

**Business and Human Rights: A study on the implications of
the proposed binding treaty**

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ABSTRACT

In September 2013, considering the UN Guiding Principles have not provided sufficient response to the human rights abuses committed by business corporations, the delegation of Ecuador delivered a statement at the UN Human Rights Council stressing “*the necessity of moving forward toward a legally binding framework to regulate the work of transnational corporations*”. As a consequence, in June 2014 the Council adopted Resolution 26/9, establishing an Intergovernmental Working Group with an open-ended mandate “*to elaborate an international legally binding instrument*”. Thus, the debate on the possibility to adopt a treaty regulating business activities in relation to human rights was once again brought back to the international agenda. The Working Group has met for the first time in July 2015 and the meeting did not shed much light on the issue other than confirming that negotiations might take years and that they will not be effortless. Since Resolution 26/9 does not further specify what sort of instrument should be drafted, this piece of work will explore different possibilities for the Working Group to better address its mandate, providing a general overview on the issue of business and human rights, its past, present and prospective of future.

ABBREVIATIONS

HRC	Human Rights Council
IGWG	Open-ended Intergovernmental Working Group on proposed binding treaty
ILO	International Labour Organization
OECD	Organization for Economic Cooperation and Development
UN	United Nations

BUSINESS AND HUMAN RIGHTS: A STUDY ON THE IMPLICATIONS OF THE PROPOSED BINDING TREATY

INTRODUCTION

In September 2013, at the Human Rights Council, the delegation of Ecuador, speaking not only in its own behalf but also for the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador, delivered a statement stressing “*the necessity of moving forward toward a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises.*” This proposal brought the business and human rights issues back to the UN the agenda. In November 2013, civil society groups meeting in Bangkok issued a Joint Statement supporting the initiative that has been joined by reportedly 600 civil society groups¹.

On the 26 of June 2014, in a sharply divided vote², the HRC approved the proposal and decided to establish an Intergovernmental Working Group with an open-ended mandate “*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 drafting process of a treaty on business and human rights

¹ See <http://www.treatymovement.com/>

² The Resolution was approved with a plurality of votes, not a majority. The final vote was twenty in favour, fourteen against, with thirteen abstentions. States that voted in favour apart from the initial supporters were India, Russia, the majority of African states, and China, even though the delegate of China expressed that their vote was conditioned. Apart from the sponsors, all other Latin American states abstained. The home countries of the vast majority of transnational corporations opposed to the resolution. The European Union and the United States even expressed their refusal to participate in the treaty negotiating process. However, the European Union did eventually participate in the first meeting of the IGWG.

³ Human Rights Council, Resolution 26/9 on the *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, Geneva, 26th July 2014.

begun, taking place the first meeting of the IGWG in Geneva in July 2015.⁴ In John Ruggie's opinion the IGWG has a "weak mandate"⁵. Taking into account his degree of expertise in the field, these do not seem really promising beginnings, but this idea should not be taken as an unalterable truth. Certainly, the majority of states did not vote in favour of the resolution and the home countries of the most important transnational corporations opposed and are sabotaging the treaty negotiations⁶. But the drafting of a treaty will most likely take years. There is a long process ahead during which support for this initiative may increase, as the current international political landscape is constantly shifting.

For now, it seems the debate between binding and voluntary means of addressing business and human rights has been reawakened. Indeed, the day after the vote on the Ecuador proposal the HRC adopted by consensus another resolution, promoted by Argentina, Ghana, Norway, and Russia to extend the mandate of the expert working group established in 2011 to promote and build on the UN Guiding Principles, and requesting the High Commissioner for Human Rights to enable a consultative process with different stakeholders in order to explore "*the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses.*"⁷

⁴ The first meeting was a confirmation of the conflictive path the negotiations will go through. Attendance by states was poor. The European Union walked out on the second day and Russia, withdrew its support to the treaty. Few basic agreements have been reached, but the IGWG will continue to work on them.

⁵ Ruggie, J. G., *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, Institute for Human Rights and Business, 09th September 2014. Online at: <http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>

⁶ For instance, *vid supra*, European Union and United States attitudes in footnotes 2 and 4. Being the home countries of the majority of transnational corporations it is possible to attribute their behaviour to corporate influence, according to NGOs. See, Martens, J., *Corporate Influence on the Business and Human Rights Agenda of the United Nations*, Bischöfliches Hilfswerk MISEREOR, Brot für die Welt and Global Policy Forum, Aachen/Berlin/Bonn/New York, June 2014.

⁷ Human Rights Council, Resolution 26/22, Human rights and transnational corporations and other business enterprises, 27th July 2014.

Those in favour of a binding instrument argue that the widely accepted UN Guiding Principles on Business and Human Rights have been proven insufficient and have not provided accountability or real remedies for corporate abuses. Whereas those against a binding instrument maintain that the Guiding Principles need more time and effort to fully develop its potential and the pursuit of a treaty may obstruct this goal, and become an excuse not to implement the Guiding Principles⁸. However, this can easily be overcome, building the treaty on the basis of the Guiding Principles so that both become complementary. In this regard, we must remember that some authors think that further implementation of the Guiding Principles is compatible with the adoption of a binding treaty.⁹

Many questions are now arising around the whole initiative. If some form of treaty is to be adopted, which are the key issues the drafters will need to address under different treaty options? Will the treaty just impose minimal reporting requirements on companies or will it provide for a special court where corporations may be criminally prosecuted for human rights abuses? Which are its possibilities of being widely ratified?

This process seems to not have been given enough importance in the general media. However, the outcome of this initiative, as any other human rights development, may influence daily lives of people around the world, practices of business enterprises and economic development. Therefore, it deserves close attention and serious debate.

