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Overview of CSR and BHR debates - Towards a Legally Binding Treaty on Business and Human Rights

I. Introduction:

We are living in a globalized economy, in which companies operate everywhere in the world. The transnational operations of business actors have been proved to often give rise to adverse human rights impacts. However, the protection of human rights against corporations' abuses is far from an easy task. The field of business and human rights is shaped by the imbalance of interest and responsibility. Corporations receive a variety of rights under international law, they do not equally hold a corresponding set of duties when it comes to the protection of human rights.[1] Under the public pressure, many initiatives have been created in order to bridge this gap.

From the business perspective, Corporate Social Responsibility (CSR) is the most important concept in the field. In a simple way of understanding, CSR refers to companies taking responsibilities for their impact on society. Since the CSR codes are voluntary, legally enforcing such responsibilities remains a difficult issue. Human rights advocates blame CSR not reliable when it comes to human rights protection.

From the legal perspective, the Business and Human Rights (BHR) movement grows out of a quest for corporate accountability. This quest for accountability is still a journey that is not complete. International law has not yet imposed direct human rights obligations on corporations. For the time being, all the related instruments of the United Nation (UN) are "soft" law and thus for many, are weak and inefficient.[2] In 2013, Ecuador called for establishing a legally binding treaty on business and human rights. In July 2014, the United Nation Human Rights Council (UNHCR) established an "*Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*" (OEIGWG) with the mandate to "*elaborate an international legally binding instrument to regulate, in international human*

[1] Pierre Thielbörger and Tobias Ackermann *A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in the Loop?* (Indiana University Press, Indiana, 2017) vol 24 at [43-79].

[2] Anita Ramasastry *Corporate Social Responsibility Versus Business and Human Rights: Bridge the Gap between Responsibility and Accountability* (Journal of Human Rights, 2015) vol 14 at [237-259].

rights law, the activities of transnational corporations and other business enterprises."[3] At this stage, opinions about a future treaty on business and human rights remain strongly divided. Opponents warn that going down that road of a treaty "*would end in largely symbolic gestures…with a high potential for creating serious backlash against any form of further international legalization in this domain*."[4] Proponents claim that CSR and existing soft law initiatives in the field even though brought positive results, cannot entirely regulate all the questions related to business and human rights because of their non-binding nature and that a legally binding treaty on business and human rights is indispensable. This paper sides with proponents, supporting the OEIGWG's effort in elaborating a treaty on business and human rights.

This paper proceeds in two main parts. The first part provides an overview and assessment of the two key debates in the field: CSR and BHR (with focus on the Guiding Principles on Business and Human Rights[5]). The second part argues the necessity to move the BHR movement to "hard" law and evaluates the challenges that a treaty on business and human rights' negotiations are facing as well suggestions of solutions to overcome these challenges.

II. CRS and BHR: The gap between responsibility and accountability

A. CSR with respect to human rights obligations

1. What is CSR?

Although the concept of CSR has been advocated for decades and is nowadays commonly used by corporations all over the world, until today there is no universal definition of CSR. When looking for a definition of CSR, many often cited Harold

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[3] *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* HRC Res 26/9, A/HRC/26/9 (2014)

[4] John Ruggie "A UN Business and Human Rights Treaty?" (November 2014) Havard Kennedy School < https://sites.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>

[5] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* A/HRC/17/31 (21 March 2011) [hereinafter Guiding Principles]

Bowen's definition. With his book "*Social Responsibilities of the Businessmen*" published in 1953, Bowen was accredited by some as father of CSR. In his book, for the first time a scholarly significant definition of CSR was proposed as "*the obligation of business to pursue those policies, to make those decisions or to follow those lines of action which are desirable in terms of objectives and values of our society*"[6]. Later, Scherer and Palazzo have described CSR as an umbrella term for a discussion focused on the "*responsibilities of business and its role in society, including categories such as business and society, business ethics, or stakeholders theory.*"[7] In 2011, the European Union (EU) defined CSR as "*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.*"[8] Among countless different definition of CSR, these three mentioned above definitions are just examples to reaffirm what Votaw had noticed in 1972 that this brilliant term "*means something but not always the same thing to everybody*."[9] It involves a broad variety of terms, approaches and concepts. The following part of this essay focuses on CSR with respect to human rights obligations.

