REFLECTIONS ON THE UN WORKING GROUPS ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

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Abstract

This article explores the work of the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group) as well as the open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights OEIGWG). The main purpose of the Working Group is to promote the implementation of the UN Guiding Principles on Business and Human Rights. It does this by engaging with stakeholders such as governments, civil society, human rights institutions, UN agencies, TNCs and other business enterprises, to ensure that the relevant support and guidance is provided to effectively implement the Guiding Principles. The OEIGWG was established by the Human Rights Council and mandated to produce an international legally binding instrument to regulate the activities of TNCs and other business enterprises. The process of establishing such an instrument is still at an early stage and the article analyses the work of the first few sessions of this working group.

Keywords: Transnational corporations and human rights; UN working groups on human rights and transnational corporations and business enterprises; UN business and human rights agenda

1 Introduction

The United Nations is currently considering the issue of human rights and transnational corporations in the context of two working groups, namely, the working group on the issue of human rights and transnational corporations and other business enterprises (Working Group) and the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG).

The purpose of this article is to provide an analysis of the work of

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these two working groups. The first part of the article gives an overview of the historic developments that led to the establishment of the Working Group and the OEIGWG. The second part of the article discusses the work being done by these bodies and the progress they have made in addressing transnational corporate behaviour. The final part of the article provides conclusions regarding the impact of this work on the United Nation's (UN) business and human rights agenda.

2 Historic Developments

The call for an international code on transnational corporations (TNCs) was the result of an international incident where the International Telephone and Telegraph Company (ITT) was accused of conspiring with the Central Intelligence Agency to overthrow Chile's leftist president, Salvador Allende.[1] In 1972, the UN Economic and Social Council requested the Secretary-General to establish a Group of Eminent Persons to study the impact of transnational corporations on economic development and global relations.[2] This Group recommended the establishment of a Commission on Transnational Corporations. It was tasked with developing a code of conduct for TNCs. The Commission was established in 1974 with 20 members,[3] and its mandate included 'providing information, analysing policy, and offering advisory services,

1 On the ITT involvement in Chile, see M Bucheli & E Salvaj 'Reputation and political legitimacy: ITT in Chile' (1927–1972) 87 *Business History Review* 729–756. See also KP Sauvant 'The negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and lessons learned' (2015) 16 *The Journal of World Investment and Trade* 13.

2 See United Nations Economic and Social Council (ECOSOC) Resolution on The Impact of Transnational Corporations on the Development Process and on International Relations 1721 (LIII) (28 July 1972) in which ECOSOC '[r]equests the Secretary-General, in consultation with Governments, to appoint from the public and private sectors and on a broad geographical basis a study group of eminent persons intimately acquainted with international economic, trade and social problems and related international relations, to study the role of multinational corporations and their impact on the process of development, especially that of developing countries, and also their implications for international relations, to formulate conclusions which may possibly be used by Governments in making their sovereign decisions regarding national policy in this respect, and to submit recommendations for appropriate international action'. See also, T Sagafi-Nejad & JH Dunning *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (2008) 52.

3 ECOSOC Resolution on The Impact of Transnational Corporations on the Development Process and on International Relations 1913 (LVII).

technical assistance and capacity-building'.[4] One of the main objectives of the Commission was to[5]

> secure effective international arrangements for the operation of transnational corporations designed to promote their contribution to national developmental goals and world economic growth while controlling and eliminating any negative effects.

These developments occurred at the height of the pursuit for a 'new international economic order'[6] by developing states in the 1970s, which was a response to the international economic climate and the belief by developing countries that international trade conditions were more advantageous to developed countries. The purpose of the new international economic order was thus to acquire more favourable trade regulations and economic conditions for developing countries. Developing countries voiced their concerns through the UN Conference on Trade and Development and, subsequently, their concerns were discussed in a UN General Assembly Resolution entitled 'Declaration on the Establishment of a New International Economic Order'.[7] An example of the manner in which developing countries started to assert their new-found independence was a trend towards nationalisation in the 1970s, especially in the extractive industry sector.[8] During this time there existed significant polarisation between developing states who advocated mandatory rules regulating corporate activity, and developed states, who preferred a voluntary approach to corporate regulation.[9]

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4 See TH Moran 'The United Nations and Transnational Corporations: A review and a perspective?' (2009) 18 *Transnational Corporations* 92.

5 *Report of the Commission on Transnational Corporations on the Work of its Second Session* (1–12 March 1976), General Assembly Records Supplement No 5 (E/5782) paras 6(b), 7(c) and 29(e). See also Sauvant (n 1 above) 20. As part of its programme of work, the Commission aimed to focus on five areas, one of them being 'research on the political, economic and social effects of the operations and practices of transnational corporations'. This includes research on specific industries including the extractive industries sector.