⁸ For instance the United States provided many arguments against the treaty. First, such instrument would “unduly polarize” business and human rights issues. Second, the UN Guiding Principles will become undermined by this new “competing initiative.” Third, a comprehensive instrument is not the right approach to the complexities of the topic. Fourth, a treaty would bind only states that become party to it, while the UN Guiding Principles are already universally applicable. Finally, the United States argued that corporations are not subjects of international law, so it is not possible to impose legal obligations directly on them. (*Vid Infra*, Subjects, p. 16) See, *Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument, Statement by the Delegation of the United States of America*, 26th June 2014. Available from: <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>

⁹ Mehra, A., *The Caravan Towards Business Respect for Human Rights*, Institute for Human Rights and Business, 11th February 2015. Online at: <http://www.ihrb.org/commentary/caravan-toward-business-respect-for-human-rights.html>

PREVIOUS INITIATIVES AND CURRENT STATE OF LAW

First attempts to regulate transnational corporations in depth through an internationally binding instrument go back to the 1970s. However, they had been overtaken by other initiatives, like the OECD Guidelines for Multinational Enterprises¹⁰ and the appointment of John Ruggie as the Special Representative of the Secretary General. Activists and developing countries have been the most persistent supporters of the adoption of a treaty. Now, Ecuador has brought the debate back to the international agenda and negotiations on the issue are to be undertaken during next years. Those participating in the discussions may recuperate now some teachings from those past efforts to develop international standards on business and human rights.

The New International Economic Order debates took place in between 1973 and 1974. Developing countries were making efforts to reshape the world economy toward a more statist system. The regulation of multinational corporations was a core element of the program they were trying to adopt. Consequently, the Economic and Social Council passed a resolution mandating the creation of an advisory group of eminent persons and the UN Secretariat prepared a comprehensive report entitled *Multinational Corporations in World Development*.¹¹ Meetings of leading world experts took place in Geneva and soon afterwards, the new UN Commission on Transnational Corporations opened a process of negotiations on a code of conduct to govern the activities of multinational companies which soon became to an impasse.¹²

¹⁰ Adopted in 1976, The OECD Guidelines for Multinational Enterprises are annex to the OECD Declaration on International Investment and Multinational Enterprises. They are recommendations providing principles and standards for responsible business conduct for multinational corporations operating in or from countries adhered to the Declaration, and they cover business ethics on, employment, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.

¹¹ United Nations, *Multinational Corporations in World Development*, United Nations, New York, 1973.

¹² The current division between those pleading for a binding instrument and those supporters of voluntary measures, could already be appreciated, since these were the two main positions around the issue, represented the former by developing countries and the later by OECD countries. This division, together with the developing countries' negative to include national corporations and the OECD members

During the 1980's, negotiations started to fade as developing countries began to compete for the attraction of foreign investment since they had big external debts as a consequence of the 1979 oil-price crisis. Negotiations were finally closed down in the early 1990s and the Commission was abolished.

In 2003, the Working Group on Transnational Corporations, established by the UN Sub-commission on the Protection and Promotion of Human Rights, developed the *Draft Norms on Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, trying to address all human rights in their relation to business, highlighting issues as corruption, consumer protection, and environmental harm. Their intention was to apply the full range of human rights obligations to business enterprises and to transpose the existing system of monitoring and reporting on to companies. However, the Commission on Human Rights refused to adopt the document, alleging that “*has not been requested by the Commission and, as a draft proposal, has no legal standing*”.¹³

Two years later, the UN Guiding Principles' elaboration process started.

UN Guiding principles

In 2005, UN Secretary General appointed Harvard professor John Ruggie as the UN Special Representative for Business and Human Rights. Ruggie presented the “*Protect, Respect and Remedy*” framework in 2008 and the HRC welcoming his report extended his mandate for an additional period of three years. The result of those years of work were the UN Guiding Principles on Business and Human Rights, a set of global standards aiming to prevent and address the risk of adverse impacts on human rights linked to business activity. They were presented to the HRC in 2011, which unanimously endorsed them. They became the first corporate human rights

considering inadequate the treatment given to multinationals by host governments proposed by developing countries, are said to be the causes of such an impasse.

¹³ Commission on Human Rights, *Resolution 2004/116, Responsibilities of transnational corporations and related business enterprises with regard to human rights*, 20th April 2004.

responsibility initiative to be endorsed by the UN, adding to the Un Guiding Principles authoritative status.

The Guiding Principles embody the notion of “polycentric governance”¹⁴, which means that the Guiding Principles lay on the idea that corporate conduct at the global level comes influenced by three different governance systems. First, the traditional system of public law, both domestic and international. Second, a system of civil control involving stakeholders affected by business enterprises and different forms of social pressure, but also collaboration with corporations to stimulate positive change. Third, governance by business enterprises of their own affairs. The aim of Ruggie was to create a system where the “*three forms of governance become better aligned in relation to business and human rights, compensate for one another’s shortcomings and begin to play mutually reinforcing roles, out of which cumulative change can evolve over time*”¹⁵. To make this possible, the Guiding Principles were drawn to reflect the different social roles those governance systems play in the regulation of business conduct. So, the thirty-one Guiding Principles are built upon three interrelated pillars: Protect, Respect and Remedy. This is, the State duty to **protect** people against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to **respect** human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others; and the access to effective **remedy** for the victims of corporative abuse.

But, we must remain clear about the nature of the Guiding Principles. They are an authoritative document, yet not legally binding, usually defined as “soft law”. They reflect existent international law standards but propose no new obligations. The reason was that Ruggie decided to aim for broad consensus across the different stakeholder groups for a basic normative framework. This way the endorsement of the Guiding Principles would be more likely to happen, and this would enable their entrance into

¹⁴ Ruggie, J. G., *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, 23rd January 2015, p. 2. Online at: <http://ssrn.com/abstract=2554726>

¹⁵ *Ibid*, p. 2.

actual policy and practice. So, finally the international community would have a unanimously agreed-upon base on which to build.

