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A UN Business and Human Rights Treaty Update

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On 28 January 2014, I posted an "issues brief" raising the question whether the time has come to begin negotiations on a UN business and human rights treaty. Discussions on this subject have been under way in Geneva for some time now and may reach a decision point at the June session of the Human Rights Council. I understand that my name is occasionally invoked by opponents and proponents alike. Therefore, I thought that it may be worthwhile rejoining the debate at this stage.

Like any body of law, international law will continue to evolve as situations on the ground demand new solutions that are not readily achieved by other means. But international law does not exist for its own sake, for its symbolic value. International law is an institutionalized tool for collective problem solving. The development of an international legal instrument requires a certain degree of consensus among states. And there ought to be reasonable expectations that it will be enforced by the relevant parties and turn out to be effective in addressing the particular problem(s) at hand.

In my earlier brief, I expressed grave doubts about the value and effectiveness of moving toward some overarching "business and human rights" treaty. Even with the best of "political will," I stated, the crux of the problem is that the category of business and human rights is not so discrete an issue area as to lend itself to a single set of detailed treaty obligations. It includes complex clusters of different bodies of national and international law—for starters, human rights law, labor law, anti-discrimination law, humanitarian law, investment law, trade law, consumer protection law, as well as corporate law and securities regulation. The point is not that these are unrelated, but that they embody such extensive problem diversity, institutional variations, and conflicting interests across and within states that any attempt to aggregate them into a general business and human rights treaty would have to be pitched at such a high level of abstraction that it is hard to imagine it providing a basis for meaningful legal action. Yet much of the Geneva debate continues at this abstract level.

Even more fundamental, how would such a treaty be enforced? We can all agree that inadequate enforcement is the main shortcoming of the current system. But if states have ratified existing human rights treaties, then they already have legal obligations flowing from them to protect individuals against human rights abuses by third parties, including business, committed within their territory and/or jurisdiction. Therefore, to add value any new treaty enforcement provision would have to involve extraterritorial

jurisdiction. Some UN human rights treaty bodies have urged the home states of multinationals to provide greater extraterritorial protection against corporate-related human rights abuses, and research conducted under my United Nations mandate identified the grounds on which, and the ways in which, states have agreed to do so in a number of policy domains. But state conduct generally makes it clear that they do not regard this to be an acceptable means to address violations of the entire array of internationally recognized human rights. Again, far greater specificity than the ongoing debate exhibits is required to achieve meaningful progress.

It has also been suggested that a treaty body could oversee any such business and human rights instrument. Here too a dose of realism is in order. According to UN figures, there are 80,000 multinational corporations in the world, with ten times that number of subsidiaries, and millions upon millions of national firms. Depending on the treaty's provisions, either the states parties would be required to report periodically to the new treaty body on their progress in dealing with corporate-related human rights abuses within their jurisdictions, or they would have to require businesses to do so directly. If the reporting were done by states many would lack the capacity to do so adequately, as is already the case today with reporting on their current state-related obligations. And if the reporting were done by companies directly then presumably states would have to enforce that obligation upon them—which would take us back to some of the enforcement challenges discussed in previous paragraph. In addition, the overall arithmetic for the treaty bodies would be daunting. They cannot keep up with monitoring the limited universe of states parties today, and yet each deals only with a specific set of rights or one affected group. How such a committee would cope with the incalculably larger universe of businesses, while addressing all rights of all persons affected by them, is unclear.

I noted in my earlier brief that enumerating these challenges is not an argument against treaties. But it is a cautionary note to avoid going down a road that would end in largely symbolic gestures, 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. Likewise, 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. Questions such as those raised above ought to be clarified *before* deciding what next steps to take, if we are to build on, and not undo, the significant global consensus that has been achieved around business and human rights.

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