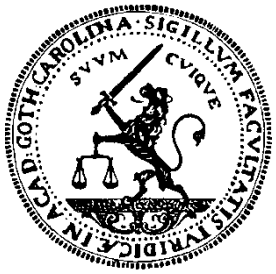

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A Decade of Dialogue:

the Journey to Consensus in Negotiations for a UN Treaty on Business and Human Rights

JURM02 Graduate thesis

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Table of Contents

Summary

This thesis examines the continuing development of a potential UN Treaty on Business and Human Rights. This year marks a decade since the Human Rights Council passed resolution 26/9, establishing a working group to elaborate a potential legally binding instrument in international human rights law, with the objective to regulate the activities of transnational corporations and other business enterprises.

Various structural aspects of international law have created a legal void. States have traditionally been the sole bearers of the duty to fulfil and protect human rights, including from third parties like companies. Business actors have therefore not had any international legal obligations to safeguard human rights throughout their operations. Instead, any initiatives have rested on voluntarism. At present, non-binding instruments are the primary normative documents setting the standards and expectations for business enterprises with regards to human rights. However, these instruments have proven unable to prevent misconduct and violations related to corporate operations from taking place. The current framework has been criticised for not offering sufficient access to remedy for victims and allowing for companies to evade any legal consequences. The hope is that a future treaty could effectively regulate business activities and enhance corporate accountability.

The thesis evaluates the progress made thus far in the treaty negotiations by identifying which key legal issues that have been settled, and subsequently which of the substantive debates that remain unresolved. The thesis offers an indication of which direction delegates appear to have moved the draft treaty, and discusses the potential added legal values if, one day, passed by the Council and ratified.

The thesis consists of five main chapters. *The first chapter* introduces the subject of business and human rights, the purpose and research questions, materials used, the methodological aspects employed and delimitations. *The second chapter* addresses the legal void by exploring the current framework and relevant cases, historic and present, that portray the ways in which a governance gap exists. *The third chapter* examines reports and compilations of statements made during negotiations alongside significant revisions in the draft versions of a treaty. Chapter two and three each includes separate analyses. *The fourth chapter* discusses the potential legal added values of a binding instrument, drawing from contents of the previous chapters. *The fifth chapter* concludes by answering the research questions.

Sammanfattning

Denna uppsats undersöker den fortsatta utvecklingen av ett potentiellt FN-fördrag om företag och mänskliga rättigheter. I år är det ett decennium sedan rådet för mänskliga rättigheter antog resolution 26/9, vilken inrättade en arbetsgrupp för att utarbeta ett potentiellt rättsligt bindande instrument inom mänskliga rättigheter, med målet att reglera transnationella företag och andra affärsverksamheters aktiviteter.

Olika strukturella aspekter av internationell rätt har skapat ett rättsligt tomrum. Stater har traditionellt sett varit de enda bärarna av skyldigheten att uppfylla och skydda mänskliga rättigheter, inklusive från tredje part som företag. Affärsaktörer har därför inte haft några internationella juridiska förpliktelser att skydda mänskliga rättigheter i sin verksamhet. Alla initiativ har i stället byggt på frivillighet. För närvarande är icke-bindande instrument de primära normativa dokumenten som sätter standarder och förväntningar på företag om mänskliga rättigheter. Dessa instrument har dock visat sig oförmögna att förhindra kränkningar av mänskliga rättigheter relaterade till företagsverksamhet. Det nuvarande ramverket har kritiserats för att inte erbjuda tillräcklig tillgång till rättsmedel för offer och för att tillåta företag undvika juridiska konsekvenser. Förhoppningen är att ett framtida fördrag skulle kunna reglera affärsverksamhet på effektivt sätt och öka företagens ansvarsskyldighet.

Studien utvärderar de framsteg som gjorts hittills i fördragsförhandlingarna, genom att identifiera inom vilka viktiga juridiska frågor som det har nåtts en överenskommelse och därigenom även vilka som förblivit olösta. Studien ger en indikation på vilken riktning delegater verkar ha flyttat fördragsutkastet och diskuterar de potentiella juridiska mervärdena om det en dag antas av rådet och ratificeras.

Uppsatsen består av fem huvudkapitel. *Det första kapitlet* introducerar ämnet företagande och mänskliga rättigheter, syfte och frågeställningar, material som används, metodologiska aspekter tillämpade och avgränsningar. *Det andra kapitlet* omfattar det rättsliga tomrummet genom att utforska det nuvarande ramverket och relevanta fall, historiska och pågående, som visar hur ett styrningstomrum existerar. *Det tredje kapitlet* undersöker rapporter och sammanställningar av uttalanden som gjorts under förhandlingar inom arbetsgruppen, tillsammans med betydande revideringar som gjorts i de olika utkasten till ett fördrag. Kapitel två och tre innehåller separata analyser. *Det fjärde kapitlet* diskuterar de potentiella juridiska mervärdena av ett bindande instrument, utifrån innehållet i de föregående kapitlen. *Det femte kapitlet* avslutas med att besvara frågeställningarna.

Acknowledgements

My heartfelt gratitude goes out to my family and friends, for your unwavering support and constant belief in my ability to pursue my endeavours. I am the most fortunate to have you in my close circle.

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I also wish to acknowledge Clara, for your invaluable assistance in proofreading this thesis. Any errors remain mine.

Lastly, I would like to thank my supervisor, Nicole Citeroni, for generously sharing your advice on the writing process and for guiding me in this final stretch of my studies.

Amanda Magnusson

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Abbreviations

BHR	Business and Human Rights
BIT	Bilateral Investment Treaty
CSDDD	Corporate Sustainability Due Diligence Directive
CSO	Civil Society Organizations
EU	European Union
FTA	Free Trade Agreement
HRC	United Nations Human Rights Council
HRDD	Human Rights Due Diligence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
LBI	Legally Binding Instrument
NAP	National Action Plan
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-Ended Intergovernmental Working Group
SOE	State-Owned Enterprise
SRSG	Special Representative of the United Nations Secretary General
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights

1 Introduction

The first chapter lays the foundation of the thesis. It begins with an introduction to the subject, its emergence, and the prevailing critical issues that have spurred this work. The chapter then presents the objectives of the study and the methodological approach employed.

1.1 Background

This year marks a decade since the United Nations Human Rights Council (HRC) adopted resolution 26/9, on 26 June 2014, establishing an Open-Ended Intergovernmental Working Group (OEIGWG) with the mandate to 'elaborate an international legally binding instrument (LBI) on transnational corporations and other business enterprises with respect to human rights'.[1] In joint efforts Ecuador and South Africa tabled the resolution with financial support from Bolivia, Cuba and Venezuela. The resolution, which was ultimately passed despite being highly divisive among the 47 members of the Council, marked a new phase of the development of potential positive obligations for corporations with regards to human rights under international law. The resolution was contested, adopted by a vote of 20 in favour[2], 14 against[3], and 13 abstentions.[4] The numbers can be said to demonstrate with clarity the different and often opposing views that consistently has surrounded the topic and continues to do to this day.

Though there was weak support for the proposal in the HRC it still became a defining moment as a dedicated forum with a clear purpose was created, allowing states and various stakeholders across the globe to gather in conversations on a possible authoritative document. As the OEIGWG enters its tenth year, nine sessions have taken place with the most recent one held in October 2023.[5] The output reached so far is the fifth version of a Draft LBI.

[1] Human Rights Council, 2014. Res. 26/9. A/HRC/RES/26/9.

[2] Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam voted in favour of the resolution.

[3] Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the United States of America voted against the resolution.

[4] Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates abstained. Ibid. p. 3.

[5] UN HRC, Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc. Accessed 28 February 2024.

1.1.1 Human Rights and Business: In Context

The history leading up to the establishment of the OEIGWG is often said to have its formal starting point in the 1970s when the UN Draft Codes of Conduct was drawn up.[6] These documents represent one in a series of unsuccessful attempts to introduce legally binding obligations on companies with regards to human rights – a series rooted in years of increased corporate power and growing concern of corporate misconduct.[7] Early developments in the field of BHR can be traced back to the abolishment of the Transatlantic slave trade in the 1850s and the creation of the International Labour Organization (ILO) 1919 in Versailles after World War I, in response to inequal labour conditions during and after the industrial revolution. However, formal steps towards establishing binding obligations were not taken until 50 years later.[8]

In the post-war era following World War II, trade liberalization drove intensified integration of the global economy. Rooted in pragmatism and the objective to prevent new wars, many countries adopted a market-state model compromising capital and labour – commonly referred to as "embedded liberalism". These ideas later resurged as they produced high rates of growth during the 1950s and 1960s.[9] In the meantime, human rights also gained attention, with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 as a prime example.[10]

The revival of neoliberal market theories in the 1980s, is viewed by scholars as the early onset for the contemporary movement within BHR that is seen today. The movement includes mechanisms such as self-regulatory models like Corporate Social Responsibility (CSR), deriving from years of growing advocacy for, and awareness of, responsible business practices.[11] This shift in economic policy created an unprecedented rise in transnational (or multinational) corporations (TNCs/MNCs)[12] facilitated by foreign direct investment (FDI) through bilateral investment treaties (BITs) and free trade agreements

[6] Stéphanie Bijlmakers, *Corporate Social Responsibility, Human Rights and the Law* (2019) p. 13; Peter T. Muchlinski, *Advanced Introduction to Business and Human Rights* (2022) p. 16.

[7] Bijlmakers (2019) p. 14.

[8] Nadia Bernaz, *Business and Human Rights. History, law and policy – Bridging the accountability gap,* Routledge (2017), Chapter 1, 52 and 57; Muchlinski (2022) p. 5.

[9] Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (2018) pp. 8–12.

[10] Universal Declaration of Human Rights. Resolution 217A (1948).

[11] See for instance Bijlmakers (2019) p. 18 and Muchlinski (2022) p. 17.

[12] TNC is the term used in UN context, while MNC is the term used by the OECD. The OECD Guidelines describes TNCs/MNCs as corporations that "usually comprise companies or other entities established in more than one country and are so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of other entities in a group, their degree of autonomy within the group may vary widely from one multinational enterprise to another. Ownership may be private, State, or mixed.", Part I. Concepts and Principles', para. 4.

(FTAs).[13] It is estimated by the Organisation for Economic Co-operation and Development (OECD) that there are over 80,000 TNCs operating worldwide today.[14] The top six countries with the most TNCs domiciled within their territory are the US, China, Japan, UK, Australia and Canada.[15] This forceful shift in economic policy closely relates to the changed perception of companies' role in society. With the revenue of many of the largest TNCs surpassing by far the gross domestic product of several nation states, a shift in power dynamics was noted.[16]

Economic globalisation has brought both significant opportunities and challenges. The expansion and profitability of TNCs have proven outstanding.[17] Generating millions of jobs throughout their extended value chains across the globe has been fundamental for both domestic and international economy, indirectly supporting other human rights goals like fighting poverty, the rights to work, health and access to education. It produces tax, which enables governments to carry out their work and further create jobs and stimulate trade. But globalisation has also created new challenges for the protection of human rights. Some business practises use weak regulatory frameworks or operate in countries lacking the political will to safeguard human rights. The erosion and disregard have, in some cases, instead contributed to violations.[18]

The positive aspects of TNCs thus need to be viewed in relation to their objective, which is profit adhering to corporate interests. Since the significant rise and expansion of TNCs, their distinct advantages and prominent role socio-economically and in global affairs have been discussed. The considerable power possessed and lack of any single controlling mechanism have raised questions about the need for greater accountability since the 1970s.[19] Meanwhile, there has been growing concern about the ability of states to regulate and see to the public interests, balancing them to BITs and FTAs and growing corporate power.[20] TNCs have been, and still are, typically at the centre of the BHR debate.[21]

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[13] UN DESA, 'Multinational Corporations in World Development'. UN Doc, ST/ECA/190 (1973) p. 1.

[14] OECD, ANME database, 2023. Available at: https://www.oecd.org/en/data/datasets/multinational-enterprises-and-global-value-chains.html. Accessed 28 February 2024.

[15] Listed in falling order. Barklie, Glenn, 'Where do the world's top companies have subsidiaries?', Investment Monitor, 14 March 2022. Available at: https://www.investmentmonitor.ai/features/where-do-the-worlds-top-companies-have-subsidiaries/?cf-view&cf-closed. Accessed 28 February 2024.

[16] Bijlmakers (2019) p. 21; Nolan (2016) pp. 3–4; Muchlinski (2022) pp. 17–18.

[17] UN DESA, 'Multinational Corporations in World Development'. UN Doc, ST/ECA/190 (1973) p. 2.

[18] Nolan (2016) p. 3.

[19] UN DESA, 'Multinational Corporations in World Development'. UN Doc, ST/ECA/190 (1973) p. 2.

[20] Bijlmakers (2019) pp. 18–19; Nolan (2016) p. 3.

[21] Bernaz (2017) pp. 166–168.

The situation called for the establishment of a normative framework for businesses with regards to human rights. Several soft law initiatives and general guides on desired behaviours have been written throughout the years, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles (UNGPs), and the ISO 26000, to name a few. While having contributed immensely to changing expectations of business conduct, they have also been criticised for being voluntary, and as they lack enforcement mechanisms, essentially toothless.[22] In response to bridge what appears to be an accountability gap, efforts have been taken to create an international treaty, last time with resolution 26/9 and the establishment of the OEIGWG. Additionally, from 2015 onwards, there has been an increase in human rights reporting requirements on domestic level and growing support for Human Rights Due Diligence (HRDD) obligations.[23]

1.1.2 Previous Attempts at Addressing Activities of TNCs

The ongoing drafting process for an international treaty is not a unique initiative. Instead, an informal attempt to approach activities of TNCs by legal means can be found in 1948 when efforts were made to include provisions addressing investment and social responsibility in the Havana Charter for an International Trade Organization. However, that charter never came to be ratified.[24]

The first formal attempt was initiated five decades ago in 1973 when a group of "eminent persons" were appointed by the UN Economic and Social Council to study the societal impacts on economic development and international relations of TNCs. The group suggested that an additive approach be adopted, with the short-term objective to produce a code of conduct and the long-term objective that it evolves into a treaty.

Additionally, the UN Economic and Social Council was advised to create an institution dedicated to research TNCs. This led to the establishment of the UN Commission on Transnational Corporations and the UN Centre on Transnational Corporations in 1974. The Commission on TNCs tasked a working group with drafting a Code of Conduct. Negotiations were held between 1977

[22] Florian Wettstein, *Business and Human Rights. Ethical, Legal and Managerial Perspectives* (2022) pp. 209, 216 and 221.

[23] John. G Ruggie et al., 'Ten Years After: From UN Guiding Principles to Multi Fiduciary Obligations' (2021) 6:2 *Business and Human Rights Journal* p. 190.

[24] Khalil Hamdani and Lorraine Ruffing, 'Lessons from the UN Centre on transnational corporations for the current treaty initiative'. In: Surya Deva and David Bilchitz (eds.) *Building a treaty on business and human rights: context and contours* (2017) p. 27.

and 1982 and resulted in an initial draft being presented in 1983. New deliberations followed and a final revised draft was issued in 1990.[25]

The 1990 Draft Code was universally applicable to all TNCs including their entities.[26] Duties were placed upon TNCs to adhere to local socio-cultural objectives and values by refraining from practises which could have adverse effects.[27] It was stated that TNCs "shall respect human rights and fundamental freedom in the countries in which they operate".[28] Other provisions stipulated that TNCs observe domestic laws and not to interfere with internal affairs.[29]

Negotiations stalled as major divide between mainly developing and developed countries[30] arose on matters of state responsibility vis-à-vis TNCs.[31] The different stances taken are best understood when put in a historic context. In short, three groups with different underlying interest situations were present at the time that the Code negotiations took place. Hence, they all entered negotiations with different priorities. [32]

Developing countries were by a majority recipients of FDI. Their key focus was therefore to impose responsibilities on TNCs to limit any adverse impacts on their host-territory. *Socialist countries'* main priority was to protect their government controlled TNCs from the Code and have them remain outside the scope and definition. Close to no socialist countries engaged in FDI practices whether it being inward or outward, as they generally held a pessimistic view on TNCs. *Developed countries* were both the principal home and host country worldwide. However, as the bulk of flows both ways were among developed countries, there were already various instruments in place protecting capital abroad ensuring well treatment in host countries. The priority was therefore to secure protection and treatment of investments in developing countries, essentially by limiting host governments possibility to interfere and limit civil society space.[33]

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[25] Surya Deva, 'International Investment Agreements and Human Rights: Assessing the role of the UN's Business and Human Rights Regulatory Initiatives'. In: Julien Chaisse et al. (eds), *Handbook of International Investment Law and Policy* (2021) p. 1738.

[26] Draft United Nations Code of Conduct on Transnational Corporations, UN Doc. E/1990/94. Article 1(a) and 1(c).

[27] UN Doc. E/1990/94. Article 13.

[28] Ibid., Article 14.

[29] UN Doc. E/1990/94.

[30] The classification of economies follows that of UNCTAD. Here, the terms 'developing' and 'developed countries' and 'countries of the Global South' and 'Global North' are used interchangeably. Available at: https://hbs.unctad.org/classifications/. Accessed 23 February 2024.

[31] Hamdani and Ruffing (2017) p. 1739.

[32] Karl Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16:1 *The Journal of World Investment & Trade* pp. 19–23.

[33] Ibid.

Negotiations were eventually abandoned before the legal nature of the Draft Code could be decided upon. At the time, proponents for both a legally binding code, a voluntary code and a universally applicable code were present. The Draft Code would have served as a convention containing national and international mechanisms for implementation. Conversely, if made voluntary, the Draft Code would have become a set of guidelines.[34] While developed countries argued for a voluntary code, developing countries stressed the need for a legally binding instrument. Negotiations ended in 1992 following a deadlock.[35]

The second attempt at regulating business and human rights arose from the UN Sub-commission on the Promotion and Protection of Human Rights in 1997. A working group was established the following year, tasked to identify and examine issues and effects, and provide recommendations on TNCs and human rights. The mandate was renewed in 2001, with the added authority to draw up relevant norms (the Norms).[36] The working group embarked on a lengthy process of consultations with a wide range of stakeholders during which several draft versions were produced. Business representatives, NGOs, the unions, scholars and other interested persons were among those participating in yearly deliberations in Geneva.[37] A final set of the Norms and its interpretative commentary was approved by the Sub-Commission in 2003 and submitted to the parent body UN Commission for consideration.[38]

The Norms assembled provisions on human rights, labour, the environment, principles on anti-corruption and best practices for corporate social responsibility. It was a wide range appearing to be more comprehensive and human rights centred than previous codes of conducts and institutional initiatives drawn up.[39] The Norms had a mandatory nature, gaining its authority from sources in customary international law and treaties, but without taking the shape of primary law as a treaty itself.[40]

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[34] Justine Nolan 'Mapping the movement: the business and human rights regulatory framework'. In: Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (2016) p. 39.

[35] Deva (2021) p. 1739.

[36] David Weissbrodt and Maria Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97:4 *The American Journal of International Law* pp. 903–905.

[37] Pini Pavel Miretski and Sascha-Dominik Bachmann, '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' (2012) 17:1 *Deakin Law Review* pp. 16–17.

[38] UN ECOSOC 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights E/CN.4/Sub.2/2003/12/Rev.2 (hereinafter 'the Norms'). Approved through Sub-Commission resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003.

[39] See for instance the ILO, the OECD, the European Parliament. Weissbrodt and Kruger (2003) p. 912.

[40] Weissbrodt and Kruger (2003) p. 913.

Most notable about the Norms is that they spelled out direct responsibility for TNCs – a new legal standard in human rights protection.[41] While recognising that states have the primary responsibility to ensure human rights, TNCs and other business enterprises were "also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights (UDHR).[42] This part was heavily contested among stakeholders and the debate quickly turned divisive following the approval by the Sub-commission.[43]

The Norms were well received by civil society, with close to 90 NGOs confirming their support.[44] Proponents held that the Norms could bridge the regulatory gap that originated from ineffective state legislation and compensate the insufficiency of voluntary initiatives.[45] By contrast, critics argued that the Norms placed too large of a responsibility on businesses, with some even more extensive than those of states, essentially creating a new legal standard that moves the duties from states to individual actors in the private sector.[46]

The Norms eventually failed to obtain the approval of the Commission. In light of the extensive criticism brought forward by states and the business community alike, the Commission concluded that the Norms had no legal status as a draft proposal and thus put an end to the Sub-Commission's work in 2005.[47] Efforts by the UN moved on with the UN Commission on Human Rights requesting that a Special Representative to the Secretary General (SRSG) be appointed to lead the work.[48] The third attempt culminated with the UNGPs being endorsed in 2011.[49] The UNGPs and its framework will be further examined in section 2.1.1.

1.1.3 Framing the Issue

The core issue in business and human rights stems from the governance gaps created by globalisation. These gaps exist between the vast reach and power of economic forces and the limited ability of states to control their negative impacts. This discrepancy allows companies to commit wrongful acts without facing adequate consequences or providing reparations.

