

**HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS:
THE ELABORATION OF AN INTERNATIONAL LEGALLY BINDING
INSTRUMENT UNDER THE AUSPICES OF THE UN HUMAN RIGHTS COUNCIL**

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ABSTRACT

In the light of globalization, the power of corporations increased and brought both advantages and challenges. One of the challenges is the impact of corporations upon human rights. The relationship between business and human rights suffers from a lack of legally binding regulatory instruments and as a consequence, victims of corporate human rights violations have difficulties in accessing effective remedies.

In order to address the challenges brought by corporations in relation to human rights, the possibility of an international legally binding instrument on business and human rights is discussed at the United Nations level.

This thesis aims at presenting the main stages, approaches, difficulties and advantages regarding the elaboration of a new legally binding instrument, a process which is led by the United Nations Human Rights Council addressing the activities of transnational corporations and other business enterprises with respect to human rights. The process itself is valuable because it offers a common forum for different stakeholders to debate and clarify controversial issues in relation to business and human rights.

The first chapter sets the international scene, by exposing the legal frameworks regarding businesses and human rights, existing from 1976 until recently, when the United Nations Human Rights Council decided in its Resolution 26/9 of 26 June 2014 to establish an open-ended intergovernmental working group (OEIGWG) on transnational corporations (TNCs) and other business enterprises (OBEs) with the mandate to elaborate an international legally binding instrument which will regulate the activities of TNCs and OBEs with respect to human rights.

The second chapter presents (i) the major ideas shared during the first two sessions of the OEIGWG and (ii) the content of the document emanated from the OEIGWG, which portrays the elements proposed to be included into the new legally binding instrument after negotiations.

The third chapter offers a critical appraisal of elements proposed by the OEIGWG, emphasizing the challenges that might be faced during the negotiations.

The Conclusion chapter sums up the aspects discussed within this thesis and it provides a short perspective into the future developments in this area.

You will not find in this thesis, tragic human rights stories of corporate human rights violations because the scope of the thesis is to inform the reader about legal developments and not to sensitize, as many INGOs are doing greatly through their work. You will not find also, a perfect recipe or the best approach in tackling the business and human rights issues, but this thesis will help you to draw your own conclusions in this regard.

I hope that this thesis will contribute to a better understanding of the United Nations' initiative towards an international legally binding instrument in relation to business and human rights. Capturing the existing legal frameworks and exposing positions of different stakeholders regarding the way forward will help the reader to contour an informed idea over the current developments in international human rights law.

EXECUTIVE SUMMARY

The current negotiations, about the new legally binding instrument on business and human rights conducted under the UN Human Rights Council, deserve attention with regard to the reasons that brought different stakeholders at the negotiation table and most of all, with regard to the issues discussed during the negotiations.

This thesis has been written in the spirit of providing information to the reader about: (i) the legal regulatory developments in relation to business and human rights over the last half of a century in international law; (ii) the Resolution of the United Nations Human Rights Council towards the process of elaborating an international legally binding instrument which will regulate the activities of transnational entities with respect to human rights; (iii) the process of elaboration during the first two sessions of the open-ended intergovernmental working group and (iv) the content of the proposed international legally binding instrument and (v) its feasibility.

This thesis serves as a source of awareness on the issues and the options during the negotiations, but it will not give a verdict or predict on how the ongoing negotiations will evolve.

DEDICATIONS

I dedicate this thesis to people I don't know.

To you, who picked up this thesis and to all those who inspired it and will never have the chance to read it because they lost their lives through human rights violations.

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The views expressed in this thesis are the views of the author and should not be construed as the views of the European Investment Bank. This thesis is intended for educational purpose and does not represent a legal advice.

LIST OF ACRONYMS

EU:	European Union
OBEs:	Other Business Enterprises
OECD:	Organisation for Economic Co-operation and Development
OEIGWG:	Open-ended Intergovernmental Working Group
OHCHR:	The Office of the United Nations High Commissioner for Human Rights
ILO:	International Labour Organization
INGOs:	International Non-Governmental Organizations
NGOs:	Non-Governmental Organizations
TNCs:	Transnational Corporations
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCTAD:	United Nations Conference on Trade and Development
UNGPs:	United Nations Guiding Principles on Business and Human Rights
WHO:	World Health Organisation

INTRODUCTION

I. Background Information

Imagine that you are a United Nations delegate, it is Monday morning and you find your desk buried under a mountain of Non-Governmental Organizations reports containing stories of human rights violations where corporate entities were involved. After reading all the tragic stories you will perhaps ask yourself: what is the applicable regulatory framework and why so many victims do not have access to remedies? It will take less than 10 minutes of google search and you will be surprised to find out that in 2017 there is no international legally binding instrument requiring corporations to respect human rights throughout their activities. Considering that you have the power to change this scenario, what would you do?

In 2014, the United Nations Human Rights Council approved the initiative of the Ecuador and South Africa delegations and decided through its Resolution 26/9 of 14 July 2014 to establish ‘an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate 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.’¹

However, the process of elaborating a legally binding instrument which will regulate the activities of transnational entities with respect to human rights is not that smooth. The pressure felt by corporations in the light of new changes, the opposition of certain States and

¹ United Nations Human Rights Council Resolution A/HRC/RES/26/9 of 14 July 2014 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights [2014] para 1(Resolution 26/9) < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> > accessed 9 October 2017.

even the existent UN soft law approach under the United Nations Guiding Principles on Business and Human Rights (UNGPs) are just a few challenges faced by this process.

It is well known that transnational corporations (TNCs) possess colossal power in this globalized world, influencing the international politico-economic order and the lives of millions of persons. Evaluating the source of this enormous power from a political perspective, it can be observed that the neo-liberalism ideology,² dominating the States from the Global North, has set the ground and increased the chances of TNCs to accumulate the power. The States contributed to this accumulation of powers in the hands of TNCs and as Ellen Woods accurately illustrates, the States provided the ‘conditions enabling global capital to survive and navigate the world.’³

It is beyond doubt that, the TNCs nested in the neo-liberal ideology challenge the Westphalian international legal order. It is helpful to engage examples in this political discussion in order to better illustrate the concepts. The nucleus of the Westphalian order is the principle of state sovereignty which assumes that each state is a unitary agent, able to control the actions of entities operating within its territory. Globalization refutes this assumption because multiple TNCs operate across jurisdictional boundaries and are capable to elude the control of the state. Therefore, there is a discrepancy between the transnational essence of these entities which promotes interdependence and the Westphalian international order which promotes the state-centric model. During the 1980s, the globalization process led

² See a comprehensive definition of neo-liberalism offered by David Harvey in *A Brief History of Neoliberalism* ‘Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper function of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture.’ (Oxford University Press 2005) 2.

³ Ellen Meiksins Woods, *Empire of Capital* (Verso 2005) 139.

to the erosion of the Westphalian international order. In the late 1990s extreme voices⁴ talked about ‘the decline of state’ arguing that corporations are beyond the control of States and the economic major players will have the supremacy over the politics or, how Susan Strange points out critically that in the end the power will shift from States to corporations.⁵ To conclude this political discussion, before the beginning of the 21st century, the TNCs were seen as a threat to the political order because States have less sovereignty when the phenomenon of globalization is present.

With regard to the relationship between the State and TNCs, after the Second World War, a concept that was widely accepted was the tacit ‘social contract’ that divided responsibilities between the government and the corporations.⁶ The corporations were responsible for generating wealth and for maximizing profits, or how Milton Friedman put it, ‘the social responsibility of the modern corporation is simply to maximize profits.’⁷ Considering the profit maximization as the corporations’ core obligation, the ethical and social responsibility were narrowed and included: honesty in transactions, prevention of conflict of interest, respect for the business property, compliance with contractual obligations and respect for the law.⁸ The government was responsible for equitable sharing of wealth.⁹ The result of this division is the emergence of a legal vacuum and corporations were willing to exploit this vacuum for self-serving purposes.

Over the last decades, there have been distinct attempts to fulfill the legal vacuum and a distinguished movement towards corporate accountability enlarged. The legal vacuum is

⁴ Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (Harper Collins 1995) and Susan Strange, *The Retreat of the State: The Diffusion of Power in The World Economy*, (Cambridge University Press 1996).

⁵ Susan Strange, ‘The Erosion of the State’ [1997] 96 *Current History* 613, 365.

⁶ Wesley Cragg, ‘Human rights and business ethics: fashioning a new social contract’ [2000] in Sojka, J. and Wempe, J. (Eds), *Business Challenging Business Ethics: New Instruments for Coping with Diversity in International Business of the 12th Annual EBEN Conference*, Springer, 205.

⁷ Ibid 206.

⁸ Ibid.

⁹ Ibid.

present if the rules under which the businesses should conduct their activities do not exist or if the rules exist, the state is not willing or not able to apply these rules. Once there is a legal vacuum, businesses may tend to take advantages of this vacuum and to profit from the low standards in labor law, tax, environmental provisions or consumer protection. The TNCs are famous for outsourcing their activities in less developed States with weak regulations and limited sanctions for human rights abuses. One might say that an effective solution is to strengthen the State's duty to prevent and punish the human rights abuses. Within its territory, the State is responsible to take the appropriate steps to secure the protection of human rights through different measures such as public policies, legislation and adjudication. This approach might be a solution but in a globalized world, the domestic legislation cannot solve by its own all the problems.

II. Thesis Statement

This thesis states that the international regulatory framework with regard to businesses and human rights should develop even further in order to achieve a better protection for victims of corporate human rights violations. Specifically, this thesis argues that the United Nations initiative to elaborate an international legally binding instrument which will regulate the activities of transnational entities with respect to human rights might be the solution to obtain that better protection and thus, examining the process of elaboration is a valuable approach in this regard.

III. Hypotheses and Research Questions

The assumption underlying this thesis is that, the existing regulatory framework under the United Nations, namely the Guiding Principles on Business and Human Rights, is a soft law approach which does not offer fair answers to the pressing human rights issues related to violations made by corporations. More needs to be done with regard to global corporate accountability and the elaboration of an international legally binding instrument might be a solution.

This assertion requires an examination of the international regulatory framework developed in relation to business and human rights. If the research concludes that the existent international regulatory framework is not enough for a proper protection against corporate human rights violations, then this calls for an analysis of the current negotiations under the United Nations Human Rights Council. This thesis will explore the process of elaborating a legally binding instrument which will regulate the activities of transnational entities with respect to human rights. In the end, the thesis will examine the elements proposed by the open-ended intergovernmental working group to be further negotiated and it will outline the criticism that the proposed elements might get in the future debates.

The purpose of this thesis is to analyze the process of elaborating an international legally binding instrument which will regulate the activities of transnational entities with respect to human rights and this thesis will provide answers to the following questions:

What is the genesis of legal developments in international human rights law pursuing to regulate transnational entities? More specifically, when did the process start; which instruments were adopted and by whom; what kind of rights are covered in these instruments;

what are the mechanisms of implementation and whether the relevant provisions have binding or non-binding nature.

What is the existent international legal framework with regard to business and human rights? This question will trigger questions such as: is this instrument binding or non-binding; what kind of provisions does it contain with regard to transnational entities and States; what are the weaker points of this existent international legal framework?

Is there a need for a new legally binding instrument concerning the regulation of transnational corporations in relation to human rights or the existent legal framework is effective and it is sufficient to prevent future human rights violations? If there is a need, what was decided in this sense by the UN?

What was agreed by the UN Human Rights Council in its Resolution 26/9 and what is the mandate of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights?

What was discussed during the two sessions of the open-ended intergovernmental working group? In what manner was conducted the work and what are the conclusions?

What are the elements proposed for the new legally binding instrument and prepared as a result of the two sessions? More specifically: what is the scope of the new instrument; which are the entities that fall under the application of this new instrument; what are the rights protected and what are the obligations for States and transnational entities; what kind of liability is mentioned; what are the remedies available for affected persons; what solution is offered for the jurisdictional issue?

Will this new initiative share the regrettable faith of the previous one?

To whom it might apply in practice this proposed legally binding instrument?

The obligations of transnational entities and the obligations of States are similar or different?

What are the obligations of transnational entities vis-à-vis their supply chains and their subsidiaries? How can be explained the proposed broad concept of jurisdiction? How is it pictured the criminal liability of transnational corporations? In which manner will this instrument be implemented and monitored?

IV. Methodology

Firstly, the methodological approach for this thesis will focus mostly on presenting and interpreting the elements from primary sources of international law. Subsequently, a large part of the thesis will have a personal touch of the author, based on the fact that the primary sources are interpreted through personal lens.

Secondly, the thesis will be based on secondary sources such as books, academic articles, NGOs reports, oral statements and presentations available on the UN Web TV Channel and reliable online resources in order to sustain the arguments and to facilitate the comparisons.

Having mentioned the sources that I am using for the thesis, the methodological approach will be the black letter methodology, the traditional legalistic approach. I will use the descriptive analysis in order to present the content of the primary sources such as the Draft Elements Paper elaborated by the open-ended intergovernmental working group and other UN Resolutions. The aim of this research method is to describe and organize the provisions of the documents and to offer a comparative view on the new initiative. The

proposed legally binding instrument will be compared with the existent international legal framework. I will offer comments on both the existent and the proposed legal framework. The methodological process will consider the new legally binding instrument as part of an inter-related system and it will focus on interpreting the proposed provisions, taking into account the limitations of the international legal system.

This methodological approach can be described as a method of conceptual analysis because it will interpret the existing concepts with regard to business and human rights and it will also analyze the construction of the new conceptual framework with regard to this issue.

V. Thesis Structure

The first chapter will set the international scene, by exposing the legal frameworks of businesses and human rights, existing from 1976 until recently, when the United Nations Human Rights Council decided in its Resolution 26/9 of 14 July 2014 to establish an open-ended intergovernmental working group (OEIGWG) on transnational corporations (TNCs) and other business enterprises (OBEs) with the mandate to elaborate an international legally binding instrument which will regulate the activities of TNCs and OBEs with respect to human rights;

The second chapter will present (i) the major ideas shared during the first two sessions of the OEIGWG and (ii) the content of the Document emanated from the OEIGWG, which portrays the elements proposed to be included into the new legally binding instrument after negotiations.

The third chapter will offer a critical appraisal of elements proposed by the OEIGWG, emphasizing the challenges that might be faced during the negotiations.

CHAPTER 1: LEGAL DEVELOPMENTS IN INTERNATIONAL LAW REGARDING HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND THE EXISTENT NORMATIVE FRAMEWORK

1.1 Introduction

The genesis of legal developments in international human rights law pursuing to regulate TNCs can be traced back to the period of late 1970s. The International Community tried to adjust the growing power of transnational corporations using a soft law approach. The Organisation for Economic Co-operation and Development (OECD) adopted a set of Guidelines for Multinational Enterprises in 1976 and one year later, the International Labour Organization (ILO) adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises. Later, the Voluntary Codes of Conduct and the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights completed the legal framework.

There has been a growing concern about the mechanism for holding corporations accountable for their human rights repercussions. These instruments prove that ‘the social contract’ might not be valid and there was an increased awareness to include respect for human rights into the corporate conduct.

