Hierarchy or Ecosystem?
Regulating Human Rights Risks of Multinational Enterprises
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Business and Human Rights: Beyond the End of the Beginning

Calls to regulate multinational enterprises through a single overarching international treaty instrument go back to the 1970s. Over time, pressure for such a treaty has come most persistently from activists, and more intermittently from developing countries.[1] A recent civil society assessment sums up the record to date: "All these efforts met with vigorous opposition from TNCs and their business associations, and they ultimately failed."[2] This includes a 2003 initiative known as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, developed by an expert subsidiary body of the then UN Commission on Human Rights (now Human Rights Council), but dismissed by its intergovernmental parent body, the Commission.[3]

In contrast, in June 2011 the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights (UNGPs), which I developed over the course of a six year mandate as Special Representative of the UN Secretary-General for Business and Human Rights. It involved nearly fifty international consultations in all regions of the world, extensive research as well as site visits to business operations and affected communities.[4] The UNGPs are the first authoritative guidance that the Council and its predecessor body, the Commission on Human Rights, have issued for states and business enterprises on their respective obligations in relation to business and human rights; and it marked the first time that either body "endorsed" a normative text on *any* subject that governments did not negotiate themselves.

In comparison with normative and policy developments in other complex and difficult domains, such as climate change, uptake of the UNGPs has been relatively swift and widespread: by other international standard-setting bodies, governments, businesses, civil society and workers' associations, law societies, institutional investors, and most recently by FIFA (International Federation of Association Football), the governing body of the world's most popular sport.

Some observers attribute the success of the UNGPs to the fact that they were not legally binding. Undoubtedly this made Council endorsement easier. But it does little to explain subsequent developments. More to the point, the UNGPs were not conceived as a static document. Instead, they were designed to help generate a new and different regulatory dynamic, one in which public and private governance systems—corporate as well as civil—each come to add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which a more comprehensive

and effective global regime might evolve, including specific legal measures. The spatial imagery embedded in the UNGPs is a regulatory ecosystem, not hierarchy.

The lead chapter by Rodríguez in this volume addresses several key issues concerning how to build on the foundations established by the UNGPs to keep advancing the business and human rights agenda. I appreciate his understanding of the UNGPs as a dynamic process. I find myself in agreement with much of his argument regarding the desirability of continuing to pursue the "polycentric approach" embodied in the UNGPs; identifying ways of dealing with the attendant "orchestration" problems; the challenge of institutionalizing what he calls "accountability politics" in order to "ratchet up" the internalization and compliance by business with human rights standards; and his conclusion that any move toward further international legalization in this space is no substitute for continuing to address ongoing needs in the here and now, and that it should focus as a matter of priority on gross human rights abuses.

In what follows, I begin with a reprise of the UNGPs and the logic behind them. Then I elaborate on two important issues raised elsewhere in the book. The first is the criticism by Rodríguez as well as others that the UNGPs don't do enough to ensure what they call "the empowered participation of civil society." The second is the role and forms of international law that would reinforce and build on the UNGPs rather than positioning the two in opposition and thereby threatening to repeat past failures yet again. I begin with a reprise of the UNGPs and the logic behind them.

THE UNGPs

Human rights discourse is infused with the assumption of a rights-based hierarchy – the idea that human rights trump not only in a moral sense but that they also do, or at least should, in terms of the law. Yet in an influential report to the UN General Assembly, the authoritative International Law Commission concluded that "no homogenous hierarchical meta-system is realistically available" within the international legal order to resolve the problem of incompatible provisions among different bodies of law, including when different tribunals that have overlapping jurisdictions address exactly the same set of facts and yet reach different conclusions.[5] Thus, the UNGPs took a different tack.

Polycentric Governance

The UNGPs are based on the observation that corporate conduct at the global level is shaped by three distinct governance systems. The first is the system of public law and governance, domestic and international. The second is a civil governance system involving stakeholders affected by business enterprises and employing various social compliance mechanisms such as advocacy campaigns and other forms of pressure, but also collaborating with them. The third is corporate governance, which

internalizes elements of the other two (unevenly, to be sure) as constraints and opportunities. Lacking was an authoritative basis whereby these governance systems become better aligned in relation to business and human rights, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which cumulative change can evolve over time.

To foster that alignment, the UNGPs draw on the different discourses and rationales that reflect the different social roles these governance systems play in regulating corporate conduct.[6] Thus, for states the emphasis is on the legal obligations they have under the international human rights regime to protect against human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations, the UNGPs focus on the need to manage the risk of involvement in human rights abuses, which requires that companies act with due diligence to avoid infringing on the rights of others and address harm where it does occur. For affected individuals and communities, the UNGPs stipulate ways for their further empowerment to realize a right to remedy.