2. Human rights as a blind spot in CSR

Although there are countless different definitions of CSR, the term "human rights" never appears explicitly in those definitions. CSR may encompass some aspects of human rights but the focus of CSR has been broader and not as explicit about human rights as an end goal. Observers noticed that CSR codes and policies have avoided the terminology of human rights for a long time. This does not mean that human rights have been entirely absent from the CSR debate. Only, their role is not where it needs to be. In general, human rights related contributions to the CSR literature, according to Florian Wettstein, can be resumed in three phases. The first one, emerged in the mid-1980s, remained sporadic and fragmented and tended to focus narrowly on the domain of labor

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[6] Bowen Harold *Social Responsibilities of the Businessmen (*New York: Harper and Row, 1953)
[7] Ramasastry, above n 2, at 239.
[8] European Commission "Corporate Social Responsibility: A New Definition, a New Agenda for Action" <http://europa.eu/rapid/press-release_MEMO-11-730_en.htm>.
[9] Votaw *Genius becomes rare: A comment on the doctrine of social responsibility* (California Management Review, 1972).

rights and employment. The second one emerged in the mid-1990s when outsourced and dispersed global value chain raised the questions about the universality of labor standards and about the responsibility for the conduct of suppliers and contractors in the context of the emergence of ongoing sweatshop and child labor. The third phase has begun with UN Global Compact in 2000. This phase is where CSR and BHR movement overlap and will be discussed more in detail in the next part of this essay. Overall, Wettstein concluded that "*human rights have not come to play a pivotal role for the general conceptualization of CSR; attempts to integrate human rights at the very core of the concept have …generally been rare.*"[10] How does this conclusion explain the fact that most companies have code of conduct by joining Incorporate Global Compact and Suppliers Code of Conduct? Wettstein argued that "*the UN Global Compact explicitly distinguishes between general human rights principles (principles 1 and 2) and principles specifically addressing labor practice (principles 3, 4, 5 and 6). As such, it has done much to render human rights relevant for corporations in their own right, rather than merely as add-ons to labor issues. This was reflected in a growing, although still rather small, number of contributions to human rights implications of the UN Global Compact itself as well as on the conceptual relation between CSR and human rights in general*."[11]

Human rights advocates have been criticizing corporations for not doing enough and have been skeptical about the reliability of CSR. What are CSR limitations? If you ask how many scholars this question, they probably would give you that many answers. This essay focuses on the two fundamental problems of CSR which are the voluntariness character and the over-reliance on citizen oversight- sometimes referred to as "civil regulation". These two problems are closely linked: since there is no clear standard for corporate responsibility, civil regulation cannot function well.[12]

[10] Florian Wettstein *CSR and the debate on business and human rights: Bridging the great divine* (Business Ethics Quarterly, 2012), at [739-770].
[11] At 749.
[12] Joanne Bauer "The Problem with Corporate Social Responsibility" Open Democracy <https://www.opendemocracy.net/joanne-bauer/problem-with-corporate-social-responsibility>

a. Problems of the voluntariness

There are no legal standards defining what counts as corporate responsibility, but it is up to the corporations to decide themselves. Business managers get to cherry-pick the areas of social benefit the company will address. The voluntariness becomes problematic when CSR is at the end what companies want and very often is what is most convenient for them. John Ruggie, author of UN Guiding Principles for Business and Human Rights, noted that an "*issue of concern involves the elasticity of human rights standards in cooperate policies…Most of the companies with such policies include human rights in an overall corporate code or set of business principles; only minority has a separate human rights instrument; and a few of those adopt what the human rights community considers as "rights-based approach*." Those companies that do not adopt a "right-based approach" "*typically approach the recognition of rights as they would other social expectations, risks and opportunities, determining which are most relevant to their business operations and devising their policies accordingly*."[13]

b. Problems of the civil regulation

CSR advocates can argue that companies do not have totally free hands to do whatever they want to when it comes to social responsibility. The concept of CSR rests on the idea of business operate with a social contract granted by the society. This means that companies have to satisfy the expectations that the society has on them. Otherwise, the business cannot work. But the question here is who is the society? Is that everybody? It is often not the case. Even in a well-functioning democracy, the civil regulation is hard to achieved. Very often, apathy and indifference lead to the fact that people do not have time or means to participate in the decision-making process. "Someone else is doing it for me" and the civil regulation ends up with a domination of a minority group with purchasing power. This does not represent the interests of the whole society and far from the interests of the most vulnerable.[14]

[13] John Ruggie "Human Rights Policies and Management Practices of Fortune Global 500 Firms", Havard Kennedy School <https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_28_ruggie.pdf.>

[14] Bauer above n 12.

For all of these reasons, human rights advocates find that CSR is not up to the task of preventing harm to people and far from providing a remedy when it happens. This is why the business and human rights (BHR) movement emerged. The next part of this essay provides an overview about the BHR movement and discusses if BHR movement at the time being can bridge the gap between responsibility and accountability of corporations in terms of human rights protection or promotion.

