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**CREATING INTERNATIONAL LEGAL
ACCOUNTABILITY FOR CORPORATE HUMAN
RIGHT ABUSES**

Final Thesis to obtain the degree of
Doctor of Law with the specialty in
Public International Law

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Ayşe Elif Yıldırım

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ABSTRACT

It is a known fact that businesses are drivers of economic development, social welfare and technological advancement. However, they also became responsible for many physical human sufferings, human rights violations or system 'hacks' that effects the future of societies. We are facing a problem of compliance with international human rights standards by these private entities and compensating the human rights victims of these abuses becomes a pressing legal issue. On the other hand, the current international law-making structure is not allowing any regulation to evolve in a manner that is beneficial for all the stakeholders and state legislators are very limited to their territorial borders. The problems appear to have high complexities, sometimes root itself in theoretical discussions of legal scholarship. This study aims to look into the international and national efforts to fill in these legal lacunas by analysing the history, the current regulatory framework and the status of the discussions on business and human rights. It aims to pinpoint the main blockages hindering the process of solving problems of the field. It arrives to the solution that state systems can only offer solutions to a certain extent, an over-arching legal regime at the international level should be taken into consideration more seriously and creation of international legal accountability might pose monumental changes in the way we are thinking about international law.

KEYWORDS

Public International Law, Business and Human Rights Law, Binding Treaty Negotiations on Business and Human Rights, Corporate Human Rights Abuses, International Legal Accountability

RESUMO

É sabido que as empresas são os motores do desenvolvimento económico, do bem-estar social e do progresso tecnológico. Mas também se tornaram responsáveis por muito sofrimento humano físico, violação de direitos humanos, ou adulterações do atual sistema que irão afetar o futuro das sociedades. Estamos perante um problema de cumprimento dos padrões internacionais de direitos humanos por estas entidades privadas e a compensação das vítimas por violação de direitos humanos torna-se uma questão jurídica. Por outro lado, a atual estrutura legislativa internacional não está a permitir que as normas evoluam de maneira benéfica para todos os stakeholders, assim como os legisladores nacionais são limitados às suas fronteiras territoriais. Os problemas aparentam ser de alta complexidade, às vezes enraizados em discussões teóricas da academia jurídica. O presente estudo tem como objetivo observar os esforços nacionais e internacionais para preencher tais lacunas jurídicas, por meio da análise histórica, do atual quadro normativo e do status das discussões sobre empresas e direitos humanos. A finalidade é apontar os principais obstáculos que impedem o processo de solução de problemas em campo. O trabalho conclui que os sistemas estatais podem oferecer somente soluções até certo ponto, sendo necessário considerar de forma mais séria a adoção de um regime jurídico internacional abrangente e a criação de um sistema de responsabilização jurídica, o que pode provocar mudanças monumentais na maneira em que se pensa o direito internacional.

PALAVRAS-CHAVE: Direito Internacional Público; Empresas e Direitos Humanos; Negociação Vinculativa de Tratados sobre Empresas e Direitos Humanos; Abuso de Direitos Humanos por Empresas; Responsabilidade Jurídica Internacional.

LIST OF ABBREVIATIONS

| | |
|---------------|--|
| ASEAN | Association of Southeast Asian Nations |
| ATS | Alien Tort Statute |
| BHR | Business and Human Rights |
| CEDAW | The Convention on the Elimination of all Forms of Discrimination Against Women |
| CSR | Corporate Social Responsibility |
| EBT | Elements of a Binding Treaty |
| ECHR | European Convention on Human Rights |
| ECOSOC | United Nations Economic and Social Council |
| ECtHR | European Court of Human Rights |
| ETO | Extraterritorial Obligations |
| EU | European Union |
| FDI | Foreign Direct Investment |
| GATT | General Agreement on Tariffs and Trade |
| ICJ | International Court of Justice |
| ILO | International Labour Organization |
| IMF | International Monetary Fund |
| IOE | International Organization for Employers |
| ISO | International Organization for Standardization |
| MNE | Multinational Enterprise |

| | |
|---------------|--|
| NAP | National Action Plan |
| NCPs | National Contact Points |
| NGO | Non-Governmental Organization |
| NPR | National Public Radio |
| OBE | Other Business Enterprises |
| OECD | Organization for Economic Co-operation and Development |
| OEIGWG | The Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights |
| SRSG | Special Representative to the Secretary-General |
| TNCs | Transnational Corporations |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| UNCTC | United Nations Centre on Transnational Corporations |
| UNEP | United Nations Environment Programme |
| UDHR | Universal Declaration on Human Rights |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| UK | United Kingdom |
| US | United States |
| WTO | World Trade Organization |

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INTRODUCTION

1. INTRODUCTORY REMARKS

The impact of the corporations on societies in the 21st Century is bigger than before. Today business enterprises are essential contributors to the global economy¹ and larger ones sometimes outperform the national economies of some states². Big companies tend to grow faster than nations³, especially the newer companies (also known as start-ups) with a market potential. According to the website Fortune, “In total, the Fortune 500 companies account for \$12.5 trillion in revenues, \$945 billion in profits, \$17 trillion in market value and employ 26.8 million people worldwide”⁴. These companies mostly operate in more than one state and have effects on many aspects of the society and how they are being governed. We are living in an era where the corporations are undeniably having more and more influence on the national governments and their citizens⁵.

The business enterprises today are taking advantage of the opportunities provided by the globalization trend. Businesses are the forerunners in contributing to and benefitting from globalization, however this is not a story of a fairy-tale. There are major side effects of globalization, especially on those cannot benefit from it. The globalization comes with its costs

¹ “Global FDI inflows declined in 2014. Global foreign direct investment (FDI) inflows fell by 16 per cent to \$1.23 trillion in 2014, mostly because of the fragility of the global economy, policy uncertainty for investors and elevated geopolitical risks. New investments were also offset by some large divestments.

Inward FDI flows to developing economies reached their highest level at \$681 billion with a 2 per cent rise. Developing economies thus extended their lead in global inflows. China became the world’s largest recipient of FDI. Among the top 10 FDI recipients in the world, 5 are developing economies. (...)

Investments by developing-country multinational enterprises (MNEs) also reached a record level: developing Asia now invests abroad more than any other region. Nine of the 20 largest investor countries were from developing or transition economies. These MNEs continued to acquire developed-country foreign affiliates in the developing world.” UNCTAD, World Investment Report 2015: Reforming International Investment Governance, [http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf] accessed December 2019

² Robert C. Blitt, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance”, *Texas International Law Journal*, Vol. 48, Issue 1 (2012), p. 35

³ UN Press Release (TAD/INF/PR/47), UN Conference on Trade and Development, Are Transnationals Bigger than Countries?, (12 August 2002)

⁴ Fortune 500, [<http://fortune.com/fortune500/>], accessed December 2019

⁵ Francesco Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations” in *Economic Globalisation and Human Rights* edited by Wolfgang Benedekt, Koen de Feyter and Fabrizio Marella, (United Kingdom: Oxford University Press, 2008), p. 249. Not only throughout their operations but we even face situations of human rights activism of corporations that resonates among their consumers, resulting their influence being stronger than the states’ influence on its own citizens. This of course, created some discussions around the activist CEOs and their impact on sales of their own products when they pursue activist missions. Please see: Harvard Business Review, “The New CEO Activists” [<https://hbr.org/2018/01/the-new-ceo-activists>] accessed December 2019

and it is hard to manage these costs without a proper legal regime that creates an environment protecting the most vulnerable⁶.

Whereas it is true the businesses are contributing to economic development with their investments in the less developed countries and consequently, creating jobs, rising the standard of living, supporting the exercise of fundamental rights; they are also getting involved in harmful activities and sometimes human rights abuses⁷. We see these types of abuses mostly in the countries where there is lack of rule of law, weak governance and poor implementation of human rights mechanisms. Despite not all companies are 'hostile' towards people and their fundamental rights, there have been cases of harm also reflected in the global media⁸. Well-known enterprises were getting involved in gross human rights abuses, with or without intending to do so. For instance, in 2001, the US-based multinational oil company ExxonMobil was accused at the US Courts that the Indonesian security forces hired to protect the natural gas pipeline being built, was conducting human rights abuses against the villagers of Aceh, Indonesia. The accusations included torture, rape and murder⁹. It is not clear whether the security forces are liable for the crimes committed, as well as the company ExxonMobil, who hired these professionals probably knowing what they might be capable of. The victims are still struggling to get proper compensation due to legal limitations exist¹⁰.

