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The Struggle for a UN Treaty

Towards global regulation
on human rights and business



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Published by:

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Translation: Tim Jack and Helen Veitch

Cover picture: UN Photo/Jean-Marc Ferré:

„Human Rights Council Concludes Twentieth Regular Session“

Further pictures: Amigos de la Tierra / Victor Barro -

www.fotosconletra.com

Design and production: www.kalinski.media

Deutsche Nationalbibliothek has registered this publication in the
German national bibliography; find the detailed bibliographic data
online at: <http://dnb.d-nb.de>.

ISBN 978-3-943126-28-0

Berlin/Bonn/New York, August 2016

This report is the result of a cooperation project between the Global Policy
Forum Europe and the New York Office of the Rosa Luxemburg Stiftung
and received funding from the German Federal Ministry for Economic
Cooperation and Development (BMZ).

The sole responsibility for the content of this publication lies with the authors.

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Overview

Over the course of the last years, the international debate surrounding the environmental, social and human rights responsibilities of corporations has gained momentum. Not least, growing public criticism of transnational corporations and banks has contributed to this debate. The list of criticisms is long: Ever-new pollution scandals (most recently the VW emissions scandal), disregard for the most basic labour and human rights standards (for example in Bangladesh's textile or the Chinese IT industry), massive bribery allegations (faced for example by Siemens for years), as well as widespread corporate tax avoidance strategies (such as Google, Starbucks and IKEA).

Against this background, the United Nations Human Rights Council's decision on 26 June 2014 to adopt a resolution, which was initiated by Ecuador and South Africa, to establish an intergovernmental working group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"¹ deserves to be called historic. For the first time since the dissolution of the United Nations Commission on Transnational Corporations in 1992, an intergovernmental body of the United Nations (UN) was established to address the international regulation of corporations.

Until that point, at least at an international level, politics and businesses had relied mainly on voluntary initiatives. This fact is reflected in the UN Guiding Principles on Business and Human Rights adopted in June 2011. They established a global set of recommendations accepted by all governments concerning how states can meet their human rights obligations vis-à-vis the activities of corporations as well as the responsibility of corporations and business enterprises to comply with human rights standards. Nonetheless, these Guiding Principles were non-binding and only called on business enterprises to conduct "human rights due diligence" where appropriate.

Based on an assessment of the initial experiences with the UN Guiding Principles, however, more and more governments and researchers concluded that they were only limitedly effective and therefore should be complemented by a legally binding international instrument. The UN should replace *soft law* with *hard law*.

A global alliance of several hundred civil society organisations has been at the forefront of such a demand. This Treaty Alliance recommends the

The establishment of a UN working group for the elaboration of a treaty—a historic decision

In the area of business and human rights, governments should replace soft law with hard law

1 UN Doc. A/HRC/RES/26/9.

establishment of a binding treaty to regulate the activities of transnational corporations and other business enterprises with respect to human rights (www.treatymovement.com).

The UN Human Rights Council's decision provoked massive resistance by the United States and its allies. In a statement, the US representative made it clear that he understood the very establishment of an intergovernmental working group to pose a threat to the UN Guiding Principles and announced that the US would refuse to participate. The European Union shared the US position. EU member states in the UN Human Rights Council voted en bloc against the establishment of an intergovernmental working group and called on all council members to do the same. Their resistance, however, failed.

The first session of the intergovernmental working group then took place at the beginning of July 2015. Discussions surrounding the form, content and scope of a possible legal instrument dominated the agenda. Many of the participants agreed that a binding agreement should complement the existing UN Guiding Principles. Participants also agreed that such an instrument should address not merely gross human rights abuses, but all human rights abuses in general. Greater controversy surfaced mainly over the following questions: Should the legal instrument target transnational corporations exclusively or all business enterprises regardless of size? Should the legal instrument contain extraterritorial obligations for states? Should the instrument set out direct obligations for businesses?

The form and content of a future legal instrument remains unclear. Proposals have so far mainly been put forward by researchers and civil society organisations, differing greatly in terms of thematic scope and degree of detail, but also in terms of the (political) likelihood that they could actually be implemented.

A treaty could take very different forms. It could be an all-encompassing, detailed agreement, a shorter, more general framework agreement, an optional protocol to an existing human rights agreement, or even a set of thematically focussed individual agreements.

There is already a set of proposals for such an agreement, which can be grouped as follows:

- 1. Definition of responsibilities and liability for human rights abuses:** A treaty should establish corporate liability for human rights abuses. This would require a definition of the specific responsibilities of corporations and business enterprises.
- 2. Due diligence commitments, including human rights risk and impact assessments:** The treaty should commit businesses to intro-

ducing guidelines and taking the necessary measures to prevent human rights abuses in all their economic activities, throughout the entire supply chain.

- 3. Monitoring and enforcement mechanisms:** Ensuring the implementation of such a treaty will require corresponding monitoring and enforcement mechanisms at the national and international levels.
- 4. Enhanced intergovernmental cooperation to investigate, sentence and enforce judgements:** A treaty should commit states to collaborate in all judicial matters based on a principle of shared responsibility analogous to the principle applied to tackling corruption and transnational organised crime.
- 5. Establishment of extraterritorial obligations for states to protect human rights:** States need to exercise their human rights protection obligations vis-à-vis businesses, even when the victims of human rights abuses reside in a foreign country. States must therefore ensure the enforcement of the corresponding norms and standards, even in foreign business locations under control of the national parent company.
- 6. Clarification of the relation between the treaty and bi- and multilateral trade and investment agreements:** Either the treaty becomes superordinate to such agreements or it would have to amend, in binding terms, existing trade and investment agreements to include effective human rights clauses.

The second session of the intergovernmental working group is scheduled for 24–28 October 2016 in Geneva. The working group aims to present a draft for a legally binding instrument by the third session in 2017.

Discussions at the Human Rights Council's intergovernmental working group have been without US participation so far. The European Union (EU) only participated in the first one and a half days of the first session and held up the start of discussions. According to environmental, development and human rights organisations, the EU's behaviour and demonstrative absence sent a negative signal, thus also damaging its political credibility in other processes. These organisations have repeatedly asked the EU to participate constructively in the working group discussions. Moreover, in December 2015, even the EU parliament explicitly recommended that the EU and its member states participate in the debate on a legally binding international instrument on business and human rights within the framework of the United Nations system.

The US and EU remained absent from the first discussions on the UN treaty

The leading international business associations will most likely continue their resistance to a binding agreement. Governments should not bow

to the pressure of business lobby groups; to the contrary, they need to question their arguments critically. Governments need to recognise that a growing number of corporations and businesses back far more progressive approaches than those put forward by their respective business associations and they should therefore not rely solely on the so far predominant voices of these associations.

Governments should
show that they put
human rights over the
interests of big
business

For governments, the treaty process offers the unique opportunity to show that they put human rights over the interests of big business. Ultimately, profits can be shared—human rights cannot.



Protests against human rights violations and environmental degradation by transnational corporations at the UN in Geneva

I.

The rekindled struggle over global corporate regulation

International economic and financial policy is currently experiencing a new wave of deregulation and liberalisation. Most prominently figure the negotiations surrounding a number of trade and investment agreements, and in particular the Transatlantic Trade and Investment Partnership (TTIP), the Transpacific Partnership (TPP), the Trade in Services Agreement (TiSA), as well as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The essential aim of these agreements is to extend market access for transnational corporations globally and bolster the rights of foreign investors.

In recent years, however, in the wake of these negotiations, the international debate on the environmental, social and human rights responsibilities of business has also gained momentum. Not least, this is due to the growing public criticism of transnational corporations (TNCs) and banks. The list of criticisms is long: Ever-new cases of pollution, such as for example the recent VW emissions scandal, disregard for the most basic labour and human rights standards (for example in Bangladesh's textile or the Chinese IT industry), massive allegations of bribery (faced for example by Siemens for years), as well as the tax avoidance strategies pursued by corporations (such as Google, Starbucks or IKEA).

A study by the University of Maastricht analyzed 1,800 human rights complaints filed between 2005 and 2014.² With 511 complaints US companies ranked first, followed by the United Kingdom (UK) (198), Canada (110), China (87) and Germany (87). A 2014 study by the International Peace Information Service came to a similar conclusion. It found, over the course of ten years, human rights complaints filed against 43 companies listed on the UK's FTSE 100, 24 listed on France's CAC 40 and 23 listed on Germany's Dax 30.³

At the international level, politics and business has relied mainly on voluntary initiatives. Far too often, however, there is a considerable gap between the social and environmental commitments companies make and the actual effects of their activities on people and the environment. Considering how weak instruments have been so far, numerous governments, NGOs, academics, and even a growing number of business representatives are calling for legally binding rules for TNCs.

Growing gap between social and environmental commitments companies make and actual effects of their activities on people and environment

² See Kamminga (2015).

³ See International Peace Information Service (2014).



Protests by members of the Treaty Alliance in front of the UN in Geneva

Several hundred NGOs globally are members of the Treaty Alliance which is calling for global corporate regulation

Since the end of 2013, this demand has been supported by an alliance of several hundred civil society organisations. They represent a broad spectrum ranging from international human rights organisations, to worker associations, environmental and development organisations, academics and human rights activists, and also include local groups that represent the victims of corporate human rights abuses. Referred to collectively as the Treaty Alliance (www.treatymovement.com), they want to see a globally valid treaty to regulate corporate human rights responsibilities.

At the intergovernmental level, on the initiative of Ecuador, 85 countries subscribed to a statement at the Human Rights Council in September 2013⁴ for the establishment of a legally binding instrument to hold business to account for human rights abuses.⁵ In June 2014, in spite of objections from certain EU member states, the US and further allies, the Human Rights Council established an intergovernmental working group tasked with developing a proposal for such an instrument by 2017. This represents a historic opportunity to adopt at the UN level a human rights treaty that protects people against the human rights abuses committed by transnational corporations and other business enterprises. However, in the face of the massive resistance from influential governments and corporations, many do not believe the adoption of an ambitious agreement is a realistic or imminent possibility. How discussions at the UN level will

4 This statement was supported by Ecuador, the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru.

5 In international law literature and international practice the term "human rights violations" is often restricted to the actions (or non-actions) of states, while the actions of businesses are usually described as "human rights abuse" or as "having adverse human rights impacts." This practice is based on the argument that international law does not directly bind corporations to uphold human rights standards and that they therefore also cannot legally commit crimes against human rights. However, if one extends the argument beyond the positive legal basis to understand the inherent universality of human rights as a moral claim, then the private sector is bound to them as much as states are. In this publication we therefore use the terms corporate human rights violations and abuse.

affect TTIP and other trade and investment agreement negotiations also remains unclear.

This working paper presents the basic facts concerning the current discussions at the UN Human Rights Council. The paper outlines the events leading up to today's discussions, describes the controversies and lines of conflict, sets out the potential content of a legally binding instrument on business and human rights and concludes with some remarks on the further process.

II.

Antecedents

Attempts to establish a binding UN agreement on TNCs and human rights have a long history. Already during the 1990s, the then Sub-Commission on Prevention of Discrimination and Protection of Human Rights,⁶ at the time a subsidiary body of the UN Commission on Human Rights, requested the Secretary-General to prepare three reports on TNCs and human rights.⁷ All three reports emphasized the need to establish an international legal framework for transnational corporations. In its 1996 report, for example, the sub-commission wrote:

“A new comprehensive set of rules should represent standards of conduct for TNCs and set out economic and social duties for them with a view to maximizing their contribution to economic and social development.”⁸

A draft for UN Norms in 2003

In 1999, this basic concept led the sub-commission to establish a working group chaired by human rights expert David Weissbrodt and tasked with exploring the working methods and activities of transnational corporations. Already during its first session in August 1999, the working group announced that it aimed to develop “a code of conduct for TNCs based on the human rights standards.”⁹ Four years later, the working group presented the draft proposal *Norms on the Responsibilities of Transnational and Other Business Enterprises with Regard to Human Rights*.¹⁰ Although these Norms emphasised the obligation of states to protect human rights, they also committed businesses to ensuring that human rights are observed within their respective spheres of influence. Beyond human rights, these Norms also considered environmental and consumer protection, and envisaged a complaints procedure for cases of corporate violations. The sub-commission achieved consensus and approved the draft in August 2003, which it forwarded to the UN Human Rights Commission.

During its 2004 session, the Human Rights Commission reacted coolly to this draft proposal for binding regulations for business. The Commission explicitly emphasised that the document “has not been requested

6 The ECOSOC renamed it Sub-Commission on the Promotion and Protection of Human Rights in 1999.

7 UN Doc. E/CN.4/Sub.2/1995/11 of July 24, 1995, E/CN.4/Sub.2/1996/12 of July 2, 1996 and E/CN.4/Sub.2/1998/6 of June 10, 1998.

