

NEGOTIATING A TREATY ON BUSINESS AND HUMAN RIGHTS: THE EARLY STAGES

HUMBERTO CANTÚ RIVERA*

I INTRODUCTION

The idea of subjecting corporations to some sort of international obligation, particularly in the field of human rights, is not new;¹ different processes and ways of doing this have been debated since the 1970s, when a proposed all-encompassing Code of Conduct for Transnational Corporations was pushed through the ranks of the United Nations ('UN') Commission on Transnational Corporations.² Failure to adopt such a proposal in the early 1990s due to a changing international economic and political landscape and the necessity to attract foreign direct investment by developing countries³ redirected attention on this issue to a subsidiary organ of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, which by 2003 had submitted a proposal to adopt the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.⁴ This project was met with fierce opposition by states and the

* Professor at the School of Law of the University of Monterrey; Expert Adviser to the Delegation of Mexico before the Open-Ended Intergovernmental Working Group on human rights and transnational corporations and other business enterprises and to Mexico's multi-stakeholder Working Group on a National Action Plan on Business and Human Rights; Member of the International Law Association's Study Group on business and human rights, and of the Editorial Board of the *Business and Human Rights Journal*.

- 1 For a brief summary of previous initiatives on this issue, notably in relation to human rights, see Olivier De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006) 1, 3.
- 2 *Letter Dated 31 May 1990 from the Chairman of the Reconvened Special Session of the Commission on Transnational Corporations to the President of the Economic and Social Council*, UN ESCOR, UN Doc E/1990/94 (12 June 1990) annex ('*Proposed Text on the Draft Code of Conduct on Transnational Corporations*'). This project included provisions relating to respect for national sovereignty and national development objectives, human rights and fundamental freedoms, non-interference in internal affairs of host countries, abstention from corrupt practices, employment conditions, transfer pricing, taxation, consumer protection, environmental protection and transfer of technology, among others.
- 3 See Rebecca M M Wallace and Olga Martin-Ortega, 'The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?' (2004) 26 *Dublin University Law Journal* 304, 307.
- 4 Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR,

international business community, thus being put to rest by the Commission on Human Rights in 2004.⁵ Yet, the issue of corporate impact on human rights was not interred then and there: instead, the project was taken on by Professor John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, who between 2005 and 2011 produced numerous reports, including the now (relatively) widely known ‘Protect, Respect and Remedy’ Framework⁶ and the UN Guiding Principles on Business and Human Rights⁷ (hereinafter ‘UNGPs’ or ‘Guiding Principles’).

The UNGPs are based on a three-pillared structure, revolving around the state duty to protect from corporate human rights abuses, the corporate responsibility to respect human rights, and the need for more effective access to remedy by victims. The three pillars are interconnected and attempt to focus on the actual processes and mechanisms established both at the state and company levels in order to address, at an early stage, any possible impact on human rights, and where this is not possible, to mitigate or redress their negative effects.⁸ In this sense, they depart from previous taxonomic efforts that tried to establish specific corporate obligations in relation to specific rights, to focus on the actual working methods of businesses in relation to all human rights.

Through a multi-stakeholder consultation approach during his mandate, the Special Representative’s efforts were well received across different sectors, including by the business community and civil society – although the latter to a relatively lesser extent – as well as by states. As a result of this, and of reducing the expectations raised in the previous effort to develop all-encompassing binding international human rights obligations for corporations, he succeeded in gaining widespread political support for his Framework and Guiding Principles, obtaining the endorsement of the UNGPs by the Human Rights Council.⁹ Yet, the expectation of civil society and of certain states to continue the process of developing binding international standards did not disappear, and barely three years after the adoption of the Guiding Principles, a proposal was voted on in the

55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003, adopted 13 August 2003).

5 See *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, Commission on Human Rights Dec 2004/116, 60th sess, 56th mtg (20 April 2004) in Commission on Human Rights, *Report on the Sixtieth Session*, UN ESCOR, 60th sess, Supp No 3, UN Doc E/2004/23 (2004) ch II(B) 332–3.

6 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008).

7 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/17/31 (21 March 2011) (‘Ruggie Report’) annex (‘Guiding Principles on Business and Human Rights’).

8 *Ruggie Report*, UN Doc A/HRC/17/31, [6].

9 *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011).

Human Rights Council to start an intergovernmental process to elaborate an international legally binding instrument on the responsibilities of transnational corporations and other business enterprises with respect to human rights.¹⁰ This initiative, led by Ecuador and South Africa, brought back the divisive ‘binding versus non-binding’ rhetoric that has marked this discussion for at least the past two decades, and was accused by Western states and businesses of not allowing enough time for the implementation of the UNGPs.¹¹ Yet, the proposal also made several developed and developing states become more active¹² in the pursuit of implementing the Guiding Principles domestically through National Action Plans,¹³ perhaps to counter the idea that binding international standards are required. Whatever the results of this intergovernmental process, it is true that it has pushed several states to start processes to develop public policies, regulation and legislation on business and human rights. That alone is an important step forward to ensure that the issue remains on regional and domestic political agendas.¹⁴

These brief introductory remarks set the stage for the current discussion within the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (‘OEIWG’), which recently finished its second session. As per its mandate, the

10 *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HRC Res 26/9, UN GAOR, 26th sess, 37th mtg, Agenda Item 3, A/HRC/RES/26/9 (14 July 2014, adopted 26 June 2014) (‘OEIWG Resolution’).

11 Olivier De Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1 *Business and Human Rights Journal* 41, 41–3.

12 Sara Blackwell and Nicole Vander Meulen, ‘Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights’ (2016) 6 *Notre Dame Journal of International and Comparative Law* 51, 73–4.

13 See Claire Methven O’Brien et al, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’ (2016) 1 *Business and Human Rights Journal* 117; Damiano de Felice and Andreas Graf, ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights’ (2015) 7 *Journal of Human Rights Practice* 40; Humberto Cantú Rivera, ‘Planes de Acción Nacional sobre Empresas y Derechos Humanos: Sobre la Instrumentalización del Derecho Internacional en el Ámbito Interno’ (2017) XVII *Anuario Mexicano de Derecho Internacional* 113. For a repository of existing National Action Plans, see Office of the High Commissioner for Human Rights, *State National Action Plans* (19 July 2017) <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

14 In regional settings, the European Union has repeatedly called on its member States to develop National Action Plans on business and human rights: see European Commission, ‘Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Renewed EU Strategy 2011–14 for Corporate Social Responsibility’ (COM(2011) No 681 final, 25 October 2011) 14–15 pt 4.8.2; European Commission, ‘Joint Communication to the European Parliament and the Council – Action Plan on Human Rights and Democracy (2015–2019): “Keeping Human Rights at the Heart of the EU Agenda”’ (JOIN(2015) No 16 final, 28 April 2015) 14 objective 17 action b.

The same has happened in the context of the Organization of American States, which in 2016 passed a resolution requiring the member States to develop national strategies to implement the UNGPs: General Assembly of the Organization of American States, *Promotion and Protection of Human Rights*, AG/RES 2887 (XLVI-O/16), 2nd plen sess (14 June 2016) pt I.ii.3. This was followed by the Inter-American Commission on Human Rights, which included important references to future work in the area of business and human rights: Inter-American Commission on Human Rights, ‘Strategic Plan 2017–2021’ (OEA/Ser.L/V/II.161 Doc 27/17, Organization of American States, 20 March 2017) 35.

initial two sessions were set aside for discussion of the potential content, scope, nature, and form of the future international instrument, before entering the substantial negotiation stage.¹⁵ As will be argued, the first two sessions have been useful in generating some relative consensus on issues that states do not necessarily desire to push further at this stage. They have also highlighted the areas where more governmental action is needed, both individually and collectively through cooperation processes, in order to effectively regulate the impacts of corporations with transnational operations. And yet, as we move forward to the negotiation stage, it is necessary to maintain a realistic approach as to what a treaty may be able to do and how it may do it, taking into consideration the political reality and the existing legal barriers to achieving better protection of human rights. As part of this exercise, it is useful to start reflecting upon what a follow-up mechanism could look like, taking into consideration previous experiences of other human rights treaty bodies, but also the reality that a new type of actor would (at least) be the indirect subject of the obligations set forth in the potential treaty.