[41] Miretski and Bachmann (2012) pp. 8 and 17.
[42] UN ECOSOC, the Norms, Preamble.
[43] Nolan (2016) p. 42.
[44] Weissbrodt and Kruger (2003) p. 906.
[45] Nolan (2016) p. 42
[46] Ibid.
[47] Miretski and Bachmann (2012) p. 17.
[48] Commission on Human Rights, Responsibilities of transnational corporations and related business enterprises with regard to human rights, Decision 2004/116.
[49] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31, 2011 (hereinafter *Guiding principles* A/HRC/17/31).

The challenge is to reach consensus on how to close these gaps and ensure that businesses are held accountable for their impact on human rights.[50]

1.2 Purpose

This thesis examines the negotiation process of a UN legally binding treaty on business and human rights. The objective is to map and analyse the progress made over the last decade, identifying significant legal issues that have been resolved and highlight major debates that remain open. Based on these findings and the direction in which the instrument appears to be heading, the potential added value of the treaty is discussed in relation to the current legal void. The thesis covers all sessions of the OEIGWG, with particular emphasis on the latest draft.

1.3 Research Questions

To fulfil the purpose of this thesis, the following research questions are formulated:

(i) In what ways do the current governance framework create a gap in addressing business and human rights?

(ii) Which out of the key legal issues debated in the drafting process appear to have been settled and which remain unresolved?

(iii) Based on the direction in which the intergovernmental working sessions have moved the draft proposal, what are the added values, if any, of a legally binding instrument?

1.4 Method and Material

To answer the first research question, this thesis adopts a traditional legal approach. First, sources of hard and soft law are examined to explore the legal void within BHR. The binding sources encompass relevant treaties and other international agreements along with binding customary international law. The "soft" non-binding sources encompass official recommendations, guidelines or other policy documents of similar character. Second, prominent legal cases are studied to uncover which legal gaps and issues arise under the current framework. These cases are found through a literature review of scholarly books and articles and chosen based on their significance and ability to extensively portray the legal challenges.

[50] John G. Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', A/HRC/8/5, p. 3.

The second research question is answered through a comprehensive analysis of the negotiations during the past years. As previously introduced, the OEIGWG publishes official reports from each of its sessions elaborating the LBI. These reports, together with addendums and attachments on States and non-States statements from the sessions, constitute the backbone and main material for the analysis. This material is studied thematically and then compared, to identity which are the main legal issues to include in the thesis. The potential progress made within each of these debates is assessed based on any prevailing disagreements and the revisions made in the drafts. The main arguments and most influential statements from state delegates and other stakeholders are presented alongside key revisions made between the draft versions of the treaty to provide context.

For added depth and analytical dimension, the main substantive debates identified are placed in a legal context through the incorporation of principles under international law, scholarly articles, and opinions voiced by stakeholders. To provide substance to the analysis, secondary sources have been studied, including books, articles, online scholarly commentaries, and when needed for factual context, research reports conducted by CSOs. The scholarly sources are all written by prominent and recognised scholars within the field of BHR. Reports included are assessed and selected based on the credibility of the CSO.

Lastly, the third research question builds on the previous two and is addressed by discussing the added legal value of an LBI and the potential contributions it can make in addressing the challenges identified within the current framework.

Given the interdisciplinary and multifaceted nature of the ongoing treaty process, it is evident that BHR discussions do not exist in a legal vacuum. Therefore, this thesis recognises the relevance of policy aspects, insofar as deemed necessary to assess negotiations. Moreover, the future of a treaty is not solely determined by its legal effectiveness and technical aspects. The adoption of a treaty hinges on political consensus, and a solely legal approach might overlook critical factors relevant to the development of the draft. Hence, this thesis draws on insights from international relations and history when they illuminate legal issues shaped by opposing political or state viewpoints.

The method employed bears a few limitations. Compilations of statements delivered by states and non-state actors only include those shared with the secretariat in written form and their original language. This may affect the comprehensiveness of the thesis in two ways. First, the compilations by the secretariat may not be exhaustive and some statements delivered therefore not retrievable. However, the existing material provides sufficient depth and understanding of the negotiations to complement the official reports, which typically summarize events by limiting details or longer deliberations.

Second, negotiations are conducted in English, with simultaneous interpretation for statements made in other languages. Some statements are, therefore, only available in their original language. Given the author's language capacity, the included material is limited to English.

1.5 Delimitations

Business and human rights intersect with multiple areas of international law including international environmental law, international criminal law, international humanitarian law and international investment law. As this thesis aims to examine a potential treaty in human rights law, it will, alongside general principles under international law, serve as focal point. Other areas of international and domestic law are only included when necessary for examining the treaty negotiations, for instance when explicitly referenced to.

This thesis focuses on the substantive legal issues addressed in sections one and two of the different drafts, as these sections include the core legal material. Therefore, it is important to note that section three of the drafts is explicitly excluded from this study. Section three predominantly concerns procedural arrangements, including but not limited to, the settlement of disputes, ratification, reservations and entry into force. These procedural aspects, while significant, fall outside the scope of the study, which aims to concentrate on the substantive legal provisions and the debates surrounding them.

Lastly, it should be emphasised that the thesis does not intend to provide any technical legal suggestions on the treaty in the form of daft proposals. The sole objective is to examine the ongoing legal debate and deliberate on the implications and difficulties that may lie ahead going forward.

2 Portraying the Governance Gap

This chapter addresses the legal void in international law and elucidates the consequences stemming from the existing framework. First, soft law instruments are studied to provide understanding for the current framework. Special attention is directed towards the UNGPs, given their significant influence and relevance to the ongoing drafting process, often presented as the alternative option to a treaty. Second, the absence of hard law is examined, with a focus on legal complexities that have arisen due to the gap. Third, prominent cases are presented to illustrate the framework in practice and portray the breadth and depth of legal issues within the realm of BHR. Lastly, above is analysed.

2.1 Legal Framework

2.1.1 Soft Law Instruments

As introduced above, there are no legally binding sources creating international human rights obligations for businesses today. While soft law norms can evolve into binding customary international law, the field of BHR still lacks such cases. Instead, non-binding instruments make up for the most influential documents in terms of setting the human rights standards for companies.[51] There is no universal definition of soft law and there are discussions on whether soft and hard law are dichotomies or rather sits on each end of a continuum.[52]. However, in a general sense soft law can be described as law-like instruments, for instance principles, norms, or standards. The difference lies in the absence of normative power, enforceability, and formal legal status.[53] Any commitments to soft law therefore rests on voluntarism.[54]

Recalling what was described in the first chapter, previous attempts to create a legally binding instrument by the UN have been unsuccessful. The UN Code of Conduct (1973-1992) and the UN Norms (1998-2005) both failed to gain sufficient support. However, both initiatives succeeded in conveying the need for continued debate in the field, creating enough momentum for the UN Council to move the work forward.

[51] Sarah Joseph and Joanna Kyriakakis 'From soft law to hard law in business and human rights and the challenge of corporate power' (2023) 36:2 *Leiden Journal of International Law* p. 337.

[52] See for instance Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law'. In: Surya Deva and David Bilchitz (eds) *Human rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect?* (2013); Barnali Choudhury 'Balancing soft and hard law for business and human rights' (2018) 67:4 *International and Comparative Law Quarterly* p. 963; Wettstein (2022) p. 177.

[53] Choudhury (2018) p. 963.

[54] Wettstein (2022) p. 176.

The non-adoption of the UN Norms by the Commission of Human Rights in 2005 gave cause for a new approach. As the UN Norms obtained a rather hard line, essentially placing the same duties to secure human rights on companies to those of states, large disagreements arose between human rights advocates and representatives from the business community, and ultimately failed to attract Government support. With the objective to narrow division and advance the debate, the Commission recommended that the UN Secretary-General appoint a SRSG on the issue of human rights, TNCs and other business enterprises.[55] In July 2005, the choice fell on Professor John Ruggie who was asked to conduct an in-depth study, compiling existing initiatives and standards of corporate responsibility and accountability with regards to human rights.[56]

Following comprehensive consultations with stakeholders including states, TNCs, labour associations, international organisations and agencies, among other, Ruggie introduced the 'Protect, Respect, and Remedy Framework' (the Framework) in 2008. The framework comprises three differentiated but complementary pillars: (i) The State duty to protect against human rights abuses by third parties; (ii) The corporate responsibility to respect human rights and lastly; (iii) Effective access to remedies for victims of business-related abuse, whether judicial or non-judicial.[57]

The phrasing of each pillar consciously differentiates the levels of obligations. That states have a 'duty' to protect whereas corporations only have a 'responsibility' to respect conveys a clear distinction of states and businesses, limiting expectations and obligations for companies. By contrast, the UN Norms controversially called for businesses to 'promote, secure the fulfilment [… and] ensure respect of and protect human rights.[58] Instead, the Framework adopts the more pragmatic approach that business responsibilities to respect human rights only is a baseline expected from society, without basis in international law. Any duties to respect human rights law therefore fall solely on states, in line with the approach held in international human rights law.[59]

The idea of keeping a state-centric approach was to avoid further fragmentation in an already multifaceted legal sphere. The Framework thus attempts to create a system that simultaneously acknowledges separate governance systems (the system of public law and policy, the system of civil governance and the system of corporate governance) and coordinate, but without integrating them.[60] This is known as Ruggie's 'polycentric governance' system which

[55] Commission on Human Rights, Responsibilities of transnational corporations and related business enterprises with regard to human rights, Decision 2004/116.

[56] *Guiding principles,* A/HRC/17/31, paras 2– 3.

[57] UN Human Rights council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', 7 April 2008. UN Doc. A/HRC/8/5.

[58] UN ECOSOC, the Norms, Article A, General Obligations.

[59] Bernaz (2017) p. 191.

[60] Ibid., p. 193.

gained wide support among stakeholders and was received well by the HRC. As a result, the SRSG was asked to operationalise the Framework.[61]

In June 2011, the HRC unanimously endorsed the end-product of Ruggie's mandate – the UNGPs, built on the same tripartite Framework introduced in 2008. The UNGPs constitutes 31 principles that universally assign all states and all business enterprises to prevent and address adverse business-related human rights impacts.[62] It was emphasised by the SRSG that the contribution of the Guiding Principles does not lie in the creation of any new international law obligations. Instead, existing standards are compiled and elaborated upon to create a coherent template.[63]

The first pillar regulates states duty to protect human rights. It is based on standard obligations under public international law and attributes the obligation to protect against human rights abuse to states. The duty is to respect, protect and fulfil human rights within its jurisdiction and territory.[64] This includes abuses by enterprises. Further, states should clearly outline the expectation that businesses domiciled in their territory or jurisdiction respect human rights throughout their operations. However, this is purely for policy reasons, as states generally are not required to regulate extraterritorial activities by businesses domiciled in their territory or jurisdiction.[65]

The second pillar deals with the corporate responsibility to respect human rights. It sets a global standard for company operations regardless of where in the world they operate or what states' national legislation may prescribe.[66] This pillar does not impose any positive obligations. Instead, it calls for companies to refrain from actions that may cause or contribute to harmful impacts.[67]

The third pillar addresses access to remedy. States are to ensure that those negatively affected have access to effective remedy through judicial, administrative, legislative or other means.[68] It seeks to reinforce the first and second pillars by outlining state- and non-state based judicial mechanisms as well as remedial methods like corporate-based grievances. Remedies include, but are not limited to, financial or non-financial compensation, restitution, apologies, and prevention of harm through guarantees of non-repetition.[69]

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[61] UN HRC, resolution 8/7.

[62] UN HRC, 'Human rights and transnational corporations and other business enterprises' UN Doc. A/HRC/RES/17/4, Annex, p. 6.

[63] UN HRC Doc. A/HRC/RES/17/4, Introduction, paras. 13– 15.

[64] *Guiding principles,* A/HRC/17/31, Commentary to Article 1.

[65] Ibid., Commentary to Article 2.

[66] Ibid., Commentary to Article 11.

[67] Ibid., Commentary to Article 13.

[68] Ibid., Article 25.

[69] Ibid., Commentary to article 25.

Prior to the UNGPs, the issue of business and human rights had been addressed in a few other soft law instruments. Later, the UNGPs came to directly influence such regulations when revisions were made to include a more human rights-oriented approach. Three key documents that need to be mentioned when mapping soft law instruments within BHR are the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the OECD Guidelines, the International Labour Organization (ILO) Multinational Enterprise Declaration, and the UN Global Compact (UNGC).[70]

Initially adopted in 1976 by the member states, the Declaration of International Investment and Multinational Enterprise represented a commitment by governments to foster an open and transparent investment environment. In 2011, the Declaration became the OECD Guidelines when amended specifically to align with the new standards set out in the UNGPs.[71] The OECD Guidelines provide principles and standards for all major business areas in a global context but are in themselves voluntary.[72] The OECD Guidelines and UNGC entail similarities by way of covering more than just human rights. However, the revision in 2011 resulted in a section fully dedicated to human rights, drawing from the UNGPs in language and content.[73]

Another instrument revised to better align with the UNGPs is the ILO Multinational Enterprise Declaration.[74] Adopted more than 40 years ago, the instrument is based on various international labour standards and sets out principles to encourage economic and social progress towards decent work for all. For instance, it covers HRDD processes on inclusive growth and better disbursement of benefits arising from FDI. The revision in 2017 reinforces the UNGPs by referring to the International Bill of Human Rights.[75]

The UNGC marked a significant milestone as the first high level-international code to put business responsibilities for human rights on the agenda. The UNGC comprises 10 non-binding principles on human rights, labour, environment and anti-corruption. They are crafted in a broad and general manner, aimed at setting the standard rather than guiding companies through implementation. Since first launched in 2000 by former Secretary-General Kofi Annan, more than 13 000 signatories in 160 countries have made the UNGC the largest soft law initiative and is considered to have been key for advancing the debate both within and outside the UN.[76]

[70] McCorquodale (2024) p. 35; Wettstein (2022) p. 211.
[71] McCorquodale (2024) p. 35– 36.
[72] OECD Guidelines for Multinational Enterprise on Responsible Business Conduct, p. 12.
[73] Wettstein (2022) p. 207.
[74] The ILO MNE Declaration is binding on governments. However, it has had little direct impact on employers and workers according to McCorquodale (2024) p. 46.
[75] McCorquodale (2024) p. 37.
[76] Wettstein (2022) p. 211.

The UNGPs have significantly contributed to serving as a focal point, addressing the void described by Ruggie.[77] Additionally, they have directly influenced existing international regulation and national legislation and recently also in national case law. This also applies to the OECD Guidelines. Countries like France, the Netherlands, Germany and Norway have all referred to or considered them while drafting national acts in relevant areas.[78] The EU Draft Corporate Sustainability Due Diligence Directive (CSDDD) also contains multiple references to both guidelines.[79] In 2021, a ruling from the District Court in the Hague explicitly used the UNGPs for assessing the standard of care in a climate case. The court held that the UNGPs are universally endorsed and an authoritative instrument, making it a suitable guideline in the current case.[80] Naturally, the ruling does not make the UNGPs themselves binding, but bears significance as it made the UNGPs enforceable under Dutch domestic law.[81]

All soft law instruments have faced harsh criticism for being toothless, essentially lacking enforcement mechanisms, failing to improve access to remedy for victims and generally being ineffective.[82] Ruggie has responded to this criticism with regards to the UNGC by explaining that they were never intended to be a regulatory tool, meaning that critics sometimes blame it for not doing something it was never designed to do.[83]

2.1.2 Lack of Hard Law Instruments

Hard law is generally described as legally binding obligations which create enforceable rights and duties.[84] There are currently no such human rights obligations imposed on corporate activities.[85] However, there is relevant 'hard' law in the BHR sphere that heavily shape the development. To gain a better understanding of the regulatory gap, the legal issues debated and the state of play in the ongoing treaty negotiations, legal areas framing the discussions require some attention.

[77] A/HRC/8/5 para 5.

[78] See for instance the French Duty of Vigilance Act 2017, the Netherlands Child Labour Due Diligence Act 2019, the Norwegian Transparency Act 2021 and the German Corporate Due Diligence in Supply Chains Act 2021, as compiled by McCorquodale (2024), chapter 7.

[79] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937), Preamble, para. 12.

[80] Milieudefensie v Royal Dutch Shell, para. 4.4.11.

[81] McCorquodale (2024) p. 177.

[82] Wettstein (2022) p. 209 and 217.

[83] John G. Ruggie 'The Global Compact as a Learning Network' (2001) 7:4 *Global Governance Review of Multilaterals and International Organisation* p. 372.

[84] Choudhury (2018) p. 963.

[85] Ludovica Curzi, C. *General Principles for Business and Human Rights in International Law* (2020) Preface; Article 38(1) of the ICJ statute typically serves as point of departure when assessing formal sources of public international law.

Legal personhood of corporations at the intentional level is a divisive issue. The restriction on corporate actors as subjects of international law arises from the divide between private international law (conflict of laws dealing with the legal implications of private international transactions) and public international law (dealing with the legal implications in inter-state relations exclusively). The traditional notion is that public international law governs the relations between states, and that states remain the only subjects of international law. Other participants in the international sphere are merely passive objects of the law, generally defined as non-state actors. Treaties can therefore, according to traditional authors, not apply to businesses as a non-state actor.[86] Conversely, some scholars, and BHR scholars in particular, presupposes that individuals and other entities including companies already have acquired human rights obligations under international law.[87]

Generally, the emphasis has to some extent moved away from the limited perspective of passivity and redirected it towards participation. There is a growing recognition that the definitions of subject and object are no longer static dichotomies, but rather fluid. Apart from theoretical discussions, the matter of legal personality has had practical consequences culminating in the rejection of the UN Norms in 2003, thus underscoring its significance in ongoing BHR talks.[88]

The human rights law framework has been tone-setting for the way the debate has unfolded. Traditionally, the responsibility for protecting human rights has been attributed exclusively to states. Rules have mainly derived from international treaty law and customary international law, which then have been translated into national legislation.[89] The International Bill of Human Rights is the core of human rights. It comprises the UDHR and two core human rights treaties. The UDHR lacks, as any declaration of the UN, bindingness and enforceability.[90] Instead, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) codifies the UDHR into binding international law. They hold a state-centric approach by placing the responsibility to protect, respect and fulfil human rights on states. Neither of the two covenants place any direct obligations on non-state actors and the strict interpretation is therefore that businesses and TNCs are not subjects of international human rights law.[91]

[86] Bernaz (2017) p. 86– 91.
[87] Wettstein (2022) p. 113.
[88] Bernaz (2017) p. 86– 91.
[89] Ibid., p. 81; Justine Nolan 'Mapping the movement: the business and human rights regulatory framework' (2016) p. 32.
[90] Wettstein (2022) p. 56 ff.
[91] Bernaz (2017) p. 100.

It should be noted that States may be held accountable for the actions of businesses under specific circumstances. The general legal principle of state responsibility acknowledges instances where states are deemed responsible for business actions, albeit within limited parameters where such actions can be *attributed* to the state.[92]

It is undisputed that states have a duty to protect human rights from adverse impacts or violations committed by third parties, including corporate misconduct. However, the extent to which this obligation also extends to extraterritorial situations is unclear and remains debated. This is because jurisdiction over transnational business activities challenges aspects of state sovereignty, a key principle in international law. Exercising jurisdiction beyond a state's territory will naturally infringe on another state's territory. It is however broadly accepted as an exception to the principle that states generally may exercise jurisdiction over transnational business activities if there is a "reasonable link" between the activity and state, along with a basis for jurisdiction.[93] The problem is thus not theoretical aspects of international law itself, but rather the controversy surrounding the scope and subsequently a lack of state initiatives that utilises the full scale – creating a regulatory and remedial void.[94] At present, states are *permitted*, but *not generally required* to, regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction under international law, as restated in the UNGPs.[95]

Another problem arises from the organisational and structural arrangements of businesses within the modern global economy. The effectiveness of jurisdictional rules interacts with the corporate structures and particularly the distinction of separate legal entities. For instance, the home state of a parent company may lack jurisdiction over a foreign subsidiary, whereas the host state may have jurisdiction over the subsidiary but not over its foreign parent. This too creates a regulatory, and thus a remedial, gap.[96]

In a BHR context, this "dominant way" in which large businesses, typically TNCs, are organized causes difficulties in two ways. First, multiple subsidiaries and separate legal entities may limit the liability of shareholders to the level of their investment. The complexity is exacerbated by globalization which allows shareholding to take place across the globe. Second, long supply chains are making it even more challenging when determining responsibility

[92] ARSIWA Article 1– 2.

[93] Doug Cassels 'State jurisdiction over transnational business activity affecting human rights'. In: Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (2020) p. 198; Olivier De Schutter 'Towards a Legally Binding Instrument on Business and Human Rights' *SSRN Electronic Journal* (2015) p. 46.

[94] Cassels (2020) p. 199; Wettstein (2022) p. 232.

[95] *Guiding principles,* A/HRC/17/31, Commentary to Article 2.