The scope of this chapter is to frame the legal mechanisms that can secure human rights protection within corporate behavior. The scrutiny refers to the significant instruments which have been adopted or proposed regarding: the relationship between business and human rights, the scope of such relationship, what it actually covers, the mechanism of implementing this relationship, what happened when a breach occurred, to whom belong the enforcement powers, and the binding or non-binding nature of the relevant provisions.

1.2 The OECD Guidelines

The first substantial effort in trying to regulate the TNCs behavior on international stage was the OECD Declaration on International Investment and Multinational Enterprises, in 1976.¹⁰ The Declaration contains four parts: the Guidelines for Multinational Enterprises, National Treatment, Conflicting Requirements and International Investment Incentives and Disincentives.¹¹ The scope of the OECD Guidelines was to encourage the foreign investment in order to gain economic progress.¹² The OECD Guidelines covered topics related to competition, taxation, employment, consumer interest, but only in the year 2000 the revised version made specific reference to human rights and recommended to TNCs to ‘respect the human rights of those affected by their activities’.¹³ The most recent update of the OECD Guidelines of 2011 contains an entire chapter entitled human rights and requires the TNCs to respect human rights, so as to avoid generating adverse human rights impact, to engage into a human rights policy, to accomplish human rights due diligence and to co-operate in the remediation process of adverse human rights impact.¹⁴

The OECD Guidelines set a mechanism for the implementation of its provisions. The Member States¹⁵ must initiate and establish national contact points in order to promote the

¹⁰ See the text of the OECD Declaration on International Investment and Multinational Enterprises available at: <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm> accessed 9 October 2017.

¹¹ See The OECD Declaration and Decisions on International Investment and Multinational Enterprises available at: <http://www.oecd.org/investment/investment-policy/oecddeclarationanddecisions.htm> accessed 9 October 2017.

¹² See The OECD Guidelines on Multinational Enterprises (2011) para 2 available at: <http://www.oecd.org/corporate/mne/48004323.pdf> accessed 9 October 2017.

¹³ See OECD Declaration and Decisions on International Investment and Multinational Enterprises (2000) available at: <http://www.oecd.org/corporate/mne/1922428.pdf> accessed 9 October 2017.

¹⁴ The OECD Guidelines (n 12) 31-34.

¹⁵ Currently there are 35 adhering Member States and 8 Non-Member States. See OECD Guidelines for Multinational Enterprises (2011) available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 9 October 2017.

OECD Guidelines and to open a forum for discussion if the TNC infringes the Guidelines.¹⁶

If a breach is found, the only damage suffered by the TNC is a loss of reputation. The OECD Guidelines are non-binding and represent ‘soft law’ therefore, there are no effective enforcement powers against the wrongdoers.

1.3 The ILO Tripartite Declaration

In 1977, a year after the OECD Guidelines were launched, the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the Tripartite Declaration) was released.¹⁷ The scope of the Tripartite Declaration was to regulate the conduct of the TNCs in their relations with developing countries and to offer guidelines on employment, training, conditions of work and life, and industrial relations to the TNCs, governments, employers and workers’ organizations.¹⁸ The Tripartite Declaration has been revised in 2000 and 2006. Starting from the beginning, it was included therein the recommendation that all parties should respect the Universal Declaration of Human Rights. In 2000, in order to eradicate child labour, a new provision was incorporated, which states that ‘multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour’.¹⁹

There is no mechanism of implementation for the Tripartite Declaration and the adherence to it is voluntary. A periodic survey monitors the implementation of the Tripartite

¹⁶ The OECD Guidelines (n 12) 18.

¹⁷ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th edn, International Labour Office 2006) Introduction, available at: < http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf > accessed 9 October 2017.

¹⁸ Ibid.

¹⁹ Ibid 7.

Declaration.²⁰ Once the TNCs, governments, employers and workers' organizations answer to the specific questions, their responses are analyzed and the ILO Governing Body can submit recommendations. The ILO Governing Body does not have enforcement powers and it is important to mention that the ILO Tripartite Declaration is an instrument which offers non-binding guidelines.

1.4 Voluntary Codes

An American survey revealed that more than 77% of large corporations had a corporate code of conduct in the late 1980's.²¹ These codes of conduct were focused on 'measures designed to protect the firm from wrongful acts by its employees'.²² Perhaps the most persuasive statement comes from François Vincke, Secretary General of PetroFina, who said in a campaign against bribery at the International Chamber of Commerce's that 'until recently, ... corporate responsibility was dictated by the law, or to put it in even simpler terms: the ethical code of a company was the criminal code'.²³ Initially, these codes of conduct were designed to protect the corporations. Later the corporations understood that the code of ethics have substantial benefits. Creating an ethical reputation led to better job applicants who prefer to work for corporations with an ethical corporate culture. These Codes of conducts settle the interaction between the employee and the corporation in order to be in accordance with the public image of the corporation but they do not cover human rights issues.

²⁰ Ibid Introduction.

²¹ Craig Forcese, 'Commerce with Conscience: Human Rights and Corporate Codes of Ethics' [1997] International Centre for Human Rights and Democratic Development 14.

²² Ibid.

²³ Vincke François, Fritz Heiman and Ron Katz, *Fighting Bribery: A Corporate Manual* (International Chamber of Commerce 1999) 15.

Recently, there are numerous voluntary codes of conduct adopted by TNCs in order to demonstrate that they act adequately, protecting the human rights.²⁴ As a result of massive human rights abuses committed by TNC in their global business, there is an increased call for TNCs to act in a manner that is socially responsible. The scope of the voluntary codes of conduct is to promote human rights and to assure globally applicable social standards. The contents of the voluntary codes are not similar, but essentially, they are addressing issues regarding human rights, employment, labour and environment.

Considering that TNCs are driven by profit and any harm to their brand will allegedly result in a decrease of profit, the TNCs might be in general committed to voluntary codes to avoid negative public scrutiny. The commitment of TNCs to voluntary codes did not derive from charity, but rather from anticipation of the brand's importance to its customers and other investors.²⁵ The lack of an effective mechanism of implementation and the self-determined content of these voluntary codes are subjects to criticism.²⁶ These voluntary codes are drafted in abstract terms and do not create legal binding obligations for TNCs.

²⁴ See for example The Code of Conduct for Rio Tinto Ltd. Which states that: 'we respect human rights and commit to avoid human rights harm. We support the United Nations' Universal Declaration of Human Rights and respect those rights wherever we operate.' available at: http://www.riotinto.com/documents/20150728_RT_The_way_we_work_ENG.pdf > accessed 9 October 2017.

²⁵ Sol Picciotto, 'Rights, Responsibilities and Regulation of International Business' [2003] 42 Columbia Journal of Transnational Law 131, 139.

²⁶ Ibid 143.

1.5 The UN Norms

In 1998 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities established a Working Group on the Working Methods and Activities of Transnational Corporations.²⁷ Its mandate was to elaborate recommendations regarding the activities of TNCs in order to be consistent with the socio-economic norms of the State in which they operate and to ensure that TNCs promote human rights.²⁸ The drafting initiative was supported by numerous NGOs because the previous instruments in relation to human rights and corporations were not effective in their aim to eliminate corporate abuses. After a comprehensive, long-lasting research²⁹ and annual public hearings in which business representatives, scholars and NGOs were invited, the final document and its commentaries were approved by the United Nations Sub-Commission in August 2003.³⁰ The title given to the afore-mentioned document was the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the UN Norms).³¹

²⁷ The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1998/45 *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, session 50, 26th meeting (20 August 1998).

²⁸ Ibid 4(d).

²⁹ The working group mandate was extended several times and certain objectives regarding the outcome have been added. The Sub-Commission expectations from the working group were to identify international instruments and norms applicable to TNC; to draft general human rights norms that can be applicable to TNCs behavior; to analyze the possibility to implement a mechanism of monitoring the TNCs activities and another mechanism that can apply sanctions for the infringements; and the last but the most important part, to draft binding norms for the above-mentioned purposes. See the Sub-Commission's Resolution 2001/3, UN Sub-Commission on the Promotion and Protection of Human Rights, *The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights*, 53rd session, 25th meeting, UN Doc E/CN.4/Sub.2/2001/40 (15 August 2001).

³⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11 *Responsibilities of transnational corporations and other business enterprises with regard to human rights*, 55th session, 22nd meeting, (13 August 2003).

³¹ UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution E/CN.4/Sub.2/2003/12/Rev.2 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th session (26 August 2003).

The UN Norms had a progressive approach and established binding obligations for TNCs in the area of human rights.³² The UN Norms incorporated principles internationally recognized and adopted by the UDHR, the ILO, the OECD, the WHO Health for All Policy for the Twenty-first Century and the United Nations World Summit on Sustainable Development.³³ The UN Norms incorporated a list of human rights obligations related to TNCs such as: (i) the obligation of due diligence in order to ensure that the business does not contribute to human rights abuses, directly or indirectly; (ii) the obligation to assure that TNCs do not benefit from abuses; (iii) the obligation to abstain from undermining the achievements in human rights protection; (iv) the obligation of TNCs to promote human rights; the obligation to evaluate the human rights impact of the TNCs; and (v) the overall obligation to refrain from complicity in human rights abuses.³⁴ These obligations apply regardless the country in which the TNC conducts business and independent of the human rights protection standard in that country.³⁵

Under the UN Norms important rights were protected among which the following: the right to equal opportunity and non-discrimination, the right of fair remuneration, the right of persons to security, labour rights for workers, the rights of consumers and other human rights.³⁶ Besides civil and political rights, the UN Norms referred also to socio-economic rights.

³² Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights': A requiem' [2012] 17 Deakin Law Review 1, 17.

³³ Denis Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' [2010] 20(3) Business Ethics Quarterly 349, 374.

³⁴ The UN Norms (n 31) 4.

³⁵ Ibid.

³⁶ Ibid.

The UN Norms established a mechanism of enforcement applicable to TNCs³⁷ and in case of infringement of their obligations, the TNCs were mandated to provide effective remedies to those affected by their human rights abuses.³⁸ The intention behind this initiative was to enforce binding and exigent obligations against TNCs.

After strong criticism from numerous States and from the business sector, the UN Norms were abandoned by the United Nations Commission on Human Rights through a consensual decision in 2004. The UN Norms, an instrument prepared by Working Group in accordance with their mandate, was not approved. While the intention to set in place an instrument regulating the TNCs conduct in relation to human rights might be appreciated, many aspects of the UN Norms are subject to criticism.

The UN Norms were different from the previous frameworks, as mentioned above,³⁹ which were mainly oriented towards the business and human rights relationship because they intended to be non-voluntary. It is likely that the UN Norms were considered as going too far, but they created an impact in the field of corporate social responsibility and offered an imperfect solution to the existent, inefficient system. It is also possible that the UN Norms were to be implemented too early in term of preparedness and readiness of the TNCs and of the states.

³⁷ TNCs were exposed to ‘periodic monitoring and verification by United Nations and other international and national mechanisms already in existence or yet to be created regarding the application of the Norms.’ *See* Article 16 (n 31).

³⁸ TNCs should provide ‘prompt, effective and adequate reparations to those persons, entities and communities’ that had been adversely affected by failure to comply with the Norms’ *See* Article 18 (n 31).

³⁹ *See* The OECD Guidelines, ILO Tripartite Declaration and Voluntary Codes.

1.6 UN Global Compact

The United Nations Global Compact (the UN Global Compact) was launched in 2000 at the initiative of the United Nations Secretary-General Kofi Annan, and includes more than 12 000 members in 170 countries.⁴⁰ The UN Global Compact is a form of collaboration between the United Nations, civil society and business entities. The scope of the UN Global Compact in Annan's words was to 'ensure that the global market is embedded in broadly shared values and practices which reflect global social needs, and that all the world's people share the benefits of globalization.'⁴¹ The United Nations made a strategic shift by launching the UN Global Compact. Before 2000, the United Nations were a strong opponent of TNCs and frequently emphasized the human rights abuses made by TNCs.⁴² After the UN Global Compact 'TNCs became recognized as pioneering the shift toward globalization, taking part in the solution, not just the problem.'⁴³

The TNCs agreed voluntary to do business responsibly by respecting the Ten Principles⁴⁴ on human rights, labour, environment and anti-corruption included in the UN Global Compact.⁴⁵ In exchange for their commitment, the United Nations promote the TNCs by publishing their responsible and sustainable practices. Entering in this partnership with the United Nations will result in an improvement of TNCs' brand image. TNCs are required to submit to the United Nations an annual report that must contain the steps taken to implement

⁴⁰ UN Global Compact homepage available at: < <https://www.unglobalcompact.org/about> > accessed 9 October 2017.

⁴¹ Kofi Annan, 'A Deal with Business to Support Universal Values' [2000] INT'L HERALD TRIB. 8.

⁴² Jena Martin Amerson, 'The end of the beginning?: A comprehensive look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective' [2012] 17 Fordham J. Corp. & Fin. L. 871, 8.

⁴³ Ibid.

⁴⁴ The first two principles relate to human rights vaguely and state that 'businesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses.' See UN Global Compact The Ten Principles, available at: <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 9 October 2017.

⁴⁵ The Mission of the UN Global Compact available at: < <https://www.unglobalcompact.org/what-is-gc/mission> > accessed 9 October 2017.

the Ten Principles and the outcomes of these measures.⁴⁶ If the TNC fails to submit the annual report, it is considered as ‘non-communicated’ and after one year it will be sanctioned.⁴⁷ The TNC will be withdrawn from the list of members and the TNC name may be published.⁴⁸

The vague language of the Ten Principles and the fact that TNCs were entitled to self-regulate their guidelines and practices in order to conduct socially responsible businesses provoked frustration to human rights advocates. In this sense, the Secretary General of Amnesty International, Pierre Sane stated that in order for the Global Compact to be “effective and credible” there must be publicly reported independent monitoring and enforcement via a sanctions system “so companies who are violating these principles cannot continue to benefit from the partnership.”⁴⁹ A strong defender of the Global Compact, John Ruggie, recognizes that ‘the fact that the G [lobal] C[ompact] recognizes and promotes a company's “good practice” provides no guarantee that the same company does not engage in “bad practice” elsewhere. Indeed, it may even invite a measure of strategic behaviour.’⁵⁰

There is a lack of an outside mechanism that can supervise the implementation of the Ten Principles. A TNC can benefit from the United Nations logo only by submitting its own guidelines, without actually being involved in a manner that the Global Compact recommends. The UN Global Compact is a voluntary initiative, it is not monitored, do not

⁴⁶Guide to Corporate Sustainability UN Global Compact available at: <https://www.unglobalcompact.org/library/1151> > accessed 9 October 2017.

⁴⁷ Integrity Measures, UN Global Compact available at: <https://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html> > accessed 9 October 2017.

⁴⁸ Ibid.

⁴⁹ Joshua Karliner and Kenny Bruno, ‘The United Nations Sits in Suspicious Company’ [2000] INT'L HERALD TRIB., 6.