This being the landscape we can find two main opinions on the effectivity of the UN Guiding Principles. Some argue that the Guiding Principles are still quite new and that all the parties involved need more time for a better implementation.¹⁶ Some others think that the Guiding Principles are simply too weak to succeed in defeating the traditional business resistance to accountability, and only “hard law” can overcome this situation. Civil society organizations report that not much has improved in practice since the adoption of the Guiding Principles, particularly regarding Pillar Three.¹⁷

In this regard, it is worthy to be mentioned the OHCHR Accountability and Remedy Project, born in November 2014, with the intention of implementing the Third Pillar, and make access to effective remedy to become a reality. This initiative comprises six interrelated projects and it will operate until June 2016 when OHCHR will present its recommendations and conclusions from the initiative to the HRC¹⁸.

Anyway, despite what it may seem, Ecuador itself acknowledges that the UN Guiding Principles on Business and Human Rights are a first step to provide global standards for preventing and addressing the risk of adverse impacts on human rights linked to

¹⁶ They argue UN Guiding Principles are indeed being increasingly implemented by states through national action plans, by international organizations such as the European Union through its new corporate social responsibility policy, by business associations through the issue of ‘user guides’ and by corporations themselves, bringing internal management and oversight systems into greater alignment with the Guiding Principles. See, for instance, *Ericsson’s Sustainability and Corporate Responsibility Report 2014*, using UN Guiding Principles Reporting Framework. Online at: <http://bit.ly/1NZwKTm>

¹⁷ Discouraging legal and practical obstacles keep on frustrating access to justice for victims of corporate abuses. Actually, remarkably in the United States, access to judicial remedies for victims of human rights abuses allegedly committed by business has been limited since the adoption of the UN Guiding Principles. See, for instance, Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 17th April 2013, where the Court ruled that overseas human rights violations may not be litigated in federal courts under the Alien Tort Statute except where they sufficiently “touch and concern” the United States.

¹⁸ See <http://business-humanrights.org/en/ohchr-accountability-and-remedy-project>

business activity. This idea is perfectly compatible with projects for further international legal development.

Current state of Law

It is clear now that nowadays there is no comprehensive international binding instrument on business and human rights. Although a few international laws imposing human rights obligations on corporations or their executives do exist, their coverage is incomplete, fragmentary and in best cases obligations are imposed indirectly.¹⁹

First, the 1948 Universal Declaration of Human Rights, while imposing most obligations on States, is not exclusively directed to them. Its preamble proclaims the Declaration as a “*common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, ...*” Of course, among those “organs of society” we can find business corporations. As a consequence, they should not only respect human rights, but also to promote respect for them and to secure their effective observance. Sadly, even if the binding force of the Declaration is still discussed, it is generally acknowledged that its preamble is not hard law.

Second, corporations and their executives have some indirect obligations to respect human rights derived from general human rights treaties. These treaties joined by States impose obligations on them to protect the human rights of persons within their jurisdiction, including from violations by third parties, which includes corporations.²⁰

¹⁹ General human rights treaties impose some obligations on States but they lack specificity as to the scope of the duties States must impose on companies. Then, it is worthy to mention that ILO treaties are specific, but limited in scope to particular labour rights, for instance, the Convention Concerning Forced or Compulsory Labour, or the Convention concerning Freedom of Association and Protection of the Right to Organise.

²⁰ International law imposes on States a “duty to protect” persons within their jurisdiction from human rights violations committed by business. These commitments require States to take reasonable measures, to prevent violations, to investigate, prosecute, punish, and provide reparations for violations, and, where possible, to restore rights that have been violated.

This State duty to protect is not only limited to negative obligations. States may also impose positive obligations on businesses, such as paying workers a minimum wage²¹. If national law and domestic courts sufficed they would not need to be supplemented by international instruments. However, the situation is very different.

Finally, not every treaty is always ratified by all the States, so not all States are bound by all or the same human rights treaties. Furthermore, even when the States have agreed to be bound by a treaty, they may later lack the will or ability to perform their commitments. And it can be even worse if those treaties lack of monitoring mechanisms to compel the State to fulfil those commitments. This way States will not fully implement their human rights obligations, which obviously eases the path for business to avoid accountability.

Then, the UN Guiding Principles were born with the idea to sort out this fragmentism, even though not as a binding instrument but as a foundation to build upon.

Given this current state of law, it seems easy for transnational corporations to get away with the abuses they commit. As a consequence, it is an understandable reaction to claim for a single international binding instrument to regulate the negative corporate-related impacts on human rights.

In words of John Ruggie, as the UN Guiding Principles “*were never intended to foreclose other necessary or desirable future paths*”²², the business and human rights agenda must continue their inevitable evolution into future developments, including further legalization, and those opposing the treaty should face the fact that a relatively new area of international law such as business and human rights cannot and will not remain inalterable forever. And so, it seems that Ecuador’s proposal has now brought us the opportunity to go further.

²¹ ILO treaties require States to implement and enforce laws on minimum wages, maximum hours, safe working conditions, freedom of association, etc.

²² Ruggie, J. G., *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, forthcoming chapter in *Business and Human Rights: Beyond the End of the Beginning*, Rodriguez-Garavito C. (ed.), 2015. Online at: <http://ssrn.com/abstract=2474236>

ANALYSIS AND IMPLICATIONS OF A BINDING INSTRUMENT

The aspiration for a general legal instrument on business and human rights covering all relevant dimensions is understandable and it may even seem a simple task but its practical realization presents great challenges. For instance, an important political challenge would be to overcome the improbability that states with many different needs and preferences could all agree to meaningful legal liability standards. As a consequence, norms included in such treaty could end up imposing very low standards. Hence, social pressure on business to perform at a higher level could become ineffective as corporations would be able to allege full compliance with the treaty. Highest diligence will be necessary during the elaboration of the treaty to avoid such a counterproductive consequence to take place. But there are some no less important legal challenges like the currently increasing fragmentation of international law, already documented by the International Law Commission²³. Indeed, business and human rights as a category involves many complex areas of law²⁴ for a single instrument to provide full coverage. Then, an attempt to combine all of those issues in a single general treaty could end up leading to too high levels of abstraction and this would decrease the possibilities of such instrument to actually be effective in practice.