8 E/CN.4/Sub.2/1996/12 of 2 July 1996, para. 74.

9 E/CN.4/Sub.2/1999/9 of 12 August 1999, para. 32.

10 E/CN.4/Sub.2/2003/12/Rev. 2 of 26 August 2003.

by the Commission and, as a draft proposal, has no legal standing.”¹¹ Instead of adopting the Norms, the Commission requested the Office of the High Commissioner for Human Rights to compile a further report. After a broad consultative process, the Office presented its report in 2005. The report refers to the proposed UN Norms as one of several important instruments concerning corporate responsibility that requires further analysis.¹²

The following year, however, the UN Human Rights Commission resolution on “Human rights and transnational corporations and other business enterprises” totally ignored the Norms, effectively pretending they did not exist.¹³ Instead, it requested the UN Secretary-General to appoint a special representative for human rights and transnational corporations and other business enterprises.

The resolution was adopted by a vote of forty-nine votes to three, with one abstention.¹⁴ The US rejected the resolution on the argument that it takes

“(...) a negative tone towards international and national business, treating them as potential problems rather than the overwhelmingly positive forces for economic development and human rights that they are.”¹⁵

Furthermore, the US stated that the country would reject any resolution that did not explicitly state that it was “not intended to further the cause of norms or a code of conduct for TNCs.”¹⁶

This unambiguous announcement to reject any business-critical approaches and legally binding international norms was a clear signal to the future special representative.

The UN Guiding Principles on Business and Human Rights

On 28 July 2005, UN Secretary-General Kofi Annan complied with the UN Human Rights Commission’s request and appointed John Ruggie as the Special Representative for Business and Human Rights. Between 1997 and 2001, Ruggie, a Harvard professor, worked for Kofi Annan as the Assistant Secretary-General for Strategic Planning. He is considered

11 E/CN.4/DEC/2004/116 of 20 April 2004.

12 E/CN.4/2005/91 of 15 February 2005.

13 See UN Doc. E/CN.4/RES/2005/69 of 20 April 2005.

14 Against: Australia, South Africa and US, Abstention: Burkina Faso.

15 Statement by the US delegate Leonard Leo before the UN Human Rights Commission, item 17 on the agenda “Transnational Corporations” on 20 April 2005.

16 Ibid.

one of the architects of the Global Compact and an advocate of a type of global governance that strives for partnerships with business rather than global regulation. Ruggie's appointment was therefore also a political decision.

**Business lobby has
decried the draft
UN Norms**

Business lobby groups and most prominently among them the International Chamber of Commerce (ICC), the International Organisation of Employers (IOE) and the Business and Industry Advisory Committee to the OECD (BIAC) had decried the proposed UN Norms. Obviously, they rejoiced Ruggie's appointment.¹⁷ In a joint letter, they assured him their support, declaring:

“We stand ready to do all that we can to assist you in a positive and open manner as you consider what are often complex and difficult issues.”¹⁸

These representatives of business also made it very clear which results they expected from Ruggie:

“(...) business believes the success of your work could be defined by the way in which you are able to:

- » “reinforce the extent to which business already makes a contribution and move the debate away from anti-business rhetoric to create a more effective partnership approach;
- » “identify and clarify the wide range of instruments, codes and other mechanisms for assisting companies;
- » “explicitly recognize that there is no need for a new international framework.
- » “ensure that good practice is promoted and extended;
- » “find ways for states to better discharge their obligations and to encourage ways of improvement where the rule of law is less than adequate.”¹⁹

Ruggie delivered on these expectations over the coming six years. In June 2008, he presented his interim report *Protect, Respect and Remedy: a Framework for Business and Human Rights* at the UN Human Rights Council. In the report, he defined the conceptual boundaries for the future political

¹⁷ See on this and the following in more detail Martens (2014).

¹⁸ See ICC/IOE (2005).

¹⁹ Ibid.

discourse on business and human rights.²⁰ Ruggie's framework consisted of three core principles:

- » The state duty to protect human rights.
- » The corporate responsibility to respect human rights.
- » Access to remedy.

The report by the UN Special Representative was met with broad acceptance by the members of the Human Rights Council. In their corresponding 2008 resolution, the Council explicitly welcomed the tripartite approach that distinguishes clearly between state *duties* and corporate *responsibilities*.²¹ They also emphasised the need to operationalize this general framework and to develop concrete proposals for each of the three core principles. To this end, they renewed the Special Representative's mandate for a further three years.

The UN Guiding Principles distinguish clearly between state duties and corporate responsibilities

After this second term, Ruggie, in early 2011, presented his proposal for *UN Guiding Principles on Business and Human Rights*.²² The UN Human Rights Council endorsed these principles in June 2011.²³ The UN Guiding Principles consist of the three elements proposed by Ruggie:

- » **State duty to protect human rights:** States must protect against human rights abuse within their territory and/or jurisdiction by business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
- » **Corporate responsibility to respect human rights:** The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.
- » **Access to remedy:** As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, that those affected have access to effective remedy.

The report sets out 31 principles to illustrate the fundamental obligations and responsibilities, and contains recommendations for governments and corporations for their implementation.

²⁰ See UN Doc. A/HRC/8/5, para. 10.

²¹ See UN Doc. A/HRC/RES/8/7 of 18 June 2008.

²² See UN Human Rights Council (2011).

²³ See UN (2011).

This established the first global set of recommendations accepted by all governments regarding how states can implement their obligation to protect people from corporate human rights abuses and how corporations themselves can implement their human rights responsibilities. Nonetheless, these Guiding Principles remain non-binding and only call on corporations to act with due diligence.

Human rights expert Nicola Jägers comments:

“(...) Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as sole duty bearer.”²⁴

Whilst she acknowledges that this is understandable regarding the resistance to the UN Norms, she nonetheless adds:

“However, the outright dismissal of the notion of corporate duties is regrettable and seems somewhat at odds with the intention that the Guiding Principles are to become ‘a common global platform for action on which cumulative progress can be built (...) without foreclosing any other promising longer-term development’.”²⁵

According to John Ruggie, the Guiding Principles cannot provide answers to all the challenges in the field of business and human rights, and should rather be seen as the “end of the beginning” of a process and as a “joint platform for measures,” without, however, excluding the possibility of other measures in the long-term.²⁶

While the business lobby welcomes the UN Guiding Principles, many human rights organizations consider them as incomplete

Unsurprisingly, this is precisely what business representatives hope to prevent. The IOE, ICC and BIAC welcomed the *principled pragmatism* of the UN Guiding Principles and expressed their expectation that there would be no changes any time soon:

“[O]nce adopted, the Guiding Principles should be left unchanged for a number of years in order to allow for a period of reflection, adoption and application by States and the business community.”²⁷

They expect the implementation of the UN Guiding Principles to take place in a multi-stakeholder process in close collaboration with business, and directed a clear warning at governments and the UN:

²⁴ Jägers (2011), p. 160.

²⁵ Ibid.

²⁶ See UN Human Rights Council (2011), para. 13.

²⁷ IOE/ICC/BIAC (2011).

“Conversely, we would be extremely concerned with a follow-up mechanism based on the traditional approach of a Special Rapporteur with a complaints-receiving mandate. We believe that such an approach would undermine the very productive consultative process developed by the SRSG [Special Representative of the Secretary-General] and significantly increase the risk that the process would return to the highly contentious debate that preceded his mandate.”²⁸

Most members of the UN Human Rights Council obviously shared this position. To accompany the implementation of the Guiding Principles, the council established a working group on the issue of human rights and transnational corporations and other business enterprises, and tasked it with organising an annual two-day Forum on Business and Human Rights in Geneva.²⁹

International human rights organisations criticised these decisions as wholly inadequate. A joint statement focusses on three main shortcomings of the proposed follow-up mechanisms for the UN Guiding Principles:³⁰

- » “It focuses almost exclusively on the dissemination and implementation of the proposed Guiding Principles, which are incomplete in important respects and do not fully embody the core human rights principles contained in the UN ‘Protect, Respect, Remedy’ Framework approved by the Council in 2008.
- » “It lacks a mandate for the follow-on mechanism to examine allegations of business-related abuse and evaluate protection gaps, an aspect stressed by civil society groups from around the world. Neither of these essential tasks is embedded in the proposed three-year follow-on mandate for a new special procedure, a working group of five experts.
- » “It does not clearly recognize the Council’s unique role to provide global leadership in human rights by working toward strengthening of standards and creating effective implementation and accountability mechanisms.”

As the process evolved, more and more governments concluded that the UN Guiding Principles and the mechanisms for their implementation were only of limited effect. A statement to the UN Human Rights

²⁸ Ibid.

²⁹ See UN Doc. A/HRC/RES/17/4 of June 16 2011, item 6 and 12.

³⁰ See Joint Civil Society Statement on Business and Human Rights during the 17th session of the UN Human Rights Council on 15 June 2011 (www.escr-net.org/docs/i/1605781).

Council in September 2013 initiated by the government of Ecuador and supported by further 85 countries, states:

“We are mindful that soft law instruments such as the Guiding Principles and the creation of the Working Group with limited powers to undertake monitoring of corporate compliance with the Principles are only a partial answer to the pressing issues relating to human rights abuses by transnational corporations. These principles and mechanisms fell short of addressing properly the problem of lack of accountability regarding Transnational Corporations worldwide and the absence of adequate legal remedies for victims.”³¹

Joseph Stiglitz, a Nobel Prize in Economics laureate, shares this opinion. At the UN Forum on Business and Human Rights in December 2013, he too demanded to go beyond the UN Guiding Principles:

“We need international cross-border enforcement, including through broader and strengthened laws, giving broad legal rights to bring actions, which can hold companies that violate human rights accountable in their home countries. (...)”

“Economic theory has explained why we cannot rely on the pursuit of self-interest; and the experiences of recent years have reinforced that conclusion. What is needed is stronger norms, clearer understandings of what is acceptable—and what is not—and stronger laws and regulations to ensure that those that do not behave in ways that are consistent with these norms are held accountable.”³²

Many civil society organisations welcomed the initiative taken by Ecuador and the support provided by prominent economists such as Joseph Stiglitz. At the beginning of 2014, in a joint statement, 620 groups and organisations as well as over 400 individuals from 95 countries launched the *Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises*. The call urges the UN Human Rights Council to work towards a binding treaty for TNCs and other business enterprises and to establish an intergovernmental working group to formulate a draft proposal.³³ It took less than six months before the Council put the call’s demand into practice.

31 See <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>.

32 Joseph E. Stiglitz’s introductory speech for the Panel “Defending Human Rights” during the 3rd UN Forum on Business and Human Rights, Dezember 3 2013 in Geneva (www.ohchr.org/EN/Issues/Business/Forum/Pages/2013FBHRSUBMISSIONS.aspx), pp. 4–5.

33 See www.treatymovement.com/statement-2013.

III.

The treaty process

Business and human rights was a regular item on the UN Human Rights Council's agenda for June 2014. Initially, the agenda involved evaluating the implementation of the UN Guiding Principles and renewing the 2011 mandate of the working group on business and human rights. Ecuador, South Africa and their allies were not satisfied. They presented a draft resolution intended to initiate a process towards a legally binding instrument on business and human rights. They did not want to leave the discussion to a group of experts (as in the case of the UN Norms), or to a special representative (as in the case of the UN Guiding Principles) and pronounced themselves explicitly in favour of an intergovernmental working group to lead the discussion.

For the first time, an intergovernmental working group discusses a legally binding instrument on business and human rights

Historic resolution by the Human Rights Council

Behind the closed doors of the Human Rights Council, heated discussions took place on the initiative by Ecuador and its partners. The US and the EU in particular vehemently opposed the draft. On 26 June 2014, the supporters of the resolution won a crucial vote. The forty-seven members of the UN Human Rights Council adopted the resolution by a vote of twenty in favour, fourteen against and thirteen abstentions.³⁴

In favour: Algeria, Benin, Burkina Faso, China, Cuba, Ethiopia, India, Indonesia, Côte d'Ivoire, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Republic of the Congo, Russia, South Africa, Venezuela, and Vietnam.

Against: Australia, Czech Republic, Estonia, France, Germany, Great Britain, Ireland, Italy, Japan, Montenegro, Republic of Macedonia, Romania, South Korea, and US.

Abstentions: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and United Arab Emirates.