⁵⁰ John Gerard Ruggie, ‘The Theory and Practice of Learning Networks’ [2002] J. OF CORP. CITIZENSHIP, 33.

generate accountability and it has not a mechanism that can enforce corporate social responsibility.⁵¹

1.7 The UN Guiding Principles on Business and Human Rights.

In June 2011 the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (UNGPs).⁵² The proposal was delivered by John Ruggie, the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The UNGPs have been considered as ‘a milestone in the decades-long debate about how human rights apply to business’⁵³ because they established a global framework addressing the corporate impact on human rights; a global framework which was applicable for businesses and States and formulated their responsibilities and duties in relation to human rights.⁵⁴

The UNGPs reflect the report ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’ which was presented before the United Nations Human Rights

⁵¹ Cindy Woods, ‘It isn’t a state problem: the Minas Conga Mine Controversy and the Need for Binding International Obligations on Corporate Actors’ [2015] 46 Geo. J. Int’l L. 629, 8.

⁵² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31) 21 March 2011(UNGPs) available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

⁵³ Frequently asked questions about the Guiding Principles on Business and Human Rights, United Nations, [2014] 1 available at: < http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf > accessed 9 October 2017.

⁵⁴ Ibid.

Council by John Ruggie, in 2008.⁵⁵ The UNGPs provide 31 principles structured into three pillars:⁵⁶

- (i) the State duty to protect its individuals against human rights abuses committed by corporate actors; this implies taking the appropriate steps to prevent, to conduct investigations and to punish such abuses through legislation, domestic policies and adjudication;
- (ii) the Corporate responsibility to respect human rights, meaning that corporations have a distinct responsibility independently of the state obligation, to avoid infringing human rights when conducting their activities and taking mitigation measures or remediation when the harm occurred; this corporate responsibility ‘is a global standard of expected conduct for all business enterprises’;
- (iii) the access to effective remedy for victims when abuses of human rights occur, through judicial and non-judicial mechanism.⁵⁷

With regard to the corporate responsibility to respect human rights, John Ruggie argues in his book ‘Just Business Multinational Corporations and Human Rights’ that the UNGPs addressed to businesses:

‘Comprise three main parts: a policy commitment by business enterprises to meet the responsibility to respect human rights; a human rights due-diligence process to identify, prevent, mitigate, and account for the way they address their impacts on human rights; and

⁵⁵ Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, (A/HRC/8/5) 7 April 2008 available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement> > accessed 9 October 2017.

⁵⁶ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31) 21 March 2011 available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

⁵⁷ Ibid.

processes to enable the remediation of any adverse human rights impact they cause or to which they contribute.’⁵⁸

However, under the international human rights law, corporations do not have direct obligations in relation to human rights and the UNGPs do not change this approach. In addressing this subject, the UNGPs General Principles state: ‘nothing in these Guiding Principles should be read as creating new international law obligations.’⁵⁹ With regard to the applicability of international human rights instruments such as the International Bill of Human Rights, the UNGPs state that: ‘these are the benchmarks against which other social actors assess the human rights impacts of business enterprises. The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.’⁶⁰ Therefore, the existing international human rights instruments are not legally binding for corporations, and should be understood merely as standards for social expectation.⁶¹

There are voices who argue that the approach of UNGPs was successful because it created the expectation that non-State actors need to show involvement and to take responsibility throughout their activities.⁶² There are also voices who criticize the UNGPs. Joseph Stiglitz, winner of Nobel Prize in Economics, calls for stronger norms:

‘Economic theory has explained why we cannot rely on the pursuit of self-interest; and the experiences of recent years have reinforced that conclusion. What is needed is stronger norms, clearer understandings of what is acceptable—and what is not—and stronger laws and

⁵⁸ John Ruggie, *Just Business Multinational Corporations and Human Rights* (W. W. Norton & Company 2013) 112.

⁵⁹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31) 21 March 2011, 1 available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

⁶⁰ Ibid Commentary 12.

⁶¹ Surya Deva and David Bilchitz, *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2015).

⁶² Michael K. Addo, ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’ [2014] *Human Rights Law Review* 14, 133–147.

regulations to ensure that those that do not behave in ways that are consistent with these norms are held accountable.⁶³

A relevant book questioning the UNGPs and ‘the Protect, Respect and Remedy’ Framework is ‘Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect’ written by Surya Deva and David Bilchitz.⁶⁴ The authors are critical about the regime of UNGPs and consider that a better protection of human rights is desirable in the future, moving away from the trajectory set by the UNGPs.⁶⁵

1.8 Conclusion

Since the global awareness of globalization’s negative impacts had arisen, there was a compelling need for international cooperation and coordination in order to solve the issues raised by TNCs. There was a wide spread view between corporations that only the government is responsible for protecting human rights and the corporations have no involvement. Moreover, the basic instruments for international protection of human rights adopted in that period moved upon the States the obligation to respect, protect and fulfill the human rights enshrined in these instruments. The human rights depend on the State’s capacity to perform the obligations. Without committed and accountable governments ready to comply with these obligations, human rights have no real meaning.⁶⁶

⁶³ Joseph Stiglitz at the third UN Forum on Business and Human Rights, speech for the Panel ‘Defending Human Rights’ December 2013 available at: <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013FBHRSUBMISSIONS.aspx> accessed 9 October 2017.

⁶⁴ Surya Deva and David Bilchitz, *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2015).

⁶⁵ Ibid.

⁶⁶ Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights’ [2007] 7 Human Rights Law Review 3, 501.

The instruments mentioned above in this scrutiny, provide a poor protection against human rights abuses because they are entirely voluntary. This voluntary aspect raises the predictable question: Are TNCs free to seek maximum profit on short term, despite the impact on the host state?

After three decades of soft law approach, a significant push for corporate accountability was the UN Norms which elaborated legally binding obligations for corporations with respect to human rights. Obviously, TNCs were not willing to get involved in such a strong commitment and the UN Norms were never accepted.

The transnational nature of corporations which enables them to conduct activities in multiple jurisdictions is an essential element for their success. At the same time, this key element is a source of concern for States because it raises the issue of competent jurisdiction and it is difficult to hold the corporations responsible for human rights abuses.

Nowadays, TNCs do not have binding obligations with regard to human rights under international law. At the same time, States do not have the obligation imposed by the international law to legislate the extraterritorial actions of TNCs which are headquartered within their jurisdictions. Having said that, it arises a legitimate question: Is the State responsible for regulating the conduct of businesses? The answer is yes, the State is responsible to regulate the conduct of businesses but only within its territory. The State has no power to regulate the extraterritorial conduct of an entity. Put it simply, the State cannot impose a specific conduct to a TNC that is doing business in another State, even though the TNC is headquartered within its territory. The State has the obligation to respect, protect and fulfil the human rights within its territory. The State's obligation to protect includes the duty to exercise due-diligence in order to prevent the violations coming from the private sector (including TNCs) but only within State jurisdiction. In conclusion, the actions of TNCs in

other jurisdictions do not fall under the State obligation to regulate their behavior. In short, ‘there is in IHRL an almost complete absence of any effective way of holding corporations directly accountable for human rights abuses, or of preventing such abuses or even of ensuring redress for the victims of such abuses.’⁶⁷

Considering that the Home State is not responsible to regulate the abroad activities of TNCs, this responsibility to regulate is left to the Host State, the State in which TNCs operate. The problem is that usually TNCs operate in underdeveloped countries where the legal system is rather lax, the corruption is present and there is a lack of effective legal mechanisms for the protection of human rights. The Host State is unable or unwilling to regulate the TNCs conduct within its territory. In short, when it comes to holding TNCs responsible for their human rights abuses, there is a serious accountability gap. In addition to this accountability gap, it can be added the issue of the limited liability of TNCs. It is well known that the TNC is a complex of interlocking layers of entities that makes it very difficult to hold it accountable. In conclusion, the process of accountability is almost impossible and that is why the extraterritorial accountability of TNCs emerges.

⁶⁷ Anna Grear and Burns H. Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ [2015] 15 Human Rights Law Review 27.

CHAPTER 2: THE PROCESS OF ELABORATION OF AN INTERNATIONAL LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

2.1 Introduction

Against this background presented in the first chapter, the United Nations Human Rights Council decided in 2014 through its Resolution 26 sponsored by Ecuador and South Africa, to establish an open-ended intergovernmental working group (OEIGWG) on TNCs and other business enterprises (OBEs) with the mandate to elaborate an international legally binding instrument which will regulate the activities of TNCs and OBEs with respect to human rights.⁶⁸

During the first two sessions, in July 2015 and October 2016, States, INGOs and scholars gathered in Geneva to discuss about the content, scope and nature of the proposed legally binding instrument. Before the beginning of the third session which will be held in October 2017, the Chair Rapporteur of the OEIGWG prepared a document⁶⁹ containing elements for the new legally binding instruments which will be negotiated during the third session.

The current process of elaborating an international legally binding instrument triggered global discussions into the international arena with regard to the feasibility of such an initiative and its possible content. The process itself is valuable because it offers a common ground for different stakeholders to debate and clarify controversial issues in relation to business and human rights.

⁶⁸ Resolution 26/9 (n 1).

⁶⁹ Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 of the United Nations Human Rights Council, 29 September 2017 available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

Whether the new legally binding instrument will be adopted or not, it is not clear for the moment, but what it is certainly clear is that the process is valuable, and this second chapter of the thesis presents (i) the major ideas shared during the first two sessions of the OEIGWG and (ii) the content of the Document emanated from the OEIGWG, which contains the elements proposed for the negotiations of the new legally binding instrument.

2.2 Resolution 26/9 adopted by the Human Rights Council on Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

Starting from 2014, the United Nations Human Rights Council brought again the issue of businesses and human rights into the international agenda. On 14 July 2014, a majority of 20 to 14 adopted in the Human Rights Council⁷⁰ a resolution which started the process of regulating the activities of TNCs and OBEs in relation to human rights. The Resolution 26/9 established ‘an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate 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.’⁷¹

⁷⁰ For details about the voting pattern, the Resolution 26/9 states that it was: ‘Adopted by a recorded vote of 20 to 14, with 13 abstentions. The voting was as follows: In favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d’Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam; Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America; Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates’ available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> > accessed 9 October 2017.

⁷¹ Resolution 26/9 (n 1) para 1.

The Resolution 26/9 provided a provisional agenda for the OEIGWG and established that the first two sessions will ‘be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument’⁷² and before the third session should be elaborated ‘elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions.’⁷³

2.3 The sessions of the OEIGWG

It is crucial to know the inputs provided by the stakeholders during the first two sessions of OEIGWG, in order to envisage how this new legally binding instrument will look like. In this sense, the aim of this subchapter is to reflect the discussions held in Geneva on July 2015 and October 2016 under the framework of Resolution 26/9. Perhaps it is difficult to draw conclusions only based on two sessions, but presenting the inputs of the sessions is certainly helpful in identifying the concerns of different stakeholders involved and the possible solutions offered in this regard.

It is important to mention at this stage that different stakeholders have been invited to participate in the discussions held in Geneva during the two sessions and it is essential to distinguish between the different stakeholders because their opinions reflect the interest of the entity of which they represent. The OEIGWG conducted constructive deliberations based on the inputs provided by different stakeholders such as: representatives of some States Members of the United Nations; representatives of the European Union, representatives of intergovernmental organizations; representatives of United Nations funds, programmes,

⁷² Resolution 26/9 (n 1) para 2.

⁷³ Resolution 26/9 (n 1) para 3.

specialized agencies and related organizations; representatives of non-member States and representatives of Non-governmental Organizations in consultative status with the Economic and Social Council.⁷⁴

The first session of the OEIGWG took place in Geneva from 6 to 10 July 2015 and the second session from 24 to 28 October 2016. The work programme was structured in plenary discussions and in panel discussions, where different panelists were invited to provide inputs on diverse subjects related to their expertise.⁷⁵

⁷⁴ More details about participation can be found in each report prepared for the sessions, available at: < <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx> > accessed 9 October 2017.

⁷⁵ More details about the agenda can be found at: <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>> accessed 9 October 2017.

2.3.1 The first session of the OEIGWG

This first subchapter will present the main ideas shared during the first session of the OEIGWG⁷⁶ and it will cover the report issued by the OEIGWG as a follow-up to this first session.⁷⁷ From 6 to 10 July 2015, the first session of the working group was organized at the Office of the United Nations High Commissioner for Human Rights headquartered in Geneva. Stakeholders with different backgrounds⁷⁸ were invited for discussions on thematic panels and a written procedure was open before the session, when other relevant stakeholders⁷⁹ submitted their contribution in order to be considered for a constructive debate. The participants shared their view in different panel discussions such as: principles for an international legally binding instrument on TNCs and other business enterprises with respect to human rights, the spectrum of human rights that are to be covered by this new instrument, obligations of the States, responsibilities of TNCs including mitigation and remedies, the standards for the corporate liability, new projects of national and international access to remedy and other recommendations.⁸⁰ The main ideas discussed during the session and the views shared will be summarized below, maintaining the structure of the agenda agreed by the OEIGWG.

⁷⁶ The webcast of the first session of the OEIGWG is available at: < <http://webtv.un.org/search/1st-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4339866849001?term=business&languages=&sort=date> > accessed 9 October 2017.

⁷⁷ Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, United Nations Human Rights Council Report A/HRC/31/50, 5 February 2016 available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/22/PDF/G1601822.pdf?OpenElement> > accessed 9 October 2017.

⁷⁸ A full list of panelists participating in the meeting is available at: <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/ListofPanellists.pdf>> accessed 9 October 2017.

⁷⁹ Specialized agencies, intergovernmental organizations, Non-governmental organizations with ECOSOC consultative status. A full list of contributions made by these stakeholders is available at: <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx> > accessed 9 October 2017.

⁸⁰ Report on the first session (n 77).

Panel discussion 1: ‘Implementation of the Guiding Principles on Business and Human Rights: a renewed commitment by all States’⁸¹

The session started with a panel discussion on the implementation of the United Nations Guiding Principles on Business and Human Rights. The participants considered that there is no contradiction between the scope of the OEIGWG and the progressive implementation of the UNGPs.⁸² Moreover, these principles are a reference point in the process of elaboration of a new international legally binding instrument.⁸³ Some delegations criticized the United Nations Guiding Principles on Business and Human Rights as not offering access to remedies and just one delegation considered that the implementation of the UNGPs is more desirable than the elaboration of a new international instrument.⁸⁴ The Chair-Rapporteur of the working-group⁸⁵ recognized the value of the UNGPs and concluded that the work of the OEIGWG is not contradictory to the Guiding Principles and does not undermine them or limit their implementation.⁸⁶

Panel discussion 2: ‘Principles for an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’⁸⁷

In this panel the principles of universality of human rights was pointed out in order to justify the inclusion of all human rights in the new instrument.⁸⁸ One panelist argued that

⁸¹ Report on the first session (n 77) para 37-39.

⁸² Report on the first session (n 77) para 39.

⁸³ Ibid.

⁸⁴ Report on the first session (n 77) para 23.

⁸⁵ Maria Fernanda Espinosa, Chair-Rapporteur of the working group on transnational corporations and other business enterprises with respect to human rights and Permanent Representative of Ecuador to the United Nations Office at Geneva, according with Report on the first session (n 77).

⁸⁶ On 11 March 2016, Maria Fernanda Espinosa presented before the Human Rights Council the report of the OEIWG on its activity in 2015 available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17213&LangID=E> > accessed 9 October 2017.