So, for a successful development of the proposed treaty a certain degree of carefully built and weighed consensus is required on some key areas such as the determination of its scope, content, form, subjects and enforcement. In this regard, there are many possibilities to be taken into account²⁵. We are now going to examine some of the

²³ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations, Geneva, August 2016.

²⁴ Such as human rights law, labour 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, corporate and securities law.

²⁵ For a deeper analysis see: Cassel, D., and Ramasastry, A., *White Paper: Options for a Treaty on Business and Human Rights*, Prepared for American Bar Association, Center for Human Rights, and The Law Society of England and Wales, May 2015. Online at: <http://bit.ly/1Qdc7Cp>

options that the IGWG may find when considering different alternatives for addressing these key issues in the proposed treaty.

Scope²⁶

The scope of the proposed treaty is, according to its supporters, to be broad, to apply to any case of human rights abuses committed by ‘transnational corporations and other business enterprises’. It seems a titanic task that indeed will take years to accomplish and risks to end up either as the UN Commission on Transnational Corporations or with a too abstract instrument unable to be operated in practice.

In fact, John Ruggie has said that an instrument with such a broad scope “*would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places*”.²⁷ He advises that to be successful international instruments should be “*carefully constructed precision tools, addressed to specific governance gaps that other means are not reaching*”²⁸, and suggests to start for an obvious candidate: business involvement in gross human rights abuses²⁹, including those that can qualify as

²⁶ It has not been easy to find the better way in which to divide this section since all categories are deeply interrelated and overlap. ‘Subjects’ or ‘Enforcement’ are obviously part of the ‘Content’ of a treaty. The ‘Content’ conditions the ‘Form’. And it is really difficult to discriminate what should go under the section ‘Scope’ rather than ‘Content’. I have just opted for the division that seemed better to me to address all the issues related to the treaty and accepted ‘Scope’ as a broader concept, whereas ‘Content’, in this context, should be understood as substantive norms.

²⁷ Ruggie, J. G., *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, Institute for Human Rights and Business, 8th July 2014. Online at: <http://www.ihrb.org/commentary/past-as-prologue.html>

²⁸ Ruggie, J.G., *A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie*, John F. Kennedy School of Governance, 28th January 2014. Online at: <http://bit.ly/1KQBQz7>

²⁹ Many scholars have criticised this idea because of its too limited scope that would cover only a few cases, excluding broader human rights issues that do not qualify as gross violations. Besides, a treaty like that would not fully address the accountability gap, which is essential. And last but not least, to exclusively focus on crimes would place more emphasis on civil and political rights and undermine efforts to advance socio-economic rights. See: Bilchitz, D., *The Necessity for a Business and Human Rights Treaty*, 30th November 2014. Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562760; Darcy, S., *Key Issues in the debate on a*

international crimes, such as genocide, extrajudicial killings, and slavery and forced labour, but, he also acknowledges that gross abuses are just one possibility and comments other may be worth considering.³⁰ Any case, Ruggie defends that what is needed is laws that get implemented and make a difference on the ground, and in his opinion this would not be possible if the instrument's scope is too broad. In this regard, Anita Ramasastry³¹ has noted that a trend towards narrowly focused treaties is increasing. And suggests that a set of these kind of specific instruments is more likely to be adopted than a single overarching human rights framework, just as it has been happening in the area of terrorism³².

binding business and human rights instrument, Business & Human Rights in Ireland, 13th April 2015. Online at: <https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/>; Deva, S., *Corporate Human Rights Abuses and International Law: Brief Comments*, 28th January 2015. Online at: <http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/>

³⁰ In *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, (Op. Cit.), Ruggie himself quotes Erika George's suggestion of "exploring binding legal instruments that would require integrated reporting in high impact industry sectors could be a beginning." See: George, E. R., *Incorporating Rights: Making the Most of the Meantime*, S.J. Quinney College of Law research paper No.112, University of Utah, Salt Lake City, 2014. Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560082##

³¹ Ramasastry, A., *Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement*, in Deva S., and Bilchitz, D. (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, November 2013.

³² For obviously controversial political reasons, the international community has been incapable during the last decades to adopt a comprehensive instrument on terrorism. Instead, agreements have been reached on a set of treaties addressing specific issues such as hostage-taking, hijacking, etc. See, for instance, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in 1970; the International Convention against the Taking of Hostages, signed in 1979; or the International Convention for the Suppression of the Financing of Terrorism, signed in 2000.

However, many human rights treaties set broad principles and general measures, which are then successfully developed throughout jurisprudence³³.

Ruggie also doubts that a too overarching treaty will be supported by major States³⁴. In this regard, it has been suggested³⁵ that treaties with a narrow scope, could follow the example of the Anti-Bribery Convention, as it is narrowly focused on a separate issue, and had considerable support from the United States. But some previous experiences show that lack of support of the main international powers would not necessarily mean the treaty is predestined to be a failure. For instance, the United States has not ratified the Convention on the Rights of the Child, the Additional Protocol II of the Geneva Conventions or the Rome Statute of the International Criminal Court and they have progressed positively without their support.

