

***Does the World Need a Treaty on Business and Human Rights?  
Weighing the Pros and Cons***

**Introduction of Topic**

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There was a time when human rights were thought to limit the power only of States.

No more. Globalization has accelerated the spread of transnational companies into faraway places where gross violations of human rights are endemic.

A pair of contrasting examples illustrates the consequences. Two decades ago I had the honor of assisting the United Nations Truth Commission for El Salvador. We investigated the Salvadoran army's massacre of peasants at a place called El Mozote. The number of civilians killed in the massacre – between 500 and 900 people – was the largest death toll of any single incident in that country's civil war.

Now compare El Mozote to the collapse a year ago of an unsafe building at Rana Plaza in Bangladesh. The building was full of small garment factories, in which most of the workers were young women. The death toll – 1100 workers – surpassed El Mozote.

Much responsibility belongs to the Bangladeshi government. It failed properly to inspect and shut down a death trap. But why were the workers inside a visibly unsafe building? Because they were producing clothes for western retailers – many of them based in your country and mine.

Corrupt local business owners disregarded unsafe conditions. But the western companies had not done enough to ensure that workers in their supply chain were safe. On the contrary, one company reportedly opposed a plan to make factories in Bangladesh safer, on the ground that it was too expensive. And all companies pressured their Bangladeshi suppliers to produce clothing on tight schedules with little honest profit margin.

If such cases are now more numerous, they are not new. In the 1970s, both the Organization for Economic Cooperation and Development (“OECD”) – the organization of the world's wealthy nations – and the International Labor Organization issued non-binding guidelines for States to require multinational enterprises to protect basic rights of workers.

In 2000 the United Nations (“UN”) established its Global Compact, by which thousands of companies commit to respect for human rights, worker rights, and environmental rights, and to act against corruption.

But these and many other so-called “soft law” or voluntary initiatives are not legally binding. They have no enforcement mechanisms beyond reporting, and toothless dispute resolution procedures. Collectively they may help to change corporate culture and improve practice. But as illustrated by Rana Plaza, they are a step too short.

Recognizing this, the UN Subcommission on Human Rights in 2003 issued a set of Norms on the human rights responsibilities of transnational corporations and business generally. The Norms had much good content. But they asserted – with scant foundation in law -- that existing human rights treaties that bind States also, already, bind business as well. And they set up vague standards backed by potentially severe penalties for businesses that transgressed them.

Many non-governmental organizations (“NGO’s”) supported the Norms. But the Norms attracted support from few businesses and even fewer States. The UN Commission on Human Rights declared that the Norms had “no legal standing,” and forbade the Subcommission from monitoring their implementation.

The controversy over the Norms did, however, prod the UN to put business and human rights on its agenda. In 2005 the UN appointed John Ruggie, a professor at the Kennedy School of Government at Harvard, and a close adviser to Kofi Annan, as its special expert on business and human rights. In 2008 Professor Ruggie proposed, and the UN Human Rights Council formally “welcomed,” a 3-pillar framework of “protect, respect and remedy.”

Under the first pillar, *States* have a duty to “protect” human rights, including from violations by business. Under the second pillar, *business* has a duty to “respect” human rights. This means adopting written human rights policies, implementing them throughout the company, and exercising due diligence to anticipate and avoid or mitigate risks to human rights arising from the activities of the business.

And under the third pillar, *both States and business* have a duty to remedy human rights violations when they arise.

In 2011 Ruggie expanded his 3-pillar framework into a set of Guiding Principles, supplemented by his commentary. But he made clear that the Principles were not legally binding; they are instead a set of societal expectations for business. The Human Rights Council, acting by consensus with no dissent, “endorsed” his Guiding Principles.

The Council also established a five-member Working Group to promote the implementation of the Guiding Principles. We are graced tonight by the presence of Professor Michael Addo, a member of the Working Group. We will hear his reflections later this evening.

However, some States and NGO's argue that the Guiding Principles are too vague and too little enforced to be effective. Last September Ecuador introduced a proposal before the UN Human Rights Council, formally supported by over 80 countries, to study the possibility of a legally binding treaty on business and human rights. We welcome the presence here this evening of Ms. María Eugenia Avilés, First Secretary of the Embassy of Ecuador in London.

More than 100 NGO's have endorsed Ecuador's proposal. This March Ecuador sponsored a seminar on its proposal, as a side event to the UN Human Rights Council meeting in Geneva. A number of governments spoke from the floor. Most were noncommittal. By my count, only Ecuador, Bolivia and Cuba clearly supported the proposal. The UK, I believe, was the only government to make clear that it opposes the proposal. The UK explains that, in its view, States would do better to focus on implementing the UN Guiding Principles. As for my country: the US hid under the table, saying nothing.

Among human rights advocates, there is a debate over Ecuador's proposal. We will shortly hear more from Professor Chip Pitts, as a proponent, and lawyer Chris Esdaile, as a skeptic. There are a number of points to be made on each side. But in large part the debate comes down to two bodies of thought. One believes that the UN Guiding Principles are and will remain far too little. They believe that only a binding treaty can get the job done.

The opposing school argues that the Guiding Principles are making a positive contribution and can achieve much more if properly tended. A treaty, they say, will take years to negotiate and, in the end, likely attract few States Parties. Meanwhile the very pursuit of a treaty may distract all concerned from implementing the Guiding Principles, which can bring more immediate benefits.

In principle, of course, there is no necessary inconsistency between doing both. The Guiding Principles can do their work in shaping business attitudes and practices. A treaty could do its work by supplying useful incentives and more effective enforcement. Some advocates on both sides publicly endorse this compatibility. But tensions remain. At the very least, questions arise about which approach deserves more emphasis, by whom, and when.

One difficulty is that we don't know what sort of treaty we are talking about. What human rights will it cover? What businesses will it cover? Will home States have responsibilities for the activities of their companies in other States? What sort of enforcement mechanisms would there be? Will they be limited to reporting mechanisms, or include civil or even criminal sanctions? Will they be at the State level or at the international level? And so on.

We do not propose to resolve this debate this evening. We do hope to cast a bit of light on it. We thank you all for joining us in this modest aspiration.