6 Declaration on the Establishment of a New International Economic Order (GA Res/S-VI1974).

7 Ibid.

8 Sauvant (n 1 above) 14–15; See also SJ Kobrin 'Expropriation as an attempt to control foreign firms in LDCs: Trends from 1960 to 1979' (1984) 28 *International Studies Quarterly* 329.

9 A de Jonge *Transnational Corporations and International Law: Accountability in the Global Business Environment* (2011) 28, 29; D Bilchitz & S Deva 'The human rights obligations of business: a critical framework for the future' in D Bilchitz & S Deva (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) 5; JG Ruggie 'Business and human rights: The evolving international agenda' (2007) 101 *American Journal of International Law* 819. See also Sauvant (n 1 above) 15–17.

The Commission continued its work until 1990 and it published various draft codes.[10] In 1990, the final Draft Code on Transnational Corporations failed to be adopted and, by 1994, the Commission abandoned the project.[11] The failure of the Code was largely the result of differing interests on the part of the various negotiating groups and later also the lack of political will to bring the negotiations to a successful close. Some of the main issues of contention during the negotiations were the legal nature of the Code, ie whether it should be voluntary or binding, compensation for expropriation, the use of international standards as opposed to national regulation, the implementation mechanisms to be used, and the scope of application of the Code, including a definition of 'transnational corporations'.[12]

While negotiations were dragging on, the international investment and political landscapes were changing in such a way that, for many states, a regulatory code started to seem redundant. The rise of international investment agreements, such as Bilateral Investment Treaties (BITs), meant that developed countries now had instruments at their disposal that contained mandatory provisions protecting their investors abroad with adequate dispute-settlement measures.[13] With the fall of socialism in the late 1980s, the priorities of developing countries started changing as they lost many former allies and they became more dependent on Foreign Direct Investment (FDI).[14] This meant that the political will for

10 The Draft Code included a comprehensive section on environmental protection. Paragraph 41 of the 1983 version, for example, states: 'Transnational corporations shall/should carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations shall/should, in performing their activities, take steps to protect the environment and where damaged to [restore it to the extent appropriate and feasible] [rehabilitate it] and should make efforts to develop and apply adequate technologies for this purpose'. See Draft United Nations Code of Conduct on Transnational Corporations (1983 version).

11 Bilchitz & Deva (n 9 above) 5. See Moran, who comments on this period by stating: 'Gradually it became clear that heavy-handed and overly legalistic binding-code regulation was probably not a suitable or even desirable approach for developing-country authorities. But neither was the "laissez-faire, hands-off, and just let international markets work" approach'. Moran (n 4 above) 96–97.

12 Bilchitz & Deva (note 9 above) 46–48, 50; *Report of the Commission on Transnational Corporations on the Work of its Second Session* (n 5 above) para 62, where the Commission stated that the definition of TNCs was a topic that 'posed one of the most difficult tasks facing the Commission, since any formulation of a definition would have to take into consideration the different aspects of the scope, characteristics and impact of the activities of transnational corporations'.

13 Sauvant (n 1 above) 56.

14 D Kinley & R Chambers 'The UN Human Rights Norms for Corporations: The private implications of public international law' (2006) 6 *Human Rights Law Review* 455; Sauvant (n 1 above) 59–61.

the negotiation of a code of conduct relating to TNCs slowly dissipated.[15] During the early 1990s, the Commission on Transnational Corporations was renamed the Commission on International Investment and Transnational Corporations and it was incorporated into the institutional framework of the UN Conference on Trade and Development in Geneva.[16]

Despite the Draft Code not being adopted, the 20 years of dedicated work and effort by the Commission cannot be regarded as a complete failure. As a result of the Commission's efforts, we now have a much more comprehensive understanding of TNCs and their role in global economics and international relations. The work of the Commission may also have helped to pave the way for subsequent UN processes aimed at regulating transnational corporate behaviour in the two decades following the failure of the Draft Code.[17]

In 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights (Human Rights Sub-Commission) established a Working Group on the Working Methods and Activities of Transnational Corporations (Methods and Activities Working Group).[18] The mandate of the Methods and Activities Working Group 'identify and examine the effects of the working methods and activities of transnational corporations on the enjoyment of economic, social and cultural rights and the right to development, as well as civil and political rights'.[19] Furthermore, the Methods and Activities Working Group was required to[20]

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15 Ibid. See Sauvant (n 1 above) 61: 'As the 1980s progressed, the window of opportunity – if there had indeed been one – closed for a comprehensive United Nations Code'. See also 62 where Sauvant quotes Peter Hansen, the last Executive Director of the United Nations Centre on Transnational Corporations (UNCTC), from an interview with Hansen on 20 January 2014: 'The effort to negotiate a comprehensive Code of Conduct in the United Nations was ahead of its time when it was conceived and negotiated. It was never completed because macro-economic and political circumstances changed. But, hopefully, the effort opened the eyes of policy-makers and others about what needs to be done in the area of international investment'.