[96] Cassels (2020) p. 199.

and control over a certain act. This is known as the issue of "piercing the corporate veil" and can be a hurdle on victims' quests for remedy.[97]

As current regulatory approaches primarily focus on the state duty to protect against human rights abuses, it becomes a pressing issue when states are either unable or unwilling to fulfil this responsibility. There have been instances where states have failed to intervene or have even contributed to corporate misconduct. The existing framework and institutional circumstances within the host state may be inadequate to address and effectively manage human rights violations. Weak governance within states is often a more prevalent issue in developing countries compared to developed ones.[98] The absence of incentives to protect human rights and effective enforcement mechanisms undermine efforts to compel states to address the activities of both domestic and foreign corporations. States hesitate to act against TNCs and are sometimes influenced by the economic advantages associated with such companies, such as attracting FDI and maintain close ties between governments and conglomerates.[99]

Current legal framework also allows for weak or non-existing mutual legal assistance between states. The absence of cooperation across boarders where TNCs operate seems to be a significant contributor to impunity, thereby leaving victims without access to remedies, or at least making it more difficult. Such assistance could encompass various forms, including collection of evidence, freezing and recovery of assets and enforcement of judgements.[100]

It should be noted that states are increasingly taking measures to regulate and assert jurisdiction over transnational corporate conduct. This is shown through national legislation requiring companies to report on and exercise due diligence across their global operations. Additionally, treaty bodies are placing greater emphasis on the idea that state responsibilities under treaty law extend beyond national borders. However, the extent of that responsibility remains unclear and enforcement mechanisms weak, if even existing at all.[101]

[97] De Schutter (2015), p. 21; David Bilchitz 'Introduction: Putting Flesh on the Bone. What Should a Business and Human Rights Treaty Look Like?' In: Deva and Bilchitz (2017) *Building a Treaty on Business and Human Rights* p. 3.

[98] Bilchitz (2017) p. 3. See also relevant case studies by Nam Seunghyun 'Reducing the governance gap for corporate complicity in international crimes' (2019) 24:1 *Brooklyn Journal of International Law* pp. 193– 239.

[99] Seunghyun (2019) pp. 234–235.

[100] De Schutter (2015) pp. 63–64.

[101] Cassels (2020) p. 199.

2.2 Case Practice: Illustrating the Legal Void

2.2.1 Texaco/Chevron Oil Operations in Ecuador (1964)

In the 1960's, different companies began oil exploration and drilling in the 'Oriente' region of eastern Ecuador. Among them was the fourth-level subsidiary to the United States-based oil company Texaco Inc. (Texaco) named Texaco Petroleum Company (TexPet), which later started operating for a consortium owned equally by the subsidiary and Gulf Oil Corporation. In 1974, the Ecuadorian government obtained a 25 percent share in the consortium through the state-owned agency PetroEcuador. By 1976, PetroEcuador had become the majority shareholder as it acquired all of Gulf Oil's ownership. TexPet remained the operational partner until June 1992 when the Consortium was fully left to PetroEcuador.[102]

Between 1964 and 1992, TexPet drilled "339 oil wells, constructed 18 central production stations, 1000 kilometres secondary pipelines, 600 kilometres of roads and extracted 1,5 billion barrels of crude".[103] Exploration for and extraction of oil generate waste products such as oil field brines, a highly contaminated produced water containing toxins like radioactive isotopes and heavy metals. It is estimated that almost 17 million gallons of crude were spilled in the Amazon, contaminating water sources used by locals for drinking and fishing and damaged soil used for crops. This led to significant adverse effects on local Indigenous people in the Oriente.[104]

Two separate class action lawsuits were filed against Texaco in the Southern District of New York. In 1993, Ecuadorian plaintiffs sued on behalf of 30 000 inhabitants in the Oriente region. The following year, residents of Peru did the same on behalf of around 25 000 residents living in an adjoining area across the border from Ecuador. Both claimed socioenvironmental liabilities by Texaco and sought damages, alleging that TexPet's operations were directed and controlled by the parent company based in the US. In addition, extensive equitable relief for redressing the environment and contamination of water supplies were sought. Texaco requested that the case be dismissed on grounds of *forum non conveniens*[105], failure to join Ecuador as defendants, and international comity.[106]

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

[103] Lorenzo Pellegrini et. al. 'International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case from the Ecuadorian Amazon' (2020) 23:2 *Journal of International Economic* p. 458–459.

[104] Ibid.

[105] The doctrine refers to the discretionary power of a court to decline to exercise its jurisdiction when another forum may hear the case more conveniently. It may be invoked by the defendant or the court. Legal Information Institute, Cornell Law School. Available at: https://www.law.cornell.edu/wex/forum_non_conveniens. Accessed 14 March 2024.

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

After the merger of Texaco and energy corporation Chevron in 2001, legal action continued against the latter. The New York District Court granted the motion, determining that Ecuador is the appropriate forum for the case. The court found that the plaintiffs failed to include all indispensable parties by omitting PetroEcuador and the Republic of Ecuador, which are essential for the equitable relief sought. The decision was conditioned on Chevron's agreement to continue litigation in Ecuador. The decision of 1996 was upheld in a judgment by the United States Court of Appeals in 2002.[107]

Plaintiffs subsequently tried litigation in Ecuador and filed a new class action lawsuit against Chevron before the Provincial Court of Sucumbios in 2003.[108] Over a period of four years, judicial inspections were conducted, during which experts examined the sites and their potential connection to allegations that severe contamination resulting from Texaco's oil operations had led to increased rates of cancer and other health issues among residents in the Oriente. Damages were estimated to 27 billion USD in 2008. The same year, Chevron reportedly lobbied to the US Government to end trade preferences with Ecuador. The evidentiary phase was concluded in 2010 and in February 2011 the Ecuadorian judge ordered Chevron to pay 8,6 billion USD in damages and clean-up costs (the Lago Agrio judgement). The figure would increase to 18 billion USD unless Chevron also publicly apologises (although compensation was later reduced to 9,5 billion USD). Several failed attempts from Chevron to appeal the decision and to block enforcement of the judgement followed. Finally, the decision was upheld by the Ecuadorian High Court in 2012 and later in the Constitutional Court in 2018.[109]

In response, Chevron turned to the global investment protection system and launched an Investor-State Dispute Settlement (ISDS) claim before an arbitration tribunal in 2009, alleging that the Government of Ecuador violated Chevron's rights under the US-Ecuador BIT. A series of legal issues were dealt with between 2010 and 2016 by the arbitral tribunal, before landing two important decisions. In August 2011, 96 million USD was awarded Chevron and in 2016, the tribunal found that Ecuador was bound by the BIT. Ecuador's challenge was declined to be heard by the US Supreme court in 2016.[110]

In August 2018, the Permanent Court of Arbitration in the Hague rendered its decision in favour of Chevron and found Ecuador liable for "denying justice" to the company. The court held that Ecuador "grossly violated [Chevron's] fundamental procedural rights" by "permitting" domestic litigation, and

[107] Ibid.

[108] Provincial Court of Sucumbios – Judgment of Case No. 2003-0002 (2011).

[109] Business and Human Rights Resource Centre: Texaco/Chevron lawsuits (re Ecuador) (N/A). Available at: https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador- /. Accessed 14 March 2024.

[110] Business and Human Rights Resource Centre: Texaco/Chevron lawsuits (re Ecuador) (N/A). Available at: https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador- /. Accessed 14 March 2024.

ordered Ecuador to annul the Lago Agrio Judgement, which it considers unlawful and therefore should not be enforced nor recognised by any state.[111] The government of Ecuador asked that the arbitral award be nullified but saw its request being rejected by the Hague Court in 2020, and again by the Hague Court of Appeal in 2022. The proceedings to quantify the damages owed by Ecuador are still underway as part of the arbitrations' third phase.[112]

Back in 2011, Chevron also initiated legal proceedings by filing a racketeering lawsuit in a US federal court, alleging that lawyers representing Ecuador had conspired to extort up to 113 billion USD through the proceedings. In 2014, the federal court issued its ruling, barring the plaintiffs from enforcing the 9,5 billion USD Lago Ario Judgement from the Provincial court of Sucumbios in 2011. The decision was based on findings of misconduct including ghost-writing, bribes and fabricated evidence, thus rendering the judgement obtained by corrupt means. The decision remains in place after the US Supreme Court declined to hear a petition filed by Ecuadorian lawyers.[113]

In the meantime, the case had been country-hopping since 2012 as plaintiffs moved from forum to forum in search for enforcement of the Lago Agrio Judgement. Given that Chevron lacked assets in Ecuador enforcement has been sought in different countries hosting subsidiaries to Chevron, such as Argentina, Brazil and Canada. Argentinian and Brazilian courts both rejected the decision for lacking jurisdiction and connection to the country respectively.[114] Seven years of litigation in Canada ended in 2019 when the Canadian Supreme Court rejected the request to review a court decision rendered by Ontario Superior court, ruling that Chevron Canada as a separate entity cannot be held liable for its parent company actions. Additionally, Ecuadorian communities filed a complaint to the International Criminal Court (ICC) in 2014. The ICC concluded that the alleged actions did not meet the criteria for international crimes against humanity and that it was outside of the limited timeframe under the Court's jurisdiction.[115]

[111] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, Second Partial Award on Track II, 30 August 2018., part X pp. 2–3.

[112] UNCTAD, Investment Policy Hub, Chevron and TexPet v. Ecuador (II) Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II), (PCA Case No. 2009-23). Available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/341/chevron-and-texpet-v-ecuador-ii- . Accessed 14 March 2024.

[113] Business and Human Rights Resource Centre: Texaco/Chevron lawsuits (re Ecuador) (N/A). Available at: https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador- /. Accessed 14 March 2024.

[114] Yaiguaje v. Chevron Corporation. Business and Human Rights Resource Centre: Texaco/Chevron lawsuits (re Ecuador) (N/A). Available at: https://www.business-human-rights.org/en/latest-news/texacochevron-lawsuits-re-ecuador- /. Accessed 14 March 2024.

[115] Business and Human Rights Resource Centre: Texaco/Chevron lawsuits (re Ecuador) (N/A). Available at: https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador- /. Accessed 14 March 2024.

The Texaco/Chevron portrays protracted litigation arising from environmental conflict between large Western corporation and Indigenous peoples living in the Global South. The lengthy processes and multiple lawsuits filed across various forums and countries represents the difficulty to hold TNCs accountable for adverse operations abroad. Further, it highlights what role bilateral investment agreements with ISDS mechanisms play and specifically how it generates an asymmetrical system, limiting affected communities and individuals' ability to seek justice in national courts.[116]

2.2.2 Bhopal Chemical Gas Leak (1984)

On the night between December 2 and 3 in 1984, a massive gas leak occurred in a pesticide plant situated in the central city of Bhopal in Madhya Pradesh, India. The plant was run by Union Carbide India Ltd (UCIL), a subsidiary to the United States-based TNC corporation Union Carbide Corporation (UCC). The leakage was triggered by water entering one of the tanks storing methyl isocyanate, used in rubber and adhesive, releasing an acutely toxic gas over Bhopal.[117] While consensus was reached on water being the immediate cause for the chemical reaction, opinions on how the water entered the tank remain divided. The UCC asserted that the leak stemmed from sabotage, while the Indian Government suggested the possibility of water entering the tank during routine cleaning of pipes the same night.[118] Reports by Amnesty International conducted 30 years after the leak estimates the number of deaths to have surpassed 20 000 and that more than 570 000 people (62% of Bhopal's total population at the time) were exposed to damaging levels of the gas.[119]

Events in Bhopal led to intricate litigation proceedings in both India and the US, aimed to impose criminal and civil liability on UCC and UCIL. Pursuing legal action against UCC instead of UCIL seemed logical for several reasons. UCC as parent company exercised control over UCIL, contributed to capacity building through training efforts for staff and provided technology for the plant in Bhopal. Additionally, UCIL had limited assets which thereby reduced any chances for victims and relatives of such to receive any monetary compensation. Therefore, legal action was taken against UCC.[120] As the language barrier and limited recourses of the victims was deemed as unrealistic conditions for success, the Government of India invoked the doctrine of *parens*

[116] Pellegrini et al. (2020) pp. 456–457.

[117] In Re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986) and McCorquodale, Robert, *Business and Human Rights* (2024) p. 1.

[118] Surya Deva 'Bhopal: the saga continues 31 years on'. In: *Business and Human Rights – From Principles to Practice* (2016) p. 22.

[119] Amnesty International, *The Bhopal tragedy: 30 years of injustice for victims and survivors Amnesty International written statement to the 25th session of the UN Human Rights Council (3 – 28 March 2014)* p. 2.

[120] Deva (2016) p. 23.

patriae[121] and promulgated 'the Bhopal Gas Leak Disaster (Processing of Claims) Act' in 1985.[122] Prior to the promulgation, 145 different actions had been initiated in US federal courts.[123] Through the Processing of Claims Act, the Indian government was able to represent the victims, suing in US court. However, the court held that the main events occurred in Bhopal and that majority of evidence and witnesses are in India, hence why the appropriate forum is the host country. The lawsuit was dismissed based on grounds of *forum non conveniens,* thus legal proceedings began before Indian courts.[124]

In 1989, a 470 million USD settlement was directed by the Indian Supreme Court wherein UCC agreed to pay in exchange for the elimination of all criminal and civil liabilities of both companies. [125] The settlement received widespread public criticism for omitting the victims from the process and capping the liability at 470 million USD, before final estimates of the damage were completed.[126] To provide reference, damage claims amounted to over 3 billion USD. The burden of proof for victims to access their money from the settlement was high, leaving them with little or no compensation in the end.[127] The latter part of the settlement deal that granted UCC/UCIL immunity from further legal proceedings was later reversed.[128]

Multiple procedures have taken place since the settlement. The criminal case initiated in 1987 continued until June 2010. The chairman of UCC (acquired by The Dow Chemical Company, Dow Company, in 2001) was prosecuted alongside seven Indian site managers of UCIL and three connected entities. However, only defendants from India were convicted.[129] UCC/Dow and its chairman Mr. Anderson persistently refused to partake and appear before the court, asserting that the Indian Criminal Court lacked jurisdiction and that the settlement from 1989 still applied. In 2004, the US denied a formal request for extradition of Mr. Anderson filed by the Indian Government. A second request was filed in 2010 and remained pending until the chairman passed away in 2014. Efforts to seek compensation continued with three lawsuits in 1999, 2004 and 2007 on environmental damages, water pollution and

[121] The doctrine by which a state has the legal authority to act on behalf of its citizens. Legal Information Institute, Cornell Law School. Available at: https://www.law.cornell.edu/wex/parens_patriae. Accessed: 14 March 2024.

[122] Bhopal Gas Leak Disaster (Processing of Claims) Act (No. 21 of 1985).

[123] In Re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986).

[124] Ibid.

[125] Deva (2016) p. 23.

[126] Amnesty International, 'Clouds of Injustice Bhopal Disaster 20 years on', ASA 20/015/2004, p. 59–60; Uprendra Baxi 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2016) 1:1 *Business and Human Rights Journal* p. 30; De Schutter (2015).

[127] Baxi (2016) pp. 29–30.

[128] Deva (2016) p. 23.

[129] McCorquodale (2024) p. 3.

property damage respectively.[130] All proceedings were unsuccessful with the last case rejected by the US Court of Appeal in 2016.[131]

The verdict of the criminal case and the public discontent that followed led to the coming together of a group of ministers in the Government of India. The ministers filed a curative petition[132] to the Supreme Court in late 2010, seeking reopening of the case and an increase in the settlement amount. The petition was dismissed thirteen years later in March 2023.[133] The court held that the request lacked foundation in legal principles and that the amount of money previously granted was sufficient and adequately measured. Thus, finality was already reached by way of the settlement.[134]

Later the same year, lawyers of Dow Chemical appeared in Madhya Pradesh High Court in October following an application filed by an NGO regarding responsibility of waste removal from the site. Dow Chemicals consistently pleads that it has no responsibility for the outcome and that the Indian court lacks jurisdiction to summon a US based corporation under international law. Dow Chemicals has applied to be removed as a respondent in the case [135] The Madhya Pradesh High Court is still to deliver its judgement as per spring 2024.

Bhopal serves as an illustrative example as it captures almost every complex aspect of human rights violations and large TNC's operations. It portrays the tendency of companies, often based in the Global West, denying any responsibility for their operations abroad, typically carried out in the Global South. Additionally, as noted by Professor Surya Deva and quoted by Professor Robert McCorquodale:

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[130] De Schutter (2015) pp. 41–42.

[131] Business and Human Right's Centre (N/A), 'Union Carbide/Dow lawsuit (re Bhopal, filed in the US)'. Available at: https://www.business-humanrights.org/en/latest-news/union-carbidedow-lawsuit-re-bhopal-filed-in-the-us/. Accessed 6 March 2024.

[132] The last available recourse for rectifying or reconsidering judgments by the Supreme Court in the Indian judicial system. For further information see Rupa Ashok Hurra v Ashok Hurra (2002). Available at: https://www.scobserver.in/about/supreme-court-of-india/procedure/. Accessed 6 March 2024.

[133] The Supreme Court of India, Union of India & Ors. vs. M/S Union Carbide Corporations and Ors, CURATIVE PET (C) No.345-347 of 2010 in R.P. No.229/1989 & 623-624/1989 in C.A. No.3187-3188/1988 and SLP (C) No.13080/1988. Available at: https://www.scobserver.in/wp-content/uploads/2022/10/UOI-v.-UCC-Judgement.pdf.

[134] Ibid., pp. 31–33.

[135] The Economic Times 'Bhopal Gas tragedy case: 18 years on, Dow Chemical to see their day in Bhopal court' (2023). Available at: https://economictimes.indiatimes.com/news/india/bhopal-gas-tragedy-case-18-years-on-dow-chemical-to-see-their-day-in-bhopal-court/articleshow/104156566.cms and 'Bhopal gas tragedy: Pleas seeking Dow Chemical to be made accused'. Available at: https://economictimes.indiatimes.com/news/india/bhopal-gas-tragedy-pleas-seeking-dow-chemical-to-be-made-accused-posted-to-jan-6/articleshow/105507185.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. Accessed 6 March 2024.

> […] Bhopal was, and remains, a stark reminder of the difficulties that victims of corporate human rights abusers experience in seeking justice, especially when an MNC is involved, and both the home and the host government lack the political will or capacity to pursue all means to hold the MNC accountable.[136]

The challenges victims faced as the legal quest for remedy unfolded have been of both substantial, procedural, conceptual and practical nature – ranging from the involvement of corrupt state agencies, insufficient criminal frameworks, lack of legal aid to a high number of victims, misuse of *forum non conveniens*, and difficulties in piercing the corporate veil.[137] Bhopal remains *sub judice* as questions on liability and waste removal are under consideration to this day.

2.2.3 Rana Plaza Collapse (2013)

Rana Plaza was an eight-story commercial complex situated in Dhaka's outskirt Savar, Bangladesh. The building housed several garment factories that produced clothes as part of a long value chain of suppliers and subcontractors under a range of foreign global brands. On the morning of 24 April 2013, Rana Plaza collapsed, resulting in the death of over 1 100 workers and 2 500 severely injured under debris. On the day before the fatal collapse, an evacuation order had been issued by an inspector following the discovery of large structural cracks in the building. Facing pressing delivery deadlines from buyers, suppliers drove workers to return for work the next day, ignoring evident flaws and clear instructions that the building remain closed. This was carried out under the threat of dismissal. The deadly collapse of the factory building was unprecedented within garment production history in terms of scale (not type) and the most severe industrial accident since the explosive gas leak in Bhopal 1984.[138]

In search for justice, survivors and families of victims took to litigation. Several civil lawsuits were filed in multiple countries aimed at monetary compensation for damages.[139] All attempts proved unsuccessful due to hurdles of liability, legal standing, choice of law, statutes of limitations or damage measurements. Weak domestic negligence law was a particular obstacle, leaving supply chain workers unprotected from harm by third party.[140] Therefore, a

[136] Deva (2016) p. 24; McCorquodale (2024) p. 3.
[137] Deva (2016) p. 24.
[138] Justine Nolan 'Rana Plaza: the collapse of a factory in Bangladesh and its ramifications for the global garment industry'. In: Dorothée Baumann-Pauly and Justine Nolan (2016) *Business and Human Rights from Principles to Practice* p. 27; Ann Trebilcock 'The Rana Plaza disaster seven years on: Transnational experiments and perhaps a new treaty?' (2020) 159:4 *International Labour Review* p. 546.
[139] Trebilock (2020) p. 546.
[140] Ibid.

group of victims filed a class action lawsuit against Canadian companies Loblaw (purchaser) and Bureau Veritas (auditor and inspector), seeking to hold them accountable for damages under Ontario law. Appellants saw their case being dismissed in the Superior Court of Ontario in July 2017, and later upheld by Ontario Court of Appeal in December 2018. Both courts concluded that *lex loci delicti* was Bangladeshi law, that the action is statute-barred and that none of the respondents owed a duty of care and thus lack any legal responsibility towards the victims.[141]

In parallel, criminal charges were brought up against 41 individuals in 2016. Among them were majority owner of the Rana Plaza building Sohel Rana and a number of factory executives, accused of murder. Three others were charged for assisting Rana in attempts to flee across the country border to India after the building collapsed.[142] Eight years later the case is still pending. In recent developments, a bail petition was filed by Rana and later passed in 2023, only to be suspended shortly after due to a landmark verdict by the Bangladesh Supreme Court Appellate Division in January 2024, ordering the lower court to conclude the trial within six months.[143]

New multi-stakeholder initiatives with the objective to improve safety standards in Bangladesh were launched. Bangladeshi authorities, the ILO, NGO's, trade unions and roughly 170 businesses joined the seven-year "Accord on Fire and Building Safety in Bangladesh" (the Accord). As a binding instrument, the Accord and its transparency programme achieved its immediate goals of independent inspections, capacity building, reporting, and remediation, amongst other, in selected factories. Moreover, the American business initiative "the Alliance for Bangladesh Worker safety" (the Alliance) was established to improve building and fire standards in around 590 factories. It was a five-year commitment by 29 retailers contributing to building a knowledge base and financing inspections and remediation.[144]

Finally, an Arrangement and Trust Fund were installed to receive third-party donations and deal with compensation payments in an equitable and transparent manner. As Bangladesh lacked any system for providing effective redress, the void called for the assistance of ILO, which in 2013 brokered multi-party consultations resulting in the "Understanding for a Practical Arrangement on

[141] Das v. George Weston Limited, 2018 ONCA 1053. DATE: 20181220. DOCKET: C64146 & C64679 (M48391), paras. 2–4. Available at: https://www.canlii.org/en/on/onca/doc/2018/2018onca1053/2018onca1053.html

[142] Welle Deutsche, 'Bangladesh: Rana Plaza murder trial to resume after five years', 2022, Business and Human Rights Centre. Available at: https://www.business-human-rights.org/en/latest-news/bangladesh-rana-plaza-murder-trial-to-resume-after-five-years/. Accessed 8 March 2024.