⁸⁷ Report on the first session (n 77) para 40 - 54.

the new instrument should cover all human rights otherwise limiting the scope of the treaty to certain human rights will be contrary to principles of human rights law.⁸⁹ Some delegations motivated the need to include all human rights in the new instrument based on the principles of universality and indivisibility of human rights.⁹⁰ Another principle discussed during the meeting was ‘the principle of hierarchy of human rights above other fields of international law’.⁹¹ Most NGO’s acknowledged that there should be a hierarchy between human rights treaties and investment treaties and the human rights should be above the commercial rules.⁹²

Panel discussion 3: ‘Coverage of the instrument: transnational corporations and other business enterprises — concepts and legal nature in international law’⁹³

The concepts mentioned in relation to TNCs were the power of TNCs, the possibility for TNCs to be subject of international law and the nature of the corporations that will be regulated by the new instrument.⁹⁴

Regarding the power of the TNCs, one panelist argued that the permissible legal framework and the new technology are factors that accelerated the power of TNCs and offered as justification a study where more than a half of the top 100 economies were TNCs.⁹⁵ The panelist mentioned as key element, the control that can be exerted by TNCs on states, employees and civil society.⁹⁶

With respect to the possibility for TNCs to be subject of international law, one panelist argued that the traditional view is that international law applies only between states

⁸⁸ Report on the first session (n 77) para 46.

⁸⁹ Report on the first session (n 77) para 43.

⁹⁰ Report on the first session (n 77) para 46.

⁹¹ Report on the first session (n 77) para 53.

⁹² Ibid.

⁹³ Report on the first session (n 77) para 55 – 61.

⁹⁴ Report on the first session (n 77) para 55-61.

⁹⁵ Report on the first session (n 77) para 55.

⁹⁶ Ibid.

although there are exceptions.⁹⁷ The Modern Slavery Act of the United Kingdom of Great Britain and Northern Ireland is one of them, when the law of stamping out slavery was applied to non-state actors as subjects of international law.⁹⁸

Regarding the nature of the corporations that will be regulated by the new instrument, the views are divergent. On the one hand there is the view that only TNCs should be regulated by the new instrument because it will be impossible to cover all types of businesses and because TNCs are in the position to elude the domestic regulations based on their extraterritoriality dimension of conduct.⁹⁹ On the other hand there is the view that all types of businesses should be regulated by this new instrument because all businesses are susceptible for committing human rights abuses and the victims need protection and remedy regardless of the type of business that is committing the abuse.¹⁰⁰

Panel discussion 4: ‘Human rights to be covered under the instrument with respect to activities of transnational corporations and other business enterprises’¹⁰¹

The participants expressed their will that all human rights should be covered by the new instruments, based on two main arguments.¹⁰² The first argument is that the conduct of TNCs has an impact on a vast cluster of stakeholders and could affect a multitude of human rights.¹⁰³ The second argument pleading in favor of including all human rights is the fact that there is no established hierarchy of human rights violations.¹⁰⁴ Since there is no clear

⁹⁷ Report on the first session (n 77) para 56.

⁹⁸ Ibid.

⁹⁹ Report on the first session (n 77) para 57.

¹⁰⁰ Report on the first session (n 77) para 61.

¹⁰¹ Report on the first session (n 77) para 62-66.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

definition of grave human rights violation, a new instrument that will cover only grave human rights violations will assume that violations less seriously are to be tolerated.¹⁰⁵

Panel discussion 5: ‘Obligations of States to guarantee the respect for human rights by transnational corporations and other business enterprises, including extraterritorial obligation’¹⁰⁶

The discussion started from a conclusion agreed by all panelists and NGOs: there is a gap in the UNGPs and other international treaties regarding ‘the extraterritorial obligations of States to respect, protect and fulfil human rights obligations with regard to transnational corporations and other business enterprises’.¹⁰⁷ The participants could not reach a solution with regard to this absence of State extraterritoriality obligation. Some panellists recommended the abolition of ‘forum non conveniens’ by which access to justice will be provided for victims who could address their claims in the State where TNC is based.¹⁰⁸ Some States responded to this proposal by reminding the principle of state sovereignty, but they made an appealing suggestion. A number of states suggested as a solution, to institute an obligation for TNCs to introduce a complaints mechanism division in their business and to report to States about how they handled the claims regarding allegations of human rights violations.¹⁰⁹ Another solution offered by panellists was to strengthen the domestic law in order to establish a reliable legal framework that will promote human rights.¹¹⁰

To sum, three were the solutions offered for the issue of state extraterritoriality obligation: (i) to exclude ‘the forum non conveniens’ and to offer another jurisdictional

¹⁰⁵ Ibid.

¹⁰⁶ Report on the first session (n 77) para 67-77.

¹⁰⁷ Ibid.

¹⁰⁸ Report on the first session (n 77) para 68.

¹⁰⁹ Report on the first session (n 77) para 73.

¹¹⁰ Report on the first session (n 77) para 69.

possibility: the home State of TNCs as judicial forum for victims of human rights violations; (ii) to maintain the states' sovereignty and to put pressure on them to create a stable legal framework that promotes human rights in their jurisdiction; (iii) to impose obligations to TNCs to create accountability mechanisms inside their business and to report to the States about how they handled the complaints received from the victims.¹¹¹ The participants did not decide on which one is the best approach.

Panel discussion 6: 'Enhancing the responsibility of transnational corporations and other business enterprises to respect human rights, including prevention, mitigation and remediation',¹¹²

This panel discussion touched a sensitive issue, the responsibilities of TNCs, and it was very clear that different stakeholders have different opinions. The representatives of the businesses underlined the fact that the States have the duty to support businesses in the due diligence process and proposed as a step forward, the elaboration of national action plans by the States, in order to achieve the supportive approach.¹¹³ The businesses passed the hot ball labelled responsibility into the yard of States. The State Delegations stressed the idea that there is a need to impose direct obligations for TNCs and the work of the working group should focus on that.¹¹⁴ Not surprisingly, the NGOs affirmed that both, the States and the TNCs should have responsibilities in relation to human rights. It is for the States to have efficient legislation that prevents human rights abuses and criminalize the negative conduct once the harmed occurred and it is for the businesses to conduct human rights due diligence and to ensure that the supply chain is in compliance with the regulations.¹¹⁵

¹¹¹ Report on the first session (n 77) para 67-77.

¹¹² Report on the first session (n 77) para 78-87.

¹¹³ Report on the first session (n 77) para 82.

¹¹⁴ Report on the first session (n 77) para 83.

¹¹⁵ Report on the first session (n 77) para 85-86.

2.3.2 The second session of the OEIGWG

This second subchapter will present the main ideas shared during the second session of the OEIGWG¹¹⁶ and it will cover the report issued by the OEIGWG as a follow-up to this second session.¹¹⁷ From 24 to 28 October 2016, the second session of the OEIGWG was organized at the Office of the United Nations High Commissioner for Human Rights headquartered in Geneva. Stakeholders with different backgrounds¹¹⁸ were invited for discussions on thematic panels and a written procedure was open before the session, when other relevant stakeholders¹¹⁹ submitted their contribution in order to be considered for a constructive debate. The main ideas discussed during the session and the views shared will be summarized below, maintaining the structure of the agenda agreed by the OEIGWG.

Panel discussion 1: ‘Overview of the social, economic and environmental impacts related to transnational corporations and other business enterprises and human rights, and their legal challenges.’¹²⁰

A number of panellists mentioned the international investment treaties as a source generating imbalance of power, based on the fact that TNCs have the possibility to lodge a claim against a state, but vice versa is not possible.¹²¹ The solution offered to counter balance the right to remedy afforded to corporations is to elaborate a new international instrument that

¹¹⁶ The webcast of the second session of the OEIGWG is available at: < <http://webtv.un.org/search/opening-of-session-1st-meeting-2nd-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/518288736001/?term=business&sort=date> > accessed 9 October 2017.

¹¹⁷ Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, United Nations Human Rights Council Report A/HRC/34/47, 4 January 2017 available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/000/94/PDF/G1700094.pdf?OpenElement> > accessed 9 October 2017.

¹¹⁸ A full list of panelists participating in the meeting is available at: <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> > accessed 9 October 2017.

¹¹⁹ Specialized agencies, intergovernmental organizations, Non-governmental organizations with ECOSOC consultative status. A full list of contributions made by these stakeholders is available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>

¹²⁰ Report on the second session (n 117) para 23-36.

¹²¹ Report on the second session (n 117) para 23-25.

will expand the right of access to justice to affected individuals and communities.¹²² The panellists suggested that the judicial forum should be the home state of TNCs and the judicial costs should be covered by TNCs.¹²³ Another suggestion made by one panellist is that the new instrument should influence the development of international investment agreements, including obligation for investors to elaborate ‘ex ante and ex post facto human rights impact assessments.’¹²⁴ Besides the due diligence obligations, the new binding instrument should make reference to the standards stipulated by the ILO Declaration on Fundamental Principles and Rights at Work and the World Health Organization.¹²⁵ The discussion evolved and one panellist elaborated on the structure of TNCs, the principle of limited responsibility and the principle of separate legal identity regarding the relation between the subsidiaries and the mother company.¹²⁶ He mentioned that it is expected that the new binding instrument will provide the formula for integrating the above-mentioned principles with the principle of piercing the corporate veil.¹²⁷

Several States Delegations referred again to the imbalanced power offered to TNCs, they have the rights and the possibility to access international arbitration in relation to trade agreements but there is no international available mechanism that focuses on the obligations of TNCs to respect human rights.¹²⁸ Many NGOs concluded that the respect for human rights is above the investments agreements and the new binding instrument should include this hierarchy clause.¹²⁹ In this panel discussion, only the NGOs were courageous enough to call for an new international Tribunal with the mandate to investigate the TNCs accountability.¹³⁰

¹²² Ibid.

¹²³ Report on the second session (n 117) para 23.

¹²⁴ Report on the second session (n 117) para 26.

¹²⁵ Report on the second session (n 117) para 23.

¹²⁶ Report on the second session (n 117) para 27.

¹²⁷ Ibid.

¹²⁸ Report on the second session (n 117) para 30.

¹²⁹ Report on the second session (n 117) para 34.

¹³⁰ Ibid.

Panel discussion 2: ‘Primary obligations of States, including extraterritorial obligations related to transnational corporations and other business enterprises with respect to protecting human rights:

Subtheme 1. Implementing international human rights obligations: examples of national legislation and international instruments applicable to transnational corporations and other business enterprises with respect to human rights’¹³¹

The discussion started from the premise that there is a well-developed system of human rights and the States have the primary obligation ‘to protect, respect and fulfil human rights, including in relation to the activities of third parties, such as businesses’¹³² and the new binding instrument should address the current gaps in the enforcement procedure. One panellist mentioned the paradox of the extraterritorial obligation of the States.¹³³ The panellist tried to argue that the idea of State extraterritorial obligation to protect human rights interferes with its sovereignty is not a valid one since States usually sign investment treaties with TNCs, allowing rights to corporations that interfere with the state sovereignty.¹³⁴ His recommendation for the new binding instrument was to include provisions regarding the capacity building in order to help States to criminalize and to punish the human rights abuses made by TNCs.¹³⁵ Another panellist recalled the state obligations in relation to human rights and referred to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, as relevant and useful international standards.¹³⁶ The necessity to settle an international Court with the mandate to enforce the new binding instrument was also another topic discussed by a panellist.¹³⁷

¹³¹ Report on the second session (n 117) para 37-52.

¹³² Report on the second session (n 117) para 38.

¹³³ Report on the second session (n 117) para 37.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Report on the second session (n 117) para 39.

¹³⁷ Report on the second session (n 117) para 40.

Many state delegations agreed that there is a need to set clear standards that are to be respected by the States and TNCs with regard to human rights. One example of good practice from the international investment was shared by one delegation. The national law established the obligation for TNCs to accept visits from the Government and from the public, moreover monitoring procedures were set in place in different fields such as labour, consumer protection and environmental law.¹³⁸ Another delegation brought into discussion the corruption, the activity of lobby and other several factors which contribute to the complicity of the State in the human rights abuses.¹³⁹ This delegation mentioned that the domestic Court held the TNCs responsible for their human rights violations but the main challenge was to enforce the decisions because the corporate entities relocated or closed their operations.¹⁴⁰ Other States intervened into discussion noticing the same obstacle of enforcing decisions against TNCs.¹⁴¹

The NGOs highlighted the multiple procedural impediments met in the process of assisting the victims in the litigation against TNCs.¹⁴² The NGOs suggested the reversal burden of proof when complaints regarding the corporate behavior were investigated.¹⁴³ The NGOs also advocated for the establishment of a new body that will investigate the complaints against TNCs¹⁴⁴ and they proposed that the states should impose due diligence obligations to TNCs that operate abroad.¹⁴⁵ The discussion was concluded with some reference made to

¹³⁸ Report on the second session (n 117) para 43.

¹³⁹ Report on the second session (n 117) para 45.

¹⁴⁰ Ibid.

¹⁴¹ Report on the second session (n 117) para 46.

¹⁴² Report on the second session (n 117) para 47.

¹⁴³ Report on the second session (n 117) para 48.

¹⁴⁴ Report on the second session (n 117) para 49.

¹⁴⁵ Report on the second session (n 117) para 48.

existent instruments that can be used for the drafting of the new binding instrument in order to assure access to remedy and access to remedy.¹⁴⁶

‘Subtheme 2. Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty’,¹⁴⁷

With regard to the jurisprudential aspect in relation to extraterritoriality, one panellist explained that the International Court of Justice ruled that the States have an obligation to respect human rights beyond its borders, if there is a link between the activity undertaken abroad and the State.¹⁴⁸ Another panellist argued that States have the obligation to protect human rights but in the cases where the State is too weak to do so or the State failed to protect its citizens, often the victims cannot claim this abuse before an international tribunal.¹⁴⁹ The panellist considers that the solution is not to impose obligations to the States in order to improve their legal framework, because this will lead to different human rights standards.¹⁵⁰

The discussion moved on to the lessons learned from two international instruments elaborated under the World Health Organization¹⁵¹ and how these instruments protected the individuals against abuses from TNCs.¹⁵² Some State delegations argued that in certain areas the extraterritorial jurisdiction is available and progress is being made in regulating the corporate conduct in relation to worker’s safety and health.¹⁵³ The necessity of a strong

¹⁴⁶ See The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the Committee on the Elimination of Discrimination against Women. Report on the second session (n 117) para 50.

¹⁴⁷ Report on the second session (n 117) para 53-64.

¹⁴⁸ Report on the second session (n 117) para 53.

¹⁴⁹ Report on the second session (n 117) para 54.

¹⁵⁰ Ibid.

¹⁵¹ Reference made to the International Code of Marketing of Breast-milk Substitutes and the WHO Framework Convention on Tobacco Control.

¹⁵² Report on the second session (n 117) para 56.