16 Resolution on the Economic and Social Council on the Integration of the Commission on Transnational Corporations into the institutional machinery of the United Nations Conference on Trade and Development (1994/1). See also Bilchitz & Deva (n 9 above) 5.

17 See Moran (n 4 above) 94.

18 Resolution of the United Nations Sub-Commission on the Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations (Res/1998/8); Bilchitz & Deva (n 9 above) 6. See also D Weissbrodt & M Kruger 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 97 *American Journal of International Law* 903, 904.

19 Resolution of the United Nations Sub-Commission on the Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations (Res/1998/8).

20 Ibid.

> make recommendations and proposals relating to the methods of work and activities of transnational corporations in order to ensure that such methods and activities were in keeping with the economic and social objectives of the countries in which they operate, and to promote the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights.

In 1999, the former Secretary-General of the UN, Kofi Annan, announced a set of nine principles relating to the areas of human rights, labour standards and the environment, called the Global Compact on Human Rights, Labour and Environment.[21] In 2003, the Methods and Activities Working Group presented the final draft of a document it had been working on since its establishment in 1998. The draft document, entitled 'The Norms on the Responsibilities of Transnational Corporations and Other Business Entities' (Norms on Responsibilities of TNCs), was presented to the Human Rights Sub-Commission in 2003,[22] which subsequently approved it.[23]

The Sub-Commission on the Promotion and Protection of Human Rights, however, stated that the Norms on the Responsibilities of TNCs had no legal standing and that the Sub-Commission would not perform any monitoring function in relation to its implementation.[24] In an attempt to resolve this impasse and come up with a new solution to the challenges posed by transnational corporate activity, the Sub-Commission requested the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises. The Special Representative's mandate was, among other things, to 'identify and clarify standards of corporate responsibility

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21 'Secretary-General proposes Global Compact on Human Rights, Labour and Environment in address to World Economic Forum in Davos', UN Press Release SG/SM/6881 (1 February 1999) http://www.un.org/press/en/1999/19990201.sgsm6881.html (accessed 1 July 2016).

22 See Economic and Social Council Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement (accessed 16 August 2016).

23 Id. Where the Sub-Commission 'solemnly proclaims these Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights and urges that every effort be made so that they become generally known and respected'.

24 Id. Where the Sub-Commission 'affirms that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Sub-Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard'. See also Kinley & Chambers (n 14 above) 450, who describe the Norms as 'a viable first step in the establishment of an international legal framework through which companies can be held accountable for any human rights abuses they inflict, or in which they are complicit'.

and accountability for transnational corporations and other business enterprises with regard to human rights'.[25] In July 2005, John Ruggie was appointed as the first such Special Representative.[26]

During the course of his mandate, the Special Representative presented several reports on his findings. Some of his most notable achievements included the Protect, Respect, Remedy Framework[27] and the Guiding Principles on Business and Human Rights.[28]

3 The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises

In response to the adoption of the UN Guiding Principles on Business and Human Rights, the Human Rights Council established a Working Group on the issue of human rights and transnational corporations and other business enterprises (Human Rights Council Working Group) in July 2011.[29] This Working Group consisted of five independent experts and it was constituted for an initial period of three years.[30] The mandate of the Human Rights Council Working Group focused primarily on ways to 'promote the effective and comprehensive dissemination and implementation of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'.[31]

The resolution establishing the Human Rights Council Working Group

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25 See 'Human rights and transnational corporations and other business enterprises' UN Doc (E.CN.4/2005/L.87) https://documents-dds-ny.un.org/doc/UNDOC/LTD/G05/125/07/PDF/G0512507.pdf?OpenElement (accessed 16 August 2016).

26 See 'Secretary-General appoints John Ruggie of United States Special Representative on issue of human rights, transnational corporations, other business enterprises', UN Press Release SG/A/934 (28 July 2005) http://www.un.org/press/en/2005/sga934.doc.htm (accessed 16 August 2016).

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

28 Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie (A/HRC/17/31).

29 See resolution on Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/17/4); See also 'Working Group on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx (accessed 20 January 2017).

30 The five initial Working Group members were Michael Addo, Alexandra Guáqueta, Margaret Jungk, Puvan Selvanathan and Pavel Sulyandziga. See *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (A/HRC/20/29).