Drawing these foundational elements together, the UNGPs rest on three pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. An independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved;
3. Greater access by victims to effective remedy, judicial and non-judicial.

The UNGPs comprise thirty-one principles, each with commentary elaborating its meaning and implications for law, policy, and practice. They encompass all internationally recognized rights, and apply to all states and all business enterprises. They do not by themselves create new legally binding obligations for business but derive their normative force through the recognition of social expectations by states and other key actors, including business itself. Yet elements of them have already been incorporated into binding regulations and national laws.

Implementation through Distributed Networks

I was succeeded in my UN mandate by a five-person expert group, one from each of the geographic regions recognized within the UN, whose job it was to promote the UNGPs and facilitate their implementation. Rodríguez discusses the Working Group in his chapter. Here, I want to stress that the model of implementation I envisaged from the start involved a variety of other actors. Of course, this included individual governments and businesses. Some thirty states either have issued or are in the process of developing National Action Plans for the implementation of the UNGPs. Leading companies have aligned their policies and practices with them.[7] Beyond them,

I worked closely with the Organization for Economic Cooperation and Development, to ensure that its Guidelines for Multinational Enterprises were made consistent with the UNGPs. The Guidelines are important because each of the 42 adhering governments are required to establish a complaints mechanism, known as National Contact Points (NCPs). Previous Guidelines iterations lacked a human rights chapter; the 2011 has such a chapter, drawn directly from the UNGPs. Early evidence suggests that human rights complaints fare better in the NCP process than on other types of complaints.[8]

Similarly, I worked with the International Finance Corporation to include appropriate human rights criteria in their sustainability framework and performance standards to which clients are required to adhere. In turn, these are tracked by the so-called Equator banks, private financial institutions that account for three-fourths of global project lending—thus affecting the cost of capital. The European Union has adopted a new mandatory non-financial reporting requirement for companies above a certain size, referencing the UNGPs.

I also sought to ensure that the human rights provisions of ISO26000, a social responsibility guidance issued the International Organization of Standardization, is fully compatible with the UNGPs. Its importance lies in the heavy uptake it enjoys in Asia. The ASEAN Intergovernmental Commission on Human Rights is drawing on the UNGPs in its own work; so is the African Union, in relation to the Africa Mining Vision. The General Assembly of the Organization of American States has formally endorsed the UNGPs. The China Chamber of Commerce of Metals, Mineral and Chemicals Importers and Exporters, affiliated with the Ministry of Commerce, has issued Guidelines for Social Responsibility in Outbound Mining Investments, which instruct Chinese companies operating overseas to "observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project."[9]

Ever-increasing numbers of companies report that they are bringing internal management and oversight systems into greater alignment with the UNGPs. Workers organizations and a number of global NGOs are using the UNGPs as legal and policy advocacy tools. The International Bar Association, U.K. Law Society, and American Bar Association are promoting the UNGPs' incorporation into the legal profession, including through law firms' client advisory work.[10]

Perhaps the least expected convert to the UNGPs has been embattled FIFA. FIFA's decision to review the adequacy of its bidding requirements in relation to human rights goes back to 2011, not long after the selection of Russia and Qatar to host the 2018 and 2022 World Cups respectively. Amid other sources of external pressure, in June 2014 Mary Robinson, former President of Ireland and former United Nations High Commissioner for Human Rights, and I sent an open letter to then FIFA President Blatter. We recommended that FIFA incorporate the United Nations Guiding Principles on Business and Human Rights (UNGPs) into its policies, practices and relationships.[11]

In early 2015, FIFA staff sought technical support from the UN Office of the High Commissioner for Human Rights on the UNGPs in relation to bidding documents for the 2026 Men's World Cup. In July 2015, FIFA issued a press release stating that its Executive Committee had decided that, "future bids [for the Men's World Cup] will have to meet a number of important additional criteria. In particular, FIFA will recognise the provisions of the UN Guiding Principles on Business and Human Rights and will make it compulsory for both contractual partners and those within the supply chain to comply with these provisions."[12] FIFA subsequently asked me, as the author of the UNGPs to provide recommendations for "further embedding" them "into FIFA's policies and practices."[13] In February 2016, the FIFA Congress adopted a new provision in the FIFA Statutes that states, "FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights."[14] And the bidding requirements for the 2026 Men's World Cup are expected to include human rights criteria for the first time, broadly in line with the UNGPs.