¹⁵³ Report on the second session (n 117) para 58.

cooperation between the Home State and the Host State was emphasized by several State delegations in order to achieve the access to justice.¹⁵⁴ Another idea proposed by a state delegation was the creation of body similar with the Ombudsman, which will handle the complaints and will elaborate reports.¹⁵⁵

Panel discussion 3: ‘Obligations and responsibilities of transnational corporations and other business enterprises with respect to human rights

Subtheme 1. Examples of international instruments addressing obligations and responsibilities of private actors’,¹⁵⁶

One instrument analyzed was the WHO Framework Convention on Tobacco Control and it was offered as example for the possibility to hold corporations accountable for their products, their harmful practices and for excluding from the policy making sector those entities with conflict of interests.¹⁵⁷ Other instruments discussed were: the United Nations Global Compact, the Standards of the International Organization for Standardization, the OECD Guidelines for Multinational Enterprises and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of ILO.¹⁵⁸ The participants referred to the fundamental principles and standards and to the corporate social responsibility.¹⁵⁹

One delegation noted that the absence of an international binding instrument in relation to corporate accountability encourages the potential violations.¹⁶⁰ Another delegation mentioned that it is expected from the new legally binding instrument to draw a clear

¹⁵⁴ Report on the second session (n 117) para 59.

¹⁵⁵ Report on the second session (n 117) para 60.

¹⁵⁶ Report on the second session (n 117) para 65-78.

¹⁵⁷ Report on the second session (n 117) para 65.

¹⁵⁸ Report on the second session (n 117) para 66.

¹⁵⁹ Report on the second session (n 117) para 65-78.

¹⁶⁰ Report on the second session (n 117) para 71.

distinction between the obligations of States and the obligations of TNCs and OBEs.¹⁶¹ Moreover, a mechanism should be set in place in order to monitor the corporate due diligence.¹⁶²

‘Subtheme 2. Jurisprudential and other approaches to clarify standards of civil, administrative and criminal liability of transnational corporations and other business enterprises’¹⁶³

One panellist explained the common law requirements for corporate civil liability and offered this approach as a model.¹⁶⁴ He argued that the conditions imposed to multinational companies to not do harm and to have a duty of care, might be considered similar with the proposed due diligence.¹⁶⁵ Therefore, he considered that tort law approach from common law might be suitable to be transformed into a universally applicable principle in regard of corporate accountability.¹⁶⁶

Another panellist focused on corporate criminal liability and identified law systems where this concept exists: the United Kingdom of Great Britain, Australia, Northern Ireland, South Africa, Malawi, Gambia, and Kenya.¹⁶⁷

The principles that should be included into the new legally binding instrument, enumerated by another panellist were: corporations as subject of civil, administrative and criminal liability; the right of victims to seek compensation for the violation suffered either in

¹⁶¹ Report on the second session (n 117) para 75.

¹⁶² Ibid.

¹⁶³ Report on the second session (n 117) para 79-92.

¹⁶⁴ Report on the second session (n 117) para 80.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Report on the second session (n 117) para 81.

State where the harm occurred or in the State where the corporation is incorporated; doctrine of forum non conveniens should not be applicable; shifting the burden of proof.¹⁶⁸

One delegation observed that the Special Rapporteur on crimes against humanity, in the Report presented before the International Law Commission,¹⁶⁹ gave arguments for imposing criminal liability for legal entities.¹⁷⁰

One participant expressed the contribution of the national contact points established under the OECD guidelines, which helped in setting expectation for the business entities and promoted mediation as a way of resolving the conflicts.¹⁷¹

Panel discussion 4: ‘Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument’¹⁷²

The first panellist argued that TNCs are a distinct group of enterprises and represents only 1 percent of all worldwide enterprises, according to UNCTAD.¹⁷³ He considered that there is not necessary to define TNCs because their changing character will make them difficult to define.¹⁷⁴

With regard to the scope of the new legally binding instrument, the second panellist offered as example of narrow scope, the duty of care from the French system.¹⁷⁵ He suggested that all TNCs should be covered, regardless of their size and together with the

¹⁶⁸ Report on the second session (n 117) para 83.

¹⁶⁹ Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016) United Nations General Assembly Supplement No. 10 (A/71/10) available at: http://legal.un.org/docs/?path=../ilc/reports/2016/english/a_71_10.pdf&lang=EFSRAC > accessed 9 October 2017.

¹⁷⁰ Report on the second session (n 117) para 87.

¹⁷¹ Report on the second session (n 117) para 92.

¹⁷² Report on the second session (n 117) para 93-102.

¹⁷³ Report on the second session (n 117) para 93.

¹⁷⁴ Ibid.

¹⁷⁵ Report on the second session (n 117) para 94.

companies from their supply chains and all their subsidiaries.¹⁷⁶ The fourth panellist evoked the efforts made by ILO and OECD to define TNCs and he observed that the new legally binding instrument should have a broad covering of human rights.¹⁷⁷

Some delegations advocated for the need to provide a definition of TNCs and other delegations considered not necessary, since there are also other international treaties which do not have a definition of the subject, such as terrorism.¹⁷⁸ With regard to the human rights that should be covered by the new legally binding instrument, there was a consensus that all human rights are eligible.¹⁷⁹

Panel discussion 5: ‘Strengthening cooperation with regard to prevention, remedy and accountability and access to justice at the national and international levels

Subtheme 1. Moving forward in the implementation of the United Nations Guiding Principles’¹⁸⁰

The panellist offered the example of the French initiative based on the UNGP and the OHCHR accountability and remedy project in order to highlight the progress made.¹⁸¹ The importance of the national action plans was also mentioned.¹⁸² However, there was underlined the need to move forward and to regulate mandatory human rights due diligence, to include respect for human right into the content of bilateral treaties and to introduce a mechanism which will investigate the corporate human rights compliance.¹⁸³

¹⁷⁶ Ibid.

¹⁷⁷ Report on the second session (n 117) para 96.

¹⁷⁸ Report on the second session (n 117) para 99.

¹⁷⁹ Report on the second session (n 117) para 102.

¹⁸⁰ Report on the second session (n 117) para 103-108.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

‘Subtheme 2. Relation between the United Nations Guiding Principles and the elaboration of an international legally binding instrument on transnational corporations and other business enterprises’,¹⁸⁴

The first panellist stressed the importance of improving access to remedy for victims and he recommended addressing all the issues met in practice by victims, such as legal, procedural, financial and practical barriers.¹⁸⁵

The second panellist considered important to mention the need of institutional collaboration in cross-border cases where police might play a role in facilitating investigations and the establishment of an exchange of information mechanism might be useful.¹⁸⁶

Some NGOs observed that the national action plans instituted under UNGPs are not enough and more need to be done in order to be effective.¹⁸⁷ They expect from the national action plans more dialog and transparency, orientation to results and periodically review.¹⁸⁸

Panel discussion 6: ‘Lessons learned and challenges to access to remedy (selected cases from different sections and regions)’¹⁸⁹

The panelists exposed some cases where they met practical challenges such as redress and access to remedy in post-conflict countries, lack of transparency in the industry of natural resource extraction, difficulties in accessing justice based on the rigid conditions for legal standing before a Court of law.¹⁹⁰

¹⁸⁴ Report on the second session (n 117) para 109-115.

¹⁸⁵ Report on the second session (n 117) para 109.

¹⁸⁶ Report on the second session (n 117) para 110.

¹⁸⁷ Report on the second session (n 117) para 114.

¹⁸⁸ Ibid.

¹⁸⁹ Report on the second session (n 117) para 116-128.

¹⁹⁰ Report on the second session (n 117) para 116-118.

Another point raised by the panelists was that non-judicial bodies, grievance mechanisms and other ombudsman institutions are accessible but at the end of the day, they cannot replace the judicial mechanisms.¹⁹¹

NGOs advocated for removing barriers to access justice and effective remedy and suggested as a source of inspiration the work of the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on violence against women.¹⁹²

In conclusion, the work carried out by the OEIGWG during the two sessions managed to provide a good forum for different stakeholders in order to share their ideas and to engage in fruitful debates over the scope, content and nature of the new legally binding instrument. The inputs of different stakeholders are key elements in shaping the elements of the proposed instrument.

The first two sessions of the OEIGWG have been considered a success due to the large number of participants.¹⁹³ There was an active participation from civil society organizations but also from the business branch, the International Organization of Employers and the International Chamber of Commerce being engaged in discussions. More than 80 States were represented during the first two sessions. Moreover, the European Parliament¹⁹⁴ demanded active and constructive participation from the Member States during this process of elaborating an international legally binding instrument.

¹⁹¹ Report on the second session (n 117) para 124.

¹⁹² Report on the second session (n 117) para 128.

¹⁹³ The conclusion is drawn from the opinions of different stakeholders who comment on the online platform dedicated to this initiative. More details can be found at: < <https://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries> > accessed 9 October 2017.

¹⁹⁴ European Parliament Resolution on EU priorities for the UN Human Rights Council sessions in 2017 (2017/2598(RSP)) 16 March 2017, para 27 available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P8-RC-2017-0183+0+DOC+XML+V0//EN>> accessed 9 October 2017.

2.4 Elements for the Legally Binding Instrument

Reflecting on the new legally binding instrument, the task to create the scope and the content of a new instrument seems overwhelming but it is refreshing to mention the statement made by Abraham Lincoln in the House of the Representatives: ‘determine that the thing can and shall be done, and then we shall find the way.’¹⁹⁵ In tackling the question of how will the instrument look like, this subchapter will reflect and analyze the Elements Draft¹⁹⁶ proposed by the OEIGWG to be included into the legally binding instrument and it will comment on the implications of these elements identified. The scope of the work is to present the elements which are under negotiations and to anticipate the elements that will be included in the legally binding instrument. In fulfilling this aim, the methodological approach for the research will focus firstly on presenting the elements prepared by the OEIGWG and secondly on interpreting these elements through personal lens and the lens of the existent legal framework and comparing it with the Guiding Principles on Business and Human Rights.

On 29 September 2017, the OEIGWG prepared a document titled: ‘Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (the Elements Draft) as part of its mandate which stated that: ‘the Chairperson-Rapporteur of the open-ended intergovernmental working group should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions.’¹⁹⁷

¹⁹⁵ Collected Works of Abraham Lincoln, Speech in United States House of Representatives on Internal Improvements, Volume 1, 488 available at: <

<https://quod.lib.umich.edu/l/lincoln/lincoln1/1:498?rgn=div1;view=fulltext> > accessed 9 October 2017.

¹⁹⁶ The Elements Draft (n 69) available at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCS_OBEs.pdf > accessed 9 October 2017.

¹⁹⁷ Resolution 26/9 (n 1) para 3.

The Elements Draft includes elements gathered as a result of the first and second session of the OEIGWG and aims ‘to reflect the inputs provided by States and other relevant stakeholders in the framework of the referred sessions, dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument, as well as during the intersessional period’.¹⁹⁸ The Elements Draft proposes the elements for negotiations ‘to elaborate the instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises during the third session of the OEIGWG, to be held from 23 to 27 October 2017.’¹⁹⁹

With regard to the inclusiveness of the process, the Elements Draft specifies that ‘it is important to acknowledge the constructive participation of different actors in more than 200 bilateral and multilateral intersessional meetings in Geneva and in many different countries in the world, since the adoption of Resolution 26/9 on July 14, 2014.’²⁰⁰

2.4.1 The scope of the legally binding instrument

The starting point in creating a vision about the new legally binding instrument is to envisage the scope of the instrument. What role will play this new instrument? What are the major changes which will be achieved as a result of it? These are questions which need to be answered. A clear vision about the scope of the instrument will set the basis for its further content.

¹⁹⁸ The Elements Draft (n 69) 1 available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf accessed 9 October 2017.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

What I propose is to start with the point of view agreed by the OEIGWG in this regard. The Elements Draft states that the purpose is:

‘to create an international legally binding framework that aims to guarantee the respect, promotion and protection of human rights against violations or abuses resulting from the activities of TNCs and OBEs, in order to:

- ensure civil, administrative and criminal liability of TNCs and OBEs regarding human rights violations or abuses.
- include mechanisms to guarantee the access to justice and effective remedy for such human rights violations or abuses committed by TNCs and OBEs, including adequate remediation and guarantees of non-repetition, as well as the strengthening of international cooperation between all relevant actors.
- include obligations to prevent such adverse human rights impacts.
- reaffirm that State Parties’ obligations regarding the protection of human rights do not stop at their territorial borders.’²⁰¹

It becomes clear that, this paragraph emphasizes the main purpose of the work done by the OEIGWG, which is to create an international legally binding instrument and it clearly states that the role of this instrument is ‘to guarantee the respect, promotion and protection of human rights against violations or abuses resulting from the activities of TNCs and OBEs.’²⁰² Further, the paragraph summarizes the main actions and tools that will help accomplish this purpose.

One key element and at the same time the main goal to be achieved is the elaboration of an international legally binding instrument. The question that arises is why there is a need for an international legally binding instrument? The instinctive answer which comes to my

²⁰¹ Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 29 September 2017, 3-4 available at: < http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

²⁰² Ibid.

mind is the potential failure of the United Nations development in the field of business and human rights, the UNGPs. In the followings, I will explain why I believe that the UNGPs approach was the factor which generated the need for an international legally binding instrument. The arguments outlined here will attempt to show that the soft law approach generated a need for a radical shift towards a legally binding instrument.

The existing responsibilities of corporations in relation to human rights are not enough for an effective protection of human rights and that is why there is the need to elaborate an international legally binding instrument. The UNGPs state that corporations have the responsibility to respect human rights, meaning that it is required for them to ‘avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’²⁰³ and in line with their role ‘as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.’²⁰⁴ In general terms, the UNGPs focus on the negative obligation for corporations meaning that they have the responsibility to avoid doing harm.

The UNGPs created confusion on what are the obligations of the businesses in relation to human rights and on what basis. This confusion needs to be clarified through an international instrument that will identify the obligations of business and their legal nature. The UNGPs distinguish that corporations do not have legally binding obligations in relation to human rights but it also states that corporations need to respect the fundamental human rights, and in case of non-compliance corporations will be subject of critique made by ‘the courts of public opinion’ and as a result, corporations will lose the ‘social license to operate.’²⁰⁵ This social framing of corporate responsibilities in relation to human rights

²⁰³ The UNGP (n 52) 11 available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

²⁰⁴ Ibid 1 General Principles.

²⁰⁵ Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other

together with the idea of social censorship ‘led to a situation in which confusion reigns supreme as to the exact nature and status of corporate obligations in this regard.’²⁰⁶ There is a need for spelling with authority the obligations of businesses in relation to human rights.

From a strategic point of view, I tend to believe that the approach of the UNGPs was not efficient. After many decades of condemning the gross human rights violations committed by corporations and after two failed initiatives to impose binding obligations for corporations, the United Nations made a surprising turn by endorsing the soft approach of the UNGPs. The civil society considered this approach too soft and many influential civil society actors criticized at the global level the gaps of the UNGPs by saying that ‘these gaps will prevent the Guiding Principles from effectively advancing corporate responsibility and accountability for human rights and so may fail to gain widespread acceptance by civil society.’²⁰⁷ Starting from 2013, the civil society actors created a movement seeking the drafting of a legally binding instrument and their efforts are reflected in their Joint Statement in this regard.²⁰⁸ At the moment, more than 900 human rights organizations signed the Statement towards the active involvement in the negotiations for the new legally binding instrument which will regulate the activities of TNCs and OBEs.²⁰⁹ There is a need to structure a well-integrated rule of law for the development of business and human rights.²¹⁰

business enterprises, John Ruggie, (A/HRC/8/5) 7 April 2008, para 54 available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement> > accessed 9 October 2017.