31 See (n 29 above).

emphasised the primary responsibility of states to promote and protect human rights and it reiterated that the responsibility of TNCs and other business enterprises is to respect human rights.[32] It also expressed concern that national institutions that are not fully equipped to regulate corporate activities effectively, will be unable to counter or mitigate the negative effects of transnational corporate activity and globalisation in general.[33] The resolution required the Working Group to work with various stakeholders, including governments, civil society, human rights institutions, UN agencies, TNCs and other business enterprises, in order to ensure that the relevant support and guidance is provided regarding the implementation of the Guiding Principles.[34]

The Working Group formally started its work on 1 November 2011, and held its first session in January 2012.[35] The Working Group's first report to the Council made the following observation:[36]

> Transforming the Guiding Principles from agreed-upon practice standards to everyday standard practice is an undertaking of global proportions, and the Working Group underestimates neither the scale nor complexity of the challenge.

The working method of the Human Rights Council Working Group included conducting country visits, issuing thematic reports on various relevant issues, receiving information through tools such as surveys from relevant stakeholders, for example, states, human rights institutions, the business community and civil society. This information related to human rights abuses, the implementation of the Guiding Principles,

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32 Id.

33 Id. See quotation from the resolution that states: 'Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary'.

34 See Resolution on Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/17/4). See also 'Working Group on the issue of human rights and transnational corporations and other business enterprises' http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx (accessed 20 January 2017).

35 The Working Group submits annual reports to the Human Rights Council and the General Assembly as per the Resolution on Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/17/4) para 6(j) and the Resolution on Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/RES/26/22) para 6.

36 See (n 30 above) para 48.

and capacity-building initiatives to improve the implementation of the Guiding Principles.[37]

The Forum on Business and Human Rights is another important initiative, which was established by the same resolution establishing the Human Rights Council Working Group. The Forum on Business and Human Rights holds regular multi-stakeholder meetings that assist the Working Group to gain insight into current challenges related to transnational corporate activity and possible solutions to these challenges.[38] According to the resolution the Forum is guided by the Working Group to [39]

> discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.

The Working Group has stated that the Forum '[became] the main global meeting for the discussion of business and human rights issues'.[40]

The Working Group has engaged not only with international stakeholders, but also with regional stakeholders, such as states, civil society, and business entities, in order to gain insight into regional challenges to the implementation of the Guiding Principles.[41] An important endeavour of the Working Group, on the national level, was the establishment of state national action plans that require states to adopt national action plans in order to ensure the effective implementation of the Guiding Principles.[42] According to the Working Group, the system of using national action plans is important for a number of reasons:[43]

> National action plans encourage constructive multi-stakeholder dialogue on business and human rights issues; they ensure domestic-level uptake of the Guiding Principles; they accommodate all three pillars of the

37 See (n 29 above). Outcome of the Fourth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/4/1) para 3.

38 See (n 29 above).

39 Id para 12.

40 Outcome of the Thirteenth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/13/1) para 18.

41 Outcome of the Sixth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/6/1) para 15.

42 Outcome of the Seventh Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/7/1) para 2.

43 Id para 5.

> Guiding Principles; and they are sufficiently flexible to respond to the range of business and human rights problems that a country may face as well as the diversity of regulatory environments. In addition, national action plans are a key instrument to help level the business and human rights playing field around the world. Global problems cannot be solved by a small number of countries or companies alone.

The Working Group has also described National Action Plans (NAPs) as 'a key driver in advancing wide and comprehensive implementation of the Guiding Principles'.[44] The Working Group stressed that the implementation of a NAP does not fulfil the duty of a state to protect human rights, because the plan merely intended to assist states in implementing the Guiding Principles and ultimately to fulfil their duty to protect human rights.[45] The Working Group provides guidance or assistance with the plan and its implementation through the relevant guidelines. These are updated on a continual basis.[46]

In the view of the Human Rights Council Working Group, NAPs could level the playing field with regard to the legal regulation of business enterprises operating in countries that have established such frameworks.[47] In its ninth session, however, the Working Group stated that there is 'no "one size fits all" approach to formulating, implementing, and reviewing a national action plan, but hoped that its guidance would provide States with a helpful guide to the essential elements for a successful and constructive national action plan process'.[48] Furthermore, at the first session of the OEIGWG, the body tasked with elaborating an international legally-binding instrument on TNCs, one state noted that 'national action plans were neither integrated nor uniform, and that companies could jump from one jurisdiction to another'.[49]

It seems, therefore, that there are doubts whether the NAP would

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44 Id para 8.

45 Outcome of the Eight Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/8/1) para 5 (d).

46 See 'State national action plans' http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed 1 February 2017); See also Outcome of the Eighth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/8/1) para 5.