[143] Jawad, Muhammad, 'Bangladesh: Supreme Court orders Rana Plaza murder case to conclude within six months', 2024, Business and Human Rights Centre. Available at: https://www.business-humanrights.org/en/latest-news/bangladesh-supreme-court-orders-rana-plaza-murder-case-to-conclude-within-six-months/. Accessed 8 March 2024.

[144] Trebilock (2020) pp. 547–548.

Payments to the Victims of the Rana Plaza Accident and their Families and Dependents for their Losses". To further strengthen the initiatives, the Rana Plaza Trust Fund was set up in 2014 principally collected through the Accord and The Alliance.[145]

The collapse of Rana Plaza and the aftermath highlights fundamental asymmetries in the global value chains in which subcontractors compete in a 'race to the bottom'. The multi-stakeholder initiatives were viewed as largely successful, with creative solutions, combined efforts and quick responses. However, global supply chain practices and sub-standard labour conditions remain structural issues impossible to mend by response-oriented programmes with little focus on decisive issues like sourcing, pricing and procurement.[146] Effects at the very ends of long supply chains in Bangladesh were further worsened by weak domestic regulations, portraying inadequate government efforts, lack of technical capacity and other resources necessary to effectively protect its workers. The presence of corruption encompassing state and the garment sector as well as increased outsourcing of regulatory responsibilities further contributed to weak legal realities.[147]

2.2.4 Present-day Adverse Human Rights Impacts

The catalogue of human rights abuses has remained relatively consistent while simultaneously evolving to include new types and areas of violations. There are multiple recent or ongoing operations by TNCs abroad that reportedly entail human rights abuse.

In the Democratic Republic of Congo there have been reports of forced evictions and displacement following an all-time spike in global demand for cobalt and copper. There are multiple ongoing mining projects in the southern city of Kolwezi, a city that remains dominated by the mining industry since Belgian colonial rule. Operators range from joint ventures and separate subsidiaries with several shareholders or parent companies domiciled in Dubai, Luxembourg, China or Canada. There is also minority shareholding from local State-Owned Enterprises (SOEs) involved. Communities frequently find themselves caught amid mining ventures and forced evictions, with no adequate ways to seek remedy. The Congolese government have failed to enforce local protective legislation and even facilitated forced evictions.[148]

[145] Ibid., pp. 553–554.
[146] Ibid., p. 556.
[147] Nolan (2016) p. 28.
[148] Amnesty International, 'DRC: Powering Change or Business as Usual? Forced Eviction at Industrial Cobalt and Copper Mines in the Democratic Republic of Congo', 11 September 2023, Report no: AFR 62/7009/2023, pp. 6–7 and 90.

Labour migration represents another significant area where violations occur. In 2022, a group of 23 workers in Nepal and Bangladesh filed their Statement of Claim against British household appliance manufacturer Dyson, over dangerous working conditions and forced labour for their migration workers. The English High Court declined to exercise jurisdiction on the basis that Malaysia 'is clearly and distinctly the more appropriate' forum available.[149] The decision is particularly interesting, as the first BHR case to be dismissed on *forum non conveniens* grounds since Brexit. It marks a departure from the recent trend of allowing human rights and environmental cases involving British TNCs to go to trial in UK courts. It also shows that the return of the doctrine in the UK in 2016 poses a legitimate concern for victims.[150] Other recent events that attracted attention is migration garment worker's situation in Myanmar and migrant workers situation connected to the FIFA World Cup 2022 in Qatar.[151]

Meanwhile, the landscape is shifting in the 21st century with the rise of TNCs from developing nations as major global actors. Both developed and developing countries are now home- and host countries of TNCs, adding an extra layer of complexity and changing the political economy. For instance, TNCs from Brazil, India, and China may pass on risks to other companies when operating in developing countries (horizontal risk) or push risks downwards to lower levels when operating in developed countries (vertical risk).[152]

The development of digital platform corporations has further diversified the shape and form of adverse impacts. In China corporations have reportedly collaborated with the host government to limit freedom of speech by constraining internet access.[153] In the same digital bracket, the cyber-surveillance program Pegasus, developed by an Israeli software company, has been harmfully utilised by several governments across the globe. Despite its original intended use being for military purposes, purported sales and export of licenses have enabled governments to access encrypted content and phone conversations of civil society representatives, lawyers, activists, and journalists, even in cases unrelated to organised crime or terrorism.[154]

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[149] Limbu v Dyson Technology Ltd (2023) pp. 3–4 and 33.

[150] Ekatarina Aristova 'The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens', *Bonavero Institute of Human Rights*, University of Oxford (2023) pp. 1 and 5. Available at: https://conflictoflaws.net/2023/the-jurisdiction-puzzle-dyson-supply-chain-liability-and-forum-non-conveniens/?print=pdf. Accessed 7 April 2024.

[151] BHR Resource Centre, 'Myanmar garment worker allegations tracker', 30 January 2024. Available at: https://www.business-humanrights.org/en/big-issues/labour-rights/myanmar-garment-worker-allegations-tracker/; Human Rights Watch, 'FIFA: No Remedy for Qatar Migrant Worker Abuses', 20 November 2023, available at https://www.hrw.org/news/2023/11/20/fifa-no-remedy-qatar-migrant-worker-abuses, both accessed 7 April 2024.

[152] Deva (2016) p. 24.

[153] Muchlinski (2022) p. 96.

[154] Ibid.

2.3 Analysis

This chapter has highlighted the numerous limitations of the current international frameworks, and the superseding effects. By exploring relevant hard and soft law instruments within the BHR sphere, it becomes evident that there are no hard law instruments addressing the activities of TNCs, and generally no binding obligations placed upon corporations with regards to human rights. Instead, existing soft law instruments, which serve merely as voluntary guidelines, constitute the primary documents for setting the human rights standards for businesses. Except for a few domestic initiatives, there are hardly any laws that mandate companies to implement safeguards throughout their value chains. The significant absence, or at best fragmentations, of hard law creates a notable and undisputed legal void.

Multiple soft law initiatives do not appear to be sufficient to prevent corporate misconduct or provide access to remedy for victims – whether at present or historically. The UNGPs and UNGC have made meaningful contributions, by serving as focal points for businesses globally, shaping desired corporate behaviour, influencing revisions of other soft law instruments and recently even a Dutch court. However, as noted by the SRSG himself, the intention of the instruments was never to be legally binding but rather to encourage corporate responsibility. At present, existing soft law instruments cannot be regarded as evolving customary international law, and do not carry binding force under international law.

The Texaco/Chevron operations in Ecuador, the Bhopal Gas leak in India and the collapse of Rana Plaza in Bangladesh demonstrate how current frameworks allow for corporations, particularly TNCs, to evade full accountability. In the absence of normative mechanisms on international level, results are mostly reflected in national courts and through intricate and prolonged litigation, proved by cases bouncing from forum to forum for decades.

Different legal processes related to the Texaco/Chevron case span from 1993 all the way to 2022 when the Hague Court of Appeal rejected the Government of Ecuador's request to nullify the decision of the Permanent Court of Arbitration in the Hague, rendering the Lago Agrio Judgement unenforceable and unrecognisable by states. The 2019 ruling in Canada portrays the challenge in 'piercing the corporate veil' and that the principle of separate legal entities and limited liability remains relevant issues, as lawsuits were moved through judiciaries where subsidiaries to the parent company have assets. Further, the annulment of the Lago Ario Judgement shows that BITs with ISDS mechanisms (and awards supporting them) in practice interferes the state duty to protect human rights and rights-holders ability to seek redress. In combination with the dismissal of the case on grounds of *forum non conveniens* in 2002, and the rejection principle on separate legal entities limiting liability in 2019, victims had practically emptied every route possible.

The 2023 ruling in the Bhopal case further cements the chemical gas leak as the worst industrial accident to ever occur and enhances its status as a historical reference point in the field of modern BHR. It took 13 years for ministers of the Indian Government to receive a decision on the application to reopen the case, with the goal of increasing the settlement from 1989 – a series of events that showcased corrupt state agencies and weak political will. The densely populated area of Bhopal remains chronically contaminated to this day, while UCC, UCIL and Dow Chemicals all have evaded accountability. While the 40th year mark of Bhopal is around the corner, the legal quest for waste removal and liability determination is still underway.

The events in Savar brought significant attention to the global garment manufacturing industry, raising pressing ethical questions on labour and safety responsibilities within global supply chains – this time on the immediate safety and rights of garment workers. The collapse highlights the risks that are pushed down to the lower tiers of value chains and underscores the consequences of weak governance in states that lack adequate inspection mechanisms due to outsourcing practices and inadequate domestic legislation. The weak Bangladeshi negligence law compelled rights-holders to seek redress under Canadian law. There is no legal framework that uniformly sets the standard of states, or directly holds corporations accountable that victims can turn to in cases of weak state practice. This situation highlights the structural power asymmetries along global value chains, the phenomenon of the 'race to the bottom' and yet again, the long route to (potential) remedy, as the criminal case is still ongoing.

The legal obstacles include the high cost of litigation, which is exacerbated by the extreme length of the legal processes. Access to the recourses needed to pursue such demanding litigation varies greatly between TNCs and those exposed to the misconduct, typically Indigenous People or other particularly vulnerable groups in society. Additionally, there are significant evidential hurdles to pierce the corporate veil, challenges in accessing crucial information, and difficulties in establishing jurisdiction. Another critical obstacle is the burden of proof for liability. Moreover, there is the issue of state complicity, or at least passivity, in addressing these concerns. The cases also demonstrate the involvement of SOEs with state shares, such as Petro Ecuador and similarly in the Democratic Republic of Congo. The weak rule of law and other inadequacies, such as corruption, lack of resources, political will, and governance, present as substantial challenges. The common law doctrine of *forum non conveniens* is another well-known hurdle for victims as portrayed in the Texaco/Chevron case, the Bhopal and UCC/Dow Chemicals, and recently also in connection to the Dyson Ltd case. The doctrine continues to apply in common law countries like USA, UK, Canada and Australia, all large and developed economies home to many TNCs.

Without binding international obligations, states are not compelled to enforce human rights protections against corporate violations in a consistent manner. While it is true that states increasingly adopt domestic HRDD legislation, such initiatives are sporadic and with no binding international standard as common baseline, leaving discretion for states to establish them. The EU CSDDD might be a large contributor in this regard, as it affects all value chains of the European TNCs, but it does not overcome the fact that the EU remains a regional organisation and BHR a global issue. Therefore, while HRDD should be supported and welcomed, it does not solve all existing BHR issues.

The forms of abuse have diversified. While the three cases presented in depth have reached a somewhat 'iconic' status, serving as textbook examples of the myriads of issues that can arise in the business and human rights domain in respect to victim's quest for remedy, these problems are continually evolving in both nature and scope. The advancement of digital and technological development has introduced new areas of corporate responsibility, necessitating changes in legislative demands – all while old gaps remain unbridged.

That the current framework creates a legal void is evident. The evolution of older cases (some of which remain *sub judice* to this day) and more recent ones reveals a pattern of how the current frameworks create a governance gap and thus, corporate impunity. The road for victims towards any remedies is long and filled with multiple hurdles. The primary challenge lies in reaching a consensus on how to best close this governance gap. Even if a treaty becomes the chosen road to travel, or at least an attempted solution, State delegates must overcome numerous negotiation and policy hurdles to agree on the most effective approach to address corporate activities and human rights.

3 Negotiation Sessions of the OEIGWG

This chapter presents and examines the ongoing negotiations within the OEIGWG. As of spring 2024, nine sessions have been held. Pursuant to resolution 26/9, the first two sessions focused on deliberating the content, scope, nature, and form of the LBI. These discussions culminated in a document compiling the main elements of the treaty. Subsequently, five drafts have been produced and deliberated upon: (i) the "Zero Draft in 2018", presented and negotiated during the 4th session; (ii) the "Revised Draft" in 2019, presented and negotiated during the 5th session; (iii) the "Second Revised Draft" in 2020, presented and negotiated during the 6th session; (iv) the "Third Revised Draft" in 2021, presented and negotiated during the 7th session and lastly; (v) the "Updated Draft" in 2023, presented and negotiated during the 9th session. No new draft version was created ahead of the 8th session in 2022.

The Updated Draft of 2023 deals, similarly to its predecessors, with three main matters and is built upon those themes, namely: (i) purpose, scope and legally binding obligations; (ii) devising an arrangement for effective access to remedies for victims; and (iii) creating an international institutional structure for further development.[155] For logical reason, this part is conducted with a corresponding structure to that of the Updated Draft.[156] The key legal issues identified within each theme are presented thematically. Each sub-section concludes with an analysis as per the second research question.

3.1 Purpose, Scope and Legally Binding Obligations

3.1.1 Obligations of States

State obligations underpin the effectiveness of the treaty by ensuring that states not only commit to protecting human rights within their jurisdictions but also actively implement and enforce the stipulated measures. Their significance stem from international law, with states as primary duty bearers. State obligations are therefore pivotal for the UN Draft Treaty on Business and Human Rights and its future influence.

Early discussions were held to identify general state obligations and how to fulfil them. Various broad proposals were made by panellists and delegates ranging from prevention to State responsibility for indirect human rights violations. Attorney Nomonde Nyembe, panellist during the second session, feared that the placement of obligation on States to create national legislation could result in diverging standards, ultimately resulting in 'a race to the

[155] See for instance the Table of content in the Third Revised Draft (2021) p. 1.
[156] The third section of the treaty is not included, as presented in Delimitations above.

bottom' undermining human rights. It would also allow for corporations to relocate their operations to states with weaker protection.[157] One delegation asked that the treaty addresses state complicity, stressing that extensive lobbying by corporations with large economic recourses could lead to corrupt influence.[158]

One recurring concern was that requiring states to adapt national legislation, within areas such as public procurement, was considered an internal matter, and that each state should determine its own implementation.[159] Daniel Aguirre, legal advisor to the International Commission of Jurists and panellist during the second session, challenged states by questioning how they can assert that human rights obligations interfere with state sovereignty, while simultaneously signing BITs that in fact directly limit their sovereignty.[160]

One of the main legal issues related to obligations of states is their applicability beyond their territory and the possible extent. Extraterritorial obligations for states involve determining whether they must regulate and ensure accountability for human rights abuses committed by their companies operating abroad and to what the extent. As presented above, the challenge lies in balancing state sovereignty with the need for effective human rights protection in the global business environment. Clarifying these obligations is essential to ensure that businesses cannot evade accountability by operating in countries with weaker regulatory frameworks.[161] This issue is closely tied to jurisdiction, which will be further elaborated upon in section 3.3.3.

During the third session preceding the Zero Draft, Professor Olivier De Schutter, advocated for the treaty to clearly mandate that states regulate the extraterritorial actions of companies within their jurisdiction.[162] Given the established competence of states to regulate the conduct of their nationals abroad under international law, the treaty presents a valuable opportunity to address the ambiguities inherent in the UNGPs and to clearly define their actual reach. Not only are the UNGPs vague in this regard, they also arguably set the bar below the current state of international human rights law as prescribed by the ICESCR. Professor Surya Deva adheres to the opinion that the UNGPs are unambitious and argues that principles must evolve, and that extraterritorial law is needed.[163]

[157] Report on the second session, p. 11.
[158] Ibid., p. 10.
[159] Report on the third session, p. 12.
[160] Report on the second session, p. 9.
[161] Wettstein (2022) p. 229
[162] Report on the third session, p. 12.
[163] De Schutter (2015) p. 14.; Surya Deva, 'The UN Guiding Principles' orbit and other regulatory regimes in the business and human rights universe: managing the interface' (2021) 6:2 *Business and Human Rights Journal* p. 342.

A new treaty could require states to regulate their companies, even if those companies operate in other countries. This approach fits with international law but might face resistance from countries that want to control their own investments. It also assumes that it is always possible to identify which company is in charge in cases of human rights abuses. Another option is parent-based extraterritorial regulation. This would require parent companies based in a particular state to follow human rights laws everywhere they operate and ensure their subsidiaries do the same. This avoids directly interfering in other countries' laws, as the obligations are placed on the parent company by its home state, with any effects on other countries merely being indirect.[164]

All drafts have adopted a language which reaffirms that the primary obligation to respect, protect, fulfil and promote human rights lie with the State.[165] With regards to extraterritoriality, the preamble of the Third Revised Draft spelled out obligations for States and explicitly limited them to be within States' "territory, jurisdiction or otherwise under their control".[166] The Updated Draft does not exhibit this limitation, potentially leaving extraterritoriality open.[167]

There have also been discussions regarding the scope of state obligations and the areas, if any, that states should be required to assess beyond human rights. For instance, the Third Revised Draft included the obligation for states to require businesses to also respect environmental and climate impacts.[168]

The US emphasised that here are no universally recognised human rights specifically related to the environment, and that international law does not support recognising such a right.[169] On the contrary, the inclusion was welcomed in a joint statement by NGOs during the eight session of the OEIGWG, on the basis that access to clean water and a healthy environment was declared a human right by the UNGA in 2022.[170] However, any such references or language related to climate change impacts or environmental rights have been removed in the Updated Draft of 2023.[171] This sparked reactions from the EU (although without formal negotiation mandate, which was deeply regretted by several NGOs[172]) and Egypt who asked for a reintroduction.[173]

[164] De Schutter (2015) p. 21.
[165] Preambles of all LBI Drafts.
[166] Third Revised Draft (2021) Preamble (PP7).
[167] Updated Draft (2023) Preamble (PP7).
[168] Third Revised Draft (2023) Preamble (10) and Article 1.2.
[169] Annex to the report on the seventh session, p. 7.
[170] Third Revised Draft (2023) Article. 6.4.
[171] Compare for instance (PP10), Article 6.4 and 6.4(e) of the Third Revised Draft (2021) and Updated Draft (2023).
[172] CIDSE, Misereor, Broederlijk Delen, CCFD, Trocaire and Fastenaktion, Compilation of general statements from States and non-State stakeholders made during the ninth session, p. 32.
[173] Compilation of general statements from States and non-State stakeholders made during the ninth session, pp. 8 and 21.

Changes made were heavily criticized by multiple NGOs, emphasising that several states have promoted such inclusion. It was described as a significant step back, weaking the draft.[174]

3.1.2 Responsibilities of Businesses Enterprises

The discussion is centred around whether companies *can* and *should* bear direct obligations or responsibilities under international law. The Elements document presented ahead of the third session in 2017 spelled out explicit obligations placed on TNCs and other business enterprises.[175] The Updated Draft of 2023 has replaced any references to “obligations” with "responsibilities", changing the significant wording which had been consistently utilized in the previous four drafts.[176] NGOs argued, considering the planned treaty's legally binding nature, that enterprises should also have obligations to uphold human rights.[177] Conversely, countries such as the UK and the USA argued for adopting the language of the UNGPs, which refers to corporate *responsibility* versus the *duty* of states to protect human rights, serving as a guiderail.[178]

It was not until the seventh session of the OEIGWG in 2021 that the US decided to first participate in negotiations.[179] The US then voiced its “serious substantive concerns with the [LBI] text”, pointing to several parts of the Second Revised Draft which, according to the US, would fail to gain sufficient support to ever be implemented.[180] One of the key issues was the imposition of binding obligations upon businesses. This was further elaborated upon during the eight session. The US expressed understanding for the desire to enhance corporate accountability through ongoing negotiations but underscored their inability to accept a phrasing that imposes direct obligations on companies, when stemming from a treaty among states. According to the US, the Third Revised Draft misinterprets international human rights law by claiming that business enterprises are obligated to uphold internationally recognised human rights, as businesses lack the capacity to hold obligations under international law. Based on this, the US proposed that “obligation” be replaced with “responsibility” and successfully saw it happen in the preamble and later also in article 2(b) on the purpose of the treaty.[181]

[174] Ibid., pp. 25–26, 31–32 and 34–35.