II CONSTRUCTIVE DELIBERATIONS WITHIN THE INTERGOVERNMENTAL WORKING GROUP

Resolution 26/9 of the Human Rights Council determined that the initial two sessions of the OEIWG should be devoted to ‘constructive deliberations’,¹⁶ upon which an elements paper would be prepared, in order to start substantive negotiations by the third session,¹⁷ which will take place in 2017. The first session, held in July 2015, was marked by a political confrontation between developed and developing states, and by the analysis of substantive issues such as the possibility of establishing direct international obligations upon corporations, the hierarchy within competing international legal regimes, and an insistence on creating obligations only applicable to ‘transnational corporations’ and not to businesses with commercial activities of a purely domestic character. And yet, in just over a year (the second session was held in late October 2016), and despite the fact that some states continue to be especially prudent and even reluctant to engage fully in the deliberations of the OEIWG, the discussion seems to have somehow become more focused and centred on constructing a new international legal regime upon the foundations of the three-pillared structure of the Guiding Principles. Specific references to possible ways forward at the domestic level and steps to enhance international cooperation to avoid a denial of justice for victims of corporate-related human rights abuses are part of the debate

15 *OEIWG Resolution*, UN Doc A/HRC/RES/26/9, paras 3, 5.

16 Comments and reflections in this Part are personal insights gained from participating as Expert Adviser to the Delegation of Mexico in the OEIWG sessions in 2015 and 2016. As a result, a large portion was taken from the author’s notes throughout both sessions. Of course, they represent a personal view of the development of the sessions, and do not necessarily represent the position of the Government of Mexico in relation to the treaty process.

17 *OEIWG Resolution*, UN Doc A/HRC/RES/26/9, paras 2–3.

within the OEIWG. Whether these brainstorming discussions will be sufficiently precise to be incorporated in the elements paper remains to be seen, and yet, it is clear that they have provided some food for thought as we move closer to the negotiation stage.

A The First Session¹⁸

As López and Shea have already pointed out,¹⁹ the first session was marred by the political confrontation between developed states (namely the member states of the European Union ('EU'), given that the United States and Canada did not attend the session) and developing states. This was due to the developing countries' insistence on focusing exclusively on 'transnational corporations' and not on 'all other business enterprises', and the requirement by the EU and other states that a panel on the implementation of the UNGPs be included in the programme of work.²⁰ Even within developing countries, the sentiment was not unanimous: taking as an example the Group of Latin America and Caribbean Countries,²¹ it was clear that those of them with a market economy were leaning more favourably towards continuing the implementation of the UNGPs before addressing the need for a treaty. And yet, despite the logistical issues, the political confrontation and the divisive rhetoric, the substantive content discussed during the first session of the OEIWG shed some light on several issues that states and civil society identified as problematic for the development of an internationally binding regime on business and human rights.

One of the most important issues raised was the hierarchy of international law, particularly focusing on the clash between international human rights standards and bilateral investment agreements. Practice has shown how the latter has severely limited the ability of host governments to enact policies and regulatory measures to address health or environmental issues or other public policy concerns.²² The largely theoretical discussion was eventually confronted

18 This section draws upon a previously published article: Humberto Cantú Rivera, '¿Hacia un Tratado Internacional sobre la Responsabilidad de las Empresas en el Ámbito de los Derechos Humanos? Reflexiones sobre la Primera Sesión del Grupo de Trabajo de Composición Abierta' (2016) XVI *Anuario Mexicano de Derecho Internacional* 425. See also *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, UN Doc A/HRC/31/50 (5 February 2016); Marco Fasciglione, 'Towards a Human Rights Treaty on Transnational Corporations and Other Business Enterprises: The First Session of the UN Open-Ended Intergovernmental Working Group' (2015) 9 *Diritti Umani e Diritto Internazionale* 673.

19 Carlos López and Ben Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session' (2016) 1 *Business and Human Rights Journal* 111, 112.

20 *Ibid.* As a result of a lack of compromise on all issues raised in relation to the programme of work, the EU and its member States decided to leave the session after the second day of work.

21 For a more thorough analysis on this example, see Humberto Cantú Rivera, 'Business and Human Rights in the Americas: Defining a Latin American Route to Corporate Responsibility' in Nicolas Carrillo Santarelli and Jernej Letnar Čerňič (eds), *The Future of Business and Human Rights – Theoretical and Practical Considerations for a UN Treaty* (2017) (forthcoming, copy on file with author).

22 And yet, recent examples have shown that States may succeed in fighting back against corporate interests, particularly in investor-State dispute settlement mechanisms: see, eg, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016).

by the reality that only state action to reform existing treaties or to include human rights considerations and clauses in new bilateral investment agreements could enhance the prospects for human rights protection by states vis-à-vis foreign investors, while limiting the risk of dispute settlement that has largely been more protective of corporate interests than of public concerns. Of course, even within these possibilities, the shadow of the debate on the fragmentation of international law looms large, highlighting the need for states to maintain policy coherence in order to avoid impairing their own capacity for compliance with different types of international obligations.²³

A second issue raised – one central to this discussion – was the need to develop binding measures exclusively for transnational corporations, but not for other business enterprises with purely domestic activities or presence. This was an ideological perspective that seemed like a blast from the past. Notably, some states and experts participating in the discussions advocated this position, which was nevertheless questioned by some civil society organisations and panellists. One important aspect to ponder is whether it is possible to reconcile the economic concept that constitutes the term ‘transnational corporation’ with the legal precision needed in a binding international agreement: at the end of the day, every unit within a ‘transnational corporation’ has a specific nationality and is subject to a specific jurisdiction and its legislation, and as such, it would be a futile exercise to develop binding standards over a subject that does not exist. In that sense, it is the transnationally-coordinated activities of the different units within a group of companies that work towards a common goal that should be the target of the OEIWG. Focusing on the activities that have a negative impact on human rights, instead of on the legal character of the perpetrator,²⁴ would do more to advance the discussion than entering a terminological debate that would unnecessarily waste some of the momentum for the development of binding international human rights standards for corporations.

The depth of the applicability of the future international instrument was discussed within this same issue, that is, whether it should focus only on the parent companies of transnational groups (which would entail the political opposition of home states, whether they be developed or developing) or if it should descend throughout the supply chain (which could imply the need for parent companies to exercise oversight and due diligence over their subsidiaries, affiliates and providers). Any decision in this regard would imply the need to adopt measures, both at the international and domestic level, to transform the corporate human rights due diligence element of the Guiding Principles into a

23 On the issue of fragmentation, see Pierre-Marie Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’ (2007) 1 *European Journal of Legal Studies* 25; Heejin Kim, *Regime Accommodation in International Law: Human Rights in International Economic Law and Policy* (Brill Nijhoff, 2016) 27–8. See also *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682 (13 April 2006).