47 Outcome of the Seventh Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/7/1) para 8.

48 Outcome of the Ninth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/9/1) para 8.

49 See *Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (A/HRC/31/50) para 50.

indeed create a level playing field with regard to the regulation of multinational activity. The NAP initiative is still in its developmental phase, and it is difficult to envision how each country would have the same basis for an action plan. Unavoidably, therefore, there will be differences in these regulatory regimes and corporate 'forum shopping' will most probably ensue. The NAP initiative seems to be an attempt by the Working Group to strengthen national legislative regimes and create more unified structures to be applied to all corporate activity, no matter where the operations may occur. The problem with the regulation of transnational corporate activity in host states is, however, not always only an issue of insufficient legislative regimes, but also one of ineffective regulatory and enforcement mechanisms.

Despite these concerns, the Working Group noted in its tenth session's report that it had received positive feedback from states on the NAP, and many states had already adopted such a plan, or were in the process of doing so. In this regard, the Working Group believed that its efforts were bearing positive results.[50] In subsequent reports, the Working Group [51]

> emphasised its long-held view that the development of NAPs on business and human rights is an essential tool to help increase implementation of, and awareness of, the Guiding Principles on Business and Human Rights by States, civil society organisations, national human rights institutions, and business enterprises.

The full effect of the NAPS is yet to be determined. It is difficult to envision this initiative creating a uniform system with the equal regulation of TNCs and the protection of human rights.

4 The Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights

In June 2014, at its 26th session, the Human Rights Council established

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50 Outcome of the Tenth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/10/1) para 4. See also Outcome of the Twelfth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/12/1) para 4; Outcome of the Thirteenth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/13/1) para 4.

51 Outcome of the Eleventh Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/11/1) para 4; See also Outcome of the Twelfth Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/WG.12/12/1) para 4.

the OEIGWG.[52] The resolution mandated the OEIGWG to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[53] The first session of the OEIGWG, held in July 2015, included inputs from states and other relevant stakeholders. The Human Rights Council had decided that the first two sessions of the OEIGWG should focus on 'conducting constructive deliberations on the content, scope, nature and form of the future international instrument'.[54]

In the first session, the Special Rapporteur on the rights of indigenous peoples, who was also a keynote speaker at the session, remarked that an international legally-binding instrument was a step in the right direction towards addressing any gaps or discord in the existing legal structure, while also addressing the lack of remedies available to victims of corporate human rights abuses.[55] While this view was accepted by delegations, the view was expressed that the focus of the discussion should be on the effective implementation of the Guiding Principles, instead of on the creation of a new international regulatory instrument.[56]

Some delegations expressed the need to see in such an instrument principles such as the indivisibility of human rights, environmental principles such as the polluter-pays-principle, intellectual property rights, prior and informed consent, inherent dignity, peace, justice, and respect for all rights.[57] Many of the abovementioned principles that states would like to have included in the treaty, already apply to multinationals (albeit indirectly) under the primary rules of international law.

Another important aspect that was discussed, especially by non-governmental organisations (NGOs) that participated in the session, was that of the liability of TNCs under any future treaty. The report states that 'most NGOs argued that a legally binding treaty should provide for companies to be held liable' and 'a number of participants considered that the instrument should include the principle of direct responsibility of transnational corporations'.[58] NGOs had particular concerns over the fact that while corporations had effective enforcement mechanisms at

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52 Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights (A/HRC/RES/26/9).

53 Id para 1.

54 See *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* (A/HRC/31/50) para 1.

55 Id para 4.

56 Id para 23.

57 Id para 24.

58 Id paras 29, 47.

their disposal, in the form of arbitration under investment agreements, the victims of corporate abuse did not have a similar mechanisms to enforce their rights against TNCs.[59]

It is difficult to envision that a treaty, signed and ratified by states, would establish direct responsibility on TNCs. Rather states, as the parties to the treaty, would be held directly responsible. TNCs, however, can be held responsible insofar as states incorporate the treaty provisions into national legislation and make them binding on the multinationals, which are either incorporated or operating within their territory or jurisdiction. In this scenario, the responsibility of the TNC would flow from the application of the implementing legislation.

The report further provides:[60]

> Most delegations underlined that a future instrument should clearly set out the direct obligations of corporations to respect human rights. One delegation pointed out that, while the primary responsibility of States was to protect human rights by means of legislative and judicial measures, the responsibility of corporations to respect human rights entailed a direct obligation to prevent, mitigate and redress the human rights abuses caused by their operations.

According to this view, although multinationals may not have direct responsibility in terms of the treaty, they do have a direct responsibility to respect human rights in general, and this includes a duty to exercise due diligence when conducting their operations.

Another argument in favour of the new instrument seems to be that some stakeholders believe that domestic regulation is not sufficient to regulate the activities of TNCs. According to the report:[61]

> One panellist noted that national legislation and jurisdiction were not enough to address human rights by transnational corporations, and that provisions of international law need to deal with the issue in addition to strengthening domestic law.