My task was two-fold. First, I was asked to provide advice on, among other things, human rights language planned for inclusion in the FIFA Statutes and the 2026 Men's World Cup bidding requirements, as well as identifying key gaps in current FIFA's policies and practices. Second, we agreed that I would publish a comprehensive and independent public report on what it means for FIFA to embed respect for human rights across the full range of its activities and relationships, using the UNGPs as the template. The report was published in April 2016.[15]

Candidate countries would not be peremptorily excluded from hosting a World Cup. The way future bidding requirements are expected to work in relation to human rights is for FIFA to conduct human rights diligence of all bidders. If serious risks are identified, FIFA would then ask the bidder(s) to develop effective mitigation strategies for the purposes of the Cup. If these are judged adequate, the bid would be considered along with others; if they were not adequate, FIFA would move on the next bidder. For tournaments that have already been awarded, FIFA is expected to use its leverage to reduce existing human rights harm—which FIFA has begun to address in Russia and Qatar.[16] Nothing like this has ever happened in the history of international sports.

The two component elements of the UNGPs that have enjoyed the most rapid uptake are human rights due diligence requirements for companies, and expanding the role of non-judicial grievance mechanisms, including at the operational or site level established by or otherwise involving companies. The reason is simple. At least in principle, each of the three main stakeholder groups has an interest in making these work, even though their rationales for doing so may differ. For states, promoting or requiring human rights due diligence and grievance mechanisms serves the duty to protect; for businesses, they are a means to manage stakeholder-related risk; and for affected individuals and communities, they offer the promise of reducing the overall incidence of corporate-related harm while also serving as one possible source of remedy

where harm occurs. I expect this kind of dynamic interaction to continue to drive change. Changes in judicial remedy are moving much more slowly.

I now turn to two key challenges raised by other contributors to this volume.

CIVIL SOCIETY IN THE UNGPs

The UNGPs were developed through a "polycentric" process, involving representatives of states, business, and civil society.[17] With regard to civil society specifically, I held numerous bilateral meetings with NGOs as well as with individuals and communities adversely affected by business operations. Civil society groups typically accounted for the largest single number of participants in the multi-stakeholder consultations I convened, many of which were held in the global South. But still the question is sometimes asked: where is civil society in the UNGPs? Rodríguez argues that the future success of the UNGPs depends in no small measure on the "empowered participation of civil society," and he finds that the UNGPs fall short in this respect. Tara Melish and Errol Meidinger have suggested that the UNGPs should have had a fourth pillar, officially recognizing civil society's critical role.[18] Melish, in her chapter in this volume, repeats that proposal and argues that there are insufficient "expressive commitments" to civil society participation in the UNGPs, as a result of which NGOs are unable to use of the UNGPs sufficiently to press for changes in state and corporate conduct.

I certainly agree with the proposition that civil society participation is critical, and from the start conceptualized and articulated the UNGPs with that in mind: hence their very foundation in the idea of polycentric governance. Moreover, neither NGOs nor workers organizations have had the slightest difficulty in using the UNGPs as a tool to press for changes. But there are also several logical, practical, and empirical issues in play here that require clarification.

For starters, Rodríguez takes the concept of "empowered participation" from an important study by Archon Fung and Erik Olin Wright on institutional innovations in democratic countries that are intended to achieve more direct citizen involvement in devising and implementing public policies affecting their daily lives.[19] There is much to be learned from the cases on which that study's conclusions and generalizations are based. But let us also recall the cases themselves and their settings: neighborhood councils in Chicago, addressing issues related to policing and public schools; habitat conservation planning under the U.S. Endangered Species Act; participatory budgeting in Porto Alegre, Brazil; and certain steps toward administrative and fiscal devolution from the states of West Bengal and Kerala, India, to villages. Fung and Wright believe these innovations to be transferable and scalable in some contexts. Indeed, the UNGPs provisions for non-judicial grievance mechanisms involving companies and affected

individuals and communities embody some of Fung and Wright's insights.[20] But there are strict limits to the applicability of the institutional innovations they identify to the level of the global polity itself, including (or perhaps above all) to the state-based United Nations system.

What about a "Participate" pillar, as recommended by Melish and Meidinger? There are two problems with that idea in this context. First, it might have made sense if the UNGPs were a discrete multi-stakeholder membership initiative like the Kimberley Process to stem the trade in conflict diamonds or the Forest Stewardship Council. But they are not. They are a soft-law instrument that prescribes minimum standards of conduct for all states and all businesses in relation to all human rights. There is no central governing institution as such. Moreover, Rodríguez suggests that introducing such a fourth pillar into the UNGPs might have required including standards for civil society actors as well – which would have delighted some states and many businesses, but I suspect would have been resisted by civil society.