⁶ For more on this subject please refer to: Joseph Stiglitz, *Globalization and Its Discontents*, (United States: W.W. Norton & Company, 2002)

⁷ For an analysis of the correlation between the FDI attraction and kept low wages for workers: Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, "The Effects of Multinational Production on Wages and Working Conditions in Developing Countries" in *Challenges of Globalization: Analyzing Economics* edited by Robert E. Baldwin and L. Alan Winters, (United States: University of Chicago Press, 2004), pp. 279-326

⁸ For some of them: Al Jazeera, "BlackRock in Amazon: World's Largest Investor in Deforestation" (30 August 2019), [<https://www.aljazeera.com/ajimpact/blackrock-amazon-world-largest-investor-deforestation-190830140755393.html>]; The New Yorker, "WhatsApp Claims that an Israeli Tech Firm's Spyware Targeted Human Rights Activists and Journalists" (29 October 2019), [<https://www.newyorker.com/news/news-desk/whatsapp-sues-an-israeli-tech-firm-whose-spyware-targeted-human-rights-activists-and-journalists#>]; The Guardian, "Human Rights Violations have increased 70% since 2008 globally" (9 September 2014), [<https://www.theguardian.com/sustainable-business/2014/sep/09/human-rights-violations-increase-corporate-responsibility>]; ILO, "The Rana Plaza Incident and Its Aftermath" [http://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm]; NPR, "4 Years after Rana Plaza Tragedy What's Changed for Bangladeshi Garment Workers?" [<https://www.npr.org/sections/parallels/2017/04/30/525858799/4-years-after-rana-plaza-tragedy-whats-changed-for-bangladeshi-garment-workers?t=1538401463830>] all accessed December 2019

⁹ Business & Human Rights Resource Centre, "ExxonMobil Law Suit (re Aceh)", [<http://business-humanrights.org/en/exxonmobil-lawsuit-re-aceh>] accessed December 2019

¹⁰ The latest update on the ExxonMobil case we could find was from 2016, where the US Federal Court decided that the case 'touch and concern' the US jurisdiction under the Alien Tort Statute, however after the recent decision of *Jesner v. Arab Bank* (please see Chapter IV(6.2.)), the outcome of the case became more unpredictable. Please see: Corporate Social Responsibility and the Law, "Alien Tort Case Development: Plaintiffs in ExxonMobil Case Survive 'Touch and Concern' Review" (31 July 2015).

There is a difficulty in regulating the activities of business enterprises and align these activities with the international human rights law and make sure that there is compliance¹¹. In addition, in case of an abusive action, states, especially the host states, might fail to address them which makes the situation more compelling¹².

The business and human rights discussions are on the agenda of the UN for nearly half a century. Corporate human rights abuses started to attract the attention of the international community already in the 1970s with the raise in foreign investment trends¹³, however, attempts to have a legal regime to address the negative impacts of businesses were unsuccessful, probably for the sake of encouraging the positive impacts of the businesses on the global economy. The most recent successful legal development in the field is the United Nations Guiding Principles on Business and Human Rights (“UNGPs”)¹⁴.

The UNGPs was constructed as a soft-law instrument. The soft-law instruments are somewhat diplomatic consensuses under international law¹⁵ and they do not create international legal obligations and accountabilities. Therefore, despite in the beginning the UNGPs claimed to be a success story, in few years it deemed insufficient to address corporate human rights abuses. That being said, following the acceptance of UNGPs, certain countries started to adopt national

[<https://www.csrnthelaw.com/2015/07/31/alien-tort-case-development-plaintiffs-in-exxon-mobil-case-survive-touch-and-concern-review/>] accessed December 2019

¹¹ Laura García Martín, “Empresas transnacionales y derechos humanos: explorando el concepto de complicidad empresarial” in *Os Sujeitos Não Estaduais no Direito Internacional* edited by Francisco Pereira Coutinho, (Portugal: Petrony Editora, 2019), pp. 200-207; José Elías Esteve Moltó, “La limitada responsabilidad de las empresas transnacionales: el necessário tránsito de um soft law autorregulatori a um tratado vinculante”, in *Os Sujeitos Não Estaduais no Direito Internacional*, pp. 219-224

¹² Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law*, (United Kingdom: Edward Elgar, 2011), pp. 9-10

¹³ The foreign direct investment numbers reach its peak with entering into the new millennium. For the trade flows in numbers please see UNCTAD Statistics Website: [<https://unctad.org/en/Pages/statistics.aspx>] accessed December 2019

¹⁴ UN Guiding Principles on Business and Human Rights (for the full text): [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf] accessed December 2019

¹⁵ “We have advanced four complementary theories explaining why in certain circumstances states may use soft law-legally nonbinding commitments from which legal consequences flow. These theories (coordination, loss avoidance, delegation, and international common law) explain a significant range of the soft law we observe. Under the loss avoidance theory, the negative sum aspect to sanctions for violating international legal rules means that in many cases binding legal obligations are inefficient. Nonbinding soft law obligations allow states to realize more value from their commitments by reducing the losses in the event of undeterrable violations. Under the delegation theory, soft law allows states to tap into a more efficient method of amending legal rules as circumstances change by allowing individual states to act as a focal point for re-coordinating expectations about what constitutes compliant behavior with legal rules.” Please see for a comprehensive overview on “soft-law” and why states opt for this option: Andrew T. Guzman and Timothy L. Meyer, “International Soft Law”, *Journal of Legal Analysis*, Vol. 2, Issue 01 (2010), pp. 171-225; also please see Chapter IV(4.1.1)

legislations, but the legal evaluation is rather slow, compared to the rapid expansion of businesses¹⁶.

In 2014, a working group was established to elaborate the possibility of an international legally binding treaty that might “provide legal solutions to cure serious lacunae and ambiguities in the current framework of international law which have a serious negative impact upon the rights of individuals affected by corporate activities¹⁷”. It was aimed to close the necessary gaps to ensure some sort of liability arising from human rights violations and granting access to effective remedies. However, the future of these negotiations appears uncertain¹⁸.

The current tools exist both in the national and international systems appear to be deficient in solving the issues of business and human rights and providing relief to victims. The discussions are heated more than ever. This study aims to provide a more holistic outlook on the business and human rights issues by looking at the problem from historical and legal points of views and continuing with the analysis of the current discussions at the UN. It aims to make inferences on the basis of these analysis and aims to contribute to the future of the business and human rights field.

2. DEFINITION OF THE PROBLEM

The problem this thesis is focusing on has two dimensions: First, there is no legal harmonization ensuring the businesses are operating in compliance with international human rights principles¹⁹. Second, the business enterprises involved in human rights abuses can easily escape from liability due to legal lacunas existing both in national and international levels²⁰.

The first dimension of the problem was, to a certain extent, tried to be solved by the UNGPs. What the UNGPs tried to achieve was to create an understanding that corporations do indeed

¹⁶ Please see: Chapter II(4)

¹⁷ David Bilchitz, “The Necessity for a Business and Human Rights Treaty” (30 November 2014), p. 3

¹⁸ Please see: Chapter III

¹⁹ Sarah Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights”, *Netherlands International Law Review* Vol. 46(02) (1999), pp. 171-203; Menno T. Kamminga, "Corporate obligations under international law." *Submission to the Office of the United Nations High Commissioner for Human Rights* (2004); Jennifer A. Zerk, *Multinationals and corporate social responsibility: Limitations and opportunities in international law*, (United States: Cambridge University Press, 2006)

²⁰ Nicola Jägers, “UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?”, *Netherlands Quarterly of Human Rights* Vol. 29(2) (2011), pp. 159-163; Lee McConnell, “Assessing the Feasibility of a Business and Human Rights Treaty” *International & Comparative Law Quarterly* Vol. 66(1) (2017), pp. 143-180; Jean d’Aspremont, et al. "Sharing Responsibility between Non-State Actors and States in International Law: Introduction." *Netherlands International Law Review* Vol. 62(1) (2015), pp. 49-67.

have to comply with these principles. But the UNGPs does not create legal obligations, which is its shortcoming. It accepts that the corporations should comply with international human rights principles, but according to the UNGPs this is not an obligation but a responsibility. Furthermore, the UNGPs comes in a set of principles format, making its application is voluntary, which diminishes its legal enforceability²¹.

The soft-law nature of the UNGPs would not be the only issue. In fact, the soft-law nature of the UNGPs could be acknowledged as a positive move, looking at the example of the Universal Declaration of Human Rights (“UDHR”) which is also constructed as a not-binding document but currently has huge acceptance and respect among the international community. However, there is a nuance with the UNGPs which makes a difference. Differentiating from the UDHR, the UNGPs states this corporate responsibility to respect human rights does not derive from international law, but from the expectations of the society²², which is a concept that is hard to define under legal scholarship²³. This, unfortunately, decreases the reliability of the UNGPs and even makes it less serious in the eyes of international lawyers and stakeholders²⁴. Therefore, the situation of a legal acceptance for the businesses to comply with international human rights principles still lingers.