24 See Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press, 2006) 199–201, for a brief discussion on the complexities of the terminology surrounding ‘transnational’ corporations; David Bilchitz, ‘The Necessity for a Business and Human Rights Treaty’ (2016) 1 *Business and Human Rights Journal* 203, 217.

mandatory standard – a situation that has already begun in relation to specific industrial sectors and in the form of reporting standards in the EU and the United States.²⁵

Finally, another one of the main discussion points was on the width or scope of the future international instrument: should a treaty on business and human rights focus only on ‘gross human rights violations’, or should it cover all recognised human rights? The risk of adopting the first approach, despite the political and legal consensus on most of the prohibited conduct, would be that many of the actual impacts that take place as a result of extractive projects would be left out of the scope covered by the treaty – namely those on economic and social rights, such as on the rights to water, health, food, livelihood and a healthy environment. This would be the result of two factors. First, many states consider the nature of economic, social and cultural rights to be progressive commitments, not binding duties with direct effects – or even commitments at all, for that matter. Secondly, in the current political climate, violations of economic, social or cultural rights are considered inherent consequences of development, not grave violations that may amount to crimes and be prosecuted at the international level.²⁶ Yet, the possibility of adopting a broad perspective on corporate human rights responsibilities (particularly, as one author suggested, on all currently existing and future human rights)²⁷ would entail the risk that several of the rights would not be recognised entirely by some of the states. Thus, following the formula of the UNGPs to focus on the International Bill of Human Rights, while also adding the specific standards related to vulnerable groups (women, children, migrant workers, indigenous peoples and people with disabilities) or prohibited conduct (discrimination, torture, enforced disappearance), would potentially result in the necessary political consensus to achieve support from different states throughout the different regional groups.

As the beginning of a treaty-making process, the first session was particularly marked by doubts about how to progress the issue of corporate human rights responsibilities and by speculation as to the possibilities of this exercise. The insistence by some actors on ideological concerns, while completely normal due to the early stage of this intergovernmental process, had a negative effect on participation and engagement by other actors. This situation led to the need to accommodate different interests and find a compromise to obtain wider political support, particularly from market economies. This approach was adopted for the second session.

25 See, eg, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 1502, 124 Stat 1376, 2213–18 (2010); *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups* [2014] OJ L 330/1.

26 See Larissa van den Herik, ‘Economic, Social, and Cultural Rights: International Criminal Law’s Blind Spot?’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014) 343.

27 Surya Deva, ‘Defining the Scope of the Proposed Treaty on Business and Human Rights’, Submission to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 2016 <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/SuryaDeva.doc>>.

B The Second Session²⁸

The second session of the OEIWG, which, as already noted, took place in late October 2016, continued the brainstorming spirit of the first session, although in a more precise manner that allowed the debate to focus on previous experiences and trends under international and domestic law.²⁹ The participation of the EU and several of its member states, as well as a smooth adoption of the Programme of Work, pointed to a significant change in the tone of the discussions and engagement during the second session.

Being relatively more charged than the first one, the second session had six thematic panels focusing either on state duties or corporate responsibilities as well as other general issues for the development of a conventional framework. Each of them had two primary approaches relating to examples of domestic or international normative instruments, or to jurisprudential or practical approaches to specific issues, in addition to some more generally oriented panels.³⁰ The first panel,³¹ for example, had several comments related to investment and human rights, where experts, states and non-government organisations (‘NGOs’) highlighted the importance of ensuring that competing international obligations in the investment and human rights fields were avoided, or that the latter had precedence over the former. In that respect, other interesting ideas and procedural proposals were discussed. The ideas discussed included codifying doctrines such as piercing the corporate veil or the integrated enterprise. The procedural proposals included filing amicus briefs before arbitral tribunals, establishing human rights impact assessments as regular practice in investment treaties, and opening causes of action for affected communities in investor–state dispute settlement mechanisms. An interesting argument was made by Susan George of the Transnational Institute that codes of conduct do not necessarily make their way to subsidiaries or down the supply chain of a transnationally operating corporate group – a situation that would call for the development of robust international norms to ensure that those types of standards were not left to the will of economically-motivated entities.

28 *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/34/47 (4 January 2017). For an account of specific aspects of the second session, see Marta Bordignon, ‘La Road Map verso uno Strumento Internazionale Giuridicamente Vincolante su Imprese e Diritti Umani alla Luce del Ruolo degli Attori Non-statali’ (2016) 16(2) *Diritto & Questioni Pubbliche: Rivista di Filosofia del Diritto e Cultura Giuridica* 89, 96–9.

29 Cf Carlos López, ‘Struggling to Take Off?: The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights’ (2017) 2 *Business and Human Rights Journal* 365.

30 Examples of these focused on the ‘social, economic and environmental impacts related to business, and their legal challenges’, on ‘criteria for the future definition of the scope of the international legally binding instrument’, on ‘lessons learned and challenges to access to remedy’, or on ‘[s]trengthening cooperation with regard to prevention, remedy and accountability and access to justice at the national and international levels’: *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/34/47 (4 January 2017) 2.

31 The panel was entitled ‘Overview of the Social, Economic and Environmental Impacts Related to Transnational Corporations and Other Business Enterprises and Human Rights, and Their Legal Challenges’.

The second panel focused on state obligations under international human rights law, including extraterritorially, when dealing with transnational corporations and other business enterprises. Several procedural rights or obligations that could be included in a future treaty were discussed, including environmental and social impact assessments, the right to consultation and accountability mechanisms, and the need to include standards on national regulation of corporate conduct (with its remarkable resemblance to several discussions held in the 1970s and 1980s during the Code of Conduct era). Daniel Aguirre from the International Commission of Jurists highlighted that ideological opposition to the regulation of markets no longer makes sense, a position that has been debated with some regularity as a result of the 2008 global financial crisis or of other accidents resulting from a lack of corporate due diligence.

Ana María Suárez Franco of FIAN International argued that the UNGPs fail to treat the issue of extraterritorial regulation properly, focusing on the *expectation* that states should regulate corporate behaviour where they have a recognised jurisdictional basis, and not on their actual international obligations as interpreted by numerous UN human rights treaty bodies and Special Procedures mandate holders. Thus, it was posited that other instruments should be taken into consideration as the treaty process moves forward, namely the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,³² in order to assert jurisdiction over companies with foreign operations. The last participant in the panel, Juan Hernández Zubizarreta, identified an asymmetry between corporate rights and obligations, and called for the establishment of an international judicial mechanism in support of the binding instrument, with capacity and jurisdiction to respond to issues of corporate liability, international financial institutions, and host and home states.

Two key contributions arose in the debate. First, the (particularly welcome) statement by the delegate from the Netherlands that Dutch companies were expected to respect the same standards at home and abroad, and that voluntary sectoral multi-stakeholder agreements on responsible business conduct were being prepared; however, if those agreements proved ineffective, the Dutch government was prepared to consider introducing new legislation to hold corporations accountable for extraterritorial abuses, as well as to make corporate respect for human rights mandatory under domestic law. Secondly, the delegate from Brazil asked the panellists how the position of developing countries could be strengthened in investment negotiations, a recurring issue for developing countries in Latin America, Asia and Africa. Several responses were shared, particularly focusing on the need for the imperative status of social and environmental clauses in investment agreements and their primacy against investment clauses, and on the need to increase transparency and leverage by knowing the comparative international practices of companies investing in developing countries. A second leg within the second panel served to underscore

32 ETO Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (January 2013) <http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23>.

the importance of clarifying home state responsibilities in relation to extraterritorial regulation of corporate human rights due diligence, and the need to exercise jurisdiction over companies involved in human rights abuses abroad, as well as to enhance the possibility of international judicial cooperation.