[175] Elements document (2017) Article 3.2.

[176] The Zero Draft (2018), the Revised Draft (2019), the Second Revised Draft (2020), the Third Revised Draft (2021) and the Updated Draft (2023).

[177] Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the ninth session, pp. 4 and 11.

[178] Annex to the report on the seventh session, p. 6 and Compilation of general statements from States and non-State stakeholders made during the ninth session, p. 18.

[179] Report on the seventh session, Annex *List of participants*.

[180] Annex to the report on the seventh session, p. 24.

[181] Ibid.; Third Revised Draft (2021) Article 2.1(b) and Updated Draft (2023) Article 2.b.

The preamble to the Updated Draft was amended and now instead reads:

> (PP12) Underlining that business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the *responsibility* to respect internationally recognized human rights […] as well as by preventing human rights abuses or mitigating human rights risks linked to their operations, products or services by their business relationships.

The change from "obligation" in the Third Revised Draft' to "responsibility" in the Updated Draft was challenged by Egypt (backed by Cameroon, Ghana and South Africa) during the ninth OEIGWG session.[182] Building further on the changed wording, the UK suggested that the paragraph explicitly reference to the provisions of the UNGPs.[183] Egypt subsequently argued that the UNGPs should serve as the starting point for the treaty negotiations, rather than constraining ongoing discussions. They further emphasized that voluntary measures have proven insufficient and as soft law instruments, are unenforceable.[184] Several CSOs regretted the changed term, stressing its inappropriateness for the context of an LBI with the main purpose to increase corporate accountability.[185]

The International Organisation of Employers voiced concern over the broad responsibility for businesses that would arise out of the term "linked". They noted that this overbroadly extends the scope set forth in the UNGPs and suggested changing to the term "that are directly linked", to limit the responsibility to direct causality.[186]

One panellist acknowledged that scholars have long debated whether non-state actors can be subject to international law. However, they highlighted instances related to the eradication of slavery where this indeed has been the case, such as the Modern Slavery Act of 2015 in the UK.[187] In efforts to facilitate the movement away from the "whether"-debate, scholars like Nadia Bernaz and Denis Arnold have covered this matter, agreeing that there is wide support that corporations already have positive obligations under international law, and that it is timely to shift focus onto the next stage of implementation.[188]

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[182] Compilation of statements delivered by States during the ninth session, p. 6.

[183] Ibid., p. 10.

[184] Ibid., p. 6.

[185] Compilation of statements delivered by non-State actors during the ninth session, pp. 4 and 11.

[186] Ibid, p. 9.

[187] Report on the first session, p. 11.

[188] Denis G. Arnold 'Corporations and Human Rights Obligations' (2016) 1:2 *Business and Human Rights Journal* p. 275; Nadia Bernaz 'Conceptualizing Corporate Accountability

Professor Carlos Lopez elaborates on what he refers to as "the somewhat old general debate" on direct versus indirect obligations. He revisits the fundamentals of contract law, reaffirming that the basis for treaty law is that it can only be binding upon parties who consent in good faith, as per the principle of *pacta sunt servanda*. According to the Vienna Convention on the Law of Treaties, no third party can be bound by positive obligations unless it agrees (or is presumed to agree if not indicated otherwise). However, while it is theoretically possible for a treaty to create direct obligations, Lopez emphasises that a treaty which applies horizontally with obligations on companies will not necessarily overcome the obstacles posed by unwilling or unambitious state bodies, as there would still be a need for a state mechanism to monitor, enforce, and hold parties accountable.[189]

3.1.3 Transnational or All Companies

Article 3 of the Updated Draft addresses which types of businesses the treaty covers. The current version mandates that "all business activities, including business activities of a transnational character" is covered by the treaty.[190] Division persists on the issue of what kind of companies the treaty should regulate: all business enterprises (whether transnational or not) or strictly limited to TNCs and other business enterprises of a transnational nature. Further, it appears to be disputed how exactly transnationality should be assessed and characterised.

Substantial disagreement was prevalent already during the first session. The footnote in the preamble to resolution 26/9, which gave the OEIGWG its mandate, states that '"Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of relevant domestic law'. Reaching consensus on how to interpret the footnote has proven to be challenging and it was early on anticipated to spark disagreement going forward.[191]

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in International Law: Models for a Business and Human Rights Treaty' (2021) 22:1 *Human Rights Review* p. 61. Bernaz references among others professor Carlos López 'In defence of direct obligations for businesses under international human rights law' (2020) 5:1 *Business and Human Rights Journal* pp. 56–85 and David Bilchitz 'A chasm between "is" and ought"? A critique of the normative foundations of the SRSG's Framework and the Guiding Principle.' In: Deva and Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) pp. 107–137.

[189] Carlos Lopez 'Human Rights Legal Liability for Business Enterprises: The Role of an International Treaty'. In: Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights. Context and Contours* (2017) pp. 312–313.

[190] Updated Draft (2023) Article 3. See Article 1.4 and 1.5 for treaty specific definitions.

[191] Carlos Lopez and Ben Shea 'Developments in the Field Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session' (2016) 1:1 *Business and Human Rights Journal* p. 113.

Prior to the first session, the EU had conditioned its participation in the negotiations by saying that it would only partake if the scope was not limited to TNCs, but instead includes "*all* other businesses enterprises" in line with the UNGPs.[192] The EU therefore brought attention to the matter in the opening session, arguing for a broader scope. The request put forth by the EU was not received particularly well by other participants, expect for a few states and NGOs that shared the opinion. Some NGOs simply reasoned that since all victims need protection and remedy, all businesses should be covered by the LBI. Opponents argued that this exceeds the mandate given to the OEIGWG.[193] Following through on its promise, the EU left the opening session and remained absent throughout the week.[194] It was not until a year later that the EU seemed to accommodate to the circumstances and re-joined talks, asserting once again that there is no legal void to be filled since the UNGPs are universally applicable, and that the treaty should mirror the principles by covering all businesses.[195]

Professor Carlos Correra, special advisor on trade and intellectual property at South Centre, debated arguments put forward against the footnote during the second session. He held that it is common practice to assign footnotes the same legal value as paragraphs, and that the treaty therefore should limit the scope to TNCs accordingly.[196]

Several states argued that TNCs should be the focus of the LBI, as they possess a unique ability to evade responsibility under current legal framework. Extraterritorial aspects and the adverse human rights impact that derive from their size and structure are all aspects that set TNCs apart from other businesses.[197] For instance, Pakistan emphasised that TNCs have the option to move their economic activity to another legal order (while maintaining operational activity in the host country), whereas domestic businesses are sufficiently covered by national law. For this reason, imbalances and legal gaps must be redressed to prevent TNCs from escaping jurisdiction. Ecuador, Cuba and Russia argued in similar fashion by highlighting the difficult nature the task entails and that to effectively fill the void, the sole objective should be to create international norms for TNCs.[198] Several NGOs shared this view.[199]

A few states expressed the need to clarify and define the meaning of TNCs. To reach consensus on a definition, one delegation suggested that the working

[192] Lopez and Shea (2016), Footnote p. 112.
[193] Report on the first session, p 12.
[194] Lopez and Shea (2016) p. 112.
[195] Carlos Lopez 'Struggling to Take Off?: The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights' (2017) 2:2 *Business and Human Rights Journal* p. 367.
[196] Report on the second session, p. 16.
[197] Report on the first session, p. 12.
[198] Kinda Mohamadieh and Daniel Uribe 'Discussing the scope of application of a prospective instrument' (2015) 87-88 *South Bulletin* p. 15.
[199] Report on the first session, p. 12.

group draws from previous work by the ILO and the OECD. This was challenged by another delegation, deeming it unnecessary to decide on an interpretation since other concepts like extremism and terrorism without a universal definition still were used in various binding instruments.[200]

Anne van Schaik, representative of Friends of the Earth Europe and panellist in early deliberations, stressed the need for a TNC-centred treaty that is applicable throughout global supply chains and to all the subsidiaries under the parent company. This was crucial as many TNCs held the power to influence domestic legislation through lobbying.[201] She also commended states that were actively engaged in the process but expressed regret over the "non-constructive" attitude of Western countries, including early disruptive actions taken by the EU "to derail the process" and more generally by highlighting the absence of the USA and other affluent countries".[202]

Following the initial debates, the first concrete indication on the scope of enterprises was offered by the Zero Draft. It prescribes that "any business activities of a transnational character" are covered by the treaty.[203] Professor Ruggie perceived this as a vague compromise, which on the one hand broadens the scope to include other businesses than strictly TNCs, but also has the potential to exclude SOEs of transnational character which naturally lack the typical business trait of making profit.[204] The EU also pointed towards this ambiguity[205], while Namibia suggested that it is reasonable to assume that "all business enterprises" also includes SOEs.[206]

Since the production of the Zero Draft, the wording has been subject to multiple revisions over the course of the drafting process. It was first changed to cover "all business activities, including particularly, but not limited to those of a transnational character". The Second Revised Draft contains a similar wording, but explicitly expands the scope to encompass joint ventures and SOEs in the definition section.[207] The Third Revised Draft prescribes that the LBI "shall apply to all business activities, including business activities on transnational character".[208] This phrasing was retained in the Updated Draft of 2023, only with slight amendments.[209]

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[200] Report on the second session, p. 17.
[201] Ibid., p.16.
[202] Mohamadieh and Uribe (2015) p. 10.
[203] Zero Draft (2018) Article 3.
[204] John G. Ruggie 'Comments on the "Zero Draft" Treaty on Business & Human Rights', Business and Human Rights Resource Centre (2018). Available at: https://www.business-humanrights.org/en/blog/comments-on-the-zero-draft-treaty-on-business-human-rights/. Accessed: 11 April 2024.
[205] Annex to the report on the fifth session, p. 33.
[206] Annex to the report on the sixth session, p. 15.
[207] Second Revised Draft (2020) Article 1(3).
[208] Third Revised Draft (2021) Article 3.
[209] Updated Draft (2023) Article 3.

The Updated Draft of 2023 once more proposed expanding its coverage to encompass all business enterprises, rather than solely focusing on TNCs. This was met with heavy criticisms by CSOs, calling it a "flagrant violation" of the mandate established by resolution 26/9, and a strategy to ultimately end up with a less effective LBI. The chair maintained that changes made were necessary to ensure support from more states.[210] The EU continued to promote its agenda and voiced appreciation for changes made in the Updated Draft that ensures closer adherence to the UNGPs, including the issue of personal scope. Since all types of businesses equally may act in a way which has adverse impacts, TNCs should not be singled out.[211]

An increasing number of countries, including South Africa, expressed apprehension regarding the breadth of application outlined in the Updated Draft, advocating for its restriction solely to TNCs again. Three categories can be identified: (i) States suggesting a broad scope, with a treaty encompassing all business enterprises irrespective of character are Chile, Mexico, Panama, and the USA; (ii) states aligning themselves to resolution 26/9, promoting a scope limited to TNCs and other businesses of transnational character are Algeria, China, Cuba, Colombia, Ghana, Honduras, Indonesia , Pakistan, Russia and South Africa; and (iii) A State suggesting a compromise with a treaty applicable to all business enterprises, but particularly focuses on TNCs, namely Brazil. Furthermore, Ghana and South Africa proposed that value chains could explicitly be included in the provision. Despite apparent divergent opinions, several states agreed on the significance the article bears and called for further consultations with experts going forward.[212]

Professor Deva dissects the contents of the footnote and notes that the firsts two sessions were dedicated to deliberating upon, among other themes, the scope – suggesting that the footnote might not have predetermined the scope after all. What further adds to this argument is that the working programme ahead of the second session of the OEIGWG was revised with the particular purpose to secure EU's participation by allowing discussions on "all business enterprises" as part of the scope. The language is clearly ambiguous, but arguably intended to limit the scope to TNCs and other companies of transnational character and exclude domestic businesses operating within the territory of a single state.[213]

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[210] Compilation of statements by non-State actors from the ninth session, p. 3.

[211] Compilation of general statements from States and non-States stakeholders during the ninth session, p. 21.

[212] Textual proposals submitted by States during the ninth session, A/HRC/55/59/Add.1 p. 21; BHR Recourse Centre, 'Day 4: Thursday 26 October 2026. Available at: https://www.business-humanrights.org/en/latest-news/day-4-thursday-26-october-2023/. Accessed 12 April 2024.

[213] Surya Deva 'Scope of the Proposed Business and Human Rights Treaty. Navigating through Normativity, Law and Politics'. In: Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights* (2017) pp. 167–173.

The suggestion that the treaty should exclude domestic businesses stems from the belief shared by many states in the Global South, as well as by several states endorsing resolution 26/9, that the treaty only needs to address TNCs and businesses of transnational character. In addition, States of the Global South are concerned that if the treaty were to encompass all forms of business enterprises, their local and small-scale companies could face significant burdens from international human rights standards. Several developed states situated in the Global North hold a contrary view, fearing that restricting the potential treaty to only TNCs would adversely impact their own TNCs economically. Consequently, those states promote the inclusion of domestic businesses too. They also highlight impractical implementation aspects that stem from only targeting a selected group of companies, and not all of them.[214]

Professor Deva deliberates on the three main options going forward. There are a few pros and cons in terms of a TNC focused approach strictly aligned with the resolution. The advantages to a narrower scope would be that small- and middle-sized companies in developing countries would not be burdened by norms, while at the same time enhancing the leverage of those states. Additionally, it would make enforcement significantly more manageable due to the limited number of complaints. However, the obvious disadvantage lies within the divide among state interests, as it is highly unlikely that a narrow scope ever will be agreed to by developed countries. It could also be argued that TNCs would be subject to discrimination.[215]

The second option involving an all-encompassing LBI has the advantage of gaining the necessary participation from developed countries in the Global North. It would also eliminate the need for states to define 'TNCs' and 'transnational character' as well as avoid any risk of violating the principle of non-discrimination. This route also aligns well with the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises, the OECD Guidelines for Multinational Enterprises and the UNGPs, which do not distinguish businesses. A risk tied to this option is that states in support if the treaty may withdraw from negotiations.[216]

The third option is a hybrid approach. This could constitute a broad scope covering all businesses, and an additional set of provisions for TNCs developed specifically to tackle issues arising from the legal gap. A hybrid approach might be able to break the deadlock and by doing so, further advance the negotiations. However, it may not be the statement many pro-treaty states first hoped for.[217]

[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Ibid.

3.1.4 Primacy and Scope of Human Rights

The issue of the primacy of human rights over other areas of law has been a key point of discussion in early sessions and continues to resurface. This debate centres whether human rights should take precedence over other legal considerations, such as trade, investment, and national sovereignty. It highlights the tension between upholding fundamental human rights and balancing other legal and economic interests, a critical aspect shaping the development of international human rights law.

Several speakers and participants voiced concern over how the treaty could address potential conflicts between human rights and trade and investments policies during the second session.[218] Some state delegations and stakeholders contend that human rights law should be given formal primacy, thereby establishing a superior hierarchy for human rights within international law and domestic systems. This would ensure that human rights cannot be limited or constrained by trade and investment treaties or other commercial regulations.[219]

One panellist voiced concern over enhanced protection of investor rights, arguing that investment treaties could interfere with States' obligation to protect human rights since such investment treaties often surpasses domestic law. Further, the ISDS mechanism often included in investment treaties tend to create an imbalance of power between the state and the investor, by only providing remedy options for business stakeholders.[220] Similarly, another panellist pointed towards the potential adverse effects of FTAs. While recognising that investments by corporate actors abroad can be beneficial from a developmental perspective, they noted that it also may result in companies competing in 'a race to the bottom'. FTAs risk manifesting further along the economic chain (downstream economic risks).[221]

During negotiations of the Second Revised Draft in the sixth session, it was proposed by Palestine that the preamble should affirm the primacy of human rights. Palestine suggested the following addition: "To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements".[222] However, this part of the preamble was removed in the Updated Draft of 2023. Colombia

[218] Report on the second session pp. 6–8.
[219] Ibid.
[220] Ibid., p. 7.
[221] Ibid.
[222] Annex to the report on the sixth session, p. 35.

alongside several non-state stakeholders regretted the deletion of this part, describing it as "one of the most significant losses" of the latest draft.[223]

On the topic of primacy of human rights, Professor Markus Krajewski makes the case that the UNGPs and their voluntary nature have not created any notable change on states' treaty practices.[224] He highlights a few areas of conflict between human rights and trade and investment policies.

First, Krajewski addresses the restriction of policy space and the actual impact of trade and investment agreements. FTAs and BITs generally seek to limit the respective states' behaviours that could negatively impact commercial activities. Requirements usually range from fair and equitable treatment to prohibition of discriminatory measures that put foreign investors at a disadvantage. However, such obligations undertaken by parties to an agreement naturally creates constraints on the regulatory space of both the host State, with regards to investment protection, and the importing state, with regards to trade obligations. This shrunken space may be necessary for the protection of human rights. Further, he also points to the "chilling effect" of such agreements, meaning that governments may hesitate to implement policies that protect human rights due to the fear of violating an agreement in place. This effect exists irrespective of there being an actual ISDS claim or an award.[225]

Second, as international law lacks a clear hierarchy, there is no simple answer to conflicting obligations between human rights and trade and investment agreements. It is generally accepted that all sources of public international law rank the same, except for peremptory *jus cogens* norms and the Charter of the United Nations. *De lege lata* recognises that treaty obligations does not justify the violation of human rights but does not create any obligations.[226]

Third, trade and investment incentives may further impact the realities of business and human rights. Government-backed investment insurances, export credit and guarantees offered to exporters and investors in their jurisdiction are all important financial sources. However, lack of controls and regulatory conditions have led to a significant number of projects supported by states' export credit agencies with severe adverse environmental and human

[223] Refers to PP11bis to the Third Revised Draft (2021), Compilation of Statements by non-State stakeholders of the ninth session, pp. 3–4, 6 and 10. Stakeholders were among others: CETIM, Friends of the Earth International, Justica Global, the Global Trade Union and the Institute for Policy Studies.

[224] The UNGPs "[…] call upon states to negotiate and conclude trade and investment agreements which do not impose undue restrictions on national policy space needed to respect, protect and fulfil human rights". Markus Krajewski 'Ensuring the primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights' (2017) CIDSE, p. 5.

[225] Ibid., pp. 9–10.

[226] Ibid.

rights impacts. The activities of export credit agencies are viewed as a matter of domestic law, as there is no international binding set of rules in place.[227]

Krajewski argues that a supremacy clause that formally establishes the primacy of human rights obligations over trade and investment agreements could mitigate these potential conflicting areas of law. An additional clause could outline specific obligations of export credit and investment guarantee agencies with regards to human rights.[228]

Another issue closely related to the hierarchal debate is the scope of human rights, addressed in article 3.3 of the Updated Draft. Which human rights violations to cover is a key issue of the treaty and subsequently its reach in practice. The central issue of the debate is whether the treaty should encompass all human rights violations or be restricted to only gross violations. After the first and second sessions back in 2015 and 2016, it was noted that there appeared to be a wide consensus on the treaty covering the full spectrum of human rights.[229]

Several participants held that it would be inaccurate to limit the treaty to only include gross human rights violations, since all human rights are universal, indivisible and interdependent, as recognised in the Vienna Declaration and Programme of Action in 1993. Distinguishing certain human rights, essentially ranking some violations above others, would therefore not be coherent. The fact that there is no definition of grave violations of human rights in international law was also used as an argument to push for a full scope.[230]

On the Revised Draft of 2019, states mostly raised concerns on the vagueness of the article and asked for a more specific formulation. Despite scaling back its scope compared to the Zero Draft in 2018, delegates still found the article unclear due to its failure to adequately anchor it in human rights instruments.[231] The provision has since been revised, taking this into account. With only slight differences between them, the Second Revised Draft and the Third Revised Draft explicitly refer to the UDHR, the ILO Declaration on Fundamental Principles and Rights at Work, all core international human rights treaties and fundamental ILO Conventions to which a state is a Party, and customary international law.[232] The Updated Draft removed these references, and now only refers to "all internationally recognised human rights and fundamental freedoms".[233]

[227] Ibid.
[228] Ibid., pp. 24–30.
[229] Report on the first session, p. 12 and Report on the second session, p. 17.
[230] Report on the first session, p. 12.
[231] Report on the fifth session, pp. 8–9.
[232] Second Revised Draft (2020) Article 3.3 and Third Revised Draft (2021) Article 3.3.
[233] Updated Draft (2023) Article 3.3.