²⁰⁶ David Bilchitz, ‘The Necessity for a Business and Human Rights Treaty’ [2016] *Business and Human Rights Journal* 1, 207.

²⁰⁷ Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights, January 2011 available at < https://www.fidh.org/IMG/pdf/Joint_CSJ_Statement_on_GPs.pdf > accessed 9 October 2017.

²⁰⁸ Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises 2013 available at: < <https://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/59120caaa5790ad8728e1285/1494355115520/2013+Bangkok+Joint+1st+Statement.pdf> > accessed 9 October 2017.

²⁰⁹ Treaty Alliance, Global Movement for a Binding Treaty available at: < <http://www.treatymovement.com/statement> > accessed 9 October 2017.

²¹⁰ Larry Catá Backer, ‘Moving forward the UN Guiding Principles on Business and Human Rights: between enterprise social norm, State domestic legal orders, and the treaty law that might bind them all’ [2015] 38 *Fordham Int'l L.J.* 542.

Another factor which support the elaboration of an international legally binding instrument containing clear corporate obligations is the fact that the UNGPs created a legal right to access to effective remedy for victims²¹¹ but this right was not correlated with a binding corporate obligation for corporations which allegedly violated human rights. The new instrument should fill this gap because the obligation for corporations in relation to human rights is a precondition for enforcing the access to remedy. It is perplexing how the UNGPs afforded access to effective remedy as a legal right²¹² without creating a binding obligation for corporations. How is it possible to have the right to remedy for an abuse done by a corporation without setting a prior obligation for corporation in this sense? The new legally binding instrument should provide a clear understanding of corporate obligations and its significant connection with the right to have access to remedy.

After having outlined the purpose of the work done by OEIGWG and the link between the UNGPs and the new legally binding instrument, this paragraph will take a look at the scope of the instruments itself. The OEIGWG agreed that the scope of the new legally binding instrument is ‘to guarantee the respect, promotion and protection of human rights against violations or abuses resulting from the activities of TNCs and OBEs.’²¹³ The scope of the new legally binding instrument is one of the central issues faced by the OEIGWG and it has two aspects that should be clarified: the understanding of the human rights and the definition of TNCs and OBEs. Since the Elements Draft elaborates on these aspects corroborated with other issues, they will be presented in detail in the next sections, keeping in mind that the scope of the new legally binding instrument was continuously discussed during the first two sessions of the OEIGWG and it is still under negotiations.

²¹¹ The UNGPs (n 52) para 25-31 available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

²¹² Ibid.

²¹³ The Elements Draft (n 69) 3 available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

2.4.2 The application of the legally binding instrument

The Resolution 26/9 of UN Human Rights Council provides that the OEIGWG will ‘elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’²¹⁴ with the explanation that ‘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.’²¹⁵ During the State negotiations, the definitions for TNCs and OBEs are expected to be settled, but from the Elements Draft, which is the basis for negotiations, it appears that ‘with regard to the subjective scope, the present instrument does not require a legal definition of the TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character.’²¹⁶ It further states that ‘the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure.’²¹⁷

It remains to be seen whether States will reach a consensus in this regard and will take a wide approach but what is a certain fact is that the local businesses which do not have a transnational character will not fall under the application of the new legally binding instrument. However, preeminent scholars argued that from the perspective of victims of human rights abuses resulting from corporate activity, it is not relevant whether the

²¹⁴ Resolution 26/9 (n 1) 2.

²¹⁵ Resolution 26/9 (n 1) 1.

²¹⁶ The Elements Draft (n 69) 4 available at:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

²¹⁷ Ibid.

corporation has a transnational character or not.²¹⁸ In this regard, Professor Surya Deva offered a hybrid solution which will solve the paradox of the transnational character and more details can be found in his paper sent as a written contribution for the second session of the OEIGWG.²¹⁹ With respect to the form of the instrument and the options available for the OEIGWG, there is a draft document prepared for the American Bar Association, the Center for Human Rights and the Law Society of England and Wales on the possibilities, ranking from the basic form of treaty to a strong treaty containing provisions on criminal liability.²²⁰

With regard to the acts subject to application of the new legally binding instrument, the Elements Draft specifies that:

‘Acts subject to its application [are] violations or abuses of human rights resulting from any business activity that has a transnational character, including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.’²²¹

In conclusion, it is also adopted a broad perspective concerning the acts of TNCs and OBEs which will fall under the applicability of the new legally binding instrument.

²¹⁸ Surya Deva, ‘Defining the Scope of the Proposed Treaty on Business and Human Rights’ [2016] available at: <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>> accessed 9 October 2017.

²¹⁹ Ibid.

²²⁰ Douglass Cassel and Anita Ramasastry, ‘White Paper: Options for a Treaty on Business and Human Rights. Prepared for the American Bar Association, Center for Human Rights, and The Law Society of England and Wales’ May 2015 available at: <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>> accessed 9 October 2017.

²²¹ The Elements Draft (n 69) 5 available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

2.4.3 The rights protected

The deliberations from the first two sessions of the OEIGWG reached the consensus that all human rights will be covered by this new legally binding instrument. The Elements Draft states that ‘all internationally recognized human rights, taking into account their universal, indivisible, interrelated and interdependent nature, as reflected in all human rights treaties, as well as in other intergovernmental instruments related, inter alia, to labour rights, environment, corruption.’²²² This statement is in accordance with the opinion of John Ruggie: ‘there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner. Therefore, companies should consider all such rights.’²²³

From this perspective the new legally binding instrument is oriented on victims and any attempt to focus only on gross human rights violations will enter into contradiction with the main attributes of human rights which are interrelated, indivisible and interdependent. Moreover, there is no consensus among scholars about the definition of gross human rights violations. Professor Surya Deva suggests in his written contribution that instead of enumerating the human rights protected by the new legally binding instrument, there should be annexed a list with the core international human rights conventions applicable to the corporations.²²⁴

²²² Ibid 4-5.

²²³ Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, (A/HRC/8/5) 7 April 2008 para 52 available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement> > accessed 9 October 2017.

²²⁴ Surya Deva, ‘Defining the Scope of the Proposed Treaty on Business and Human Rights’ [2016] 4 available at: < <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> > accessed 9 October 2017.

2.4.4 The obligations of States

The Elements Draft states that the section of obligations represents the core of the new legally binding instrument, with the aim of reaffirming the States' primary responsibility and recognizing several general obligations for TNCs and OBEs.²²⁵ The Elements Draft recalls 'the principle of primary responsibility of States to protect against human rights violations or abuses within their territory and/or jurisdiction by third parties, including private parties, implies that States have to take all necessary measures to attain such objective.'²²⁶ It seems appropriate that this foundational principle should be addressed in the first section entitled general principles, acknowledging that States already have obligations deriving from treaties, customary law or soft law in order to protect human rights. The Elements Draft further states the specific measures needed to be implemented by the States in order to protect against violations or abuses made by TNCs and OBEs in relation to human rights.

In terms of the obligations of the States²²⁷, the Elements Draft presents a list of obligations which are similar with the States' obligations required by the UNGPs in its first

²²⁵ The Elements Draft (n 69) 5 available at:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

²²⁶ Ibid.

²²⁷ The Elements Draft states as follows: 'Obligations of States:

- States shall respect, promote and protect all human rights against violations or abuses within their territory and/or jurisdiction by third parties, particularly TNCs and OBEs, and guarantee access to remedy for victims of such violations or abuses.
- States shall take all necessary and appropriate measures to prevent, investigate, punish and redress such violations or abuses, including through legislative, administrative, adjudicative or judicial measures, to ensure TNCs and OBEs respect human rights throughout their activities.
- States shall take all necessary and appropriate measures to ensure access to justice and effective remedy for those affected by human rights violations or abuses of TNCs and OBEs.
- States shall adapt domestic legislation to the provisions of this instrument and enforcement measures to require business enterprises to respect human rights.
- States shall take all necessary and appropriate measures to design, implement and follow up on national policies on human rights and TNCs and OBEs, taking into account the primacy of human rights over pecuniary or other interests of corporations.
- States shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that fully comply with all requirements as established in this instrument.

pillar.²²⁸ However, there are also included new obligations which might be contained in the new legally binding instrument. If agreed during the negotiations, the States will be under specific obligations such as: the obligation to regulate the activity of TNCs and OBEs, requiring them to respect human rights in their activity and more than this, the obligation to prevent human rights violations through the supply chain of those corporations; the obligation to guarantee for victims the right to effective remedy and the access to justice; the obligation to investigate and to hold liable TNCs and OBEs for their negative imprint on human rights; the obligation for the State to enter into business relations through the way of public procurement contracts only with TNCs and OBEs that comply with the duty to respect human rights; the obligation to regulate the superiority of human rights over the trade investments or other pecuniary interest of TNCs and OBEs; the obligation to adopt mechanisms which will allow monitoring the activities of TNCs and OBEs that might interfere with respect to human rights, and examples of such mechanisms are the obligation to undertake human rights impact assessments, the obligation to report on their activities and the requirement to disclose information related to their operations.²²⁹

If analysed in details, each of these obligations might turn into a comprehensive paper but I would like to stop for a moment on one obligation that excited my imagination. The obligation that I would like to reflect on is the State's obligation to regulate 'the primacy of

- States shall take all necessary and appropriate measures to ensure that human rights are considered in their legal and contractual engagements with TNCs and OBEs, and their implementation.

- States should adopt measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains.

- State Parties shall take all necessary and appropriate measures to ensure that TNC and OBEs design, adopt and undertake human rights and environmental impact assessments that cover all areas of their operations, and report periodically on the steps taken to assess and address human rights and environmental impacts resulting from such operations.

- States shall adopt all necessary measures to include disclosure requirements for all TNCs and OBEs before registering or granting a permit of operation for TNCs and OBEs.' The Elements Draft (n 69) 5-6.

²²⁸ UNGPs (n 52) available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

²²⁹ Ibid.

human rights over pecuniary or other interests of corporations.’²³⁰ In other words, the pecuniary interest of corporations comes after the respect for human rights, which is superior. Just stop for a moment, relax and start imagine how this principle will change the world.

For some mind-sets, ‘the primacy of human rights over pecuniary or other interests of corporations’²³¹ would be considered as normal, but there are also some other mind-sets reluctant to this approach, claiming that the main scope of the corporation is to make profit. In my view, respect for human rights should prevail over financial interest and I will provide an example to illustrate how logical it is. Let us look at a corporation which is conducting activities in the mining sector. The head of corporation loves making profit, and she knows that her employees are a valuable asset. At the same time, she does not want to lose one of them in the mine because she realized how dangerous the working conditions are. The head of corporation will protect the employees by setting and implementing a set of norms applicable for the employees’ safety at the work place. In this respect, the safety of people is more important than the interest in making profit so the primacy of human rights over pecuniary interest applies. Zooming out of this picture, the same head of corporation should apply the same vision when it comes to protect the environment or the lives of people who might be imperilled by the activities of the mining corporation. The only difference between the two pictures is that in this second picture, the head of corporation does not have a legally binding duty to protect the lives of others or the environment. That is one of the reasons why there is a need for a legally binding instrument, to remind to the head of corporation that all lives are equally important and to impose an obligation in this sense, just to be sure that she will not forget.

²³⁰ Ibid.

²³¹ Ibid.

2.4.5 The obligations of TNCs and OBEs

In terms of obligations of TNCs and OBEs, the Elements Draft states a collection of obligations designed for them.²³² The obligations proposed for negotiations are: the obligation for TNCs, OBEs and their supply chains to comply with national and international human rights law, the obligation to prevent and when occurred, to redress the negative impact of their activity over human rights; the obligation to regulate internal rules consistent with the international human rights law and to implement review mechanisms in order to verify the compliance with the internal rules; the obligation to avoid using their influence with the aim of undermining the rule of law, but instead to use their influence for a better scope which is helping promoting human rights.²³³

The drafting of these obligations for TNCs and OBEs seems to start from the obligations laid down by the UNGPs²³⁴ and it introduces new obligations. In my opinion, this is an effective method to build on the obligations contained in the UNGP because this framework is already known by corporations and it will be the next organic step to switch them from a soft law approach to a legally binding approach.

²³² The Elements Draft states as follows: ‘Obligations of Transnational Corporations and Other Business Enterprises:

- TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains.
- TNCs and OBEs shall prevent human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes.
- TNCs and OBEs shall design, adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations.
- TNCs and OBEs shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.’ The Elements Draft (n 69) 6.

²³³ Ibid.

²³⁴ The UNGPs (n 52) para 11 available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 9 October 2017.

It is encouraging to see that a particular interest is afforded to the obligation of the TNCs and OBEs to prevent human rights violations by adopting internal rules in this regard and by conducting due-diligence procedure. In consonance with UNGPs, the corporations should conduct human rights due diligence and this process requires an assessment of the corporate impact on human rights as well as finding the way to avoid the negative impact and providing a solution on how the impact will be addressed.²³⁵ It is emphasized by the UNGPs that corporations could cause a negative impact on human rights either through their own activities or contributing to the violation of human rights through business relationships.²³⁶ This due-diligence approach is comprehensive and introducing this concept was a major step towards managing potential negative human rights impacts.

The Elements Draft evolves on this achievement, takes a step further and includes the obligation to ‘establish effective follow up and review mechanisms, to verify compliance throughout their operations’²³⁷ However, the new legally binding instrument should elaborate on this proposed model by setting clearly the steps required. My recommendation concerning the implementation of a review mechanism is that the TNCs and OBEs should pursue a model based on the achievements of development banks which created the Independent

²³⁵ The UNGPs states the following with regard to human rights due diligence: ‘In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.’ The UNGPs (n 52) para 17 available at: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf accessed 9 October 2017

²³⁶ The UNGPs (n 52) available at: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf accessed 9 October 2017.

²³⁷ The Elements Draft (n 69) 6 available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf accessed 9 October 2017.

Accountability Mechanisms²³⁸ to review their activities and to hold them responsible for non-compliance with their own internal policies. In a paper named ‘Glass Half Full? The State of Accountability in Development Finance’ a joint team of INGOs, practitioners and scholars reported on how effective is this model promoted by the development banks.²³⁹

2.4.6 Legal Liability

The Elements Draft articulates that ‘States must take all necessary action, including the adoption of legislative and other necessary measures to regulate the legal liability of TNCs and OBEs in administrative, civil and criminal fields.’²⁴⁰ According to the Elements Draft, States have the obligation to regulate the liability of TNCs and OBEs, which might be criminal liability, administrative liability or civil liability. The liability of TNCs and OBEs covers the abuses or the violations of human rights made through their activities. Complicity and the attempt to commit the forbidden conduct are also punished. More than this, ‘legal liability must also cover those natural persons who are or were in charge of the decision-making process in the business enterprise at the moment of the violation or abuse of human rights by such entity.’²⁴¹ The criminal liability for TNCs and OBEs designed by the Elements Draft will punish ‘criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments.’²⁴² The

²³⁸ See for example The European Investment Bank Complaints Mechanism - Principles, Terms of Reference and Rules of Procedure available at: < <http://www.eib.org/infocentre/publications/all/complaints-mechanism-policy.htm> > accessed 9 October 2017.

