SUMMARY OF THE WORKSHOP ON A TREATY ON BUSINESS & HUMAN RIGHTS (MADRID, 26 JUNE 2015)

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On 26 June 2015, the Autónoma de Madrid University, Spain, and Graduate School of Government and European Studies, Brdo pri Kranju, Slovenia, hosted a Workshop devoted to the discussion of whether and how a treaty on business and human rights could be adopted, which took place in Madrid (programme available here: http://business-humanrights.org/en/workshop-on-a-treaty-on-business-human-rights). The idea for a potential UN treaty on business and human rights has been around in international civil society for many years. Moreover, several years ago, two human rights law professors included in the draft statute proposal for the World Court of Human Rights the proposal that such a body would also have jurisdiction over corporations.¹ However, the formal proposal for a UN treaty on business and human rights was first put forward by the delegation of the Republic of Ecuador at the September 2013 session of the Human Rights Council, when they submitted a statement aimed at the adoption of ‘an

¹ Julia Kozma, Manfred Nowak and Martin Scheinin, A World Court of Human Rights - Consolidated Statute and Commentary (Vienna: Wissenschaftlicher Verlag, 2010).
international legally binding instrument, concluded within the UN system, which would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States.\(^2\) Almost a year later, the UN Human Rights Council adopted on 26 June 2014 with a majority vote, a Resolution establishing “an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights; whose mandate 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.”\(^3\) Aside from some general observations, the proponents of a binding treaty on business and human rights have been so far mostly silent on what exactly the treaty should entail. The co-organizers where Nicolás Carrillo-Santarelli and Jernej Letnar Černič, and the main points of the presentations and highlights of the discussion are offered below.

Chiara Macchi underscored that the processes of adopting a treaty on business and human rights and non-binding standards (as the so-called Ruggie Principles) are not incompatible, as highlighted by the Treaty alliance. Addressing fears that treaties could have too broad a content, she considered that a treaty could serve to solve issues as those related to extraterritorial jurisdiction or allocation of liability within corporate groups (ratione materiae or scope questions). On the other hand, she argued that a supervisory body could complement the work of others (as the HRC or CRC), some of which have already issued comments and observations stressing the need of State regulation of corporate conduct and have addressed human rights abuses. Such a body could monitor the respective governance gaps and focus on the respective recommendations for States. As to the fear that the process of adopting a treaty could be too lengthy, she argued that the prospect of a hard law solution could help catalyze work on it and stimulate recommendations. Regarding how divisive the reception of the Ecuadorian and South African resolution proposal was, she stressed that this is not news in the human rights landscape, and that important treaties have had similar receptions at first, reason why this factor should not be exaggerated; and argued that customary legal processes may be developed. Moreover, countries that did not support the resolution at first are still discussing about it (as happens with Brazil and encouragements for EU countries to participate in negotiations). For her, the great merit of Ruggie’s mandate was to make businesses, States and NGOs acquire a common language on issues as sphere of influence, supply chain or due diligence. Finally, she underscored that there are encouraging signs in some jurisdictions on the examination of allegations of corporate abuses.


Tara Van Ho mentioned that, while initially in favor of attributing direct international responsibility to corporations, she no longer thinks that is the best course of action, favoring a traditional approach, as the one present in the Ruggie Principles. According to her, such an approach, based on State obligations to undertake regulation and prevent and respond to abuses, prevents losing a division of labor and attribution of responsibility to States. In this regard, she considers it necessary to have the possibility of attaching to an actor (i.e. States) the obligation to remedy; and that diffusing responsibilities harms more than benefits victims. Additionally, it could lead to losses in the primacy of peoples and democratic States and risks putting corporations at the center or in a position of primacy under international law. She wondered, for instance, how the interests of shareholders versus the obligations to respect and fulfill human rights could be balanced, something she considered tricky in light of the Anglo-American understanding that corporations serve to maximize shareholder value. Furthermore, shareholders have an interest in States and other actors buying from them, which could lead to some conflicts of interest were corporations to have duties to fulfill. One aspect she considered complicated was how to find jurisdiction, given how corporations can simultaneously be in different places and how their presence and operations can appear and disappear in States, being the continuity of corporate actors another problematic aspect, alongside those of the corporate veil or the difficulty to pinpoint individual responsibility. She argued that some objectives can be achieved without direct international obligations.