B. BHR movement's overview

1. BHR as a set of emerging crises?

From the late 1970s, developing countries have become the new destinations of the transnational corporations' investment. Many host countries in the South created the so-called "red carpet" in order to attract investment. While this has been considered to contribute to their economic growth, nothing came without a price, sometimes just too expensive! In 1984, forty tons of poisonous gas leak at Union Carbide, a pesticide plant in India, killed and injured tens of thousands of people and showed how it was difficult for the victims to seek remedy from a transitional corporation.[15] Seeking remedy for the victims could be difficult because of many reasons. The host state may lack regulation that would prevent human rights abuses from occurring. They may be unwilling or unable to provide their citizens access to remedies for human rights violations caused by transnational corporations. The BHR movement has been in existence since that time, focusing on the human rights impact of businesses in their global operation. However, until 1999, it was not a true movement but more a set of emerging crises where companies and governments scrambled to respond once their connections to human rights abuses were made public.[16]

2. BHR movement towards a Universal Yardstick

The UN Global Compact was the first initiative addressing corporate responsibility in a broader context. Initiated in 1999, Global Compact with its ten principles, asked

[15] Business and Human Rights Resource Center <https://business-humanrights.org/en/union-carbidedow-lawsuit-re-bhopal>.
[16] Ramasastry, above n2, at 242.

companies to measure their conduct against key international human right law. This is an example of where CSR and BHR overlapped. Global Compact was voluntary and classed as CSR initiative. At the same time, it was the first initiative creating a universal measurement tool for corporate conduct. This is why scholars believe it forms an integral part of BHR history. However, human rights advocates criticise that Global Compact have no "real teeth" and inefficient with respect to human rights protection.

In 2003, a set of Draft "*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*" (Draft Norms) was developed by the United Nations Sub-Commission on the Promotion and Protection of Human Right (Sub-Commission). While these norms were non-binding, they were formulated in a treaty-like manner by imposing a wide range of obligations on businesses which were in many ways equal to state's own obligations to respect, protect and fulfill human rights. The Draft Norms were controversial. While some praised the Norms as big steps towards binding hard law, most corporations and states rejected them for going excessively far. In 2004, the Commission on Human Rights ended the Norms' story by stating that the Norms "had not been requested" and "had no legal standing."[17]

In 2005, Havard Professor John Ruggie, took over as the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other business enterprises. In 2008, Ruggie proposed the "Protect, Respect and Remedy" Framework (Framework), aimed at offering an "authoritative focal point". The Guiding Principles (GPs), proposed three years later in 2011, serve to implement the Framework. The UN Human Rights Commission endorsed both and installed a working group as a follow-up mechanism after the SRSG's mandate had expired.[18] The instruments rest on three pillars: Pillar I is state duty to protect human rights abuses by third parties, including businesses; Pillar II is the corporate responsibility to respect human rights; and Pillar III calls for states and the private sector to provide victims with access to effective remedies, judicial and non-judicial.[19]

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[17] Thielbörger and Ackermann, above n 1, at [47-48].
[18] Florian Wettstein *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment* (Journal of Human Rights, 2015) at [162-182].
[19] Ruggie, above n 4.

The UNGPs are an important articulation of BHR. With the first pillar "state duties", they underscore the role of state as a regulator and enforcer of the law. They are the first authoritative guidance that the Council and its predecessor body, the Commission on Human Rights, have issued for state and enterprises on their responsibilities in relation to business and human rights. The GPs obtained an unprecedented consensus among states, corporations and human rights advocates alike. Even though the consensus supporting the Framework and the GPs in the Human Rights Council was powerful, it is only one part of the tale. The other part of the tale has been fulfilled by critiques of them for being too soft, too pragmatic and too short.[20]

a. The "too soft" critique

The opponents claim that the GPs' non-binding character make it too soft and that "soft" law approach is inefficient when it comes to human rights protection. Even the innovation of the GPs which is human rights due diligence is not without its critics. More specifically, the UNGPs ask companies to manifest their respect via risk assessment in the form of ongoing process referred to as human rights due diligence. This means that companies should engage in an ongoing process to assess conduct against a common set of rights. Some see this as a progress compared to the human rights "a la carte" of CSR. However, others see it as too weak of a measure to hold companies accountable for their wrongdoing.

b. The "too pragmatic" critique

Ruggie took an approach he labelled "*principled pragmatism*". He "*focused on gaining broad consensus across the different stakeholder groups for a normative framework and authoritative policy guidance to bring greater coherence, larger-scale effects, and cumulative change than the prior patchwork of limited and uncoordinated business and human rights schemes was able to generate.*" According to Ruggie, he "*emphasized measures that states and businesses could adopt relatively quickly, because they can have immediate effects on reducing overall incidence of corporate-related human rights*

[20] Thielbörger and Ackermann, above n 1, at [49-50].

harm, thereby benefiting victims."[21] However, in the eyes of his critics, Ruggie's work, by trying to gain a consensus at all price, has left ambition and the normative understanding of human rights behind.