Content

Resolution 26/9 is not addressed to any specific human rights abuses. Its aim is to create an overarching legal framework regulating business conduct in relation to human rights. The idea may seem like a reasonable aspiration. But, as noted before, international political and legal order pose great challenges. The category of business and human rights comprises many complex areas of international law. As a result there is a wide range of possible contents to include into a treaty on business and human rights. So, possible norms to incorporate in to the treaty range from a weak simple mandate of public reporting by large companies, to strong civil and criminal norms and corresponding remedies, as the treaty supporters claim.

³³ E.g. just like the European Court of Human Rights has been developing the European Convention through its jurisprudence.

³⁴ Ruggie J. G., *Quo Vadis? Unsolicited Advice...*, *Op. Cit.*

³⁵ Darcy, S., *Op. Cit.*

As for the nature of the norms to be included the treaty may include rules of *jus cogens*, customary international law, human rights treaties in States Parties, the norms specified by the UN Guiding Principles³⁶, or all of them.

As for the specific human rights covered by the treaty, they depend on the duties imposed by the treaty. In this case we can distinguish three main possibilities.

First, the treaty will address a broad range of rights if its norms are focused on reporting or implementation the whole spectrum of rights that the commentary to Guiding Principle 12, acknowledges as the minimum catalogue of rights that can be affected by business activities³⁷. This approach is consistent, with the principles of indivisibility universality and interdependence of all human rights.

Second, the list of specific human rights can be narrower if the treaty establishes complaint procedures, or provides for civil damages remedies. In this case, the rights to be invoked would be those considered “reasonably justiciable”. The list would still be

³⁶ UN Guiding Principles on Business and Human Rights, Guiding Principle 12: “*The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International labour Organization’s Declaration on Fundamental Principles and Rights at Work*”

³⁷ Guiding Principle 12 recognizes the business responsibility to respect, at minimum, all rights established in the International Bill of Human Rights, which includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; and the ILO Declaration of Fundamental Principles and Rights at Work, which addresses specific workplace rights, such as freedom of association, prohibitions on child labour and forced labour, and non-discrimination. In the commentary to Guiding Principle 12 it is expressly stated the responsibility of corporations to respect the entire spectrum of human rights “because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights...In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.”

quite long but it would possibly leave outside of the spectrum rights considered as “less compelling”.³⁸

Finally, if the treaty would focus on criminal sanctions, it would not apply to all human rights abuses, but only to those caused by the commission of an international crime, either an already existent one or a new crime recognized by the treaty. This would be the narrowest possible catalogue of rights to be addressed by the treaty, excluding most human rights infringements by business, which usually do not qualify as international crimes³⁹.

Of course, the treaty could address different sets of rights combining some of the previously explained possibilities.

However, those are all theoretical possibilities. We must not forget that the principal reason behind this recently renewed claim for a treaty is the necessity to better address two main issues: access to remedies and extraterritorial obligations. These should be addressed by the treaty, whatever the path the IGWG may choose among those just explained, since they are more in need of further clarification and implementation than any other issue in the area of business and human rights. As for access to remedies, the International Commission of Jurists has stated that “the most acute challenges and needs in the area of business and human rights relate to the deficits both in ensuring the accountability of companies and in access to effective remedies for victims of abuse”⁴⁰. They have noted problems with jurisdictional rules, corporate structures, the procedure for claims, and the enforcement of judgments. While the right to a remedy is an obvious component of human rights law, its realisation faces significant obstacles in the business and human rights area, especially in relation to activities of transnational corporations. As for extraterritorial obligations, the UN Guiding Principles do not require States to

³⁸ However, even rights that might appear “less compelling” compare to other bigger issues, such as the right to leisure, can become urgent depending on the context, for instance, in cases in which workers are subjected to long hours with no rest.

³⁹ *Vid supra*. Footnote 27, David Blitzch, Shane Darcy, and Surya Deva.

⁴⁰ International Commission of Jurists, *Needs and Options for a New International Instrument In the Field of Business and Human Rights*, Geneva, June 2014.

exercise jurisdiction extraterritorially. Instead, they simply acknowledge that this possibility exists. However, for different reasons States have been reluctant to apply it in the business and human rights context. Access to remedies and extraterritoriality are both the key, the really valuable content of a treaty on business and human rights, the only way through which such instrument will achieve practical value. This means that these two issues addressed correctly will make the difference between the binding treaty civil society organizations are pushing for and another international declaration of good intentions, which is the last thing international community needs to waste time on. This would raise the questions of which ways for remedy the treaty would provide, to be treated in an upcoming section, and how to overcome some States resistance to extraterritoriality.⁴¹

Clearly, the IGWG will need to make difficult choices about the specific content of the treaty.

Form

There are also different options for the IGWG to consider business with regard to the form of the treaty.

One possibility would be a “framework treaty”. This means the treaty would only address broad principles and the States would be committed to supplement its provisions later, for instance, through additional protocols⁴². This option presents attractive advantages: it will ease the way to the achievement of initial broad agreement by States, those broad principles could be directly transpose from the UN Guiding Principles, the negotiation process will be not so lengthy since more complex issues

⁴¹ Shane Darcy in *Key Issues in the debate on a binding business and human rights instrument (Op. Cit.)* suggests “an approach similar to the complementarity regime under the International Criminal Court, where a home State would only be under an obligation to take proceedings if the host State was either ‘unwilling or unable’, with some external oversight or remedy in case neither acts”.

⁴² Examples of this option could be the European Convention on Human Rights, which has been further developed by 15 additional protocols, or the Vienna Convention for the Protection of the Ozone Layer adopted “with a view to the adoption of protocols and annexes”, and posteriorly developed by the Montreal Protocol on Substances that Deplete the Ozone Layer.

could be postponed to future protocols, etc. However, it is also true that this approach has one major disadvantage: Most likely it would not initially provide for access to remedy, which, we must bear in mind, is what treaty promoters are mainly interested in.