The second dimension of the problem is more related to access to remedy and relatively more complicated, since it involves more stakeholders and more variables²⁵. The first layer of this problem would be the hardship of identifying the liable entity or person when a human rights

²¹ Julia Ruth-Maria Wetzel, *Human Rights in Transnational Business: Translating Human Rights Obligations in Compliance Procedures*, (Switzerland: Springer, 2015), pp. 143-144

²² Whereas the UDHR has a more humanistic foundations, which facilitates linking it with natural law theories. Please see *infra*. pp.17-23

²³ Please see: Chapter IV(5)

²⁴ Jennifer Franken, *Corporate Responsibility in the Natural Stone Sector: The Effectiveness of Voluntary CSR Initiatives in Achieving Sustainability*. (LAP LAMBERT Academic Publishing, 2017). Stephanie Bijlmakers, *Corporate Social Responsibility, Human Rights and the Law* (United States: Routledge, 2019), p. 2; Florian Wettstein, "Beyond voluntariness, Beyond CSR: Making a Case for Human Rights and Justice." *Business and Society Review* Vol. 114(1) (2009), pp. 125-152.

²⁵ "Access to justice in victims' local courts – in the host states of MNCs – may be impeded by intimidation, corruption, or victims' invariable inability to fund lawyers and to muster the legal resources and expertise necessary to litigate against a well-resourced MNC. Access to adequate legal resources (namely, lawyers who are in a position and willing to take on complex, protracted and expensive litigation) has resulted in victims filing claims in courts of an MNC's home state where the parent MNC is based and over which its home courts can exercise jurisdiction. In the past this approach has usually been confronted by two key obstacles: firstly, whether the court has, or will exercise, jurisdiction; and secondly, whether the court will lift the 'corporate veil' to hold a parent company liable in respect of operations ostensibly conducted by foreign subsidiaries." Richard Meeran, "Access to Remedy: the United Kingdom Experience of MNC tort litigation for human rights violations" in *Human Rights Obligations for Business: Beyond Corporate Responsibility to Respect* edited by Surya Deva and David Bilchitz (United States: Cambridge University Press, 2013), p. 382

abuse occurs²⁶. The main legal issue is the corporate laws of the States allow the headquarters of the company to escape from liability deriving from harmful actions conducted by the subsidiaries²⁷. The legally established limited liability principle does not always permit reaching to the parent company in case of an abuse. In addition, for bigger companies the subsidiaries involved in human rights abuses are often located abroad, which highly benefits from territorial application of laws²⁸. States are often reluctant to accept the existence of an extraterritorial jurisdiction in a case, which overrules the possibility to go to the parent company with liability claims²⁹.

To add to the complexity of the problem, the subsidiaries may also escape from liability. It could be the case these human rights abuses are left uncompensated or get ‘swept under a rug’ to accommodate the needs of the business enterprises for the sake of keeping the financial investment inside the country³⁰. Indeed, the host states sometimes depend on these business enterprises and the financial resources they bring into a country³¹. In addition, there is a lack of willingness coming from the home states courts to look into a case that occurred in another State’s territory³². Furthermore, the host states having weak administrative and judicial powers and being heavily dependent on these corporations for economic reasons, might result several unwanted situations. The State might act as a co-perpetrator in crimes or the state courts might not to provide any remedies for the victims, even go as far as silencing them³³. The state might be also a zone where armed conflict³⁴ is taking place and the state institutions might not be

²⁶ *supra*. ft. 20

²⁷ David Bilchitz, “Introduction: Putting Flesh on the Bone, What Should a Business and Human Rights Treaty Look Like?” in *Building a Treaty on Business and Human Rights: Contexts and Contours* edited by Surya Deva and David Bilchitz, (United Kingdom: Cambridge University Press, 2017), p. 3-4; also please see Jena Martin, ““The End of the Beginning?”: A Comprehensive Look at the UN’s Business and Human Rights Agenda from a Bystander Perspective” *Fordham Journal of Corporate and Financial Law* Vol. 17 (2012). pp. 880-885

²⁸ Gwynne Skinner, "Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law." *Washington and Lee Law Review* Vol. 72 Issue 04 (2015), pp. 1769-1864.

²⁹ Smita Narula, “International Financial Institutions, Transnational Corporations” in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* edited by Malcom Langford et. al., (United States: Cambridge University Press, 2013), pp. 118-120

³⁰ Gatto, *Multinational Enterprises and Human Rights*, p. 10-11

³¹ Wetzel, *Human Rights in Transnational Business*, p. 4

³² Gatto, *Multinational Enterprises and Human Rights*, p. 26; also please see: Chapter IV(6)

³³ David Bilchitz, “Introduction: Putting Flesh on the Bone”, p. 3

³⁴ “national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting (gross) human rights abuses, potentially amounting to international crimes. Such abuses occur most frequently in situations where the human rights regime cannot be expected to function as intended, such as armed conflict. Greater legal clarity is needed for victims and business enterprises alike.” UN Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Recommendations on follow-up to the mandate (11 February 2011)

operating efficiently to address these abuses. The state might be the abusers itself and might use the businesses to provide tools to continue their abusive actions.

This in fact would bring us to a more urgent issue, which would be the criminal liability of corporations. Criminal prosecution against a company is not always possible, since the criminal laws are mostly considered as addressing the individuals and not the legal entities³⁵. Only a handful of national legal systems allow going directly to the company officials, managers or business representatives³⁶. In addition, when the companies are operating in more than one legal system, the traceability of the crime and generating accountability gets even more complicated, and currently neither national nor international law provide solutions³⁷.

In light of this, this study will focus on three research questions; each elaborated in separate chapters:

- *How did the international community form and why the businesses were left out to be a part of the creation of the international order; what is the relationship between the state and business enterprises, how can a business enterprise get involved in a human rights abuse and what kind of solutions were offered in the past to address these abuses?*
- *What are the existing regulations on businesses and human rights issues on international, regional and national levels; what kind of rights and obligations they pose for corporations, how large are their impact and how far reaching their problem-solving abilities?*
- *Where does the current discourse on business and human rights heading at the international level with regard to the future evolution of business and human rights law?*

3. THEORETICAL FRAMEWORK

This study will mainly focus on the possibility of creation of a mandatory international legal accountability for corporate human rights abuses which touches the problem whether it is

³⁵ André Ventura, *Lições de Direito Penal*, Vol. 1, (Portugal: Chiado Editora, 2013), pp. 97-98

³⁶ More on this subject: Helen Anderson ed., *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (The Netherlands: Kluwer Law International, 2008)

³⁷ Eric Colvin, "Corporate Personality and Criminal Liability", *Criminal Law Forum* Vol. 6 No. 1 (1995); pp. 1-44; Jennifer Arlen, "The Potentially Perverse Effects of Corporate Criminal Liability", *The Journal of Legal Studies* Vol. 23 No. 02 (1994), pp. 833-867

possible to extend international human rights principles to corporations. Currently, such direct legal accountability does not exist³⁸, but considering the complexities of the problem, we do believe this should be the aim to solve business and human rights problems³⁹. This study will dive deeper into the analysis of why the current international legal order may not be accommodating for creation of such legal accountability.

Before diving deep into the analysis, we aim to lay down the theoretical tensions exist behind the evolution of such legal accountability.

In the most traditional sense, international law has been defined as the law between states⁴⁰. The people, the individuals, were never a part of the international law⁴¹ and international law-making. First World War started as a conflict of power between states and not individuals⁴². After the Second World War, the international organizations started to appear, such as the United Nations and in pursuit, the Council of Europe, European Union, World Trade Organization among many others⁴³. Most international organizations have a specific focus, and the UN initially, was formed not for the individuals but to ensure that the global peace is secured⁴⁴. And this was done through creating mechanisms, such as the UN Security Council, to monitor again the state actions that might be violent.

