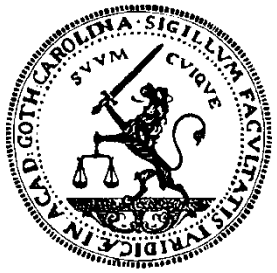

FACULTY OF LAW
Lund University

Fredrik Werdelin

A UN Treaty on Business and Human Rights: Bridging the Gap for Corporate Responsibility

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Radu Mares

Semester of graduation: Fall semester 2016

Contents

Summary

Since the 1970's there has been several attempts within the UN at drafting a binding instrument on business and human rights. Up until today, none of the attempts at adopting binding standards have succeeded, with the only successful initiative being the United Nations Guiding Principles on Business and Human Rights – a voluntary set of guiding principles meant to further the respect for human rights among both states and businesses.

In 2013, Ecuador released a statement backed by a large group of governments that called for a binding treaty to provide remedy for victims of human rights abuses by transnational corporations and other business enterprises. In 2014 the statement was backed by a plurality of the member states of the UN Human Rights Council, which then went on to pass a resolution to establish an open-ended Intergovernmental Working Group responsible for drafting a legally binding treaty on business and human rights.

The main objective of the treaty is to fill the legal void present within international human rights law, addressing pressing issues such as corporate impunity under weak rule of law and obstacles to victim's access to remedy. The thesis separates and identifies the main themes and issues of the treaty process and the legal void present within today's insufficient legislation, and analyses the options for addressing the legal issues that allows corporations avoid accountability and leave victims without redress. The analysis is enhanced by a comparative perspective on the previous attempts undertaken by the UN, drawing conclusions based on the arguments presented during past negotiations.

Sammanfattning

Sedan 1970-talet har det gjorts flera försök inom FN för att utarbeta ett bindande fördrag som reglerar företags ansvar att beakta mänskliga rättigheter. Fram till idag har inget av försöken till att anta bindande normer lyckats, och det enda framgångsrika initiativet är FN: s ”Guiding Principles on Business and Human Rights” - en uppsättning frivilliga riktlinjer, avsedda att främja respekten för de mänskliga rättigheterna bland både stater och företag.

2013 lade Ecuador fram ett uttalande, understött av en stor grupp regeringar, där de efterfrågade ett bindande fördrag för att hjälpa offer för brott mot de mänskliga rättigheterna, begångna av både transnationella och andra typer av företag. År 2014 stöddes förslaget av en pluralitet av medlemsstaterna i FN:s råd för mänskliga rättigheter. De gick sedan vidare med att anta en resolution, vilken upprättade en mellanstatlig arbetsgrupp som fick ansvaret för att utarbeta ett rättsligt bindande fördrag för företags ansvar för mänskliga rättigheter.

Huvudsyftet med fördraget är att fylla det rättsliga tomrum som existerar inom internationell lagstiftning om mänskliga rättigheter, och ta itu med angelägna frågor som exempelvis svaga rättsstater där företag kan undgå ansvar, samt hinder för offer att nå rättvisa. Uppsatsen separerar och identifierar huvudteman i fördragsprocessen och det rättsliga tomrummet som existerar under dagens otillräckliga lagstiftning, och analyserar möjligheter att åtgärda de glapp i lagstiftningen som möjliggör för företag att undvika ansvar och lämna offer utan upprättelse. Analysen förstärks av ett komparativt perspektiv av FN:s tidigare försöken, där slutsatser dras baserade på de argument som anförts under förhandlingarna.

Preface

Four and a half years of law school passes by fast, but the six years I ended up studying somehow felt even shorter - just a heartbeat and suddenly it all was just a memory from the past, as a new chapter eagerly begun. Maybe because the man that stepped out of the law faculty doors after those six years no longer is the same person as the boy that entered for the first time, that day in January 2011. When you get to experience so many exciting new things, experiences that has such an impact on you as an individual, time has a way of just flashing by and leaving you amazed of how far you have come. And now here I am; with my finished work, my final thesis before I earn my degree and leave my life as a student behind me, to get out into a world full of endless possibilities and opportunities. But these years, and especially these last six months, would never have gone by so smoothly without the support from those close to me. Therefore I would like to dedicate a few rows of gratitude towards you all, and to some in particular.

Thank you:

Mom and dad, for always standing by me, always believing in me and always making sure that I am doing my absolute best, without you I would not be anywhere close to where I am today.

All my friends in Law School, in particular Oskar and Jesper for our companionship throughout the education, your valuable advice and all the feedback you provided for my thesis; and Magda who gave me inspiration and support at the very start of the process, and helped move my thoughts in a more clear direction.

Esther, my love, for always motivating me to be a better person and giving me a purpose in life greater than myself.

Lastly I want to thank my supervisor Radu Mares, for all the help, guidance and inspiration you provided to make this thesis possible. I would not have gotten half as far without all your valuable advice!

Varberg, January 4, 2017

Fredrik Werdelin

Abbreviations

CETIM	Le Centre Europe – Tiers Monde
CHR	UN Commission on Human Rights
CJEU	Court of Justice of the European Union
CSO	Civil Society Organizations
CSR	Corporate Social Responsibility
ECCJ	European Coalition for Corporate Justice
EU	European Union
FIDH	International Federation for Human Rights
HRC	UN Human Rights Council
ICC	International Criminal Court
IChC	International Chamber of Commerce
IGWG	Intergovernmental Working Group
ILO	International Labor Organization
IOE	International Organization of Employers
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
SRSG	Special Representative of the UN Secretary-General
TNC	Transnational Corporation
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights
WTO	World Trade Organization

1 Introduction

1.1 Business and Human Rights

The idea of human rights can be traced several centuries back in time, with certain rights spelled out in documents like the Magna Carta of 1215, discussions during the 15th and 16th century renaissance, and the concept of natural rights embraced by John Locke and other philosophers of high regard. Later on such ideas laid ground for the ideologies behind the American and French revolutions. In modern days, the League of Nations was formed in the aftermath of the First World War, and its charter contained a mandate to promote several rights that later on was included in the Universal Declaration of Human Rights (UDHR). The UN was then founded in 1945 after the end of the Second World War, and only three years thereafter it adopted the UDHR. While the document itself does not consist of binding law, its importance for international law and human rights cannot be overstated; it has influenced most national constitutions since its adoption and has also been incorporated in many subsequent national and international laws and treaties.

From there on state obligations have continued to evolve and have been clearly established in international instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[1] When it comes to the responsibility of corporations, progress has been slow. Voices both within official organizations such as the UN, as well as the public sphere has called for more responsibility from the corporate, with the UN first attempting to create binding rules for transnational corporations (TNC) in the 1970s.[2] The initiative never led to any material progress, and negotiations ended up being abandoned in 1992. However, soft law approaches from the Organisation for Economic Co-operation and Development (OECD) and the International Labor Organization (ILO) were developed simultaneously, which after their adoption became reference points for Corporate Social Responsibility (CSR) debates at an international level.[3] In 1998, after escalating reports about corporate human rights violations, a Sub-Commission to the UN Commission on Human Rights (CHR) moved on to establish a working group on business and human rights. In 2003 the Sub-Commission presented its "Draft Norms on the Responsibilities of

[1] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, accessible at: http://www.refworld.org/docid/4538838e10.html, visited 2016-12-31.
[2] UN Commission on Transnational Corporations, *Draft UN Code of Conduct on Transnational Corporations*, UN Doc. E/1990/94.
[3] Ruggie, John Gerard, "Business and Human Rights: The Evolving International Agenda", *Corporate Social Responsibility Initiative, Working Paper No. 31*, Cambridge: John F. Kennedy School of Government, Harvard University, 2007, p. 2

Transnational Corporations and Other Business Enterprises with Regard to Human Rights"[4]. After being approved by the Sub-Commission, the Norms were called the first "non-voluntary initiative (in the area of business and human rights) accepted at international level."[5] However, when it was time to transfer the Norms to the CHR, the draft sparked strong opposition from various states and the majority of the business community, and few stood up to defend it.[6] With such a weak display of support, the CHR ended up declining to adopt the draft, arguing that while it contained "useful elements and ideas", it lacked legal standing.[7] Building upon the sense that the issue of business and human rights required serious attention, in 2005 the Commission on Human Rights asked the UN Secretary-General to appoint a Special Representative (SRSG) to investigate and submit views and recommendations concerning corporate responsibility and accountability with regard to human rights.[8] In 2011 the Human Rights Council (HRC), who took over the role of the CHR after a restructure in 2006, endorsed what would be the first global standard for human rights issues linked to business activity, the United Nations Guiding Principles on Business and Human Rights (UNGP).[9]

Even though the endorsement of the UNGPs was a huge step forward, there was still a legal void to be filled, and the debate on corporate responsibility for human rights abuses moved on. In September 2013, Ecuador released a statement backed by a large group of governments, proposing a legally binding instrument to "provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises".[10] In their view the UNGPs was merely a first step which, without a legally binding instrument, would be insufficient to put an end to corporate human rights violations.[11] In June 2014 the statement was backed

---

[4] UN Sub-Commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12.
[5] Weissbrodt, David and Kruger, Maria, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 2003, p. 903, accessible at: http://scholarship.law.umn.edu/faculty_articles/243, visited 2016-12-04.
[6] Miretski, Pini Pavel, and Bachmann, Sascha-Dominik, "Global Business and Human Rights - The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem", *Deakin Law Review*, Vol. 17, No. 1, 2012, p. 4f, accessible at: http://eprints.lincoln.ac.uk/6272/1/Miretski_Bachmann_-_Business_and_Human_Rights.pdf, visited 2016-12-04.
[7] UN HRC Res. 2004/11, UN Doc. E/CN.4/2004/L.73/Rev.1
[8] Kenan Institute for Ethics at Duke University, *The U.N. Guiding Principles on Business and Human Rights – Analysis and Implementation*, 2012, p. 5, accessible at: https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf, visited 2016-11-13.
[9] UN HRC Report A/HRC/17/31.
[10] *Statement on behalf of a Group of Countries at the 24rd [sic] Session of the Human Rights Council*, 2013, accessible at https://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf, visited 2016-11-13.
[11] Ibid.

by a majority of the Human Rights Council, which then went on to pass a resolution to establish an open-ended Intergovernmental Working Group (IGWG) responsible for drafting a legally binding treaty on business and human rights.[12] The Working Group has so far held two sessions, and is expected to present a draft at its third and upcoming session in 2017, containing material propositions for provisions in a prospective binding treaty.

Opinion has varied with regard to the responsibilities of corporations under international human rights law, and whether or not they should be bound to adhere to the same standards. Just a little more than a decade ago, few companies recognized that they had any responsibilities to respect human rights.[13] Instead they maintained that the human rights standards were only applicable to governments, and that their sole obligation was to respect national laws – even when those laws failed to meet the standards of international human rights law.[14] However, this point of view has changed dramatically these last years; in 2014 The Economist intelligence Unit conducted a survey, where over 80% of the responding corporate executives agreed that human rights are a matter of concern for both businesses and governments.[15] Another development during the 20th century is the advance of CSR, a corporate self-regulation model which aims to increase long term profits by sustainable actions that leads to reputational and operational benefits due to improved relationships with stakeholders.[16] With the growth of business' global operations, as well as the scale of which business as a whole is operating on, it has become more and more clear that focus needs to lie not only on states, but also on the impact that the actions of corporations has on the enjoyment of human rights.

[12] UN HRC Res. A/HRC/26/L.22/Rev.1.
[13] Ganesan, Arvind, *Reflections of the State of Business and Human Rights*, accessible at https://www.hrw.org/news/2013/01/02/reflections-state-business-and-human-rights, visited 2016-09-21.
[14] Business & Human Rights Resource Centre, *Business & Human rights – A Brief Introduction*, accessible at https://business-humanrights.org/en/business-human-rights-a-brief-introduction, visited 2016-09-21.
[15] The Economist Intelligence Unit, *The Road from Principles to Practice –Today's Challenges for Business in Respecting Human Rights*, accessible at https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice/white-paper/road-principles-practice-todays-challenges-business-respecting-human-rights, visited 2016-09-22.
[16] Australian Centre for Corporate Social Responsibility, *What is CSR?*, accessible at http://accsr.com.au/what-is-csr/, visited 2016-09-22.

1.2 Purpose

The thesis examines the ongoing progress of the Intergovernmental Working Group, established by the United Nations Human Rights Council in June 2014, to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[17] The focus lies on analysis and discussion of the ongoing process, its scope and its main elements. This is combined with a comparative analysis of previous attempts to create international instruments within this field. The objective is to separate and analyze the main themes out of the disorganized state of the debate, and identify core issues that needs to be resolved.

1.3 Research Questions

The debate on corporate responsibility for human rights is often complex, and covers a wide range of topics discussed simultaneously or intertwined with each other. The discussion has been open for several decades, and the thesis will therefore examine the circumstances and arguments of previous proceedings to provide a greater depth of understanding of the regulatory and policy options heatedly debated among stakeholders. In order to identify the core legal and conceptual issues of the process, the thesis aims to answer the following research questions:

- What constitutes the regulatory gap that the treaty aims to fill?
- What are the main elements of the proposed treaty, and what are the relevant legal and policy aspects that has made progress in regulation of transnational corporations difficult?

1.4 Methodology

The methodology applied in this thesis is a mix of the traditional legal approach and a comparative approach, with the majority focus on the analysis in the traditional legal approach. The study of the Intergovernmental Working Group in progress is an analysis of the preparatory work of a possible future instrument on business and human rights, and makes a textual and contextual analysis of soft law instruments. Such instruments and current proposals are discussed in relation to legal principles found at national and international level. Official documents, reports, draft articles, and writings of academic scholars will all be important to take into consideration, to create a wide base of information. A comparative approach will then be applied to acquire a greater

[17] UN HRC Res. A/HRC/26/L.22/Rev.1.

understanding of the overarching principles and themes that shape the treaty.

When a discussion of an ongoing process is conducted, the nature of the subject entails that the source material will be limited to publications available shortly after the event. It will take years for in-depth academic treatments through articles and books to appear; they are currently unavailable to cover such recent developments within the UN. In this case it is evident by the large part of sources being gathered from the internet – especially the portal on Business and Human Rights Resource Center[18], which comprehensively gathers position papers and analysis from direct participants and informed observers of the process. There are also difficulties with accurately attributing some views referred to in this thesis. Thus the second session of the Intergovernmental Working Group, held in October 2016, is covered in a draft report released by the UN which leaves out the names of the panellists as well as the states and NGOs. This left me no option other than to account for those discussions referring to statements anonymously from "a state", "a panellist", or "an NGO".

It should also be emphasized that the thesis does not intend to apply a historic method, and that the sections describing the processes of the earlier attempts at adopting a treaty on business and human rights serve the purpose to provide a comparative background for the discussion of the present process. The Code of Conduct contained only a brief and general reference to human rights, which furthermore did not spark any controversy or discussion during the long negotiations before the process ultimately was terminated. Therefore the section describing the Code is mainly drawn from a single, comprehensive, academic source that proved sufficient for purposes of this analysis.

1.5 Structure

The thesis begins with an overview of the various attempts at regulating business and human rights, from the beginning with the UN Code of Conduct, up until the most recently proposed binding treaty (Chapter 2). In Chapter 3, the legal void in the international human rights regulations is discussed, in order to create a solid base for the following analysis of the ongoing process. Each of the three subsequent chapters (4-6), addresses one of the main elements that I have discerned out of the treaty process, paired with a comparative analysis at the end of each chapter. The thesis is then concluded with a final chapter (Chapter 7), that contains my own thoughts and analysis of the findings that were discussed throughout the thesis.

[18] https://business-humanrights.org/en/binding-treaty.

2 UN Instruments on Business and Human Rights

Disasters such as the Rana Plaza factory collapse in Bangladesh, where more than a thousand workers were killed[19], and the chemical accident in Bhopal with more than 20 000 casualties[20], as well as reports of child labor being used within the mining industry[21] serves to illustrate how pressing the issue of corporate responsibility with regard to human rights is. Reality is that the present system contains differences and deficiencies that allows for corporate impunity under weak rule of law, which leaves victims without access to remedy. This chapter gives an overview of the key instruments developed within the UN to address the legal void present within the field of business and human rights.

2.1 UN Code of Conduct (1973-1992)

In 1973, the UN Economic and Social Council established a "Group of Eminent Persons" to study the impact of TNCs on the international development process.[22] The group recommended the UN to set up a Commission on TNCs which, among other things, would be tasked to formulate a code of conduct.[23] In 1974 the UN Centre on Transnational Corporations[24] was established, and by 1977 it was leading the negotiations of the Draft Code of Conduct on Transnational Corporations.[25] The Code applied solely to TNCs, and contained provisions for respect of national sovereignty and national laws, prohibitions against corruption, environmental concerns, disclosure of information, how TNCs are treated by their host countries, jurisdiction and intergovernmental cooperation.[26]

---

[19] Kasperkevic, Jana, "Rana Plaza collapse: workplace dangers persist three years later, reports find", *The Guardian*, 2016, accessible at https://www.theguardian.com/business/2016/may/31/rana-plaza-bangladesh-collapse-fashion-working-conditions, visited 2016-11-15.
[20] Discussed in detail in chapter 3.1.
[21] Human Rights Watch, *"What… if something went wrong?" – Hazardous Child Labor in Small-Scale Gold Mining in the Philippines*, accessible at https://www.hrw.org/report/2015/09/29/what-if-something-went-wrong/hazardous-child-labor-small-scale-gold-mining, visited 2016-11-15.
[22] Nolan, Justine, "Mapping the movement: the business and human rights regulatory framework", *Business and Human Rights – From Principles to Practice*, 2016, p. 39.
[23] Deva, Surya, and Bilchitz, David, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, 2013, p. 5.
[24] Will from here on during chapter 2.1 be referred to as "the Commission".
[25] Nolan, "Mapping the movement", p. 39.
[26] Draft United Nations Code of Conduct on Transnational Corporations, UN Doc. E/1990/94. TNCs are defined in article 1(a): "The term 'transnational corporations' as used in this Code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that

The process went on for more than a decade, but the final Draft Code in 1990 ended up never being adopted, due to disagreements between developing countries and developed countries.[27]

The first session of the Commission was held in 1975, and it established a preliminary programme of work which gave the Code the highest priority. By the second session the year after, an intergovernmental working group was set up to formulate the Code, with the objective to reach consensus in its adoption. However, it would prove hard to reach consensus on the subject, since the states were clearly distinguished into three groups of interest; developing countries, developed countries, and socialist countries.[28] The different positions can in simple terms be described as follows:

At the time of the negotiations for the Code, developing countries were by an overwhelming majority acting solely as recipients of foreign TNCs, and therefore their interest leaned towards rules that was beneficial to host countries. They wanted to minimize the negative effects TNCs could have on their territories – economic, social and political, and at the same time retain the capacity to regulate the treatment of TNCs within their national legislation, to not yield any of the sovereignty that for many of the states was just recently achieved. Since they had virtually no TNCs of their own, they were not particularly interested in developing rules that protected foreign investors. Their main goal was therefore to develop a treaty that solely prescribes obligations for TNCs.[29]

Socialist countries on the other hand, had a purely negative view on TNCs altogether; they did not permit any foreign investors into their countries, and their presence as foreign investors themselves was negligible. In their view, the few TNCs they actually had was to be excluded from the scope of the Code, since they were subject to complete government control. This led to difficulties with the definition of the scope, since western countries would not agree on making a difference between privately owned companies and those controlled by socialist governments. Their position in the negotiations was therefore defensive, their main objective being that their corporations remain outside of the scope of the Code. On other topics they were leaning towards the position of developing countries.[30]

---

one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others." The final version from 1990 is not available to find online, but can be studied in extracted form in: Tully, Stephen, *International Documents on Corporate Responsibility*, 2005, p. 6–14, accessible at: https://books.google.se/books?id=OjNmAwAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, visited 2016-12-03.