The third panel focused on corporate obligations and responsibilities with respect to human rights, first through the lens of existing international instruments, and secondly through jurisprudential approaches and developments to establish corporate liability, either in the civil, criminal or administrative spheres. In relation to the first question, one of the most relevant issues raised was the possibility of modelling a clause similar to the standard introduced in article 5.3 of the *WHO Framework Convention on Tobacco Control*³³ that stipulates that state parties shall protect their public health policies (with respect to tobacco control) from commercial and other vested interests of the tobacco industry. Limiting undue corporate structure through an international norm that imposes direct obligations on states would be an interesting possibility to explore within the framework of a business and human rights treaty, namely in relation to investment agreements, which could be a measure to limit the negative effects (the so called ‘regulatory chill’) that can be produced by the threat of binding arbitration. The Latin American presence was particularly felt in relation to this issue. The delegations of Bolivia, Brazil, Ecuador, Uruguay, Cuba, Venezuela and Mexico intervened by formulating questions, such as the possible existence of a general principle of international law recognising the corporate responsibility to respect human rights.³⁴ They also stated their expectation that national development objectives, as well as environmental, human rights and social standards, would be respected by corporations investing in their countries.

The second leg of the panel, focusing on practical experience for the clarification of standards of corporate liability, identified the functional equivalence of human rights due diligence as established in the Guiding Principles with the duty of care existing in common law, and its (limited) applicability in the context of torts. Michael Congiu noted the necessity of ensuring that domestic enforcement regimes are effective; yet, recent cases (such as the Chevron saga in Ecuador) have showed the difficulty in holding businesses with transnational operations accountable in host states,³⁵ which would thus call

33 Opened for signature 31 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).

34 This question has also been addressed in Humberto Cantú Rivera, ‘Los Desafíos de la Globalización: Reflexiones sobre la Responsabilidad Empresarial en Materia de Derechos Humanos’ in Humberto Cantú Rivera (ed), *Derechos Humanos y Empresas: Reflexiones desde América Latina* (Instituto Interamericano de Derechos Humanos, 2017) 37.

35 The Chevron saga in Ecuador resulted from the oil exploration activities undertaken by Texaco in the 1970s and 1980s in the Lago Agrio region, which caused important environmental and human rights damage to the local population. A liability waiver was reached in the 1990s between the Ecuadorian government and Chevron (who acquired Texaco) for environmental damages, stipulating that the company had cleaned the area from any oil pollution. However, residents in the area claimed there was severe environmental degradation, which caused numerous health problems for a large number of people. A claim was filed by Ecuadorian petitioners before American federal courts, where Chevron nevertheless requested the court to dismiss the case on the ground of *forum non conveniens*, arguing that Ecuadorian courts were in a better position to adjudicate the case. However, after several years of litigation, an Ecuadorian appellate court passed a judgment ordering Chevron to pay almost US\$19 billion (later

for a larger role for home states in these scenarios. It is precisely in this sense that another panellist, Michelle Harrison, suggested following the *Brussels I Regulation*³⁶ as a model to determine jurisdiction under the future binding international instrument. Several delegations posed questions in relation to possible ways to address jurisdictional challenges, including the criteria to determine corporate liability. In this regard, one contribution by the Mexican delegation highlighted the possibility of modelling a clause for corporate liability under the future binding instrument on the work undertaken by the International Law Commission's Special Rapporteur on Crimes against Humanity.³⁷

A fourth panel was dedicated to an open debate on the approaches and criteria to define the scope of the future instrument, which produced several interesting and politically feasible ideas. For example, Harris Gleckman suggested modelling the instrument after examples from the World Trade Organization arena, in a format that includes general principles and procedural matters, and annexes on specific abuses that can be amended by the Conference of Parties to the treaty, in a manner not too different from the *United Nations Framework Convention on Climate Change* and its protocol.³⁸ Another panellist, Robert McCorquodale, suggested three types of instrument: a detailed treaty with substantive and procedural provisions (which nevertheless would have the issue of micro-management as an obstacle that could delay negotiations and eventual adoption); a framework treaty with key principles and approaches, with protocols on specific issues; and finally, an optional protocol to existing human rights treaties, therefore empowering the corresponding treaty bodies to address issues of corporate human rights abuses and state omissions directly, and imposing a general type of obligation on states with the different nuances deriving from the different sets of rights and obligations.

Other important aspects of the general business and human rights field were discussed, such as the need to resolve the relationship between an eventual treaty

reduced to US\$9.5 billion by the Ecuadorian National Court of Justice). Chevron refused to recognize the judgment, which spurred efforts by the plaintiffs to execute the judgment in countries where Chevron had assets, and by the company to try to block the judgment in American courts and to sue Ecuador before an arbitral tribunal from the Permanent Court of Arbitration. For a thorough account of the Chevron saga, see Kathia Martin-Chenut and Camila Perruso, 'El Caso Chevron-Exxon y el Aporte de los Proyectos de Convención sobre Crímenes Ecológicos y Ecocidio a la Responsabilidad Penal de las Empresas Transnacionales' in Humberto Cantú Rivera (ed), *Derechos Humanos y Empresas: Reflexiones desde América Latina* (Instituto Interamericano de Derechos Humanos, 2017) 355. See also Manuel A Gómez, 'The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador' (2013) 1 *Stanford Journal of Complex Litigation* 429. The original case docket in Ecuador is *Aguinda contra Chevron Corporation*, Corte Provincial de Justicia Sucumbíos [Sucumbíos Provincial Court of Justice], No 2003-0002 (14 February 2011). See also the final Ecuadorian appellate decision: *Aguinda Salazar contra Chevron Corporation*, Corte Nacional de Justicia [National Court of Justice], No 174-2012 (12 November 2013).

36 *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2001] OJ L 12/1.

37 *Report of the International Law Commission on the Work of the Sixty-Eighth Session (2 May – 10 June and 4 July – 12 August 2016)*, UN GAOR, 71st sess, Supp No 10, UN Doc A/71/10 (2016) [84].

38 Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005).

and other existing instruments, including in the fields of trade and investment.³⁹ In relation to content, it was posited that the treaty should cover all human rights that have been considered as having a customary character, as well as indigenous peoples' rights and international humanitarian law, and that it should also include within its scope the activities of state-owned enterprises. On the issue of access to remedy, the necessity of including interim measures was recognised, in addition to cross-border cooperation and mutual assistance, and the possibility of determining joint liability between states and corporations.

The fifth panel focused explicitly on the state of implementation of the UNGPs and on their relationship with the treaty negotiations. A particularly clear position was the need to address access to remedy more thoroughly in National Action Plans ('NAPs'), which has been lacking in recent examples of such instruments.⁴⁰ In addition, it was highlighted that the treaty process and the domestic implementation of the UNGPs should be considered as complementary,⁴¹ in a more constructive effort than the general view during the first session. Yet, the delegate of Brazil raised one key question during the debate that deserves further consideration: how to use NAPS to build upon the prospective business and human rights treaty? In theory, the basic goal of NAPs is to create a synergy and coordination among government departments to allow them to identify areas of opportunity to advance the business and human rights agenda and reduce the grey areas that result in an accountability gap. Thus, NAPs could be used to define more clearly the national position and interest of the state vis-à-vis the treaty project.⁴² Nevertheless, such an approach has not been used in existing NAPs, which have centred exclusively on unpacking and trying to implement the UNGPs and not on defining a position vis-à-vis an eventual business and human rights treaty, following the divisive either/or approach that has been generally present in relation to the development and adoption of binding human rights standards for corporate activity.