³⁸ Cedric Ryngaert, “Imposing International Duties on Non-State Actors and the Legitimacy of International Law” in *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* edited by Math Noortmann and Cedric Ryngaert, (United Kingdom: Ashgate, 2010), pp. 68-69

³⁹ In the same line: Wetzel, *Human Rights in Transnational Business*, p. 5; Nicolás Carrillo-Santarelli, “A Defence of Direct International Human Rights Obligations of (All) Corporations” in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* edited by Jernej Letnar Cernic and Nicolás Carrillo-Santarelli, (United Kingdom: Intersentia, 2018), pp. 33-61; David Bilchitz, “The Necessity for a Business and Human Rights Treaty”; David Weissbrodt, “Keynote Address: International Standard Setting on the Human Rights Responsibilities of Businesses”, Stefan A. Reisenfeld Symposium 2008, Berkeley, California (14 March 2008)

⁴⁰ Bardo Fassbender et. al. ed., *The Oxford Handbook of the History of International Law*, (United Kingdom: Oxford University Press, 2012), p. 27

⁴¹ *Ibid.*, p. 27

⁴² *Ibid.*, p. 40

⁴³ For a comprehensive study on International Organizations: Manuel Diez de Velasco, *Las Organizaciones Internacionales*, 14^a ed. (España: Editorial Tecnos, 2006)

⁴⁴ *infra*. pp. 36-37

International law is a system that is constructed by and for states⁴⁵. States are the most prominent actors in shaping international law, since these organizations have been constructed in a way only be created by and work with the consent of the States⁴⁶.

Furthermore, under international law, states would be equal, despite the fact that they might have different economic, political and military powers⁴⁷. They have voting powers in granted by the treaties created the international organizations⁴⁸. More importantly they can choose to become which international rules apply to them. Actually, the modern international law heavily relies on the voluntary state consent to be bound by certain rules⁴⁹. This voluntary consent is constructed to be necessary, since international law generally limits the sovereignty and decision-making power of States to a certain extent⁵⁰.

Looking from this perspective, it is clear the individuals do not possess any status under international law. And thus, the international human rights law being a part of the international law also only binds states⁵¹. Indeed, that would be what the followers of positivism theory would suggest⁵². On the other hand, the foundations of international human rights law heavily relies on humanistic values⁵³. It is constructed upon the ideals of being applicable to *every individual no matter where they are from*, and they possess these rights by virtue of being human beings, independent of their social status or merits⁵⁴.

⁴⁵ And there are certain international rules on creation of new States: James Crawford, *The Creation of States in International Law*, 2nd ed. (United States: Oxford University Press, 2006)

⁴⁶ João Mota de Campos et. al., *Organizações Internacionais: Teoria Geral, Estudo Monográfico das Principais Organizações Internacionais de que Portugal é Membro*, 4^a ed. (Portugal: Coimbra Editora, 2010), pp. 59-69; 77-96

⁴⁷ “Traditional international law was based on a set of rules protecting the sovereignty of States and establishing their formal equality in law.” Antonio Cassese, *International Law*, 2nd ed. (United States: Oxford University Press, 2005), p. 48. Also, Article 2(1) of the UN Charter affirms the equality among states.

⁴⁸ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, (United Kingdom: Cambridge University Press, 2004), pp. 25-61

⁴⁹ Rüdiger Wolfrum, “Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations” in *Legitimacy in International Law* edited by Rüdiger Wolfrum and Volker Röben, (Germany: Springer, 2008), pp. 6-21

⁵⁰ *Ibid.*, p. 6

⁵¹ Wesley Cragg, “Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework”, *Business Ethics Quarterly* Vol. 22 Issue 02 (January 2012), p. 29

⁵² Jeremy J. Shestack, “The Philosophic Foundations of Human Rights”, *Human Rights Quarterly*, Vol. 20 (1998) p. 210

⁵³ Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd ed. (United Kingdom: Oxford University Press, 2014), pp. 1-3; Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization*, (United States: University of Pennsylvania Press, 2017), p. 10

⁵⁴ Shestack, “The Philosophic Foundations of Human Rights”, p. 203; Wesley Cragg, “Business and Human Rights: A Principle and Value-Based Analysis” in *The Oxford Handbook of Business Ethics* edited by George G. Brenkert (United Kingdom: Oxford University Press, 2009), pp. 277-278

The Universal Declaration of Human Rights (“UDHR”), a document received wide global endorsement⁵⁵, was aiming to create a common standard for “*all people and all nations*”. This was contradictory with the traditional foundations of international community built upon the shoulders of states⁵⁶. The international human rights law has a more ‘naturalistic’ approach compared to rest of the international law⁵⁷. As Martinez states, “the tension between ideas of natural law and legal positivism is one of the dominant, if deeply submerged, axes of debate in modern international law and international relations theory even today. International human rights law is sometimes still criticized for being too heavily based on natural law principles, which are seen as a suspect in secular, pluralistic world.⁵⁸”.

Currently, international human rights law mainly is about the states’ duties to respect, protect and fulfil human rights⁵⁹ and the international human rights enforcement mechanisms work as to protect the individual against the State abuse⁶⁰. It is not possible to go to an international human rights court and demand the exercise of international human rights principles against an individual. The application of human rights in private relationships is the obligation of the State, consequently domestic laws, and State should do its duty to protect the victim of a human rights abuse⁶¹.

This theoretical tension between the foundations of modern international law and international human rights law is at the core of the business and human rights discourse⁶². Is it possible to extend international human rights law towards non-state actors when the international law traditionally only covers states?⁶³ In fact, hard supporters of traditional view of international law sometimes state discussions on business and human rights are meaningless⁶⁴, due to the

⁵⁵ Micheline R. Ischay, *The History of Human Rights: From Ancient Times to the Globalization Era*, (United States: University of California Press, 2008), pp. 211-225

⁵⁶ Please see Chapter I(2); Chapter IV(2,3)

⁵⁷ Anthony J. Langlois, “Normative and Theoretical Foundations of Human Rights”, *Human Rights: Politics and Practice* Vol. 25(4) (2009), pp. 990-1019; Mary Ann Glendon, “Foundations of Human Rights: The Unfinished Business” *American Journal of Jurisprudence* Vol. 44 Issue 1 (1999), pp. 12-13

⁵⁸ Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law*, (United States: Oxford University Press, 2012), p. 161

⁵⁹ Olivier de Schutter, *International Human Rights Law*, 2nd ed. (United Kingdom: Cambridge University Press, 2014), p. 280

⁶⁰ For a comprehensive study on the protection mechanisms: *Ibid.*, pp. 807-1040

⁶¹ This has been referred as ‘the obligation to protect’ by de Schutter. *Ibid.*, pp. 427-526

⁶² August Reinisch, “The Changing International Legal Framework for Dealing with Non-State Actors” in *Non-State Actors and Human Rights*, edited by Philip Alston, (United Kingdom: Oxford University Press, 2005), p. 72

⁶³ de Schutter, *International Human Rights Law*, p. 457 (Box 4.1); Peter Muchlinski, “Human Rights and Multinationals: Is there a problem?”, *International Affairs* Vol. 7 (2001), pp. 31-47

⁶⁴ National Review, “Business and Human Rights” by Jacob Mchangama (10th November 2011), [<http://www.nationalreview.com/article/282792/businesses-and-human-rights-jacob-mchangama>] accessed December 2019

fact that it is not possible to extent international human rights law to the realm of private persons and private relationships⁶⁵.

Clapham would argue traditional view to international law does not comply with the reality anymore, particularly in the field of international human rights law, due to two reasons:

- “1. International law recognizes that individuals or private bodies are capable of committing violations of human rights and there are various jurisdictions to prevent, punish, or compensate these violations⁶⁶;
2. In practice, it is impossible to differentiate the private from the public sphere. Even if we feel we can distinguish between the two, such difficult distinctions leave a lacuna in the protection of human rights, and can in themselves be particularly dangerous⁶⁷”

When we look into the issue from this lens, we can observe throughout the years more actors came to the scene of international law and international human rights law. In modern times it would be hard to say that the States are the only threat to human rights⁶⁸. Now it is not possible to talk about a clear subject-object cut⁶⁹.

In October 1946, Nuremberg trials accepted the individuals may be responsible in case of “crimes against humanity”⁷⁰. It has been stated “international law imposes duties and liabilities upon individuals as well as upon States has long been recognised (...). Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law to be enforced”⁷¹. In fact, under the Nuremberg Trials many individuals were punished on the grounds of international law and values⁷². The Nuremberg Trials sourced the modern international criminal law where we can observe direct international liabilities for individuals which constitutes a ground for the claim that that international law already has a reach beyond States⁷³.