Second, and in a more practical vein, I seriously doubt that a "Participate" pillar would have survived the UN political process of getting the UNGPs approved. More and more countries are limiting the degrees of freedom of human rights organizations, especially those with international ties, and are requiring the latter to register with and be monitored by the authorities. This is happening in China, India, Russia, several Middle Eastern countries, and even Ecuador, which for a time had become a hero to NGOs when it proposed an international business and human rights treaty.[21] It strains credulity to believe that in this environment governments would agree to establish NGOs on equal footing with them in a "Participate" pillar to govern the business sector.

But if not a pillar, what about more extensive "expressive commitments" in the UNGPs text in support of civil society participation? Melish references the Convention on the Rights of Persons with Disabilities as a precedent, contending that the UNGPs are weaker in this regard and don't give civil society enough hooks.[22] Indeed, Article 4.3 of that Convention provides that "States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."[23] Here I would make two points.

First, I did in fact embed affected individuals and communities, together with civil society actors that may represent them, within the three pillars. There are specific references to the need to engage with, consult, and report to affected persons and communities as part of the UNGPs human rights due diligence requirements. Moreover, detailed legitimacy and effectiveness criteria are laid out for non-judicial grievance mechanisms, state-based and private, on the premise that "a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it" (Commentary to GP 31). Finally, the UNGPs as a whole do provide (and are being used as) a public and judicial advocacy tool, an authoritative

basis for making demands on states and businesses. This includes leading global human rights and workers organizations, as well as legal advocacy groups. [24] None of this may be enough, as Melish and Meidinger and to a lesser extent Rodríguez contend. But it reached the limits of my imagination of what was achievable—not as a theoretical exercise, but in actual practice—regarding civil society empowerment within the UNGPs' provisions.

My second point again concerns inappropriate (and therefore misleading) analogizing from one setting to another. There are substantial differences in scope, scale and political dynamics between the disabilities convention and attempts to regulate multinational corporations. The former addresses one group of persons and enumerates the rights relevant to their being able to lead lives of dignity. As is true of other economic, social and cultural rights treaties, states' undertakings are subject to "progressive realization," linked to state capacity. Moreover, broad consensus exists on the underlying aims. In contrast, business and human rights deals with all rights of all people, with all states, and with all businesses. It is characterized by extensive problem diversity, significant institutional variations, and conflicting interests across and within states. Not least are the interests and influence of multinationals themselves. Consequently, straight analogizing from the disabilities convention to business and human rights is questionable on both substantive and methodological grounds.

Ultimately, my main concern with the line of criticism contending that the UNGPs do not provide enough hooks for civil society is its potential risk of creating a self-fulfilling prophecy. Rodríguez notes that many human rights organizations in developing countries lack the capacity to fully track and engage in global governance processes, such as the evolving UNGPs. Therefore, they look for cues to opinion leaders whose views and preferences broadly reflect their own. It would be far more helpful, not only to the UNGPs but more importantly to those suffering corporate-related human right harm, if those opinion leaders provided further guidance on how such organizations can use and build on the UNGPs, instead of re-litigating the question about whether the UNGPs text adopted in 2011 says enough regarding the role of civil society.

INTERNATIONAL LEGALIZATION

As the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future developments. But in light of the failure of past treaty efforts in this domain, we need to ask ourselves what form legalization should take at the international level. What approach does experience tell us would yield the most benefit for affected individuals and communities? This is no mere academic question. In September 2013 Ecuador proposed that the UN Human Rights Council establish an intergovernmental working group to negotiate just such a treaty instrument, and some 600 NGOs formed a "treaty alliance" to support it.[25] In a

sharply divided vote, the Council adopted the proposal on June 26, 2014. Negotiations are expected to convene sometime in 2015.

Will this latest attempt to impose binding international law obligations on transnational corporations turn out to be another instance of the classic dysfunction of doing the same thing over and over again and expecting a different result? Or might the negotiations come to reflect more deeply on the reasons for this prior record and move in a productive direction? In the heat of the moment, treaty advocates and opponents seem to be on a collision course. Going forward, the answer hinges on whether the initiative's supporters are more interested in making a difference than in making a point, and whether its opponents can accept that some form of further international legalization in business and human rights is both necessary and desirable. I elaborate on these scenarios below.

Let's begin with the Ecuador resolution and the vote on it. The resolution calls for the establishment of an open-ended (no time limit) intergovernmental working group within the Human Rights Council, "the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[26] Thus, the resolution is not addressed to any specific human rights abuses. Rather, it seeks to establish an overarching international legal framework—a global constitution of sorts—governing business conduct in relation to human rights. It then goes on to define "other business enterprises" in a way that is intended to exclude national companies, so that the new legal framework would apply only to transnational corporations.[27] Thus, to illustrate, the language of the proposed treaty would have covered international brands buying readymade garments from the factories housed in the collapsed Rana Plaza building, but not the owners of the local factories in which they are produced.