The problem with expecting international law to carry the burden of regulating corporate activity is that the states, which sign and ratify treaties that make international law, are the same states which have to return home after negotiations and ensure that those treaties are implemented and enforced on a national and regional level. International law is not a self-enforcing discipline, one which will ensure that corporate entities comply with international regulations. International law is only

59 Id para 30.
60 Id para 83.
61 Id para 69.

as strong as the body of states that choose to implement and enforce its provisions against its subjects and people under its jurisdiction. Ultimately, the responsibility to implement and enforce international law provisions applicable to multinationals lies with the home and host states that have the capacity and international obligation to regulate corporate behaviour within their jurisdiction. In this regard, the home and host states are also held responsible under international law for failing to regulate corporate activity within their territory and jurisdiction to the extent that it is possible for a home state or a host state to do so within the bounds of international law.

On this point the report states that 'other panellists noted that an international system for the protection of human rights could not replace national legal systems and that host and home states must ensure the existence of legal remedies for victims'.[62]

Furthermore, according to the report, several NGOs[63]

> highlighted the importance of adopting legislation to prevent negative human rights impacts and establish mechanisms for human rights due diligence, including prevention, mitigation and redress for any such negative impacts that a private business enterprise may cause or contribute to through its own activities or through business relationships directly linked to its operations, products or services. Various NGOs recommended that States adopt policy and regulatory measures to ensure that companies are required to conduct human rights due diligence when operating at home or abroad, including through their business relationships and throughout their supply chains. Parent companies should have a duty to ensure their subsidiaries' compliance. Particular attention should be paid to high-risk zones, including in conflict zones or occupied territories, in order to prevent companies from contributing to human rights violations.

The second session of the OEIGWG took place in October 2016. According to the report of the session, the opinion of the majority of participants was that the instrument envisioned should be directly

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62 Id para 74.

63 Id para 85. The Report further states in para 86: 'Other NGOs noted that States should be required to establish legislation that defines appropriate criminal and civil liability in order to sanction companies that have caused or contributed to human rights abuses. Due diligence processes must involve meaningful consultations with those likely to be affected by corporate activities, including obtaining the free, prior and informed consent of indigenous peoples. Finally, most NGOs noted that the instrument could fill in the gaps of the Guiding Principles and stressed the need for the instrument to cover the obligation of transnational corporations to respect all human rights, including national and international norms on human rights, labour and the environment'.

binding on multinationals and that voluntary initiatives were insufficient.[64] Participants expressed the view that the proposed treaty should contain stringent enforcement mechanisms and possibly be enforced by an international enforcement body,[65] while more focus should be placed on victims and remedies for human rights abuses.[66]

The Chair-Rapporteur, in her opening statement, stated:[67]

> The initiative of a binding instrument was based on respect for the principles of fairness, legality and justice, which should prevail for the benefit of all in the international context, and the objective of the process was to fill gaps in the international system of human rights and to provide better elements for access to justice and remedy for victims of human rights abuses related to transnational corporations. That objective was in no way aimed at undermining host States or the business sector, but was intended to level the playing field with regard to respect for human rights.

The report further seems to express support for the Guiding Principles and states that the envisioned instrument should build upon provisions in the Guiding Principles. According to the report, the Council of Europe Commissioner for Human Rights, Nils Muiznieks, expressed:[68]

> [S]upport for the Guiding Principles, which had formed the basis for a recommendation on human rights and business adopted recently by the Committee of Ministers of the Council of Europe. He recalled that the European Union had also recognized the Guiding Principles as the authoritative policy framework in promoting corporate social responsibility, and the European Commission had encouraged the development of national action plans for the implementation of the Guiding Principles.

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64 Id para 29, which provides: 'Most delegations concurred that voluntary standards were insufficient and that a binding instrument should affirm that human rights obligations prevailed over commercial law.' Regarding direct responsibility of multinationals, one panellist stated in para 69: 'there was no legal obstacle to international law imposing obligations and responsibilities on private non-State actors. He provided examples of several treaties and other instruments that did so, including the Guiding Principles. He agreed that States could impose direct obligations on non-State actors in a treaty, in addition to the obligations imposed on States themselves. That would make it easier for victims to seek remedy without the help of State agencies and to negotiate out-of-court settlements'.

65 Id para 38, which states: 'Any binding instrument should be developed in a way that addresses the causes of current enforcement gaps'. And in para 40: 'There would be a need for an international court to enforce the treaty, as well as for extraterritorial obligations and universal jurisdictional mechanisms.' NGOs also stated, in para 91, that: 'there had to be a binding instrument and a court to enforce it'.