Another possibility, completely opposite to the previous one, would be a comprehensive treaty, which seems to be the preferred option of the treaty promoters. A treaty that would address the whole catalogue of human rights likely to be affected by business and that would provide for legally enforceable corporate responsibility and access to remedies through different possible measures such as state report, individual complaints, international civil adjudication, international mediation and arbitration, and/or international criminal prosecution. This has an obvious and already mentioned disadvantage: the more comprehensive, the more difficult it would be to negotiate and to reach an agreement among States. As for the obvious advantage, that the treaty promoters intend to achieve through this approach, would be more effectivity in providing remedies.

One last possibility would be to adopt a set of sectoral treaties. This means to adopt many different narrower treaties focusing each of them on a particular aspect of the area of business and human rights. Some already mentioned advantages of narrowly focused treaties is that agreements are easier to achieve and their elaboration processes is simpler. However, this option presents an important disadvantage, especially if we compare it to the “framework treaty” approach, that would be more recommendable in case the IGWG wants to approach different issues separately, as after all protocols would work as those sectorial treaties but removing the risk of fragmentation and compartmentalization that individual sectoral treaties pose. This way, the framework system would result in a more harmonious and coordinated legal body.

Subjects

To determine the duty bearers of the obligations imposed by the treaty, the IGWG will have to face the old academic discussion of whether corporations are subjects of international law. So, will the treaty bind only States or will it also impose direct obligations on corporations? One of the objections that the United States opposed against the Resolution 26/9 was that corporations are not subjects of international law.

The truth is that there are different schools of thought on the issue⁴³. However, it is also true that nowadays many trade agreements and international instruments grant corporations rights⁴⁴. So, setting aside the doctrinal debate about corporations as subjects of international law, if business can have rights recognized by treaties, why cannot they also have human rights obligations? Anyway, if the treaty will finally impose direct obligations on business, will have to be decided according to political choices by the IGWIG.

The following step will be to decide to which kind of business corporations the treaty will apply.

Resolution 26/9 assigns to the IGWG 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.*” Afterwards, in a footnote,

⁴³ Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, pp 25-58. Traditional approaches maintain that it is legally impossible to impose duties on non-state actors since treaties cannot bind those not being party to them, and an application of such rights and duties bestows inappropriate power and legitimacy on non-state actors. Clapham goes beyond the traditional approach and argues that some of the obligations found in public international law and traditionally only applied to states, also apply to non-state actors. They might consequently be held accountable for violations of human rights. If some other scholars have argued that the application of human rights obligations to non-state actors trivializes, dilutes and distracts from the very same concept of human rights, the counterargument that Clapham puts forward is that we can legitimately reverse the presumption that human rights are entitlements enjoyed by everyone into an obligation of everyone to respect human rights. The duties of corporations become a consequence of the power and influence they possess. According to Clapham, the ability of the human rights system to adapt to new demands is its strength and it is flexible enough to cope with these new needs. The fact that non-state actors currently cannot be a respondent in a dispute before an international court or tribunal, does not mean that they cannot be duty bearers outside of this context. International law already extended duties to international organizations and there is no reason that duties cannot be accommodated for other non-state actors.

⁴⁴ For instance, under the European Convention on Human Rights, corporations have the right to make claims against States before the European Court of Human Rights. See: Rezai, S., and van den Muijsenbergh, W.H.A.M., *Corporations and the European Convention on Human Rights*, University of the Pacific, March 2011, pp 47-50. Online at: http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012_Corporationsandthe.pdf

“other business enterprises” are defined excluding national companies⁴⁵, so that the treaty would exclusively concern transnational corporations. This decision has been criticised by different stakeholders for different reasons. Many civil society groups think it would provide a loophole through which companies may easily escape the application of the treaty⁴⁶. Furthermore, if any company can potentially cause harms to human rights, and the UN Guiding Principles –for now most important standards in the matter- do not draw any distinction between them according to transnationality standards⁴⁷, why should a treaty that intends to make remedies for the victims to become real in practice create such distinction if for the victims the corporate form of the abuser is irrelevant? As for States, those which are home countries of transnational corporations have been reluctant to exclusively focus the treaty on those kind of business. Finally, as Ruggie notes⁴⁸, since there is no real difference between “transnational corporations” and “enterprises that have a transnational character”, and the definition expressly excludes “local businesses registered in terms of relevant domestic law”, the concept of “other business enterprises” is merely redundant and plays no part in the resolution. He considers that this definition is unlikely to serve as

⁴⁵ Human Rights Council, Resolution 26/9 on the *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 26th July 2014. Footnote 1: “‘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.”

⁴⁶See, for instance, *SOMO Oral Statement Joint Submission in Panel II on Scope of the Proposed Binding Treaty*, Geneva, 10th July 2015. Online at: <http://bit.ly/1VmJlJf>

⁴⁷ The Guiding Principles explicitly apply to all business enterprises. See *UN Guiding Principles on Business and Human Rights*, Guiding Principle 14: “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.”

⁴⁸ Ruggie, J. G., *Quo vadis? Unsolicited Advice...*, *Op. Cit.*

the basis of the treaty, and envisages that major States will agree on an instrument that also applies to national companies⁴⁹.

Another important issue for the IGWG to face has to do with parent companies and their affiliated. Will the formers be liable for the wrongs of their subsidiaries? It does not seem very likely. The most broadly accepted doctrine among States practice is that of the separate entity. According to it, for legal liability purposes, two corporations are treated as separated entities although one of them has invested in the other, even if as a result the investor owns 100% of the subsidiary. So, keeping their separated personalities, one cannot be held responsible for the wrongs committed by the other, with some exceptions that allow the application of what is called the “lifting of the veil” doctrine such as evidence that the subsidiary was created to defraud creditors or as a mere façade.