In addition to Ecuador, the resolution was co-sponsored by Bolivia, Cuba, South Africa, and Venezuela. The vote in the Council was twenty in favor, fourteen against, with thirteen abstentions. A majority of African members voted for it, as did China, India, and Russia. Apart than the sponsors, all other Latin American countries, notably Brazil, abstained. The European Union and the United States voted against the resolution, which they thought counter-productive and polarizing; both stated that they would not participate in the treaty negotiating process.[28] Japan and South Korea also voted no. Representatives of the civil society coalition were euphoric, though several NGOs criticized the exclusion of national companies.[29] China's explanation of its vote was no rousing endorsement. China's delegate stated that the vote was based on the following "understanding": that the issue of a business and human rights treaty is complex; that differences exist among countries in terms of their economic, judicial, and enterprise systems, as well as their historical and cultural backgrounds; and that it will be necessary, therefore, to carry out "detailed and in-depth" studies, and for the treaty process itself to be "gradual, inclusive, and open."[30] China, of course, is no more likely

than the United States to impose human rights standards on its multinationals that it has not accepted for itself as a state.[31]

In short, a sizeable majority of Council members did not vote in favor of the Ecuador resolution. The home countries of the vast majority of the world's transnational corporations opposed and are boycotting the proposed treaty negotiations, abstained, or in China's case signaled significant conditionality. Thus, as of now this latest treaty effort looks very much like a case of dysfunction redux. But is there nothing to be learned from forty years of history—indeed, from international lawmaking generally—that could ensure additional remedy to victims of corporate-related human rights harm? I believe there is, but it would require key doctrinal preferences to yield to practical reality. I briefly flag three.

The first is for treaty supporters, states and NGOs, to recognize that no treaty of any kind will emerge in the near future. Ecuador itself, in informal consultations leading up to the vote, estimated that it could take a decade or more. Indeed, if the current impasse is not bridged we may well witness a replay of the 1970s TNCs Code of Conduct negotiations, which drifted on for years until they were finally abandoned in 1992. Recall that even the non-binding Declaration on the Rights of Indigenous Peoples took twenty-six years from conception to adoption. That's not a reason to delay. But it does raise an obvious question for treaty supporters: what do they propose to do between now and then—whenever the then may be? The obvious answer should be to implement and build on the UN Guiding Principles on Business and Human Rights (UNGPs). But this poses a dilemma for many treaty proponents. Let me explain.

Virtually every country that spoke during the Council debate stressed the importance of implementing the UNGPs. Indeed, the day after the deeply divided vote on the Ecuador proposal the Council adopted a second resolution, introduced by Argentina, Ghana, Norway, and Russia along with forty additional co-sponsors from all regions of the world. It extends the mandate of the expert working group the Council established in 2011 to promote and build on the UNGPs, and requests the High Commissioner for Human Rights to facilitate a consultative process with states, experts, and other stakeholders exploring "the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses."[32] It also asks the expert working group to report on UNGPs implementation—lack of awareness of what is actually happening being a main reason for the belief by many that not much is. This resolution was adopted by consensus, requiring no vote.

But here is the problem: many of the countries supporting the treaty process have done little if anything to act on the UNGPs. Similarly, many of the NGOs in the treaty alliance have done little to promote them—some even campaigned against their endorsement by the Human Rights Council in 2011. Both groups all along have simply held to the doctrinal position that only international legal measures can produce

significant change, and since the UNGPs do not by themselves create new international law obligations, a treaty is necessary. But given Ecuador's own conjecture that a business and human rights treaty may be a decade or more away, will treaty proponents now take implementing the UNGPs more seriously—as an interim measure, if nothing else? If not, what will they say to victims, in whose name these battles are waged?

A second doctrinal position stands in the way of progress: the very scale of the proposed treaty. 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, the problem diversity, institutional variation, and conflicting interests across states only increases as the number of TNC home countries grows (note, for instance, China's remarks above). Legally, the category of business and human rights simply encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of human rights.[33] 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—as we already began to witness in the recent Council debate.