c. The "too short" critique

Similarly to the two other critiques, the SRSG's work bypassed too many important questions in order to gain the consensus. The GPs have been criticised of being too narrow as they establish only negative corporate responsibilities, which focuses only on holding corporations accountable for harm caused (rather than on a positive recognition of the role business might play in protecting and promoting human rights.) Wettstein referred to this as "human rights minimalism".[22] Opponents also argue that the GPs ultimately failed to ensure access to effective remedies by not providing a comprehensive implementation mechanism. A study conducted by the European Parliament (EP) on the "*Implementation of Guiding Principles on Business and Human Rights*" indicated that governments' commitments to develop National Action Plans (NAPs) implementing the Guiding Principles "*have been far too slow to materialise*." Up to 31 December 2016, only twelve countries, ten of which are from Europe, have produced NAPs: The United Kingdom (UK) (2013, 2016), the Netherlands (2013), Denmark (2014), Finland (2014), Lithuania (2015), Sweden (2015), Norway (2015), Colombia (2015), Switzerland (2016), Germany (2016), Italy (2016) and the United States (2016). Additionally, Spain has released the draft version and is awaiting final government approval, while two other states, the UK and Netherlands, are either undergoing or have already completed (UK) the NAP revision process. Several other European governments (including Belgium, Poland and the Czech Republic) and more from around the world have reported that such plans are currently being drafted. These include Mexico, Kenya (which is likely to be the first African country to develop the National Action Plan) and Australia. Undoubtedly, the EU leads in regard to the number of countries that have adopted NAPs. However, the study by EP also pointed out that "*many of those early NAPs were developed without prior National Baseline Assessment*

[21] Ruggie, above n 4.
[22] Wettstein, above n 10, at [741-742].

(NBA) or sufficient consultations with stakeholders and hence the selection of NAPs' priorities was not evidence- based. Moreover, instead of being action oriented and forward looking, most of the first NAPs merely provide an overview of the activities already taken by the government, while lacking clearly formulated, future-oriented actions assigned to specific institutions."[23]

C. Bridging the gap between Responsibility and Accountability?

The previous part of this essay has argued that human rights have not come to play a pivotal role for the general conceptualization of CSR. CSR may encompass some aspects of human rights, in particular labor rights, but the focus of CSR has been broader and not as explicit about human rights as an end goal. The emphasis of CSR is corporate responsibility rather than state-driven regulation or accountability. Most importantly, CSR lacks a consistent framework focusing on business with respect to human rights protection or promotion. BHR movement at the time being has come to correct CSR's perceived failure by providing such framework and focusing not only on the role of private sector but also on the role of states on overseeing the company respect for human rights. The UNGPs may not be perfect and do carry shortcomings because of their non-binding nature. However, "*it is safe to say that Ruggie's framework has become the state of the art in the debate on business and human rights*"[24] and that one cannot write about business and human rights without referring to Ruggie. Wettstein, in his article "*Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment"* noted that Ruggie's work "*is, by all means, a significant achievement. One maybe critical or sympathetic toward the "Ruggie" process and its results but one cannot but acknowledge the tremendous transformation the (BHR) debate has undergone since John Ruggie took over*." Ruggie's reports have gained support even from businesses and capital-exporting states. Human rights advocates may see his pragmatism as a weakness. But remember why the Draft Norms

[23] European Parliament "Implementation of Guiding Principle for Business and Human Rights" (2017) <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf>

[24] Wettstein, above n10, at 741.

failed! The UNGPs could have had the same destiny as the Draft Norms if they were not designed in a pragmatic manner. Moreover, the quest for business accountability is still an open journey that is not complete. Even though being "soft", the UNGPs can eventually lead to "hard" law. The next part of this essay will address the later call for an international legally binding treaty on business and human rights and examine the feasibility of this treaty.

III. Towards a Legally Binding Treaty on Business and Human Rights

A. Recent Steps toward a Legally Binding Instrument

Despite the "*tremendous transformation the BHR debate has undergone since Ruggie took over*", frustration, however, remains. There is a widespread recognition that Pillar III of the GPs - access to effective judicial and non-judicial remedies - does not seem to have made meaningful progress.[25] Many argue that the non-binding nature of the UNGPs is their major shortcoming and therefore the establishment of "hard" legal obligations for businesses is indispensable. At the September 2013 session of the United Nations Human Rights Council (UNHRC), Ecuador called for the establishment of a new treaty on business and human rights, emphasizing "*the necessity to moving forward a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises.*" At the June 2014 Session of the UNHRC, the Resolution 29/6 on "*Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*" was adopted with a thin support- 20 votes in favor, 14 against and 13 abstentions. It was rejected by the industrialized members, the European States on the Council (except Russia), the United States, Japan and the Republic of Korea.[26] The resolution "d*ecides to establish an open-ended intergovernmental working group on transnational*

[25] Douglass Cassel and Anita Ramasastry *White Paper: Options for a Treaty on Business and Human Rights* (Notre J. Int'l Comp, 2016) vol 6, at 9.
[26] HRC Res 26/9, A/HRC/26/9.

corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (paragraph 1)[27]. The open-ended intergovernmental working group held its first Session in October 2015, a second in October 2016 and a third in October 2017 in order to debate the content, scope, nature and form of the future international instrument. Going into all the details of these debates is beyond the scope of this essay. Instead, this essay addresses below very briefly the treaty's potential form and then focuses more on the most controversial elements of the future treaty, the challenges that the treaty's negotiators are facing as well as the potential solutions to overcome those challenges.