A turning point appeared at this stage during the session when the EU delegation suggested that any future steps should be inclusive and rooted in the Guiding Principles, and asked what would be the best way to implement existing

39 A short analysis of this complex issue – and more largely of that relating to a hierarchy of international norms – can be found in Cantú Rivera, '¿Hacia un Tratado Internacional sobre la Responsabilidad de las Empresas en el Ámbito de los Derechos Humanos?', above n 18, 444–7. See also Bilchitz, above n 24, 214.

40 Relevant examples include the following: UK Government, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (September 2013) (where the main actions revolve around disseminating lessons from previous experiences, advising companies on establishing grievance mechanisms, encouraging companies to extend their practice of providing grievance mechanisms overseas, and supporting projects in other countries in relation to access to remedy), and its revised version: UK Government, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (May 2016) (committing to ensuring that access to judicial and non-judicial remedies is available in the UK, supporting work in this area in other countries, and promoting protection of human rights defenders); US Government, 'Responsible Business Conduct: First National Action Plan for the United States of America' (16 December 2016) (where the main actions relate to improving the performance of the US National Contact Point and consulting with stakeholders on remedy).

41 See Blackwell and Vander Meulen, above n 12, 68.

42 See *ibid.*

obligations and how the challenges impact on the elaboration of new norms. To a certain extent, this intervention modified the general setting of the OEIWG, tilting towards a possible exchange on how to achieve progress, as the negotiation stage looms closer. The panel closed with a stark reminder by Surya Deva that NAPs are only vehicles to achieve corporate respect for human rights, and thus, evolving the legal framework based on the UNGPs would be critical to the success of this endeavour. One final panel focused on experiences in access to remedy, where the speakers noted the transcendence of not only incorporating judicial remedies as available options in the treaty project, but widening the scope to include non-judicial remedies, including mediation and dialogue.

The second session of the OEIWG allowed delegations to find some common ground on which they can base their discussion with their central governments on the national position that will be adopted as negotiations of the draft text start in 2017. The participation of the EU in the different meetings during the session, as well as their intervention in the final panels, may be seen as a positive step forward. Indeed, their continued involvement on this topic, as well as their national and regional advances (such as those announced by the Dutch delegation) greatly contribute to setting the bar high for this initiative. This initiative could also greatly benefit from the political and judicial experiences of EU member states. Clearly, the negotiation and drafting exercise will be particularly dense, as states promoting the treaty initiative try to rally national (political and economic) interests and different legal traditions around a common point. Compromises will need to be made by the different stakeholders in order to reach consensus. And yet, if there is one key element that emerged from the second session, it was the willingness of different developed economies to engage in the discussions on this crucial issue for the 21st century.

Despite the small steps taken in the two sessions of the OEIWG, whether a treaty is desirable or feasible remains an open question. Civil society organisations and academics,⁴³ as well as some states, are particularly keen to make the adoption of a treaty covering business and human rights a reality. Businesses, as shown in both sessions through the interventions of the International Chamber of Commerce and the International Organization of Employers, as well as many developed – and developing – states are unconvinced of the convenience of such an approach.⁴⁴ It is clear, however, that isolated national (or even regional) efforts have not been able to provide the solutions that many victims of business-related human rights abuses desperately seek, and that access to remedy has become more difficult in recent years.⁴⁵

43 For example, the Treaty Alliance (which includes FIAN International, CIDSE, FIDH, ESCR-Net and the International Commission of Jurists among others), as well as academics such as Olivier De Schutter, Surya Deva, David Bilchitz and Robert McCorquodale, have been active proponents of the adoption of a treaty, although with different approaches as to the content and scope that such an instrument should have.

44 For a thorough analysis of the position of Latin American States, as well as of other developing States, vis-à-vis the treaty process, see Cantú Rivera, 'Business and Human Rights in the Americas', above n 21.

45 Business & Human Rights Resource Centre, *Corporate Legal Accountability Annual Briefing* (23 July 2017) <<https://business-humanrights.org/en/corporate-legal-accountability-annual-briefing>>.

On the one hand, the adoption of a treaty could be representative of hope, and even success, in the fight to end corporate impunity. At the end of the day, the existence of international standards can be perceived as a confluence of different interests and wills to pursue a specific goal, in this case the protection of human rights against state and non-state actors. The adoption of a treaty would then mark a small step forward, which could further develop if state and non-state practice revolves around the principles and standards set forth in the instrument, potentially entering the realm of customary international law,⁴⁶ and thus becoming largely binding despite the formal ratification (or not) of the instrument.

However, the practical feasibility of a business and human rights treaty should not be taken for granted. Adoption alone, either at the international or at the domestic level, does not make changes happen on the ground – particularly changes in legal, social and institutional cultures that are sometimes deeply embedded in society, and that are required to enhance business respect and protection of human rights. Institutional adaptation to treat matters through a ‘business and human rights lens’ is another important challenge, that is present not just for developing countries, but for developed economies as well.⁴⁷ And of course, this position assumes that there is political will to move forward with changes that may have deep effects on the global economy and in the private sector. A treaty may provide guidance or motivation to start reforms at the domestic level, but cannot be relied upon as a silver bullet that will transform the status quo. Given the lack of enforcement power of international obligations beyond the state, a treaty may be a catalyst for change, but with limited effects, that may be continued by national governments in accordance with their own procedures, limitations and political realities. This, of course, should not be interpreted as a reason to refrain from discussing and even adopting a treaty: however, it does point to the need to make sure that these scenarios are considered realistically, and that a treaty is not considered a panacea to solve all business and human rights issues, whether it is adopted (sooner or later) or not.

III NEXT STEPS: NEGOTIATING SUBSTANTIVE AND PROCEDURAL STANDARDS

In accordance with Resolution 26/9 of the Human Rights Council,⁴⁸ the substantive deliberations during sessions one and two of the OEIWG will be followed by negotiations over a draft instrument to be presented by the Chairperson-Rapporteur. As the third session approaches, the representative of

46 Such has been the case, for example, of non-binding international instruments, such as the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948): see Marc Gambaraza, *Le Statut de la Déclaration Universelle des Droits de l’Homme: Une Aventure Juridique* (Editions A Pedone, 2016).

47 Hence the focus on policy coherence as stated in the introduction to the UNGPs: *Ruggie Report*, UN Doc A/HRC/17/31, [8]–[10].

48 *OEIWG Resolution*, UN Doc A/HRC/RES/26/9, para 3.

Ecuador – who has held the role of Chairperson-Rapporteur – shall present the OEIWG with a document that accurately reflects the deliberations of 2015 and 2016 in Geneva.⁴⁹ As with any multilateral agreement, consensus will hardly be achieved unless delegations can combine political, economic and legal objectives with feasibility under international law, taking into consideration previous experiences in this and other fields. These considerations will also be applicable in relation to any follow-up mechanism that may be proposed to monitor the effective implementation of an eventual business and human rights treaty.⁵⁰

A Identifying Substantive Obligations for States and Businesses

One of the key questions in relation to the current business and human rights treaty discussions is whether it would be convenient to establish direct international human rights obligations for corporations – thus departing from usual practice⁵¹ in international human rights law – or if the existing state-based model is sufficient to address corporate human rights abuses effectively. There are several nuances to this question that need to be taken into consideration as discussions on which substantive obligations should be adopted in relation to state and corporate conduct start.