Enforcement

Once the treaty content and subjects are settled, more questions will keep on arising. How will the treaty be enforced? Which kind of remedies will it provide for? At a domestic level it could provide for access to civil claims, criminal prosecution, administrative measures, or a combination of all or two of them. In this case, the costs and the length of the procedure may be the main advantages, whereas differing national approaches and uneven resources could become the main challenges. At an international level, it could provide for some type of international court or for a treaty monitoring body. In this last case, the entity mandated with the supervision of business activities risks to become ineffective given that it is not clear if it can feasibly be able to track the activities of thousands of corporations⁵⁰.

⁴⁹This has also been pointed out by many NGOs. See, for instance, Ganesan, A., *Dispatches: A Treaty to End Corporate Abuses?*, Human Rights Watch, 1st July 2014. Online at: <https://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses>

⁵⁰ According to UN statistics there are around 80,000 transnational corporations in the world, with an average of ten subsidiaries each, and millions of national firms. Existing treaty bodies are struggling to keep up with monitoring the limited number of States even dealing only with a specific set of rights or one affected group. So, it is difficult to think of a treaty body that can cope with the much larger and growing number of businesses activities in relation to all rights of all persons affected by them. See

As noted before, what will clearly be fundamental in terms of practical enforcement of the treaty, since it will be focusing on transnational corporations that operate and have impacts in and are related to different countries, is that it provides for extraterritorial jurisdiction. This is essential to an adequate enforcement of the treaty which means nothing but the biggest possible asset of a binding instrument.

Relationship with UN Guiding Principles

John Ruggie complains that the Ecuador's proposal makes no effort to build on the UN Guiding Principles and maintains that some of the treaty supporters have not done anything to implement the Guiding Principles within their own countries⁵¹. In fact, the United States and the European Union have criticised the Resolution for being a distraction from or an attempt to undermine the UN Guiding Principles. Nevertheless, it is generally acknowledged that negotiations on a binding instrument could take years, and this can be considered as an opportunity to take the implementation of the Guiding Principles more seriously,⁵² at least as an interim measure if nothing else.

In this regard, it does worth say that every country that spoke during the Council meeting that would end up in the adoption of Resolution 26/9 stressed the importance of implementing the Guiding Principles. In fact, the day after the vote on the Ecuador proposal the Council adopted a second resolution, introduced by Argentina, Ghana, Norway, Russia and other forty States that extends the mandate of the existing UN Working Group on Business and Human Rights to promote and build on the Guiding Principles and to prepare a report considering on the benefits and limitations of legally binding instruments. So, it seems that despite all the recent fuss about the treaty, the Guiding Principles are not going to be immediately castoff by the international

Ruggie, J. G., *A UN Business and Human Rights Treaty Update*, John F. Kennedy School of Governance, 1st May 2014. Online at: <http://bit.ly/1RjT0Hy>

⁵¹ Ruggie, J. G., *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, *Op. Cit.*

⁵² See George, E. R., *Op. Cit.*

community, since so many States consider them a useful tool which full potential has not been exhausted yet.

As for the elaboration process, whatever the Resolution says, it is impossible that the treaty will not build upon the UN Guiding principles since they are the most important international instrument on the matter and cannot definitely be ignored. Indeed, in Resolution 26/9, there is nothing drastically different to issues already raised by the UN Guiding Principles⁵³.

Once the treaty has been approved then there are two main possibilities. That the UN Guiding Principles become unnecessary in case we have a fully comprehensive treaty or that the UN Guiding Principles will cover those areas that are not addressed by different sectorial treaties or by the protocols of a framework treaty.

⁵³ Resolution 26/9 agrees that “the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State” and transnational corporations and other business enterprises have only a “responsibility to respect human rights”

CONCLUSION

The questions just raised above should be answered by the IGWG in following meetings. Hopefully, their work will follow the consensus achieved with the UN Guiding Principles on Business and Human Rights.

Certainly, we must acknowledge the importance of the UN Guiding Principles. They draw the attention of the international community to business and human rights, providing a coherent and unanimously endorsed framework addressing human rights in relation to business activities. They have been a positive start point, a comprehensive body of soft law, which is how governments usually make initial moves into highly complex and conflicted issues.

However after four years of its endorsement, few States have developed national plans, and so their commitments fall short of what is needed. As the Guiding Principles, remain a voluntary, non-binding initiative, they are not sufficient to meet the challenges posed by the power of corporations and to provide redress for their negative impacts. Resolution 26/ 9 is bringing us at least the opportunity to meditate on further legalization.

In this regard, many people considers that a treaty on business and human rights may be redundant and superfluous and they provide different arguments to support these idea. Of course, not completely mistakenly, they praise the UN Guiding Principles and maintain that they have contributed to change States⁵⁴ and business attitudes with respect to human rights⁵⁵. They also argue that, according to Resolution 26/9, the treaty would only apply to transnational corporations⁵⁶. They ridiculously maintain that a treaty will never have the power to end all abuses of human rights committed by

⁵⁴ Some States have adopted different measures in line with the UN Guiding Principles. For instance, see United Kingdom's National Action Plan for the implementation of the Guiding Principles.

⁵⁵ For instance, some corporations have introduced for the first time internal human rights policy frameworks. See, for instance, Total's Human Rights Internal Guide. Online at: <http://bit.ly/1LXJiGr>, or see footnote 16 for Ericsson's Report.

⁵⁶ *Vid Supra*, footnote 43. This obstacle is easily surmountable if the IGWG wishes so, and actually has already been treated by them on their first meeting with no conclusive results.

business overnight -Of course not. But, which kind of treaty has ever had such an effect?-. Some others express their doubts about imposing direct obligations on corporations either because they are convinced that no other actors than States can be subjects of international law, or because they just do not want to give them such category, arguing that it bestows too much power and legitimacy on them, ignoring that in practice they already have too much power but not the responsibility that such great powers should usually carry. Finally, many people, like John Ruggie himself, are reluctant to an overarching treaty because the category of business and human rights involves a vast range of legal issues and diverse matters, so that a general business and human rights treaty would have to be so abstract that, according to them, it would be practically ineffective.