Based on this resolution, the Human Rights Council established the Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIWG),³⁵ “whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the

34 See UN Doc A/HRC/RES/26/9 of 26 June 2014 and www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E.

35 Sometimes this UN working group is also abbreviated to IGWG.

activities of transnational corporations and other business enterprises.”³⁶

“Open-ended” here means that the working group is open to all UN member states, states with observer status, NGOs with Economic and Social Council of the UN (ECOSOC) consultative status, as well as further actors such as national human rights institutes. All of these actors may participate in the working group sessions and introduce oral and written statements in the process.

The intergovernmental working group convenes once annually (the first session took place 6–10 July 2015). During the first two sessions, the working group was to discuss the possible content, scope, nature and form a legally binding instrument could take. By the third session in 2017, the chair of the working group, drawing on the discussions up to that point, will present a draft proposal for a legal instrument. The substantive negotiations during the third session will be based on this proposal. In July 2015, during the first session, the working group elected the Ecuadorian ambassador María Fernanda Espinosa Garcés as chair by acclamation. Considering the strong controversies over even the establishment of the working group, it would be surprising if the treaty process actually concluded within three years. After all, John Ruggie needed six years to formulate his far less ambitious UN Guiding Principles.

Complementary or counter-productive?

The opponents of the treaty process argue that it undermines the progress of the implementation of the UN Guiding Principles and divides states into two camps: supporters of the UN Guiding Principles and advocates of a legally binding instrument.³⁷

However, it became clear that this does not necessarily have to be the case the day after the adoption of the treaty resolution. On 27 June 2014 the council adopted without vote (i.e. with the support of states who the day before had voted for the treaty resolution) a resolution by Argentina, Ghana, Norway and Russia that was explicitly based on and supportive of the UN Guiding Principles.³⁸ It called on member states to establish national action plans to implement the UN Guiding Principles, renewed the mandate of the working group on business and human rights for a further three years and commissioned the Office of the High-Commissioner on Human Rights (OHCHR) to consider and provide ways to improve access to justice for the victims of corporate human rights abuses (*Accountability and Remedy Project*).

36 UN Doc. A/HRC/RES/26/9, para. 1.

37 This was also the EU's argument in its *Explanation of Vote* statement on the draft resolution by Ecuador, see European Union (2014).

38 See UN Doc. A/HRC/RES/26/22 of 27 June 2014.



Results of the vote on the resolution 26/9 of June 26, 2014 at the UN Human Rights Council in Geneva

The representative of **India** stressed the complementarity of the UN Guiding Principles with a more encompassing international legal instrument, including the corresponding resolutions of the Human Rights Council:

“We do not regard the two resolutions on business and human rights as mutually exclusive. In fact in our view, they are complementary. We believe that the Resolution before us [A/HRC/RES/26/9] seeks to open an opportunity for States to discuss in a focused manner the issue of transnational corporations. As we promote the integration of the world economy and capital flows across borders, it is important that we plug possible protection gaps that may arise due to business operations of transnational corporations. (...) When states are unable to enforce national laws with respect to the gross violations committed by business and hold them accountable due to the sheer size and clout of the transnational corporations, the international community must come together to seek justice for the victims of the violations committed by the transnational corporations. We believe that we need to further the dialogue on these aspects and the resolution gives us an acceptable roadmap for the Council to move forward in this direction.”³⁹

Remarkably, besides India and South Africa—the country that jointly introduced the treaty resolution with Ecuador—China and Russia also voted in favour of the resolution. From the BRICS political alliance only

The treaty process gets support by the BRICS

39 Permanent Mission of India (2014).

Brazil abstained. **Brazil**, however, did announce that it was willing to collaborate constructively with the intergovernmental working group and to conduct interministerial consultations with actors from government and civil society to coordinate the Brazilian position.⁴⁰

Although **South Africa** emphasized throughout the positive role played by corporations, the country nonetheless also pointed out that human rights abuses by corporations could not be ignored. National Action Plans (NAPs) drafted so far within the framework of the UN Guiding Principles had, according to South Africa, their weak points, in particular concerning the regulation of TNCs. A body of international standards providing equal protection and access to justice for all should therefore complement NAPs.⁴¹

China highlighted the important role played by corporations and in particular TNCs in development and stressed that a future legally binding instrument should by no means curb this positive drive. According to China, regulation at the national level is key, nonetheless the exchange of information, judicial collaboration between TNC home and host countries, as well as law enforcement needs to improve. The different capacities and resources of countries need to be considered and this would have to be reflected in measures to support the implementation of a future legally binding instrument.⁴²

Both China and Russia emphasized the principle of national sovereignty and expressed their reservations about extraterritorial jurisdiction. During the first session of the OEIWG in July 2015, **Russia's** position was notably less supportive of the treaty process than a year before. The Russian representative declared that he saw no urgent need to establish a legally binding instrument. He argued that the debate on the possible content of such a treaty was in this regard premature, and discussions should instead focus first on the feasibility of such an instrument. All efforts in this direction would have to be based on a gradual evolution of the UN Guiding Principles.⁴³

Unlike Russia, many **Latin American countries**, among them Bolivia, Cuba, Venezuela, El Salvador and Nicaragua, strongly supported the Ecuadorian initiative. The **African Group** too emphasized the need to gradually develop a legally binding instrument. They argued that although TNCs did contribute importantly to the development of their

40 See www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/GeneralComments/States/Brazil.pdf.

41 See www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SOUTHAFRICAS_Opening_StatementbyAmbMinty_Panel1.pdf.

42 See South Centre (2014), p. 7.

43 Ibid. p. 6.

countries, human rights abuses by TNCs on the other hand also led to the marginalization and impoverishment of certain groups in society. Furthermore, the African Group pointed to the power imbalance between large TNCs and some states. Some TNCs disposed of greater financial means than the budgets of entire states. Massive illicit financial flows out of African countries additionally exacerbated this imbalance.⁴⁴

The **US** and its allies strongly opposed the treaty resolution. In a statement prior to the vote in the Human Rights Council, the US representative described the resolution as “a threat to the Guiding Principles.” He announced that the United States would not participate in an intergovernmental working group and called on other countries to do the same.⁴⁵

Strong opposition of the
US against the treaty
resolution

During the 4th UN Forum on Business and Human Rights in November 2015, the US delegation repeated its arguments for not participating in the treaty process.⁴⁶ The US stated that it was concerned about the focus on transnational corporations. To establish a truly “level-playing field” a new legal instrument would have to apply also to domestic companies (in particular also to state-owned ones). The US opposed direct, legally binding human rights commitments for corporations; the responsibility would have to remain with governments. Moreover, a new global legal instrument, the US argued, would not solve the basic problem that the success or failure of such an instrument depended ultimately on implementation at the national level. It was wrong to describe the UN Guiding Principles as *soft law* and a treaty as *hard law*, because, in the context of National Action Plans, the Guiding Principles too could include elements of *hard law*. The US feared that the treaty process could slow the implementation of the UN Guiding Principles by governments and corporations.

The **European Union** shared the US position and rejected the treaty resolution on similar grounds. EU member states in the Human Rights Council, among them Germany, voted *en bloc* against the resolution and called on all other members to do the same. The resolution, they alleged, threatened the consensus achieved with the UN Guiding Principles.⁴⁷ Striking was the aggressive tone of the EU’s statement. Shortly before the vote, the EU issued an overt warning to the other members of the Human Rights Council:

44 Ibid. p. 6ff.

45 See U.S. Mission to the United Nations Geneva (2014).

46 See Statements of US delegates from 18 November 2015 during the 4th UN Forum on Business & Human Rights, Geneva (Session “The United Nations treaty process on business and human rights: business and other perspectives” and side event “Connecting the Guiding Principles with the business and human rights treaty process”).

47 See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E.

“We are at a critical juncture. If this resolution is adopted, it will divide the Council not only on the vote, but in the years to come. If the Open-Ended Intergovernmental Working Group is established, the EU and its Member States will not participate (...).”⁴⁸

After losing the vote, the EU relativized this statement and presented its conditions (the word “conditions” was later replaced by the diplomatically weaker term “parameters”) for participating in the intergovernmental working group.⁴⁹ The instrument for discussion by the working group would have to be applicable to all companies (not only transnational corporations); the chair of the working group would have to be “neutral”; and the broad participation of human rights defenders and companies would have to be ensured.⁵⁰

In July 2015, the EU delegation then delayed the start of the first OEIWG session by demanding that a further meeting on the UN Guiding Principles be added to the agenda and that the mandate of the UN working group not be limited to TNCs and instead the scope be broadened from the outset to include all types of companies. Whereas the working group accepted the first proposal, the second proposal did not meet with a majority among government representatives.⁵¹ Consequently, the EU took no further part in the following meetings. Delegates from France and the Netherlands observed the further discussions without actively intervening. The German seat remained vacant for the entire duration of the session.

Tactical U-turn of the business lobby

The business lobby unsuccessfully attempted to prevent a majority for resolution 26/9

In the run-up to the vote on the treaty resolution in the Human Rights Council, the lobby of international business representatives actively attempted to prevent a majority for Ecuador’s and South Africa’s proposal.⁵² They based their arguments on statements by John Ruggie, who in 2014 had strongly criticized the treaty proposal in several of his articles.⁵³ In May 2014 Ruggie expressed his “(...) grave doubts about the value and effectiveness of moving toward some overarching ‘business and human rights’ treaty.”⁵⁴ He added:

48 European Union (2014), p. 3.

49 See http://eeas.europa.eu/archives/delegations/un_geneva/press_corner/all_news/news/2015/20150323_bus_and_hr_en.htm.

50 See European Union (2015).

51 See UN Human Rights Council (2016).

52 See for example: www.ioe-emp.org/index.php?id=1197 and www.ioe-emp.org/index.php?id=1238.

53 See Ruggie (2014a, b, c and d).

54 Ruggie (2014b), p. 1.

“(...) launching an open-ended intergovernmental process to negotiate what a treaty could look like and how it might work, as some have suggested, puts the cart before the horse, which is not a recommended means of achieving forward motion.”⁵⁵

The IOE published Ruggie’s statement on its website alongside a press release by IOE Secretary General Brent Wilton that shared Ruggie’s strong doubts. Wilton warned:

“Focus on the development of any new treaty risks detracting from efforts to promote the responsibility of business to respect human rights through the UN Guiding Principles.”⁵⁶

In a further statement the IOE declared that an internationally binding agreement would not solve the fundamental problem, which was the failure of states to implement international human rights norms at the national level.⁵⁷ Strengthening access to justice for the victims of corporate human rights abuses required buttressing national legal systems and not introducing an extraterritorial jurisdiction.

After the IOE’s lobbying efforts proved unable to prevent the establishment of an intergovernmental working group, the organisation performed a tactical U-turn and announced that it would attentively follow the treaty process and constructively participate in OEIWG discussions. During the first session of the OEIWG, the IOE provided oral and written statements,⁵⁸ and at the UN Forum on Business and Human Rights in November 2015 it organized a side event focussed on the treaty process.⁵⁹ As an IOE strategy paper shows, the organisation feared corporations and industrialised nations retracting from the process could potentially lead the working group to quickly decide on a legally binding instrument.⁶⁰ The IOE strategy paper advocates developing a vague instrument, which does not contain any direct and legally binding obligations for corporations, written in the form of a declaration of general principles. Any form of extraterritorial jurisdiction or even an international court for TNCs would have to be prevented by all means.⁶¹

55 Ibid. p. 2.

56 See IOE press release dated 7 May 2014 (“IOE Secretary-General shares John Ruggie’s ‘grave doubts’ over Ecuador proposal for new business and human rights treaty”), www.ioe-emp.org/index.php?id=1078.

57 See IOE (2014b).

58 See www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/IOE_contribution.pdf.

59 See www.ohchr.org/Documents/Issues/Business/ForumSession4/Outline_IOE-GBI-BDA_session_un_treaty_bhr.pdf.

60 See IOE (2014a).

61 Ibid.

The lines of conflict in OEIWG discussions

The first session of the intergovernmental working group at the beginning of July 2015 focussed on the form, content and scope of a possible legal instrument. Over 100 representatives of civil society organisations participated alongside 60 UN member states, numerous legal experts, and business representatives.⁶²

A treaty should address
all forms of human
rights violations

Most participants agreed on certain issues. They believed that a binding agreement would have to be complementary to the established UN Guiding Principles. They also generally agreed that a future agreement should not be restricted to severe human rights abuses and should instead be applicable to all forms of human rights violations. Some governments stressed that mechanisms to monitor the implementation of and compliance with the future agreement were essential.