[27] Deva and Bilchitz, p. 5.

[28] Sauvant, Karl, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned", *The Journal of World Investment & Trade*, Vol 16, Issue 1, 2015, p. 19f.

[29] Ibid, p. 20f.

[30] Ibid, p. 21f.

The developed countries were globally both the main host and home countries of TNCs, but among themselves they already had instruments in place that covered both conduct of companies as well as how foreign investors should be treated in host countries. Their main concern was therefore to guarantee the treatment of investors establishing themselves in developing countries, since in their view there were many uncertainties tied to the recent decolonization, with factors like weak and often partial judiciaries as well as the reluctance of those states to commit to international investment rules. The interest of developed countries was therefore to draft a code of conduct for the host countries of TNCs, which would mean to decrease the space of policymaking for host countries with regard to TNCs.[31] Notably, this was in complete contradiction to the outset of the developing countries.

The negotiations faced problems, not only because of the different viewpoints of the developed and developing countries, but also because of the fact that it was the first time the negotiators dealt so extensively with international investments and their associated problems – they were simply not familiar with all the practical issues that had to be addressed. With time, it became clear from the negotiations that rules both regarding behavior of TNCs and the governmental treatment of them needed to be included in the Code for there to be a realistic chance of it ever getting ratified.[32]

Developing countries seemed to be getting their way without too much friction, as a lot of their demands were met to some extent rather quickly. But they did have a few problems with the provisions that gave rights to TNCs; mainly because they limited their space of policymaking, and because those provisions were drafted in a more precise legal language than those that put restrictions on companies.[33]

The developed countries on the other hand were not particularly against guidelines on TNCs. Since most of them already had agreed on mutual standards among themselves via the OECD Guidelines for Multinational Enterprises, the process of negotiating standards for the Code was made much easier, and in the end they did not arrive far from the already existing principles. However, the main interest of the developed countries was strong investment protections, and at the very minimum they wanted to keep the standards already set out in the various trade treaties they had established amongst themselves.[34]

None of the provisions for investment protection in the treaty ended up being fully agreed upon, where the hardest part was to get developing countries to recognize the principles of already established trade law – since none of them had taken part in their creation. There was also the issue of the legal nature of the Code – binding or voluntary – where developing

[31] Ibid, p. 22-25.
[32] Ibid, p. 40f.
[33] Ibid, p. 42f.
[34] Ibid, p. 43ff.

countries wanted binding guidelines for the conduct of TNCs, but were disinterested in binding standards for states' treatment of foreign investors, while developed countries desired voluntary provisions out of fear that they would otherwise be enforced too harshly against the corporations. Other issues never fully agreed upon were: (i) implementation – while developed countries wanted strong implementation of treatment provisions and weak on guidelines, the developing countries wanted the exact opposite; (ii) scope of application – if it should apply to both private enterprises as well as state-owned enterprises; (iii) provisions relating to international law; (iv) national treatment and fair and equitable treatment; (v) nationalization and compensation, settlements of disputes; (vi) jurisdiction; and (vii) respect for national sovereignty.[35]

The division between the interests and objectives of developed and developing countries permeated the entire set of issues being disagreed upon, and a balance between the two was never reached. The negotiations started to slow down after 1983, and while experts and different groups of interest made efforts to keep the negotiations moving forward, they eventually died out. In a last effort, at what ended up being the last meeting of the Commission, each state was asked to share the wording of an acceptable treaty, which was then incorporated into a new suggestion. But even that was rejected by several western countries, led by the UK and the USA, and after that it was clear that neither developed nor developing countries were interested in continued negotiations.[36]

2.2 Draft Norms (1998-2005)

Concerned by escalating reports of corporate human rights abuses[37], a Sub-Commission to the UN Commission on Human Rights asked for a working document on the issue of TNCs and human rights to be presented at its next session in 1997. The following year, as a response to the report, the Sub-Commission decided to create a working group on the activities of TNCs. The group had a three-year mandate to identify issues, gather information on corporate effects on human rights, evaluate the compatibility of investment agreements with human rights, make recommendations regarding the methods and activities of TNCs to ensure protection of human rights, and define the scope of states' obligations to regulate TNCs. In its 1999 session, the working group sent a request to prepare a draft of the Norms.[38]

In 2001 the working group considered the draft a second time, after having left a year for improvements and suggestions by different groups of Non-Governmental Organizations (NGOs), scholars and corporate

[35] Ibid, p. 45-50.
[36] Ibid, p. 52-55.
[37] Ruggie, *Business and Human Rights*, p. 3.
[38] Weissbrodt and Kruger, p. 903f.

representatives on the first draft presented in 2000. Since it had not yet reached the stage of completion, the working group got its mandate extended for another 3 years, wherein the task of drafting human rights norms was specified further. In August 2003 the working group presented its final version of the Norms to the Sub-Commission, after taking into consideration all comments made on previous versions by NGOs and other interested parties.[39] A notable difference in the process of drafting the Norms is that no governments took part in the negotiations and discussions during the drafting, in contrast to the Code as well as the present process of developing a binding treaty.

The finalized version contained 23 provisions, out of which four were definitions of the terminology in the document. The definition of "other business enterprises" was fairly wide within the Norms; it included any corporation regardless of the nature of its activities being domestic or transnational, as long as it either had any relation to a TNC, the impact of its activities were not entirely local, or if its activities violated the provisions for personal security. The provisions protecting personal security included prohibitions against activities relating to war crimes, crimes against humanity, genocide, torture, forced or compulsory labor, and other violations of humanitarian law or international crimes defined in international law, which meant that the Norms applied to all corporations in situations of gross human rights violations. Additionally, there were principles regarding right to equal treatment, right of workers, respect for national sovereignty, consumer protection, and environmental protection.[40]

The Sub-Commission approved the Norms and transferred them to the Commission on Human Rights for consideration during their next session, asking them to invite UN bodies, states, NGOs, and other stakeholders to make comments on the Norms. A large number of NGOs made public statements of support for the Norms after the meeting in 2003, and several TNCs agreed to try out the Norms in their corporate policy as a commitment to human rights protection.[41] In contrast to the overwhelmingly positive response from NGOs was the intense opposition from various states and most of the business community, led by the International Chamber of Commerce (IChC) and the International Organization of Employers (IOE).[42] Most states took a reluctant position towards the Norms, preferring to stick to the traditional framework of international law, which keeps the States as its direct legal subject.[43] The IChC and IOE led a campaign against the Norms; already in 2003 they submitted a statement to the session of the CHR saying that the Norms would neither contribute to encouragement nor promotion of human rights, that it would divert states' attention from implementing their existing obligations, and that it was counterproductive to

[39] Ibid, p. 904ff.
[40] UN Doc. E/CN.4/Sub.2/2003/12.
[41] Weissbrodt and Kruger, p. 906f.
[42] Ruggie, *Business and Human Rights*, p. 4.
[43] Miretski and Bachmann, p. 5.

the voluntary effort of the Global Compact[44]. Before the CHR considered the Norms in 2004, the IChC and IOE sent a 40-page document to the member states, suggesting that the Norms should be struck down and advising against further work in that direction. They urged the CHR to disapprove of the Norms and clearly state that they have no legal significance, and that only states – and not private persons or legal entities – are duty-bearers of human rights.[45]

Regardless of the adoption of the Norms by the Sub-Commission and the wide acclaim from the NGO community, the Commission on Human Rights deemed in its 2004 session that the draft, despite its valuable elements, ultimately had no legal standing and therefore dismissed it. Furthermore, the Sub-Commission was instructed not to engage in monitoring of corporations.[46] The Norms were finally completely abandoned in 2005 when the CHR transferred the task of regulating TNCs to other UN organs, such as the mandate given to the SRSG.[47]

2.3 UN Guiding Principles (2005-2011)

While the Norms entailed yet another failure to impose human rights obligations upon the business community, the project had caught the attention of enough governments around the world to spark the debate. Even if the instrument itself had been rejected, the issue of business and human rights had been highlighted as an area that required further attention. The topic was however still politically charged, with strong opposing opinions between states, the business community and various NGOs. The Commission on Human Rights therefore decided to take a more balanced approach and try to find common ground to build upon – in contrast to the Code and the Norms, where a more aggressive and direct approach had been attempted by drafting strong, binding norms.[48]

In 2005 the Commission therefore chose to establish a mandate for an individual expert to clarify existing standards for businesses. That included the role of states in regulating business, as well as to define fiercely debated concepts such as "corporate complicity" in human rights abuses, and the corporate "sphere of influence" which are essential for defining the scope of

[44] The Global Compact is the world's largest global corporate sustainability initiative (a.k.a. CSR), for further information, see for example: https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf, visited 2016-11-28.
[45] Bischöfliches Hilfswerk Misereor, *Corporate Influence on the Business and Human Rights Agenda of the United Nations*, Working Paper, 2014, p. 10f, accessible at: http://www.socialwatch.org/sites/default/files/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf, visited 2016-11-18.
[46] Ruggie, *Business and Human Rights*, p. 4.
[47] Miretski and Bachmann, p. 5, Ruggie, *Business and Human Rights*, p. 4.
[48] Ruggie, John Gerard, *Just Business: Multinational Corporations and Human Rights*, 2013, p. 10f.

corporate responsibility. The UN Secretary General was asked to appoint the expert as his Special Representative on human rights and TNCs, and the choice fell on John Ruggie, Professor in Human Rights and International Affairs at Harvard's Kennedy School of Government.[49]

Ruggie ended up in the midst of a polarized debate. On one side were the NGOs, insisting that the Norms-initiative was not dead and that they needed to play a central role in the debate. On the other were the business community with IOE and IChC at the frontline, demanding a statement from Ruggie rejecting the need of a new international framework, and instead urging the need for a voluntary instrument that helps business deal with human rights challenges.[50] Another stakeholder speaking out heavily against the Norms was the USA, who stated that they would oppose any future resolution which intended to promote a code of conduct or norms for TNCs.[51] In his first interim report, Ruggie decided to distance himself from the Norms, by criticizing them and emphasizing his approach based on consensus with all stakeholders including the business community.[52]

After being appointed, Ruggie started a lengthy process that spanned over six years, including over 50 international consultations and collecting hundreds of submissions and commentaries. After the first three years, in 2008, the report "Protect, Respect and Remedy: A Framework for Business and Human Rights"[53] was presented to the HRC (who now had taken over the responsibilities of the CHR), wherein it was explained that the fundamental challenge of international human rights law was to bridge the global governance gap in the legislations. The solution was presented under three fundamental pillars: (i) the state duty to protect against human rights abuses; (ii) the corporate responsibility to respect human rights; and (iii) the access to effective remedy for victims, both judicial and non-judicial. The framework was unanimously approved by the Council, but was found to be difficult to apply in practice, which is why another three years were added to the mandate to build the framework into more practical guidance.[54]

The end result was presented to the Council in 2011 as the UN Guiding Principles,[55] and a resolution endorsing the principles was adopted without the need for a vote – a clear indication of the close engagement of states during the drafting process.[56] The UNGPs are based on the same three pillars from the framework presented in 2008, and contains 31 principles

---

[49] Ibid, p. 11.
[50] Ibid, p. 12.
[51] Statement of US Delegate Leonard Leo at the Commission on Human Rights on Item 17, "Transnational Corporations", 2005, can be read as an excerpt in "Digest of United States Practice in International Law", p. 328f, accessible at: https://www.state.gov/documents/organization/138677.pdf, visited 2016-11-30.
[52] Bischöfliches Hilfswerk Misereor, p. 12.
[53] UN HRC, *Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN HRC Report A/HRC/8/5.
[54] Bischöfliches Hilfswerk Misereor, p. 11-14.
[55] UN HRC Report A/HRC/17/31.
[56] Kenan Institute, p. 5.

that detail the obligations and responsibilities of states and businesses. However, as Ruggie himself stated it, the UNGPs does not contribute by creating any new international standards, but by defining and elaborating on existing standards and identifying shortcomings and gaps in the current framework that needs improvement.[57]

The consequence of the UNGPs being a voluntary set of principles is that global implementation is required for there to be any enforceable rules, and specialized instruments needs to be negotiated to cover certain areas such as extraterritorial jurisdiction. In Ruggies own words, the adoption of the UNGPs was "the end of the beginning", and thus there is still a long process ahead to reach a complete legal framework that is globally enforced and provides adequate remedies for victims.[58]

2.4 A Binding Treaty (2013-)

In September 2013, a joint statement in favor of an international treaty on business and human rights was drafted and issued by Ecuador. The statement was signed by a large number of countries, and over 90 national groups, international NGOs and trade unions expressed their support for it.[59] In the statement they expressed their clear opinion regarding the effectiveness of the UNGPs, stating that they were simply a first step that is not adequate to completely address the issue with human rights violations by TNCs.[60]

However, not everyone had a positive attitude towards this new initiative. Ruggie released a response, stating that the category of business and human rights is too large and too complex to ever be covered by a single binding instrument.[61] Moreover he quoted himself from a previous article in 2007, where he had stated that international legal instruments will play an important role in the development of business and human rights, but that their success were dependent on them being very precise and carefully crafted.[62] Later on he chose to publish an explanatory note, where he further clarified that he in his earlier brief had been expressing "grave doubts about the value and effectiveness of moving toward some overarching 'business

[57] Bischöfliches Hilfswerk Misereor, p. 14f.
[58] Ruggie, John Gerard, *A UN Business and Human Rights Treaty?*, Issues Brief, Boston: Harvard John F. Kennedy School of Government, 2014, p. 5, accessible at: https://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf, visited 2016-11-18.
[59] Kasla, Coldo, *Ruggie versus Ecuador: Will a human rights norm ever emerge regardless of Western support?*, accessible at https://rightsincontext.eu/2014/02/09/ruggie-versus-ecuador-will-a-human-rights-norm-ever-emerge-regardless-of-western-support/, visited 2016-11-18.
[60] *Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council*, supra not 10.
[61] Ruggie, *A UN Business and Human Rights Treaty*, 2014.
[62] Ruggie, *Business and Human Rights*, 2007, p. 28.

and human rights' treaty".[63] The update was posted on the website of the IOE, along with a statement from the IOE Secretary-General, in which he shares Ruggie's doubts. Additionally the IOE press release expresses concerns that the work with the new treaty would detract from the ongoing efforts to promote the corporate responsibilities established with the UNGPs. It also warns that the consensus reached among all the stakeholders to the UNGPs might be threatened by subversion in the new process, if the different groups of stakeholders choose to pursue their own objectives instead of focusing on working together to find solutions for pressing issues.[64] The response from the IOE gives an indication to the position of the corporate stakeholders in the discussion, and demonstrates the pressure they put on Governments and civil society when the issue of a legally binding instrument on business and human rights is discussed in the HRC.[65] Nonetheless, the treaty was brought up on the HRCs agenda merely 9 months after the initial statement by Ecuador.

In June 2014, during the Human Rights Council's 26th session, a resolution to pursue a binding treaty that regulates business and human rights was accepted. The resolution called for the establishment of an open-ended intergovernmental working group, with the task to elaborate an international legally binding treaty on human rights that regulates transnational companies and "other business enterprises".[66] The wording of "other business enterprises" is defined in a footnote of the resolution in the following way:

> " '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."[67]

The definition gives the term an extremely narrow meaning, almost to the extent of not adding anything to the expression "Transnational Corporation". The definition is of great importance to the scope of the treaty, and is the reason behind one of the deepest divisions between stakeholders in the treaty process.