B. Form and content of a treaty

The form and content of a future legally binding treaty on business and human rights at this stage remain unclear. There are simply too many options. Proposals have mainly come from legal experts and civil organisations and differ in scope, degree of detail and political feasibility.

1. Possible forms a treaty could take

A treaty on business and human rights could take very different forms, *"ranging from a comparatively weak or minimalist treaty, one that could simply mandate public reporting on human rights by large public companies (as recently required in Europe by European Union as part of its non-financial reporting rules), to a strong treaty that provides for both civil and criminal remedies, in both national and international courts, for human rights violations committed by corporations*."[28] John Ruggie, generally highly critical of a binding legal instrument warns against regulating all aspects of corporations' human rights obligations in an overarching legal framework. According to Ruggie, such encompassing instrument would not do justice to the complexity of the issues at hand. It

[27] HRC Res 26/9, A/HRC/26/9.
[28] Cassel and Ramasastry, above n25, at 17.

would also be basically politically non-negotiable and its implementation would fail at the national level.[29]

Schutter suggested four options that the OEIGWG may wish to consider while negotiating the instrument. These four options are:

(i) to clarify and strengthen the states' duty to protect human rights, including extraterritorially;
(ii) to oblige states, through a framework convention, to report on the adoption and implementation of national action plans on business and human rights;
(iii) to impose direct human rights obligations on corporations and establish a new mechanism to monitor compliance with such obligations; and
(iv) to impose duties of mutual legal assistance on states to ensure access to effective remedies for victims harmed by transnational operations of corporations.

These options are not mutually exclusive and Schutter argued that "*a hybrid instrument building on element of the first and the fourth option may be the best way forward both in terms of political feasibility and improving access to effective remedies for victims*."[30] Calalogue all the treaty options and going into all details are beyond the scope of this paper. Instead, this paper will focus on the most controversial potential elements of the treaty that the three first Session of the OEIGWG and scholars have been discussing since the Resolution 26/9.

2. Most controversial elements of a treaty

a. What companies to be regulated?

The Resolution 29/6 on "*Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*" does not provide a definition of "transnational corporations". It only explains in a footnote the meaning of "o*ther business enterprises" (OBEs)* as *"all business enterprises that have a transnational character in their operational activities, and does*

[29] Ruggie, above n 4.
[30] Oliviver De Schutter *Towards a New Treaty on Business and Human Rights* (Cambridge University Press, 2015) at 41.

not apply to local businesses registered in terms of relevant domestic law."[31] This has been a controversial debate. Proponents believe that there are reasons for drafting the treaty only applicable to the TNCs and OBEs with transnational operations, as provided in the mandate, and not to local companies. One of the reason is because the treaty is expected to fill the gap in the international rules on determining the liability of parent or controlling companies beyond the jurisdiction of the state where the violation occurred. For the time being, TNCs are the ones that benefit the most from this governance gap.[32] The EU disagreed with the proposal of limit the scope of treaty to TNCs, arguing that this would put a numerous EU companies operating in third countries at a competitive disadvantage in relation to their local competitors, which would be exempt from the new treaty's obligations.[33] During the last Session of the OEIGWG in October this year, the EU has firmly embraced the view according to which the treaty should apply to all business enterprises.[34] Ruggie argued that this narrow scope "*pose two enormous impediments to future progress. First, an exclusive focus on transnational corporations has always triggered strong opinion from their home countries…as well as from international business…Second, the definitions of "other business enterprises"…makes no sense in either or legal terms…There is no meaningful distinction between "transnational corporations" and "enterprises that have transnational character."…More importantly, transnational corporations' subsidiaries are typically required to incorporate under "relevant domestic law", often in joint ventures, including with state-owned enterprises or …local businesses…How do all these structures and relationships get disentangled*?"[35]

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[31] HRC Res 26/9, A/HRC/26/9.
[32] European Parliament Research Service "Towards a binding treaty on business and human rights" (July 2017) http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608636/EPRS_BRI%282017%2960 8636_EN.pdf.
[33] Above.
[34] United Nations Human Rights Council "Draft report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" < http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.
[35] John Ruggies "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors" (Sep. 9, 2014) Institute for Human Rights and Business < https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors>.

b. What human rights to be covered?