⁶⁵ For a view on against the extension of human rights principles to the business enterprises: Nien-Hê Hsieh, “Should Business Have Human Rights Obligations?”, *Journal of Human Rights* Vol. 14 No. 2 (2015), pp. 218-236; also please see: Muchlinski, “Human Rights and Multinationals: Is there a problem?”, pp. 35-44

⁶⁶ And here he refers to many treaties, resolutions that include individuals as subjects. Andrew Clapham, *Human Rights in the Private Sphere*, (United States: Oxford University Press, 2002), pp. 94-124

⁶⁷ *Ibid.*, pp. 93-94

⁶⁸ Gatto, *Multinational Enterprises and Human Rights*, p. 64

⁶⁹ Stephen J. Kobrin, “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights”, *Business Ethics Quarterly*, 19, p. 353

⁷⁰ Clapham, *Human Rights in the Private Sphere*, p. 95

⁷¹ *Ibid.*, pp. 95-96

⁷² Please see: Chapter I(4)

⁷³ Steve R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, *The Yale Law Journal* Vol. 111: 443 (2001), pp. 491-492

In addition to this, the Preamble of UDHR refers to “every individual” and “every organ of the society” continuing with Article 30 stating that no state, group or person has any right to engage in any activity to destruct any of the rights and freedoms set forth in the declaration, which supports the claim that international human rights law covers more than States. The UDHR already turned into a document highly embedded in international law. It has been referred to in the Preamble of International Covenant on Civil and Political Rights⁷⁴ as well as International Covenant on Economic, Social and Cultural Rights⁷⁵. More examples could be found in other international human rights law documents⁷⁶.

Currently, what we are discussing is whether is it possible to include non-state actors under the umbrella of international human rights law, because that would be expected considering the characteristics of international human rights law⁷⁷. However, the theoretical tension between international law and international human rights law seem to hinder this process⁷⁸. The reason behind the appointment of a Special Representative for the Secretary-General at the UN was to solve this theoretical tension⁷⁹. But Ruggie decided international human rights law does not create any legal obligations on corporations at this given moment, therefore it would not be

⁷⁴ “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights” Preamble, International Covenant on Civil and Political Rights (in force 23 March 1976)

⁷⁵ “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights” Preamble, International Covenant on Economic, Social and Cultural Rights (in force 3 January 1976)

⁷⁶ For instance: “Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex” Preamble, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (in force 3 September 1981)

⁷⁷ Peter Malanczuk, “Multinational Enterprises and Treaty-Making – A Contribution to the Discussion on Non-State Actors and the “Subjects” of International Law” in *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* edited by V. Gowlland-Debbas (The Netherlands: Martinus-Nijhoff, 2000), pp. 45-72; D. Kokkini-Iatridou and P.I.J.M. de Waart, “Foreign investments in developing countries – Legal personality of multinationals in international law.” *Netherlands Yearbook of International Law*, Vol. 14 (1983), pp. 101-104 ; Juan Manuel Rodríguez Barrigón, “La globalización económica y las empresas transnacionales” in *Os Sujeitos Não Estaduais No Direito Internacional* edited by Francisco Pereira Coutinho et. al., (Portugal: Petrony Editora, 2019), pp. 179-197

⁷⁸ “Traditionally, the law has perceived constitutional human rights as a barrier protecting individuals from the state’s “omnipotent” power—to somewhat ease the power imbalance between individuals and the government. In this sense, human rights were perceived as a part of public law. Due to this traditional starting point, discourse on human rights in private law has been lacking, and unsystematic, even though private law has also discussed human rights in one way or another, but without using the specific language of rights.” Eli Bukspan and Asa Kasher, “Human Rights in Private Sphere: Corporations First”, *University of Pennsylvania Journal of International Law* Vol. 40 No. 2 (2019), p. 423

⁷⁹ Please see: Chapter I(7)

feasible to have a legally binding treaty on business and human rights⁸⁰, in addition this question was hindering the process, therefore it had to be left aside for the sake of progress⁸¹. Indeed, instead of a legal instrument he created the UNGPs⁸². Though in 2014, this debate resurrected with the initiation of the binding treaty negotiations.

4. SCOPE OF THE STUDY

This study is conducted in a manner to be a part of international law⁸³ and specifically for the field of business and human rights. It mainly focuses on the international regulatory efforts within the business and human rights law domain. This study is should be understood as a criticism to the traditional view of international law and its shortcoming to fulfil the needs of today's ever more global society, with focusing in the field of study of business and human rights.

Despite this thesis relies on literature about the world history, international relations, international economics and political science, the research on these resources was done in a manner that would give an understanding to the general business and human rights issues. This

⁸⁰ Penelope Simons, "International Law's Invisible Hand and The Future of Corporate Accountability for Violations of Human Rights", *Journal of Human Rights and the Environment*, Vol. 3 No. 1 (March 2012), p. 8

⁸¹ "The traditional view of international human rights instruments is that they impose only "indirect" responsibilities on corporations – responsibilities provided under domestic law in accordance with states' international obligations. In contrast, some observers hold that these instruments already impose direct legal responsibilities on corporations but merely lack direct accountability mechanisms. For example, the UN Sub-Commission on the Promotion and Protection of Human Rights, explaining that its proposed Norms "reflect" and "restate" existing international law, attributed the entire spectrum of state duties under the treaties – to respect, protect, promote, and fulfil rights – to corporations within their "spheres of influence." UN Human Rights Council (A/HRC/4/035), Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, (9 February 2007), para. 35

⁸² "The SRSG's questionnaire survey of states, asking them to identify policies and practices by which they regulate, adjudicate, and otherwise influence corporate actions in relation to human rights, reinforces those concerns. No robust conclusions can be drawn because of the low response rate. But of those states responding very few report having policies, programs or tools designed specifically to deal with corporate human rights challenges. A larger number say they rely on the framework of corporate responsibility initiatives, including such soft law instruments as the OECD Guidelines or voluntary initiatives like the Global Compact. Very few explicitly consider human rights criteria in their export credit and investment promotion policies or in bilateral trade and investment treaties, points at which government policies and global business operations most closely intersect. (...) In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations. Even so, corporations are under growing scrutiny by the international human rights mechanisms. And while states have been unwilling to adopt binding international human rights standards for corporations, together with business and civil society they have drawn on some of these instruments in establishing soft law standards and initiatives. It seems likely, therefore, that these instruments will play a key role in any future development of defining corporate responsibility for human rights." A/HRC/4/035, para. 17, 44

⁸³ It has to be noted that business and human rights as a field of study lies in the intersection of traditional public international and private international law. therefore, we did not want to define this thesis as a part of any fields of study but under the umbrella term international law. That being said, we believe this thesis is more relevant to the field of public international law

research does not use any methodologies of political science, economic theory or international relations theories.

For the historical part of the thesis, only the periods and the historical events and persons considered relevant to the business and human rights field were included into the scope. Other events had major effects on the international community were only mentioned if they are important to give context to the upcoming chapters.

For the regulatory framework we only included the regulations and measures directly relevant to the business and human rights field. Hence, the legal texts might have indirect effects on business enterprises were left outside of this research. This would be the same with the regional legal texts chosen to be within the scope of this research. The national laws were selected if they have been in fact enforced by the national legislations and they were analysed to understand the extend of the national efforts, and whether they are sufficient in creating accountability for corporations. The upcoming legislations that are in the drafting phase were not included in the scope of this research.

For the chapter on the current discourses on future evolution of the business and human rights law, only the discourses taking place at the UN were taken into account. This is largely due to the fact that the discussions are concentrated mainly at the UN. UN contributes abundantly to the evolution of the field compared to the rest of the international organizations. Therefore, the discussions taking place at the other institutions and or at the national levels were not included to be a part of this study.

Last but not least, we acknowledge the fact that the business and human rights discussions are a part of the discourse on sustainable development agenda of the UN, however the thesis does not touch upon the sustainable development issues to have a stronger focus on business and human rights. This thesis also does not touch the discussions ongoing under the international investment law field and any other legal fields.

5. METHODOLOGY

This study will include an extensive research of the doctrinal sources. For this thesis traditional methods of desk-based legal research, meaning researching the relevant doctrinal sources, literature, legal texts and case-law, has been used. That being said, the traditional methods of critical legal research, which heavily relies on criticism of the positivist legal sources is not chosen for this study. We believe at this stage doing a principled doctrinal research would not be feasible to meet the needs of a research field mostly built on principles and non-binding

initiatives, and still under construction. Thus, we have opted for a research based on the socio-legal methodology.

In socio-legal methodology the focus is on the society⁸⁴ and the importance is given to the economic, social values and social norms and their relationships with the legal rules, rather than the criticism of the legal text and sources. “Such a research prominently involves an inquiry into dynamics of law, its social contents, role and impact of law in the social system⁸⁵”. This methodology assumes there are many variables affecting the law to develop, such as social, political, economic circumstances at a given time period. It is also normal to involve pure legal doctrinal research within the socio-legal research, but it will be done as one of the many variables, which is why the chapter on the regulatory framework does the analysis on the existing international and national legal tools, but in a more generalized manner and only offers light criticism.