The resolution was passed by the council in a voting that went 20 to 14, with 13 members abstaining. Among the states voting against the resolution were Germany, Japan, the UK, and USA.[68] While China did vote for the

---

[63] Ruggie, John Gerard, *A UN Business and Human Rights Treaty Update*, Boston: Harvard John F. Kennedy School of Government, 2014, accessible at: https://business-humanrights.org/sites/default/files/media/un_business_and_human_rights_treaty_update.pdf, visited 2016-11-10.
[64] IOE press release, *IOE Secretary-General shares John Ruggie's 'grave doubts' over Ecuador proposal for new business and human rights treaty*, 2014, accessible at www.ioe-emp.org/index.php?id=1078, visited 2016-11-18.
[65] Bischöfliches Hilfswerk Misereor, p. 25.
[66] UN HRC Res. A/HRC/26/L.22/Rev.1.
[67] Ibid.
[68] UN HRC Res. A/HRC/26/9.

passing of the resolution, they also put up tough qualifications for their support, indicating that it is far from unconditional and could be easily withdrawn. With this, the process came off to a weak start; the mandate had very thin support, since it did not win a majority in the voting of the council members but merely a plurality, and furthermore among the countries that opposed are the homes of most of the world's TNCs.[69]

The adoption of the resolution triggered intense and opposing views. Yet again the IOE released a statement, this time expressing deep regrets that the voting results breaks up the unanimous consensus achieved in 2011 with the adoption of the UNGPs. They went on to describe the outcome as a genuine setback to the efforts of improving human rights, by what is in their view an exchange of the constructive work with the UNGPs for an approach that has only ended in failure in the past. [70] Strong opposition was also expressed by the US, UK, and states of the EU, who stated that they would refuse to participate during the sessions of the IGWG.[71] USA put forth multiple objections to the new treaty, arguing that it would polarize the issue, that states have not yet had enough time to implement the UNGPs which would now be undermined by the new process, that the type of one-size-fits-all instrument proposed is inadequate for the complexities of the issue, that only state parties to the treaty would be bound in contrast to the universal application of the UNGPs, that an intergovernmental working group would lack participation from key stakeholders such as businesses, that there are problems with the propositions to impose legal obligations upon corporations – since according to the USA they are not subjects of international law, and mentioned lastly was that only some corporations would be regulated, due to the narrow scope of the treaty established by the footnote in the resolution.[72]

On the other end of the spectrum a wide support for the initiative was displayed, with a broad coalition of NGOs signing a joint statement of approval. They argued that a binding instrument is required to recognize human rights on the same level as other obligations in the context of trade and investment. Corporate adherence to the duties is likely to be irregular when it is left up to the businesses themselves to ensure the regulations are complied with. Nonetheless, the development of the legally binding treaty should not deter the ongoing work with other national or soft law (such as

[69] Ruggie, John Gerard, *Quo Vadis? – Unsolicited advice to Business and Human Rights Treaty Sponsors*, 2014, accessible at https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors/, visited 2016-11-16.
[70] IOE press release of 26 June 2014, *Consensus on Business and Human Rights is broken with the Adoption of the Ecuador Initiative*, accessible at http://www.ioe-emp.org/index.php?id=1238, visited 2016-11-18.
[71] Cassel, Douglass and Ramasastry, Anita, *White Paper: Options for a Treaty on Business and Human Rights*, 2015, p. 8.
[72] Statement by the Delegation of the United States of America, *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, 2014, accessible at: https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/, visited 2016-11-18.

the UNGPs) regulations with the purpose to enhance the corporate respect for human rights.[73]

Beside the establishment of the IGWG, it was also determined in the resolution that the working group should dedicate its first two sessions to holding discussions about the form, scope, nature and content of the proposed treaty. In particular the first session would be focused on collecting input from states and other relevant stakeholders on the scope, rules and other possible elements of the treaty.[74]

The sessions of the IGWG are divided into thematic panels, held over the course of five days. Each panel focuses on a specific topic relevant to the development of the treaty, and contains discussions by panellists invited to the negotiations, as well as interventions from state delegations and Civil Society Organizations (CSO) representatives.[75]

The IGWG held its first session 6th – 10th of July 2015, a little more than a year after the resolution of its establishment was adopted by the HRC. For the first meeting a total of 60 states members of the United Nations were in attendance, together with representatives from the EU and other intergovernmental organizations, as well as 49 NGOs. Noticeable absences from the negotiations were many of the big global economies, including USA, Canada, Australia, Germany, Japan and the UK.[76]

Turbulence in the discussions arose already during the adoption of the programme of work, when the EU representative, together with delegates from France and Luxemburg, proposed two new amendments to the programme: the first being that more emphasis was to be put on the UNGPs, adding a session to renew commitment for their implementation; and the second referred to the definition of "other business enterprises", calling for the binding treaty to incorporate every type of business regardless of transnational activities being involved or not.[77]

The proposition to revise the scope was not well received, and on the second day of the session the EU chose to depart from the negotiations.[78] This decision was highly criticized, especially among NGOs, and furthermore so since they just one week after participated in highly controversial

---

[73] Nolan, Justine, "A Business and Human Rights Treaty", *Business and Human Rights – From Principles to Practice*, 2016, p. 71.
[74] UN HRC Res. A/HRC/26/9.
[75] UN HRC Report A/HRC/31/50, p. 5.
[76] Ibid, p. 4.
[77] ECCJ, *UN Treaty on Business & Human Rights negotiations Day 1 - Divide emerges between EU and other delegations*, 2015, accessible at http://corporatejustice.org/news/173-un-treaty-on-business-human-rights-negotiations-day-1-divide-emerges-between-eu-and-other-delegations, visited 2016-11-20.
[78] ECCJ, *UN Treaty on Business & Human Rights negotiations Day 2 - EU disengagement & Lack of consensus on scope*, 2015, accessible at http://corporatejustice.org/news/174-un-treaty-on-business-human-rights-negotiations-day-2-eu-disengagement-lack-of-consensus-on-scope, visited 2016-11-21.

negotiations regarding the Transatlantic Trade and Investment Partnership[79]. An article authored by the European Coalition for Corporate Justice (ECCJ), the International Federation for Human Rights (FIDH), and Friends of the Earth was published in the EU Reporter, questioning if the EU really stands up for its citizens or rather the profits of large corporations. In the text they agreed that the proposition the EU made was in itself a necessary one, because of the prospect of loopholes being preserved with a narrower scope of corporations being targeted by the treaty. However, the way they went about it; by announcing them as prerequisite demands before the discussions even started, instead of participating in the procedure and then introducing them during the panel dedicated to this specific issue, was questioned as potentially being a political stunt simply to create a reason to walk out of the negotiations.[80] In response, right as the second session of the IGWG was about to begin, the European Parliament adopted a resolution, calling for participation in the discussions. In the resolution, the parliament expresses its warm welcome to the initiated process of developing a binding treaty, and apologizes on behalf of the union and its member states for any obstructive behavior during the past session. Thereafter they proceed to urge the EU and all member states to constructively participate in the negotiations from now on.[81]

The IGWG held its second session 24th – 28th of October 2016, carrying big hopes for progress from the international community. At the second meeting the attendance had risen to 80 state members of the UN, together with 42 NGOs, and the EU showing up again after its early departure at the previous session. As a positive development, besides the pure increase in numbers of states attending, had a few of the previously absent global economies decided to show up for the second session, including Australia, Germany, Japan and the UK, and the number of EU member states in attendance had jumped from 8 to 16. However, the problem of Canada and USA refusing to take part still remained unresolved.[82]

[79] TTIP is a trade partnership between the EU and the US that is highly criticized for the prospective reducing of regulatory barriers it would bring for big business. For further information: http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html, visited 2016-11-29.
[80] ECCJ, FIDH and Friends of the Earth, "TTIP and UN Treaty: EU must stand up for human rights", *EU Reporter*, 2015, accessible at: https://www.eureporter.co/world/2015/07/16/ttip-and-un-treaty-eu-must-stand-up-for-human-rights/, visited 2016-11-29.
[81] European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)).
[82] UN HRC, *Draft report on the second session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, p. 2f, accessible at: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx, visited 2016-11-30.

3 Legal Gap

As shown in the previous chapter, there have been several attempts in the past 50 years to regulate the extraterritorial activity of corporations and to establish efficient means to protect human rights all across the globe. Previous attempts have been made with various levels of success, but there is still a long way to go before the problem is solved. The Norms chose to impose direct obligations on corporations, in combination with enforcement mechanisms such as UN monitoring and national-level enforcement of corporate obligations, but ended up being rejected in the shadow of the reluctant attitude from states and the strong objections from the business community. The UNGPs on the other hand were based on the principle of the state as the primary caretaker for human rights, putting the focus on strengthening national legal mechanisms for states to regulate corporate activity within their territory together with non-binding responsibilities for corporations to abide by, and was unanimously adopted by the HRC.

The lack of binding obligations upon corporate activity leaves a regulatory gap, since the existing national mechanisms in many cases have proven to be insufficient to adequately handle situations arising from transnational business ventures. Disagreements prevail regarding the scope of states extraterritorial duties to protect victims from human rights abuses, and therefore whether or not a legal obligation exists for states under international law in relation to extraterritorial activities from corporations domiciled within their territory. It is clearly established in international human rights law that the state duty to protect is not limited to cases within their territory, but rather to cases that falls within their jurisdiction. The scope of jurisdiction is interpreted broadly by international human rights tribunals, and states can therefore be in violation of that duty for extraterritorial actions of anyone within its effective control or authority. However, that is not the sole source, as there are many others who maintain different views on the subject of extraterritorial jurisdiction. The SRSG developing the UNGPs among others, asserts that there is no obligation for states to regulate extraterritorial activities, but neither any prohibition to do so[83]. Others express legal opinions ranging from implicit obligations on states to regulate extraterritorial activities, to victims of corporate violations of human rights being brought under the jurisdiction of the violator's home state, to responsibility for transnational human rights abuses being attributed to the home state of the company.[84]

In light of this disagreement upon a clear definition of extraterritorial jurisdiction, home states have avoided human rights regulations regarding the transnational activities of corporations domiciled within their

[83] Principle 2 of the UNGPs, UN HRC Report A/HRC/17/31.
[84] Simons, Penelope and Macklin, Audrey, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, 2014, p. 5ff.

jurisdiction, and instead left it to the host state to ensure the protection of human rights from TNCs. But a majority of corporate human rights abuses take place in developing countries, where the legal systems often are weak and lacking in several key aspects required to efficiently protect human rights. In the current state of affairs even the most powerful of states are starting to face issues with controlling corporate activity.[85] Furthermore, international investment and trade agreements have created a chilling effect on the regulatory capacity of host states towards foreign investors. They could face lawsuits in international arbitration tribunals, which often tend to lean towards corporate interests in their decisions, and where enormous monetary damages are at stake. There is also a reluctance to impose laws that are too strict, because of the risk of losing foreign investments to competing nations with softer regulations.[86]

Furthermore, in addition to the gaps in international and national regulations, the way that international corporations structure themselves also allows them to avoid liability in many cases. Corporate groups containing parent companies, subsidiaries, affiliates, joint-ventures, supply chains etc. are typically treated as separate entities, despite the often closely integrated relationship within the group. This leads to corporate groups being able to protect themselves from liability with risky business by utilizing subsidiaries, containing the damage in that particular corporate branch. The solution to the problem lies with finding new ways to "pierce the corporate veil"[87], and thus hold controlling companies accountable for the actions of their subsidiaries. But courts are very reluctant to apply this doctrine, and it becomes even more complicated when the piercing crosses borders, especially if the chain of ownership goes through a number of subsidiaries domiciled in different states.[88]

Another problem is the lack of cross-border cooperation between the states' legal systems in the access to remedies for victims. Improvements needs to be made within several areas, including monitoring, exchange of information, and execution of judgments.[89] To better understand how the gap manifests itself, two prominent international corporate human rights cases will be used for illustration.

---

[85] Ibid, p. 7.
[86] Mohamadieh, Kinda, and Uribe, Daniel, "Identifying standards for legal liability of TNCs and other business enterprises for human rights violation and building national and international mechanisms for access to remedy", *South Bulletin*, No 87-88, 2015, p. 30f, accessible at https://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf, visited 2016-11-26; Simons and Macklin, p. 180f.
[87] "Piercing the corporate veil" is an expression in Corporate law, meaning that the protection of limited liability that parent companies and shareholders enjoys is removed, holding them responsible for the actions of the corporation. For more information, see: https://www.law.cornell.edu/wex/piercing_the_corporate_veil, visited 2016-11-26.
[88] Simons and Macklin, p. 8f.
[89] De Schutter, Olivier, *Towards a Legally Binding Instrument on Business and Human Rights*, 2015, p. 40f, accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668534, visited 2016-12-07.

3.1 Bhopal Chemical Accident

Union Carbide India Ltd (UCIL), which is a subsidiary of the American TNC Union Carbide Corporation (UCC), was running a chemical plant in the Indian city of Bhopal. In December 1984 water entered one of their storage tanks, resulting in a leak of a massive amount of toxic gases. There is no consensus as to what caused the water to enter the tank, as UCC blamed it on sabotage while the Indian government suggested that the water might have entered during the routine washing of the pipes. The leakage was a disaster, with approximately 560 000 of the 895 000 inhabitants of Bhopal affected in some way, and more than 20 000 casualties as well as environmental pollution in the area around the plant as a consequence.[90]

Complex litigation arose from the Bhopal case in both Indian and US courts, pursuing civil as well as criminal liability, but to this date no justice has been served for the victims. UCC controlled UCIL, supplied the technology for the plant and trained its employees, and on top of that UCIL had minimal assets, minimizing the potential compensation for victims. Taking these factors into account it made sense to sue UCC in the US courts, but it was no easy task for poor, non-English speaking victims to challenge a big corporation in its home court. India instead stepped in and enacted a law as "parens patriae"[91], to represent the victims in their place.[92] But the case was dismissed in 1986 on ground of "forum non conveniens"[93], on the condition that UCC accepted to submit to Indian jurisdiction to hear the cases.[94] The Indian case ended in 1989 with a 470 million dollar settlement, where UCC/UCIL buried all civil and criminal liabilities and avoided admitting any guilt in the tragedy.[95] The settlement was criticized since it was negotiated without the participation of the victims.[96]

In parallel to the civil claims, criminal charges were initiated in 1987 against UCC chairman Anderson, seven managers of UCIL and three corporations connected to the disaster: UCC; Union Carbide Eastern and UCIL. In 1991 the Indian Supreme Court held that the cases could proceed despite the settlement, but UCC and its chairman still refused to submit to the jurisdiction of the court – arguing that the charges were dropped as part of the settlement. An extradition for Anderson was filed, but denied in 2004,

---

[90] Deva, Surya, "Bhopal: The Saga Continues 31 Years On", *Business and Human Rights – From Principles to Practice*, 2016, p. 22.
[91] Parens Patriae is a legal doctrine that allows a state to act as a guardian for those not able to fend for themselves. For more information, see: https://www.law.cornell.edu/wex/parens_patriae, visited 2016-12-09.
[92] Deva, *Bhopal*, p. 23.
[93] Forum non conveniens is a legal term that describes the court's power to decline to exercise its jurisdiction if there is deemed to be another court that more conveniently could hear the case. For more information, see: https://www.law.cornell.edu/wex/forum_non_conveniens, visited 2016-11-25.
[94] De Schutter, p. 41.
[95] Deva, *Bhopal*, p. 23.
[96] De Schutter, p. 41.

and a new one was filed and pending when he died in 2014.[97] The eight Indian defendants were convicted in 2010 - with one of them already being deceased and the rest expected to appeal the decision - and rights groups and NGOs expressing dissatisfaction with the verdict, labeling it as too little, too late and comparing it to the way a traffic accident is handled.[98] Three final lawsuits were launched in 1999, 2004 and 2007 for different allegations of pollution and property damage, but were all dismissed in the end by U.S. courts.[99]

Bhopal highlights basically every complication that victims face when they attempt to hold a TNC accountable for human rights violations, including corporate human rights obligations lacking in precision and clarity, the struggle to pierce the corporate veil, forum non conveniens creating jurisdictional obstacles, lacking legal aid for victims, the huge number of victims, inadequate sanctions for corporate civil and criminal liability, and involvement of corrupt state agencies. Furthermore it also displays the general attitude TNCs tend to adopt in cases like this, denying any responsibility unless subjected to significant pressure, either from the court or from civil society campaigns.[100]

3.2 Texaco/Chevron Oil Pollution

In 1964 TexPet, a subsidiary of Texaco, began drilling operations in eastern Ecuador, and started operating in 1965 for a consortium owned equally by TexPet and Gulf Oil. In 1974 the Ecuadorian government obtained a 25% share in the consortium through its state-owned oil company PetroEcuador, and within two years PetroEcuador had acquired all of Gulf Oil's shares and became majority owner. TexPet operated the oil pipeline until 1989, and the drilling until 1990, and by 1992 TexPet had completely left the operations wholly to PetroEcuador as the sole owner.[101]

In 1993, 30 000 Ecuadorian citizens brought a class action lawsuit against Texaco in US Court, and 25 000 Peruvian citizens living downstream from the area of operation brought a second class action lawsuit the following year. Both cases alleged that the TexPet operations between 1964 and 1992 had polluted rainforests and rivers of Ecuador and Peru, and that the TexPet activities were being controlled through Texaco operations in the US. Monetary damages as well as equitable relief to redress the contamination was sought by the plaintiffs, but Texaco moved to dismiss the lawsuits on grounds of forum non conveniens and that Ecuador should be joint responsible in the lawsuit.[102]

---

[97] Ibid, p. 41f.
[98] BBC News, *Bhopal trial: Eight convicted over India gas disaster*, 2010, accessible at: http://news.bbc.co.uk/2/hi/south_asia/8725140.stm, visited 2016-12-09.
[99] De Schutter, p. 42.
[100] Deva, *Bhopal*, p. 24.
[101] Aguinda v. Texaco, Inc., 303 F. 3d 470 (2002).
[102] Ibid.

The court accepted the arguments made by Texaco and the cases were dismissed, partly on forum non conveniens because of the hurdles of handling the case in US court compared to Ecuadorian court, and partly because of the failure to join PetroEcuador and its government, since they were essential parties and their absence would make it impossible to order the equitable relief sought by plaintiffs.[103]

The decisions were appealed, but were finally dismissed in 2002, though on the condition that Texaco subject itself to the jurisdiction of Ecuadorian and Peruvian courts. In 2003 a class action lawsuit was brought in Ecuador against Texaco (who were acquired by Chevron in 2001), with inspections of the contaminated sites commencing in 2004. In 2008 an independent expert estimated the damages to 27 billion dollars, and the same year Chevron reportedly lobbied to the US Government to end trade preferences with Ecuador. Chevron filed a petition in 2010 to dismiss the lawsuit based on alleged fraud from the plaintiffs, backing their argument with unused footage from the "Crude" documentary depicting part of the ongoing lawsuit and the gathering of evidence. In 2011 the Ecuadorian court sentenced Chevron to pay 8.6 billion dollars, raised to 18 billion unless Chevron publicly apologized. Chevron appealed the decision, calling it illegitimate and referring to the alleged fraud by the plaintiffs depicted in "Crude". The appeal went all the way to the Ecuador Supreme Court, which upheld the ruling but adjusted the damages to 9.51 billion dollars.[104]

Chevron brought a case in US federal court in 2011, claiming that the lawyers and representatives had conspired to extort money from Chevron through the Ecuadorian judgments, which they alleged were based on forged evidence and false testimony. In 2014 the federal court ruled in favor of Chevron, barring the plaintiffs from acquiring the monetary damages sentenced because the decision was based on corrupt evidence. The plaintiffs appealed, arguing that the US are required to recognize the ruling of a foreign court, which prevents them from challenging the judgment. In 2016 a US appeals court upheld the lower court decision to prohibit the collection of the judgment sum, and the plaintiffs are currently examining further appeal options.[105]

In parallel with the cases brought in Ecuadorian court, Chevron had filed arbitration claims before the Permanent Court of Arbitration at The Hague, alleging that Ecuador had violated a bilateral investment treaty between USA and Ecuador. The tribunal awarded Chevron 96 million dollars in damages, which Ecuador and the plaintiffs unsuccessfully tried to appeal in US federal court arguing that their due process rights were

[103] Ibid.
[104] Business and Human Rights Resource Center, Texaco/Chevron lawsuits (re Ecuador), accessible at: https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador, visited 2016-12-09.
[105] Ibid.

threatened if Chevron continued its arbitration, and in 2016 Ecuador paid a 112 million dollar compensation to Chevron.[106]

Additionally, Ecuadorian communities made a complaint in 2014 to the International Criminal Court (ICC), alleging that the pollution and subsequent evasion of responsibilities amounts to crimes against humanity. However, the ICC disagreed on that assessment based on the available information, and added that while environmental abuses had been declared as an area within the court's scope, they may only hear cases that occurred after July 2002.[107]

Ecuador continues to file suits in countries where Chevron has assets they can target. In 2012 plaintiffs filed suit in Canada, targeting Chevrons assets in the country to enforce the Ecuadorian judgment, and in 2015 the Canadian Supreme Court granted jurisdiction for the Ecuadorian plaintiffs. Hearings began in September 2016, and similar proceedings are taking place in Brazil and other countries.[108]

3.3 Analysis

That there is a legal gap in the international human rights law could be said to be an undisputed fact, and the real challenge is instead to reach global consensus on how to close that gap. As proven by the cases discussed above there is a strong need for international cooperation to effectively provide remedies for victims, no matter where they live. Gathering of evidence, recognition of foreign judgments, extraterritorial jurisdiction and removal of hindrances such as forum non conveniens are all important issues to deal with. Another reason cooperation is so important lies with the calls for national action plans and purely domestic implementation of regulations; many states are simply too weak to effectively enforce such rules on their own against powerful TNCs, facing possible litigation in international tribunals. This combined with the fear of losing out on foreign investments if rules that are too strict are imposed – and thus implementing softer rules, or refraining from legislating at all – clearly showcases the need for cooperation between states, to back up the weaker ones that lack capacity to effectively enforce human rights rules. Another issue linked to national implementation is the risk that the standards the different states set varies heavily, which opens up for forum shopping among companies where they would be able to relocate to another state with softer standards.