Controversies however surfaced over the following three questions:

1 Should a legal instrument target only TNCs or all forms of business enterprises including state-owned ones?

The initiative to create a binding agreement in international law is based on the recognition of the fact that the current framework does not provide adequate regulation for the activities of transnational corporations in terms of human rights. Due to the transnational character of these businesses, their economic might and the numerous bi- and multilateral investment agreements, it is difficult to hold them accountable for corporate human rights abuses and provide the victims with access to justice. In particular with regard to transnational corporations a regulatory gap exists.

Opinions were divided, however, on the question as to whether a future instrument should cover only TNCs or apply generally to all businesses. Defining and distinguishing TNCs from other businesses is already not easy. The treaty resolution simply defines TNCs as “all business enterprises that have a transnational character in their operational activities.”⁶³ How can the treaty prevent a transnational corporation or a subsidiary of a transnational corporation from restructuring or changing its legal status, and thus excluding it from the definition? Depending on the form the treaty takes, a definition might not be necessary. In current UN, ILO and OECD practice, often no uniform definition of TNCs applies. The UN Guiding Principles do not distinguish at all between transnational and national businesses.

62 See UN Human Rights Council (2016).

63 UN Doc A/HRC/RES/26/9 of 26 June 2014.

A further difficulty is that in the footnotes, the treaty resolution explicitly excludes “local businesses registered in terms of relevant domestic law.” This is problematic because a transnational corporation is always registered under the national laws of one country, even though it surely cannot be described as a locally operating business.

The US, the EU and business associations criticised that the exemption of local businesses would lead to a situation of double standards that would distort competition. This was sufficient ground for the US and the EU to refuse to participate in the process.

Some NGOs believed the treaty should apply to all businesses, because, they argued, only this could ensure the broadest possible protection of human rights. In any case, they believed it was important to close the gaps in regulation concerning the activities of TNCs. Other NGOs, however, considered it right for the treaty not to apply to local businesses, because defining a focus for the treaty would otherwise become impossible. According to their line of argument, national governments could easily regulate these businesses by themselves.

2 Should the legal instrument include extraterritorial obligations for states?

A further controversial question among states was the question as to whether an obligation for states exists to punish human rights abuses committed by TNCs outside of their national territories.⁶⁴

Extraterritorial state obligations are a fundamental element of numerous UN human rights agreements. The UN Human Rights Committees make explicit reference to these state obligations, usually calling them “international obligations of the state.” In their reports and statements, numerous UN Human Rights Council Special Representatives emphasise extraterritorial obligations of states.

Particularly noteworthy in this regard are the *Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*.⁶⁵ These principles, compiled by a group of international human rights experts in 2011, represent a systematic overview of international law regarding state obligations. Moreover, the authors provide comments on each principle, thus contextualising it within the overall legal framework.⁶⁶ The Maastricht Principles set out the human rights obligations

The Maastricht Principles on the Extraterritorial Obligations of States are essential

⁶⁴ On the fundamental question of extraterritorial state obligations see also the website of the ETO Consortium www.etoconsortium.org.

⁶⁵ See ETO Consortium (Ed.) (2013) and www.etoconsortium.org/en/main-navigation/library/maastricht-principles.

⁶⁶ See de Schutter et al. (2012).

of states with respect to the people living within their national boundaries, but also detail the obligations of states towards people living in other states and globally. Accordingly, measures taken by one state must never affect, either directly or indirectly, the enjoyment of economic, social and cultural rights outside of that state. States also have the obligation to ensure that non-state actors, which, according to the Maastricht Principles, they are able to regulate, do not limit or prevent the enjoyment of economic, social and cultural rights. Furthermore, the Maastricht Principles affirm the obligation of states to contribute, individually and collectively, to an international environment that is conducive to the universal implementation of economic, social and cultural human rights.⁶⁷

The Treaty Alliance and its members have repeatedly referred to the extraterritorial obligations of states in their demands for the treaty. Various sides however expressed reservations concerning the concept of extraterritorial obligations of states and the corresponding legal competency “beyond borders”. Some countries of the global South, among them China, but also Russia, perceived a danger that foreign countries could attempt to interfere in what they see as their internal affairs, violating their national sovereignty.

Business representatives, too, were sceptical about the introduction of extraterritorial competencies. The Confederation of German Employers’ Associations (BDA) warns:

“The debate surrounding the introduction of such an instrument leads to decreasing pressure on states to create a functioning legal system. Moreover, the instrument would only apply to multinational corporations, completely exempting non-multinationals. Consequently, creating functioning national legal systems needs to be the focus, not the introduction of extraterritorial instruments.”⁶⁸

This is not a plausible argument. All companies obviously fall under their national jurisdiction first. Yet, as experience shows, even in countries with a functioning legal system, transnational corporations repeatedly slip through the net.

3 Should the instrument envisage direct obligations for transnational corporations?

A third key point of discussion was whether a binding instrument should establish direct obligations under international law for TNCs, i.e. obligations for corporations that the jurisdiction of treaty parties or an interna-

67 See ETO Consortium (Ed.) (2013).

68 Letter by the Confederation of German Employers’ Associations (BDA) to the state secretary of the German Foreign Office Stephan Steinlein dated 19 June 2014.

tional court could apply directly. In most cases, states simply commit to implementing the third-party obligations arising out of a treaty in their national legislation, which then renders it applicable in national courts.⁶⁹ How much sense does the role of the state as an intermediary make in this case?⁷⁰ This question also touches on the status of transnational corporations in international law.⁷¹

An argument in favour of direct obligations for corporations is that a purely national system of obligations to legislate international human rights norms at the nation-state level has so far not been able to prevent human rights abuses by transnational corporations. This is in particular the case where weak states with a non-functioning judiciary are not willing to or are incapable of regulating TNCs and holding them to account for human rights abuses.⁷²

Direct obligations for TNCs would have the advantage that corporations could no longer hide their failure to act behind the alleged shortcomings of states.⁷³ Transnational corporations have already become actors in international law, as for example the investor-state dispute settlement (ISDS) mechanisms included in many bi- and multilateral investment agreements allow corporations to sue states directly in arbitration courts. Corresponding obligations nonetheless do not so far complement these rights.

In international law, there are already a few agreements that contain direct obligations for corporations. The 1969 International Convention on Civil Liability for Oil Pollution Damage holds ship owners (including companies) liable for oil pollution damage.⁷⁴ The 1982 UN Convention on the Rights of the Sea forbids not only states, but all natural and juridical persons, from appropriating the seabed and/or associated resources.⁷⁵

The 2003 draft UN Norms to regulate the obligations of transnational and other business enterprises with regard to human rights also included direct obligations for corporations:

69 See Bilchitz/Lopez (2015).

70 See *ibid.* p. 5.

71 See Nowrot (2012).

72 See Bilchitz/Lopez (2015), p. 6.

73 See *ibid.*

74 See Article III of the International Convention on Civil Liability for Oil Pollution Damage (1969): "(...) the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."

75 See: Article 137(1) of the UN Convention on the Law of the Sea (1982): "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized."

“Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, *inter alia*, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.”⁷⁶

There are, however, a number of fundamental reservations about defining direct human rights obligations for TNCs. One argument is that even direct obligations are no guarantee: Even under a regime of direct obligations for TNCs, states would nonetheless have to intervene to monitor compliance with obligations and enforce possible judgements, meaning there is no way to get around the consent of states.

Then there is the argument that we need to balance the rights of corporations in ISDS mechanisms by creating obligations in international law. Critics however admonish that ISDS mechanisms should be opposed outright because they undermine international and national constitutional law. ISDS mechanisms should therefore be abolished. Moreover, TNCs could turn the argument around that rights should be accompanied by obligations, and use it to legitimize ISDS mechanisms.

Finally, the opponents of direct obligations for TNCs also argued that human rights obligations must not be confounded with the principles concerning the civil and criminal law regulation of TNCs that these obligations entail. In line with the international, quasi-constitutional role of human rights in the UN Charter and international law, only states can be recognised as subjects of international law.

During the first OEIWG session, FIAN therefore warned that granting transnational corporations international legal status would only further strengthen their position:

“TNC are licensed by states and shall not have standing in international human rights law. Human rights historically and conceptually are there to instruct and limit the power of states, based on peoples’ sovereignty. Transnational corporations have no legitimacy, nor governance functions in this context.

FIAN is concerned about the ongoing corporate capture of policy spaces, internationally and nationally. In some countries corporations

76 See: UN CHR (2003), 18.

have also captured the territories, and the administrative, legislative and even the adjudicatory systems. To give transnational companies international legal status would further empower corporate capture of human rights.”⁷⁷

During the two OEIWG sessions in October 2016 and then in 2017, governments have to continue the discussion over these controversial points and to explore the form and content a treaty should have to take to achieve consensus.

77 See www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel3/Others/Food-First_InformationandActionNetworkFIAN.pdf.

IV.

Form and content of a treaty

The form and content of a future legal instrument on business and human rights remains unclear. Proposals to date have mainly come from legal experts and civil society organisations. These differ in thematic scope, degree of detail and certainly political feasibility. Governments have tended to provide statements of a more general nature and made proposals concerning individual aspects of a treaty.

Possible forms a treaty could take

A treaty could take very different forms, ranging from an all-encompassing, detailed convention, to a shorter more general framework convention, an optional protocol to an existing human rights agreement, or a set of thematically focussed individual instruments.

The treaty as detailed agreement, framework convention, optional protocol, set of focussed instruments or as a "living treaty"?

John Ruggie, architect of the UN Guiding Principles, who is generally highly critical of a binding legal instrument, explicitly warns against regulating all aspects of corporations' human rights obligations in an overarching legal framework. According to him, such an encompassing instrument would not do justice to the complexity of the issues at hand. It would also be basically politically non-negotiable and its implementation would fail at the national level.

"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 (...). 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 (...)." ⁷⁸

However, a number of human rights agreements, such as the European Convention on Human Rights, are of a very general nature, overwhelmingly containing general principles. These agreements constitute the basis

⁷⁸ See Ruggie (2014c).

for further detailed regulations.⁷⁹ Some proposals on the form of a future instrument point in this direction.⁸⁰

For example, in the case that a political agreement on a more detailed treaty proves impossible to achieve, the International Commission of Jurists (ICJ) proposes a more general declaration or framework convention. In their view, such a declaration should then focus on defining the standards that have not (or only insufficiently) been considered in the UN Guiding Principles. These would include a clear definition of what constitutes corporate human rights abuses as well as standards for human rights due diligence, compensation and international cooperation in the punishment of human rights abuses.⁸¹

The human rights expert Surya Deva lists some requirements for such a declaration:⁸² “The proposed Declaration

- “1. should provide a sound normative basis for why companies have human rights obligations;
- “2. proclaim that human rights applicable to companies are not limited only to those mentioned in the International Bill of Rights but rather extend to those elaborated in all human rights treaties adopted by the UN;
- “3. outline the principles governing the extent of corporate obligations in relation to these rights;
- “4. envisage a number of state-focal and non-state-centric mechanisms to implement and enforce human rights obligations against companies, and
- “5. suggest ways to remove substantive, conceptual procedural and financial obstacles experienced by victims in holding companies accountable for human rights violations.”⁸³

Such a declaration or framework convention has the advantage that it could prove easier to achieve consensus among the UN member states over such general principles. Optional protocols could then later define obligations in more detail.⁸⁴

⁷⁹ See Darcy (2015).

⁸⁰ See Deva (2014), p. 8. and Bilchitz (2015), p. 15.

⁸¹ See ICJ (2014), pp. 43-44 and Cassel/Ramasastri (2015), p. 21.

⁸² See Deva (2014), p. 8.

⁸³ See Deva (2014), p. 8.

⁸⁴ See Cassel/Ramasastri (2015), p. 21.

Rolf Künneemann, FIAN human rights director, proposes a “living treaty” consisting of a few basic standards and principles plus process-oriented elements, similar to the successful Montreal Protocol to protect the ozone layer. Such an approach could institutionalize the flexible growth of binding standards as well as the necessary level of international cooperation for their implementation. David Bilchitz, professor of human rights and international law at the University of Johannesburg, explains:

“They are not meant to address every single issue that arises in this complex arena but to create the legal ‘basic structure’ in terms of which legal matters would be resolved.”⁸⁵

Bilchitz proposes for example mechanisms for norm development and decision-making in the case of disputes.⁸⁶

Future tightening
of standards by a
majority of treaty
parties possible

Further process-oriented elements could include creating a secretariat, nominating an ombudsperson and establishing procedures based for example on the Montreal Protocol that allow a majority of treaty parties to eventually broaden the scope of or tighten standards.