What rights the treaty should cover? Will they be every international recognized human rights? Or if only limited rights, which ones would they be and on what basis would they be selected? According to the report on the third session of the OEIGWG, most delegations agreed that all internationally recognized human rights should be included. While this is ideal, it might be legally controversial. Ruggie pointed out that "business and human rights encompass "too many complex areas of national and international law for a single treaty instrument to resolve across the full range of human rights. Any attempt to do so would have to be pitched at such high level of abstraction that it would be devoid of substance, of little practical use to real people in real place…"[36] Being also part of the "sceptic" side, Nadia emphasised that "business and human rights" covers incredibly wide ground [37]and adopt such a treaty would set out principles that could be at odds with established law, hence creating confusion and difficulties of implementation.[38] Cassel and Ramasastry suggested that "*the range of human rights covered by the treaty may depend on the kinds of duties imposed by the treaty…A single treaty could employ different menus of rights: a full range for planning provisions, a somewhat narrower range for civil complaints, and a much narrower range for criminal prosecutions*."[39]

c. Extraterritorial jurisdiction

Extraterritorial jurisdiction is an extremely controversial issue in formulating the Treaty. Corporation's impunity for human rights abused are not rare. It happens when host states are unwilling or unable to effectively regulate the conduct of the corporations

[36] John Ruggie "Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization" Harvard Kennedy School < https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/RPP_2015_04_Ruggie.pdf>.
[37] It touches upon various and complex areas of law such as international criminal law, international human rights law, investment law, world trade law, financial law, tort law, contract law, environmental law, tax law, etc.
[38] Nadia Bernaz "Does the world need a business and human rights treaty?" Right as Usual < https://rightsasusual.appspot.com/?p=850>.
[39] Cassell and Anita Ramasastry, above n 25, n 17.

concerned and home states are restrained by international law as well as their national laws in exercising extraterritorial jurisdiction (even if they may be willing to take actions). Extraterritorial jurisdiction exists already but not sufficiently clarified in the BHR context. Guiding Principles 2 provides that "*States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.*"[40] The Commentary is more specific, providing that extraterritorial jurisdiction is permissive but not mandatory: "*At present States are not generally required under international human rights law to regulate extraterritorial activities business domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basic.*" The question here is should the treaty adopt the "required" approach instead of "permissive" approach as in GPs? In other words, will States be expressly authorized or required to exercise jurisdiction over human rights violations committed outside their territories by companies domiciled in the State? If the answer is "no" then victims may continue to be deprived of effective remedies [41] and corporations concerned may continue walk away from human rights abuses. If the answer is "yes" then it would raise both political resistance and legal obstacles. Regarding political resistance, Ruggie claimed that "*State conduct generally makes it clear that they do not regard this to an acceptable means to address violations of the entire array of internationally recognised human rights*" and warned the treaty proponents that they are on "*tricky terrain*" when seeking "*comprehensive forms of extraterritorial jurisdiction under international human rights law*."[42] Cassel and Ramasastry however argued that: "*International law plainly allows States to engage in reasonable exercises of jurisdiction over the conduct of their corporations in other States. A treaty on business and human rights…could either explicitly authorize or require such (reasonable) extraterritorial jurisdiction. The treaty could undertake to articulate guidelines on the parameters of the "reasonableness" or instead allow courts or legislatures to decide on the reasonableness of particular*

[40] Guiding Principles, above n 5, Guiding Principle 2.
[41] Cassel and Ramasastry, above n 25, at 45.
[42] John Ruggie, above n 4.

exercises of extraterritorial jurisdiction, in light of general principles of international law governing jurisdiction."[43]

d. What is the scope of corporate responsibility?

The Guiding Principle has been criticized of, among others, not addressing adequately the problem of corporate veil. According to McConnell, GPs include a human rights due diligence requirement as part of the corporate responsibility to respect human rights. However, the extent to which this requirement imposes a responsibility on corporation to ensure that their subsidiaries operations comply with human rights remains unspecified. In fact, the parent corporation and its subsidiary form two distinct legal entities, each with their own judicial personalities. The shareholders in a corporation may not be held liable for the wrong of the parent company and vice versa. A legally binding instrument on business and human rights would have to correct this problem. Otherwise, it would always be difficult for the victims of the conduct of the subsidiary to seek remedy by filling a claim against parent company. In other words, corporation's impunity will continue. The question here is how the treaty will hold parent companies for the wrong of subsidiaries and vice versa? Cassel and Ramasastry suggest that "*a parent company can be held to have "duty to care" to the employees of the subsidiary, or to person injured by a subsidy, the breach of which can result in legal liability.*"[44] According to Schutter "*the most advisable solution to avoid a parent corporation from shielding itself behind the subsidiary…seems to consist in imposing directly on the parent corporation an obligation, defined by statute, to effectively monitor the behavior of the subsidiaries which it "controls*"".[45] More specifically "*The duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations, directly or indirectly, should be clearly affirmed. This should be seen as part*

[43] Cassell and Ramasastry, above n 25, at 46.
[44] Cassel and Ramasastry, above n 25, at [47-48]
[45] Schutter, above n 30, at 53.

of the due diligence necessary to meet the corporate responsibility to respect human rights, as set out in UNGPs."[46]