Other issues of great importance to address are the complex corporate structures that helps companies avoid responsibility, as well as the expensive process of litigating against a TNC. With regard to the corporate

[106] Ibid.
[107] Ibid.
[108] Ibid; Garcia, Claudia, *A Slippery Decision: Chevron Oil Pollution in Ecuador*, accessible at: http://dw.com/p/1GS5b, visited 2016-12-09.

structure the issue lies with the separation of responsibility between parents and subsidiaries, and also with the fact that the chain of subsidiaries often can be incorporated in a number of different countries – once again getting back to the importance of cross-border cooperation. It will be of great importance for the ability to hold parent companies accountable for violations committed by their subsidiaries, that a unified doctrine for the piercing of the corporate veil is established on an international level. Regarding access to remedy, the excessive cost of litigation can often be a huge obstacle for victims in developing states, a problem even more prominent when the defendant is a TNC. Therefore it is crucial that some sort of mechanism exists to lend aid to those victims who do not have the capacity to represent themselves, since the ability to get recourse for victims of human rights abuses cannot be allowed to be affected by the victim's economic situation.

4 Obligations

The first of the main elements in a binding treaty to be discussed is the obligations that it could potentially impose upon states and corporations, and if corporations could be subjects of international law.

4.1 State Obligations

States have traditionally been the main subject of international laws, bearing the duty to implement national legislation that complies with the provisions agreed upon in the international instruments. To clearly define the obligations to implement, as well as providing the means to fulfill them, will therefore be one of the most important tasks in the process of developing a binding instrument.

4.1.1 Primacy of Human Rights in International Law

The primacy of human rights over other fields of international law was one of the most important points discussed, to make sure that the ability to protect against human rights abuses is not limited by international trade and investment agreements.

Mexico advocated the importance of clearly placing the treaty on top of the legal hierarchy, making sure that the rules are given priority over international investment and trade agreements.[109] The importance of keeping human rights above other fields in the international law hierarchy was mentioned during a previous panel, with commercial rules and investment treaties specifically pointed out to be subordinated.[110]

South Africa stressed the need for balance in foreign investments, noting that investments in and of themselves are not inherently beneficial to the host country unless they contribute to positive and sustainable development and the business adheres to human rights standards. They pointed towards their own legal system as a good example of successful litigation against TNCs for their human rights abuses, as well as their experience in designing investment agreements that balances the rights of the investors with the human rights. South Africa suggested that the way to straighten out the massive inequalities between obligations and rights for TNCs would be to apply uniform standards across all states, closing the legal void that is referred to so often in these discussions.[111]

[109] Mohamadieh and Uribe, *Identifying standards*, p. 34
[110] UN HRC Report A/HRC/31/50, p. 11.
[111] Mohamadieh and Uribe, *Identifying standards*, p. 40.

Sanya Reid Smith put focus on the impact that international trade and investment agreements have on the legislation, policies and human rights obligations of states. She stated that an overview displays a heavy imbalance tilting towards the TNCs, who both have the ability to circumvent legal obligations in host countries, and enjoys strong investment protection with virtually unlimited levels of monetary damages awarded in lawsuits. The prospect of getting such a case brought against them has a strong chilling effect on states, both developing and developed, discouraging legislation that impose obligations on transnational corporations. Ms. Smith noted that such strong rights stand in stark contrast to the difficulties victims of human rights violations must face to sue a TNC. TNCs also has a strong advantage compared to domestic companies, who will simply get sued in the domestic courts and penalized if it violated a human rights or environmental provision. A foreign investor however can appeal the decision to the investor-state dispute tribunal, which examines if the investor's rights have been violated by the state, and the tribunal does not typically consider human rights treaty obligations.[112] Mexico responded on the issue that investor-state tribunals disregard human rights obligations in their decisions, stating that consideration of the treaty provisions should be required against conflicting provisions in existing international agreements.[113]

Panellist Ariel Meyerstein, representing the US Council for International Business, disagreed with the view that all investment tribunals constantly side with the investors, and pointed out that a state can withdraw from an investment treaty at any time.[114]

The suggested way to overcome this obstacle is to place human rights on top of commercial rules and investment treaties in the hierarchy of international law, to ensure that a state cannot be convicted for breaching an international investment agreement by introducing stronger human rights protections. The treaty Initiative makes the same suggestion within their key proposals for the treaty, explaining that the primacy of human rights originates with the UDHR and the Charter of the UN, both established before the introduction of investment treaties. In the proposal, two ways that investment treaties impact human rights are discussed. First the situation where an investor argues that new human rights regulations violates the right to "fair and equitable treatment", which means that the investor has the right to know in advance which rules will govern its investment. The core of the argument is therefore that changes in human rights protections introduced by the state would constitute a breach of those rights. Second is the broad definition of "expropriation", which includes indirect expropriations. Investors therefore argue that new legislation, which lower the value of their investment, constitutes an expropriation that trigger the right to compensation. The proposed solution is to include a provision in the treaty text, which establishes between state parties to the treaty, that the provisions of the

[112] Ibid, p. 32f.
[113] Mohamadieh and Uribe, *Identifying standards*, p. 34
[114] *Draft report on the second session*, p. 13.

treaty supersedes any pre-existing obligations between themselves and other state parties. The situation where only one state has ratified the binding treaty was also addressed. The suggestion was to state in the treaty that its foundation lies with pre-existing human rights obligations, and that it therefore enjoys preference over conflicting treaty provisions.[115]

4.1.2 Obligations to Protect from Abuses by Third Parties

According to China the government has obligations to strengthen its legal system and capacity of enforcement, as well as to protect individuals and vulnerable groups from violations. They recognized that developing countries have not caught up to the developed countries within this field yet, and that they could benefit from working together with another state to improve their capacity, especially if they are hosting many TNCs. Cuba agreed with China on the importance of strengthened domestic rules, as well as that the subsidiaries needs to abide by the laws in the states where they conduct their business.[116]

State delegations stressed the importance of implementing rules for protection of human rights at the domestic level, and pointed out that many states has regulations regarding health and safety of workers. The work of other UN treaty bodies such as the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child were mentioned as examples of states' obligation to prevent third parties from violating human rights, advocating for home states to take action against TNCs with measures of extraterritorial effect.[117]

One panellist, Professor Hatem Kotrane, affirmed that states have the responsibility to respect, protect and fulfil human rights. Likewise they are obliged to make sure that all actors respect human rights, and all political and legislative actions regarding TNCs should therefore be undertaken with transparency to make full account of their effects. [118]

Another panellist, Kinda Mohamadieh, added that the state duty to protect from human rights violations by private actors is well established within international human rights law, which gives them a solid foundation of opinions and jurisprudence from national and international human rights systems. The focus should therefore be on developing means to fulfil those obligations. Other obligations she brought up included state due diligence to

---

[115] Treaty Initiative, *Ten Key Proposals for the Treaty*, p. 17-20, 24, accessible at: https://www.escr-net.org/sites/default/files/attachments/tenkeyproposals_final.pdf, visited 2016-12-02.
[116] Mohamadieh, Kinda, and Uribe, Daniel, "Discussing obligations of states and businesses", *South Bulletin*, No 87-88, 2015, p. 22, accessible at https://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf, visited 2016-11-20.
[117] *Draft report on the second session*, p. 15.
[118] Mohamadieh and Uribe, *Discussing obligations of states*, p. 18f.

prevent, punish, investigate and redress harm caused by private actors; and the option to hold the state directly responsible for human rights abuses caused by third parties, in cases where the state has failed to take measures to prevent such abuses from occurring.[119]

Mohamadieh mentioned the option to hold states responsible if they have failed to take measures to prevent third parties from violating human rights, which also can be found in the first principle of the UNGPs. The commentary to the first principle lists a few steps that states should consider under their duty to protect from human rights abuses, including preventative and remedial measures such as policies, legislation, regulations and adjudication. Furthermore, the second principle urges states to implement clear expectations of all corporations domiciled within their jurisdiction to respect human rights.[120]

Olivier De Schutter agrees that the state duty to protect is well established in international law, but adds that it is still not clearly defined in every aspect. The treaty would therefore on this part consist of a restatement of already existing international human rights law, reinforced by clearly detailed duties for states to carry out.[121]

4.1.3 Extraterritorial Obligations

To impose extraterritorial obligations on states would serve to guarantee further access to remedy for victims of abuse. In the case where a host state is unable or unwilling to provide remedy for violations committed by a foreign company, the treaty could require the home state to exercise jurisdiction, lowering the chances of victims being left without recourse.

Ecuador relied on the UNGPs principle 2, which says that states should expect from all corporations domiciled within their territory to respect human rights in all their operations. States should therefore guarantee that complaints could be brought before court even if the violations occurred outside of their territory. This would prevent TNCs from using the territorial limitations of laws to evade lawsuits and prosecution of violations they took part in. Ecuador finished their contribution by acknowledging that extraterritorial obligations of states are recognized by highly regarded institutions, such as the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights, as well as being supported by the UNs thematic experts.[122]

Bolivia agreed with other speakers on the importance of extraterritoriality, while Venezuela took a very cautious approach towards extraterritoriality and its possible impact on national sovereignty.[123]

---

[119] Ibid, p. 19.
[120] Ibid.
[121] De Schutter, p. 5.
[122] Ibid, p. 21f.
[123] Ibid, p. 22f.

Kinda Mohamadieh explained that extraterritorial jurisdiction originates from jurisprudence that States are not prohibited to enact laws that apply outside of their territory if they are intended to protect human rights. According to the International Court of Justice, human rights obligations apply outside the state's territory when there is a link between the state and the extraterritorial activity. Mohamedieh suggests that the binding treaty should require the host state to put obligations on TNCs that apply wherever they do business and to give extraterritorial jurisdiction to courts in that home state.[124]

One panellist referred to the Maastricht Principles as relevant international standards that could be of use in shaping the treaty, specifically principles 8, 9, 25, and 26.[125] Principle 8 defines the extraterritorial obligations to encompass acts and omissions of a state that have effects on human rights outside of that state's territory. Principle 9 sets the scope of the jurisdiction to situations where the state exercises control, where acts or omissions brings foreseeable effects on human rights, and situations in where the state is in a position to influence or take measures to realize rights extraterritorially. Principle 25 defines circumstances where the state has a duty to implement and enforce protective measures; when the harm originates or occurs within its territory, when an actor is of the state's nationality, when a corporation has its domicile in the state, when there is a reasonable link between the state and the action, and when conduct constitutes a crime under international law. Principle 26 says that states that are in a position to influence a non-state actor in any way, should do that in order to protect human rights.[126]

Hatem Kotrane made an analogy to the provision of extraterritoriality in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The provision gives the court a widened jurisdiction to deal with cases where the violator lives within the territory of that state, or lives outside of it but is of that nationality. Comparably, courts should be able to exercise a similar extraterritorial jurisdiction in cases where a TNC has violated human rights and the corporation has its base or headquarter in that state. To define the obligation of extraterritorial control, the Convention on the Rights of the Child limits it to cases where there is a reasonable link between the state and the activities, in which cases "reasonable" is fulfilled by certain criteria on the location of the company as well as the location of the activities in question.[127]

Another panellist, Dr. Marcos Orellana, continued the discussion on extraterritorial obligations, citing different treaties and their respective tests

[124] *Draft report on the second session*, p. 13.
[125] Ibid, p. 11.
[126] Maastricht Principles on Extraterritorial Obligations of States in the Areas of Economic, Social and Cultural Rights, 2011.
[127] Mohamadieh and Uribe, *Discussing obligations of states*, p. 18f.

to trigger the obligations. The Human Rights Committee and the Committee against Torture uses the test of "effective control" over the actor, while the Committee on Economic, Social and Cultural rights applies an "influence standard", and finally he reiterated the "reasonable link" test mentioned by panellist Hatem Kotrane above, adding that it is also applied in the Maastricht Principles. He further noted that while there are several different standards for triggering extraterritorial obligations depending on which treaty you examine, the obligations themselves are widely recognized within international law.[128]

The IOE expressed dissuading opinions on extraterritoriality, citing the high costs of pursuing remedies in foreign courts and sustaining such cases for several years, challenges of ruling in accord with foreign legal principles, and the complications with gathering of testimony and evidence abroad. Instead they suggested ways to improve state-based judicial remedies, which would, according to them, be a more efficient and economical way to provide effective remedy.[129]

Olivier De Schutter points out that the one area where the UNGPs undoubtedly set the bar below current international human rights law is regarding extraterritorial obligations. The second principle requires states to set out expectations of corporations domiciled within their jurisdiction to comply with international human rights, but this is offset by the commentary which clarifies that states generally are not required to control extraterritorial activities of their corporations. He puts this in contrast to the views expressed by UN treaty bodies, which repeatedly have stated that states should take steps to prevent human rights abuses by corporations domiciled within their jurisdiction. The Committee on Economic, Social and Cultural Rights has made it clear that states should prevent third parties from causing harm in other countries. With specific regard to corporations, the Committee has stated that states should exercise extraterritorial duties to prevent harm without infringing the sovereignty of the host states, in essence addressing the concerns expressed by Venezuela during the IGWG negotiations.[130]

De Schutter puts forth two suggestions for how the treaty could deal with extraterritorial obligations. The first option would be for the treaty to impose on states that they control corporations under their jurisdiction, as well as foreign subsidiaries to corporations domiciled within the state. While the solution would be consistent with current international law, he points out two drawbacks of the approach; firstly it risks being interpreted as an infringement on the sovereignty of host states to regulate investments in their territory, and secondly it relies heavily on the determination of which is the controlling company. The second option, preferred to De Schutter, is instead to impose on parent companies both an obligation to comply with human rights in all of its operations, including in other states,

[128] Ibid, p. 20.
[129] Ibid, p. 24.
[130] De Schutter, p. 14

as well as an obligation to impose such compliance to all entities under its control. This would circumvent the question of extraterritoriality, by making the extraterritorial impacts mere indirect consequences of the obligation to control its subsidiaries imposed upon the parent company by the state of its domicile.[131]

4.2 Corporate Obligations

The duty of states to protect from human rights abuses have been the core of international human rights ever since discussions first emerged on the subject. As pointed out in chapter 1.1, it is not until much more recently that direct obligations for corporations have been highlighted as a possibility. Historically, the issue has been a prominent source of disagreement between stakeholders in discussions on international human rights instruments, and it is of utmost importance for the outcome of the negotiations that agreement is reached on the subject.

4.2.1 Direct Obligations for Corporations

Already during the opening statements of the first session were contrary opinions on the topic of binding obligations for business enterprises in international law expressed. South Africa argued that the foundation of human rights lies with the UDHR, wherein the duty-bearers are not spelled out, meaning that corporations cannot be ruled out as bearers of legal obligations. Switzerland on the other hand was of the opinion that human rights obligations were only a matter for the states, and that companies simply are tasked with upholding those rights.[132]

Panellist Leah Margulies presented two international instruments that protect human rights against TNCs; the International Code of Marketing of Breastmilk Substitutes, and the Framework Convention on Tobacco Control. Two provisions in the Tobacco framework was mentioned; Article 5.3, which protects against corporate interference in the implementation of protective rules, and article 19, which establishes civil and criminal liability. She pointed out the fact that the Tobacco framework already had been adopted by 180 states, which includes most if not all states in attendance at the session.[133]

David Bilchitz, Professor at the University of Johannesburg, discussed civil and criminal liabilities for corporations within African constitutions, where references can be found specifically to legal persons. Corporate criminal

[131] Ibid, p. 21.
[132] Mohamadieh, Kinda, and Uribe, Daniel, "Business and Human Rights: Commencing historic discussions on a legally binding instrument", *South Bulletin*, No 87-88, 2015, p. 4, accessible at https://www.southcentre.int/wp-content/uploads/2015/11/SB87-88_EN.pdf, visited 2016-11-20.
[133] *Draft report on the second session*, p. 14.

liability can also be found within certain criminal codes, which applies a vicarious standard of liability.[134]

The IOE representative Linda Kromjong expressed the view that companies could help in the implementation of human rights standards but were not duty bearers themselves, arguing that the responsibility to protect human rights ultimately lies with the states.[135]

The Ecuadorian delegation argued, contrary to the view of the IOE and Ms. Kromjong, that there are several instruments of international law that establishes obligations on non-state actors, with the UDHR as a prime example.[136] According to Ecuador there would be no hindrance for the treaty to apply binding human rights standards to corporations, and in their argument they pointed to three different existing treaties with provisions for business responsibility: the UN Convention against Corruption, the UN Convention on Financing of Terrorism and the International Convention on Civil Liability for Oil Pollution.[137] Several delegations supported the possibility of including direct obligations for legal persons, leaving no loopholes for TNCs to escape their responsibilities.[138]

Opinion varies strongly on the issue whether or not corporations could be subjects of international law, with Ruggie stating that states held deep concerns on the topic during the drafting of the UNGPs[139], and the assertion by the USA in their objections towards the treaty process that corporations are not subjects of international law.[140] Among scholars there are three distinct views to see the issue from. There are those who believe that corporations are not subjects of international law because that obligation is not listed in any international instrument, others who say that corporations at least may have limited international legal personality, and finally there is the view that the issue of whether or not corporations can be subjects to international law is irrelevant to the question of which legal responsibilities that can be assigned. It is argued that if international treaties can give corporations rights and remedies, then there should be no hindrances to implement human rights duties as well. The issue of direct corporate responsibilities under international law seems to be an issue for stakeholders in the treaty to argue, rather than a question of its current legal status within international law.[141]

---

[134] Ibid, p. 19.
[135] Treaty Alliance, *Obligations and responsibilities of TNCs-OBEs discussed during the third day of the IGWG*, accessible at: https://treatyalliance.squarespace.com/news/3965fbee-bf77-4691-8a5d-89a83175bef4, visited 2016-12-01.
[136] Ibid.
[137] Mohamadieh and Uribe, *Discussing obligations of states*, p. 28.
[138] *Draft report on the second session*, p. 18.
[139] Ruggie, John Gerard, *Response to RAID "Executive Summary",* 2015, p. 1, accessible at: http://business-humanrights.org/sites/default/files/documents/Ruggie%20response%20to%20RAID.pdf, visited 2016-12-02.
[140] Statement by the Delegation of the United States of America, supra not 71.
[141] Cassel and Ramasastry, *White Paper*, p. 44f.