On the other hand, treaty supporters argue that the main reason for backing the treaty initiative is the widespread abuse of human rights by corporations that continues to take place, and the disturbing lack of effective remedy to hold them accountable for those abuses. They have also expressed that, only hard law can guarantee that business are dissuaded to commit abuses against human rights, and that soft law and voluntary codes, such as the UN Guiding Principles, are not enough since they do not create human rights obligations for business corporations and they do not force them to prevent human rights abuses and to provide remedies in case that prevention fails⁵⁷. They also maintain that a treaty would ensure an even enforcement of human rights law across jurisdictions, which is key to enhancing legal certainty and stability among different jurisdictions. Some of the supporters have also expressed that the lack of a binding instrument is also damaging for corporations since it makes difficult that they can gain public trust and support. Finally, as a counterargument to that of the allegedly high abstraction of the treaty, even if some detractors have not noticed it or deliberately choose to ignore it, the UN Guiding Principles are also comprehensive, involve all

⁵⁷ Amnesty International has suggested that the Guiding Principles enjoy broad support from business, “because they require little meaningful action”. See Widney Brown’s letter in response to John Ruggie’s letter to Hugh Williamson on his article “Amnesty criticises UN framework for multinationals”. Online at: <http://www.ft.com/cms/s/0/a3101700-2439-11e0-a89a-00144feab49a.html#axzz3n94Y5zq4>

states, all businesses and all internationally recognized rights, and still have enjoyed wide support⁵⁸.

Opinions on the issue seem irreconcilable and due to this, the treaty process could end up like that of the Code of Conduct. For preventing this to happen the IGWG will have to conduct the negotiations in the most skilful way. In these regard, John Ruggie has provided some advice⁵⁹, such as carefully select the right Chair of the IGWG as it is essential to get any agreement on very complex issues, or to involve every stakeholder in the debate, including States, civil society and business from every region and even those stakeholders that are not in favour of the treaty. Unanimity is improbable on this topic but dialogue is important to try and build the widest support possible. Ruggie also insists in the importance to get over the focus on transnational corporations set by Resolution 26/9 to include all kind of business, and also invites the negotiators to do research on earlier precedents and to gather information on the subject, so that negotiations will be well-founded and, hence, productive. Finally, he reminds that keeping on building on the UN Guiding Principles and improving its implementation throughout the long process of elaboration, is extremely important to better address human rights abuses here and now.

But, if there is something in which Ruggie has insisted is that the category of business and human rights involves many complex areas of national and international law for a single instrument. Such a treaty risks to end up being so abstract that it could be empty, ineffective in practice. So, for a successful development of the proposed treaty a certain degree of carefully built and weighed consensus is required on some key areas. It will be difficult that States with many different needs and preferences could all agree to meaningful legal liability standards. As a consequence, norms included in such treaty could end up imposing very low standards. Hence, social pressure on business to perform at a higher level could become ineffective as corporations would be able to allege full compliance with the treaty. Highest diligence will be necessary during the

⁵⁸ See Surya Deva, Frederic Megret, and John Tasioulas in Ruggie J. G., *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, Op. Cit. p. 5

⁵⁹ Ruggie J. G., *Quo Vadis? Unsolicited Advice...*, Op. Cit.

elaboration of the treaty to avoid such a counterproductive consequence to take place. So clearly, the successful development of a treaty requires some consensus among States, as this is the first step to generate reasonable expectations that the parties will enforce its provisions, so it will become properly effective in addressing human rights abuses. For this to happen, as already mentioned, the treaty will have to provide for extraterritorial jurisdiction and for effective remedies⁶⁰, something that the UN Guiding Principles lack of sufficiently.

Therein, effective access to remedies are the most important objective behind this treaty. Thus, after consultations and negotiations with stakeholders, the IGWG will see which one is the best way to ensure that necessary access to remedies for the victims. And as we have seen, there are many options in which the IGWG could address this issue.

Although, it is not likely that a framework treaty would initially provide for access to remedy, it seems a realistic possibility for the States to agree upon. And that initial agreement is a way of, even though slowly, eventually getting to that desired goal of the effective remedies. Besides, there is no reason why, in the meantime, States cannot keep on building on the UN Guiding Principles. This is, however, one of the many possible ways in which the IGWG can decide to address the topic. So far, their first meeting has not shed much light on this or other issues⁶¹, but following reunions should be more productive. Also the resolution presented by Argentina, Ghana, Russia and Norway, may anyway develop a positive parallel process providing for practical information, insights, and guidance on the issue, being even useful for the treaty negotiators.

To sum up, a binding treaty is a reasonable aspiration and, if there is enough will among the international community members, a possible prospect. But the path to the eventual adoption of a treaty will not be a bed of roses. This, though, is not a sufficient excuse to not go for further legalization when it is obviously needed, since it has been clearly shown that current law and the UN Guiding Principles do not satisfactorily provide for

⁶⁰ *Vid supra, Content and Enforcement*

⁶¹ See Human Rights Council, *Draft Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Report of the Chairperson-Rapporteur: Amb. María Fernanda Espinosa Garcés*, Geneva, 10th July 2015. Online at: <http://bit.ly/1KNWEHk>

remedies for victims. Nevertheless, since it is known the way to the eventual treaty will be long and uncertain, it should not be an excuse for States to stop implementing UN Guiding Principles. They may not be the ultimate legal instrument for providing remedies but, so far, they have been the best the international community has achieved until now. They are and they will always be the first serious and firm step into a better address of business and human rights issues. But they must not remain as the only step.

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