Regarding this matter, negotiators might want to look at recent development in the field. In March 2017, France adopted a law on the duty of vigilance of parent and subcontracting companies[47], imposing on large French companies the requirement to assess and prevent the negative impact of their activities and of those of their subsidiaries, suppliers and contractors on the environment and human rights. Business' failure to comply with this legal obligation entails payment of a compensation. Civil society organization hope that this law could serve as model for EU wide legislation, in line with precedent set by the French law on non-financial reporting.[48]

e. Duty bearers

Will the treaty impose direct obligation only on States or will it impose direct obligations on business as well? This subject of the treaty potential duty-bearers have provoked different thoughts. Opponents to the idea of imposing direct obligation on business have pointed out many reasons. First, taking business as duty bearers is not compatible with international legal tradition and this seems hardly achievable. Bernaz emphasized that "*imposing direct obligations onto corporations for all human rights challenges one of the most well-established principles of international human rights law, which is that states, and states only, bear responsibilities in that area. The endless debates over the UN Draft Norms which had attempted to go this route but had to be abandoned are testament to the fact that it will not be easy to sell*."[49] McConelle noted another the view

[46] G. Skinner, R. McCorquodale and O. De Schutter *The third pillar: Assess to Judicial Remedies for Human Rights Violations by Transnational Business* (2013) < http://corporatejustice.org/documents/publications/eccj/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf>.

[47] « Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre » <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id (accessed 4 April 2017)> .

[48] European Parliament, above n 32.

[49] Nadia Bernaz "Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient" Business and Human Right Resources Center <https://business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient>.

that if non-States actors are the direct addressees of international rules…this will place them on par with States politically…in order for non-States actors to be legitimately bound by international rules, they must consent to those rules and thus participate in their formulation.[50]

For civil society organisations who rallied behind a new-legally binding instrument on business and human rights, imposing direct obligations on corporations is almost the whole reason of their cause. It is often argued that the loophole of corporations being rights bearing but not rights bound must be closed. More specifically, at present corporations receive both substantive rights and remedial rights under thousands of bilateral and multilateral investment and trade agreements, they do not hold a corresponding set of duties when it comes to human rights protection.[51] Schutter suggested that "*the most plausible form a new legally-binding instrument imposing direct human rights obligations on TNCs could take is that of a treaty, open to the signature and ratification of states, by which they would accept that all TNCs under their jurisdiction are subject to some form of control, more robust than existing monitoring mechanism*."[52] According to Cassel and Ramasastry, if international treaties can grant corporations rights and remedies, it is difficult to understand why a treaty cannot also impose human rights duties on obligations. They concluded: "*whether a treaty on business and human rights should impose duties directly on companies would appear to be a policy choice to be made by the negotiators, one way or another and not a decision determined by current international law*."[53]

C. Does the world need a Business and Human Rights Treaty?

Even though the OEIGWG has held three Sessions, negotiations have been conducted, opinions about a legally binding Treaty on Business and Human Rights remain strongly divided. The above discussions of the most controversial elements of the future treaty have shown the key challenges that negotiators will have to overcome in order for the

[50] Lee McConnelle *Assessing the feasibility of a Business and Human Rights Treaty* (International and Comparative Law Quarterly, 2017) vol 66 at 148.
[51] Thielbörger and Ackermann, above n 1, at [43-44]
[52] Schutter, above at 59.
[53] Cassel and Ramasastry, above n 25, at 49.

treaty to be born. Cautious of political and legal obstacles, not everyone is ready for the BHR movement to move to hard law. Opponent to a legally binding treaty on business and human rights argue that the UNGPs have been around only for few years. States have not had enough time to implement the GPs, which have already made a meaningful difference, but which will now be undermined by this "competing initiative". They have warned that any pursuit of creating a new legally binding instrument on business and human rights must take full consideration of its ramifications and even if adopted, the good a treaty potentially provides is not worth the high costs that are most likely to be accompanied by it.[54] Ruggie's opinions are illustrative for the sceptic side and often used in numerous statements by business and government representatives. His frequent cited reasons against a legally binding treaty (at least for the time being) are:

- treaty making can be painfully slow, while changes of business and human rights are immediate and urgent;
- a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights;
- even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.[55]

Critiques go on: given the variety of businesses and corporations involved and the very different nature of their potential human rights abuses, a treaty would need to be very broad and abstract content. And that a treaty attempts to establish a "one-size fits-all" solution would thus be at risk of creating a "one-size-fits-none" framework instead.[56] At the same time, it is not better with the more pragmatic options because: Governments could use treaty negotiations as an excuse for delaying national legislation amendments; a treaty born out of a consensus between Governments can only always reflect the smallest common denominator and will always offer less than today's strictest the voluntary standards…[57]

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[54] Thielbörger and Ackermann, above n 1, at [43-44]
[55] Jens Martens and Karolin Seitz *The Struggle for UN Treaty* (Global Policy Volume, 2016) at [45-46]
[56] See Thielbörger and Ackermann, Ruggie, Bernaz above.
[57] Martens and Seitz, above.