This study tries to understand the environment the field of business and human rights is developing and the limitations it is facing. For this reason, first the history of the field is being discussed in order to give an understanding in political and economic manner to where currently the international order stands in terms of institutionalization, decision and law-making and how these realities affected the business and human rights discussions. The second chapter analyses the regulatory framework that was born out of these historical circumstances. The third chapter continues where it has been left of at the first chapter with the analysis of the current legal discourses at the UN to give a context on where the discussions might be heading in the future. We do believe giving an overview of the realities surrounding the international order would also give a good context on how a good law should evolve⁸⁶.

⁸⁴ According to Jones, the non-doctrinal, or socio-legal research has the following distinctions: “A legal scholar undertaking non-doctrinal research typically takes either some aspect of the legal decision process, or the people and institutions supposedly regulated by law as the focus of his study. Because the approach of legal scholar undertaking a non-doctrinal research is much broader and the questions he asks are more numerous, the data necessary to attempt an answer is not ordinarily available in conventional legal sources. Hence field work is usually required for this type of research. (...) The distinguishing characteristics of a non-doctrinal legal research, thus, are: (i) it lays down a different and lesser emphasis upon legal doctrines and concepts, (ii) it seeks answers to a variety of broader questions, (iii) it is not anchored exclusively to appellate case reports and other traditional legal sources for its data, and (iv) it invariably involves the use of research perspectives, research designs, conceptual frameworks, skills, and training not peculiar to law trained personnel.” Ernest M. Jones, “Some Current Trends in Legal Research”, *Journal of Indian Law Institute*, Vol. 24, No. 2/3 (April-September 1982), p. 205

⁸⁵ Khushal Vibhute and Filipos Aynalem, *Legal Research Methods Teaching Material* (2009), p. 87

⁸⁶ “The criteria for good legal research (good ordering) are not separated from the criteria for a good legal system (order). What is thought to be good legal research depends on what is thought to be good law.” Pauline C. Westerman, “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law”

6. SOURCES

The main sources used within this study are relevant literature and case-law, judiciary texts especially coming from the UN and relevant reports that offers analysis. In order to understand the “social expectations” explained in Chapter IV, empirical data has been used to give a better context due to the special character of this concept.

6.1. Literature

The sources of this thesis were mainly obtained from subject-specific business and human rights materials. The theoretical research was conducted specifically looking at the international human rights law and public international law materials. For the rest of the thesis, relevant academic articles, academic books were widely used. The Business and Human Rights Journal; Business Ethics Quarterly as well as other important legal journals were a main source of material. The important scholars’ works such as Surya Deva, Andrew Clapham, Larry Catá Backer, John Ruggie and Nadia Bernaz were taken into consideration. Materials were collected from different online sources and digital and physical libraries.

6.2. Case-Law

The case-law coming from different judicial bodies (mostly English-speaking countries, such as the United States, Canada, the United Kingdom) were used in order to provide better understanding to the national laws and extraterritoriality discussions. Certain international court decisions were also referred to give context to the relevant legal interpretations, such as the International Court of Justice decisions and advisory opinions. Specific cases at the Nuremberg Trials, particularly for the ones related to the criminal liability of business officials have been taken into consideration for the historical part of the research.

6.3. Judiciary Texts

An important source of material for this thesis was the judiciary texts coming from different international organizations. In order to give a better understanding of the current status at the international level, the documents issued by the international organizations were reviewed in Chapter II. Particularly for this thesis, the UN Guiding Principles for Business and Human Rights, UN Global Compact, the OECD Guidelines for Multinational Corporations, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,

in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* edited by Mark Van Hoecke, (United States: Hart Publishing, 2011), p. 93

ISO 26000 (Guidance on Social Policy) and regional regulations and documents such as the Council of Europe Recommendation CM/Rec(2016)3 and ASEAN Guidelines on Corporate Social Responsibility on Labour were taken into consideration. For the domestic regulations, we have included the UK Modern Slavery Act, the California Transparency in Supply Chains Act, Dutch Child Labour Due Diligence Law and French Law on Duty of Vigilance.

Another particularity of this thesis is the extensive review of the UN recommendations, policy papers and commentary on business and human rights matters. We believe this is important to give context to the legal documents and the negotiation process for the possible future binding treaty. Similarly, for Chapter III, several National Action Plans coming from the States, UN Forums on Business and Human Rights documentation and draft texts were analysed to give context on how the treaty-making and implementation process for the UNGPs is evolving.

6.4. Empirical Data

This source of material only used specifically, to explain the “social expectations” concept explained in Chapter IV. Several empirical data reports published by several NGOs and organizations were used to give a better context to what are the societal expectations on business and human rights matters. Furthermore, for the purpose of understanding the social expectations, we have conducted a similar study consist of an online survey in Portugal and Turkey. The outcome of this research was not used as a reference within this study; however, the numbers and relevant information were added into the Annex for the consideration of the reader.

6.5. Other Sources

Besides the written materials, in order to have an understanding of the functioning of the UN and get acquainted with the discussions, we have attended the UN Forums on Business and Human Rights 2016 and 2017. This way the discussions were observed in person, which also gave an understanding on how the developments are being discussed by the international community, who are the main stakeholders, what are the pressing issues, and what are the best practices and solutions.

Furthermore, couple of people were interviewed from the business sector on the matters of business and human rights to have an understanding on how the progress on business and human rights is in practice. They gave a perspective on how the businesses are perceiving business and human rights matters. These interviews were conducted in an informal manner,

like a regular conversation. No compensation was offered and provided for the interviewees and they were all informed that the interviews were being done for research purposes.

7. OVERVIEW OF THE CHAPTERS

This thesis will be divided into three main chapters and a fourth chapter focusing on our inferences made from the analysis in the three previous chapters. Each chapter will be dedicated to answer the research questions that have been identified above.

The first chapter focuses on the history of international law and the place of business and human rights discussions at the international level. The chapter starts from why the world formed an international community, how this community was formed, what was its foundations and where do the business enterprises stand within this community. It touches upon the first business and human rights dilemmas we face before the official discussions, such as the slave-trade and the Nuremberg Trials and the Cold War era. The chapter continues with the commencement of the official discussions of regulating corporate conduct at the UN after the ITT Affair and concludes with the acceptance of the UNGPs. This chapter aims to look at the history behind the course of business and human rights discussions at the UN level. The purpose here is to understand why historically the issues were escalated to the UN and why it continued within the rooms of the organization and why the UNGPs were successful when the previous attempts of a global code of conducts have failed.

The second chapter analyses the existing legal tools at the international and national levels and the strength of their impact. This chapter tries to identify important international documents related to the business and human rights discussions. It majorly focuses on the UNGPs, the OECD Guidelines on Multinational Enterprises and ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ISO 26000 and chosen regional documents such as the EU Directive on Non-Financial Reporting, the Council of Europe Recommendation and the ASEAN Guidelines on Corporate Social Responsibility on Labour. In pursuit, the recent national laws are included into the chapter, with a particular emphasis on the UK, the US, the Netherlands and France.

The third chapter focuses on the discourses regarding the future evolution of the business and human rights. The chapter starts by focusing on the recommendation issued by the UN Human Rights Council diverged the discourse and initiated the negotiations on a possible international treaty alongside the implementation process of the UNGPs. Both discourses are analysed in this chapter. Firstly, the implementation process of the UNGPs are discussed, by focusing on

the Annual UN Forums and National Action Plans as implementation tools. Second, the legally binding treaty negotiations are analysed. The discussions at the intergovernmental working group working on the binding treaty are explained here. The critique of the “Zero Draft” and the recent “Revised Draft” which is the latest published draft on the binding treaty was done in this chapter.

The fourth chapter focuses on our inferences we made after our research, we believe should be taken into consideration for the future of business and human rights. This chapter of this thesis analyses what are the main divisive concepts under business and human rights discussions, and criticises the current legal deficiencies we are facing at the international level, pinpoints the solutions proposed and try to provide leads for future discussions on the evolution of the business and human rights field.

CHAPTER I:

HISTORY OF BUSINESS AND HUMAN RIGHTS

1. INTRODUCTION

This thesis also tries to understand the environment that the current business and human rights discussions are evolving. Considering the main discussions are ongoing at the international level, we do believe it is important to have an understanding of the concepts shape the modern international system. There are many historical reasons why and how the international system has been constructed. These reasons have sociological, political, economic dimensions to them. This chapter will try to understand why the international community evolved into a state-centric system, why the international community is reluctant to involve non-state actors to the international relations, how is the relationship between the state and the businesses, what role does the economic ideologies play and how did businesses enter into the picture of human rights discussions at the international level.

This chapter aims to give an overview of the historical highlights shaped the international community. We will be focusing on the relationship between business and human rights, business and states, starting with the Westphalian Principles and continuing with the evolution of the international institutionalization. In pursuit, the chapter will gradually move towards to more contemporary history of business and human rights discussions at the international level, with the first attempts to create a code of conduct for the corporations and finalizing the chapter with the acceptance of UNGPs.