Though the article was up for debate during the ninth session, it sparked no major reactions from state delegates. However, a related change in the preamble was commented on by an NGO. Prior to the Updated Draft of 2023, the preamble only referenced international human rights law as the scope. The Updated Draft calls for States to "[…] ensure respect for international humanitarian law in all circumstances", essentially expanding the scope to another area of international law.[234] The United States Council for International Business expressed deep concern over the feasibility and practicality of such a change in the Updated Draft of 2023.[235]

A treaty with the full scope of human rights (and the attitude of some NGOs) has received harsh critique from the SRSG Ruggie. To this day he has voiced the fiercest criticism towards an all-encompassing treaty, contending that demands by some stakeholders which imply that the treaty should not only include all internationally recognised human rights, but also declare primacy of those human rights, undermine the entire treaty process. Such proposals "are so far removed from reality" that they simply are not workable or even worth engaging with for states.[236]

Ruggie entirely dismisses the possibility of pursing an all-encompassing treaty as a viable option for solving current human rights challenges in a meaningful way. He points to previous all-encompassing treaties on contentious issues, such as climate change, and their lack of producing tangible result. For any consensus to be achieved, the standards would likely have to be significantly lowered from the current highest voluntary standards, ultimately resulting in a weak treaty with less impact than the UNGPs. Another problem would be to effectively implement and enforce the treaty. Given that business and human rights sit in the middle of various areas of domestic and international law (and thus involve different judicial bodies), achieving any uniform practice or coherent outcomes would be exceedingly difficult, if not impossible.[237] Rather than an all-encompassing treaty with a top-down approach, Ruggie advocates for multiple international instruments with narrow scopes, specifically designed to address existing legal gaps. This would mitigate the problems above, be compatible with the current legal framework and align with the concept of principled pragmatism upon which the UNGPs sit.[238]

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[234] Ibid., Preamble (PP7).

[235] Compilation of statements delivered by non-State stakeholders during the ninth session, p. 11.

[236] John G. Ruggie 'Get real, or we'll get nothing: Reflections on the first session of the Intergovernmental Working Group on a business and human rights treaty' (2015) *Harvard's Kennedy School of Government*, p. 2. Available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Ruggie_Get_Real.pdf.

[237] John. G. Ruggie 'A Business and Human Rights Treaty? International legalisation as precision tools' (2014) *Institute for Human Rights and Business*. Available at: https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision/. Accessed 13 April 2024.

[238] Ibid.

3.1.5 A Framework Agreement

The format of the treaty is crucial for its implementation process and the timeframes required for its realisation. The treaty will determine the degree of discretion granted to states regarding the measures to be undertaken and the pace at which they are adopted. Essentially, there are two options: (i) a comprehensive instrument that outlines precise obligations and implementation mechanisms, or (ii) a framework convention agreement that provides a broad set of principles or goals.

During the seventh session in 2021, the US stated its opposition to the current LBI draft as a whole and proposed that the treaty take a completely different route. Prior to this session, the US had not participated in negotiations. The US argued that the current division among states, particularly on key issues like binding obligations for businesses, extraterritorial reach of domestic laws, and broad liability for an unclear scope of human rights, calls for a different treaty approach. For a BHR treaty to effectively enhance global corporate accountability, it must gain widespread acceptance and support from all stakeholders.[239]

The US contended that the current approach has resulted in limited to no participation from a sizeably percentage of states which domicile some of the world's largest TNCs, like themselves, Canada and Australia. Convinced that this route never could reach multi-stakeholder consensus and that a different type of instrument would be more effective than the current drafts, the US proposed that the treaty instead should take the shape of a framework agreement that builds on the UNGPs.[240] Germany similarly welcomed the exploration of a framework agreement structure in 2023.[241]

This route has scholarly support from, among others, Methven O'Brien, who makes the case for a framework convention that is based on the UNGPs and National Action Plans (NAPs) on BHR. Negotiations on a treaty may unintentionally hinder progress, delaying advancements and undermining years of efforts to implement and institutionalise the UNGPs. Instead of disrupting these processes, they could be preserved with an approach that imposes general obligations on states to build on their NAPs and further develop and report on national legislation.[242]

[239] Annex to the report on the seventh session, pp. 24–25.

[240] Ibid.

[241] Report on the ninth session, pp. 9–10.

[242] Claire Methven O'Brien 'Experimentalist Global Governance and the case for a Framework Convention based on the UN Guiding Principles on Business and Human Rights'. In: Mullen et al. *Navigating a New Era of Business and Human Rights,* Article 30 and the Institute of Human Rights and Peace Studies (2020) Mahidol University pp. 204 and 210.

On the other hand, Professor Anita Ramasastry has advocated for several treaties with narrower scope, referencing anti-corruption and bribery initiatives. Like Ruggie, she questions whether one single treaty could ever be built into the legal architecture, and that it in fact could dilute already existing standards by lowering the bar.[243]

Professor De Schutter highlights the most compelling arguments for each option. Pointing towards the 2003 Framework Convention on Tobacco Control, adopted by the World Health Organization, such conventions generally require states to undertake certain actions but allows them to define the specifics. To balance the flexibility allowed by such an approach, State parties must comply with rigorous reporting processes on national tobacco control strategies and submit periodic implementation reports. A UN Treaty on BHR may benefit from a similar approach, given the divergent opinions in some key issues debated. Further, it would be aligned with current encouragements under the UNGPs, promote policy coherence and increase convergence on effective practices that remain vague under the UNGPs.[244]

De Schutter recognises that a framework convention agreement might appear less invasive on states' policy space and thus might gain broader political support. However, he stresses that such an instrument too is demanding for states, obliging them to initiate comprehensive domestic processes, like developing NAPs. For a framework convention to effectively work, it typically necessitates a robust international mechanism that monitors and follows up on such NAPs and processes of each State. Considering the vast amount of funding an international monitoring body would require, De Schutter doubts that there would be enough political will to pursue a framework agreement in the end. He argues that states in fact might resist such a route once they realize that the burdens of reporting exceed that of other reporting processes under existing UN human rights treaties, in addition to the significant number of financial resources that would be required.[245]

3.2 Analysis

The initial the two sessions of the OEIGWG were dedicated to conducting deliberations on the content, scope, nature and form of a possible future LBI to regulate the activities of TNCs and other business enterprises. Though treaty talks often appear to progress slowly, sometimes limping at best with many old issues resurfacing rather than being resolved, some notable new aspects and changing dynamics have emerged. Since the publication of the

[243] Anita Ramasastry 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement'. In: Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business* (2013); John G. Ruggie 'A UN Business and Human Rights Treaty? An Issues Brief', Harvard Kennedy School (2014) p. 3.

[244] De Schutter (2015) pp. 56–57.

[245] Ibid.

Elements document in 2017 and the Zero Draft in 2018, subsequent revisions based on negotiations have significantly altered the contents and character of the draft proposal of an LBI.

With states as the primary duty bearers under international human rights law and treaty law, state obligations mandated by the treaty are essential for its effectiveness. Arguably, this is especially true in the current phase of negotiations, where the latest draft further reaffirms state sovereignty, the state centric approach to BHR and emphasises prevention as one of the most important state duties. Indeed, all drafts have adopted a language which reaffirms that the primary obligation to respect, protect, fulfil and promote human rights lie with the State, adhering the foundational principles of the international legal structure.

As negotiations have progressed, discussions have moved away from covering obligations on a general level to specific formulations within the articles. Key examples include the state obligation to ensure the practice of preventative due diligence, establish a liability regime and to regulate the extraterritorial activities of TNCs (tied to jurisdiction) which both will be addressed below. However, extraterritoriality continues to provoke reactions and thus appears to be an unresolved issue. Given the contentious nature of extraterritoriality and TNCs, with strong opinions both ways, it is unlikely that the final formulation will leave extraterritorial obligations ambiguous. Therefore, the matter will likely resurface to be clarified.

Following the ninth session, it appears reasonably certain that the issue of obligations for companies has been settled, with the idea of placing direct binding obligations on companies rejected. While the Elements document indicated that direct obligations would be placed on businesses, superseding drafts have gradually (but now completely) moved away from this approach. The changed terminology from “obligation of companies” to “responsibilities of companies” is not insignificant. Replacing the term moves the draft closer to the UNGPs and reinforces that the treaty will maintain a state-centric approach. This alignment is particularly desired by the EU and other States of the Global North, as the UNGPs uses the softer language of responsibility.

Given the contentious nature of the issue, highlighted not least by the strong stance taken by the US during their entry session in 2017 and reactions that followed from countries like Egypt, it could very much become a deciding factor for future state ratification. It would not be the first time obligations for businesses would become a deciding factor, as shown in the past when the UN Norms were turned down. This is one of the debates that continues to reappear several years into negotiations, with significant changes recently incorporated in the Updated Draft.

Responsibilities versus duties for businesses is one of the debates that clearly is multidimensional, influenced by both the scholarly theoretical discourse and state policy. Whether one adheres to the view that business enterprises already can possess direct obligations, as seen historically during the eradication of slavery, or to the traditional view that businesses cannot hold obligations under international law, practical considerations outside this isolated debate may ultimately be decisive. As Lopez notes, imposing direct obligations on corporations will still require strong state bodies to monitor and hold companies accountable.

Ultimately, proponents of direct obligations may be willing to compromise if other mechanisms to ensure accountability and facilitate remedy for victims are significantly strengthened. In the end, the same obligations can be imposed via the States parties, deriving from the treaty, without placing them directly upon businesses. This approach though hinges on strong and non-corrupt state participation. However, advancing the polarised debate is undeniably difficult when there is fundamental disagreement on the basics. Much of current argumentation is still rooted in the question of whether companies can and have human rights obligations, despite many scholars advocating for a shift in focus beyond this debate.

The scope of enterprises covered by the treaty is arguably one of the most critical legal issues to decide its impact and is proving to one of the most contentious. From the early sessions of deliberating on the scope, disagreement has persisted and the arguments on both sides remain largely unchanged. This issue is particularly significant, as many parties view it as foundational to the mandate of resolution 26/9 and the very establishment of the OEIGWG. However, with respect to the scope of enterprises, there has been a clear movement towards a much broader range than in the early drafts. The Updated Draft of 2023 expands the scope to apply to all businesses indistinguishably but clarifies that TNCs are also included. Many states that voted in favour or the resolution along with multiple NGOs, feel this overlooks or ignores the very reason that sparked treaty negotiations in the first place – the activities of TNCs and their unique ability to evade accountability under the current framework.

Despite having been negotiated since day one, it is evident that the issue remains a major discussing point. Following multiple revisions and the scope moving back and forth, it uncertain whether the current formulation will stand. If the industrialised states manage to further align the treaty with the UNGPs on other legal issues, it is highly unlikely that the LBI will single out TNCs in the end. Given the fragmented current state of play, it is likely wise to further consult with experts, as agreed upon by states during the ninth session. Discussions have reached a deadlock, with three distinct categories of states emerging. It has become clear that trade and economic incentives are the driving force in the debate, rather than a perspective that centres victims.

While other aspects of a narrow scope, such as being more manageable or avoiding excessive burdens for SMEs, are all important, they are clearly treated subordinately. As noted by Professor Deva, states act on the notion that a treaty focusing on TNCs is economically undesirable for them, as it would target many large and profitable enterprises, and potentially reduce their current advantages.

Stakeholders and states appear to stand on opposite ends on whether the treaty should grant primacy of human rights over other areas of law. This division is likely because there is no middle ground, and as demonstrated by Krajewski, there are a few areas of evident conflict where diverging interests are competing for the same policy space. Clearly, the strongest tension revolves around BITs, their strong protection of investor rights and their potential interference with States duty to protect human rights. This is another legal issue where trade and investment incentives are prominent in negotiations. The removal of the provision that affirms the primacy of human rights over BITs, FTAs or other commercial regulations in the Updated Draft could be said to signal a decrease in human rights focus, and instead cater to the corporate perspective. For now, the clear primacy of human rights law over economic law is rejected, and if the will of the SRSG prevails, it will remain this way.

The scope of human rights was not debated in depth during the recent sessions, and the Updated Draft adopts a formulation that might be perceived as ambiguous and thus likely will necessitate future discussion. The current preamble calls for states to ensure respect for international humanitarian law, which essentially expands the scope to another area of international law. Such an expanded scope will likely be subject to upcoming negotiations.

Every draft produced up until now has adopted the design of a comprehensive overreaching treaty, which leaves the impression of the approach being a settled issue. However, it remains to be seen if recent oppositions by the US may spark a debate. The US has asserted that the current rigid route includes too many substantial disagreements, causing it, along with Australia and Canada, to refrain from even participating in negotiations. Germany's welcoming of exploring alternative routes may indicate that also the EU could eventually favour a more flexible general framework agreement over a detailed comprehensive treaty. If pursued, this shift would represent a significant turnabout in negotiations and likely face fierce criticism from pro-treaty states and parts of civil society. A more flexible framework agreement allows for greater discretion by states, and it evolves over time, in contrast to comprehensive treaties, which provide more predictability and have immediate effect upon ratification. Should the mentioned states begin to actively engage and strongly advocate for this approach, it could perhaps become a somewhat unforeseen issue on the rise.

3.3 Devising an Arrangement for Justice and Effective Access to Remedies for Victims

3.3.1 Preventative Due Diligence

The Updated draft of 2023 follows earlier drafts by adopting HRDD. Pursuant to the current Article 6.2(c), "State parties shall adopt appropriate legislative, regulatory, and other measures to: ensure the practice of [HRDD] by business enterprises". Measures to achieve this include legally enforceable requirements to undertake HRDD. The Third Revised Draft defined HRDD adjacent to the dedicated article on prevention.[246] In the Updated Draft, this section is revised and moved to Article 1 on definitions.

The legal issues in section two were not addressed in full during the ninth session due to time constraints (only the preamble and articles 1–3 was negotiated).[247] However, there were some initial reactions in the opening statements of states and other stakeholders that give an indication as to what negotiations during the tenth session of the OEIGWG may entail.

Colombia questioned the changes made from the Third Revised Draft, pointing at the new centrality that due diligence receives throughout the Updated Draft.[248] Centre Europe-Tiers Monde expressed similar concerns, arguing that including a definition of due diligence in the first article (rather than in connection to the prevention article that spells out the obligation) positions due diligence as the primary focus of the treaty. This is undesirable, as the treaty should cover other aspects of prevention, liability and jurisdiction that go beyond the capacity of due diligence.[249]

While Colombia recognised the importance of due diligence on human rights, they emphasised that the definition on due diligence is inadequate in the Updated Draft and that prevention should not be the sole focus of an LBI. Instead, a treaty must encompass complementary obligations connected to access to justice and restorative measures. Moreover, the language used in the definition of due diligence was described as weak, since it fails to include value chains which are essential for human rights protection and does not present it as an obligation for TNCs. Due diligence is an insufficient mechanism where violations are occurring, leaving any preventative measures

[246] Third Revised Draft (2021) Article 6.3.

[247] Report on the ninth session, p. 7.

[248] Compilation of statements delivered by States during the State-led negotiations of the ninth session, pp. 12–13.

[249] Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the ninth session, p. 13.

irrelevant.[250] Mexico aligned themselves with the critique and proposed the deletion of the article all together.[251]

Germany argued that it is timely to reflect on what a treaty really should contain, in light of new binding due diligence legislation at domestic and EU level. By way of example, Germany highlighted their own Supply Chain Due Diligence Act and that the CSDDD at EU level is in its final stage. Both instruments set binding standards for business conduct and are based on the UNGPs. A similar approach which combines due diligence with specific rules on access to remedy was favoured for the treaty.[252]

The International Commission of Jurists expressed regret that key elements of significant articles in the second part of the treaty were omitted. These elements would have otherwise clarified international human rights law, particularly concerning prevention, liability, and jurisdiction.[253] The Global Union, comprising trade union organisations over 300 million workers, also stressed that the provision on prevention (alongside legal liability and jurisdiction) had been significantly diluted in the Updated Draft.[254] By way of comparison, earlier versions of HRDD have been more extensive. For instance, the Zero Draft of 2018 included *preventative responsibility* within its definition of due diligence. This prompted New Zealand to question why the treaty would extend beyond the typical standard of due diligence, which is "seeking to prevent," rather than creating an explicit responsibility to prevent.[255] The United States Council for International Business on the other hand called the current prevention provision too extensive, comparing it to the less far reaching UNGPs. It would cause “unbearable operational and financial burden on companies” to complete due diligence in every case.[256]

The road of HRDD is questioned by Professor Deva, arguing that HRDD should not be accepted as a panacea, to prevention nor accountability. The main strengths of HRDD include socialisation (increased engagement due to the business familiar process of due diligence and terminology), a common currency (manage expectations and level the playing field) and prevention (“know and show”). In terms of prevention, companies are asked to identify risks to people connected to their business operations and take action to hinder those risks from violating the rights of the people. While it is true that HRDD has become a key tool for states to fulfil their duty to protect human rights, it

[250] Compilation of statements delivered by States during the State-led negotiations of the ninth session, pp. 12–13.

[251] Ibid., pp. 14–15.

[252] Compilation of general statements from States and non-State stakeholders made during the ninth session, p. 9.

[253] Ibid., p. 21.

[254] Ibid., p. 34.

[255] Addendum to the report on the fourth session, p. 19.

[256] Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the ninth session, p. 20.

does not provide any real guarantees for substantial positive change for rightsholders on the ground. In the first 11 years of the UNGPs' implementation, most businesses have not taken their non-binding responsibilities seriously, Professor Deva argues. Although many companies and industry groups have formally adopted HRDD, they effective practice is lacking.[257]

Further, mandatory HRDD laws as constructed today (both under pillar II of the UNGPs and generally in domestic legislation) they do not centre the actual outcome but is merely a process through which potential human rights abuses are sought to be identified. It is a vital to go beyond that process stage and start expecting businesses to deliver actual results – and if not, tie failure to legal liability. Consequently, HRDD in its current form lacks the capacity to disrupt any of the systemic issues within current power and economic asymmetries and should not be considered an adequate solution.[258]

3.3.2 Legal Liability of Businesses as Legal Persons

At the heart of HRDD, and what is commonly referred to as the accountability gap and corporate impunity, lies the issue of legal liability for enterprises – the possibility of businesses facing legal consequences if they violate human rights laws. The issue closely relates to direct obligations of states, as the next step would be to negotiate the forms and extent. To respect human rights under the UNGPs, businesses should conduct HRDD. However, these principles do not speak on liability for not meeting this responsibility, leading to significant legal uncertainty.

Different approaches have been presented throughout negotiations, including by Professor David Bilchitz, who as a panellist during the second session suggested drawing from the Constitutional Court of South Africa, which applies constitutional rights obligations on private actors.[259] Another panellist, attorney Nyembe, suggested using a tort law approach because English tort law already requires companies to take reasonable steps to avoid harming others, which overlaps the HRDD requirement. This approach could help hold multinational parent companies accountable for human rights abuses, especially if they are negligent. He recommended this method with some changes to make it applicable everywhere.[260]

The Updated Draft presupposes the conferral of legal personality in an international legal setting. It incorporates legal liability for both natural and legal persons, encompassing criminal, civil, and administrative liability. Liability hinges on a basis of *control* and includes activities or relationships of

[257] Surya Deva 'Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?' (2023) 36:2 *Leiden Journal of International Law* pp. 389 and 424.
[258] Ibid., pp. 406–407.
[259] Report on the second session, p. 14.
[260] Ibid.

transnational character in the current version. If adopted, States would need to integrate these provisions into domestic law to establish a comprehensive and adequate system of legal liability.[261] The Third Revised Draft contained a provision clarifying the relationship between HRDD and legal liability, establishing that the process of undertaking HRDD not automatically absolves liability for a legal or natural person, if harm has been caused.[262] This part has been removed in the Updated Draft.[263]

Civil liability is key in this context, as companies and victims are both private actors in the civil sphere. Importantly from a victims' perspective, civil liability goes beyond monetary compensation. Depending on the legal framework, various concrete remedies may become available once liability is established. Victims can seek preventative orders such as injunctions, to prevent future or ongoing harm. They may also request that the court halt the company's harmful activities and issue remedial orders, such as clean-up mandates or land restitution. Additionally, some legal systems permit supervisory orders, where the court requires the company to take specific actions and report back on their implementation progress.[264]

The EU questioned the changes made to the provision on legal liability in the Updated Draft, and is particularly disappointed with the deletion of references related to liability for failure to carry out effective due diligence, which resulted in harm.[265] The Global Union expressed disappointment on the Updated Draft, arguing that it no longer resembles the liability regime in its two predecessors.[266] The Feminists for a Binding Treaty advocated for the expansion of Article 8 on prevention, urging the inclusion of a provision that mandates criminal liability for attacks on environmental and human rights defenders.[267]

On the other hand, The United States Council for International Business stressed that the draft, in its current form, creates legal uncertainty by expanding liability for companies. For instance, liability in the Updated Draft covers "legal and natural persons conducting business activities, within their

[261] Updated Draft (2023) Article 8.1.