This brings me to a third doctrinal impediment. Treaty opponents need to face up to the reality that international law in this domain cannot and will not remain frozen in place forever. If some of the arguments by Ecuador and the treaty alliance sounded like a blast from the past, so too did some rejoinders from the other side. For example, the delegate of the United Kingdom stated that "this issue is one of the rule of law, the national rule of law in individual states."[34] Similarly, the International Chamber of Commerce stated in a press release that "no initiative or standard with regard to business and human rights can replace the primary role of the state and national laws in this area."[35] Both statements are absolutely correct as far as they go. But if national law and domestic courts sufficed, then why do TNCs not rely on them to resolve investment disputes with states? Why is binding international arbitration necessary, enabled by 3,000 bilateral investment treaties and investment chapters in free trade agreements? The justification for this has always been that national laws and domestic courts are not adequate and need to be supplemented by international instruments.

In their response to Ecuador's resolution, the U.K. and ICC both expressed strong support for the Guiding Principles. Indeed, both have actively promoted and contributed to their implementation—the U.K. being the first country to adopt a National Action Plan. But we must remain clear about what the UNGPs are and do. The

UNGPs established an evidence- and consensus-based foundation. They have generated new national and international policy requirements as well as some new legal requirements. Where they are being acted upon and developed further, they help reduce the overall incidence of corporate-related human rights harm and also provide for sources of non-judicial remedy that did not exist before. But they were never intended to foreclose other necessary or desirable future paths.

Early on in my mandate I identified an approach to international legalization in business and human rights consistent with the principled pragmatism that brought us the Guiding Principles.[36] Principled pragmatism views international law as a tool for collective problem solving, not an end in itself. It recognizes that the development of any international legal instrument requires a certain degree of consensus among states. And it holds that before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests narrowly crafted international legal instruments for business and human rights—"precision tools" I called them—focused on specific governance gaps that other means are not reaching.[37]

One obvious candidate would be the worst of the worst: business involvement in gross human rights abuses, including those that may rise to the level of international crimes, such as genocide, extrajudicial killings, and slavery as well as forced labor. I made a proposal to this effect in a note I sent to all UN member states in February 2011, conveying my recommendations for follow-up measures to my mandate.[38] In the case of natural persons, broad consensus exists on the underlying prohibitions, which generally enjoy greater extraterritorial application in practice than other human rights standards. But further specificity is required as to what steps states should take with regard to business enterprises—legal persons—and about the role that international cooperation could play in helping states to take those steps. A legal instrument with this focus would have the secondary effect of heightening state and corporate awareness of the need for businesses to more broadly avoid human rights harm, much as the Alien Tort Statute did before the U.S. Supreme Court restricted its extraterritorial applicability in the recent *Kiobel* case.[39]

In short, the issue for me has never been about international legalization as such; it is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results, all the while building on the UNGPs' foundation.

This discussion leads to several conclusions. First, if Ecuador and its supporters hold fast to the terms and intent of their resolution, there are only two possible outcomes. Either the negotiations drag on for a decade or more and follow the path of the 1970s Code of Conduct negotiations; or they manage to persuade enough developing countries to adopt such a treaty text, but which home countries of most

TNCs do not ratify and by which they will not be bound. Whatever outcome prevails, it would represent another dead end, delivering nothing to individuals and communities adversely affected by corporate conduct.

Second, if treaty opponents hold fast to their position that national law and voluntary initiatives suffice, and that no further legalization of any kind is acceptable now or in the future, they will contribute to the resurgent polarization that we have witnessed over the past year, and in the process undermine the Guiding Principles—not because the UNGPs lack value, but because discounting or dismissing their value is politically expedient for treaty proponents.

Third, the resolution introduced by Argentina, Ghana, Norway, and Russia—currently overshadowed by Ecuador's resolution—will play an important role going forward. In the short run, the consultations it calls for on "the full range of legal options and practical measures to improve access to remedy," led by the Office of the High Commissioner and involving all stakeholder groups, will contribute practical information, insights, and guidance as the treaty negotiations get under way. But if the treaty process ends up prizing doctrine over practical results, the consensus resolution might well generate a constructive parallel process in its own right.

However this plays out, governments, businesses, and NGOs need to redouble (or in many cases, begin) efforts to implement and further develop the Guiding Principles, including through National Action Plans that set out clear expectations for governments and all types of business enterprises.[40] No future treaty, real or imagined, can substitute for the need to achieve further progress in the here and now. Indeed, the more that is accomplished by building on this widely supported foundation, the less politicized and polarized the debate about international legalization will become. Principled pragmatism may yet continue to prevail.

