

The Past as Prologue?

A Moment of Truth for UN Business and Human Rights Treaty

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Calls to regulate transnational corporations (TNCs) through an international treaty instrument go back to the 1970s. Pressure for a treaty has come most persistently from activists, and more intermittently from developing countries. A recent civil society assessment sums up the record to date: “All these efforts met with vigorous opposition from TNCs and their business associations, and they ultimately failed.”¹ Yet when, in September 2013, Ecuador proposed that the UN Human Rights Council establish an intergovernmental working group to negotiate just such a treaty instrument, some 600 non-governmental organizations (NGOs) formed a “treaty alliance” to support it.² In a sharply divided vote, the Council adopted the proposal on June 26, 2014. Negotiations are expected to convene sometime next year.

Will this latest attempt to impose binding international law obligations on transnational corporations turn out to be another instance of the classic dysfunction of doing the same thing over and over again and expecting a different result? Or might the negotiations come to reflect more deeply on the reasons for this prior record and move in a productive direction? In the heat of the moment, treaty advocates and opponents seem to be on a collision course. Going forward, the answer hinges on whether the initiative’s supporters are more interested in making a difference than in making a point, and whether its opponents can accept that some form of further international legalization in business and human rights is both necessary and desirable. I elaborate on these scenarios below.

Let’s begin with the Ecuador resolution and the vote on it. The resolution calls for the establishment of an open-ended (no time limit) intergovernmental working group within the Human Rights Council, “the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”³ Thus, the resolution is not addressed to any specific human rights abuses. Rather, it seeks to establish an overarching international legal framework – a global constitution of sorts – governing business conduct in relation to human rights. It then goes on to define “other business enterprises” in a way that is intended to exclude national companies, so that the new legal framework would apply only to transnational corporations.⁴ Thus, to illustrate, the language of the proposed treaty would have covered international brands purchasing garments from the factories housed in the collapsed Rana Plaza building, but not the local factory owners.

In addition to Ecuador, the resolution was co-sponsored by Bolivia, Cuba, South Africa, and Venezuela. The vote in the Council was twenty in favor, fourteen against,

with thirteen abstentions. A majority of African members voted for it, as did China, India, and Russia. Apart than the sponsors, all other Latin American countries, notably Brazil, abstained. The European Union and the United States voted against the resolution, which they thought counter-productive and polarizing; both stated that they would not participate in the treaty negotiating process.⁵ Japan and South Korea also voted no. Representatives of the civil society coalition were euphoric, though several NGOs criticized the exclusion of national companies.⁶ China's explanation of its vote was no rousing endorsement. China's delegate stated that the vote was based on the following "understanding": that the issue of a business and human rights treaty is complex; that differences exist among countries in terms of their economic, judicial, and enterprise systems, as well as their historical and cultural backgrounds; and that it will be necessary, therefore, to carry out "detailed and in-depth" studies, and for the treaty process itself to be "gradual, inclusive, and open."⁷

In short, a sizeable majority of Council members did not vote in favor of the Ecuador resolution. The home countries of the vast majority of the world's transnational corporations opposed and are boycotting the proposed treaty negotiations, abstained, or in China's case signaled significant conditionality. Thus, as of now this latest treaty effort looks very much like a case of dysfunction redux. But is there nothing to be learned from forty years of history – indeed, from international lawmaking generally – that could ensure additional remedy to victims of corporate-related human rights harm? I believe there is, but it would require key doctrinal preferences to yield to practical reality. I briefly flag three.

The first is for treaty supporters, states and NGOs, to recognize that no treaty of any kind will emerge in the near future. Ecuador itself, in informal consultations leading up to the vote, estimated that it could take a decade or more. Indeed, if the current impasse is not bridged we may well witness a replay of the 1970s TNCs Code of Conduct negotiations, which drifted on for years until they were finally abandoned in 1992. Recall that even the non-binding Declaration on the Rights of Indigenous Peoples took twenty-six years from conception to adoption. That's not a reason to delay. But it does raise an obvious question for treaty supporters: what do they propose to do between now and then – whenever the then may be? The obvious answer should be to implement and build on the UN Guiding Principles on Business and Human Rights (GPs), which the Council endorsed unanimously just three years ago, in June 2011.⁸ But this poses a dilemma for many treaty proponents. Let me explain.