²³⁹ C. Daniel, K. Genovese, M. van Huijstee and S. Singh, ‘Glass Half Full? The State of Accountability in Development Finance’ [2016] available at: < www.glass-half-full.org > accessed 9 October 2017.

²⁴⁰ The Elements Draft (n 69) 7 available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

²⁴¹ Ibid 8.

²⁴² Ibid.

civil liability will be triggered by ‘participating in the planning, preparation, direction of or benefit from human rights violations or abuses caused by other TNCs and OBEs.’²⁴³

In my view, the new legally binding instrument should state with clarity how this liability will be assured, taking into consideration the complex business structures, such as joint ventures or even parent companies. There should be a clear reference to what is considered abuse or violation of human rights.

The jurisdiction is a matter in a close relation with the legal liability of TNCs and OBEs. The Elements Draft ‘considered that the legally binding instrument has an enormous potential to avoid TNCs and other OBEs from making use of limitations established by territorial jurisdiction in order to escape from potential prosecution in the host States where they operate.’²⁴⁴ In this regard, during the first two sessions of the OEIGWG, the discussions led to a broad definition of jurisdiction, aiming at allowing ‘victims of such abuse by transnational corporations to have access to justice and obtain remediation through either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence.’²⁴⁵

The extraterritorial jurisdiction will be a crucial point during the negotiations. If implemented, this decision will fill in the accountability gaps present at the moment and it will prevent in the future cases where complainants faced barriers in their initiatives to seek justice. This idea of providing access to justice for violations which occurred outside the country’s territory is not an innovation for EU Member States because inside the EU, the Brussels Regulations allow the application of this jurisdictional principle. Furthermore, The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic,

²⁴³ Ibid.

²⁴⁴ Ibid 11.

²⁴⁵ Ibid.

Social and Cultural Rights offer a comprehensive legal background with regard to the extraterritorial obligations of the State, which might be used in order to implement them.²⁴⁶

2.4.7 Access to justice

On their way of seeking justice, victims face barriers to access to justice. The barriers are enumerated in the ‘Practice Note Access to Justice’ elaborated by the United Nations Development Program: prohibited costs for using the judicial system, long procedural delays, lack of reliable legal representation, abuse of power and authority, unlawful detention and seizure, weak law and decrees enforcement; lack of information and lack of legal aid systems, gender bias barriers.²⁴⁷

The Elements Draft states that ‘access to justice must include the existence of clear procedures and institutions which have the duty to provide effective remedy to the victims of TNCs and OBEs’ violation or abuse of human rights, as a way to redress moral and material damages’²⁴⁸ and proposes a set of elements for negotiations. The elements proposed with regard to access to justice are pictured as obligations for State to:

- provide judicial and non-judicial remedies, which are prompt, effective and accessible;

²⁴⁶ See Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ [2012] 34 HUMAN RIGHTS Q. 1084.

²⁴⁷ Access to Justice, Practice Note of the United Nations Development Program, 9 March 2004 available at: <https://www.un.org/ruleoflaw/files/Access%20to%20Justice_Practice%20Note.pdf> accessed 9 October 2017.

²⁴⁸ The Elements Draft (n 69) 9 available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

- guarantee to every person and especially to indigenous people and other vulnerable groups, access to justice and effective remedy;
- assure that non-judicial mechanisms do not substitute the judicial mechanism in order to provide remedies for victims; assure that any abuse or violation will trigger the access to justice through legal claims for remediation and damages;
- facilitate procedural access to justice by lowering the financial costs of justice and by accepting human rights-related class actions and litigations for the public interest and enabling ‘the reversal of the burden of proof; the adoption of protective measures to avoid the use of ‘chilling-effect’ strategies by TNCs and OBEs to discourage individual or collective claims against them and the limitation to the use of the doctrine of forum non conveniens;’
- Provide access to information, in a language that victims understand, about the availability of judicial and non-judicial remedies;
- Guarantee an impartial and comprehensive investigation of the violations or abuses and should guarantee reparations, compensation and other measures of satisfaction;
- Guarantee an impartial and independent system of justice;
- Guarantee ‘the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers, as well as proper assistance, including inter alia, legal, material and medical assistance, in the context of human rights violations or abuses resulting from the activities of TNCs and OBEs throughout their activities;’

- Guarantee the right to a fair trial including legal aid and the principle of equality of arms in both civil and criminal cases regarding abuses or violations of human rights, which are a result of the activities of TNCs and OBEs;
- Avoid unnecessary delays during the administration of justice;
- Guarantee ‘the right to truth and non-repetition, in relation to human rights violations or abuses resulting from – and throughout – the activities of TNCs and OBEs;’
- Guarantee the prompt and adequate restitution, including restoration of affected environmental areas.²⁴⁹

The right to access to justice has been inserted into UNGPs but barriers continue to obstruct the access of victims to justice.²⁵⁰ The major issue regarding domestic remedies in some countries is that they lack enforcement powers and that is why their legal system needs to be reformed in order to address these practical barriers enumerated by the Practice Note of the United Nations Development Program.

2.5 Conclusion

Since 2014, two sessions of the OEIGWG took place in Geneva and the third session is expected to start on 23 October 2017, having the mandate to elaborate a legally binding instrument regulating the activities of TNCs and OBEs in relation to human rights.²⁵¹ The initiative launched by the United Nations Human Rights Council aims toward a new legally binding instrument that will contain binding rules for both businesses branch, particularly businesses with transnational activities and States branch. The fruitful discussions held during

²⁴⁹ Ibid 9-11.

²⁵⁰ G Skinner, R McCorquodale and OD Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ [2013] The International Corporate Accountability Roundtable [ICAR], CORE and The European Coalition for Corporate Justice 66.

²⁵¹ Resolution 26/9 (n 1).

the first two sessions were summarized in this chapter and their outcome, the Elements Draft, was also presented in this chapter.

The OEIGWG made thankworthy efforts to fulfill its mandate. Distinguished scholars and practitioners were invited as speakers during the sessions in order to share their views on the scope and content of the new legally binding instrument.²⁵² States, INGOs and other stakeholders were present and contributed substantively to this initiative. The written procedure gathered also noticeable inputs from organizations willing to contribute to this process.

It is welcoming that the Elements Draft considered a broad section of issues namely: criminal, civil and administrative liability; broad concept of jurisdiction; due-diligence process; access to justice; broad covering of human rights; effective remedy; mechanism for implementation such as a new International Court on Transnational Corporations and Human Rights.²⁵³ However, in order to achieve the aim of the Elements Draft, all the issues need to be negotiated and the upcoming direction of this initiative will be decided by the United Nations Human Rights Council.

²⁵² See a full list of speakers available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx> > accessed 9 October 2017.

²⁵³ The Elements Draft (n 69) available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf > accessed 9 October 2017.

CHAPTER 3: CRITIQUE ON THE PROPOSED ELEMENTS DRAFT

The Elements Draft released by the OEIGWG serves as a base for negotiations and reflects the inputs and the shared ideas from the first two sessions. The negotiations aim to regulate the activities of TNCs and OBEs with respect to human rights and the concrete elements included in the Draft Elements will be considered for fruitful discussions. The Draft Elements was presented in the previous chapter and based on it, this third chapter will assess whether the elements proposed will be included in the new legally binding instrument. Stated slightly differently, this chapter will put on the wall the critique that this Elements Draft might receive. Of course that it is difficult to predict the future of the negotiations but it is evident that the Elements Draft will face criticism. At the moment of writing this chapter, the third session have not started yet, so I will construct my arguments based only on the content of the Elements Draft. My input will be provided based on my personal reasoning and analysis of the Elements Draft.

The week of 23 October 2017 will give the opportunity to the stakeholders to engage in discussions and constructive ideas which will contribute to the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights held in Geneva. The Elements Draft, released on 29 September 2017 will be the main document discussed and I would like to take this opportunity to share my views on it, before the beginning of the third session. I will present my preliminary observations in short subchapters throughout this chapter.

3.1 The previous failure of the UN Norms entitles us to believe that this new initiative will share its fate?

The efforts made by the OEIGWG in its ongoing mandate and the broad consultations with different stakeholders show that there is an interest in solving the issues in relation to business and human rights. However, the regrettable fate of the previous attempt to produce a legally binding instrument regulating the TNCs conduct, the UN Norms, might empower the reader to believe that this new initiative will share the same fate, being abandoned. The UN Norms were heavily contested by business representatives²⁵⁴ and another round of contestations might take place for this new initiative.

Another reason for criticizing the UN Norms was their ‘dense intertextuality’²⁵⁵ as Upendra Baxi named the issue of the text, which made reference to more than 56 international instruments, producing complexity and confusion. Returning again to the new initiative, the text should be clear enough in order to avoid this past critique. Despite criticisms, this process might be seen as:

‘a fresh opportunity to step beyond the current limitations of national and international legal imagination to challenge the state and corporate sensibilities of a globalized neo-liberal world order must be taken very seriously, placed high on the global agenda with all ‘the urgency of now’. Perhaps then human rights advocates and others can move towards the achievement of universal jurisdiction for human rights protection directly.’²⁵⁶

²⁵⁴ David Kinley and Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ [2006] 6 Human Rights Law Review 3, 448–9.

²⁵⁵ Upendra Baxi, *The Future of Human Rights* (Oxford University Press India 2012) 278–81.

²⁵⁶ Anna Grear and Burns H. Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ [2015] Human Rights Law Review 15, 44.

3.2 To whom it might apply this new legally binding instrument?

It is stated in the Elements Draft that it is not necessary to define TNCs and OBEs because ‘the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character.’²⁵⁷ It also states that ‘the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character’²⁵⁸ Reading the text, my understanding is that the activity undertaken by TNCs and OBEs is the element that will trigger the liability of the company and this activity needs to have a transnational character.

At this stage, my question is what kind of activity can be seen as transnational? If it is considered only the transnational nature of the activity, therefore many other activities conducted by TNCs and OBEs remain out of the scope of application of the new legally binding instrument. For instance, a TNC decides to implement a project in the extractive industry and needs to resettle the people who are living in the area where the project will be implemented. Based on the actual provisions of the Elements Draft, if abuses occur during the resettlement, the activity of resettlement does not have a transnational character and as a consequence the new legally binding instrument will not be applicable. I believe that a definition of TNCs and OBEs and also some clarifications related to their activities are more than welcome.

The new legally binding instrument is intended to regulate only the TNCs and OBEs, thus excluding domestic companies. However, the State has the obligation to regulate the domestic companies and it should be consistent when regulating the entities existent under its

²⁵⁷ The Elements Draft (n 69) 4 available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf accessed 9 October 2017.

²⁵⁸ Ibid.

jurisdiction. If the State is not coherent, the State might create legislation that requires only for TNCs and OBEs to respect human rights, leaving the domestic entities the choice whether they want or not to respect human rights. This regrettable scenario will certainly lead to unequal protection for individuals because those individuals who suffer abuses as a result of the activities of TNCs and OBEs, will be in the position to ask for remedies based on the new legally binding instrument, and those individuals who suffer abuses as a result of the activities of domestic entities will only have at their disposal the domestic remedies. I suggest that States should consider the principle of equal protection when regulating.

3.3 The obligations of States versus the obligations of TNCs and OBEs

In order to create a successful legally binding instrument, the text should clearly make a difference between the States' obligations and the obligations of TNCs and OBEs. The text should emphasize the obligations of the State as a main actor in protecting human rights and should set the obligations of TNCs and OBEs as actors supplementing the main actor through their obligations to respect human rights. I believe that TNCs and OBEs should not substitute the States' obligations in relation to human rights because they do not have the socio-political mandate neither the capacity to do so.

Moreover, in the section of obligations, the focus should also be on States' obligation when interacting with TNCs. I am aware that the Elements Draft contains provisions related to the public procurement, but this is just one aspect of an entire spectrum of practices which exist between a State and a TNC. These other types of practices should be also in the loop and The Council of Europe Recommendation on Human Rights and Business adopted in

2016 might serve as guidance.²⁵⁹ With regard to the obligations of corporations, Andrew Clapham offers in his book ‘Human Rights Obligations of Non-State Actors’ the parameters in which the human rights obligations of corporations can be understood and what are the legal tensions with regard to this issue.²⁶⁰

3.4 The obligations of TNCs and OBEs vis-à-vis their supply chains and their subsidiaries

The Elements Draft states that violations and abuses are a result of ‘any business activity that has a transnational character, including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.’²⁶¹ In other words, an abuse made by a subsidiary of a TNC, will trigger the liability of TNC. A valuable resource in relation to the moral and legal complicity of corporations in human rights violations is the book *Human Rights, Corporate Complicity and Disinvestment* which gather views from political philosophers and legal scholars on this issue.²⁶²

The Elements Draft further states that TNCs and OBEs have the obligation to ‘adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their

²⁵⁹ Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business (adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies) available at: < https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000016805c1ad4 > accessed 9 October 2017.

²⁶⁰ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).

²⁶¹ The Elements Draft (n 69) 5 available at:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 9 October 2017.

²⁶² Gro Nystuen, Andreas Føllesdal and Ola Mestad, *Human Rights, Corporate Complicity and Disinvestment* (Cambridge University Press 2011).

supply chains’²⁶³ and they also have the obligation to ‘comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains.’²⁶⁴ Put it simply, TNCs and OBEs will have the duty to prevent human rights violations made by their supply chains and they will also have the duty to respect human right ‘throughout their supply chain.’²⁶⁵

It is important to reiterate that the OEIGWG was established with the specific mandate to elaborate ‘an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’²⁶⁶ with the footnote: ‘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.’²⁶⁷ It is clear that the scope of the mandate is to exclude from regulation the domestic non-transnational entities. Despite of the precisely mandate, the OEIGWG included in the Elements Drafts provisions which indirectly regulate other non-transnational business enterprises. This might be one reason for critique.

Another reason of critique might be the unclear obligation of TNCs and OBEs to ‘comply with all applicable laws and respect internationally recognised human rights, wherever they operate, and throughout their supply chains.’²⁶⁸ If my understanding is correct, TNCs and OBEs could be held liable for the activities of other entities, the supply chains, which are not necessarily controlled by them. In my view, it is hard to imagine how this provision can be implemented in practice, without further details. Even if it will be set in

²⁶³ The Elements Draft (n 69) 6 available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf accessed 9 October 2017.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Resolution 26/9 (n 1).

²⁶⁷ Ibid 1.

²⁶⁸ The Elements Draft (n 69) 6 available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf accessed 9 October 2017.

place a mechanism of reviewing the activities of the supply chains, what kind of machinery can review the activities of all subcontractors and business partners and who will be in charge of that? The new legally binding instrument should be grounded in the real world practical limitations.