Conclusion

The UN Guiding Principles on Business and Human Rights have succeeded in generating the beginnings of a new global regulatory dynamic in the area of business and human rights. Their success—modest except when compared to the alternatives—is due to the fact that the development of the UNGPs consciously reflected on and was informed by the reasons for past failures. It sought explicitly to devise a different approach, as described briefly earlier in this chapter. Thus, one of the great ironies for me from the very start of my UN mandate has been the desire by many human rights activists and some academic human rights lawyers to continually try to push the agenda back into the conventional mold. Why? Because that's simply how human rights has been done in the past and must be done in the future.[41] The chapter by Rodríguez courageously recognizes not only the limits of the conventional posture, but also its potentially harmful consequences for impacted individuals and communities, particularly in the institutional contexts of the global South.

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[1] See Tagi Sagafi-nejad, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Bloomington: Indiana University Press, 2008).
[2] "Corporate Influence on the Business and Human Rights Agenda of the United Nations," Working paper issued by Misereor, Global Policy Forum, and Brot für die Welt," June 2014, p. 5, http://www.globalpolicy.org/home/221-transnational-corporations/52638-new-working-paper-corporate-influence-on-the-business-and-human-rights-agenda-of-the-un.html.
[3] The Commission stated that it had not requested the text and that it had no legal standing. It also instructed that no monitoring by UN human rights bodies take place (UN Document E/CN.4/DEC/2004/116, 20 April 2004).
[4] For the full text of the GPs, see UN document A/HRC/17/31 (21 March 2011). I elaborate on the thinking and activities that produced the UNGPs in my book, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013).
[5] International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," UN Doc. A/CN.4/L.682 (13 April 2006).
[6] For an interesting discourse analysis of the development of the GPs, see Karin Buhman, "Navigating from 'train wreck' to being 'welcomed': negotiation strategies and argumentative patterns in the development of the UN Framework," in Surya Deva and David Bilchitz (Eds), *Human Rights Obligations of Business* (Cambridge: Cambridge University Press, 2013).
[7] The Business and Human Rights Resource Centre tries to keep track of undertakings by companies and governments. See http://business-humanrights.org/.
[8] John Gerard Ruggie and Tamaryn Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges," The Brown Journal of World Affairs, 22 (Fall/Winter 2015).
[9] See http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/CCCMC_Guidelines_for_Social_Responsibility_in_Outbound_Mining_Operations_English_Version.pdf.
[10] For the official IBA guidance, see http://www.ibanet.org/Legal_Projects_Team/Business_and_Human_Rights_for_the_Legal_Profession.aspx.
[11] Mary Robinson and I sent the letter on behalf of the Institute for Human Rights and Business, of which she is the Patron and I chair the International Advisory Board. The letter is available at http://www.ihrb.org/pdf/2014-06-11-Open-Letter-FIFA.pdf. We attached a recent Institute report, "Striving for Excellence: Mega-Sporting Events and Human Rights," available at http://www.ihrb.org/pdf/2013-10-21_IHRB_Mega-Sporting-Events-Paper_Web.pdf.
[12] See http://www.fifa.com/about-fifa/news/y=2015/m=7/news=fifa-executive-committee-sets-presidential-election-for-26-february-20-2666448.html/.
[13] See http://www.fifa.com/governance/news/y=2015/m=12/news=fifa-to-further-develop-its-human-rights-approach-with-international-e-2744747.html.
[14] See http://resources.fifa.com/mm/document/affederation/bodies/02/74/76/37/draftfifastatutesextraordinarycongress2016en_neutral.pdf, Article 3.
[15] See John Gerard Ruggie, "'For the Game. For the World'. FIFA and Human Rights," available at https://www.hks.harvard.edu/content/download/79736/1789834/version/1/file/Ruggie_humanrightsFIFA_reportApril2016.pdf.

[16] On a visit to Moscow, FIFA President Gianni Infantino was asked about Russia's "gay propaganda" law. He said FIFA is not the world welfare agency but we to be responsible about these things, we have to be responsible about the position we take about human rights." A few days later in Qatar, when asked about the migrant workers situation in that country, he announced a FIFA led oversight committee that was to include civil society members. See, respectively, "FIFA's Infantino Wants Video Assistance at 2018 World Cup," New York Times, April 19, 2016, and Owen Gibson, "Fifa promises panel to ensure decent working conditions for 2022 World Cup workers," *The Guardian,* 22 April 2016.

[17] I elaborate on the analytics framing the GPs process in my article "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights," *Global Governance,* 20 (Jan.-Mar. 2014).

[18] Tara J. Melish and Errol Meidinger, "Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework," in Radu Mares (Ed), *The UN Guiding Principles on Business and Human Rights* (Leiden: Martinus Nijhoff, 2012). Curiously, the authors claim that even the third pillar was a victory "hard-fought by the human rights community" (p. 314). The claim is incorrect. The "Protect, Respect, and Remedy" framework was developed and presented as one piece from the outset.