Olivier De Schutter addresses one of the most common arguments against an instrument imposing direct obligations upon corporations: that it would be bound to fail due to the massive amount of actors involved – tens of thousands of TNCs, hundreds of thousands of subsidiaries and millions of national corporations – suggesting that any mechanism attempting to deal with it would be immediately overwhelmed. In his view the argument is unconvincing, as he states that the number of actors is not an obstacle to the establishment of an international instrument to monitor corporate behavior, more than it would be in a domestic setting, and adds that such mechanisms already exist to a certain extent.[142]

4.2.2 Corporate Liability

Provided that states manages to agree upon imposing binding obligations upon corporations, the next step would be to establish the boundaries for those obligations: what type of liability should be assigned (civil, criminal, administrative), in which situations, and what are the procedural requirements for a judge to assign liability to a corporation for an alleged violation?

Delegations were positive to the discussions on the different types of liability, and chose to put the main emphasis on criminal liability. It was argued that administrative liability does not solve the main concern, which is the protection of victims, and while civil liability does provide remedy, it was pointed out that it often involves lengthy procedures. A binding treaty was seen as the hope for redemption for the historical failures of trying to impose criminal liability on corporations. One delegation mentioned the 2016 report from the International Law Commission[143], which contained arguments that supports international criminal liability of corporations.[144]

Cuba stressed the importance for the instrument to plainly spell out direct obligations for corporations, and proposed that the IGWG uses existing UN instruments for precedent regarding duties of legal persons. Transparency and public access to knowledge was named as keystones to be able to effectively exercise oversight and prevent violations.[145]

Ghana put their attention towards prevention, which according to them could be partly addressed with environmental impact assessments that needs to be completed before the company gains permission to operate. Liability could be asserted when it is shown that the company was aware of the potential harm before taking action.[146]

---

[142] De Schutter, p. 34.
[143] International Law Commission, *2016 Report of the International Law Commission*, A/71/10.
[144] *Draft report on the second session*, p. 20f.
[145] Mohamadieh and Uribe, *Discussing obligations of states*, p. 27.
[146] Ibid, p. 28.

Surya Deva, Associate Professor at the School of Law of the City University of Hong Kong, referred to the second pillar of the UNGPs, regarding the corporate responsibility to respect human rights. He stated that the binding treaty should build upon the principles spelled out there, but refrain from a complete transcription to avoid carrying over its shortcomings. Deva continued by highlighting the problematic nature of the term "responsibility" when used in a legally binding instrument, since it is used with a different meaning in the UNGPs. There is a distinct difference between the language applied to states, where human rights are referred to as a "duty", and what is applied to corporations, where the term instead changes to "responsibilities". He suggested to use another wording, or at the very least to provide a clear definition. On the issue of the level of responsibility to be imposed upon corporations, Deva challenged the notion that requiring companies to "respect" human rights would be sufficient in every circumstance. Respect of human rights would be the minimum standard, and in certain cases a higher grade could be applied. For example, between parent and subsidiaries or suppliers a duty to protect might be more appropriate, and in other circumstances the responsibility to fulfil could be the proper choice. As his final point, Deva mentioned the importance of taking possible future consequences into account, such as potential risks from untested chemicals or technologies, suggesting that TNCs contribute to a victim's fund in proportion to each company's net profit.[147]

At a later instance, Professor Deva added that different standards should be applied for civil and criminal liability, and that a certain flexibility regarding the standards should be left in the treaty to account for the diversity of the different domestic legal systems. He advocated that the treaty should regulate both actions and omissions.[148]

David Bilchitz pointed to the South African Constitution, which applies obligations from constitutional rights directly on to private actors. He described the approach taken in their system, bringing up different points of importance to the determination of liability: first, to establish a prima facie infringement; and in second an evaluation if the infringement is justifiable. To help ascertain whether or not the infringement is justifiable, the principle of proportionality is applied to make sure that the purpose is legitimate and that no less harmful alternative is available.[149]

4.2.3 Corporate Complicity

Together with the direct obligations imposed upon corporations, the treaty would also have to consider how to deal with the notion of corporate complicity in human rights abuses. It serves to identify responsibility where an entity related to the corporation, either a business partner or the host

[147] Ibid, p. 25f.
[148] Mohamadieh and Uribe, *Identifying standards*, p. 30f.
[149] *Draft report on the second session*, p. 19.

government, has committed human rights abuses considered criminal under international or relevant national law. Complicity can be asserted when the company has assisted in the commission of the abuses, the assistance had substantial effect on the abuses, and was given with knowledge of the consequences that would follow.[150]

On behalf of several other CSOs, the Centre for Research on Multinational Corporations (SOMO) brought up the issue of corporate complicity, noting that provisions dealing with the issue would be a key element to make sure that corporations does not avoid responsibility for violations by outsourcing the conduct to a business partner.[151]

Panellist Richard Meeran put a lot of emphasis on corporate complicity, because of the difficulties to prove liability in such cases. He discussed procedural hindrances that poses big problems in certain jurisdictions in cases of corporate complicity, which would have to be considered in the drafting of the instrument.[152]

Olivier De Schutter discusses different standards of complicity that would be important to include within the scope of the treaty. Apart from assistance having a substantial effect on the abuse, he also mentions the situation where a company is in a joint venture with an actor – another business or the host government – and has knowledge of or should have known that human rights violations are being committed within their agreement. In that case, the company would be liable for not putting an end to the partnership. Another case would be if the corporation benefits from the abuse, for example when the government suppresses peaceful protests against the company. Finally he mentions the case where a company conducts business in a state where systematic human rights abuses are committed, and the company remains silent on the matter, refusing to denounce the ongoing abuses which it should have been aware of. The claim would then be that the company lends its moral support to the crimes by remaining silent. There is a growing acceptance among companies that a certain responsibility exists in such circumstances to exercise influence, instead of silently complying.[153]

4.3 Analysis

The obligations constitutes the backbone of any treaty, since they control the behavior and the liability of the subjects. Without them, there would be nothing to hold the subjects accountable for, no matter how wide the scope or how extensive the range of remedies provided.

[150] De Schutter, p. 37f.
[151] Mohamadieh and Uribe, *Identifying standards*, p. 34.
[152] Ibid, p. 37f.
[153] De Schutter, p. 37ff.

The first issue discussed in the chapter is the primacy of human rights over other fields of international law. In this context the focus lies on the primacy over international trade and investment agreements, since the effect they have on states' ability to implement and enforce human rights legislation is highlighted in the discussion. Analogies could be made between today's issues relating to international investment agreements, and the concerns expressed by developing states during the negotiations of the UN Code of Conduct. At the time the developing states were looking to protect their sovereignty against foreign corporations, which could potentially interfere with internal political affairs or with the control over valuable natural resources, which explained the cautionary provisions negotiated in the draft. In present time, the interference with states' ability to regulate human rights originates with international investment agreements and the investor-state dispute tribunals. As Ms. Smith explained, the prospect of being drawn in front of a tribunal for enacting human rights norms that are too strict works as a chilling effect on states, preventing progress in national legislation.

It would be a valid option to include a provision in the treaty that establishes the primacy of human rights in the hierarchy of international law, in combination with preference over conflicting treaty provisions. The purpose of investment treaties is to grant a certain protection to foreign investors, but not to go as far as to interfere with the protection of human rights in the host state. Such a provision would therefore be proportionate and reasonable to impose with regard to the objective of the treaty.

The fact that the state duty to protect from abuses by third parties is well established within international law has been affirmed by state's delegations, panellists and scholars. As stated within the discussions, the solid legal foundation leaves only the material definitions of the obligations to be negotiated, where obligations such as due diligence requirements to prevent, investigate, punish and redress harm caused by third parties was contemplated. The option to hold states responsible if they fail to undertake adequate measures to fulfil their due diligence obligations would create an incentive for states to take their responsibilities seriously, and also serve as an extra measure to ensure effective access to remedy for victims of abuse.

As the discussion on the topic of extraterritoriality in chapter 3 reveals, there is no definite international responsibility for states to exercise extraterritorial jurisdiction, but there are several international instruments that could provide inspiration for such an article in the treaty. The Maastricht Principles was mentioned during one of the panels as an inspiration for the modeling of the treaty, and Olivier De Schutter points to views expressed by UN treaty bodies, which repeatedly have stated that states should take steps to prevent human rights abuses by corporations domiciled within their jurisdiction. To define the obligation, the reasonable link test found in the Convention on the Rights of the Child could be of use. Extraterritorial obligations would serve as an important part to ensure access to remedies for victims, and while a definite obligation in international law cannot be

said to exist, the discussion reveals a strong precedence as well as support for their inclusion among the treaty provisions.

One of the toughest questions for treaty drafters to contemplate is whether or not to impose direct obligations on corporations under international law, a possibility which has been disputed greatly by several state actors during the current process, and has historically proven to be a source of controversy. The Norms came very close to being what David Weissbrodt described them as; the first "non-voluntary initiative (in the area of business and human rights) accepted at international level."[154] However, the Norms focused heavily upon imposing obligations on corporations, and as a consequence they were met with significant opposition. The arguments put forth at the time were almost identical to the ones that were presented when the resolution to establish the IGWG was adopted. The critics pointed out that the Norms represented a shift from voluntary to binding standards on corporations, and that no need had been demonstrated for such a change. Furthermore, it was argued that imposing binding obligations on corporations could shift the focus from governments to the private sector, and therefore provide a diversion for states to avoid their responsibilities. The final argument was that only states have legal obligations under international law.[155] While none of the arguments stands without a counterargument, the opposition from states and the business community was still strong enough to shut down the initiative.

The UNGPs then took a step back instead, and focused on the state duty to protect from human rights violations, settling for a corporate "responsibility to respect." The UNGPs was developed in consultation with all stakeholders, including the business community, and was adopted unanimously. The process highlights the importance of including every stakeholder in the negotiations, to develop provisions that both has the desired effect, and are realistic to implement. However, stakeholders whose interest leans towards weak standards cannot be allowed to influence the process to a disproportionate extent. For example, the voluntary nature of the UNGPs has been a major source for criticism, with regard to their lack of impact.[156] The current treaty process therefore needs to carefully balance the process as to not exclude any important stakeholders, but at the same time keep the focus towards binding obligations, to effectively address the issues still present within international human rights law.

To impose direct obligations would entail that civil, administrative and criminal sanctions could be established for corporations, and the provisions could be directly invoked by victims to bring a corporation to court to answer for its crimes, without the need for national implementation of rules.

---

[154] Weissbrodt and Kruger, p. 903.
[155] De Schutter, p. 11.
[156] See for example: *Draft report on the second session*, p. 24f; ECCJ, *5 Years of UNGPs: 5 Business & Human Rights Issues to Focus On*, accessible at: http://corporatejustice.org/news/135-5-years-of-ungps-5-business-human-rights-issues-to-focus-on, visited 2016-12-29.

Strong opposition has been shown towards such a proposition from countries like the USA, Canada and Australia. According to them, corporations cannot be subject to international law, since only states fall under the duties that it imposes. Counterarguments have been made with reference to instruments and reports that supports international criminal liability for corporations, and reference has also been made to the fact that there should be no hindrance for international law to assign duties upon corporations since it can provide rights and remedies. The arguments on both sides carries weight, and it seems like there is no certain legal status that speaks either for or against corporate obligations in international law. However, a treaty addressing the issue of human rights violations by TNCs will not have much effect unless it is adopted by the home states of the majority of the world's TNCs. The deciding factor will therefore be – will it be possible to get the USA, EU, Canada and other western countries that are reluctant to participate today, to ratify a treaty that imposes binding obligations on corporations in international law?

Regarding liability for corporations, there are three categories to focus on – civil liability, administrative liability, and criminal liability. As Professor Deva pointed out during the discussions, there needs to be different standards applied to the different categories of liability, since they all correlate to different types of violations. Criminal liability will without a doubt be the most difficult category for stakeholders to agree upon during negotiations, due to the gravity of the consequences it entails.

In combination with the direct obligations to respect human rights, there is also the need to address indirect obligations regarding corporate complicity. Corporate complicity was referenced within the commentary to the Norms article 1, which stated that corporations had a duty of due diligence duty to inform themselves to avoid that their activities result in complicity to human rights abuses. They were responsible to ensure that their activities would not directly or indirectly be the cause of human rights abuses, and that they do not knowingly benefit from such events.[157] The UNGPs principle 17 defines a due diligence duty on corporations to extend as far as not benefiting from abuses committed by an actor linked to its operations, products or business relationships (non-legal meaning of complicity). The commentary states that most national jurisdictions prohibits complicity to crimes, and that a number of states imposes criminal liability for corporations in such cases. The relevant international standard for complicity is stated to be "knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime".[158] As can be seen, the provisions dealing with complicity in both the UNGPs and the Norms are based on the same standards. The binding treaty could benefit from drawing upon those standards in implementing provisions for corporate complicity, relying on well-established principles.

[157] UN Doc. E/CN.4/Sub.2/2003/38.
[158] UN HRC Report A/HRC/17/31.

Provisions that covers corporate complicity with regard to another private actor ought to be somewhat uncomplicated to agree upon. However, the situation where a corporation is complicit with a government actor creates a complicated situation, which collides with rules regarding national sovereignty. It will be impossible to assert liability for a corporation, regarding compliance with abuses carried out by a state government, unless the state first agrees to submit to the jurisdiction of the court, and is found liable for human rights violations. This could perhaps be addressed by establishing an international mechanism, as suggested below in chapter 6.6, if state parties agree to submit to the jurisdiction of the court when the treaty is adopted.

5 Scope

The issue of scope is one of the most important parts of the treaty process for several reasons: it directly decides which actors can be held accountable under the treaty and for which actions; and it is a topic that has been subject to strong disagreements throughout the era of attempts at establishing binding rules for corporations in international law. Corporations holds a great deal of economic power globally – in 2012 an estimated 37 out of the 100 top economies in the world were corporations[159] – and states are therefore reluctant to impose restrictions that negatively impacts their domestic enterprises. So far this has only resulted in the adoption of voluntary rules, and so the challenge remains to achieve unity in support of a binding set of rules.

5.1 Human Rights

One of the main topics of discussion during the panels of the first session was the question of which human rights the binding treaty should cover, and a clear consensus was expressed for the decision to include the full scope of human rights. However, it should be pointed out that the EU had at this time completely left the negotiations, and did not return for the remainder of the session. Earlier discussions had mentioned the possibility to include only gross violations of human rights, but this would have meant that many incidents would have been left outside of the treaty's scope, and the participants unanimously decided to support the full spectrum of rights.[160]

According to the UNGPs, corporations can have an impact on more or less every human right. With that in mind, excluding certain rights from its scope would therefore make an instrument dedicated to providing remedies for corporate human rights abuses insufficient, maintaining part of the legal void present today. Besides that, there appears to be no clear definition of a "gross violation" of human rights under international law, making the scope of an instrument with that wording very vague. Leaving out certain violations would also give the appearance that they were being deemed less important in comparison to other abuses, essentially tolerating them.[161]

During the second session a few comments were made by panellists supporting a full inclusion of all human rights, and consistent with the outcome of the first session no state delegation objected to this decision.[162]

---

[159] List compiled by the Transnational Institute, accessible at: https://www.tni.org/en/infographic/planet-earth-corporate-world, visited 2016-12-15.
[160] ECCJ, *Negotiations Day 2*.
[161] Mohamadieh and Uribe, *Business and Human Rights*, p. 9.
[162] Treaty Alliance, *Discussions on scope of the treaty on day four of the intergovernmental working group session in Geneva*, accessible at:

There are a few important points to keep in mind when deciding which human rights to include in the scope, since different areas of focus in the treaty could have an impact as to which human rights obligations would be reasonable to impose. If the treaty focuses mainly on reporting, planning and implementation of the UNGPs, the coverage could and should be very broad. If it provides civil liability remedies the list might get narrowed down a bit, and with regard to criminal sanctions it would only be able to apply to existing international crimes, new international crimes established in the treaty as well as national crimes affecting human rights. Alternatively, the treaty could change its human rights scope to vary between provisions, with a full range applied as default, and a narrower scope applied regarding for example criminal liability.[163]

The issue of which human rights to include in the scope of the treaty seems to be one of the least controversial topics discussed, since no real indications of disputes have shown during the sessions held so far. However, Professor John Ruggie has expressed concerns for a treaty process that aims to be all-encompassing, fearing that it would eventually end up like the previous failures of the Code and the Norms. He listed six potential threats to the success of the process, which could lead to serious consequences, and instead advocated for the negotiation of precision tools that target specific areas and would be easier to agree upon. In his view, the chance of states agreeing upon uniform standards for every single human right are very slim, saying that there would be a great risk that the treaty ends up binding the lowest common standard, far below the highest voluntary standards. With a binding standard setting the bar at a low level, the incentive weakens for corporations to perform at a higher standard since they can respond to pressure by asserting that they are complying with international law. He continues by pointing out that related efforts and CSO involvement would be at risk of being diminished by the treaty process, with states hesitating to adopt new legislation with the outcome of the treaty still pending, and the limited resources of CSOs being absorbed by a potentially decades long process. In Ruggies view it would be difficult to imagine how an all-encompassing treaty could be effectively implemented, when the category of business and human rights contains so many complex and different bodies of national and international law.[164]

Professor Surya Deva on the other hand argues that the treaty needs to cover all human rights, because in his view a narrow scope is equivalent with prioritization of civil and political rights over social, economic and cultural rights. All human rights are of equal importance and cannot be ranked

---

https://treatyalliance.squarespace.com/news/4ec8df00-6690-4dc2-8178-aca3be143e31, visited 2016-12-01.

[163] Cassel and Ramasastry, *White Paper*, p. 38ff.