An effective counter-model to an encompassing general framework convention could be a model based on a set of shorter instruments, each with very specific content.⁸⁷ The treaty could also be added as optional protocol to existing human rights agreements, for example as an optional protocol to the International Covenant on Economic, Social and Cultural Rights and/or the International Covenant on Civil and Political Rights. Such a protocol could commit state parties to passing legislation that provides pre-emptive measures and creates liability for businesses that violate the rights included in the treaty.⁸⁸

Possible elements of a treaty

Concrete proposals exist not only for the form of a treaty, but also for the specific content. Douglass Cassel and Anita Ramasastry have categorized the different proposals into three groups: (1) those that demand measures mainly at the national level, (2) those that foresee bolstering existing or creating new international mechanisms, and (3) proposals that aim for a greater coherence of policies at the national and international levels.⁸⁹ According to Cassel and Ramasastry, agreements that focus on

85 See Bilchitz (2015), p. 15.

86 See Bilchitz (2015), p. 15.

87 See Deva (2014), p. 9.

88 See ICJ (2014), p. 41.

89 See Cassel/Ramasastry (2015).

specific branches or specific forms of corporate human rights abuses might also be an option.⁹⁰

Olivier de Schutter, a former UN Special Rapporteur on the right to food, sees four possible options for a treaty:⁹¹

- “1. to clarify and strengthen the states’ duty to protect human rights, including extraterritorially;
- “2. to oblige states, through a framework convention, to report on the adoption and implementation of national action plans on business and human rights;
- “3. to impose direct human rights obligations on corporations and establish a new mechanism to monitor compliance with such obligations; and
- “4. to impose duties of mutual legal assistance on states to ensure access to effective remedies for victims harmed by transnational operations of corporations.”

De Schutter favours a combined instrument that renews the obligation of states to protect human rights even extraterritorially and to take all necessary measures to stop private actors from committing human rights abuses (option 1). Nonetheless, the instrument should also commit states to cooperation at the judicial level and mutual judicial assistance to ensure victims’ access to justice (option 4). Instead of establishing new accountability mechanisms at the international level, this proposal would lead to a strengthening of jurisdiction at the national level.

States should be obliged to cooperate at the judicial level and to mutual judicial assistance

An instrument based on these elements would, according to de Schutter, represent a substantial improvement for victims of corporate human rights abuses. Politically, such an approach seems feasible, because the proposals are not fundamentally new and build on existing constructs in international law.

“Specifically, the solution that appears to achieve the best balance between what is politically feasible and what represents a true improvement for victims may be a hybrid solution building on elements of the first and the fourth option (...). States may have to be reminded of their duties to protect human rights extraterritorially, by regulating the corporate actors on which they may exercise influence, even where such regulation would contribute to ensuring human rights outside their national territory (...). The most effective

⁹⁰ Ibid., p. 36.

⁹¹ See de Schutter (2016).

means to discharge this extraterritorial duty to protect, therefore, is through parent-based extraterritorial regulation—by imposing on the parent corporation certain obligations to control its subsidiaries—, or by imposing on the company domiciled under the jurisdiction of the state concerned to monitor the supply chain (...). But such a duty to protect can only be discharged effectively if states co-operate with one another in order to put an end to the accountability gaps that may emerge from the ability of TNCs to operate across different national jurisdictions. A reinforcement of inter-state co-operation, based on the mutual trust of states in their respective legal systems when they seek to address human rights violations by corporate actors, is the price to pay for ensuring effective access to remedies for victims of transnational corporate harms.”⁹²

In a statement in 2015, the Treaty Alliance put forward proposals for a treaty that overlapped with de Schutter’s proposal in key areas (see box 1). The Treaty Alliance demanded, beyond a simple confirmation of the extraterritorial obligations of and a commitment to judicial cooperation between states, the establishment of an international monitoring and accountability system, as well as provisions that commit states to respect, protect and facilitate the work of human rights defenders and whistle-blowers.

Box 1

Form, scope and content of the treaty—the proposals by the Treaty Alliance

- a) The treaty should require States to adopt legislation and other measures requiring TNCs and other business enterprises to adopt policies and procedures aimed at preventing, stopping and redressing adverse human rights impacts wherever they operate or cooperate. These measures should also cover business operations and relationships taking place in countries other than the countries where the business may be domiciled or headquartered. Companies should be subjected to appropriate sanctions for their failure to adopt such policies and procedures.
- b) The treaty should clarify the kind of company conduct that will give rise to legal liability (civil, criminal and administrative). Through this international instrument, States will have the obligation to translate these standards into national legislation and enforce them. Offences committed against the environment and impacting adversely human rights should be included. Provisions for international legal and judicial cooperation among countries should facilitate the investigation and trial of cases of transnational nature.
- c) The treaty should elaborate on the modalities in which TNCs and other business enterprises participate in the commission of human rights abuses, including cor-

⁹² See de Schutter (2016), p. 66.

porate complicity and parent company responsibility for the offences committed by its subsidiary. Corporate legal responsibility should not exclude the legal responsibility of company directors or managers.

- d) The treaty should allow people with a claim access to judicial remedies not only in their own home States, but in all other States that have jurisdiction over the concerned business enterprise. The jurisdiction of national courts of these States should extend to deal with these cases separately and jointly, and effectively guarantee access to justice to the victims.
- e) The treaty should provide for an international monitoring and accountability mechanism. A dedicated unit or centre within the United Nations may improve the international capacity for independent research and analysis and for monitoring the practices of transnational corporations and other business enterprises. The needs and feasibility of a complementary international jurisdiction should be discussed.
- f) The treaty should contain provisions requiring States to respect, protect and facilitate the work of human rights defenders and whistle-blowers. The right to access to information of public importance and relevant to cases of business-related abuse should be guaranteed.

Source: Treaty Alliance (2015).

As part of the Campaign to Dismantle Corporate Power and Stop Corporate Impunity, more than 150 civil society organisations had jointly drafted the International Peoples Treaty in 2014.⁹³ The campaign had a far more extensive vision of the elements a future treaty should include.⁹⁴ In a paper that presents eight key arguments, the campaign proposes that the treaty give precedence to human rights norms over trade and investment agreements. Moreover, an effective treaty would have to include commitments for international financial and economic institutions, such as the IMF and the World Bank, as well as enforcement mechanisms and corresponding institutions, for example in the form of a global court for TNCs and human rights.

Based on the proposals made so far, we could sum up the possible building blocks of a treaty as follows:

1. Definition of responsibilities and liabilities in human rights abuses

In principle, the treaty should make it possible to hold transnational corporations accountable for human rights abuses. This requires a definition of the specific responsibilities of businesses. The treaty would therefore have to commit states to legally anchor corporate liability at the national level in either criminal, civil or administrative law. Appropriate standards

⁹³ See Campaign to Dismantle Corporate Power and Stop Corporate Impunity (2014).

⁹⁴ See Campaign to Dismantle Corporate Power and Stop Corporate Impunity (2015).

and a list of punishable abuses could be defined in the treaty.⁹⁵ An alternative would be to anchor such a liability regime in an optional protocol to the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights.⁹⁶

ICJ points out that corporate liability would have to apply not only in cases of direct human rights' abuses but also in cases where businesses are indirectly involved or complicit in abuses.⁹⁷ This would require defining the boundaries of parent company and subsidiary responsibilities, as well as the responsibilities of businesses in its extraterritorial activities.

According to de Schutter, parent companies would have to be obligated to monitoring the actions of their subsidiaries, because only this could prevent having to deliberate each time whether and to what degree the parent company is actually involved in such actions.⁹⁸ Parent companies would only be released from this liability if they can prove that in spite of adequate human rights risk analyses and impact assessments, as well as any applicable counter measures, the company was unable to prevent the human rights abuses committed by its subsidiary.

By definition, a company controls another company when it holds a certain number of shares in that company. However, instead of taking shareholdership as the single criterion to establish liability, it would also be possible to extend liability to suppliers, contractors and franchisees, i.e. to all entities the company in question has contractual relations with.

2. Binding due diligence including human rights risk analyses and impact assessments

Businesses tend to meet their due diligence obligations only if made legally liable for non-compliance

The treaty should commit businesses to introducing guidelines and taking the necessary measures to prevent human rights abuses in their entire economic activities and along the entire supply chain. Companies would have to implement systematic human rights risk analyses and impact assessments.⁹⁹ Consistent international standards should govern the corresponding guidelines and measures. The treaty could either commit businesses directly or commit state parties, who would then have to ensure that businesses under their jurisdiction fulfil their due diligence duties. Businesses tend to meet their due diligence obligations only if made legally liable for non-compliance. This requires a legally binding liability regime. In March 2016, Amnesty International, Brot für die Welt, Germanwatch and Oxfam presented an expert opinion that listed a number of

⁹⁵ See ICJ (2014), p. 48.

⁹⁶ Ibid.

⁹⁷ Ibid. p. 14.

⁹⁸ See de Schutter (2016), p. 53.

⁹⁹ See ICJ (2014), p. 47 and Cassel/Ramasastri (2015), p. 18 ff.

potential procedures to anchor corporate due diligence provisions in German law.¹⁰⁰ Similar initiatives currently exist in France and Switzerland.

3. National and international monitoring and implementation mechanisms

Implementation of the treaty will require monitoring and implementation mechanisms at the national and international levels. To monitor the implementation of the treaty, governments can refer to existing mechanisms, as are included for example in the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 33 of the Convention on the Rights of Persons with Disabilities for examples states:

“National implementation and monitoring

- “1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
- “2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.
- “3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.”¹⁰¹

Article 34 onwards provides for the establishment of a committee at the international level to which state parties would regularly submit reports detailing their efforts to implement the convention.

¹⁰⁰ See Klinger et al. (2016).

¹⁰¹ Article 33 of Convention on the Rights of Persons with Disabilities (www.un.org/disabilities/convention/conventionfull.shtml).

For businesses to be held accountable under international mechanisms will require imposing direct obligations. A growing number of international law and human rights experts therefore advocate direct commitments for businesses. Surya Deva for example argues:

“(..) the international instrument should not be exclusively *state-centric*, otherwise it might not fill the so-called governance gaps.”¹⁰²

Or, as Menno Kamminga, the former director of the Maastricht Centre for Human Rights, already noted in 2004:

“It seems to me that concurrence of international obligations of states and of non-state actors is an inevitable result of the globalization process (...). Perhaps what really concerns some states is that by holding companies accountable at the international level their sovereign powers may be threatened (...). To this concern I would respond that 94 states have currently accepted that their highest officials may be tried by the International Criminal Court. Surely this is a much greater challenge to state sovereignty than holding business enterprises accountable internationally.”¹⁰³

De Schutter, too, considers direct obligations for businesses. He nonetheless warns:

“(..) it would be important to avoid a situation in which the possibility to directly engage the responsibility of a corporation under such a mechanism would allow a state to circumvent its own specific duty to protect human rights by establishing an appropriate regulatory and policy framework.”¹⁰⁴

An affirmation and clear definition of the full scope of states’ obligations to protect should therefore accompany the introduction of direct obligations for TNCs.

A number of further proposals for a treaty, however, do not include direct obligations for businesses, and instead aim at suing TNCs responsible for human rights abuses before an international institution, in cases where such abuse cannot be brought before a national court.¹⁰⁵ This could be achieved either through an international court analogous to the International Criminal Court (ICC) or by extending the ICC’s mandate to legal

¹⁰² Deva (2014), p. 3.

¹⁰³ Kamminga (2004), p. 6.

¹⁰⁴ de Schutter (2016), p. 59.

¹⁰⁵ See de Schutter (2016), p. 59 and Cassel/Ramasastri (2015), p. 29 ff.

persons including businesses. France already made such a proposal when the ICC was founded in Rome in 1998.¹⁰⁶

Ecuador pronounced itself in favour of such an international court in January 2016.¹⁰⁷

In de Schutter's eyes, a court for TNCs should limit itself to handling cases of gross human rights abuses and crimes against international humanitarian law, as well as complicity in state crimes, to prevent the congestion of such an entity.¹⁰⁸ This could however imply that such a court would have no competency in crimes against economic, social and cultural human rights.¹⁰⁹ The treaty would therefore have to overcome the discrimination of these rights as their violation can lead to grave damages.

4. Enhanced cooperation between countries in investigation, jurisdiction and enforcement of judgements

A treaty needs to commit states to collaborating in all judicial matters. It should build on the principle of shared responsibility, as already applies in the struggle against corruption and transnational organised crime.¹¹⁰ Collaboration covers at least mutual legal assistance relating to investigation, collection of evidence and prosecution, as well as mutual recognition and enforcement of judgements in criminal and civil law cases.¹¹¹ Such an agreement would not create new mechanisms at the international level, but instead strengthen jurisdiction at the national level.