Nicolás Carrillo-Santarelli responded to fears of making corporations addressees of international human rights law by arguing that, as happens with common article 3 under IHL, making an actor the subject of direct international obligations does not empower it or change its status, but rather merely makes it the subject of duties and makes it more likely for others to pay attention to its conduct and supervise it and for the addressee to be aware of legal expectations, which can in turn lead to changes in conduct and attitudes. He considered that corporate responsibilities may well differ from those of States under human rights law; and that a treaty or customary law can complement rather than replace soft law and voluntary approaches, with the latter having the drawback that, absent domestic legislation, they can be ignored with no legal consequences, which may lead to impunity and lack of remedies to victims when States are diligent but fail to respond to or prevent corporate abuses, since States will not have responsibility in those cases. Furthermore, direct international obligations will entitle international and domestic authorities and actors to supervise (and sometimes judge) corporate conduct in their light.

Surya Deva addressed some apprehensions, noting how people are no longer making the argument that a process to adopt a treaty on business and human rights will undermine or replace the Guiding Principles and other initiatives. After all, he argued, a treaty should not be conceived in isolation from them, and it cannot be effective alone in making impunity fixed. That being said, binding norms offer the added value that they will signal that international law will be breached if the are violated. He also posited that is businesses, investment and trade
are subordinated to human rights, all can flourish, but the same will not happen if human rights are subordinated to them. He also considered it important to rebalance and fix asymmetries, as the situation of asymmetry regarding territorial human rights aspects, since business operations are not territorial. For this reason, for instance, extraterritorial obligations are important. The author also noted the importance of not glossing over the fact that the Guiding Principles have limitations, which must be filled. He remarked that, at the very minimum, companies should have the duty to respect human rights, and that in some cases, as those of State-owned enterprises, they may have obligations to protect or fulfill in certain situations, being it important for victims to have access to remedies. Altogether, a treaty should try to overcome obstacles and aspects not acknowledged by the Guiding Principles. Moreover, international and national law should not be seen as separate compartments when addressing corporate abuses through law. Surya also provided what he considers are key principles to negotiate a treaty on business and human rights: there should be a sound basis why companies have human rights obligations (social expectations, etc.) and a sound normative basis (why human rights are applicable to companies and not only to States; why they are not negotiable or optional norms; and why if corporations benefit from taxes and legal norms they must respect the rules of the game, which include human rights as non-optional ones); the process of adopting a treaty should be victim-oriented and victim-centered; and a treaty should apply to all types of companies, not just to transnational ones, forbidding gross violations of human rights. He concluded by mentioning that the treaty process is very beneficial and serves to move the agenda further, being it crucial to keep fundamental principles in mind and negotiate in good faith, not seeing the treaty as an isolated instrument. When responding to some questions, Surya said that the imposition of direct international obligations on both States and non-state actors as corporations is already there, as shown by IHL; and that international legal personality as an alleged conceptual barrier is not relevant, because when it comes to companies no one says they cannot sue States based on investment treaties because they are not persons, reason why it is paradoxical that the argument is made when trying to impose obligations on them. He also addressed the issue of corporate veil and liability based on a principle of subsidiarity or due diligence.

The Mission of Ecuador to the United Nations in Geneva presented how the affirmation that the Guiding Principles were not binding prompted the beginning of their efforts; and pointed out how some States, especially industrialized ones, prefer to only have soft law rules. Accordingly, in 2014 Ecuador took two major steps on the possibility of contributing to the emergence of binding norms: firstly, it raised awareness and delivered a common statement on behalf of 85 countries from all over the world, including African and Arab groups and countries from other regions, sharing a common view on the need of a stronger legal framework on the issue of business and human rights. The second major step was a workshop on a legally binding instrument (no mention of the word treaty was made) that took place in Geneva for two days, being this what they are currently working on. From 2011 onwards, Ecuador has been leading this process together with
South Africa, but other countries have lent their support, as well as civil society has (many civil society organizations have joined the treaty alliance, which was created for the specific issue of human rights and transnational corporations). Ecuador has the view that it is important to discuss what should be included in the treaty. An important consideration of the Mission is that there is a big imbalance relationship, since corporations have frameworks of protection, especially regarding investment, but there are no legally binding rules for them to follow or respect or to be held accountable under if they do something wrong. Moreover, some countries do not offer strong legal protections from their companies in the sense of providing clear rules and regulations. Answering to questions, it was said that while the Chevron case had an influence in their position because of how it was considered that justice could not be achieved and how it was considered to reveal that there was something to be done, it was but one case and the co-sponsor of the initiative is South Africa, not affected by that case. The Mission further stressed that they do not seek to demonize transnational corporations at all, but rather that they are merely trying to regulate what should happen when they behave in a wrong manner. The Ecuadorian criminal code adopted last September has rules on businesses, regardless of whether they are transnational or not, permitting those affected to take action against the company and persons involved. The Mission is also aware of the importance of the issue of extraterritorial jurisdiction, reason why they are paying attention to the debates on it.