3.5 The broad concept of jurisdiction

The OEIGWG included in the Elements Draft ‘a broad concept of jurisdiction’ as a result of the fruitful discussions about jurisdiction held during the first two sessions. This broad concept of jurisdiction will allow victims ‘to have access to justice and obtain remediation through either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence.’²⁶⁹ The Elements Draft specifies also ‘TNCs and OBEs ‘under the jurisdiction’ of the State Party could be understood as any TNC and OBE which has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned.’²⁷⁰

This broad concept of jurisdiction might get some criticism because it goes beyond the state sovereignty to legislate inside its borders. Basically, the State will have under the new legally binding instrument two extra powers: (i) to regulate the behaviour of the TNCs and OBEs within its jurisdiction and operating abroad and (ii) to expand its judiciary system by accepting claims against TNCs and OBEs under its jurisdiction irrespective of the place where the harm occurred.

The States having difficulties when it comes to the right to access to justice might welcome this concept of broad jurisdiction because the victims residing in that respective

²⁶⁹ Ibid 11.

²⁷⁰ Ibid.

State will have the possibility to lodge a claim in another State, the State where the TNC is incorporated.

The State where the TNC is incorporated might be reluctant to receive the claim from another State because of many reasons such as: financial costs, difficulties in understanding the foreign legal system and principles applying to that specific case, procedural difficulties in hearing witnesses and conducting investigations.

Even though the victims are in a position to shop for a better forum, there might be a risk that the same case to be decided differently by two different Courts. Ultimately, the business community might not welcome this broad concept of jurisdiction because it will increase the chances to get sued.

3.6 Criminal liability

The Elements Draft addresses the criminal liability of TNCs and OBEs for their abuses and violations of human rights. In this regard, TNCs and OBEs can be liable for ‘criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments.’²⁷¹ It is worth emphasising that the criminal liability of TNCs and OBEs can be triggered only by violations or abuses of human rights. As a consequence, not all criminal offences recognised under the domestic law will trigger the liability of TNCs and OBEs, but just the ones that constitute per se human rights abuses or violations. Several domestic criminal offences are not considered human rights violations and the drafters of the new legally binding instrument should be aware of this when designing it.

²⁷¹ Ibid 8.

With regard to the criminal liability, the Elements Draft provides criminal liability for ‘natural persons who are or were in charge of the decision-making process in the business enterprise at the moment of the violation or abuse of human rights by such entity.’²⁷² There is a global trend of establishing a criminal liability for business entities and their managing directors or representatives.²⁷³ However, there are legal systems which are not recognizing criminal liability for legal persons and this might be an issue during negotiations. It is my opinion that the new legally binding instrument should contain general provisions in this regard, in order to leave the opportunity for the States to be flexible when implementing it. Therefore, the State should have the discretion to implement the section of liability from the new legally binding instrument in conformity with the legal principles of that particular State.

3.7 Implementation and Monitoring of the new legally binding instrument

The Elements Draft states that national and international mechanisms will be set in place in order to implement and to monitor the applicability of the new legally binding instrument.²⁷⁴ At the national level, institutions similar with Ombudsman or National Human Rights bodies, might be considered ‘for the promotion, implementation and monitoring of this instrument.’²⁷⁵ At the international level, judicial and non-judicial mechanisms might be considered, having the same mandate as the national mechanisms. The proposals for the

²⁷² Ibid.

²⁷³ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> >; Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business (Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies) available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4 >FRA Opinion – 1/2017 [B&HR] Improving access to remedy in the area of business and human rights at the EU level Opinion of the European Union Agency for Fundamental Rights 10 April 2017 available at: <http://fra.europa.eu/en/opinion/2017/business-human-rights> > accessed 9 October 2017.

²⁷⁴ Ibid 13.

²⁷⁵ Ibid.

international judicial mechanism were to create a new Court, the International Court on Transnational Corporations and Human Rights, or to create a special Chamber on this matter inside an existing International Court.²⁷⁶

With regard to the international non-judicial mechanisms, the option proposed was to create a:

‘Committee on the issue of Business and Human Rights, which will have, among others, the following duties: (i) examining the progress made by State Parties in achieving the realization of the obligations undertaken in the present instrument; (ii) assess, investigate and monitor the conduct and operations of TNCs; (iii) conduct country visits in accordance to its mandate; (iv) examine the periodical reports according to its mandate; (v) receive and examine communications according to its mandate. The Committee shall consist of eighteen experts of high moral standing and recognized trajectory in the field covered by this Instrument. The members of the Committee shall be elected by State Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, gender balance as well as to the main different legal systems.’²⁷⁷

It remains to be seen which option will be implemented and in what manner.

In conclusion, the Elements Draft presents a set of concepts which are likely to be criticized by different stakeholders. The third session of the OEIGWG will be the perfect opportunity to raise the issues identified in the Elements Draft and to propose other suitable formulation for the text of the new legally binding instrument. With all the positive aspects presented in the Element Draft, the new legally binding instrument should be legally feasible and in harmony with international law, because international legal systems do not exist in a vacuum.

²⁷⁶ Ibid.

²⁷⁷ Ibid 13-14.

CONCLUSION

This thesis has sought to deepen the understanding of the main stages, approaches, advantages and difficulties regarding the elaboration of a new legally binding instrument under the auspices of the UN Human Rights Council, which will regulate the activities of TNCs and OBEs with respect to human rights. It has been mentioned that even though the process of elaboration is ongoing and its success cannot be granted, the process itself is valuable because it offers a common forum for different stakeholders to debate and clarify controversial issues in relation to business and human rights.

The Introduction Chapter offered to the reader a political approach over the relationship between States and TNCs during the last half of the century. The TNCs increased their power applying the rules of globalisation and conducted activities over the State's borders, choosing States more profitable from an economic and legislative point of view. The State failed to regulate these activities of TNCs conducted outside its borders based on the Westphalian international order, according to which the State has sovereignty to legislate the activities of entities operating only within its territory. As a consequence, a legal vacuum was created because the transnational activities of corporations were regulated neither by the Home State nor by the Host State. Considering that the activities of TNCs need to comply only with the law applicable in the Host State, a law which is most probably lax and provides lower standards of human rights protection, then the probability of corporate human rights violations increases just because there is no international legally binding instrument requiring corporations to respect human rights when conducting transnational activities.

The assumption underlying this thesis was that the existent regulatory framework with regard to business and human rights is a soft law approach which does not offer an effective protection against corporate human rights violations; therefore there is a need for the

elaboration of an international legally binding instrument. The research conducted under this thesis was (i) to explore the process of elaborating a legally binding instrument which will regulate the activities of transnational entities with respect to human rights (ii) to examine the sessions and the elements proposed by the UN open-ended intergovernmental working group and (iii) to outline the criticism that the proposed elements might get in the future debates.

The First Chapter of the thesis has been shown the regulatory development conducted by the United Nations and other organisations in relation to business and human rights. It has been highlighted the significant instruments which have been adopted and the previous UN tentative for a legally binding instrument (the UN Norms) concluding that there was a notable movement towards corporate accountability.

The First Chapter presented the journey from a soft law approach to a legally binding instrument conducted by the United Nations. During the 20th century, the United Nations opposed fiercely against human rights violations committed by corporations, but a new century came with a new approach and the UN Global Compact was released. The UN Global Compact was a form of collaboration between businesses and the United Nations, a kind of win-win situation where corporations agreed voluntary to conduct their activities responsibly by respecting the Ten Principles included in the UN Global Compact and the United Nations agreed to promote the corporations by publishing their responsible and sustainable practices. However, the effectiveness of this initiative was criticized based on several facts such as: the voluntary character, the lack of monitoring and the absence of an enforcement mechanism. Considering that the voluntary approach was not effective as expected, the United Nations launched the UN Norms, which elaborated legally binding obligations for corporations with respect to human rights. Obviously, the TNCs were not willing to get involved in such a strong commitment and the UN Norms were never accepted.

At the beginning of the 21st century, the United Nations already tried the voluntary approach and a tentative of binding approach in its struggle to institute corporate accountability. John Ruggie played an important role as a ‘mediator’ between corporations and the United Nations. The UN Guiding Principles on Business and Human Rights, drafted by John Ruggie were endorsed by the UN Human Rights Council, building a common understanding of the currently standards between States and corporations. John Ruggie was a magician of words and achieved a common ground between States and corporations with regard to human rights. Thanks to Ruggie we have that social expectation that corporations should carry out human rights due diligence and to respect human rights. Since there is the common ground, the expectation, we also need a further step, the law.

The Second Chapter of this thesis discussed on the step further, the UN Human Rights Council initiative to elaborate an international legally binding instrument which will regulate the activities of TNCs and OBEs with respect to human rights. The Second Chapter presented the main ideas shared during the first two sessions of the open-ended intergovernmental working group which is mandated to elaborate the instrument. The beauty of this process was that many stakeholders were involved and their point of view with regard to the current situations of business and human rights exposed the issues and also provided solutions.

The discussions from the first two sessions were concluded into a document drafted by the OEIGWG in order to serve as a basis for further negotiations during the next sessions. As has been shown into the Second Chapter, the elements proposed to be included into the new legally binding instrument addressed a broad spectrum of issues such as: binding obligations for TNCs and OBEs to respect human right when conducting their activities; criminal, civil and administrative liability for TNC and OBEs; broad concept of jurisdiction applicable to States; due-diligence process conducted by TNCs and OBEs in order to prevent violations of human rights and mechanisms to prevent human rights violations made by their

supply chains or subsidiaries; access to justice and remedy for victims; broad covering of human rights protected; mechanism for implementation, such as a new International Court on Transnational Corporations and Human Rights.

The Third Chapter highlighted some of the tensions that might appear in the next sessions of the OEIGWG. It is true that the elements provided by the OEIGWG are just a basis for the next negotiations but they need to be realistic in order to be implemented into the present day conditions. As elaborated and critically assessed in the Third Chapter, there are issues which sparked the debates during the first two sessions and no consensus was achieved among the stakeholders. For all the reasons suggested in the Third Chapter, it is expected that further negotiations to prove more engagement and to manage to portray a realistic picture of the complex issues of business and human rights.

Where do we stand now? The third session of the OEIGWG is about to start at the end of October 2017 and the negotiations of an international legally binding instrument are intended to advance, bringing the possibility to debate the limits and challenges met in this regard.

Concerning the way forward, one issue that might emerge in the global acceptance of the new international legally binding instrument is its ratification. The UN Human Rights Council initiative was supported mostly by States from the Global South, China, India, Russia and Brazil but the Global North opposed it. Without the support from the Western States, the new legally binding instrument might be ratified only by a small number of States and as a result, its effectiveness will be weak. The positive scenario is that the international legally binding instrument will be ratified by all States.

It is my impression that the new initiative looks like a contest of speeches, where the speaker tries to convince as many voters that his opinion is the best option and they should

vote accordingly. We will see how the voters will manifest but for the moment the prognostic seems to be negative from my point of view.

The OEIGWG has done an extraordinary job by bringing together representatives of the States, INGOs, representatives of business community and persons from academia. The sessions proved to be an important opportunity for sharing views from different angles but this is not enough. Watching the sessions I have seen strong and diametrically opposed opinions and it is hard to imagine how can be reached an agreement. I am saying that this initiative is not enough because something is missing: the cooperation. John Ruggie faced the same incompatible opinions but he managed to obtain an agreement. Even though this agreement is criticised as being soft law, the agreement between corporations and States with regard to human rights exists and it is the existing regulatory framework, the UNGPs. I brought into light the work of John Ruggie because I sincerely believe that his work is a successful example of cooperation. Under the new initiative for a legally binding treaty, this aspect of cooperation is faded.

I believe that UN has a great opportunity to learn from the past, and that is why I decided to offer in this thesis a historical approach, to present the previous initiatives conducted in this regard. The lesson learned from the elaboration of the UNGPs is in fact that the effort of John Ruggie to conduct so many consultations in small groups with different stakeholders led to the success of creating a common platform for corporate accountability. He understood the importance of cooperation and this was a key factor for ensuring the acceptance of the UNGPs by the international community.

If one of the lessons learned is the importance of cooperation, I suggest that cooperation should be enhanced in order to achieve a high level of acceptance by international community for the proposed new legally binding instrument. It is not sufficient

to hold a session once a year. The process of elaboration should have a continuity and active involvement throughout the whole year. The public should also be aware of the process and here the INGOs have a big mission to raise awareness. The Treaty Alliance, formed from an impressive number of civil societies, supports and promotes the need for a legally binding instrument.

Considering the contrasting views on corporate accountability exposed in this thesis and the voting patterns in the UN Human Rights Council when the Resolution 26/9 was adopted, I would not be surprised to find out that this initiative failed. The question is what can be done further? What are the other options to reach a new understanding of corporate responsibility in relation to human rights?

When facing a rejection, as might be the case for this initiative, it is hard to start over and to look for other solutions in order to reach the goal. Moreover, if the lessons from the previous experiences were not learned than it is even harder to succeed. However, I believe that the objective of the new legally binding instrument can be achieved and it is good to remember the words of Marcus Aurelius: ‘do not think that what is hard for you to master is humanly impossible; and if it is humanly possible, consider it to be within your reach.’²⁷⁸ It is humanly possible to overcome the issue of business and human rights, so a solution might be to start from what we have already achieved. Building on the UNGPs might be a solution if this initiative fails.

With regard to the proposed solution, the work of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises might be

²⁷⁸ Vivek Mathur, *Cracking Into Super Brains With 6000 Supreme Quotes* Section 4 Challenge and Motivation (Studera Press 2017) 117.

interesting to analyse and to see whether their approach is better.²⁷⁹ One day after the Resolution 26/9 was adopted, the same UN Human Rights Council adopted another resolution with regard to business and human rights but with the striking difference that this Resolution aims to build on the achievements of the UNGPs.²⁸⁰ This Resolution recognizes the importance of the implementation of the UNGPs, encouraging all States to develop the national actions plans as required by the UNGPs and calling to all business enterprises to respect their responsibilities in relation to human rights.²⁸¹ The Working Group has the mandate 'to organize consultations with experts, States and other relevant stakeholders to facilitate mutual understanding and greater consensus among different views, and to publish a progress report.'²⁸² The Forum on Business and Human Rights is also organized annually by the Working Group and it 'is the global platform for yearly stock-taking and lesson-sharing on efforts to move the UN Guiding Principles on Business and Human Rights from paper to practice.'²⁸³ I believe that the action plans implemented by the State might be a solution to the issue of business and human rights. With regard to this solution of implementation the national action plans, there is one paper written by Olivier De Schutter which elaborates on this alternative and exposes other options.²⁸⁴ Once the action plans will be implemented in a relevant number of States, than it will be much easier to reach a high level of acceptance by international community.

We shall see where the story will lead...

²⁷⁹ More details can be found at: <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> Accessed 9 October 2017.

²⁸⁰ United Nations Human Rights Council Resolution A/HRC/RES/26/22 of 15 July 2014 Human rights and transnational corporations and other business enterprises, available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/083/82/PDF/G1408382.pdf?OpenElement> > Accessed 9 October 2017.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ About the United Nations Forum on Business and Human Rights, Available at: <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx> Accessed 9 October 2017.

²⁸⁴ Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' [2015] Business and Human Rights Journal 1 available at: < https://law.yale.edu/system/files/bhrj-treaty_on_business_and_human_rights-2015_0.pdf > Accessed 9 October 2017.

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