want to address a different issue here: when states are this divided and ambivalent, NGO leadership is badly needed. Hence, NGOs need to reflect on their own positioning. Several leading international human rights organizations have yet to engage on substance, limiting their statements to procedural matters. They need to jump into the fray. In contrast, the “Treaty Alliance,” comprising some 600 NGOs from around the world, makes demands that give states a free ride by enabling them to avoid having to come to grips with specific terms of further legalization. How so?

The Alliance position is that a treaty must comprise all rights and all businesses, coupled with extraterritorial if not universal jurisdiction. Some proposals have gone even further. One urges the inclusion not only of all *existing* internationally recognized human rights – but all *future* ones as well. Another would have states fix a hierarchy of human rights law over other international legal obligations. Such demands are so far removed from reality that they become playthings for some states, and reasons for others to ignore the process. To avoid being instrumentalized in this fashion and to provide the needed leadership, NGOs would serve the business and human rights agenda well by re-examining and refining their platform.

Is there a precedent in international treaty-making for including standards that have not yet been imagined, let alone defined? Can a treaty “self-declare” that it takes precedence over all present and future legal obligations a ratifying state may have or undertake? With regard to extraterritorial jurisdiction, it is true that some UN human rights treaty bodies have urged home states of transnational corporations to provide greater protection against certain corporate-related human rights abuses abroad. But does anyone believe that the United States would impose on U.S.-based corporations the terms of human rights treaties that it has not ratified? Or that China would do so with regard to its firms? More generally, state conduct makes it abundantly clear that they do not regard extraterritoriality to be an acceptable means to address violations of the entire array of internationally recognized human rights. It makes little difference whether the states in question are located in the North, South, East, or West. So given that choices are inescapable, what should be the selection criteria?

I conclude with two further recommendations. First, the ongoing treaty negotiations are likely to be slow and contested. Therefore, it is imperative that progress continue to be made on implementing the UN Guiding Principles on Business and Human Rights (UNGPs), which the Council endorsed unanimously in June 2011 – and that civil society continues to invest time and energy to pressure governments and enterprises to do so. The available evidence suggests that where the UNGPs are implemented, the incidence of corporate-related human rights harm is reduced. Second, if there is to be any hope of further international legalization in the business and human rights domain, civil society needs to help by advancing workable proposals that states cannot ignore or dismiss out of hand – and which, therefore, have a chance of making a difference where it matters most: in the daily lives of people.

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¹ That is why I sent a *note verbale* to all UN member states in February 2011 recommending that, as a follow-up to their endorsing and acting upon the UN Guiding Principles on Business and Human Rights, they consider establishing an intergovernmental process to affirm the applicability to business enterprises of international prohibitions against certain human rights abuses. The note was posted at the time and remains available at <http://harvardhumanrights.files.wordpress.com/2011/02/mandate-follow-up-final.pdf>.