Chapter IV of the United Nations Convention against Corruption could serve as a blueprint, as it deals with international cooperation. The chapter includes articles on the extradition of wanted persons, mutual legal assistance and support relating to investigation and prosecution. Article 43 states:

- “1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

¹⁰⁶ See Clapham (2000).

¹⁰⁷ See www.andes.info.ec/es/noticias/ecuador-propone-tribunal-internacional-juzgar-delitos-transnacionales.html.

¹⁰⁸ See de Schutter (2016), p. 59.

¹⁰⁹ See Deva (2014), p. 7.

¹¹⁰ See Cassel/Ramasastri (2015), p. 24.

¹¹¹ See ICJ (2014), p. 49.

“2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.”¹¹²

To facilitate international cooperation, the UN Convention against Transnational Organized Crime provides for the establishment of a national body as a point of contact in each state party.¹¹³

To ensure territorial sovereignty Article 4 of both conventions states that:

“1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

“2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”¹¹⁴

5. Implementation of the extraterritorial obligations of states to protect human rights

Concerning ETOs, the UN Guiding Principles lag far behind the current human rights discourse

Concerning extraterritorial human rights obligations of states, the UN Guiding Principles lag far behind the current international human rights discourse. Whereas the UN Guiding Principles are very reserved on this point, the UN Committee on Economic, Social and Cultural Rights has already called upon states in several of its General Comments to prevent human rights abuses of companies under their jurisdiction in foreign countries.¹¹⁵

The Maastricht Principles compiled in 2011 explicitly set out the importance of extraterritorial state obligations in the field of economic, social and cultural rights:

¹¹² Article 43 of the UN Convention against Corruption (2003).

¹¹³ See Article 13.2 of the UN Convention against transnational organised Crime (2001).

¹¹⁴ Article 4 of the UN Convention against corruption (2003) and Article 4 of the UN Convention against transnational organised Crime (2001).

¹¹⁵ See E/C.12/2011/1, item 5.

“The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world.”¹¹⁶

As the ETO Consortium explains:

“Extraterritorial obligations (ETOs) are a missing link in the universal human rights protection system. Without ETOs, human rights cannot assume their proper role as the legal bases for regulating globalization and ensuring universal protection of all people and groups.”¹¹⁷

The Maastricht Principles also define the circumstances in which states have an extraterritorial obligation to regulate:

- “a) the harm or threat of harm originates or occurs on its territory;
- “b) where the non-State actor has the nationality of the State concerned;
- “c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
- “d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor’s activities are carried out in that State’s territory;
- “e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.”¹¹⁸

States therefore must fulfil their protection obligations concerning corporations which they can in this sense be expected to regulate, even if the victims of such corporations live in a foreign country. To this end, states must ensure that companies implement the corresponding norms

116 ETO Consortium (Ed.) (2013), p. 5.

117 ETO Consortium (Ed.) (2013), p. 3.

118 Ibid. p. 9.

and standards in the companies they control. Should such regulation only be possible through the domestic regulation of companies (parent companies), then, according to de Schutter, this would not be a classic example of extraterritoriality.¹¹⁹

The implementation of extraterritorial human rights obligations implies granting the victims of corporate human rights violations opportunities to sue companies at a court in that company's home country. This requires lowering the judicial barriers for the victims of corporate human rights violations, in particular for plaintiffs from the host country where that company does business, and should include possibilities for collective claims, relaxing burden of proof requirements, reducing process costs, as well as protection programmes for plaintiffs in the company's host country.¹²⁰ The scope of national jurisdiction might also have to be extended. Moreover, the process would have to define a way of dealing with contradicting legal systems. The corresponding regulations could be formulated analogous to the UN Convention against Transnational Organized Crime.

6. Defining the relationship between the treaty and bi- and multilateral trade and investment agreements

A treaty should clarify its position alongside other international agreements, in particular bi- and multilateral trade and investment agreements. The treaty would either be superordinate to these, or it could include a binding decision to amend the relevant trade and investment agreements to include effective human rights clauses.

Trade and investment agreements should include effective human rights clauses

120 EU trade and cooperation agreements already include such human rights clauses. However, there are considerable differences in how these clauses are formulated and used. Civil society groups criticize the EU's use of such clauses in particular against small developing countries when they break democratic and rule of law principles. The EU effectively applies these clauses as if they were political rather than human rights clauses. Moreover, the clauses fail to address abuses that are related to the provisions of the trade agreement itself. These clauses are in need of urgent reform.¹²¹ In a study published by the Deutsche Institut für Menschenrechte (jointly with MISEREOR), the international law expert Lorand Bartels has developed a model human rights clause for the EU's international law agreements.¹²² At the global level, it could potentially serve as a model clause in treaty negotiations too.

119 See de Schutter (2016), p. 47.

120 See ICJ (2014), p. 48.

121 See Bartels (2014), p. 10f and Hilbig (2015), p. 13.

122 See Bartels (2014), p. 39ff.

V.

Conclusions for the subsequent treaty process

It was a truly historic decision, when, in 2014, the Human Rights Council granted a new intergovernmental working group the mandate to develop a legally binding instrument on TNCs and other business enterprises with respect to human rights. For the first time since the closure of the United Nations Commission on TNCs in 1992, a UN intergovernmental body was to dedicate itself to the international regulation of corporations. Whether this will indeed lead to an effective legal instrument, however, remains unclear in the face of the massive resistance by certain segments of business and politics. In a Guardian article from July 2015, Phil Bloomer, the executive director of the Business & Human Rights Resource Centre, wrote:

“(..) the treaty negotiations have certainly left the starting blocks, which is more than many of us expected a year ago. Though it is far from clear that it will cross the finish line, when it will cross the finish line, and in what form that might be.”¹²³

Growing support for the treaty

Increasing numbers of people have become convinced during the last years that, as an instrument, the UN Guiding Principles cannot entirely regulate all questions related to business and human rights. More and more human rights experts and economists see the need to switch from *soft* to *hard law* to regulate the activities of transnational corporations. Already during the second UN Forum on Business and Human Rights 2013, Economic Sciences Nobel laureate Joseph Stiglitz had demanded:

In the area of business and human rights, governments should replace soft law with hard law

“Soft law—the establishment of norms of the kind reflected in the Guiding Principles on Business and Human Rights—are critical; but they will not suffice. We need to move towards a binding international agreement enshrining these norms (...).”¹²⁴

Puvan Selvanathan, a former member of the UN Global Compact, had a similar response. Between 2011 and 2015, he had also been one of five members of the UN working group on the issue of human rights and transnational corporations and other business enterprises, which was established to accompany the implementation of the UN Guiding

¹²³ Bloomer (2015).

¹²⁴ Joseph E. Stiglitz’s address to panel on Defending Human Rights (revised). Geneva (3 December 2013) (www.ohchr.org/EN/Issues/Business/Forum/Pages/2013FBHRSUBmissions.aspx), p. 4.

Principles. In mid-December 2015, in a letter to the President of the Human Rights Council, he set out his resignation from the working group in the following terms:

“(...) business is profit-orientated and must adhere to laws, but not norms (...). I believe that if a business can operate ‘legally’ yet impact negatively on human rights then that is a simple failure of a state’s duties (...). I suggest that if states wish for businesses to respect human rights then what that constitutes must be made mandatory (...). The loudest calls within a company for higher goals are distant echoes if even a whisper for profit exists (...). Companies are our own social creations and reflect our own values. They are defined by the rules that we choose to lay down.”¹²⁵

Growing gap between ever denser bi- and multilateral investment protection regulation and lack of regulation for human rights

Many human rights experts are alarmed at the significant widening in recent years of the gap between ever-denser bi- and multilateral investment protection regulation and the lack of such regulation for human rights. United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred de Zayas, warns:

“The last 25 years have delivered numerous examples of abuse of rights by investors and unconscionable ISDS arbitral awards, which have not only led to violations of human rights, but have had a chilling effect, deterring states from adopting necessary regulations on waste disposal or tobacco control (...). No one should underestimate the adverse human rights impacts of free trade and investment agreements on human rights, development and democratic governance. Respect for human rights must prevail over commercial laws. It is time for the UN general assembly to convene a world conference to put human rights at the centre of the international investment regime. In this context, a binding treaty on business and human rights is long overdue.”¹²⁶

In her opening remarks to the first session of the OEIWG, Victoria Tauli-Corpuz, the UN Special Rapporteur on the Rights of Indigenous Peoples, referred to this imbalance between business and human rights regulation and emphasised the urgent need for binding forms of corporate regulation:

“What we see more and more is that foreign investors and transnational corporations are provided with very strong rights and extremely strong enforcement mechanisms. On the other hand global and national rules dealing with the responsibilities of

125 <http://business-humanrights.org/sites/default/files/documents/Letter%20to%20the%20President%20HRC.pdf>.

126 de Zayas (2015).

corporations and other forms of businesses are characterized by the form of soft law. They fall short of legally binding instruments that allow for achieving balance in the rights and responsibilities of these actors. We face a context where corporations still lack international legal responsibility commensurate with their role and influence in international and domestic affairs. At the same time, there are gaps in the international legal framework in regard to the duty to protect human rights and access to remedy (...). An international legally binding Instrument would significantly help in establishing the much needed balance in the international system of rights and obligations with regard to corporations and host governments.”¹²⁷

Even the monolithic opposition to international corporate regulation in questions of business and human rights by those representing the interests of business is showing cracks. A survey by The Economist Intelligence Unit revealed that a significant proportion of business representatives are now in favour of an international agreement. Based on a global survey of 853 business executives, the report concludes that:

The Economist Intelligence Unit: more and more business representatives support a binding international treaty

“(...) although the reaction by most businesses has been negative, questioning not only the desirability but the efficacy and feasibility of such an instrument, 20% of respondents to our survey said that a binding international treaty would help them with their responsibilities to respect human rights.”¹²⁸

John Ruggie, the architect of the UN Guiding Principles, continues to express his doubts concerning the practicality and feasibility of a legally binding instrument, yet he too has conceded:

“Further international legalization in business and human rights is inevitable as well as being desirable in order to close global governance gaps. About that there can be little doubt.”¹²⁹

Tumbling counter arguments?

For years, Ruggie supplied the opponents of a legally binding instrument for corporations with the arguments that are even today found in business association or government representative statements. As early as 2008, Ruggie had provided three core arguments against negotiating a treaty:

¹²⁷ Opening remarks by Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, during the first session of the OEIWG on 6 July 2015 in Geneva (www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/VictoriaTauli.doc).

¹²⁸ The Economist Intelligence Unit (2015), p. 23.

¹²⁹ Ruggie (2015).

1. “(...) treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent.
2. “(...) a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights.
3. “(...) even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.”¹³⁰

None of these three statements is however a convincing argument against global corporate regulation, because all three are also true for most instruments of international law. If governments had acted according to this logic, neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights would exist. Negotiating and ratifying these Covenants was also a “painfully slow” process. Climate negotiations, for example, demonstrate that in spite of blocked negotiations at the global level, short-term measures agreed between like-minded governments are nonetheless possible, for example to promote renewables. Of course difficulties arise in the implementation of conventions and this also holds true for many ILO conventions. But this should not imply that their implementation is therefore worthless.

Accordingly, in parallel to short-term and pragmatic steps, in particular with regard to the further implementation of the UN Guiding Principles, it is nonetheless possible to drive forward the negotiations on a legally binding instrument.

Opponents, however, also put forward a number of arguments against such a two-pronged approach:¹³¹

1. Governments could use treaty negotiations as an excuse for delaying national legislation amendments.
2. Treaty negotiations would completely tie up the limited resources of governments, NGOs and businesses, thus making urgently required innovations more difficult to accomplish.
3. A treaty born out of a consensus between governments can only always reflect the smallest common denominator and will always offer less than today’s strictest voluntary standards.

¹³⁰ Ruggie (2008), p. 42.

¹³¹ Again, arguments by John Ruggie (2008) are used as examples and can be found in numerous statements by business and government representatives.

4. Pressure from civil society campaigns on businesses to voluntarily implement the strictest standards would become less effective if businesses could refer to lower international standards.

Although we should take these arguments seriously, there are also good counter-arguments.

Argument 1: Governments regularly argue that they cannot unilaterally introduce higher standards and stricter national laws for businesses, as this would compromise that country's position as a business location. A particularly clear example in this respect is corporate taxation. Yet, business too is increasingly calling for a "level playing field" and competitive neutrality between voluntarily committed small and medium-sized businesses and large corporations by establishing binding international standards that apply to all businesses. The cost of implementing human rights due diligence could then be spread evenly among all actors.