Virtually every country that spoke during the Council debate stressed the importance of implementing the GPs. Indeed, the day after the deeply divided vote on the Ecuador proposal the Council adopted a second resolution, introduced by Argentina, Ghana, Norway, and Russia along with forty additional co-sponsors from all regions of the world. It extends the mandate of the expert working group the Council established in 2011 to promote and build on the GPs, and requests the High

Commissioner for Human Rights to facilitate a consultative process with states, experts, and other stakeholders exploring “the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses.”⁹ It also asks the expert working group to report on GPs implementation—lack of awareness of what is actually happening being a main reason for the belief by many that not much is. This resolution was adopted by consensus, requiring no vote.

But here is the problem: many of the countries supporting the treaty process have done little if anything to act on the GPs, and many of the NGOs in the treaty alliance have done little to promote them—some even campaigned against their endorsement by the Human Rights Council in 2011. Both groups all along have simply held to the doctrinal position that only international legal measures can produce significant change, and since the GPs do not by themselves create new international law obligations, a treaty is necessary.¹⁰ But given Ecuador’s own conjecture that a business and human rights treaty may be a decade or more away, will treaty proponents now take implementing the GPs more seriously—as an interim measure, if nothing else? If not, what will they say to victims, in whose name these battles are waged?

For the record, elements of the GPs are being implemented by individual governments (through national action plans, their role as national contact points under the revised OECD Guidelines for Multinational Enterprises, which recapitulate the GPs’ formulation of the corporate responsibility to respect human rights virtually verbatim, and in the form of discrete legal and policy measures); by the European Union (for example, through the Commission’s corporate social responsibility policy, and the Union’s new mandatory non-financial reporting requirements); the International Finance Corporation (through its revised sustainability framework and some performance standards); ASEAN (where the Intergovernmental Commission on Human Rights is drawing on the GPs in its own work); the African Union (in relation to the Africa Mining Vision); the International Organization for Standardization (through the new ISO 26000); and the Equator Principles Banks (covering three-fourths of all international project financing). The General Assembly of the Organization of American States has formally endorsed the GPs. Ever-increasing numbers of companies report that they are bringing internal management and oversight systems into greater alignment with the GPs. Workers organizations and a number of global NGOs are using the GPs as legal and policy advocacy tools. The International Bar Association, U.K. Law Society, and American Bar Association are promoting the GPs’ incorporation into the legal profession, including through law firms’ client advisory work. These are but the most visible examples.¹¹ As a long-time scholar and practitioner of such things, I am hard pressed to identify an international treaty addressing a comparably complex and controversial subject that has generated as much activity in so short a span of time—though I am the first to stress that much more needs to be done.¹²

A second doctrinal position stands in the way of progress: the very scale of the proposed treaty. The idea of establishing an overarching international legal framework through a single treaty instrument governing all aspects of transnational corporations in relation to human rights may seem like a reasonable aspiration and simple task. But neither the international political or legal order is capable of achieving it in practice. The crux of the challenge is that business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations. Politically, it exhibits extensive problem diversity, institutional variation, and conflicting interests across states. This challenge only increases as the number of TNC home countries grows (note, for instance, China's remarks above). On the legal side, the International Law Commission documented nearly a decade ago that the predominant trend in international legalization is the fragmentation of international law into separate and increasingly autonomous spheres. Its report to the UN General Assembly concludes that "no homogenous hierarchical meta-system is realistically available" within the international legal order to resolve detailed differences among the separate spheres, that this would have to be left to the realm of practice.¹³ The category of business and human rights is a case in point: it encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of human rights.¹⁴ Any attempt to do so would have to be pitched at such a high level of abstraction that it would be devoid of substance, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalization in this domain—as we already began to witness in the recent Council debate.

This brings me to a third doctrinal impediment. Treaty opponents need to face up to the reality that international law in this domain cannot and will not remain frozen in place forever. If some of the arguments by Ecuador and the treaty alliance sounded like a blast from the past, so too did some rejoinders from the other side. For example, the delegate of the United Kingdom stated that "this issue is one of the rule of law, the national rule of law in individual states."¹⁵ Similarly, the International Chamber of Commerce stated in a press release that "no initiative or standard with regard to business and human rights can replace the primary role of the state and national laws in this area."¹⁶ Both statements are absolutely correct as far as they go. But if national law and domestic courts sufficed, then why do TNCs not rely on them to resolve investment disputes with states? Why is binding international arbitration necessary, enabled by 3,000 bilateral investment treaties and investment chapters in free trade agreements? The justification for this has always been that national laws and domestic courts are not adequate and need to be supplemented by international instruments.