[262] "Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person […]". Third Revised Draft (2021) Article 8.7.

[263] Updated Draft (2023) Article 8.

[264] Lise Smit 'The importance of civil liability for a corporate human rights duty'. Transcript of the intervention of Lise Smit in the webinar on Corporate Due Diligence and Civil Liability on 28 January 2021. Available at: https://www.biicl.org/blog/21/the-importance-of-civil-liability-for-a-corporate-human-rights-duty?DownloadPDF=. British Institute of International and Comparative Law, p. 1.

[265] Compilation of general statements from States and non-States stakeholders during the ninth session, p. 21.

[266] Ibid., p. 34.

[267] Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the ninth session, p. 16.

territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their business activities or relationships, including those of transnational character".[268] "Business relationship" refers to any connection between people or organisations, including governments and private entities, for conducting business. This includes relationships through affiliates, subsidiaries, agents, suppliers, partnerships, joint ventures, or any other business structure. It also covers all activities within their value chains.[269] The United States Council for International Business deemed the inclusion of "value chains" in the definition of business relationships unacceptable. They argued that companies could be held liable for activities they cannot control, as "value chains" encompass both upstream and downstream supply chains and relationships where there is no direct contractual link.[270] The International Organisation of Employers expressed similar concerns, stating that introducing legal liability for a company based on violations anywhere in its entire value chain would be unrealistic. Additionally, they argued that extending liability to individuals could lead companies to avoid certain markets and countries.[271]

The challenge of piercing the corporate veil and establishing parent company liability for human rights violations has repeatedly been raised during negotiations.[272] In most jurisdictions, company law principles recognise each company within a corporate group as a separate legal entity. This means that a parent company is not automatically liable for the harmful actions of its subsidiaries solely based on ownership. Only in exceptional cases can the corporate veil be lifted, making the parent company liable for the wrongful acts of its subsidiaries. However, in recent decades, the concept that a parent company may be directly liable for its own actions or omissions related to harms caused by its subsidiaries has gained traction.[273]

At present, there is need for harmonisation in the terminology used in various HRDD legislation for the determination of liability. Generally, international law and domestic legislation refer to the notion of control as a condition of liability for parent companies. Some liability mechanisms, like those in the Second Revised Draft Treaty, focus on legal or factual control over a person or activity. Others, such as the French Duty of Vigilance Law, emphasise exclusive control over an entity, particularly in terms of decision-making power over its financial and operational policies. Additionally, mechanisms

[268] Ibid., p. 19.

[269] Updated Draft (2023) Article 1.6.

[270] Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the ninth session, p. 19.

[271] Compilation of general statements from States and non-State stakeholders made during the ninth session, p. 31.

[272] See for instance the Report on the first session, p. 17; Report on the second session p. 7; Addendum to the report on the fourth session, p. 47; Compilation of general statements from States and non-State stakeholders made during the eighth session, p. 27.

[273] Nicolas Bueno and Claire Bright 'Implementing human rights due diligence through corporate civil liability' (2020) 69:4 *International and Comparative Law* pp. 807–808.

like the Swiss Responsible Business Initiative consider the concept of economic control.[274]

Adopting mandatory HRDD legislation would reduce the risk of discouraging companies from conducting it. Domestic case law on parent company liability is increasingly recognising that failing to meet HRDD requirements can lead to liability. However, different approaches exist: some cases consider the degree of control that the parent company exercises over a subsidiary's decisions, while others focus on the control that should have been exercised, based on the proximity of the parties or the legitimate expectations from group-wide policies. These approaches are also increasingly applied in case law on the liability of lead companies. Scholars have warned that scrutinising the existence of HRDD policies to determine a duty of care may discourage companies from adopting such policies for fear of legal liability. Therefore, mandatory HRDD legislation, introducing a legal obligation to exercise HRDD along with an associated civil liability regime, is preferred, as it would alleviate this risk.[275]

One option for future international law instruments advocated for by Nicolas Bueno and Claire Bright, is strict liability for controlling companies, with a due diligence defence, provided the notion of control is clearly defined for both parent and lead companies. This approach helps alleviate the practical difficulties claimants face in proving negligent conduct by the company. However, any regulation linking HRDD and legal liability should clarify that merely conducting due diligence as a cosmetic exercise will not be sufficient to avoid liability in the event of harm. This risk exists if a narrow, compliance-focused view of HRDD is adopted. Regulators can address this risk by clarifying that a company cannot automatically escape liability by merely demonstrating that it formally exercised HRDD.[276]

3.3.3 Jurisdiction

The issue of applicable jurisdiction fits under the headline of (extraterritorial) state obligations. Throughout the extensive negotiations, this topic has been discussed both as a general state obligation and, more specifically, in the context of jurisdiction.[277] Given the structure of the Updated Draft, this legal debate is more appropriately addressed in this second section. Jurisdiction is a critical legal debate in negotiations for the potential treaty due to its implications for where cases can be heard, and which laws apply. Key contentions include ensuring access to justice for victims and determining the extent of responsibilities of home vis-à-vis host states.

[274] Ibid., pp. 817–818.
[275] Ibid.
[276] Ibid.
[277] Updated Draft (2023) Article 9.

The Zero Draft from 2018 of the LBI prescribed that a court shall have jurisdiction in two specific forums: the *forum loci delicti*, where the acts or omissions occurred, and the *forum societatis*, where the natural or legal person is domiciled. The concept of domicile is further defined as the location of a company's statutory seat, central administration, substantial business interest or subsidiary.[278] Instead of delegates expressing state positions, talks were more framed by doubts and frequent questions on the feasibility of adopting a treaty which allows the exercise of extraterritorial jurisdiction by domestic courts.[279] For instance, the Russian delegation argued that a broad definition of domicile could result in arbitrary and unjustified cases. India instead recommended aligning the diverse aspects of domicile with corporate law, acknowledging that this could yield varying outcomes due to differences in domestic legal systems. Meanwhile, the Chinese delegation emphasised that the definition of domicile for jurisdictional purposes should be reasonable in scope, highlighted the unclear attribution of legal presence, and raised concerns about extraterritorial jurisdiction.[280]

Some delegations have proposed that explicit references to the bases for jurisdiction should be included. They argued that, under international law, extraterritorial jurisdiction should only be invoked in exceptional circumstances, justified by a legitimate interest, and when a real and substantial link exists between the forum and the parties and claims involved. This could be based on principles such as nationality, passive personality, and the protective principle. Extending beyond traditional bases of jurisdiction could raise several issues. For instance, excessive reliance on home state jurisdiction might discourage host states from ensuring access to justice.[281]

The principles in the Updated Draft are similar to the Third Draft, with a few differences. Article 9.1 establishes that jurisdiction lies where the human rights abuse occurred and where the harm was sustained. Instead, the former article 9.1 under the Third Draft included jurisdiction not only where the abuse occurred/and or produced effects, but also where any contributing act or omission happened.[282]

Multiple states from the Global North have expressed concern over extraterritorial application of national laws throughout the negotiation process, including the US. During the seventh session they were convinced that a treaty promoting extraterritorial jurisdiction would not gain any broad stakeholder

[278] Humberto Rivera Cantú 'Extraterritorial Obligations of States in the Business and Human Rights Context'. In: Mullen et. al. (eds), *Navigating a New Era of Business and Human Rights*, Article 30 Business & Human Rights and the Institute of Human Rights and Peace Studies (2019) Mahidol University, p. 217.

[279] Report on the first session pp. 13–14.

[280] Rivera Cantú (2019) p. 218.

[281] Report on the third session, pp. 17–18.

[282] Updated Draft (2023) Article 9.1 and Third Revised Draft (2021) Article 9.1.

support, calling for a jurisdiction limited to state territory.[283] Australia and the UK also continued to raise concerns over extraterritorial obligations. The UK argued during the ninth session in 2023 that the most recent Updated Draft is overly broad, potentially leading to significant administrative burdens and exorbitant costs for all parties involved, due to the possibility of multiple suits being filed in different states. Instead, States should be entitled to decide themselves how to use a "smart mix" of measures, legal and voluntary, to regulate businesses within their jurisdiction. The UK strongly favoured HRDD but emphasised that such practice should not be of mandatory nature.[284]

Not only states displayed contention, but division was also prevalent among non-state stakeholders. For instance, the International Organization of Employers calling it a serious risk to adopt a treaty which promotes extraterritorial jurisdiction and that diverges from *forum non conveniens* as an established doctrine.[285] Conversely, the Global Unions stressed that the changes made in fact diluted the LBI.[286]

Professor Doug Cassel sees no hindrance to extraterritorial, or transnational as he refers to it, jurisdiction over corporate conduct. He identifies territorial and active personality as the two most prominent bases for jurisdiction within international law and argues that the global conduct of subsidiaries and partners to a company abroad can, within reasonable limits, be regulated by the home state. Pointing to other relevant instruments such as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) and universal jurisdiction treaties, he argues that in his opinion, there is no other realistic route than for States to adhere to this shift in international law, taking full responsibility for human rights violations by their companies outside their territory.[287] Similarly, it was proposed by a panellist already during early deliberations that standards in the Maastricht Principles could be useful by way of proving guidance on general principles of law within the area of extraterritoriality.[288]

Professor Daniel Augenstein draws parallels between the current unequal dynamics within global supply chains and the limited efforts by the Global North to provide remedy for victims, and the historical context of European economic imperialism and hegemony. He aligns himself with Cassel and underscores that the authors of the UNGPs have recognised the importance domestic laws address human rights impacts beyond their boarders, facilitating that which Augenstein calls the "transition from shareholder to stakeholder

[283] Annex to the report on the seventh session, p. 25.
[284] Compilation of general statements from States and non-State stakeholders made during the ninth session, pp. 4, 18–19.
[285] Ibid., p. 31.
[286] Ibid., p. 34.
[287] Cassels (2020) p. 222.
[288] Report on the second session, p. 9.

capitalism". He strongly criticises the imposing of HRDD as the sole solution going forward, suggesting it may be a deliberate governance technique that allows wealthy countries in leading positions to impose their preferred rules on global actors while protecting their own industries.[289]

Professor Augenstein specifically promotes a regulatory model which draws from both the UNGPs and the Maastricht Principles. The UNGPs suggest that international human rights laws should be integrated into a global system where states regulate businesses domestically with effects that reach beyond their borders. On the other hand, the Maastricht Principles argue that states should apply their international human rights obligations outside their borders to prevent and address business-related human rights violations. The convergence of both approaches could be achieved by anchoring States' domestic regulation of businesses with extraterritorial effects in international obligations, requiring them to address human rights violations by businesses abroad. This change would then build states' business regulations on international human rights obligations, allowing foreign victims of corporate abuse to seek justice in home-state courts via transnational tort litigation.[290]

Professor Humberto Cantú Rivera highlights the role state conduct play in the matter, and that the emergence of extraterritorial obligations, including jurisdiction, may be difficult to accept for states.

> A divide between the public international law-based position of States to assert that jurisdiction is primarily territory-based, is confronted to the private international law-focused attempts to hold business enterprises accountable in their countries of origin – or potentially in other fora, under legal figures such as *forum necessitatis* […] for activities or conduct having taken place outside of their jurisdiction.[291]

He stresses the need for both the public and private perspective to be considered when debating and examining the potential expansion of human rights law, and that evidence must constitute the base for whatever agenda is advocated for in the diplomatic and academic arenas.[292]

Central to the debate on jurisdiction is the established doctrine of *forum non conveniens.* Initially, it was uncertain whether the LBI would even contain a dedicated section or article on jurisdiction.[293] The Second Revised Draft

[289] Daniel Augenstein 'Towards a new legal consensus on business and human rights: A 10th anniversary essay' (2022) 40:1 *Netherlands Quarterly of Human Rights* pp. 52–55.
[290] Ibid.
[291] Rivera Cantú (2019) pp. 218–219.
[292] Ibid.
[293] Report on the third session, pp. 17–18.

introduces for the first time a clear prohibition of the use of *forum non conveniens*.[294] The Third Revised Draft also explicitly addressed *forum non conveniens* and required courts vested with jurisdiction by the treaty, pursuant to the previous draft to, "[…] avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings […]".[295] The United States Council for International Business and the Internation Organisation of Employers argued that the article should be deleted in its entirety, and that the common law doctrine needs to be respected, as opposed to be viewed as 'a legal obstacle'. If not, the scope would be become further expanded, adding jurisdictional uncertainty and pave the way for protectionism.[296] On the other hand, human rights organisation FIAN International, among other non-state stakeholders, welcomed the prohibition of the use.[297]

The Updated Draft showcases a slimmed down provision on adjudicative jurisdiction.[298] The explicit prohibition of the use of and reference to *forum non conveniens* is removed and instead, State Parties must take necessary actions, in line with their legal and administrative systems, to ensure that decisions by state agencies about jurisdiction respect victims' rights. This includes not ending legal proceedings just because there is a more convenient or appropriate forum available.[299] Additionally, the paragraph allowing jurisdiction by *forum necessitatis* is also removed, which during the first session was criticised for being unrealistic as private international law has its limits.[300]

Several CSOs have persistently underscored the importance of the treaty rejecting the doctrine, expressing concern that failure to do so would significantly jeopardise victims' access to justice.[301] South Africa, Palestine and Namibia have generally been supporting the inclusion of an explicit prohibition. Meanwhile, China and Brazil have reservations regarding an entire provision that addresses states' responsibilities to avoid imposing any legal obstacles.[302]

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[294] Second Revised Draft (2020) Article 5.5.

[295] Third Revised Draft (2021) Articles 9.3 – 9.5. See also related Article 7.3(d): "States Parties shall provide adequate and effective legal assistance to victims […] including by: Removing legal obstacles, including the doctrine of *forum non conveniens* […]".

[296] Compilation of the comments, requests for clarification and concrete textual proposals made by non-State stakeholders during the seventh session, pp. 50 and 66; Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the ninth session, p. 29.

[297] Compilation of the comments, requests for clarification and concrete textual proposals made by non-State stakeholders during the seventh session, pp. 53 and 65.

[298] Updated Draft (2023).

[299] Updated Draft (2023) Article 9.3(a).

[300] Ibid. and Third Revised Draft (2021); Report on the first session, p. 14.

[301] Compilation of general statements from States and non-State stakeholders made during the ninth session, p. 36; Compilation of statement delivered by non-State stakeholders during the State-led negotiations of the eight session, pp. 30–31, 34–35, 40 and 46.

[302] Compilation of statement delivered by non-State stakeholders during the State-led negotiations of the eight session, p. 37.

3.3.4 Mutual Legal Assistance and International Cooperation

The statement of purpose in the Updated Draft of 2023 stipulates that the purpose of the treaty, among others, is "to facilitate and strengthen mutual legal assistance and international cooperation […].[303] The support for international cooperation has been broad, and NGOs have stressed the major obstacles victims face in seeking justice across borders, including difficulties in obtaining information.[304]

It was not until the third session delegates explicitly asked for an added element of mutual legal assistance. One regional organisation stressed the importance of increased mutual legal assistance, and the inclusion of cross-border investigation.[305] Delegations were positive and welcomed it as one of the main objectives of the treaty.[306] The addition of a provision on technical assistance could address challenges like the lack of resources for prosecutors to investigate cases involving TNCs.[307] The EU raised questions on the extent of mutual legal assistance during the sixth session, asking whether it would cover both civil and criminal matters.[308]

De Schutter acknowledges that the weak cooperation between states constitutes a significant cause of impunity. He recommends that the treaty include a list of duties for states to cooperate, for instance in the collection of evidence, tracing proceeds of crime or property, the freezing, seizure or recovery of assets, and the execution of judgments, to more effectively address the impunity of TNCs operations across borders. This encompasses financial and technical assistance as well as the provision of all available evidence, like the obligations outlined in the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, and the protocols to the Convention on the Rights of the Child. An advantage of a treaty centred around strong mutual legal assistance is that it may appear less invasive to the current legal BHR order, as it promotes state duties and refrains from imposing any obligations on companies.[309]

During the seventh session, Palestine proposed that the article on international cooperation include a non-exhaustive list of measures (phrase: "measures included but not limited to"). This received wide support among CSOs such as Centre Europe-Tiers Monde, DKA et al., the international Human Rights Association of American Minorities and FIAN International in the following

[303] Updated Draft (2023) Article 2(e).
[304] Report on the third session, p. 18.
[305] Ibid., p. 19.
[306] Ibid., pp. 10 and 12.
[307] Ibid., p. 18.
[308] Report on the sixth session, p. 70.
[309] De Schutter (2015) pp. 63–65.

year's session, underscoring the need for strong cooperation.[310] The EU, still without formal negotiation mandate, suggested drawing from the draft CSDDD. European Commission and Member States should collaborate with other countries to help upstream economic operators prevent and reduce negative human rights and environmental impacts, with special attention paid to the needs of smallholders.[311]

The International Organisation of Employers and the United States Council for International Business proposed that related articles in the UNGPs should be transferred in full into the provision on international cooperation, since the language used is accepted by all.[312] Südwind argued for the creation of a monitoring support system integrated with international cooperation to provide clarity and evaluate the effectiveness of various strategies and their respective areas of success.[313]

3.3.5 Institutional Arrangements

Some delegates and several NGOs have advocated for the establishment of a 'World Court' or another international tribunal with the authority to receive claims, adjudicate, and enforce judgments. It is evident that today's self-regulation, lacking any third-party monitoring, is insufficient to protect victims from corporate harm. Therefore, it is imperative that the binding instrument be enforced by a judicial body when national jurisdictions fail.[314] Several delegations raised questions on the effectiveness of such an international court, fearing that it would cause delays in negotiations and very costly.[315]

Scholars are not convinced either. Lopez expresses concerns about establishing an international criminal, civil, or human rights tribunal for corporations, questioning its feasibility due to the high costs and time-consuming processes involved. Expanding the jurisdiction of the ICC is another option, but this also presents significant challenges in terms of cost and political support.[316]

[310] Compilation of statement delivered by non-State stakeholders during the State-led negotiations of the eight session, pp. 51–54.

[311] Compilation of statements delivered by States during the State-led negotiations of the eighth session, p. 12.

[312] Compilation of statement delivered by non-State stakeholders during the State-led negotiations of the eight session, p. 58.

[313] Ibid., p. 55.

[314] Report on the first session, p. 20; Report on the second session, p. 15

[315] Report on the third session, p. 20.

[316] Carlos Lopez 'Human Rights Legal Liability for Business Enterprises: The Role of an International Treaty'. In: Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights. Context and Contours.* Cambridge University Press (2017) pp. 313–314 and 317.

Additionally, such measures would not diversify the current state-centric framework. Even if an international court or tribunal with jurisdiction over corporations is established, state-based mechanisms would still need to play a crucial role in implementing and enforcing internationally defined obligations through cooperation, investigation, arrests, and execution of decisions. Most international courts, including the ICC, operate on principles that prioritise national laws and state involvement. The ICC, for example, can only assume jurisdiction when a state is unable or unwilling to act, as stipulated by the Rome Statute. Therefore, it is incorrect to assume that an international body alone can address all issues related to domestic protection against corporate violations.[317]

Another proposal put forward during the first session of negotiations in 2015 was the idea of creating a treaty monitoring body.[318] This route has received criticism from Ruggie, as existing international treaty bodies already struggle with their monitoring responsibilities and the practical difficulties embedded in monitoring 'millions of companies' would entail.[319]

Macchi however, finds it unlikely that such a body ever would be mandated to act as an inspector with the purpose of monitoring millions of businesses in their daily activities. Instead, a treaty body would likely continue, expand, and organise efforts to address corporate human rights abuses, building on the work of other human rights treaty bodies. Macchi aligns herself with Cassel and Ramasastry, suggesting that combining this with a requirement for states to create and implement NAPs is the preferred option, while at the same time allowing CSOs to contribute to the monitoring process by exposing issues with company and state conduct.[320]

The option for State Parties to establish any international judicial mechanisms, for instance an International Court on TNCs and Human Rights, was included in the Elements document but has been excluded in all superseding drafts. The proposal for the creation of an ombudsperson was also rejected.[321] The debates have not been reopened since.

[317] Ibid.

[318] Report on the first session, p. 20.

[319] Chiara Macchi 'A treaty on Business and Human Rights: Problems and Prospects'. In: Jernes Letnar Cernic and Nicolás Carillo-Santarelli (eds) *The Future of Business and Human Rights. Theoretichal and Practical Considerations for a UN Treaty* (2018) pp. 81–82.

[320] Ibid.

[321] Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Chairmanship of the OEIGWG established by the HRC. Res. A/HRC/RES/26/9 (29/09/2017), 9.b(a) and 9.b.(b1), p. 13.

3.4 Analysis

As treaty negotiations have advanced (somewhat) beyond the initial deliberations on a general level of state obligations, the shape and form of due diligence has received more attention. The Updated Draft of 2023 relocates the definition to the first article of the treaty, potentially to establish HRDD as one of the primary mechanisms of the LBI. Regardless of the intent behind this change, there is a notable shift towards increased emphasis on HRDD, now serving as a cornerstone.