2. FOUNDATIONS OF INTERNATIONAL COMMUNITY: THE WESTPHALIAN PRINCIPLES

We could go back to the 17th Century and look at the transition of the society from medieval ages to the modern times in Europe in order to understand how the international community was born and how this shaped today's international relations and international law. Indeed, despite the communication between States⁸⁷ could be traced back before⁸⁸, the modern state and international intercourse between separate states and hence the need for rules to govern interstate relations started to develop during this period.

⁸⁷ Or groups of people before the modern states, for instance groups that were led by feudal lords.

⁸⁸ Fernando M. Mariño Menéndez, *Derecho Internacional Público (Parte General)*, 4^a ed. (España: Editorial Trotta, 2005), p. 22-24

Between 15th-17th Century, the States were mostly struggling to overpower one another, and new rules needed to overcome the difficulties⁸⁹. It could be seen the first set of international rules were serving the big European powers (Austria, Spain, Portugal, France, Britain, Ottoman Empire, etc.) and were mostly about treaties of alliance or of peace⁹⁰, or the protection of citizens in foreign countries, including diplomats and merchants, as seen in the likes of the capitulation system⁹¹.

It has been generally accepted the international community and the rules govern international relations as we know of today, have been crystallized with the Peace of Westphalia⁹² of 1648 concluded the Thirty Years War⁹³. The Peace of Westphalia was the first step that would start the transition of medieval Europe to the modern Europe⁹⁴. In medieval Europe before the Thirty Years War, the political map included the Spanish Monarchy, the Dutch Republic, England, Italian States, France among many other smaller states. There were also other major powers such as Sweden, Ottoman Empire, Poland and Russia outside the European peninsula. The governance of the societies was depended on a hierarchical system, mostly organized under the governing structures called “empires”. There was hierarchy highly established within the societies, there were those that are at the top and the bottom. At the top of the hierarchy there was the King, there were those carried lesser titles such as Dukes, as rulers of certain territories⁹⁵. And above them all, there was the Emperor, such as the ruler of the Holy Roman Empire⁹⁶.

⁸⁹ Cassese, *International Law*, pp. 22-24

⁹⁰ *Ibid.*, p. 22

⁹¹ Accordingly, in case a foreign national encountered a wrongful act in another state, they could ask for their national government to step in. For an explanation of the capitulation system, the protection of foreign merchants and how it impacted the Ottoman Economy, please see: Halil Inancik, *An Economic and Social History of Ottoman Empire*, Volume I, (United Kingdom: Cambridge University Press, 1994), pp. 188-195

⁹² Mariño Menéndez, *Derecho Internacional Público*, pp. 24-26; José Juste Ruíz y Mireya Castillo Daudí, *Lecciones de Derecho Internacional Público*, (España: Tirant Lo Blanch, 2005), pp. 22-24; Jorge Bacelar Gouveia, *Manual de Direito Internacional Público: Uma Perspectiva de Língua Portuguesa*, 5^a ed. (actualizada) (Portugal: Almedina, 2019), p.102; Cassese, *International Law*, pp. 22-25

⁹³ For a criticism on the Westphalian system and claims on it being the foundations of the international order, please see: Andreas Osiander, “Sovereignty, International Relations and the Westphalian Myth”, *International Organization*, Vol. 55, No. 2 (Spring, 2011), pp. 251-287. The author claims that the French Revolution and the Industrial Revolution constituted the foundations of the current international system.

⁹⁴ Cassese, *International Law*, p. 24; Bacelar Gouveia, *Manual de Direito Internacional Público*, p. 102; Juste Ruíz y Castillo Daudí, *Lecciones de Derecho Internacional Público*, p. 23; Mariño Menéndez, *Derecho Internacional Público*, p. 25

⁹⁵ *Ibid.*, p. 9

⁹⁶ Jane Burbank and Frederick Cooper, *Empires in World History: Power and Politics of Difference*, (United States: Princeton University Press, 2010), pp. 8-11

From the cultural perspective, this era was named as the “Baroque era” in Europe⁹⁷. To give an overview of the social diaspora during the Baroque era, the infectious diseases were common and there were no treatments discovered⁹⁸. It was also the era of “witch-hunts” and fear of ‘devil worship’, and there were religious separations such as the division within Christianity among Protestants and Catholics⁹⁹. Furthermore, scientists were challenging the century-old beliefs such as Hobbes and Galileo, and rulers were raising the taxes higher to finance their own extravagant court expenses¹⁰⁰. There were huge sociological, economical, religious changes that led to unrest and uncertainty among people which has been explained by Croxton as follows:

“Apart from economic problems, the Baroque was beset by intellectual and spiritual upheaval, which yanked the rug from underneath cherished certainties. Close contact with Asia and Africa, together with the discovery of entirely new peoples in the Americas, challenged assumptions about how all human societies functioned: whatever the rule, there seemed to be an exception somewhere. And how did those people in the Americas fit into the biblical scheme? How did they get separated, and from which of Noah’s three sons did they originate? Traditionally Shem was ancestor of the Arabs and Jews, Ham of Africans, and Japheth of the rest of the world, but Indians didn’t seem to fit into any category. The earth itself seemed to move beneath people’s feet. The solidity and immobility of the earth seems like one of the basic facts of experience; but according to Copernicus, it is actually hurtling through space. If he was right, what else could people believe without questioning?¹⁰¹”

Thirty Years War erupted building on these social realities¹⁰². It initially started in the Central Europe between Catholic and Protestant states, then spread to a wider region with the inclusion of more European powers, such as France, Denmark, Sweden¹⁰³ and Spain. It was also spread to the colonies, making the war global. It led to other side wars, such as the Iberian War, which

⁹⁷ ““Baroque” is a term applied by later ages to trends in the visual arts of the early seventeenth century -originally in a derogatory sense- but it has been usefully applied to literature, drama, and music as well. It has been widely used in a political context, although it seems reasonable that such a thoroughgoing trend in intellectual life would at least touch all forms of public interaction, especially if it had fundamental and deep-rooted cause.” Derek Croxton, *Westphalia: The Last Christian Peace*, (United Kingdom: Palgrave Macmillan, 2013) (w/o page number)

⁹⁸ Such as black plague, smallpox and measles.

⁹⁹ Benjamin K. Kaplan, *Divided by Faith: Religious Conflict and The Practice of Toleration in Early Modern Europe*, (United States: Harvard University Press, 2009), p. 3

¹⁰⁰ For the overview on the realities of the era: Derek Croxton, *Westphalia: The Last Christian Peace*

¹⁰¹ *Ibid.*, (The reference was taken from a digital source with no page numbers indicated)

¹⁰² Geoffrey Parker, *The Thirty Years War*, 2nd ed. (United Kingdom: Routledge, 1996); Ronald G. Asch, *The Thirty Year’s War: The Holy Roman Empire and Europe 1618-48*, (United Kingdom: Macmillan Publishers, 1997); Peter Hamish Wilson, *Thirty Years War: Europe’s Tragedy*, (United States: Harvard University Press, 2009)

¹⁰³ Erik Ringmar, *Identity, Interest and Action: A Cultural Explanation of Sweden’s Intervention to the Thirty Year’s War*, (United Kingdom: Cambridge University Press, 1996)

concluded with the independence of Portugal in 1668¹⁰⁴. Thirty Years War is being accepted as one of the deadliest wars in human history resulted in eight million casualties (mostly inhabitants of the Holy Roman Empire)¹⁰⁵.

With the aim of establishing peace, the Treaty of Westphalia was signed between the Holy Roman Emperor and the King of France and their respective allies. This treaty took five years of negotiations and its aim was to bring ‘universal peace’, in this aspect it failed since the parties of this treaty continued to fight for years to come¹⁰⁶. On the other hand, the treaty is accepted as a milestone in many ways.

Within the Treaty of Westphalia, the non-Catholic (Protestants, Calvinists and Lutherans etc.) states were legitimized and recognized, meaning the State accepted to be independent of the Church and the Pope¹⁰⁷. Furthermore, small number of countries were granted with some rights, including entering into alliances with foreign powers, also recognized the existence of several other small European states as neutral which contributed to the disintegration of the Holy Roman Empire¹⁰⁸. Westphalia is deemed important because it recognized a plurality of religion but also the independence of States, with no superior authority over them¹⁰⁹. In this respect, this is the reason why this Treaty being accepted as the foundation of the principle of “state sovereignty”¹¹⁰.