In their response to Ecuador's resolution, the U.K. and ICC both expressed strong support for the Guiding Principles. Indeed, both have actively promoted and contributed to their implementation—the U.K. being the first country to adopt a National Action Plan. But we must remain clear about what the GPs are and do. In my

first report to the Human Rights Council, I described the approach I would take as principled pragmatism: “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.”¹⁷ Thus, the GPs established an evidence- and consensus-based foundation. They have generated new national and international policy requirements as well as some new legal requirements. Where they are being acted upon and developed further, they help reduce the overall incidence of corporate-related human rights harm and also provide for sources of non-judicial remedy that did not exist before. But they were never intended to foreclose other necessary or desirable future paths.¹⁸

Early on in my mandate I identified an approach to international legalization in business and human rights consistent with the principled pragmatism that brought us the Guiding Principles.¹⁹ Principled pragmatism views international law as a tool for collective problem solving, not an end in itself. It recognizes that the development of any international legal instrument requires a certain degree of consensus among states. And it holds that before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests narrowly crafted international legal instruments for business and human rights – “precision tools” I called them – focused on specific governance gaps that other means are not reaching.²⁰

One obvious candidate would be the worst of the worst: business involvement in gross human rights abuses, including those that may rise to the level of international crimes, such as genocide, extrajudicial killings, and slavery as well as forced labor. I made a proposal to this effect in a note I sent to all UN member states in February 2011, conveying my recommendations for follow-up measures to my mandate.²¹ In the case of natural persons, broad consensus exists on the underlying prohibitions, which generally enjoy greater extraterritorial application in practice than other human rights standards. But further specificity is required as to what steps states should take with regard to business enterprises – legal persons – and about the role that international cooperation could play in helping states to take those steps. A legal instrument with this focus would have the secondary effect of heightening state and corporate awareness of the need for businesses to more broadly avoid human rights harm, much as the Alien Tort Statute did before the U.S. Supreme Court restricted its extraterritorial applicability in the recent *Kiobel* case.²²

In short, the issue for me has never been about international legalization as such; it is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results, all the while building on the GPs’ foundation.

This discussion leads to several conclusions. First, if Ecuador and its supporters hold fast to the terms and intent of their resolution, there are only two possible outcomes. Either the negotiations drag on for a decade or more and follow the path of the 1970s Code of Conduct negotiations; or they manage to persuade enough developing countries to adopt such a treaty text, but which home countries of most TNCs do not ratify and by which they will not be bound. Whatever outcome prevails, it would represent another dead end, delivering nothing to individuals and communities adversely affected by corporate conduct.

Second, if treaty opponents hold fast to their position that national law and voluntary initiatives suffice, and that no further legalization of any kind is acceptable now or in the future, they will contribute to the resurgent polarization that we have witnessed over the past year, and in the process undermine the Guiding Principles – not because the GPs lack value, but because discounting or dismissing their value is politically expedient for treaty proponents.

Third, the resolution introduced by Argentina, Ghana, Norway, and Russia – currently overshadowed by Ecuador’s resolution – will play an important role going forward. In the short run, the consultations it calls for on “the full range of legal options and practical measures to improve access to remedy,” led by the Office of the High Commissioner and involving all stakeholder groups, will contribute practical information, insights, and guidance as the treaty negotiations get under way. But if the treaty process ends up prizing doctrine over practical results, the consensus resolution might well generate a constructive parallel process in its own right.

However this plays out, governments, businesses, and NGOs need to redouble (or in many cases, begin) efforts to implement and further develop the Guiding Principles, including through National Action Plans that set out clear expectations for governments and all types of business enterprises.²³ No future treaty, real or imagined, can substitute for the need to achieve further progress in the here and now. Indeed, the more that is accomplished by building on this widely supported foundation, the less politicized and polarized the debate about international legalization will become. Principled pragmatism may yet continue to prevail.