Argument 2: Experience has shown that in international negotiations, relatively few experts are involved in the actual negotiating process. Therefore, such processes do not tie up capacities to a significant degree. International processes of negotiation do, however, create a discursive forum that can raise public awareness and create political pressure. Again, climate negotiations are a good example. On the downside, several previous multi-stakeholder dialogues, such as the process towards a German National Action Plan to implement the UN Guiding Principles, have shown that a significant amount of organisational capacity and resources can be tied up without this necessarily ensuring significant results.

Argument 3: In cases, where coalitions of like-minded governments and NGOs initially drive forward international processes of negotiation (for example the Anti-Personnel Mine Ban Convention or the establishment of the International Criminal Court) the result is not necessarily the lowest common denominator determined by those governments willing to concede the least. At the same time, however, global conventions offer groups of like-minded governments the opportunity to go beyond the minimal consensus by implementing optional protocols.

Moreover, a treaty on business and human rights does not require us to reinvent the wheel. Even today, a number of international agreements contain elements that, in a modified fashion, could serve as a blueprint for the future treaty. These include the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption, the Optional Protocol to the Convention against Torture, the International Convention on Civil Liability for Oil Pollution Damage, and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

Several international agreements contain elements that could serve as blueprint for the future treaty

Argument 4: The existence of weak international agreements by no means prevents civil society organisations from campaigning for further going commitments by businesses and governments. The ILO's core labour standards did not stop unions from struggling for further rights at the national level. And global climate agreements do not stop environmental groups from denouncing oil businesses and automobile corporations for the havoc they wreak on the climate.

Finally, the argument that we lack realistic instruments to implement such a treaty and that it would therefore quickly lose its legitimacy is hardly convincing. An effective implementation of global corporate rules could prove difficult if they are limited to the existing legal instruments in corporate home and host countries. However, even the UN Guiding Principles provide for improved access to remedies for the victims of human rights abuses. Strengthening existing or creating new judicial and extrajudicial complaints mechanisms would be the basis for this.

Even if establishing an international court for corporations currently seems a remote possibility, this option should not be ruled out. Twenty years ago the same was said about establishing the International Criminal Court. Negotiations on multilateral trade and investment agreements are now considering proposals for an international trade court. During the TTIP negotiations, German Minister of the Economy Sigmar Gabriel, together with five other social-democratic trade and economy ministers, proposed establishing such a trade court in cooperation with the US: "Including professional judges, public hearings and an appeal body."¹³² Many experts and civil society groups rejected this proposal on the grounds that it would cement the right of corporations to sue states.¹³³ This example, however, does show that enforcement instruments could very well be developed if the corresponding political will existed. Instead of feeding the particular interests of transnational investors, an adapted, transparent and democratically legitimised body could be established to grant the victims of human rights abuses access to justice.

The next steps in the treaty process

Between 24 and 28 October 2016, the second session of the OEIWG is set to take place in Geneva. Meanwhile, the chair of the OEIWG will take part in several regional consultations. She will hold bilateral talks with governments of UN member states and attempt to win the support of further countries for a constructive engagement in the coming session. She will also direct efforts at EU member countries.

¹³² Interview with Sigmar Gabriel in the German weekly *Wirtschaftswoche*, 10 October 2015 (in German) (www.wiwo.de/politik/deutschland/sigmar-gabriel-zu-ttip-wir-brauchen-einen-handelsgerichtshof-mit-den-usa/12422424.html).

¹³³ See Eberhardt (2016).



The Ecuadorian Ambassador María Fernanda Espinoza Garcés, Chairperson-Rapporteur of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

By the third OEIWG session in 2017, the chair is expected to present a draft for a legally binding instrument. This draft will be the basis for negotiations during the third session. The negotiation results will then be forwarded to the Human Rights Council, which will decide on the next steps, as well as potentially extending the OEIWG mandate.

Discussions on the possible treaty, however, will not be limited to the official OEIWG sessions, and will also take place during other events related to business and human rights. At the UN level, the relevant discussion platforms will be the sessions of the Human Rights Council, the UN working group on the issue of human rights and transnational corporations and the annual UN Forums on Business and Human Rights.

So far, the US has not participated in the discussions of the Human Rights Council's intergovernmental working group. The EU only participated in the first one and a half days of the first session and delayed the start of discussions. The EU's demonstrative absence and general refusal to participate in discussions with the members of the OEIWG sent a negative signal and also damaged its political credibility in other processes.

The EU's demonstrative absence and general refusal to participate in discussions on the treaty sent a negative signal and damaged its political credibility

Representatives of environmental, development and human rights organisations have repeatedly called on the EU to participate constructively in the discussions of the OEIWG. In December 2015, even the European Parliament expressly recommended that the EU and its member states “engage in the emerging debate on a legally binding international instrument on business and human rights within the UN system.”¹³⁴ The EU should take these recommendations seriously, and actively and constructively take part in the intergovernmental working group's second session in October 2016.

¹³⁴ See European Parliament (2015), para. 56.

A legally binding instrument on TNCs and other business enterprises is not only of importance to human rights activists. A treaty on TNCs would bolster other groups and social movements, such as those campaigning against TTIP and CETA, for the 2030 agenda, for climate and environment protection, against tax avoidance and evasion strategies by transnational corporations, as well as for enhanced consumer and data protection. Civil society organisations from diverse social movements should therefore dedicate themselves to the treaty process, support the efforts by the civil society Treaty Alliance (www.treatymovement.com) and introduce the issue in other political debates.

The leading international business associations will most likely continue to resist a legally binding agreement.¹³⁵ Instead of bowing to the pressure of business lobbies, governments should critically dissect their arguments. Would universal human rights standards really prevent investments? Or do they not rather provide the legal certainty investors seek? In particular, governments should not listen exclusively to the voices of business associations, and need to recognise that a growing number of corporations and other business enterprises today embrace far more progressive positions than their respective business associations.

Undue corporate influence on the treaty process has to be prevented

Under no circumstances can we allow business lobbies to have influence behind closed doors on discussions at the Human Rights Council. Even before the first OEIWG session, Amnesty International demanded:

“The process must be conducted transparently and there should be clear ground rules in place to help safeguard the process from corporate capture and undue influence being placed on decision-makers through closed door lobbying and other forms of pressure. Those wishing to have a voice in this process must do so publicly and in good faith. Specifically, all positions, proposals and concerns must be publicly raised and deliberated.”¹³⁶

In the same vein, in a 2015 statement, the Treaty Alliance demanded:

“States and the IGWG should safeguard their integrity from undue influence by actors from or related to the private sector whose primary interest in the process falls outside the objective of promotion and protection of human rights. The existing rules for the participation of observers with ECOSOC status in the Intergovernmental Working Group should be applied. Special attention should be given to the participation of representatives from communities and

¹³⁵ See on past business lobby activities: Martens (2014).

¹³⁶ Amnesty International, Public Statement of 18 June 2015: All States must participate in good faith in the UN intergovernmental working group on business and human rights (<http://business-humanrights.org/sites/default/files/documents/IOR4018972015ENGLISH.pdf>).

organizations of people affected by transnational corporations and other business enterprises.”¹³⁷

Margaret Chan, Director General of the World Health Organisation, has repeatedly denounced the diverse strategies of business lobbies to influence legislation and international regulation in health. She states:

“Research has documented these tactics well. They include front groups, lobbies, promises of self-regulation, lawsuits, and industry-funded research that confuses the evidence and keeps the public in doubt.

“Tactics also include gifts, grants, and contributions to worthy causes that cast these industries as respectable corporate citizens in the eyes of politicians and the public. They include arguments that place the responsibility for harm to health on individuals, and portray government actions as interference in personal liberties and free choice.

“This is formidable opposition. Market power readily translates into political power. Few governments prioritize health over big business. (...) This is not a failure of individual will-power. This is a failure of political will to take on big business.”¹³⁸

For governments, the treaty process offers a unique opportunity to prove that this failure of politics presented by Margaret Chan is not inevitable, but rather that it lies in the hands of governments to ensure that human rights are given precedence over the interests of big business. Profits can be shared—human rights cannot.

Governments should prove that they give human rights precedence over interests of big business

¹³⁷ Treaty Alliance (2015).

¹³⁸ Chan (2013).

Literature

Bartels, Lorand (2014): Eine menschenrechtliche Modellklausel für die völkerrechtlichen Abkommen der Europäischen Union. Aachen/Berlin: Deutschen Institut für Menschenrechte/MISEREOR.

www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_Menschenrechtliche_Modellklausel.pdf

Bilchitz, David (2016): Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law. In: *Indiana Journal of Global Legal Studies*, Vol. 23, No. 1, pp. 143-170.

Bilchitz, David (2015): The Moral and Legal Necessity for a Business and Human Rights Treaty.

<http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf>

Bilchitz, David (2014): The Necessity for a Business and Human Rights Treaty.

http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2562760_code1432526.pdf?abstractid=2562760&mirid=1

Bilchitz, David/ Lopez, Carlos (2015): Corporations and Human Rights: Do they have Obligations? ESCR-Net/FIDH.

Bloomer, Phil (2015): Negotiating and fighting for a binding treaty on business and human rights. In: *the Guardian* (27.07.2015).

www.theguardian.com/global-development-professionals-network/2015/jul/27/negotiating-and-fighting-for-a-binding-treaty-on-business-and-human-rights

Birss, Moira (2016): Rights, Responsibilities & Returns on Investments. Mapping the Negotiation for an International Treaty on Business and Human Rights. The Fletcher School-Tufts University: Medford.

Campaign to Dismantle Corporate Power and Stop Corporate Impunity (2015):

8 proposals for the binding treaty for transnational corporations.

www.tni.org/files/publication-downloads/written-contribution-of-the-global-campaign.pdf

Campaign to Dismantle Corporate Power and Stop Corporate Impunity (2014):

International Peoples Treaty on the Control of Transnational Corporations.

www.stopcorporateimpunity.org/wp-content/uploads/2015/02/PeoplesTreaty-EN-dec2014.pdf

Cassel, Douglass/Ramasastri, Anita (2015): White Paper: Options for a Treaty on Business and Human Rights.

<http://business-humanrights.org/sites/default/files/documents/whitepaperfinal%20ABA%20LS%206%2022%2015.pdf>

Chan, Margaret (2013): Opening address at the 8th Global Conference on Health Promotion. Helsinki, Finland, 10 June 2013.

www.who.int/dg/speeches/2013/health_promotion_20130610/en/

Civil Society Reflection Group on Global Development Perspectives (2015):

Goals for the Rich. Indispensable for a Universal Post-2015 Agenda. Friedrich-Ebert-Stiftung: Berlin/Geneva.

https://www.globalpolicy.org/images/pdfs/GPFEurope/150310_goals_for_the_rich_web.pdf

Clapham, Andrew (2000): The Question of Jurisdiction under International Criminal Law over Legal Persons. Lessons from the Rome Conference on an International Criminal Court. In: Menno T. Kamminga/Saman Zia-Zarifi (Eds.) (2000): *Liability of Multinational Corporations under International Law*. Leiden: Brill, pp. 139-195.

CorA Netzwerk für Unternehmensverantwortung/Forum Menschenrechte (Eds.) (2015): Positionspapier Wirtschaft und Menschenrechte – Erwartungen an einen deutschen Aktionsplan. Berlin.

www.cora-netz.de/cora/wp-content/uploads/2015/10/Positionspapier_Aktionsplan-Wirtsch-MR_2015-04_aktualisiert-web.pdf

Darcy, Shane (2015): Key Issues in the Debate on a Binding Business and Human Rights Instrument.

www.fes-globalization.org/geneva/documents/2015/2015_2_26_Darcy_Contribution%20to%20Roundtable%20-%20Geneva.pdf

de Pous, Pieter (2016): Better Regulation – TTIP under the radar? Brot für die Welt/ European Environmental Bureau/Forum Umwelt und Entwicklung: Berlin/Brussels.
www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Sonstiges/better_regulation-ttip_under_the_radar.pdf

de Schutter, Olivier (2016): Towards a New Treaty on Business and Human Rights. In: Business and Human Rights Journal, Vol. 1 (1), pp. 41–67.
<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=10006521&fileId=S205701981500005X>

de Schutter, Olivier et al. (2012): Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. In: Human Rights Quarterly, Vol 34, No.4 (Nov. 2012).

