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Incorporating Rights: Making the Most of the Meantime

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S.J. Quinney College of Law research paper No.112

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Incorporating Rights: Making the Most of the Meantime

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In June 2014 the U.N. Human Rights Council adopted a resolution establishing an open-ended intergovernmental working group to commence deliberations and draft an international legally binding instrument on transnational corporations. The Council also agreed to extend the mandate of the U.N. Working Group on Business and Human Rights, the entity created to promote the U.N. Guiding Principles on Business and Human Rights. The Guiding Principles are a non-legally binding set of standards created consistent with an earlier Council mandate to “operationalize” the “Protect, Respect and Remedy Framework.”

The Council’s action advancing treaty talks could be seen as calling into question the durability of the Framework and Guiding Principles or as undermining short and medium term measures to address business and human rights challenges. This would be unfortunate, but as various stakeholders contest the merits of a binding international instrument in light of the Council’s actions many observers are asking: which direction should the business and human rights movement go?

It is now clear that the movement will take parallel paths. Work must proceed on several fronts to ensure that business enterprises align their practices with respect for human rights. However, I believe the movement stands to advance human rights protection farther faster by insisting on more aggressive implementation of the Guiding Principles. In the absence of a binding international agreement, or until one is put in place, I believe future efforts should place emphasis on two things to advance protection: (1) the importance of access to information about business impacts on human rights, and (2) the imperative of access to a fair forum to provide remedy to victims of rights violations.

I do not believe another international human rights treaty will be sufficient to bring about the constructive changes necessary to ensure that human dignity is not disregarded in today’s dynamic global economy. Constructive change will require more than law. It will require that we cultivate ethical business cultures through ensuring that human rights are incorporated into business strategy as a

matter of routine daily decision-making. I believe the Guiding Principles provide a more promising path for bringing business conduct into alignment with respect for human rights by contributing to the creation of conditions that could change the culture of global commerce.

In his closing plenary remarks to the Third U.N. Forum on Business and Human Rights in December 2014, the former U.N. Special Representative for Business & Human Rights, Professor John Ruggie, reminded those stakeholders in attendance that the Guiding Principles were simply intended to be the “end of the beginning.” Accordingly, the Guiding Principles should not have been expected to end of all business and human rights challenges.

Indeed, challenges do remain and expectations have not been met. In her closing remarks to the U.N. Forum, Audrey Gaughran, speaking on behalf of Amnesty International, expressed support for an international treaty. She observed that little has changed for the victims of violations since the endorsement of the Guiding Principles. According to Amnesty International, it remains “easy and cheap” for the less socially conscious members of the corporate community to abuse human rights with impunity. In the organization’s experience, businesses continue to “deny and lie” even when confronted with evidence of abuse and only will compensate victims of violations after being compelled to do so by a court of law. The challenges identified by human rights advocates are real and more must be done to address them. Will the treaty proposal get us where we need to be?

Hard law will be hard to devise and it may not be the most appropriate device to address the business and human rights challenges of most urgent concern. Historically, there has been a lack of political support for binding international regulation in this area. For instance, an earlier effort to do so, the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, drew strong and immediate objections. Political support for future efforts will likely remain weak. Moreover, as Professor Ruggie observed in his remarks to the Forum, business and human rights challenges are myriad: “while business and human rights may be a single label that we attach to a range of activities, it is [a] vast, diverse, and conflicted an issue area that it does

not lend itself to governance through a single set of comprehensive and actionable treaty obligations.”

While proponents should not be dissuaded by the difficulty of developing a binding instrument or by political opposition to it, I am not particularly optimistic about the potential of the effort. First, the present proposal is too limited in scope. The focus on the conduct of transnational business organizations fails to appreciate that local businesses also impact human rights and are often linked to global supply chains. This limitation would be a step back from the Framework and Guiding Principles which take into account the risk of harm any commercial enterprise, no matter the size or location, has the potential to place human rights at risk. Second, it is far from clear that obligations set forth in a business and human rights treaty would be adopted or enforced. Several existing binding international human rights legal instruments are simply not enforced.