Ana Maria Suárez-Franco stressed the need of listening to what the victims have to say on the debates regarding a treaty on business and human rights instead of exclusively listening to the experts. She also posited that, for long, civil society in countries affected by dictatorships in Latin America have been asking for responsibilities without realizing it. Likewise, there is a strong position in the issue in countries where corporations have had influence, which should not be ignored; and she reiterated that the opinion of civil society should not be marginalized by paying attention only to experts. In relation to voluntary initiatives, she considers that many resources are being spent on guidelines or their implementation, but international law should not be ignored as a result. Similarly, some companies divert attention away from their possible misdeeds by funding, which is certainly good but does not eliminate violations. Therefore, not only CSR but also binding approaches are necessary, according to her. As other presenters, she highlighted that law is quite favorable for investment, but there is conversely a weak or absent framework of accountability mechanisms or extraterritorial obligations of States. Furthermore, existing mechanisms, as that of the ATCA, do not guarantee accountability and remedies for victims. An additional problem she identified is the lack of cooperation between jurisdictions in the field of business and human rights, unlike in others as those of the fight against corruption, drug trade or child traffic. These examples show that greater cooperation is possible if there is political will. According to her, the discussion is no longer if we need a treaty or not but what its content will be. NGOs have been doing lobby work, and among the ones most opposing the process were European countries, which said that they needed conditionalities to participate in the process. As to a different topic, there is
a sort of agreement on focusing on transnational corporations, which is due to the need of an extraterritorial dimension and related liability issues, but Ana María affirmed that other corporations (must) also have obligations, which is what her organization, FIAN, supports. She also argued that while corporations can participate in very specific hearings for very specific goals, their participation should not determine the process, unlike States, which for her are to be the centers of the treaty. As to the process, she stresses two ideas: the importance of reaffirming the international legal framework and the importance of enhancing and respecting it; and improving access to justice for victims and stopping corporate impunity. She also highlighted the idea that the treaty process complements other processes, as national plans. Attention must also be paid, in her opinion, to the fact that companies have changed a lot, and parent companies and subsidiary models are to be carefully examined. Finally, she argued that the responsibilities of States should not exclude those of directors and managers.

Humberto Cantú Rivera examined how Latin American States voted on the resolution proposed by Ecuador, which in turn gives some hints of what they may think about the project and what the next steps to advance the issues in the Americas may be, considering that there is not enough implementation under their domestic law. The group of Latin American and Caribbean States said that there was no consensus, with Ecuador, Cuba and Venezuela voting in favor of the Ecuadorian proposal (some of them are not human rights examples) and six other States voting against. Others, in turn, neither supported nor rejected the proposal, including States deeply affected by related issues (e.g. Argentina). Humberto thus concludes that it is not clear that we have a North-South divide, because even in the Global South there are different State positions, some favoring neoliberal or capitalist tendencies and some reluctant to move in certain directions. The two main positions are the one seeking to attract foreign investment to promote employment and economic progress fearing that obligations may discourage investment, and the one pursuing a standardized regime and avoid fragmentation and forum shopping. On the other hand, he noted how at the OAS, in a January meeting on business and human rights in the Americas, several positions were heard, and that in it NGOs, academics and corporations participated. The transcripts reveal confusion between Corporate Social Responsibility and Business and Human Rights notions, with many confusing them. Moving on to other issues, the presenter commented that six States in Latin American OAS members have announced National Action Plans; and considered that something likely to happen is for the Guiding Principles to be invoked in the case law of the Inter-American human rights system, which already cites soft law and developments in other regions. He concluded by saying that what is most needed is making standards effective.

Sara Seck examined the treaty process in light of a 2014 report by Amnesty International (Injustice incorporated). While that report does not specifically say anything about the merits of a treaty process, Amnesty has said that they support it, reason why it is useful to see what it said in these report in relation to key or emblematic cases that illustrate problems of transnational harms and remedies. The emblematic cases discussed in the report
involve environmental harm, reason why, while human rights law is treated as a separate category, it is useful to see what international environmental law has to say about analogous situations and the tools it provides, as on allocation of environmental harm, liability, transboundary harms or local commons; and how States strive to ensure that companies themselves will be responsible for costs and require them to have insurance or some other kinds of bonds, so that if accidents happen there is money available. She also noted how if there is a cap on liability in 1960s agreements there is a residual fund, so that if the full cost cannot be covered then it is needed to get the rest of the money elsewhere. She was struck by no mention of transboundary waste in the report, being there the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. She also referred to the work of the International Law Commission on transboundary damage and the international deep seabed mining regulation.