To a large extent, civil society organisations that have been present in the two OEIWG sessions have called for measures such as direct obligations for businesses under international law, the establishment of an international tribunal with jurisdiction to try corporations directly for human rights abuses, and even to dismantle corporate power. Others, notably those in academia, have called for the establishment of direct international human rights obligations for business.⁵² Many of these proposals would be supported as a result of the gross inability of national governments to tackle human rights abuses and provide redress to victims. This is due to their inability or unwillingness to effectively regulate

49 Representatives of Ecuador have repeatedly assured other delegations that the draft instrument will be elaborated during the intersessional period, in order to present it before the October 2017 session.

50 For outstanding contributions that analyse substantive and follow-up possibilities for a potential treaty on business and human rights, see Douglass Cassell and Anita Ramasastry, 'White Paper: Options for a Treaty on Business and Human Rights' (2016) 6 *Notre Dame Journal of International & Comparative Law* 1; International Commission of Jurists, 'Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises' (Report, October 2016) <<https://www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf>>.

51 Vincent Chetail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland et al (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff Publishers, 2014) 105, 115.

52 Nicolás Carrillo-Santarelli, 'A Defense of Direct International Human Rights Obligations of (All) Corporations' in Nicolás Carrillo-Santarelli and Jernej Letnar Čerňič (eds), *The Future of Business and Human Rights – Theoretical and Practical Considerations for a UN Treaty* (2017) (forthcoming, copy on file with author); Nicolás Carrillo-Santarelli, *Corporate Human Rights Obligations: Controversial but Necessary* (23 July 2017) Business & Human Rights Resource Centre <<http://www.business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary>>; De Schutter, 'Towards a New Treaty', above n 11, 58–62. See also Lee McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 *International and Comparative Law Quarterly* 143, 148, highlighting the 'potential to establish the theoretical foundations for the direct regulation of non-State actors, free from undesirable presumptions relating to political status and law-making capacity'.

corporate activities with prejudicial effects on citizens. However, the reality of international law and its decentralised nature limits the practical feasibility of several of these proposals.⁵³

In effect, one of the key aspects related to the question of the decentralised nature of international law is the interplay between the international trade and investment regimes on the one hand – notably of bilateral investment agreements – and international human rights law on the other hand. Several academics have suggested that a treaty on business and human rights should determine precedence of human rights obligations over investment commitments,⁵⁴ thus reducing the asymmetry of power between transnational corporations and host states. However, it is highly unlikely that this situation could be resolved by establishing such a premise in an eventual treaty on business and human rights.

To begin with, states enter into negotiations and agreements in different fields at the international level, as an expression of their sovereignty and in pursuit of their different economic and development interests and national policies. As a result, an overlap of existing duties and commitments may give rise to conflicting obligations for states, which may find themselves unable to honour all of them. States may thus be found to be in breach of an international engagement, either in protecting a foreign investment or the human rights of people in its territory or under its jurisdiction. However, this points to a particular situation of conflicting obligations (‘normative interactions’ as Alain Pellet calls them)⁵⁵ that would not necessarily be applicable to all cases where a state has committed to investment and human rights regimes. Under international law these obligations have equivalent value⁵⁶ due to the lack of hierarchy of international norms.⁵⁷ Thus, this conflict would not be easily resolved by a general provision establishing that states should always give precedence to human rights over other international obligations (including trade or investment commitments).

To that end, human rights would be better protected if states were to review their existing (or new) investment agreements to include specific human rights

53 See Kim, above n 23, 30:

Under the decentralized structure of international law, international regimes are the products of horizontal law-making processes: each regime consists of treaties of an equal rank. Accordingly, there is no clear hierarchy among conflicting legal regimes, which constitutes a major challenge for international policy makers in preventing and resolving conflicts between different rules of international law.

54 See, eg, Bilchitz, above n 24, 215; however, the question remains: how could one treaty impose a standard or hierarchy upon numerous other binding international instruments?

55 Alain Pellet, ‘Notes sur la « Fragmentation » du Droit International: Droit des Investissements Internationaux et Droits de l’Homme’ in Denis Alland et al (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff Publishers, 2014) 757, 760, 772.

56 Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (Dalloz, 12th ed, 2014) 17–18, arguing for the functional and hierarchical equivalence of conventional norms and among different legal sources.

57 James Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law, 2014) 283–4, on substantive fragmentation and the lack of hierarchy in international law.

clauses, including on *ex ante* human rights audit by investors,⁵⁸ or by systemic interpretation in dispute settlement procedures by arbitrators, which could then be a better remedy to the fragmented nature of international law.⁵⁹ Otherwise, how could a new treaty in the field of human rights acquire such a dominant position vis-à-vis other international commitments, including with regard to international investment, if there is no central authority to enforce it? Moreover, would not such a proposal only be applicable to states ratifying the new human rights treaty, and thus, possibly not immediately binding over most developed economies that are home to businesses operating transnationally? These questions and this topic will undoubtedly remain one of the most disputed aspects of discussions as states, business associations, NGOs, unions and academics negotiate the architecture and underpinnings of the business and human rights treaty project in future sessions.

Another core issue to which the treaty negotiations will now turn is the definition of the substantive obligations that would be imposed upon states and businesses in relation to human rights. Of course, a differentiated approach in this regard would be necessary in order to garner sufficient political will and acceptance to move beyond this point. As has been noted repeatedly, states would not require a different set of general obligations than those they have already accepted in other multilateral human rights instruments: a general obligation to protect human rights from activities of non-state actors, including corporations, exists already under different universal and regional treaties.⁶⁰ In that sense, in order to avoid having their international responsibility engaged, states must act with due diligence to prevent human rights abuses linked to non-

58 Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly* 573, 594.

59 See José E Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, 2011) 406–10; Enrique Prieto Ríos and Álvaro Amaya, 'Los Principios Rectores sobre Empresas y Derechos Humanos y la Práctica Legal en el Arbitraje de Inversión Respecto del Derecho Internacional de los Derechos Humanos' in Humberto Cantú Rivera (ed), *Derechos Humanos y Empresas: Reflexiones desde América Latina* (Instituto Interamericano de Derechos Humanos, 2017) 405, 418–21; Pellet, above n 55, 770. The last two references appeal to a systemic interpretation of international investment agreements with international human rights law and general international law.

60 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 1.1; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 1. See also Catherine Kessedjian, 'Entreprises et Droits de l'Homme – Vers une Convention Internationale?' in Jean-Jacques Ansault et al (eds), *Mélanges en l'Honneur du Professeur Michel Germain* (LGDJ-Lextenso, 2015) 413, 417, where the author wonders whether developing a new set of substantive obligations for States would be counterproductive, considering the vast array of human rights obligations States have already entered into. Another important question in this regard is how this potential treaty would interact with the existing regime of international human rights law: contrary to the UNGPs (a soft law instrument) a treaty would probably have to specify within its own text the rights that would be protected by it, unless it takes the form of a protocol applicable to the existing normative regime. On the possibility of adopting a protocol to existing treaties, see Cassell and Ramasastry, above n 50, 18.

state actors, or to ensure effective access to remedy whenever those abuses occur.⁶¹

That situation is, however, different in relation to corporate human rights obligations. To date, no binding instrument establishes direct obligations for corporations in relation to the respect or protection of human rights.⁶² Developments in this area have taken place particularly through soft law,⁶³ and only recently (although in very limited cases related to reporting requirements) have binding standards started being considered as potential tools for effective regulation.⁶⁴ It is precisely in relation to the question of corporate accountability that the issue of primary and secondary rules of international law becomes relevant in this subject matter. As has been discussed, secondary rules of international law are instrumental for the allocation of responsibility in order to ensure adjudication and eventual reparation of harm, which is currently incumbent upon the state, but do not address the quality or capacity of the actor involved in the breach of the international obligation, that is, the primary rule.⁶⁵ In other words, a breach of an international obligation can be done either by the state or its agents, or by non-state actors, but the quality of the transgressor is currently irrelevant given that the international legal system has established a system of rules that imposes international responsibility through the state. Yet, this very situation could start to change if corporations were to be included as potential addressees of the secondary rule of attribution.⁶⁶