What the Guiding Principles offer is the potential for international human rights to be *operationalized*. If business decisions were made with human rights in mind, as the due diligence and impact assessment components of the Guiding Principles detail, many adverse impacts and rights abuses could be avoided in the first instance by those businesses enterprises that care to conduct business consciously.

To date, the Guiding Principles have been underestimated and under utilized. In some instances, the Guiding Principles have been unfairly criticized. Far from foreclosing future developments in laws or policies to address business and human rights challenges, the introduction to the Guiding Principles acknowledges the possibility of “promising longer-term developments” and invites “cumulative progress.” There is encouraging evidence that the Guiding Principles are gaining traction with some governments and among some segments of the business community that would be well situated to develop business practices that respect human rights, pass laws and provide forums for resolving disputes. A treaty will be a long time coming, if ever. In the meantime there must be progress towards advancing human rights protection. What should the business and human rights movement do to make the most of the meantime?

In the context of the treaty proposal, Professor Ruggie has suggested as an initial step consideration of “gross” human rights violations. While I appreciate the political feasibility of taking on the worst abuses first, it is in the banality of the day-to-day decision-making that a real difference can be made. I believe we must begin with more public information about the human rights impacts of particular industries and certain business practices. Exploring binding legal instruments that would require integrated reporting in high impact industry sectors could be a beginning. Transparency is a prerequisite for protecting human rights. Often exposure of abuses ends impunity and can contribute to accountability.

More can be done to promote transformation in business practices through greater transparency about human rights impacts. National Action Plans promoting transparency regulations could serve to bring about the conditions under which soft standards are strengthened. Presently, global supply chains connect conscious consumers and investors with conditions of production they would find unconscionable for the adverse human rights impacts involved.

The promotion of well-crafted transparency regimes requiring reporting about human rights impacts could serve to drive systemic changes by: (1) empowering consumers and investors to make informed choices consistent with their values, and (2) enabling commercial enterprises to address risks practices present to human rights and reverse adverse impacts. Information has an important role to play to in promoting an ethical business culture and preventing abuse—provided there are marketplace or other penalties. Abusing human rights must be made difficult and costly for business enterprise.

Having observed and participated in each annual U.N. Forum the renewed effort to advance a binding instrument did not come as a complete surprise to me. While business stakeholders at the Forum share strategies for developing impact assessments and due diligence programs, the concerns articulated by NGOs have centered on the third pillar of the Framework—access to remedy. The renewed push for a binding instrument is due in significant part to the Framework process falling far short of the expectations of certain stakeholder constituencies, particularly on the issue of access to remedy for victims of rights violations.

Pursuant to the Council Resolution renewing its mandate, the Working Group on Business and Human Rights will launch an inclusive and transparent consultative process with States in 2015 and open to other relevant stakeholders to explore legal and practical measures to improve access to remedy through judicial and non-judicial forums. This will be critically important work if the Guiding Principles and Framework process is to remain credible, particularly to victims of rights violations. Here, I would like to see more attention devoted to strengthening the capacities of the OCED National Contact Points to resolve disputes and more study of the potential reach of extraterritorial jurisdiction to provide access to adjudication of claims. Creating incentives for industry actors to address the issues raised by alleged victims of abuse must also be considered.

Stakeholders in the business and human rights movement speak of a “smart mix” to fix the global governance gap that gives rise to abuses. Hard law may be required to ensure access to remedy to victims, but soft law and standard setting should not be underestimated for preventing violations. To be clear, I do not oppose a treaty in principle. However, I do think the drafters would be well advised to heed the advice offered by Professor Ruggie—a business and human rights treaty should work to reinforce and to build on the regulatory dynamics already underway in the implementation of the Guiding Principles. I do not see the treaty proposal as a threat to progress but rather a call to redouble efforts and to focus attention on the work that still remains to ensure human rights are promoted and protected.

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