However, none of these statements is convincing enough to make people just forget about a binding treaty for the issue of business and human rights, because all of them are also true for the most instruments of international law. If governments had acted according to Ruggie's mentioned logic then neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights would exist.[58] Some proponents also do not agree that a treaty would undermine the GPs. In contrast, they believe that the GPs need a Treaty to bring hard-law coherence and power to their full implementation: the GPs would be far more effective if they have 'teeth'.[59]

Ruggie said himself once "*Further international legalization in business and human rights is inevitable as well as being desirable in order to close global governance gaps. About that there can be little doubt*."[60] Then why wait? More and more people have become convinced that, as an instrument, the UNGPs, even though brought positive results, cannot entirely regulate all the questions related to business and human rights. More and more experts see the need to switch from soft law to hard law to regulate the activities of transnational corporations. Economic Sciences Nobel laureate Joseph Stieglitz had demanded: "*Soft law - the establishment of norms of the kind reflected in the Guiding Principles on Business and Human Rights - are critical; but they will not suffice. We need to move towards a binding international agreement enshrining these norms*."[61]

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[58] Martens and Seitz, above.

[59] Workshop "Does the world need a Treaty on Business and Human Rights: Weighing the Pros and Cons", Business and Human Rights Resources Center < https://business-humanrights.org/sites/default/files/media/documents/note_event_does_the_world_need_a_treaty_on_business_and_human_rights__21-5-14.pdf>.

[60] John Ruggie "Get real or we'll get nothing: Reflections on the first Session of the OEIGWG" Business and Human Rights Resources Center < https://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>.

[61] Joseph E. Stiglitz's address to panel on Defending Human Rights (revised). Geneva (3 December 2013) <www.ohchr.org/EN/Issues/Business/Forum/Pages/2013FBHRSubmissions.aspx>.

I myself am convinced that the UN's efforts to create a legally binding treaty on business and human rights is praiseworthy. Such treaty on business and human rights is needed for many reasons.

First, at the international level, there is a normative gap on the issue of BHR in international framework. At the same time, at the national level, there is a lack of legal accountability in legislation as well as in case practice regarding human rights abuses by businesses. Based on the inadequacy of existing international legal framework on BHR, the insufficiency of international law implementation on BHR issues and the loophole between corporations' rights and obligations in international law, there is a legal need for a binding instrument on business and human rights. It is true that elaboration of such treaty faces monumental legal challenges given its uniqueness of covering the complex areas of both business and human rights. The issues concerning the scope of application, the extraterritorial jurisdiction and the duty-bearers as discussed above consist the most controversial elements of the potential treaty. However, with the solutions offered by scholars, legal experts, it is not impossible to overcome these challenges. A binding instrument seems legally achievable.

Second, the most obvious and powerful objection against proposal of the treaty is lack of consensus. However, missing support by States must not be a knockout argument for any legal reform. Missing political will must be countered with widespread pressure by civil society and the whole civil society organisations are all behind a legally binding treaty for business and human rights.

IV. Conclusion: Next steps in treaty process

By the fourth Session of the OEIGWG in 2018, the chair is expected to present a draft for the legally binding treaty on business and human right. The draft will be the basis for negotiation during the fourth Session. At the meantime, the Chair should invite States and different stakeholders to summit their comments and proposals on the draft elements no later than the end of February 2018.[62] Discussions on the possible treaty will not be limited on the official Sessions of the OEIGWG but also take place in other

[62] Report on the 3rd Session of OEIGWG, above n 34.

events related to business and human rights. So far, the US has not participated in the discussion of the OEIGWG. Although the EU had initially reluctant to support the treaty negotiation process, following the reaching of an agreement with the OEIGWG it has been participating actively in the negotiations. The European Parliament is a staunch supporter of the binding treaty initiative and has called on the EU to show its full commitments to such an instrument and to actively engage in the debates.[63] The leading international business associations will likely continue to resist a legally binding instrument.

It has been clear that a legally binding treaty on business and human rights to be born will have to overcome monumental political and legal challenges. It will be certainly not an easy journey! We must accept that an effective Treaty will take time to negotiate! However, the result will be worth all the efforts! At the meantime, CSR and UNGPs must not be neglected! There is no necessary inconsistency between doing everything at the same time. The implementation of CSR codes and UNGPs must not be undermined. The GPs can do their work in shaping business attitudes and practices. A treaty could do its work by supplying useful incentives and more effective enforcement. Some advocates on both sides publicly endorse this compatibility.[64] They believe that the treaty debates would act as a "political spur" for governments and businesses to implement the Guiding Principles faster and more fully, in order to avoid or anticipate the treaty. Whether or not a treaty is finally agreed and ratified by governments, the process of treaty development itself will encourage and cajole greater action.[65] The fights against human rights abuses must be taken "forwards on all front" because profits can be shared, human rights cannot!

[63] European Parliament, above n 32.
[64] Douglass Cassel "Introduction of topics" Workshop "Does the world need a Treaty on Business and Human Rights: Weighing the Pros and Cons" < https://international.nd.edu/assets/133113/may_14_cassel_remarks.pdf>.
[65] Workshop "Does the world need a Treaty on Business and Human Rights: Weighing the Pros and Cons", above n 59.

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