[164] Ruggie, John Gerard, *A Business and Human Rights Treaty? International Legalisation as Precision Tools*, 2014, accessible at: https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision/?, visited 2016-12-21.

among themselves, and corporations are capable of violating every one of them. In Deva's view a narrow treaty would risk being of a merely symbolic purpose, because of the likelihood that it would only apply to a handful of cases. He does however agree that the negotiations for a binding international treaty could be a time-consuming process, but adds that the consensus building would be slow regardless if the scope is narrow or broad. His suggestion is therefore to draft a declaration of human rights obligations for businesses in a similar fashion to the UDHR, before any binding treaty to concretize the obligations in the declaration is negotiated.[165]

5.2 TNCs or all Business Enterprises?

Prior to the first session of the IGWG, the most substantial disputes among delegations arose when the question of which businesses to include within the scope of the treaty was mentioned. The discussions have proven to be just as divided during the two sessions held so far. The majority consensus among states was that the treaty's main focus should lie with TNCs, though arguments were made either for a wider scope including all business enterprises, or to completely avoid a clear definition of TNCs and instead focus on their actual reach.

The first option would be to limit the scope of the treaty to only encompass transnational corporations (within whichever definition states could agree upon for TNCs for the purpose of the treaty), which is an option supported by those who consider domestic corporations to be the responsibility of national legislation.

The footnote in resolution 26/9 defines "other business enterprises" as only those of transnational character, which limits the treaty's sphere of influence and excludes domestic corporations. Among the states opposing a widened scope were China, India, Pakistan, Venezuela,[166] Indonesia and Cuba.[167] During the first session, South Africa described the limitation expressed in the footnote as justified, stating that domestic corporations should be left for the national legal systems to control.[168] In the second session they added that it would be ridiculous to equate national companies to TNCs, because of the transnational corporations' unique ability to evade justice by switching jurisdiction. According to South Africa, the operations of TNCs constitutes the remaining legal gap in international human rights law, and therefore that is where the focus of the binding treaty should lie. Le Centre Europe – Tiers Monde (CETIM) agreed with the group of states wanting to

[165] Deva, Surya, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, 2014, p. 7f, accessible at: https://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf, visited 2016-11-22.
[166] ECCJ, *Negotiations Day 2*.
[167] Treaty Alliance, *Discussions on day four*.
[168] Mohamadieh and Uribe, *Identifying standards*, p. 33.

limit the scope solely to TNCs, arguing that national and state owned corporations already are covered by national legislation.[169]

One panellist criticized the arguments against the definition of "other business enterprises" in the footnote, referring to the jurisprudence of the World Trade Organization (WTO) and other frameworks which puts the same legal weight onto footnotes as the paragraphs of instruments, resolutions and decisions. The limitation itself was defended with reference to the fact that domestic companies already are subject to regulations and lacks the same opportunity as TNCs to evade justice.[170]

Several states, including Brazil, Bolivia and Russia mentioned that defining what constitutes a TNC would be a key challenge for the treaty.[171] One delegation suggested that ILO or OECD standards could be used to define TNCs, since it would be difficult to adopt a uniform approach without a clear definition.[172]

It was argued by several delegations that a precise definition of TNCs was crucial to the adoption of a uniform approach.[173] One delegation argued against defining TNCs in the treaty, mentioning concepts such as terrorism and violent extremism as examples of areas regulated in international law while still lacking a precise definition.[174] Two of the panellists, Khalil Hamdani and Carlos Correa, joined in the challenge of the assertion that coming up with a precise definition of what constitutes a TNC would be an obstacle to the treaty, pointing to several instruments dealing with TNCs that did not require a precise definition in order to function properly.[175]

The second option would be to have the treaty include all business enterprises, regardless of the nature of their activities. Taking the strong opposition from major home states for TNCs – such as the USA and the European Union – into consideration, the option will need to be carefully deliberated during negotiations.

During the adoption of the programme of work for the first session of the IGWG, the representative from EU together with delegates from France and Luxembourg proposed an amendment to the definition of "other business enterprises", calling for the binding treaty to incorporate every type of business regardless of there being transnational activities involved or not. The demands from the EU were not particularly well-received, and found no immediate support among other delegations, who argued that implementing such changes would alter the process outside of the mandate given by the resolution. Neither consensus nor compromises could be reached on the

[169] Treaty Alliance, *Discussions on day four*.
[170] *Draft report on the second session*, p. 22.
[171] Treaty Alliance, *Discussions on day four*.
[172] *Draft report on the second session*, p. 23.
[173] Treaty Alliance, *Discussions on day four*.
[174] *Draft report on the second session*, p. 23.
[175] Treaty Alliance, *Discussions on day four*.

topic at the time, and the EU were asked to bring it up at a later instance instead.[176]

While the EU decided to remain silent during the rest of the negotiations of the first session, and as previously mentioned completely disengaged during the second day, there were several other delegations during the session that expressed opinions agreeing on the importance of a widened scope. Namibia turned the attention towards the defunct domestic system that is in place today, citing the Accountability and Remedy project by the Office of the United Nations High Commissioner for Human Rights (OHCHR)[177] – which states that the present system is unpredictable, incoherent and often inadequate, and that the differences between legal systems today creates uncertainty for both victims and corporations. They therefore argued that there is clear evidence that the binding treaty needs to cover all businesses, and not just TNCs.[178]

Ghana called for a reconsideration of the scope of the treaty, to include not only TNCs but also domestic corporations in its obligations.[179] They returned to the subject once more later on, challenging the terminology used thus far in the discussions. Ghana posed the question if the word "multinational corporation" could be substituted by "foreign and local companies". The reasoning behind this was that the term should reflect the nature of the operations the company engages is, and if a local company that is making use of forced labor or child labor is purchasing goods from a foreign company, the operation itself is transnational but the corporation would not be defined as a "multinational corporation". They advocated caution with defining the scope of companies covered by the treaty, to avoid legal voids.[180]

When the EU were making their general statements at the opening of the second session, they expressed satisfaction with the widened scope in the programme of work, allowing for discussions on other business enterprises besides TNCs. They advocated that the debate cannot be limited to TNCs, due to the numerous abuses committed by national companies and the complex nature of global business networks.[181] Ecuador made an ambiguous statement, pointing out that the original resolution provides clear guidance since it refers to TNCs "and other business enterprises", and thus leaving

[176] ECCJ, *Negotiations Day 1*.
[177] OHCHR, *OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*, accessible at: http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx, visited 2016-11-30.
[178] Mohamadieh and Uribe, *Identifying standards*, p. 39.
[179] Mohamadieh and Uribe, *Discussing obligations of states*, p. 22.
[180] Ibid, p. 28.
[181] Opening remarks by the European Union on the second session of the IGWG, accessible at: http://corporatejustice.org/igwg-tncs-and-other-bes---second-session---eu-opening-remarks.pdf, visited 2016-11-30.

open the question whether or not this means that they agree with the view expressed by the EU.[182]

One panellist expressed that the priority focus should be TNCs, but that the treaty needs to apply to all of their subsidiaries, business relationships, the entire supply chain including subcontractors and financiers, and ultimately to all corporations who commit or are complicit in human rights violations, arguing that for a victim it is not of any relevance if the abuse originates with a TNC or a local company.[183]

A joint intervention by FIDH and several other NGOs[184] stated that all businesses have the potential to impact human rights, no matter if it is a TNC, state owned company or a local business, stressing the importance to include all those possibilities within the scope of a binding treaty.[185] The International Network for Economic, Social & Cultural Rights (ESCR-Net) agreed with the majority on the focus being TNCs, but added that a treaty limited to TNCs might create incentives for the corporations to arrange themselves in a way that legally defines them as national corporations, to avoid legal responsibility.[186]

Professor Ruggie argues in a similar fashion when he discusses the flaws of the proposed treaty, pointing out that an exclusive focus on TNCs always have been met with strong opposition by their home states – which there are even greater numbers of now than in the past. A treaty with the purpose of regulating transnational corporations is of little value if the home states of the corporations refuses to sign the instrument. The limitation allows huge gaps to remain left in the international framework. This can be illustrated by the example that the scope of such a treaty would have covered the international brands supplied by the factories in the collapsed Rana Plaza building, but would have excluded the local manufacturers who employed the workers that were injured or died in the catastrophe. Ruggie also argued that the definition of "other business enterprises" makes no sense, since there is no significant difference between TNCs and enterprises with a "transnational character". The definition excludes local businesses registered under domestic law, but as he points out, the subsidiaries of TNCs are usually required to incorporate under domestic law. Local companies also conducts business across borders at an increased rate, which would arguably give them a transnational character. Altogether these factors renders the definition useless, which counteracts the argument that the

[182] Treaty Alliance, *Discussions on day four*.
[183] *Draft report on the second session*, p. 22.
[184] The Centre for Research on Multinational Corporations (SOMO), The International Court of Justice (ICJ), Coopération Internationale pour le Développement et la Solidarité (CIDSE) and Bread for the World.
[185] ECCJ, *UN Treaty Talks Day 3 and 4: From business as usual to enhanced corporate responsibility for human rights*, accessible at: http://corporatejustice.org/news/327-un-treaty-talks-day-3-and-4-from-business-as-usual-to-enhanced-corporate-responsibility-for-human-rights, visited 2016-12-01.
[186] Treaty Alliance, *Discussions on day four*.

limitation of the mandate set by the footnote in the resolution precludes discussions on a wider scope. [187]

The proposition to exclude domestic corporations have met even harsher critique, being described as an attempt by countries ranked among the worst on the scale of freedom and child labor index to implement a regulation which lacks meaningful impact for victims, and instead burden foreign corporations while obscuring the corruption and abuses going on in their domestic companies.[188] The accusations of such underlying motives does however seem at least partly unfounded with regard to the Ecuadorian delegation, who has shown significant ambiguity in the discussions.[189]

The Treaty Initiative discussed the scope of the treaty from the perspective of rights holders, stressing the importance to focus on their needs. They put emphasis on the complex regulatory challenges surrounding TNCs, stating that it should be a top priority for the treaty to address those challenges. They pointed out that many examples had been put forth where state owned and local companies had violated human rights, and the victims were left without possibility of redress from domestic remedies. Therefore they argued that there is no difference from the perspective of the victim if their rights have been abused by a TNC or a local company, since they many times face considerable hindrances in obtaining effective remedies regardless of the nature of the corporation violating their rights. Their suggested solution was that the treaty should put its focus mainly on the challenges posed by TNCs, while still maintaining that all corporations are required to respect human rights by international law.[190]

5.3 Analysis

While the main focus of the UN Code of Conduct was not human rights protection, but rather the economic interests of investor states, against the developing nations' safeguarding of their (in many cases newly attained) sovereignty, the Code still did include provisions for respect of Human Rights. They were however limited to human rights and fundamental

[187] Ruggie, *Quo Vadis?*
[188] Rhodes, Aaron, "The False Promise of an International Business and Human Rights Treaty", *The World Post*, 2014, accessible at: http://www.huffingtonpost.com/aaron-rhodes/the-false-promise-of-an-i_b_5575236.html, visited 2016-12-10.
[189] See for example: Treaty Alliance, *Discussions on day four*; Cassel, Douglass, *Treaty Process Gets Underway: Whoever Said It Would Be Easy?*, accessible at: https://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy, visited 2016-11-28.
[190] Treaty Initiative, *Ten Key Proposals*, p. 28f.

freedoms in the countries in which they operate.[191] The UN Draft Norms were more focused towards human rights protection than any other international instrument at the time, and referred to existing international norms with regard to each subject, in addition to the methods of implementation provided within the instrument. Furthermore, the Norms also clearly expressed that they in no way were intended to diminish existing human rights obligations, promoting the strongest possible regulations within the whole spectrum of human rights.[192] The inclusion of all human rights into the scope of the treaty is also supported by the UNGPs, which states in the commentary to principle 12 that business can have impact on virtually every human right, and their responsibilities therefore covers the whole spectrum.[193] While the Code and the Norms never were adopted, the UNGPs have been endorsed with consensus, further strengthening the argument for an instrument that includes every human right.

During the sessions of the IGWG, there has only been consensus expressed for the inclusion of the full spectrum of human rights. Even though state delegations seems to have already reached a consensus, there are still a few reasons to continue the discussion. If the treaty is going to include every human right, then there will likely need to be different standards of liability assigned to different abuses, in line with the discussion in chapter 4.3 above. For example the grossest violations would carry criminal liability, while lesser infringements would lead to civil or administrative liability. The next point is the concern brought up by Professor Ruggie, regarding the treaty's all-encompassing ambitions. When it aims to cover such a large area, it will risk drowning in itself, never getting off the negotiation table. His suggestion is to focus on smaller precision tools, which might be a sensible alternative if the efforts to negotiate a treaty this ambitious proves to be futile.

The big topic of the treaty project is without a doubt the question if the scope will include just TNCs, or every other business enterprise as well. The core of the dispute can be traced back to the discussions during the drafting of the Code of Conduct. There, the division was clear between developing states and developed states, where two separate agendas were promoted. While the difference between developing and developed countries regarding international investments has diminished since the 70's when the Code was drafted, there is still a clear resemblance between the main disputes of the two processes. The current reluctance among western states to take part in the negotiations, because of the treaty's scope only covering TNCs, shows resemblance to the disagreement on weak or strong provisions for protecting investors in the Code. Western states still constitutes the majority of the world's home states for TNCs. Therefore the limited scope that targets only transnational corporations has a bigger impact on their economies, than it

[191] UN Doc. E/1990/94, article 13.
[192] Weissbrodt and Kruger, p. 912.
[193] UN HRC Report A/HRC/17/31.

has on the developing states. Just like with the strong obligations for TNCs that developing states were advocating during the negotiations of the Code

In the current process, the resolution was adopted with a weak mandate, and its objectors have been focusing on the narrow definition of "other business enterprises", which basically excludes all corporations except TNCs. Arguments have been made for the exclusion of domestic corporations, stating that they should be left for the national legislations and that the operations of TNCs is the only legal gap left to fill. However, the many hindrances for victims to access remedy in domestic courts serves as one of the strongest arguments against limiting the scope of the treaty solely to TNCs. The presumption that TNCs constitutes the entirety of the legal void within international human rights law stands in stark contrast to the reality of victims of abuse in countries that lack human rights regulations.

6 Access to Remedy

The third of the main elements to be dealt with is the issue of effective access to remedy, focusing on improving conditions for victims seeking redress for human rights violations. Some of the largest gaps in the current state of international law concerns access to remedy, with various issues such as lack of resources for legal aid for victims, and insufficient cooperation among states regarding investigations, sharing of information and enforcement of judgments, among other things. Most of those issues have previously been highlighted in chapter 3, discussing the legal void in international human rights law, and they will now be examined more closely with regard to the proposed binding treaty.

Worth noting is that during the last day of the second session of the treaty negotiations, the United Nations Working Group on Business and Human Rights spoke out to inform that the issue of access to remedy was high on their agenda, and would be the subject of their report to the UN General Assembly in 2017.[194]

6.1 Liability of Parent Corporations

One panellist pointed out that there are legal doctrines designed to resolve the problem of mother companies avoiding responsibility for the human rights violations committed by their subsidiaries, such as the piercing of the corporate veil, and the binding treaty only needs to establish standards to operationalize those principles.[195]

CSOs mentioned piercing of the corporate veil as an important keystone of the regulation, to effectively reach parent companies in the chain of responsibility. Their suggestion was that the treaty recognizes the TNC as one corporate group, to hold parent companies accountable for the actions of any subsidiaries.[196]

Richard Meeran suggested a solution based on English tort law during the panels of the first and second session of the IGWG.[197] In his previous works he has elaborated on the negligence standard applied in English tort law, to circumvent the piercing of the corporate veil. He explains that it focuses on the parent company's own wrongdoing, which stems from the direct

[194] Treaty Alliance, *Diplomacy Wins on the Last Day of the IGWG in Geneva*, accessible at: https://treatyalliance.squarespace.com/news/2016/11/1/diplomacy-wins-on-the-last-day-of-the-igwg-in-geneva, visited 2016-12-01.
[195] *Draft report on the second session*, p. 8.
[196] Treaty Alliance, *Last day of the IGWG*.
[197] Mohamadieh and Uribe, *Discussing obligations of states*, p. 21; *Draft report on the second session*, p. 19.

functions that it had control over or were responsible for, and in that way applies a duty of care which imposes liability without the need to pierce the corporate veil. The duty of care that is broken arises in situations where it is justified to impose such a duty, and comes from a foreseeable harm of sufficient proximity between the parties. He pointed to several cases that concerned negligence on the part of parent companies in relation to their subsidiaries, and while they were all settled or dismissed on other grounds, they still provided valuable legal statements. A later case finally decided in favor of the plaintiff and applied a duty of care on the parent company, imposing liability for the negligence of its subsidiaries. The defendant had argued that imposing liability would require lifting of the corporate veil, but the court rejected the statement and stated that it was simply a case where the actions of the parent company amounted to taking on a duty of care towards the employees of its subsidiary, the imposition of liability was not related simply to the parent-subsidiary association as in the case of the piercing of the corporate veil.[198]

Professor Deva described the doctrine of the piercing of the corporate veil as problematic, because of its limited applicability and high level of proof required by courts. Instead he discussed different options to overcome this obstacle. One option would be to utilize the enterprise principle, under which the whole corporate group is seen as one single enterprise. This would be in line with the suggestion put forth by CSOs during the treaty sessions. Another option is what Professor Deva calls the concept of "limited eclipsed personality", which is a doctrine that allows victims of alleged human rights violations to sue the parent company as a matter of principle. The "limited" aspect comes from the scope of the doctrine, which allows for liability only within the corporate group and not towards the human shareholders, and only for human rights cases. The difference compared to the enterprise principle is that under the eclipsed personality the corporations are not treated as one, instead the subsidiaries keep their separate legal identities which is just temporarily set aside by the parent company. To Deva, the choice of which doctrine to apply is of little importance, the crucial part instead being that the standard holds parent companies liable for acts by their subsidiaries as a rule and not on a case-by-case basis.[199]

Olivier De Schutter compares three different approaches to the problem of separate legal identities of parent and subsidiaries, with the first being the traditional piercing of the corporate veil. The second approach is that of an integrated group, which means that the separate entities within the transnational corporation is seen as interconnected enough to justify that any act committed by a subsidiary should be treated as if it was adopted by the parent. The third approach is different in the way that it abandons the idea of

[198] Meeran, Richard, "Access to Remedy: the United Kingdom Experience of MNC Tort litigation for human Rights Violations", *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, 2013, p. 387–391.
[199] Deva, Surya, *Regulating Corporate Human Rights Violations: Humanizing Business*, 2012, p. 50, 213.

connecting the actions of the subsidiary to the parent company, and instead imposes the liability directly upon the parent for the failure to exercise due diligence in controlling the actions of subsidiaries it has the power to control. In his view the piercing of the corporate veil brings legal insecurity, since the criteria's are many and the burden on complainants is heavy which leads to very few successful cases. Furthermore, he states that contrary to the two other approaches, piercing of the corporate veil creates disincentives to properly exercise control over subsidiaries. Since control over subsidiaries in that case works to make the parent vulnerable to piercing, while in the other two approaches effective control over the actions of the subsidiaries helps to avoid liability or accusations of being negligent. His final suggestion ends up being that of a direct obligation upon the parent company to monitor the behavior of the subsidiaries that it controls, with control being defined as a certain amount of stock ownership. This could be combined with a due diligence requirement for relations to sub-contractors, suppliers and franchisees, which would leave out any assessment of actual control towards those corporations, and instead focus on the duty to identify human rights impacts and avoid or mitigate them. This would also add legal certainty, since the responsibility would not be bound to the amount of control exercised – something which would be disputed in court – and instead to a duty to undertake all reasonable measures to prevent negative human rights impacts.[200]

6.2 Forum Non Conveniens

As illustrated by the cases presented in chapter 3.1, forum non conveniens poses a big obstacle for victims in accessing remedy in home state courts. The doctrine provides a powerful tool for TNCs domiciled within common law jurisdictions to dismiss claims against them for acts committed in foreign jurisdictions, which in many cases also leaves the applicant without redress in the state where the violations occurred.