[19] Archon Fung and Erik Olin Wright (Eds), *Deepening Democracy: Institutional Innovations and Empowered Participatory Governance* (London: Verso, 2003).

[20] One of the most successful such efforts with which I am familiar is the creation of eight Regional Development Councils under a Global Memorandum of Understanding established between Chevron Nigeria Limited and communities in Delta, Rivers, Bayelsa, Ondo, and Imo States, Nigeria. My UN mandate produced a short and award-winning documentary on this initiative, which is available at http://shiftproject.org/video/only-government-we-see-building-company-community-dialogue-nigeria. The documentary was funded by a grant from the government of Norway.

[21] See the Amnesty International report, *So that no one can demand anything: Criminalizing the right to protest in Ecuador?* (2012) p. 13, available at http://www.amnesty.org/en/documents/AMR28/002/2012/en/.

[22] See Melish and Meidinger, *supra* note 18, and Melish in this volume.

[23] http://www.un.org/disabilities/convention/conventionfull.shtml.

[24]The International Corporate Accountability Roundtable (ICAR) has done impressive work using the GPs as a platform to further advance corporate accountability, including through national regulation. ICAR is a coalition of leading global human rights organizations; its Steering Committee includes EarthRights International, Human Rights Watch, Human Rights First, Global Witness, and Amnesty International. Also see International Trade Union Confederation, "The United Nations 'Protect, Respect, Remedy' Framework and the United Nations Guiding Principles for Business and Human Rights: A Guide for Trade Unionists," available at http://www.ituc-csi.org/IMG/pdf/12-04-23_ruggie_background_fd.pdf; and Advocates for International Development, "The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession," http://a4id.org/sites/default/files/user/A4ID%20Business%20and%20Human%20Rights%20Guide%202013%20(web).pdf.

[25]http://www.treatymovement.com/. It is noteworthy that the major global human rights organizations, such as Amnesty and Human Rights Watch, did not join the alliance, reflecting doubts about the timing and efficacy of the Ecuador proposal.

[26]UN Document A/HRC/26/L.22/Rev. 1 (24 June 2014).
[27]A footnote in the resolution states the following: "'Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law." The resolution is silent on the subject of joint ventures with domestic partners, including state-owned enterprises, and on other forms of host state involvement with transnational corporations.
[28]The U.S. statement is posted at https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/.
[29]See Arvind Ganesan of Human Rights Watch: "Dispatches: A Treaty to End Corporate Abuses," available at http://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses: "A fundamental flaw lies in Ecuador's insistence that the treaty focus on multinational companies, even though any company can cause problems and most standards, including the UN [guiding] principles, don't draw this artificial distinction."
[30]See http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001?term=human rights council&sort=date.
[31] This raises a fundamental point that civil society treaty advocates and their academic supporters have ignored when criticizing what they consider to be the "weakness" of Pillar 2. All Council members in 2011 were able to endorse the corporate responsibility to respect *all* human rights because within the UNGPs' framework that responsibility is based in a global social norm, not a legal obligation. In contrast, if the corporate responsibility to respect human rights were turned into an international treaty obligation, its applicability and the range of human rights to which it would apply would be determined by individual instances of state treaty ratification—not only involving the proposed new treaty, but also the variable human rights standards that individual states recognize as international legal obligations.
[32]UN Document A/HRC/26/L.1, Rev.1.
[33]For starters, I count human rights law, labor law, anti-discrimination law, health and safety law, privacy law, consumer protection law, environmental law, anti-corruption law, humanitarian law, criminal law, investment law, trade law, tax law, property law and, not least, corporate and securities law.
[34]The statement may be viewed at http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001?term=human rights council&sort=date.
[35]"ICC disappointed by Ecuador Initiative adoption," available at http://www.iccwbo.org/News/Articles/2014/ICC-disappointed-by-Ecuador-Initiative-adoption/.
[36]John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda," *American Journal of International Law,* 101 (October 2007).
[37]I am well aware of what some call the "expressive" function of law, in contrast to its regulative role. But the field of international human rights does not lack for expressive legal instruments; what is in short supply are actionable paths to cumulative change.
[38]http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf.
[39]In *Kiobel v. Royal Dutch Petroleum Company* the Supreme Court held that a presumption against extraterritoriality applies to the statute, and "even where the claims touch and concern the

territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."

[40]For excellent guidance, see International Corporate Accountability Roundtable, "National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks," available at http://accountabilityroundtable.org/wpcontent/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report2.pdf.

[41] An academic exemplar is David Bilchitz, "A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles," in Deva and Bilchitz, *supra* note 6.