**A binding treaty on Business and Human Rights – Alfred de Zayas**

In my previous reports to the Human Rights Council and General Assembly, I too have signaled the importance of making transnational corporations accountable by way of a treaty clearly defining corporate duties and providing victims with access to remedies. Such a treaty would aim at preventing violations of human rights as a result of the activities of corporations, for instance, in the extracting and oil and gas industries, which frequently result in pollution disasters and grave health hazards.

The goal is to ensure that transnational corporations and other business enterprises conform to the values and principles of the United Nations. Indeed, the United Nations Charter, which serves as a kind of world constitution, has a supremacy clause, Article 103, which stipulates that in case of conflict between any agreement and the UN Charter, it is the Charter that prevails. Thus, agreements with transnational corporations and investors must conform to the Charter and not violate human rights, the right to development or the right to health. This is, of course, nice-sounding theory.

As we all know, States frequently ignore human rights and international law – because there is no effective enforcement thereof. The anomaly is that since the General Agreement on Tariffs and Trade and the creation of the World Trade Organization, States have treated trade as an end in itself and established dispute settlement tribunals with enforcement mechanisms and sanctions. More recently investors and transnational corporations have succeeded in bulldozing through their secret free trade agreements, compromised the ontological functions of States and undermined their regulatory space. A privatized system of justice – I would call it injustice – has been created, the infamous Investor-State Dispute Settlement arbitration system, which pretends to supplant national courts and tribunals at the expense of coherence, predictability and plain justice. Bilateral Investment Treaties and Free Trade Agreements have been equipped with enforcement possibilities lacking in the international human rights treaty regime.

John Ruggie’s famous “Guiding Principles on Business and Human Rights” are good, but they are pious pledges without enforcement machinery. Alas, experience has shown that so-called self-regulation does not work. Similarly, the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights are feeble soft law. This normative set of principles were the outcome of an expert meeting which was convened by the Maastricht Centre of Human Rights and the International Commission of Jurists in September 2011, aiming at stipulating the extraterritorial human rights obligations of States in an era characterized by economic globalization. To me it seems axiomatic that States are responsible for the actions of corporations registered within their jurisdictions.

The United Nations treaty bodies have optional protocols that allow individuals to submit cases against States. Alas, experience with the non implementation of the “Views” and “Opinions” of these UN bodies including the Human Rights Committee, indicate the necessity to ensure at the stage of elaboration and negotiation of any new treaty that provision is made for effective implementation, so that victims of violations of their human rights do not find themselves with unenforceable decisions. What is needed is a treaty whose decisions can be directly implemented in the domestic legal order.

In a way it is remarkable that anyone could object to the proposition of adopting an enforceable treaty covering the activities of transnational corporations – especially any State member of the Human Rights Council. Transparency and accountability are central concerns of all systems of justice, and enforcement is necessary for credibility. Soft law must be shored up with hard law.

I salute Ambassador Maria Fernanda Espinosa and the participants of the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises. I am convinced that an international legally binding instrument will emerge from these efforts. Skeptics have already said that there will be no consensus. But is consensus really necessary?

Back in 1948 there was no consensus at the adoption of the Universal Declaration of Human Rights, which was adopted by the General Assembly by a vote of 48 in favour, none against and eight abstentions (the [Soviet Union](https://en.wikipedia.org/wiki/Soviet_Union), [Ukrainian SSR](https://en.wikipedia.org/wiki/Ukrainian_Soviet_Socialist_Republic), [Byelorussian SSR](https://en.wikipedia.org/wiki/Byelorussian_Soviet_Socialist_Republic), [People's Federal Republic of Yugoslavia](https://en.wikipedia.org/wiki/People%27s_Federal_Republic_of_Yugoslavia), [People's Republic of Poland](https://en.wikipedia.org/wiki/People%27s_Republic_of_Poland), [Union of South Africa](https://en.wikipedia.org/wiki/Union_of_South_Africa), [Czechoslovakia](https://en.wikipedia.org/wiki/Czechoslovakia), and the [Kingdom of Saudi Arabia](https://en.wikipedia.org/wiki/Kingdom_of_Saudi_Arabia)).

On 17 July 1998, the Rome Statute was adopted by a vote of 120 to 7, with 21 countries abstaining.

More recently, in 2007, the General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Not by consensus, but by a vote of 144 in favour, four against (Australia, Canana, New Zealand and the United States) and 11 abstentions.