Deva, Surya (2014): The Human Rights Obligations of Business: Reimagining the Treaty Business. Hongkong: City University.

http://business-humanrights.org/media/documents/reimagine_int_law_for_bhr.pdf

de Zayas, Alfred (2015): How can Philip Morris sue Uruguay over its tobacco laws? In: the Guardian (16.11.2015).

www.theguardian.com/commentisfree/2015/nov/16/philip-morris-uruguay-tobacco-isds-human-rights

Eberhardt, Pia (2016): The zombie ISDS. Rebranded as ICS, rights for corporations to sue states refuse to die. Brüssel: Corporate Europe Observatory et al.
http://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf

ETO Consortium (Ed.) (2013): Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. Heidelberg: FIAN International.

[www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23).

Europäisches Parlament (2015): Entschließung des Europäischen Parlaments vom 17. Dezember 2015 über den Jahresbericht über Menschenrechte und Demokratie in der Welt 2014 und die Politik der Europäischen Union in diesem Bereich. Brussels.
www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0470&language=DE

European Union (2015): Submission of the European Union to the OEIWG.
www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/EuropeanUnion.doc

European Union (2014): Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights. EU Explanation of Vote. Geneva.
www.globalpolicy.org/images/pdfs/GPFEurope/HRC_resolution_Explanation_of_vote_EU.pdf

Falk, Gertrud (2014): Neumann Kaffee Gruppe. Vertreibung für den Kaffee-Import. Steckbrief. CorA/Forum Menschenrechte/FIAN: Berlin.
www.cora-netz.de/cora/wp-content/uploads/2014/11/CorA-ForumMR_Steckbrief-KaweriCoffeePlantation_20141114net.pdf

Fernández Sixto, Olga (2015): Business and Human Rights: A study on the implications of the proposed binding treaty. Essex.
<http://business-humanrights.org/sites/default/files/documents/Business%20and%20Human%20Rights.%20A%20study%20on%20the%20implications%20of%20the%20proposed%20binding%20treaty.pdf>

FIAN International (Eds.)(2012): Die Maastrichter Prinzipien zu den extraterritorialen Staatenpflichten im Bereich der wirtschaftlichen, sozialen und kulturellen Rechte. Heidelberg.
[www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=62](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=62)

Friends of the Earth Europe (2015): Rights for Business not for People. The EU's Agenda.

www.foeeurope.org/sites/default/files/eu-us_trade_deal/2015/ttip_un_treaty_report_v11_spreads.pdf

Heydenreich, Cornelia/Paasch, Armin/Kusch, Johanna (2014): Globales Wirtschaften und Menschenrechte. Deutschland auf dem Prüfstand. Aachen/Berlin: MISEREOR/Germanwatch.

<https://germanwatch.org/de/download/8864.pdf>

Hilbig, Sven (2015): Ausschuss für Menschenrechte und humanitäre Hilfe des Bundestages: Öffentliche Anhörung „Menschenrechte und Handelspolitik“ am 30. September 2015. Schriftliche Stellungnahme von Sven Hilbig, Referent für Welthandel und Globale Umweltpolitik, Brot für die Welt. Berlin.

www.bundestag.de/blob/389896/b3539ac3b24193203c540c8e85ccf005/stellungnahmen-data.pdf

ICC/IOE (2005): Initial IOE-ICC views on the mandate of the UN Special Representative on “business and human rights”. Paris/Geneva.

www.iccwbo.org/Data/Policies/2005/ICC-IOE-views-on-UNSG-mandate-on-business-and-human-rights/

ICJ (2014): Needs and Options for a New International Instrument in the Field of Business and Human Rights. Geneva.

http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJ_ReportFinalelecvers.compressed.pdf

International Peace Information Service (2014): The Adverse Human Rights Risks and Impacts of European Companies: Getting a glimpse of the picture. Annex C: Sources for human rights risk and impact concerns -- DAX 30 (Germany). Antwerp.

<http://ipisresearch.com/download.php?id=450>

IOE (2014a): Draft Strategy on IOE Engagement in the “Ecuador Resolution” Inter-governmental Working Group on Business and Human Rights. Geneva.

www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-11-05__Draft_IOE_Strategy_Engagement_with_Ecuador_Initiative_IWG_Final_.pdf

IOE (2014b): IOE Comments on the Proposal for a Binding UN Treaty on Business and Human Rights. Geneva.

www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-05-12__G-523_IOE_Comments_on_a_Binding_UN_Treaty_on_Business_and_Human_Rights_final_.pdf

IOE/ICC/BIAC (2011): Joint Statement on Business & Human Rights to the United Nations Human Rights Council. Paris/Geneva.

www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Joint-Statement-on-Business-Human-Rights-to-the-United-Nations-Human-Rights-Council/

Jägers, Nicola (2011): UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability? In: Netherlands Quarterly of Human Rights 29/2, pp. 159–163.

www.corteidh.or.cr/tablas/r26644.pdf

Kamminga, Menno T. (2015): Company Responses to Human Rights Reports:

An Empirical Analysis. Maastricht University. In: Business and Human Rights Journal, Vol. 1, Issue 1, pp. 95–110.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559255

Kamminga, Menno T. (2004): Corporate Obligations under International Law. Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004.

<http://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>

Klinger, Remo/Krajewski, Markus/Krebs, David/Hartmann, Constantin (2016):

Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht. Amnesty International/Brot für die Welt/Germanwatch/Oxfam: Berlin.

https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Sonstiges/gutachten_sorgfaltspflicht.pdf

Kromjong, Linda (2015): Business and Human Rights: gaining traction but SMEs crucial to keeping up the momentum. Geneva: IOE/Coca-Cola Company.

www.coca-colacompany.com/stories/business/2015/business-and-human-rights--gaining-traction-but-smes-crucial-to-/

Martens, Jens (2014): Corporate Influence on the Business and Human Rights Agenda of the United Nations. Brot für die Welt/Global Policy Forum/MISEREOR: Aachen/Berlin/Bonn/New York.

www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf

Martens, Jens/Obenland, Wolfgang (2016): Die 2030-Agenda. Globale Zukunftsziele für nachhaltige Entwicklung. Global Policy Forum/terre des hommes: Bonn/Osnabrück.

www.globalpolicy.org/images/pdfs/GPFEurope/Agenda_2030_online.pdf

Nowrot, Karsten (2012): „Wer Rechte hat, hat auch Pflichten!“? Zum Zusammenhang zwischen völkerrechtlichen Rechten und Pflichten transnationaler Unternehmen.

Halle-Wittenberg (Beiträge zum Europa- und Völkerrecht Heft 7, August 2012).

<http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft7.pdf>

Permanent Mission of India (2014): Explanation of Vote before the vote on the draft resolution on a Legally Binding Instrument on Human Rights and Transnational Corporations, 26 June 2014. Geneva.

www.pmindiaun.org/pages.php?id=970

Ruggie, John G. (2015): Get real or we'll get nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty.

<https://business-humanrights.org/en/get-real-or-we'll-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>

Ruggie, John G. (2014a): A UN Business and Human Rights Treaty? Boston: Harvard John F. Kennedy School of Government (Issues Brief, 28 January 2014).

www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf

Ruggie, John G. (2014b): A UN Business and Human Rights Treaty Update. Boston: Harvard John F. Kennedy School of Government (1 May 2014).

http://business-humanrights.org/sites/default/files/media/un_business_and_human_rights_treaty_update.pdf

Ruggie, John G. (2014c): The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty. Institute for Human Rights and Business (8 July 2014).

www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf

Ruggie, John G. (2014d): Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors. Institute for Human Rights and Business (9 September 2014).

www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html

Ruggie, John G. (2013): Just Business. Multinational corporations and human rights. New York/London: W.W. Norton & Company.

Ruggie, John G. (2010): Keynote address by SRSG John Ruggie “Engaging Business: Addressing Respect for Human Rights”. Sponsored by the U.S. Council for International Business, U.S. Chamber of Commerce, International Organization of Employers.

Hosted by the Coca Cola Company. Atlanta, 25 February 2010.

www.hks.harvard.edu/m-rcbg/CSRI/newsandstories/Ruggie_Atlanta.pdf

Ruggie, John G. (2008): Business and human rights: Treaty road not travelled. In: Ethical Corporation, 6 May 2008.

www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf

South Centre (2015a): Business and Human Rights: Commencing discussions on a legally binding instrument. South Bulletin, Issue 87–88.

www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf

South Centre (2015b): Investment Treaties. Views and Experiences from Developing Countries. Geneva.

The Economist Intelligence Unit (2015): The road from principles to practice. Today's challenges for business in respecting human rights. Geneva/London/Frankfurt/Paris/Dubai.

https://www.eiuperspectives.economist.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB_corrected%20logos%20and%20UNWG%20thx.pdf

Treaty Alliance (2015): Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse. Joint Statement. Geneva.

www.treatymovement.com/statement/

Treaty Alliance Deutschland (2015): Menschenrechte statt Investitionen schützen.

Globale Menschenrechtsstandards für Unternehmen einführen. Berlin/Bonn.

www.cora-netz.de/cora/wp-content/uploads/2015/10/TTIP_Cora-Flyer_2015-10-10.pdf

UN (2011): Guiding Principles on Business and Human Rights. New York and Geneva.

www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

UN CHR (United Nations Commission on Human Rights) (2003): Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. New York/Geneva (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)).

http://ap.ohchr.org/documents/alldocs.aspx?doc_id=7440

UN General Assembly (2014a): Resolution adopted by the Human Rights Council

26/22 Human rights and transnational corporations and other business enterprises.

New York (UN Doc. A/HRC/26/22).

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22

UN General Assembly (2014b): Resolution adopted by the Human Rights Council.

26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. New York (UN Doc. A/HRC/RES/26/9).

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

UN Human Rights Council (2016): Report of the first session of the open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument. Geneva (UN Doc. A/HRC/31/50 of 5 February 2016).

www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.50_E.docx

UN Human Rights Council (2011): Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Geneva (UN Doc. A/HRC/17/31 of 21 March 2011).

www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf

UN Working Group on the Working Methods and Activities of Transnational Corporations (2003): Norms on the Responsibilities of Transnational Corporations

and Other Business Enterprises with Regard to Human Rights, (E/CN.4/Sub.2/2003/12/Rev.2).

www.umn.edu/humanrts/links/norms-Aug2003.html

U.S. Mission to the United Nations Geneva (2014): 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. UN Human Rights Council – 26th Session. Delivered by Stephen Townley, Geneva, 26 June 2014.

<https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>

Abbreviations

BIAC	Business and Industry Advisory Committee to the OECD
BDA	Confederation of German Employers' Associations
BRICS	Brazil, Russia, India, China and South Africa
CETA	Comprehensive Economic and Trade Agreement
ECOSOC	Economic and Social Council of the United Nations
ETOs	Extraterritorial Obligations
EU	European Union
FIAN	FoodFirst Information and Action Network
ICC	International Criminal Court
ICJ	International Commission of Jurists
IGWG	Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (also abbreviated as OEIWG)
ILO	International Labour Organization
IOE	International Organization of Employers
ISDS	Investor-State-Dispute-Settlement
IMF	International Monetary Fund
NAP	German national action plan on the implementation of the UN Guiding Principles on business and human rights
NGOs	Nongovernmental organisations
OEIWG	Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (also abbreviated as IGWG)
OHCHR	Office of the High-Commissioner on Human Rights
SRSg	Special Representative of the Secretary-General
TiSA	Trade in Service Agreement
TNC	Transnational Corporation
TTIP	Transatlantic Trade and Investment Partnership
TPP	Trans-Pacific Partnership
UN	United Nations
UNGP	UN Guiding Principles on Business and Human Rights

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The Struggle for a UN Treaty

Towards global regulation on human rights and business

Over the course of the last years, the international debate surrounding the environmental, social and human rights responsibilities of corporations has gained momentum. Not least, growing public criticism of transnational corporations and banks has contributed to this debate. The list of criticisms is long: Ever-new pollution scandals (most recently the VW emissions scandal), disregard for the most basic labour and human rights standards (for example in Bangladesh's textile or the Chinese IT industry), massive bribery allegations (faced for example by Siemens for years), as well as widespread corporate tax avoidance strategies (such as Google, Starbucks and IKEA).

Against this background, the United Nations Human Rights Council took the historic decision to establish a working group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." This binding agreement should complement the existing UN Guiding Principles on Business and Human Rights, which show serious shortcomings.

A global alliance of several hundred civil society organisations has been at the forefront of such a demand. This Treaty Alliance recommends the establishment of a binding treaty to regulate the activities of transnational corporations and other business enterprises with respect to human rights.

This working paper presents the basic facts concerning the current discussions at the UN Human Rights Council. It outlines the events leading up to today's discussions, describes the controversies and lines of conflict, sets out the potential content of a legally binding instrument on business and human rights and concludes with some remarks on the further process.