One panellist suggested that the issue of forum non conveniens should be resolved in a similar way as within the EU.[201] In the EU, forum non conveniens carries no legal force, since the Brussels Convention[202] article 2 provides mandatory jurisdiction in the defendant's domicile, with only a few enumerated exceptions. Similar rules of jurisdiction could be included within the binding treaty to address that issue, and at the same time provide a higher level of legal certainty, legal protection of persons and a uniform application of rules of jurisdiction.[203]

---

[200] De Schutter, p. 21-29.
[201] *Draft report on the second session*, p. 20.
[202] 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[203] British Institute of International and Comparative Law, *Preliminary Remarks on Forum Non Conveniens Doctrine*, accessible at: http://www.biicl.org/files/1734_forum_non_conveniens_in_europe.pdf, visited 2016-12-17.

Panellist Meeran agreed with the suggestion to implement concepts from the Brussels Convention and its mandatory provisions for jurisdiction in the defendant's domicile. Its regulations means that notwithstanding any issue of sovereignty, courts in the EU must affirm jurisdiction in cases brought against TNCs who has a member state as its home state, and universal application of such rules would resolve the problem of forum non conveniens.[204]

An alternative solution is suggested by De Schutter, in combination with his method to address the issue of the corporate veil. He mentions that approaches of integrated enterprise or direct liability helps overcoming the obstacle of forum non conveniens, since the connection to the forum is stronger if the parent company is sued for its own actions rather than its subsidiaries'.[205]

6.3 Hindrances in Domestic Courts

According to Richard Meeran, one of the biggest problems relates to the limited resources for legal representation, where there are several different factors of deep concern. To run a case against a TNC you need access to substantial economic and technical resources for an extended period of time, since they have the capacity to completely overwhelm their opponents with armies of lawyers. The scale, complexity and nature of the cases also means that the amount of resources required exceeds public funding, and the same goes for public interest law centers, and even lawyers acting on a contingency basis. Therefore cases of lower magnitude risks being left without redress simply because the financial value is too low, and even cases of greater size could be problematic since they in certain circumstances could entail far greater risks for the parties involved. He wrapped up his statements by emphasizing the necessity of capacity building to help correct the hindrances to effective remedy.[206]

Meeran has previously elaborated on this topic, highlighting the lack of incentive for claimants' lawyers to undertake this type of cases. He also looks towards the option of class action lawsuits provided in Australia, USA and Canada's legal systems, which would provide a speedier and far less costly alternative that could decrease the disincentives for lawyers to represent claimants against TNCs.[207]

To find solutions for the economic problems, panellist Chip Pitts mentioned the Inter-American Court of Human Rights and the European Court and

[204] Mohamadieh and Uribe, *Discussing obligations of states*, p. 21.
[205] De Schutter, p. 28.
[206] Mohamadieh and Uribe, *Identifying standards*, p. 37f.
[207] Meeran, p. 395, 399.

their practices of providing funding for victims as a great foundation to build upon. [208]

FIAN advocated the principle of "equality of arms", proposing that states should be obliged to provide legal assistance and make sure that costs are not detrimental to the victims' ability to seek recourse.[209]

One panellist brought up key factors that affects the availability of effective remedy within a nation, which included: weak rule of law, inability or unwillingness of officials to go against big corporations by introducing protective measures, public officials who lack knowledge or capacity to enforce regulations, corruption, and limited resources. The option for victims to initiate legal complaints in either host state or home state was mentioned as helpful in evening out the inequalities between corporations and victims of abuse.[210]

Friends of the Earth highlighted the fact that many states lack human rights protection in their legislation, which poses a major obstacle to overcome for victims to access remedy. They used Mozambique as an example where the judicial system is tied together with the government, which means that only political will could grant justice.[211]

6.4 Burden of Proof

A reversal of the burden of proof has been suggested by several different participants during the treaty sessions, as a way to lighten the economic burden of gathering evidence, putting the claimants at less of a disadvantage compared to the TNCs, and as an alternative to implementing regulations that requires transparency from corporations and disclosure of documents.

During the panel on access to remedy, both Namibia and Ethiopia expressed concern about the lack of resources at the domestic level regarding gathering of evidence. In response to this, several panellists as well as members of CSOs suggested a reversal of the burden of proof, which would greatly lighten that economic burden.[212]

Ghana on the other hand was worried that the proposition to reverse the burden of proof could work to discourage home states of TNCs from signing the finished treaty, since it goes against the principle of "innocent until proven guilty". Instead they suggested that vicarious liability would be established by default in cases where the relation of parent-subsidiary is also

[208] Mohamadieh and Uribe, *Identifying standards*, p. 39.
[209] Ibid, p. 40f.
[210] *Draft report on the second session*, p. 20.
[211] ECCJ, *UN Treaty Talks Day 5: Morality cannot be legislated, but behaviour can be regulated*, accessible at: http://corporatejustice.org/news/329-un-treaty-talks-day-5-morality-cannot-be-legislated-but-behaviour-can-be-regulated, visited 2016-12-02.
[212] Treaty Alliance, *Last Day of the IGWG*.

established, removing the need for disclosure of documents. The documents would however still be important in cases of criminal liability.[213] One panellist also warned that a reversal of the burden of proof would constitute a breach of due judicial process.[214]

On the topic of evidence, panellist Meeran noted that there have been issues with disclosure of documents proving the connection between parents and subsidiaries, and this could be overcome by reversing the burden of proof – which would force the companies to open up their file cabinets in order to prove their own innocence.[215]

One panellist mentioned the UN anti-corruption convention[216] concerning provisions dealing with a reversal of the burden of proof.[217] The convention suggests a reversal of the burden of proof with regard to the origin of the alleged proceeds of the crime in its article 31, paragraph 8, and advice is provided in the convention's technical guide to take into account when considering a reversal.[218]

A reversal of the burden of proof has already been successfully utilized by the Court of Justice of the European Union (CJEU) in cases relating to Discrimination law, and the same type of provisions has made their way into the practice of the European Court of Human Rights, also with positive results. In such circumstances, where the evidence required oftentimes consists of documents and records accessible to the employer but not the plaintiff, a reversal of the burden of proof could be justified. The principle of effectiveness lays ground to the burden of proof rules within the EU, which states that substantive and procedural conditions that controls the enforcement of EU law cannot set up barriers that makes the exercise of said rights virtually impossible. [219] The principle resembles the concept of "access to effective remedy", which can be found within the third pillar of the UNGPs, as well as constituting one of the key components of the treaty discussions. For the reasons put forth, a similar approach to the burden of proof could therefore be considered within the binding treaty.

---

[213] Mohamadieh and Uribe, *Discussing obligations of states*, p. 22.
[214] *Draft report on the second session*, p. 13.
[215] Mohamadieh and Uribe, *Discussing obligations of states*, p. 21.
[216] United Nations Convention against Corruption, GA Res. 58/4 of 31 October 2003.
[217] *Draft report on the second session*, p. 28.
[218] United Nations office on Drugs and Crime Vienna, *Technical Guide to the United Nations Convention Against Corruption*, 2009, p. 98, accessible at: https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf, visited: 2016-12-18.
[219] European Commission, *Reversing the Burden of Proof: Practical Dilemmas at the European and National Level*, 2014, p. 9f, 14, accessible at: http://ec.europa.eu/justice/discrimination/files/burden_of_proof_en.pdf, visited 2016-12-26.

6.5 Cross-Border Cooperation

One of the main elements of the legal gap within international human rights law is the lack of cooperation between states, which adversely affects the prospect of victims' access to remedy. Several obstacles related to this issue are illustrated by the two cases described above in chapter 3.1, among them the absence of recognition of foreign judgments present in the Texaco Oil Pollution case.

China discussed possible ways to coordinate the remedial mechanisms, saying that home and host state needs to cooperate on investigations and enforcement of judgments while taking economic, cultural and historic reasons underlying the states' different approaches to the protection of human rights into account. Another important part mentioned was to increase assistance and capacity building for developing countries, to guarantee that access to effective remedy will not vary depending on in which state the violations was committed.[220]

South Africa highlighted the importance of establishing uniform standards for holding TNCs responsible for their actions, using the case of BP Oil and the Deepwater Horizon catastrophe as an example. That case saw BP paying 18.7 billion USD in damages to victims, while many other cases slip through the cracks without a single cent going towards the redress for the people affected. According to South Africa this serves well as an illustration of the differences with regard to states' abilities to hold TNCs accountable for their violations.[221]

Panellist Kinda Mohamadieh put emphasis on the importance of cooperation across the borders in dealing with cases involving TNCs, describing the national frameworks as insufficient in such situations and thus leaving legal gaps that prevent victims from accessing effective remedies.[222]

Another panellist stressed the importance of cross-border cooperation between states with enforcement of judgments, since it would help addressing a lot of the obstacles for victims in access to remedy. As examples of successful provisions for cooperation on enforcement of judgments, several instruments at the inter-American level and within the arbitration sphere were mentioned.[223] The UN anti-corruption convention was mentioned with regard to provisions of technical expertise and sharing of information among states,[224] which can be found in articles 60 and 61.[225]

[220] Mohamadieh and Uribe, *Identifying standards*, p. 39f.
[221] Ibid, p. 33.
[222] Mohamadieh and Uribe, *Discussing obligations of states*, p. 19.
[223] *Draft report on the second session*, p. 15.
[224] Ibid, p. 20.
[225] UN General Assembly Res. 58/4 of 31 October 2003.

Olivier De Schutter presents several suggestions for how to improve cross-border cooperation, stating that a clear listing of the duties of states to cooperate in international human rights cases involving corporations would be a good start. He mentions the Convention on the Rights of Persons with Disabilities, which recognizes the importance of international cooperation, requires state parties to undertake appropriate measures and lists measures to fulfil the commitment, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires states to provide assistance with proceedings and supply evidence. Chapter IV of the UN Convention against Corruption is also mentioned as an inspiration for provisions to include in a binding treaty that includes international cooperation. Finally, De Schutter concludes by stating that strengthening of international cooperation is probably the most effective contribution the binding treaty could make towards addressing the issue of corporate human rights abuses, describing it as being tailored to the reality of the situation. He also mentions that such provisions seem to enjoy widespread support from states within all regional groups.[226]

6.6 Establishing an International Court

Several panellists, delegations and NGOs made calls at different occasions for the establishment of an international court to enforce the binding treaty.[227]

One panellist suggested that the treaty could introduce five levels of remedy. The first level would be national and sub-national legal systems, while the second level would be an international or regional ombudsperson to aid weaker plaintiffs. The third level would be the extraterritorial jurisdiction in the home state of TNCs, or a country where such a company stores significant assets. The fourth level would be an international court on business and human rights. And the fifth level would be a register of all ongoing cases against TNCs regarding human rights.[228]

CIDSE proposed that a new institution for monitoring and enforcing the provisions of the treaty should be formed, where defendants could respond to charges against them. FIAN concurred in the proposal of the establishment of a body to monitor the implementation of the treaty. The Transnational Institute put their attention to the establishment of bodies capable of inspecting and monitoring the compliance with the treaty, but were also in favor of a global court or tribunal, with the jurisdiction to enforce judgments and receive claims from victims of business-related violations of human rights.[229]

[226] De Schutter, p. 3, 43, 45.
[227] *Draft report on the second session*, p. 6, 8, 9, 11, 24, 29f.
[228] *Draft report on the second session*, p. 14.
[229] Mohamadieh and Uribe, *Identifying standards*, p. 40f.

Chip Pitts pointed out that the Statute of the ICC could be helpful for inspiration regarding provisions to establish criminal liability of corporations at the domestic level, which is where the enforcement mainly takes place according to him. Since international remedies are secondary to domestic – requiring that you show that the national ones are exhausted to be able to appeal the decision – it would severely restrict the ability of many victims to obtain justice if the sole focus of the treaty was to provide remedies on an international level. He expressed that it is very important for the treaty to ensure that the measures it contains is also given substance in practice and shows real effects.[230]

De Schutter discusses the possibility of a new international mechanism to address serious human rights violations committed by corporations, or to which they are complicit. His suggestion is that it would be established per analogy to existing international criminal tribunals or the ICC, and that its scope should be limited to "serious violations of international human rights" or violations of humanitarian law, since the burden falling upon the court would otherwise be too heavy. There would also have to be included a clear definition of "serious violation" if such a criteria would be introduced, since the notion is not clearly defined within international human rights.[231]

6.7 Analysis

The issue with limited liability for parent companies with regard to their subsidiaries is prominent when it comes to TNCs, which opens up for the possibility to contain any damage done within an entity that lacks sufficient assets the be held responsible for committed violations. The possibility to pierce the corporate veil is argued to be too narrow and too demanding upon the plaintiff to be a satisfying way to address the issue in corporate human rights cases, and a few alternatives have been put forth instead. I would argue that Olivier De Schutter provided the best option. By moving away from a doctrine based on control over the subsidiary, his suggestion results in both a higher grade of legal certainty, and a big advantage compared to the piercing of the corporate veil. Furthermore, the fact that it encourages closer supervision of the actions of subsidiaries to avoid liability for violations, means that it contributes to prevent such misconduct. Since the main goal of the treaty should be to decrease the frequency of human rights abuses, at the same time as providing access to remedy and bringing abusers to justice, the obvious choice should be to go with the provision that lower the risks for violations to occur.

Forum non conveniens creates obstacles to access to remedy when the doctrine is misused by corporations who want to avoid liability for human rights abuses. It is present in common law jurisdictions, except for the UK

[230] Mohamadieh and Uribe, *Identifying standards*, p. 39.
[231] De Schutter, p. 35f.

as a member of the EU. Both cases studied under chapter 3.1 are perfect examples where the doctrine creates undue obstacles for claimants – leaving them without redress in the foreign court, and instead forcing them to pursue a subsidiary in their home state that most likely does not possess the assets to cover the damages, even if a conviction is ruled.

While the UNGPs does not explicitly mention the forum non conveniens doctrine, the commentary to principle 26 provides that:

> "States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable."[232]

It would therefore be in line with the UNGPs to include provisions in the binding treaty to address the issue of forum non conveniens. The suggestion by the panellists to implement provisions similar to the Brussels Convention would be an effective way to deal with forum non conveniens, as evident by the 2005 decision by the European Court of Justice that put an end to the application of the doctrine in UK courts (and all other national courts within the EU).[233] Alternatively, De Schutter's solution for the corporate veil might work to circumvent forum non conveniens as well, by imposing a direct obligation upon the parent company the link to the foreign court is strong enough that forum non conveniens will not prevail.

Economic and procedural hindrances in domestic courts severely impact the ability of victims to access remedy, which is one of the main duties of the state to provide. The UNGPs includes in the states' duty to provide effective remedies that no barriers that prevents legitimate cases from being heard should be erected. Among the procedural and practical barriers mentioned in the commentary to principle 26, both the costs of bringing claims and the difficulty to secure legal representation are included.[234] International cooperation is advocated within the UNGPs under principle 10, which promotes capacity-building, awareness-raising and technical assistance to help states meet their duty to protect against corporate human rights abuse, and cooperation between states with addressing challenges in the corporate human rights sphere.[235] The binding treaty could provide an excellent platform to include binding rules that ensures the access to remedy, since the UNGPs voluntary nature means that neither states nor corporations are obliged to fulfil the conditions set out in principles 10 and 26.

The cost of litigation and lack of incentive for lawyers to undertake claimant's case pose enormous problems for many victims, especially if there is no possibility for class action lawsuits to lower the costs. The

[232] UN HRC Report A/HRC/17/31.
[233] Owusu v. Jackson, C-281/02, 2005.
[234] UN HRC Report A/HRC/17/31.
[235] UN HRC Report A/HRC/17/31.

importance of international cooperation will be high in all situations of hindrances in domestic courts, whether it is monetary problems, a lack of human rights regulations, a government that is too weak to enforce its judgments or any other obstacle that requires capacity building or interaction across the borders. Requiring states to provide financial aid and strengthen judicial systems would serve to address both the issue of financial obstacles to seek remedy, as well as the problem highlighted by Friends of the Earth among others, regarding weak domestic judicial systems and nonexistent regulations for human rights protection. In the cases where states are unwilling or unable to cover the legal costs for the citizen, then Professor Deva's suggestion in chapter 4.2.2 of a victims fund could be contemplated. The fund would be contributed to by all corporations and utilized to help victims seek remedy when no other help is available. The states will be obliged to bear the heaviest burden in this matter, carrying the ultimate responsibility of providing redress for victims of human rights abuses. Which is why international cooperation is so important – either to provide support with funding, or to provide jurisdiction when access to remedy is unavailable in the victim's home state.

Another suggestion to simplify the process for claimants and evening out the playing field, is to reverse the burden of proof. That would impose upon the corporations to prove they had nothing to do with the alleged damage, whichever form it manifests itself in, and could in many situations help gain access to important evidence from their documents. However, a reversal of the burden of proof is a quite drastic measure, and some voices were raised during the sessions in objection, referring to the principle of "innocent until proven guilty". But similar measures has already been undertaken, for example within the CJEU in relation to discrimination law. Within that field, the burden of proof have been considered too heavy for the claimant to bear alone, while the employer did not have to do much more than just show up and tell a slightly different version of the events. Therefore the reversal was considered justified, and it has been applied with great success. A similar assessment would have to be done in the case of corporate human rights violations, and if a reversal of the burden of proof would be considered justified, it would make a valid option to include within the treaty.