Nadia Bernaz explored the possibilities in including corporate criminal liability for International Crimes in the future Business and Human Rights Treaty. She answered three questions: (1) Why including corporate criminal liability for international crimes in the future business and human rights treaty? (2) How to do it? (3) What are the main remaining questions that would have to be solved before proceeding? (1) The main reason for including corporate criminal liability for international crimes in the treaty is that arguably it is a less controversial area than that of the existence of corporate obligations for “simple” human rights violations. (2) There are three main ways of doing it: (a) Following the model of the UN Convention against Torture, there would be a state obligation to prosecute, at the domestic level, corporations suspected of international crimes; (b) Following the model of the 1948 Genocide Convention, the business and human rights treaty could set up a system to refer cases to the ICC; and (c) a third option is that no business and human rights treaty is created, but the statute of the ICC is amended anyway. (3) The pressing questions that would have to be solved have to do with the required mental element with regard to complicity liability under international criminal law, an area that has given rise to great uncertainty in recent years in the context of Alien Tort Statute litigation in the United States. Another pressing question would be related to the links between the treaty and the International Criminal Court Statute.

Ago Shinichi argued that we may learn a lesson from the ILO’s experience when considering the issue of the UN instrument on business and human rights. The ILO instruments are of particular importance to the discussion on business and human rights, because they are, in a way, human rights standards addressing corporate behavior, and they are jointly formulated by and partly addressed to non-state entities, namely employers organizations (corporate entities) and trade unions (individual workers as ultimate addressees). When the state parties to the Versailles Peace Conference designed the new institution, an idea was proposed to go for true international labour legislation, namely adoption by a majority of an instrument binding all member-States. The idea being a little too drastic, a compromise was struck to have a peculiar form of instruments: a Convention and a Recommendation. The
relationship between these two instruments was not clear at the outset, but a custom evolved over the years that a Convention would be adopted together with a Recommendation as a set. The ILO’s renowned supervisory mechanism added to it a meaningful division of labor between the two mutually supplementing instruments. However, the ILO’s strength in international labor legislation has limits, in that the Conventions, even if they are equipped with legally binding force and rigorously monitored by the supervisory machineries, cannot directly address corporate entities, due to their intrinsic nature of being international treaties. Hence, a Tripartite Declaration on Multinational Enterprises was adopted. We have unfortunately witnessed a drawback in the development of this instrument’s implementation. It looks as if the OECD Guidelines on MNE overtook the role of the ILO’s Declaration. There is a reason for this. The follow-up mechanism designed for the ILO Declaration was not efficient enough, compared to that of the OECD instrument, which is equipped with an effective NCP system.

Adriana Espinosa González argued that procedural rights of communities affected by corporate activities should be included and protected as an essential element of any draft treaty on corporations and human rights. This would, among other positive effects, help to attain the enforcement of corporate human rights obligations contained in such treaty. She argued that procedural rights of communities affected by corporate activities should be included and protected as an essential element of any draft treaty on corporations and human rights. This would, among other positive effects, help to attain the enforcement of corporate human rights obligations contained in such treaty.

Larry Catá Backer presented a talk “Considering a Treaty on Corporations and Human Rights: Mostly Failures But With a Glimmer of Success.” He noted that the substantive positions of most stakeholders are now quite clear. They appear perhaps irreconcilable. He considered what the process of negotiating the contemplated treaty may reveal about the state of structuring governance frameworks for business and human rights either within the anticipated treaty framework or under the UNGPs. What analysis may reveal is that while the move toward the negotiation of a treaty may reveal substantial normative and conceptual failures, it also suggests some not inconsiderable successes. After setting the context of the current debate, he considered the normative and structural difficulties of the move toward a comprehensive business and human rights treaty; and then considered its benefits, both for the process of developing structures of governance for business and human rights, and its substance. He argued that the Business and Human Rights treaty process can only be successful on the corpse of UN Guiding principles, and that eventually a binding treaty process will end in failure. Taken together, what may become clear is that even were the move toward a treaty to end in failure, the movement toward more robust governance of the human rights effects of economic activity will emerge stronger.

Jernej Letnar Černič concluded the workshop by noting that all the initiatives in business and human rights are worth considering and taking up. However, it is
erroneous and dangerous to concentrate only on one. The dilemma that arises is false. Business must respect, protect and implement human rights. Corporations are required to include them in their business. At the same time, victims of alleged human rights violations need to be provided with access to justice and the enforcement of corporate responsibility and accountability by an independent and impartial tribunal or similar forum. All participants in the debate on human rights in business must respect a pluralistic approach that does not exclude any proposal or initiative.