The open-ended inter-governmental working group on the Right to Peace has held three sessions and failed to adopt a declaration because the chairman of the working group insisted on the illusion of achieving consensus. It was clear from the start that there would be no consensus, as there will be no consensus on the adoption of a Declaration on the Right to International Solidarity. I think we should accept the power constellations as they are, do the best we can, and go for adoption by vote – by a coalition of States who do take it seriously with all human rights.

I am persuaded that the progressive development of human rights is not well served by the rule of consensus. It is best to adopt a coherent and comprehensive text, and be patient until the consistent objectors gradually understand that it is in their own interest to come on board.

Even the principal United Nations Human Rights Treaties are not universal. We should remember that the ICCPR has 168 ratifications, the ICESCR 164 – and this with many reservations, understanding and interpretative declarations. My own country, the United States, is the only hold-out that has not ratified the Convention on the Rights of the Child. It also has not yet ratified the Convention on Migrant Workers or the Convention on the Rights of Disabled Persons. I am sure that if Bernie Sanders were elected President, we would make progress on these ratifications.

Even if no consensus can be expected during the process of the second intergovernmental working group, there is enough urgency to carry this forward. We know of the recent murder of the environmental and indigenous activist Berta Caceres in Honduras – one day we will know whether the polluting industry was directly or only indirectly behind the murder. But we do know that in Colombia syndicalists have been murdered after industry bosses have denounced them to the paramilitaries. In Argentina during the dirty war several transnational enterprises that had trouble with syndicalists simply gave lists of names to the police, and these labour-rights activists were then picked up and disappeared. My colleague Juan Pablo Bohoslavsky, rapporteur on foreign debt, and Horacio Verbitsky published an excellent documentation of this collusion between industry and the military Junta – *Cuentas Pendientes*. And Truth Commissions have further documented the role of business in suppressing labour leaders, environmentalists and indigenous peoples.

Just recently in the Wampi community in Mayuriaga, Peru, two massive oil spills polluted large areas of the Amazon, causing a water emergency after the oil spills of 25 January and 3 February 2016. Responsible was Petroperu. Everyone in this room will remember the Texaco/Chevron scandal and the refusal of the transnational to pay the 9 billion dollars in compensation for the deaths and cancers caused as a result of the destruction of a portion of Ecuador’s Amazon forest.

This brings me to another issue that deserves attention – the criminal law aspect of corporate responsibility. Last summer, in July 2015 the University of Jaen in Spain hosted a summer course devoted to corporate civil and criminal responsibility and the possibility of extending universal jurisdiction to white collar crime. My own presentation focused on a reaffirmation of the polluter pays principle and the application of the principle of the Chorzow Factory case to non-State actors – that is, *ubi jus, ibi remedium.* If there has been a violation of a right, there must also be reparation. I also pointed out that the Rome Statute of the International Criminal Court has some relevance here, since massive environmental crimes can be considered a crime against humanity under article 7, paragraph k, of the statute which includes under the Court’s jurisdiction:

”(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

This could cover the Chevron disaster and possibly also the reckless endangerment of human life that the builders of the Fukushima nuclear station are responsible for. Surely the nuclear energy industry in Japan made huge profits and took unnecessary risks in building the Fukushima nuclear power station where they did – an area at risk of both earthquakes and tsunamis. Nor only the corporate executives, but also the politicians who advocated the investment should be called to account.

By way of conclusion I would say that adoption of a binding legal instrument on corporate responsibility is urgent to set an end to the impunity hitherto enjoyed by transnational corporations and their executive officers. Parliaments must be involved at an early stage – and the Inter-Parliamentary Union with its headquarters in Geneva should be invited to formally participate in the elaboration of the treaty, which would be more than just complementary to the Guiding Principles – but a necessary transformation of soft-law into hard law. Civil society should also play an active role in this process – and in those countries where referenda can be held, it would be useful to take the temperature of world public opinion by conducting opinion polling and referenda. In the meantime, national action plans for the implementation of the “Guiding Principles” should be encouraged. Who knows? Transnational corporations may actually develop good human rights habits, and then the implementation of the Guiding Principles would not appear so onerous. We owe it to the victims of corporate abuse to listen to their plight and to ensure by the adoption of a treaty that henceforth they will have effective remedies.

I thank you for your attention.

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