Suggestions have been made to establish an international mechanism to address corporate human rights abuses, which would serve as an extra safeguard when the national judicial systems have failed to provide remedy and all instances are exhausted. The view expressed by Chip Pitts regarding the secondary nature of an international mechanism in relation to domestic remedies goes well together with De Schutter's view on international cooperation. In his view would strengthening of intergovernmental cooperation in improving the national forums be the most important contribution the binding treaty could provide. A court that is established analogous to existing international criminal tribunals such as the ICC, and limits its scope to only the more serious violations would be a valuable addition to the binding instrument, and more so in relation to the states with

weak domestic protection of human rights. However, the main focus should still lie with improving the domestic measures, where the vast majority of the cases will end up. Relying too heavily on an international court would also risk overburdening it, compromising its effectiveness.

7 Conclusions

After decades of different processes trying to define and establish regulations regarding corporate human rights abuses, the latest attempt to negotiate such a treaty is looked upon by different NGOs, experts and states all over the world as a hope of finally bridging the gap in international human rights law.

The IGWG was first established in 2014 to address the legal void in international law regarding transnational corporations and other business enterprises. The legal void, which is discussed in chapter 3.1, and further elaborated in the analysis at the end of chapter 4-6, consists of a myriad of obstacles that together both hinders the access to remedies for victims as well as allows for corporate impunity under weak rule of law. The details of the legal void, and the different options that have been suggested during the negotiations to address those issues, have already been discussed at length. However, there are two vital elements of the gap that require further discussion.

The main focus point of the IGWG to fill is the legal void with regard to business and human rights. But with regard to which business? It is specified in the fiercely debated footnote of resolution 26/9 that it only intends to address business with a "transnational character", but the question is if that really encompasses the full scope of the issue. A multitude of states, comprising the majority of the speakers during the panels, have argued against widening the scope determined by the footnote. South Africa argues that the limitation is justified, because domestic corporations are already covered by domestic legislation. Furthermore, they state that domestic and transnational corporations cannot be equated because of the unique ability of the TNC to avoid accountability by switching jurisdiction. According to South Africa, the operations of TNCs constitutes the remaining legal gap in international human rights law, and therefore that is where the focus of the binding treaty should lie.[236]

And it is true that most of the points accounted for in the section about the legal gap – extraterritorial obligations, procedural barriers such as forum non conveniens, the complex structure of corporations, the excessive costs for transnational litigation, enforcement of judgments, lawsuits in investor-state tribunals, forum shopping – are of transnational nature. However, that does not account for the full scope of issues, which also concerns strictly domestic situations. This is exemplified by Ruggie, when he mentions that the limited scope of the treaty would mean that the local factory owners employing the people who died or got injured in the Rana Plaza catastrophe would be excluded from liability, and only the international brands purchasing the products would be covered.

[236] See chapter 5.2, above.

A different point of view is presented by Namibia, who turned the attention towards the inadequate domestic systems that are in place today all over the world. The Accountability and Remedy project by the OHCHR which they cited, gives a view of a system that is unpredictable and incoherent, creating uncertainty for both victims and corporations. The inadequate legal systems that are in place in many states around the world, creates legal gaps in relation to domestic corporations in the same way as TNCs do. The Treaty Initiative cited several examples where there were absolutely no difference for the victim if the violator was a domestic corporation or a TNC, since the domestic legal system left them without possibility of redress. The aforementioned reasons are pointed to as clear evidence that the binding treaty needs to cover all corporations, not only TNCs.

The deficient domestic systems, and the fact that many states are unable or unwilling to enforce human rights obligations on TNCs, brings me to the second point that is of great importance for the IGWG: International cooperation. The greatest contribution a binding treaty could do would be to strengthen the intergovernmental cooperation, since addressing transnational issues requires transnational measures. Assistance with investigations, gathering of evidence and testimonies, cooperation with regard to monitoring and enforcement of provisions, extraterritorial jurisdiction, procedural barriers such as forum non conveniens, and recognition of foreign judgments are all key elements within international cooperation, required to provide effective remedy for victims. Furthermore, cooperation would be necessary with regard to implementation of human rights standards and standards of liability. Both to prevent forum shopping by corporations, as well as to avoid the situation where states are reluctant to impose stricter standards, out of fear to lose out on potential future investments from corporations who would switch to a jurisdiction with softer standards.

The importance of international cooperation is also highlighted by Olivier De Schutter, who states that it is probably the most effective contribution the treaty could make. Moreover, the widespread support for stronger international cooperation is also mentioned, which stands in contrast to the divided outlook on the scope of the treaty. What they both have in common though is the focus on the inadequacies of domestic legal systems, which serves as an argument in favor of including all corporations within the scope of the treaty.

It is therefore evident that there are three different legal gaps being discussed simultaneously, by different stakeholders of the debate. One suggests that the gap covers all business enterprises, both transnational and domestic, due to the inconsistencies among legal systems, lack of cross-border cooperation and the weak human rights protection within certain legal systems, while the other two focuses on the activities of TNCs. There is a split, where one group of stakeholders concentrate on the transnational problem from the perspective of the home state, defining the legal gap as the responsibility of the parent corporations to exercise sufficient control on

their subsidiaries in their extraterritorial operations. The other group moves the focus towards the host state, and highlights the problems with supply chains and other business relationships, where the parent corporation possesses less control over the separate actors compared to the parent-subsidiary relationship, but instead merely an association. The lack of a clear definition of the term "transnational corporation" have therefore been contributing to the complexity of the debate, with stakeholders discussing the legal gap in reference to TNCs, but making their arguments with a different definition of the term in mind.

These three differing views are actually not legal gaps separated from each other, but in fact interacting gaps compounding the legal and policy difficulties confronting the negotiators. This is an important distinction for the debate, and an issue that needs clarification for the prospect of achieving real and meaningful progress to bridge the gap of corporate impunity. As long as different parts of the same problem are argued against each other as different solutions, the development on the area will remain severely hindered, if moving forward at all. Therefore the issue needs a new foundation for discussion, based on consensus among stakeholders upon the definition of the legal gap, upon which the rules framework can be built. From there on the limitations can be determined, whether or not to address the full issue within a single instrument, or if separate precision tools would be the preferred course of action. But no matter the outcome of this particular process, for there to be a meaningful discussion on the issue, it would have to be based on a common understanding of the full scope of the problem. Otherwise, past mistakes will inevitably be repeated, and the legal gap will continue to leave victims of corporate human rights abuse without redress.

Bibliography

Books

Deva, Surya, and Bilchitz, David, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, New York, 2013

Deva, Surya, "Bhopal: The Saga Continues 31 Years On", *Business and Human Rights – From Principles to Practice*, Routledge, New York, 2016

Deva, Surya, *Regulating Corporate Human Rights Violations: Humanizing Business*, Routledge, New York, 2012

Meeran, Richard, "Access to Remedy: the United Kingdom Experience of MNC Tort litigation for human Rights Violations", *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, New York, 2013

Nolan, Justine, "A Business and Human Rights Treaty", *Business and Human Rights – From Principles to Practice*, Routledge, New York, 2016

Nolan, Justine, "Mapping the movement: the business and human rights regulatory framework", *Business and Human Rights – From Principles to Practice*, Routledge, New York, 2016

Ruggie, John Gerard, *Just Business: Multinational Corporations and Human Rights*, New York, W. W. Norton & Co., 2013

Simons, Penelope and Macklin, Audrey, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, Routledge, New York, 2014

Articles

Cassel, Douglass and Ramasastry, Anita, "White Paper: Options for a Treaty on Business and Human Rights", *Notre Dame Journal of International & Comparative Law, Vol. 6, No. 1, pp. i-x, 1-50, 2015*

Miretski, Pini Pavel, and Bachmann, Sascha-Dominik, "Global Business and Human Rights - The UN 'Norms on the Responsibility of Transnational

Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem", *Deakin Law Review*, Vol. 17, No. 1, 2012

Mohamadieh, Kinda, and Uribe, Daniel, "Business and Human Rights: Commencing historic discussions on a legally binding instrument", *South Bulletin*, No 87-88, 2015

Mohamadieh, Kinda, and Uribe, Daniel, "Discussing obligations of states and businesses", *South Bulletin,* No 87-88, 2015

Mohamadieh, Kinda, and Uribe, Daniel, "Identifying standards for legal liability of TNCs and other business enterprises for human rights violation and building national and international mechanisms for access to remedy", *South Bulletin*, No 87-88, 2015

Ruggie, John Gerard, "Business and Human Rights: The Evolving International Agenda", *Corporate Social Responsibility Initiative, Working Paper No. 31*, Cambridge: John F. Kennedy School of Government, Harvard University, 2007

Ruggie, John Gerard, *A UN Business and Human Rights Treaty?*, Issues Brief, Boston: Harvard John F. Kennedy School of Government, 2014

Ruggie, John Gerard, *A UN Business and Human Rights Treaty Update*, Boston: Harvard John F. Kennedy School of Government, 2014

Sauvant, Karl, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned", *The Journal of World Investment & Trade*, Vol 16, Issue 1, 2015

Weissbrodt, David and Kruger, Maria, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int'l L. 901, 2003

Official Documents

1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

European Commission, *Reversing the Burden of Proof: Practical Dilemmas at the European and National Level*, 2014

European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI))

International Law Commission, *2016 Report of the International Law Commission*, A/71/10.

Maastricht Principles on Extraterritorial Obligations of States in the Areas of Economic, Social and Cultural Rights, 2011.

Opening remarks by the European Union on the second session of the IGWG, 2016

Statement by the Delegation of the United States of America, *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, 2014

Statement on behalf of a Group of Countries at the 24rd [sic] Session of the Human Rights Council, 2013

Statement of US Delegate Leonard Leo at the Commission on Human Rights on Item 17, "Transnational Corporations", 2005

UN Commission on Transnational Corporations, *Draft UN Code of Conduct on Transnational Corporations*, UN Doc. E/1990/94

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23

UN HRC, *Draft report on the second session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*

UN HRC, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN HRC Res. A/HRC/26/9

UN HRC, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN HRC Res. A/HRC/26/L.22/Rev.1

UN HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN HRC Report A/HRC/17/31

UN HRC, *Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN HRC Report A/HRC/8/5

UN HRC, *Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights on its first session*, UN HRC Report A/HRC/31/50

UN HRC Res. 2004/11, UN Doc. E/CN.4/2004/L.73/Rev.1

UN General Assembly, *United Nations Convention against Corruption*, UN General Assembly Res. 58/4 of 31 October 2003

United Nations office on Drugs and Crime Vienna, *Technical Guide to the United Nations Convention Against Corruption*, 2009

UN Sub-Commission on the Promotion and Protection of Human Rights, *Commentary for the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38.

UN Sub-Commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12

Web Based Documents

Bischöfliches Hilfswerk Misereor, *Corporate Influence on the Business and Human Rights Agenda of the United Nations*, Working Paper, 2014, accessible at: http://www.socialwatch.org/sites/default/files/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf, visited 2016-11-18.

De Schutter, Olivier, *Towards a Legally Binding Instrument on Business and Human Rights*, 2015, accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668534, visited 2016-12-07

Deva, Surya, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, 2014, accessible at: https://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf, visited 2016-11-22.

Kenan Institute for Ethics at Duke University, *The U.N. Guiding Principles on Business and Human Rights – Analysis and Implementation*, 2012, accessible at: https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf, visited 2016-11-13

Ruggie, John Gerard, *Response to RAID "Executive Summary",* 2015, accessible at: http://business-humanrights.org/sites/default/files/documents/Ruggie%20response%20to%20RAID.pdf, visited 2016-12-02.

The Economist Intelligence Unit, *The Road from Principles to Practice – Today's Challenges for Business in Respecting Human Rights*, accessible at: https://www.eiuperspectives.economist.com/strategy-leadership/road-

principles-practice/white-paper/road-principles-practice-todays-challenges-business-respecting-human-rights, visited 2016-09-22

Treaty Initiative, *Ten Key Proposals for the Treaty*, accessible at: https://www.escr-net.org/sites/default/files/attachments/tenkeyproposals_final.pdf, visited 2016-12-02.

UN Global Compact, *Guide to Corporate Sustainability*, accessible at: https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf, visited 2016-11-28.

Websites

Australian Centre for Corporate Social Responsibility, *What is CSR?*, accessible at: http://accsr.com.au/what-is-csr/, visited 2016-09-22

BBC News, *Bhopal trial: Eight convicted over India gas disaster*, 2010, accessible at: http://news.bbc.co.uk/2/hi/south_asia/8725140.stm, visited 2016-12-09.

British Institute of International and Comparative Law, *Preliminary Remarks on Forum Non Conveniens Doctrine*, accessible at: http://www.biicl.org/files/1734_forum_non_conveniens_in_europe.pdf, visited 2016-12-17.

Business & Human Rights Resource Centre, *Business & Human rights – A Brief Introduction*, accessible at: https://business-humanrights.org/en/business-human-rights-a-brief-introduction, visited 2016-09-21

Business and Human Rights Resource Centre, Texaco/Chevron lawsuits (re Ecuador), accessible at: https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador, visited 2016-12-09.

Cassel, Douglass, *Treaty Process Gets Underway: Whoever Said It Would Be Easy?*, accessible at: https://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy, visited 2016-11-28.

ECCJ, *5 Years of UNGPs: 5 Business & Human Rights Issues to Focus On*, accessible at: http://corporatejustice.org/news/135-5-years-of-ungps-5-business-human-rights-issues-to-focus-on, visited 2016-12-29.

ECCJ, FIDH and Friends of the Earth, "TTIP and UN Treaty: EU must stand up for human rights", *EU Reporter*, 2015, accessible at: https://www.eureporter.co/world/2015/07/16/ttip-and-un-treaty-eu-must-stand-up-for-human-rights/, visited 2016-11-29

ECCJ, *UN Treaty on Business & Human Rights negotiations Day 1 - Divide emerges between EU and other delegations*, 2015, accessible at http://corporatejustice.org/news/173-un-treaty-on-business-human-rights-negotiations-day-1-divide-emerges-between-eu-and-other-delegations, visited 2016-11-20.

ECCJ, *UN Treaty on Business & Human Rights negotiations Day 2 - EU disengagement & Lack of consensus on scope*, 2015, accessible at http://corporatejustice.org/news/174-un-treaty-on-business-human-rights-negotiations-day-2-eu-disengagement-lack-of-consensus-on-scope, visited 2016-11-21.

ECCJ, *UN Treaty Talks Day 3 and 4: From business as usual to enhanced corporate responsibility for human rights*, accessible at: http://corporatejustice.org/news/327-un-treaty-talks-day-3-and-4-from-business-as-usual-to-enhanced-corporate-responsibility-for-human-rights, visited 2016-12-01.

ECCJ, *UN Treaty Talks Day 5: Morality cannot be legislated, but behaviour can be regulated*, accessible at: http://corporatejustice.org/news/329-un-treaty-talks-day-5-morality-cannot-be-legislated-but-behaviour-can-be-regulated, visited 2016-12-02.

Forum Non Conveniens, accessible at: https://www.law.cornell.edu/wex/forum_non_conveniens, visited 2016-11-25.

Ganesan, Arvind, *Reflections of the State of Business and Human Rights*, accessible at: https://www.hrw.org/news/2013/01/02/reflections-state-business-and-human-rights, visited 2016-09-21

Garcia, Claudia, *A Slippery Decision: Chevron Oil Pollution in Ecuador*, accessible at: http://dw.com/p/1GS5b

Human Rights Watch, *"What… if something went wrong?" – Hazardous Child Labor in Small-Scale Gold Mining in the Philippines*, accessible at https://www.hrw.org/report/2015/09/29/what-if-something-went-wrong/hazardous-child-labor-small-scale-gold-mining, visited 2016-11-15.

IOE press release, *IOE Secretary-General shares John Ruggie's 'grave doubts' over Ecuador proposal for new business and human rights treaty*, 2014, accessible at www.ioe-emp.org/index.php?id=1078, visited 2016-11-18.

IOE press release of 26 June 2014, *Consensus on Business and Human Rights is broken with the Adoption of the Ecuador Initiative*, accessible at http://www.ioe-emp.org/index.php?id=1238, visited 2016-11-18.

Kasla, Coldo, *Ruggie versus Ecuador: Will a human rights norm ever emerge regardless of Western support?*, accessible at https://rightsincontext.eu/2014/02/09/ruggie-versus-ecuador-will-a-human-rights-norm-ever-emerge-regardless-of-western-support/, visited 2016-11-18.

Kasperkevic, Jana, "Rana Plaza collapse: workplace dangers persist three years later, reports find", *The Guardian*, 2016, accessible at: https://www.theguardian.com/business/2016/may/31/rana-plaza-bangladesh-collapse-fashion-working-conditions, visited 2016-11-15

Lee Williams, *What is TTIP? And six reasons why the answer should scare you*, 2015, accessible at: http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html, visited 2016-11-29.

OHCHR, *OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*, accessible at: http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx, visited 2016-11-30.

Piercing the Corporate Veil, accessible at: https://www.law.cornell.edu/wex/piercing_the_corporate_veil, visited 2016-11-26.

Parens Patriae, accessible at: https://www.law.cornell.edu/wex/parens_patriae, visited 2016-12-09.

Planet Earth: A Corporate World, accessible at: https://www.tni.org/en/infographic/planet-earth-corporate-world, visited 2016-12-15.

Rhodes, Aaron, "The False Promise of an International Business and Human Rights Treaty", *The World Post*, 2014, accessible at: http://www.huffingtonpost.com/aaron-rhodes/the-false-promise-of-an-i_b_5575236.html, visited 2016-12-10.

Ruggie, John Gerard, *A Business and Human Rights Treaty? International Legalisation as Precision Tools*, 2014, accessible at: https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision/?, visited 2016-12-21.

Ruggie, John Gerard, *Quo Vadis? – Unsolicited advice to Business and Human Rights Treaty Sponsors*, 2014, accessible at https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-

unsolicited-advice-to-business-and-human-rights-treaty-sponsors/, visited 2016-11-16.

Treaty Alliance, *Diplomacy Wins on the Last Day of the IGWG in Geneva*, accessible at: https://treatyalliance.squarespace.com/news/2016/11/1/diplomacy-wins-on-the-last-day-of-the-igwg-in-geneva, visited 2016-12-01.

Treaty Alliance, *Discussions on scope of the treaty on day four of the intergovernmental working group session in Geneva*, accessible at: https://treatyalliance.squarespace.com/news/4ec8df00-6690-4dc2-8178-aca3be143e31, visited 2016-12-01.

Treaty Alliance, *Obligations and responsibilities of TNCs-OBEs discussed during the third day of the IGWG*, accessible at: https://treatyalliance.squarespace.com/news/3965fbee-bf77-4691-8a5d-89a83175bef4, visited 2016-12-01.

Court Cases

Aguinda v. Texaco, Inc., 303 F. 3d 470 (2002).

Owusu v. Jackson, C-281/02, 2005.