In this regard, however, a business and human rights treaty would need to focus on the types of differentiated obligations it imposes upon states and upon corporations. McConnell creatively suggests that ‘a regime addressing both states *and* non-state actors is required to ensure effective engagement with fundamental human rights standards’.⁶⁷ As has been pointed out earlier, the role and obligations of the state under international human rights law would not change generally, although a recognition of the practical reality related to the unwillingness or incapacity of the state (most notably of host states, but also, to some extent, of home states) to effectively regulate corporate behaviour would give rise to the necessity of establishing a secondary type of obligation bestowed

61 De Schutter, ‘Towards a New Treaty’, above n 11, 44.

62 McConnell, above n 52, 151: ‘A long-standing issue concerning the establishment of liability for the adverse effects produced by the cumulative acts of State and non-State actors is the lack of primary rules governing the conduct of non-State actors’. See also Chetail, above n 51, 115.

63 See, eg, *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31.

64 See above n 25. See also Arvind Ganesan, ‘Towards a Business and Human Rights Treaty?’ in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 73, 75. Another interesting avenue is judicial interpretation in regional human rights systems: see Nicolás Carrillo-Santarelli, ‘La Promoción y el Desarrollo de la Protección de los Derechos Humanos frente a Abusos Empresariales en el Sistema Interamericano’ in Humberto Cantú Rivera (ed), *Derechos Humanos y Empresas: Reflexiones desde América Latina* (Instituto Interamericano de Derechos Humanos, 2017) 87.

65 Bilchitz, above n 24, 208: ‘it is important to recognize that if states are required by international law to ensure that third parties (including corporations) comply with binding human rights requirements, then this entails that the third parties are themselves obligated to comply with such requirements’.

66 See Chetail, above n 51, 130.

67 McConnell, above n 52, 152–3 (emphasis in original).

upon corporate actors: ‘The question arises as to whether a complicity rule which *derives* responsibility from the principal actor’s wrongful conduct, rather than *attributing* the wrongful conduct to a secondary actor, may hold utility’.⁶⁸

In that sense, the business and human rights treaty negotiations could benefit from establishing a shared responsibility regime: ‘where a non-State actor, serving as the principal wrongdoer, engages in a direct breach of an obligation, a State’s conduct which assists the non-State actor’s substantive breach via positive act or omission could be said to breach a *second* primary obligation to refrain from complicit conduct’.⁶⁹ This proposal would fall squarely into the archetype developed in the Guiding Principles, where the state may, by action or omission, contribute to a corporate human rights violation⁷⁰ and where businesses may participate in that same violation through a lack of human rights due diligence to prevent harm from happening.⁷¹ An important procedural difficulty recognised by McConnell revolves around the loose concept of corporate human rights due diligence, notably in cases of businesses with transnational operations;⁷² yet, it would be precisely in that area that both treaty negotiators and an eventual treaty body could elaborate, in order to ensure that the technical deficiencies found in the UNGPs are overcome in the treaty negotiations.

Another substantive aspect that would need to be addressed is the type of obligations incumbent upon corporations; whereas previous efforts to bestow upon business enterprises duties to protect and comply with human rights standards have largely faced the opposition of states and of the international business community, there is currently a relatively widespread consensus on their responsibility to respect human rights.⁷³ The fact that corporations can be found liable in domestic systems for their involvement in human rights abuses – through torts under common law regimes or through extra-contractual civil liability in civil law systems, and in some cases under criminal law⁷⁴ – points to the possibility of even extending that responsibility into a corporate obligation to respect human rights. This would reinforce the posited shared responsibility regime and the coexistence of international responsibilities between states and non-state actors.

68 Ibid 156 (emphasis in original).

69 Ibid 157 (emphasis in original). See also at 170: ‘there is scope to establish two sets of primary obligations within the proposed treaty: one which deems a principal violation wrongful, and a second which deems complicity in that principal wrong to engage an actor’s responsibility’.

70 *Ruggie Report*, UN Doc A/HRC/17/31, [4].

71 McConnell, above n 52, 163, where the author argues that ‘[i]n the context of a business and human rights treaty, a regime of shared responsibility is conceivable in which non-State actors bear direct obligations, ... in addition to a separate general obligation on States to act with diligence in protecting their populations from the abusive conduct of private parties’. See also De Schutter, ‘Towards a New Treaty’, above n 11, 53.

72 McConnell, above n 52, 172.

73 Michael K Addo, ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’ (2014) 14 *Human Rights Law Review* 133, 135–6.

74 See, eg, *Civil Liability Act 2002* (NSW), regarding negligence; and *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *R v AC Hatrick Chemicals Pty Ltd* (1995) 152 A Crim R 384, regarding corporate homicide.

Finally, the negotiations over the subject matter that the treaty covers should not be especially controversial: treaty negotiators, taking into consideration the limited substantive grounds covered by the Guiding Principles, should expand the focus to include the rights of vulnerable groups, notably women, children, migrants, people with disabilities and indigenous peoples, thus integrating into its scope several of the core treaties of the UN system.⁷⁵ The interrelated and indivisible character of human rights would call for a treaty that covers all internationally recognised rights,⁷⁶ including those addressing the special situations and contexts of minorities or disadvantaged groups.

B Functional Possibilities for a Business and Human Rights Treaty Body

One final aspect that will be analysed in this article, which has been the subject of much speculation in recent years, is the creation of a follow-up mechanism to a potential business and human rights treaty, an issue that will likely be discussed in the following sessions of the OEIWG. This aspect is particularly relevant given the (very) limited success that has been found in domestic legal systems, and the potential for businesses with transnational operations to evade accountability, most notably in weak governance zones or in states lacking the political will or ability to prosecute corporate human rights impacts. Recent experiences have showcased the tremendous efforts undertaken by corporations to fight lawsuits for their involvement in alleged human rights abuses,⁷⁷ and thus awakened the call for the establishment of a robust follow-up mechanism.⁷⁸ While discussion of this issue has not been specifically addressed within the OEIWG setting yet, it is relevant to analyse such a mechanism's possible functions and powers as the negotiation stage approaches.

Previous experiences have certainly been moulded after the Human Rights Committee, a body derived directly from the *International Covenant on Civil and Political Rights* that reviews periodic reports by state parties, which has the

75 But as noted above in Part III(A), the question is how to insert in a substantive treaty all the rights developed in different (binding or soft law) international human rights instruments.

76 Some leading scholars have argued for the establishment of corporate obligations exclusively in relation to their involvement in 'gross' or 'severe' human rights violations, and not in relation to all human rights, which would rapidly cripple any international regime: see De Schutter, 'Towards a New Treaty', above n 11, 60; John Gerard Ruggie, 'Incorporating Human Rights: Lessons Learned, and Next Steps' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 64, 69; John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty* (8 July 2014) Institute for Human Rights and Business <<http://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre->>; cf Bilchitz, above n 24, 225–7, who argues that it is necessary to address all human rights violations in the treaty negotiations, not only 'gross' abuses.

77 Such as the aforementioned Chevron-Texaco case in Ecuador. For an overview of this case, see Martin-Chenut and Perruso, above n 35.