66 Id para 17, which states: 'Several delegations stressed the importance of a victim-centered approach and a focus on access to remedies and reparations'.

67 Id para 7.

68 Id para 103.

> However, much remained to be done, including ensuring broad and inclusive participation in the process of implementation, all of which would feed into the work of the working group in elaborating an international legally binding instrument.

This, however, begs the question of why there is a process for establishing an internationally binding treaty to regulate multinational corporations as well as other business entities, and why there is not more of a focus on building upon the existing framework, such as the Guiding Principles.[69] It seems to make more sense to attempt to strengthen and adjust the existing framework and, further, to focus on implementation and enforcement, which is especially lacking regarding multinational corporate activity.

The OEIGWG held its third session in October 2017. During this session the elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (elements document) was discussed. The elements document was mandated by Human Rights Council Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights[70] and is meant to 'reflect the inputs provided by states and other relevant stakeholders in the framework of the referred sessions, dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument'.[71] The purpose of the elements document was to serve as 'a basis for substantive negotiations to elaborate the instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises (OBEs) during the third session of the OEIGWG'.[72]

The document mostly reaffirms already established duties under international law such as the state duty to protect human rights, the

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69 Id para 111: 'Some delegations noted that a binding instrument would be complementary to the Guiding Principles with regard to both fundamental and operational principles. Such an instrument would strengthen the State duty to protect, in particular with regard to effective compensation, while reaffirming States' regulatory capacity and accountability. One delegation observed that the Guiding Principles had not been negotiated through an intergovernmental process and therefore did not constitute codified international law'; and in para 112: 'The European Union and other delegations insisted that any further steps must be inclusive, rooted in the Guiding Principles and applicable to all types of companies. The European Union insisted that the motto should remain to implement existing obligations'.

70 See (n 52 above).

71 Elements for the Draft Legally Binding Instrument on Transnational Corporation and Other Business Enterprises with respect to Human Rights Chairmanship of the OEIGWG established by Human Rights Council Resolution (A/HRC/RES/26/9) 1.

72 Ibid.

corporate duty to respect human rights and the state duty to take all measures to provide redress or remedy to victims of human rights abuses. However, the elements document goes a step further and requires TNCs and OBEs to 'prevent human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes'.[73] The scope of jurisdiction under the elements document is also fairly broad. It includes any transnational corporation or business enterprise which 'has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned'.[74] The broad scope of jurisdiction is intended to prevent regulatory gaps which exist because of TNCs having such a widespread presence globally. It also aims to ensure that access to justice will be more readily available to victims of human rights abuses.[75]

According to the elements document, 'one of the core objectives in the process of elaboration of an international legally binding instrument is to put an end to impunity in cases of violations or abuses of human rights that occur in the activities performed by TNCs and OBEs'.[76] In order to achieve this, states must (i) 'take all necessary action, including the adoption of legislative and other necessary measures to regulate the legal liability of TNCs and OBEs in administrative, civil and criminal fields'; and (ii) 'strengthen administrative and civil penalties in cases of human rights violations or abuses carried out by TNCs and OBEs'.[77] Furthermore, states 'which do not yet have regulations on criminal legal liability on legal persons are invited to adopt them in order to fight impunity and protect the rights of victims of violations of human rights perpetrated by TNCs and OBEs'.[78] According to the elements document, criminal liability should also be extended to include natural persons such as directors of corporations.[79]

The elements document also recognises the 'primacy of human rights obligations over trade and investment agreements.'[80] This sentiment is in conflict with current principles of international law, which do not provide for a hierarchy of norms, except in the case of *jus cogens*.[81] Delegates

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73 Id 5.
74 Id 11.
75 Ibid.
76 Id 7.
77 Id 8.
78 Ibid.
79 Ibid.
80 Id 3.
81 *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 (accessed 27 November 2017) para 29.

also raised this concern at the third session, questioning the legal basis for the provision and asking whether the provision would 'require the renegotiation of existing treaties, and whether this implied that States could disregard provisions of trade and investment treaties, citing human rights'.[82]

Concerning the scope of application of the proposed treaty, the elements document states that actors subject to the application of the instrument would include 'states and organisations of regional economic integration', 'TNCs and OBEs' and 'natural persons'.[83] Some delegations at the third session expressed concern with regard to the application provision and argued that 'only States would be the proper subjects'.[84] A panellist in the general obligations panel 'voiced concern over imposing international law obligations on companies' and stated that 'establishing human rights obligations on companies could lead to States delegating their duties to the private sector, undermining the full protection of human rights'.[85]

Regarding the jurisdiction section, delegations[86]

> expressed most concern with the provision authorizing jurisdiction over "subsidiaries throughout the supply chain domiciled outside [States'] jurisdiction." Additionally, concern was raised over the provision permitting jurisdiction over "abuses alleged to have been committed by TNCs and OBEs throughout their activities, including their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them." These delegations argued that this wording was too broad and could cover legal entities with little connection to the forum State.