The division among states and stakeholders does not appear to be the adoption of HRDD itself, but rather the prominent role it has been assigned and its current definition. Historically and at present, the extent of HRDD in commercial context has been characterised, as described by New Zealand, as "seeking to prevent", rather than an actual duty to prevent. While earlier drafts articulated more distinctly a responsibility to prevent violations, possibly hinting about the introduction of an outcome-oriented focus, the current wording now appears to align more closely with existing business standards and does not contribute with any meaningful change.

If HRDD remains central to the draft, there may be pressure from several CSOs and States from the Global South to make it mandatory. Concerns seem to arise from the fact that HRDD receives more focus than other obligations with regards to access to justice and restorative measures, while at the same time exhibiting a diluted definition. The discretionary space allowed for states could again become a major discussion point, as the provision on HRRD might be key for proponents of a framework agreement, with non-mandatory HRDD serving merely as a general goal for states. This would allow for diverging standards in national legislation, with some states potentially lowering them to attract and maintain business opportunities. Therefore, the definition is likely not decided yet.

While there are advantages to HRDD, such as being a business familiar concept, as identified by Deva, its very nature, at least in the current construction, is inadequate from a victims' perspective. Both scholarly critics and some state delegates argue that due diligence obligations must move beyond their current self-regulated character or incorporate an additional dimension that addresses the actual outcome to ensure effective practice and avoid cosmetic adoption. The main criticism is that it would be naive to assume that simply because businesses undertake the process of identifying, mitigating and accounting for their adverse impacts or violations, that it would suffice as a guarantee that violations will never occur.

One of the most debated legal issues is the ability to hold businesses accountable for human rights violations that arises out of their operations, which arguably is the primary driving factor behind the proposal for an LBI. It is

viewed as crucial to close the governance gap and ‘piercing the corporate veil’, while at the same time being a sensitive issue for the business community and states opposing legal personality for companies in an international setting.

Based on the significance of the legal liability provision and the increased role of HRDD, the connection between them will be further scrutinised. Due to the revisions made to the Updated Draft, highlighting the increased role of HRDD, and the close relationship between HRDD and an extensive liability regime, it is likely that it will continue to be negotiated. Other legal ambiguities remain, particularly regarding the determining factor of *control*, as the international terminology lacks harmonisation and currently does not provide sufficient clarity. Additionally, concerns voiced in recent opening statements by CSOs from the business community suggest that further negotiations can be expected on the current liability regime, specifically regarding its extension upstream and downstream throughout the entire value chain and thus whether the reference to "business activities or relationships" will be accepted by industrialised states. There have also been requests for the treaty to address joint or several liability but does not appear to have gained enough support.

The Third Revised Draft addressed the concern that HRDD might become a checkbox exercise for companies, as Deva argues is not a new phenomenon, by linking the failure to conduct effective due diligence to liability. The draft established that if harm has been caused by a company, demonstrating properly conducted HRDD would not automatically eliminate liability of legal or natural persons. The Updated Draft instead lacks such incentives for businesses to effectively carry out their HRDD and does not limit its use as a defence to avoid consequences. These changes made in language may reflect the business agenda more than human rights agenda.

Jurisdiction is another substantive debate, and divisions amongst stakeholders have persisted throughout the negotiation sessions also with respect to this issue. Two conflicting perspectives are identified: one which focuses on territorial limits, with states having legal authority within its borders. The second, stemming from private international law, which seeks different ways to hold businesses accountable for activities outside their jurisdiction, also across borders, if necessary, through legal concepts like *forum necessitatis*. The Updated Draft of 2023 is slightly less clear on allowing jurisdiction of the state where the act or omission which led or contributed to the harm took place, narrowing jurisdiction from the Third Revised Draft. The removal of the provision allowing *forum necessitates* creates another uncertainty.

An expanded state jurisdiction does not necessarily pose a technical legal issue, as extraterritoriality is not a new concept to public international law and has scholarly support. Cassels references international instruments that promote extraterritorial and universal jurisdiction, arguing that it is the only

realistic approach, and that states must follow it. However, many states maintain a restrictive interpretation of jurisdiction in international law during negotiations, naturally creating friction deliberating the extent of such jurisdiction. The significance of states foreign policy is prominent in these discussions, portraying the additional dimension of difficulties in treaty negotiations beyond the judicial issues themselves.

The common law doctrine of *forum non conveniens* has been a recurring topic in the negotiations since the first session. A significant revision in the Updated Draft was the removal of the prohibition on the use of the doctrine, which has proven to be a burdensome hurdle in tort claims for rightsholders, delaying and obstructing the process. While the Updated Draft still addresses such circumstances, the substance of the article has been undeniably diluted, with only a vague reference to the doctrine. In its current form, the treaty requests that states consider victims' rights when applying the doctrine, thereby granting states greater discretion in their decisions. From the perspective of victims, this formulation in an LBI will not result in any meaningful change and therefore, may not represent a settled debate.

The development of an effective regime on mutual legal assistance is one of the main objectives of the treaty to strengthen access to remedy and has generally been broadly welcomed among delegates and stakeholders. No major debates have surrounded the topic yet, which perhaps is due to that which De Schutter identifies as being an advantage. He asserts that it is easy to incorporate mutual legal assistance into the current legal BHR order, building on uncontroversial principles of state duties. Some diverging ideas have been presented in negotiations in terms of what duties to include, but no suggestions have sparked major discussion.

A more contentious issue has been the potential establishment of institutional arrangements, such as a "world court" or tribunal with the authority to adjudicate and enforce judgments, as included in the Elements document. Another discussed option was the creation of a monitoring body. Although a third-party monitoring mechanism could offer benefits, these proposals faced immediate resistance and were abandoned before the production of the Zero Draft, which based on negotiations, likely was due to concerns over very high cost and lack of efficiency. The topic has not resurfaced and the idea of an international judicial mechanism, or an ombudsperson or similar entity, appears to be a resolved issue, having been effectively rejected.

4 Discussion on the Potential Added Legal Values of an LBI

The second chapter explored the ways in which the current frameworks create gaps with regards to business accountability for human rights. The chapter piles not only recent or ongoing human rights violations, but also old cases spanning over decades that are yet to see their judicial ends. Undeniably, this leaves many impressions, including a strong sense of imbalance in the way international law is structured – arguably tilting towards supporting corporate interests rather than the protection of human rights. The breadth and depth of these challenges arising out of the significant limitations of the current framework highlights the pressing need for a change that ensures access to remedy for rightsholders and closes the governance gap by enhancing corporate accountability. Against this background, the potential legal added values, if any, will be discussed, considering the state of play in the OEIGWG sessions, progress made on the legal matters and implications going forward.

The added value of the LBI lies in its potential to enhance accountability, close governance gaps, and provide a comprehensive international framework for business and human rights. Naturally, if the LBI was to establish (the arguably already existing) standards for corporations, but making them enforceable, the reliance on voluntary compliance would be significantly reduced. While it can be argued that such a treaty may not radically alter the existing legal landscape, given the prevailing view that companies already have human rights obligations, the formalisation and enforcement of these standards would mark a significant advancement. However, considering that the inclusion of direct human rights obligations appears to have been largely rejected in current negotiations, the issues of liability and access to remedy have become even more critical.

The previously presented cases demonstrate with clarity the extreme extent to which the doctrine of *forum non conveniens* can make litigation both lengthy and expensive. A treaty could effectively mandate that parties refrain from invoking this doctrine, thereby permitting home state jurisdiction over both parent companies and their overseas subsidiaries. Based on the current state of play, it is not possible to predict the outcome definitively, and it appears that this discussion remains open. While different legal traditions should be respected by principle, it is evident that *forum non conveniens* presents a severe obstacle for victims seeking justice. However, the current phrasing in the Updated Draft asks countries to balance the realities of victims with the practicalities of litigation, which offers a modest contribution to this challenge.

The treaty encompasses civil, criminal and administrative liability and addresses both domestic and transnational business activities and relationships – undeniably a very broad coverage that adds value for rightsholders by promising multiple types of accountabilities. However, it remains unclear what difference this would bring about in practice. This is one of the significant examples where the Updated Draft allows significant discretion for states to establish their own liability systems and determine what measures to take. Further, no specific restrictions are spelled out for domestic legal principals or the extent to which they would be accepted by the treaty. While there is inherent value in compelling states to establish a liability regime, this provision appears somewhat underdeveloped, and the exact added legal value for victims subsequently unclear. Despite efforts to try and lift the corporate veil the challenge for rightsholders to pierce it may still stand.

It is evident that HRDD serves as the cornerstone of prevention in the Updated Draft. If the treaty manages to include effective (and perhaps even mandatory) HRDD imposed by law, it will signify an important shift from the current self-regulatory basis. Such a mandate could add considerable value in terms of human rights impact assessments. By imposing HRDD, the treaty could contribute to harmonisation of domestic laws, which is crucial to reduce the imbalances between countries with stronger and weaker legal systems for human rights protection. A key challenge may lie in finding a balanced yet effective liability regime that respects and is compatible with the diverse legal systems worldwide. However, if HRDD serves as the sole focal point to gain sufficient support from industrialised states, the added value should not be overstated. Drawing from critique from various experts including Professor Deva, it needs to be emphasised that due diligence alone cannot guarantee the discontinuation of all adverse impacts or abuse and cannot contribute at all once it has taken place. This is unless the model is altered to also include the actual outcome of corporate operations.

Standardising HRDD would ensure that companies adhere to the same uniform standards, irrespective of their domicile or operational locations. Benefits are primarily two: it improves due diligence practices and contributes to create a more level playing field for businesses, by reducing the competitive advantage enjoyed by companies operating in jurisdictions with stricter regulations. Provided that the provision on the relationship between HRDD and liability is reinstated, the mechanism can contribute to incentivise and enhance compliance, both of which are important values. Lastly, it is crucial that the treaty clarifies that the mere demonstration of properly conducted HRDD does not absolve liability.

If the treaty continues to promote state duties extraterritorially, the LBI could even go one step further and mandate that home states exercise jurisdiction, if the host state lacks the economic or legal means, or simply is unwilling, to do so. This would increase victims' chances of having their claims

adjudicated and bridge the gap created by the present shortcomings of home state regulation, specifically its limited reach. It appears that the treaty text on jurisdiction opens for such approach, though not explicitly. The significance of jurisdiction cannot be overstated, as TNCs operate across jurisdictions where human rights protections vary. If the treaty imposes such obligations on State parties in the end, it could provide substantial added value for rights-holders seeking redress.

A draft treaty that compels states to enforce HRDD and ensure access to justice through the establishment of a liability regime, jurisdiction and mutual legal assistance is important. The treaty could contribute significantly by harmonising legalisation and creating a common baseline at a global level. Multilateral engagement would enhance coherence and require states to strengthen their regulations. Consequently, a large part of the international community would have to engage, as a result of extensive value chain coverage. This would add significant value, as the lack of a common baseline creates unevenness, allowing for some states to use self-exclusion (non-ratification) as a competitive advantage.

Many of the critical legal issues identified are clearly not resolved. Even if there is a treaty draft on the table, currently the Updated Draft, negotiations still appear conflict ridden and progressing slowly enough to leave room for considerable amendments in years to come. This is particularly relevant since many of the states hosting the majority of TNCs have not been very active in negotiations, and that the EU still lacks a formal mandate.

Despite unresolved substantive debates, the current version of the treaty represents a notable step towards the UNGPs. Previous drafts from 2017 to 2021 indicated a potential shift away from self-regulation, which may explain why the current text is perceived as compromising of several desired aspects, and deviates from the expectations of multiple stakeholders. Likely, as maintained by the Chair-rapporteur, changes were made to broker consensus. It is however regrettable, as highlighted by several delegates, since the UNGPs should mark the starting point for negotiations rather than constraining them.

Even without an LBI, significant improvements in corporate behaviour are possible. However, such improvements are unlikely to sufficiently counterbalance the existing structural differences in international law. Provided that the treaty proceeds as a comprehensive one, it could still offer relevant values in several areas. It would enhance corporate accountability and access to remedy, harmonise HRDD, likely expand jurisdiction and establish a system of mutual legal assistance. The primary benefits would include the creation of a common global baseline for human rights protection to which states can be held. It would also level the competitive advantages and mitigate ‘races to the bottom’. Additionally, clarifying state obligations and other legal uncertainties such as the obligation to regulate the extraterritorial activities of TNCs

would be beneficial. The emphasis on access to remedy for victims also represent a desirable advancement.

Nonetheless, a treaty should not be regarded as a panacea or silver bullet. As mentioned, its success hinges on enough political consensus to be ratified and broad state support to have any meaningful effect. For this reason, business interests are key, and need be welcomed in the debate. Moreover, the BHR domain is complex and intersects with numerous legal areas, enough to have any simple or quick fix solutions. Simply demonising TNCs or global business operations will not contribute to any progress. They are a fundamental part of society and prosperity, and thus themselves part of the solution. The added values should therefore be viewed in the context of other mechanisms and instruments within the area, such as the UNGPs, to foster synergies on all levels. For this added effect to be created, it is essential that the treaty advances beyond the UNGPs, instead of merely recreating them.

Given that current negotiations remain divisive and that key states have not fully participated, it is likely that much work remains. While positions on the main substantive provisions and legal issues are somewhat crystalised, there is still room for changes to be made. Despite the draft's potential to provide positive effects and added values in its current form, it could be strengthened by reinstating some of the formulations lost from the Third Revised Draft, as discussed above. CSOs may gather sufficient pressure on states to be able to push the pendulum back on a few provisions that clearly were weakened in the Updated Draft. For geopolitical reasons, the realisation and contents of this instrument remains to be seen.

5 Concluding Remarks

By way of conclusion, the research questions are to be answered. This chapter addresses the three questions presented initially and provides the main findings from the analyses conducted and the following discussion.

5.1 Legal Gaps in the Current Framework

The current legal framework has proven insufficient to hold business enterprises accountable when causing human rights violations related to their operations. Today, soft law instruments constitute the main normative documents in terms of setting the human rights standards for companies. Such voluntary mechanisms lack enforcement mechanisms and does not ensure any access to remedy in the event of misconduct.

The established state-centrism rooted in traditional interpretations of human rights law and legal principles under public international law, in combination with the economic globalisation and subsequent rise in TNCs, has created the governance gap. This stems from limitations in state power and state regulation imposed on businesses vis-à-vis vast corporate power. The legal void is noticeable in several ways, and foremost regarding accountability. There are no international binding obligations upon corporations to adhere to human rights, which have allowed for businesses to operate across national borders and legal systems, ultimately evading any consequences for violating such rights.

There is also a prominent imbalance between TNCs and victims on the ground, an asymmetry further exacerbated by the way in which international law is structured, arguably tilting towards favouring corporate interests over the protection of human rights. The legal obstacles victims face are many, including extremely lengthy processes, high cost of litigation, limited access to information, evidential hurdles in 'piercing the corporate veil' and the principle of separate legal entities, the continued (mis)use of the doctrine of *forum non conveniens* and finding jurisdiction. The challenges can also be related to realities within the host-states, and range from state complicity, participation of SOEs, lack of political will or resources, weak rule of law or corruption. As there is no international framework that uniformly sets the standards for states with regards to businesses responsibilities for human rights, domestic legislation and enforcement significantly varies across the globe. Once a violation has occurred, access to remedy is limited, with little to no chance at receiving monetary compensation or other forms of equitable relief, like waste removal or the promise to refrain from certain acts.

5.2 Uneven Progress: Consensus and Contention as Treaty Talks Continue

Negotiations have been conflict ridden, sometimes giving the impression of limping as many of the legal issues continue to resurface with delegates firmly holding on to their positions. Given the complex nature of the subject, it is expected that almost all legal issues debated contain opposing views to some degree. However, a few observations of the process can be made.

As the OEIGWG enters its tenth year, negotiations have not moved beyond some of the very first legal issues deliberated during the dedicated sessions in 2016 and 2017. Three of these issues are extraterritoriality, scope of human rights and scope of enterprises. The preamble in the Updated Draft potentially promotes extraterritorial duties and the recent inclusion of references to humanitarian law are both revisions expected to spark further debate. Discussions on which types of businesses the treaty should cover appears to have reached a deadlock, with views and opposing interests too strong for any consensus to be reached or middle way to be found. Further consultation with experts on the matter is expected.

One of the main proposals that have been rejected is that of placing direct obligations on businesses to protect and respect human rights. Except for the Elements document, all superseding drafts reaffirms state sovereignty and the sate centric approach in the BHR sphere. The draft now consistently uses the term “responsibilities of companies”, a softer language that aligns the LBI closer with the UNGPs. Though resistance was voiced during the ninth session and that no issue is definite until the very last minute, this debate appears to be settled.

The proposal of giving primacy to human rights law over other areas of law, specifically commercial regulation and BITs containing the controversial ISDS mechanism, has also been rejected. This issue, along with the scope of businesses, are two legal areas where trade and other economic incentives extensively affect the ongoing debate.

All drafts produced have taken the shape and form of a comprehensive overreaching treaty, as opposed to a framework agreement. Only recently have some states displayed increased resistance to this approach, which potentially could open the debate. However, at least until now has the shape of the treaty been a closed issue and reconstructing the draft to a framework instrument would signify a notable change of direction.

Preventative HRDD has been given a central role to the treaty, now serving as a cornerstone. While the adoption itself of HRDD as a mechanism is not a contentious issue, the definition and prominent role it has been assigned continues to divide delegates and stakeholders. The main criticism stem from the

limitations HRDD holds, with the sole focus on prevention and not actual outcome. The final design of the prevention provision will likely depend on the liability regime and the potential establishment of their relation to each other. Indeed, the extent of liability and its determining factors remains a contentious issue which will be further negotiated during the tenth session. Similarly will the issue of jurisdiction be addressed, as recent changes resulted in a narrower reach and still contains ambiguities.

Common ground appears to be found on the need for strengthen mutual legal assistance. The exact forms of cooperation will have to be discussed, but there is broad support for the provision and the objective it seeks to achieve. By contrast, the proposal of establishing a monitoring body or an international court received little to no support and has been effectively rejected.

Overall, recent changes made to the draft implies that a potential future treaty will have to compromise many of the initial hopes of pro-treaty states and large parts of civil society, to have any chance of ever reaching broad state ratification. Notable changes that align the treaty closer to the UNGPs are increased discretion for states, for instance with regards to the issues of liability and jurisdiction, and the adoption of a language that caters to the corporate perspective.

5.3 Added Values Realised

The treaty represents a significant opportunity to create meaningful change in the BHR domain. It has the potential to fill the legal void by enhancing accountability and reduce the reliance on voluntary mechanisms currently dominating the field. Despite that the treaty appears to be moving away from key formulations persistently advocated for by states in support of resolution 26/9 and large parts of civil society, typically all with a prominent human rights perspective aimed at strengthening the protection, important progress can still be made.

A multilateral treaty would establish a common baseline for human rights protection throughout corporate activities, contributing to the harmonisation of laws at domestic level across states. This would provide value by mitigating the potential creation of ‘a race to the bottom’, essentially lifting the lowest levels of protection to an acceptable standard, while at the same time bringing clarity to contentious legal issues like the extent of the extraterritorial duties of states.

By standardising HRRD, two important values would be created. It would mitigate the potential advantage gained by businesses not conducting HRDD by removing the possibility of self-exclusion. This would create a fairer and more level playing field for companies. If the process of conducting HRDD is also made mandatory, it would signify a stark shift from current self-

regulation practises and undeniably strengthen the prevention of human rights violations. Despite a recent rise in domestic legislation requiring companies to conduct human rights reporting, BHR remains a global issue and cannot be overcome by regional or national initiatives.

The draft does no longer spell out the explicit prohibition of the us of *forum non conveniens*, but mandates states to balance the dismissal of a claim with the respect to victims' rights to access to remedy. In practice, this means that the claimants, typically the victims, still would have to go through the process of asserting jurisdiction and argue for their chosen forum. Arguably, it still represents an added value for victims as it recognises the disproportions between TNCs and rights-holders, only far less significant.

To reach consensus, it appears that the treaty has been moved towards a product that balances corporate interests with human rights, with many considerable changes made from the Elements document and earlier drafts. It may not become the 'silver bullet' many of the pro-treaty countries initially hoped for, as the draft increasingly leaves discretion for State parties to establish their own regimes with regards to prevention, liability and jurisdiction to name a few, and overall appears to adopt a more trade and business friendly approach. The Updated Draft of 2023 is undeniably a diluted version of the LBI from a human rights perspective.

Despite that some key features were lost in the latest draft it still represents a small step towards enhanced corporate accountability for human rights violations overall and a step towards creating a common baseline of protection – possibly the most significant advancements. As a binding instrument, it would complement the current self-regulatory framework consisting of soft law instruments.

Given the current state of negotiations, it is uncertain to predict whether a treaty will be finalised and ultimately see the light of day. It is also not possible to conclude with certainty in which ways, and to what extent, the LBI might provide added values – but it does indeed present a significant opportunity and holds potential. Negotiation sessions in the coming years will determine the final contents and impacts of any potential treaty, and whether it will achieve what for many is long-awaited and meaningful change.

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