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¹“Corporate Influence on the Business and Human Rights Agenda of the United Nations,” Working paper issued by Misereor, Global Policy Forum, and Brot für die Welt,” June 2014, p. 5, <http://www.globalpolicy.org/home/221-transnational-corporations/52638-new-working-paper-corporate-influence-on-the-business-and-human-rights-agenda-of-the-un.html>. The most recent such failure was the rejection by what was then the Commission on Human Rights (now Human Rights Council) of the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, produced by an expert subsidiary body. The Commission instead established a mandate for a Special Representative of the Secretary-General to explore the issues anew; Kofi Annan appointed me to that post in 2005. Over the course of six years, I developed the UN Guiding Principles on Business and Human Rights through nearly fifty international consultations, extensive research, and pilot projects.

²<http://www.treatymovement.com/>. It is noteworthy that the major global human rights organizations, such as Amnesty and Human Rights Watch, did not join the alliance, reflecting doubts about the timing and efficacy of the Ecuador proposal.

³UN Document A/HRC/26/L.22/Rev.1 (24 June 2014).

⁴A footnote in the resolution states the following: “‘Other business enterprises’ denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.” The resolution is silent on the subject of joint ventures with domestic partners, including state-owned enterprises, and on other forms of host state involvement with transnational corporations.

⁵The U.S. statement is posted at <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>.

⁶See Arvind Ganesan of Human Rights Watch: “Dispatches: A Treaty to End Corporate Abuses,” available at <http://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses>: “A fundamental flaw lies in Ecuador’s insistence that the treaty focus on multinational companies, even though any company can cause problems and most standards, including the UN [guiding] principles, don’t draw this artificial distinction.”

⁷ See [http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001?term=human rights council&sort=date](http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001?term=human%20rights%20council&sort=date).

⁸The GPs are contained in UN Document A/HRC/17/31; the Council endorsed the GPs in its resolution 17/4 of 16 June 2011.

⁹UN Document A/HRC/26/L.1, Rev.1.

¹⁰On this point, see Larry Catá Backer, “And a Treaty to Bind them All—On Prospects and Obstacles to Moving from the GPs to a Multilateral Treaty Framework,” <http://lcbackerblog.blogspot.ch/2014/07/and-treaty-to-bind-them-all-on-prospects.html>.

¹¹The GPs are being used not only by institutional actors but also by numerous individuals. For an unusual case in point, see “Barrister takes on Slavery at Sea,” available at <http://www.maritime-executive.com/article/Barrister-Takes-on-Slavery-at-Sea-2014-07-01>.

¹²The International Corporate Accountability Roundtable (ICAR) has done impressive work using the GPs as a platform to further advance corporate accountability, including through national regulation. ICAR is a coalition of leading global human rights organizations; its Steering Committee includes EarthRights International, Human Rights Watch, Human Rights First, Global Witness, and Amnesty International.

¹³See International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,” UN Document A/CN.4/L.682 (13 April 2006). Of course, there is the category of *jus cogens*, the name given to norms of general international law that permit no derogation under any circumstances. But even leaving aside various doctrinal and practical challenges, *jus cogens* norms do not encompass the broad spectrum of human rights harms with which businesses may be involved.

¹⁴For starters, I count human rights law, labor law, anti-discrimination law, health and safety law, privacy law, consumer protection law, environmental law, anti-corruption law, humanitarian law,

criminal law, investment law, trade law, tax law, property law and, not least, corporate and securities law.

¹⁵The statement may be viewed at [http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001?term=human rights council&sort=date](http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001?term=human%20rights%20council&sort=date).

¹⁶"ICC disappointed by Ecuador Initiative adoption," available at <http://www.iccwbo.org/News/Articles/2014/ICC-disappointed-by-Ecuador-Initiative-adoption/>.

¹⁷Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006), paragraph 81.

¹⁸Hence my Churchillian remark when I presented the GPs to the Human Rights Council in March 2011: "I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning."

¹⁹John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda," *American Journal of International Law*, 101 (October 2007).

²⁰I am well aware of what some call the "expressive" function of law, in contrast to its regulative role. But the field of international human rights does not lack for expressive legal instruments; what is in short supply are actionable paths to cumulative change.

²¹http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf.

²²In *Kiobel v. Royal Dutch Petroleum Company* the Supreme Court held that a presumption against extraterritoriality applies to the statute, and "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."

²³For excellent guidance, see International Corporate Accountability Roundtable, "National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks," available at <http://accountabilityroundtable.org/wpcontent/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report2.pdf>.