A further concern raised by delegates with regard to the elements document involves its similarity to the UNGPs and the possibility of it undermining the UNGPs.[87] Some delegations expressed the opinion that 'discussions on a legally binding instrument were premature' and that the 'UNGPs were unanimously adopted six years ago, and more time was needed to allow for States to implement the UNGPs'.[88] With regard to the UNGPs specifically:[89]

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82 Id para 41.
83 See (n 71 above) 5.
84 See (n 81 above) para 55.
85 Id para 60.
86 Id para 102. See also Elements for the Draft Legally Binding Instrument on Transnational Corporation and Other Business Enterprises with respect to Human Rights Chairmanship of the OEIGWG established by Human Rights Council Resolution (A/HRC/RES/26/9) 11.
87 See (n 81 above) para 22.
88 Id para 23.
89 Id paras 19–20.

> Delegations recognised that initiatives such as the UNGPs have been a large step forward, but found that voluntary principles have not been enough; a mandatory regulatory framework was needed to ensure accountability and access to justice. Creating a legally binding instrument would be complementary to, and not in opposition of, the UNGPs. Legal lacunae in the UNGPs could be addressed with international obligations, and certain aspects of the UNGPs should be made mandatory. A legally binding instrument would benefit victims of business-related human rights abuse by ensuring that companies are held accountable and that victims have access to prompt, effective, and adequate remedies.

Bearing in mind this statement it is important to remember that the UNGPs are a reflection of existing international law standards relating to the responsibility of TNCs and states regarding TNC behaviour. Not all of the principles contained in the UNGPs are voluntary; in fact, most constitute binding international law norms such as the state duty to protect and the corporate duty to respect which is reflected in many domestic legal frameworks.[90] Regarding the implementation of the instrument or treaty, new mechanisms will probably be suggested in order to hold TNCs accountable and ensure that victims have access to judicial process to enforce their rights against TNCs. However, during the panel on implementation, delegations questioned whether this would be useful and instead argued that the focus should be on 'strengthening existing institutions' and relying more on initiatives such as the formulation of national action plans in terms of the UNGPs.[91] Other delegations supported the establishment of an international judicial body. However, concerns were raised whether this would be an effective solution.[92]

5 Conclusion

During the panel on general obligations one panellist discussed[93]

> the obligation of companies to comply with internationally recognized human rights law, regardless of whether the host State has ratified a particular convention.

This begs the question: What is the contribution of a proposed binding instrument? It seems that the document's main objective, besides restating existing obligations applicable to TNC activity, is to put an

90 See Frequently Asked Questions about the Guiding Principles on Business and Human Rights http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf (accessed 27 November 2017) 9.
91 See (n 81 above) para 116.
92 Id para 117.
93 Id para 59.

end to impunity and to ensure that binding rules exist which can be effectively enforced against TNCs. Nevertheless, is a treaty capable of achieving this objective? A business organisation stated that 'the root problem regarding access to justice was a lack of the rule of law, and the instrument would need to find ways of incentivizing States to implement existing obligations'.[94] As we have seen from the UNGPs, international rules already exist which can comprehensively address the activities of TNCs.

However, it seems that what the international community is craving at this point is a one-size-fits-all, instant solution to the problem of holding TNCs accountable for their actions. The UNGPs, for example, attempt to ensure accountability of TNCs by focusing on implementation of the guiding principles, mostly on the domestic level, through initiatives like the national action plans. The UNGPs make it very clear that states have a duty to regulate corporate behaviour within their jurisdiction and therefore states need to implement measures and monitor compliance with such measures.[95] Corporations, on the other hand, have a duty to respect, which includes the responsibility to incorporate regulatory measures into their own operations in order to ensure compliance with relevant human rights standards.[96]

Taking into account the fact that we already have a comprehensive legal framework in place that further provides for measures of implementation, we have to ask whether a new legally binding instrument will be more effective in regulating corporate behaviour. Despite the fact that the proposed instrument addresses TNCs directly, this provision is not legally sound and the ultimate responsibility of regulating corporate behaviour and enforcing standards applicable to TNCs will still fall on the state, whether that responsibility is in terms of existing international law or a new instrument which simply restates existing international law. The problem of enforcement and access to justice will probably not improve through stricter legal language, and the power of a treaty is not absolute in ensuring that states comply with certain international standards. However, the work of the OEIGWG is still in its infancy and it is yet to be determined whether their efforts will aid or harm the current progress made by the UN on the Business and Human Rights agenda.

94 Id para 92.

95 See Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 27 November 2017).

96 Ibid.