78 Many scholars and civil society organisations consider the establishment of an international tribunal with jurisdiction over business enterprises for their involvement in human rights violations necessary: see, eg, De Schutter, 'Towards a New Treaty', above n 11, 59; Bilchitz, above n 24, 219. However, the political, legal and financial obstacles are not to be underestimated if such an avenue is pursued in the treaty negotiations. For this reason, a treaty body with an ad hoc communications procedure is deemed here as an interesting alternative that would probably not face as much political resistance as a court or tribunal.

capacity to receive individual communications from aggrieved individuals or groups against an alleged human rights violation by the state or other non-state actors,⁷⁹ and unpacks and interprets the different normative elements contained in the treaty. Other bodies have the power to conduct on-site visits: for example, the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment visits detention centres in order to assess progress – or lack thereof – in the fight against torture.⁸⁰ Most of these attributes are common to UN treaty bodies, and a business and human rights treaty body would likely not fall very far from its counterparts.

It is foreseeable that any treaty body that would be set up as a result of the adoption of a binding international instrument on business and human rights would have inherent powers to interpret its normative content, in order to make it a ‘living’ document, and to analyse the scope of the different provisions set forth therein.⁸¹ Thus, following in the footsteps of other committees, an eventual business and human rights treaty body would likely approach issues such as jurisdiction (potentially in relation to extraterritorial regulation and adjudication), positive obligations and due diligence for states (and eventually for corporations), access to remedies (including judicial and non-judicial remedies), as well as substantive obligations such as the protection of economic and social rights,⁸² in the manner of general comments. An innovation would be allowing regular participation by the potential addressees of the treaty (ie, businesses), especially during discussion days or through written submissions.

In addition, state parties should probably have a periodic reporting obligation, in order to inform the committee on the status of implementation of the norms included in the international instrument, to share information on good practices and adopted measures,⁸³ and to highlight difficulties in advancing the business and human rights agenda domestically.⁸⁴ An aspect that would be particularly welcome in this regard is the explicit participation of national human rights institutions (‘NHRIs’) in providing the eventual committee with independent and reliable information on practical and legal challenges to the implementation of

79 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 28–45.

80 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) arts 4, 11.

81 For example, Bilchitz argues that such a mechanism would contribute importantly to norm development, especially in relation to the application of certain human rights obligations to corporations, the interpretation of such obligations, and the determination of justifiable limits to them: Bilchitz, above n 24, 210–14.

82 Discussing the protection of economic and social rights in the context of business activities is an already existing characteristic of general comments of the Committee on Economic, Social and Cultural Rights: see Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN ESCOR, UN Doc E/C.12/GC/24 (23 June 2017).

83 De Schutter, ‘Towards a New Treaty’, above n 11, 56–7.

84 ‘Ex ante measures embedded within human rights treaty regimes are “forward-looking”, in that they seek the prevention and management of harm arising from adverse human rights impacts’: McConnell, above n 52, 173.

the normative elements of the treaty.⁸⁵ Thus, receiving information both from the state and from NHRIs would potentially ensure a more accurate assessment of the situation on the ground, on which the committee could rely to provide the state with appropriate feedback on matters of concern.

The previously mentioned functions would, however, reflect the current practices of UN human rights treaty bodies, and would not change the current manner in which UN committees operate vis-à-vis states and the issue of conventional interpretation. An important and profound practical change could nevertheless take place in relation to individual communications brought before it for violations of the normative content of the treaty. Currently, states appear before the different committees that have quasi-judicial functions to respond to allegations of human rights violations taking place in their jurisdiction. This has been the case even in communications relating to corporate activities that have negative impacts on human rights.⁸⁶ Thus, considering the important difference in jurisdiction of the relevant treaty body, where both corporations and states would have binding obligations, it would be convenient to ensure that both are participants in the quasi-judicial procedure. This would serve a dual purpose: to allow corporations to demonstrate their use of human rights due diligence to identify, prevent and/or mitigate human rights abuses related to their operations or commercial relationships, with full respect for the presumption of innocence; and to apply indirect pressure on how corporations behave and operate in their transnational activities, so that they will act diligently to avoid human rights abuses linked to them.

Taking into consideration the importance of their brands and image, corporations would be forced to invigorate their prevention mechanisms to avoid the negative publicity resulting from an international procedure where their direct or indirect participation in severe human rights violations would be analysed, regardless of the binding nature or the enforcement of the decision. This would also allow states to explain how their duty to protect from human rights violations has been implemented in specific cases related to corporate activity, therefore not switching the classical role vested in them by international human rights law. If the ideological structure and tenets of the Guiding Principles were to be kept for the future treaty, such a mechanism would allow victims or their representatives to confront, on an international stage, states and corporations who, as a result of a lack of due diligence, may have violated the substantive human rights obligations recognised in the eventual treaty.

While discussion of a potential treaty body – and even a communications mechanism – is probably not on the agenda of the OEIWG for the third session, it

85 In addition, the treaty should establish a specific role for NHRIs in order for them to contribute in this endeavour: see Humberto Cantú Rivera, 'National Human Rights Institutions and Their (Extended) Role in the Business and Human Rights Field' in Surya Deva (ed), *Research Handbook on Human Rights and Business* (2018) (forthcoming, copy on file with author).

86 Recent examples include concluding observations by the Human Rights Committee against Canada and Germany: Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, UN GAOR, 114th sess, 3192nd mtg, UN Doc CCPR/C/CAN/CO/6 (13 August 2015) [6]; Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Germany*, UN GAOR, 106th sess, 2944th and 2945th mtgs, UN Doc CCPR/C/DEU/CO/6 (12 November 2012) [16].

would be necessary to consider the establishment of such a regime to satisfy the appetite for redress sought by victims of corporate human rights abuses around the world. Even though other treaty bodies do not have enforcement powers over their decisions (which are called ‘views’ rather than resolutions or judgments),⁸⁷ establishing a minimum obligation to examine allegations of corporate participation – and giving businesses the opportunity to prove their diligence in preventing human rights violations – could potentially become a silver lining for those seeking redress. It could also add pressure to ensure that corporations that know their human rights responsibilities show how they comply with them.

IV CONCLUSION

The beginning of the intergovernmental process to draft a legally binding instrument under international human rights law on the responsibility of businesses with respect to human rights showcases the difficulties in accommodating competing interests between developed and developing countries, and moreover, in establishing a basic global legal framework on how corporations are expected to behave in relation to human rights. The first two sessions – the ‘brainstorming’ period – clearly showed a number of important issues on which precise and objective ideas and proposals are needed in order to move from dogmatic or practical barriers to concrete international legal standards. As the negotiation phase begins, states and other actors need to assess the intricacy of the challenge before them, including its political and legal feasibility, in order to craft adequate solutions to the many different existing issues in the business and human rights field. To this end, identifying the most relevant issues upon which political agreement and technical solutions can be found will necessarily be a priority, to the detriment of many expectations of civil society organisations. Building upon the UNGPs and their three-pillared model, focusing on ensuring adequate transnational cooperation in judicial procedures, and developing legislative or regulatory measures with extraterritorial reach could potentially contribute to filling some of the existing gaps in this domain. None of this will be attained unless the different parties work with the principle of ‘maximum consensus’ – instead of focusing on finding the lowest common denominator – in pursuit of a politically and legally feasible instrument that allows for better protection and respect of human rights by states and businesses.

87 See, eg, Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, UN GAOR, 114th sess, 3192nd mtg, UN Doc CCPR/C/CAN/CO/6 (13 August 2015) [5]. See also McConnell, above n 52, 173–4, where the author highlights the low efficacy of such decisions in ensuring reparation for victims, but identifies the possibility that States ‘pursue binding domestic litigation against business actors to ensure remediation for victims’.