Following Westphalia, the principle of equality of all states was kept and the inter-state relations were built upon the ideas of every state has the right to decide their own fate within their own territorial limits¹¹¹. Building on this foundation, the international relations and consequently international law shaped throughout years to come¹¹². However, until the end of

¹⁰⁴ Bartolomé Yun-Casalilla, *Iberian World Empires and the Globalization of Europe 1415-1668*, (Singapore: Palgrave Macmillan)

¹⁰⁵ These people did not only die during war but also due to infectious diseases, such as plague. Henry Kamen, “The Economic and Social Consequences of the Thirty Years’ War”, *The Past and Present Society* No. 39 (April 1968), pp. 44-61

¹⁰⁶ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*, (United States: Cambridge University Press, 2010), pp. 279-299

¹⁰⁷ Daud Hassan, “Rise of Territorial State and the Treaty of Westphalia” *Yearbook of New Zealand Jurisprudence* Vol. 9 (2006), pp. 63-70

¹⁰⁸ Cassese, *International Law*, p. 24

¹⁰⁹ *Ibid*, p. 24

¹¹⁰ Though it had to be mentioned that the treaty itself does not include the term “sovereignty”, instead this idea is being driven from the decisions that were taken within this treaty. Please see: Derek Croxton, “The Peace of Westphalia of 1648 and the Origins of Sovereignty”, *The International History Review*, Vol. 21, No. 3 (September 1999), pp. 569-591

¹¹¹ Hassan, “Rise of Territorial State and the Treaty of Westphalia”, p. 67

¹¹² Leo Gross, “The Peace of Westphalia, 1648-1948” *The American Journal of International Law* Vol. 42(1) (1948), pp. 20-41

the First World War, we did not encounter with institutionalization. In fact, throughout the 18th and 19th Century, the idea of a modern state was still under construction¹¹³. The French Revolution occurred at the end of 18th Century initiated the fall of the monarchy system and establishment of liberal democracies, it also started the idea of a “nation state” and its organization, around a constitutional system¹¹⁴.

During the 19th Century, the international scene was still dominated by the big European powers, and they were rivalries among each other. This resulted in more wars among themselves. With the hope to prevent wars and revolutionary efforts, balance of power attempted to be established with the “Concert of Europe” which was agreed at the beginnings of 19th Century. The “Concert of Europe” was a set of principles and treaties reached among statesmen of Europe governing their relations with one another¹¹⁵.

With the “Concert of Europe”, it has been agreed that to keep the ‘collectivity’ within Europe by meeting regularly and upheld their current territorial status quo¹¹⁶. Indeed, the territories of European States changed very little throughout the 19th Century up until the First World War¹¹⁷, but States did intervene into Italy and Spain to stop the revolutionary movements¹¹⁸. The “international law” as a term also started to appear during this period¹¹⁹. During these times, international law was the product of and exist to serve the Western civilization. It was still relying on the philosophy of all States should be legally equal and free to pursue their own interests¹²⁰.

¹¹³ Please see: David Held, *Political Theory and the Modern State*, (United Kingdom: Polity Press, 2000)

¹¹⁴ David S. Mason, *Revolutionary Europe, 1789-1989: Liberty, Equality, Solidarity*, (United States: Rowman & Littlefield Publishers, 2005), p. 37

¹¹⁵ Mason, *Revolutionary Europe, 1789-1989.*, p. 55; The military destruction of Napoleon with the aim of spreading revolutionary ideas of liberty, equality and solidarity was not welcomed in the beginning; Matthias Middell, “The French Revolution in the Global World of the Eighteenth Century” in *The Routledge Companion to the French Revolution in World History* edited by Alan Forrest and Matthias Middell, (United Kingdom: Routledge, 2018), p. 25

¹¹⁶ Mason, *Revolutionary Europe, 1789-1989*, p. 55

¹¹⁷ For more information on the “Concert of Europe” please see: Richard B. Elrod, “The Concert of Europe: A Fresh Look at an International System”, *World Politics*, Vol. 28, No. 2 (January 1976), pp. 159-174; Kyle Lascurettes, “The Concert of Europe and Great Power Governance Today: What can the order of 19th Century Europe Teach Policymakers about International Order in the 21st Century?”, (United States: Rand Corporation, 2017)

¹¹⁸ Mason, *Revolutionary Europe, 1789-1989*, p. 55

¹¹⁹ Cassese, *International Law*, p. 30

¹²⁰ *Ibid.*, pp- 30-31

Throughout the 19th Century, Europe was also facing the Industrial Revolution started in England and slowly spread to the whole continent¹²¹. Industrial revolution was about the mechanization of the manufacturing process, making production faster, larger and more efficient. Steam engine was invented which was then used in locomotives and steamboats, facilitating transport and mobility of people¹²². The industrial revolution established a whole new “working class”, also started the urbanization process, which led to the change of the whole sociological landscape with new, and arguably higher, living standards¹²³. That being said, the industrial revolution also affected the arms used in warfare, making them more modernized and effective. Due to these changes, armies were easier to command, and easier to transport¹²⁴, which led to more competition among nations¹²⁵.

The First World War happened at the beginning of the 20th Century, was result of these changes. It was mostly the making of the leaders in charge of the States and more of a result of nations trying to overpower each other¹²⁶. The starting point of the war was the assassination of the heir of the throne of Austria-Hungary by a Serbian student in Sarajevo and it continued for 4 years, ending in 9.8 million military deaths. Following the First World War, the attempts to prevent war and have a collective co-ordination of States were made with the establishment of the League of Nations in 1926¹²⁷. This was the first attempt to establish an international institution to facilitate the international order, restraining the sovereignty of powerful state organizations for the first time. However, the League of Nations failed miserably to prevent more wars from breaking¹²⁸. The Second World War broke few decades later, which has the notoriety of being the most sorrowful war in history.

¹²¹ For the overview of Industrial Revolution and spread of capitalism in Europe please see: David S. Mason, *Revolutionary Europe, 1789-1989: Liberty, Equality, Solidarity*, p. 41-51; Robert C. Allen, *The British Industrial Revolution in Global Perspective*, (United Kingdom: Cambridge University Press, 2009); Phyllis Deane, *The First Industrial Revolution*, 2nd ed. (United Kingdom: Cambridge University Press, 2000); Thomas Southcliffe Ashton, *The Industrial Revolution, 1760-1830*, (United Kingdom: OUP Catalogue, 1997); Peter N. Stearns, *The Industrial Revolution in World History*, 4th ed. (United States: Taylor & Francis, 2013)

¹²² Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century*, (United States: Princeton University Press, 2014), p. 144

¹²³ *Ibid.*, p. 244

¹²⁴ For an historical overview of the subject: Stuart Robson, *The First World War*, 2nd ed. (United States: Routledge, 2014)

¹²⁵ Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, pp. 331-368

¹²⁶ Samuel R. Williamson, Jr. “The Origins of War” in *The Oxford Illustrated History of the First World War* edited by Hew Strachan (United Kingdom: Oxford University Press, 1998), pp. 9-25

¹²⁷ Christian J. Tams, “League of Nations” *Max Planck Encyclopedia of Public International Law* (2007), (w/o page numbers)

¹²⁸ Lassa Oppenheim, *The League of Nations and Its Problems*, (Books on Demand, 2018)

Between the First World War and the Second World War, Europe was haunted by the remainders of war¹²⁹. Also, the British and French were left exhausted after the First World War and Spain was dealing with the Spanish Civil War. They were slowly losing their economic and political dominance in the global scene¹³⁰. The US and the Soviet Union were becoming more powerful in the international scene¹³¹, also the colonial states were getting costlier to rule, which gradually turned into the decolonization process¹³². Japan was increasingly becoming powerful in the east, having tensions with China¹³³.

This was also the era where many great inventions were made, automobiles, electric lighting, radio broadcasts were becoming common in the developed countries, the industrial revolution was still ongoing. However, the Great Depression¹³⁴ was started in the US in 1929, gradually affected all other countries. Prices fell, unemployment raised, international trade was hit, and businesses started to make less profit which also affected the living standards of the people working for these businesses. The downfall of economic system created a huge distrust in democracies, which led to the rise of fascist regimes, the most famous one being the rise of Nazism in Germany¹³⁵. Indeed, Germany was a nation shamed by the defeat and humiliated by the Treaty of Versailles after First World War. With the hyperinflation, democracy started to decline dramatically, paving way for Adolf Hitler to gain the utmost power. Hitler's main aim was to gain "racial supremacy" for Germans, an idea he followed obsessively and led Europe and the world to war once more, ending almost in 60 million casualties worldwide¹³⁶.

Following the Second World War, the UN was established in order to settle the disputes occur between states¹³⁷. Within the UN system, both the US, the Soviet Union and China were granted the equal status with other European powers, as seen from the composition of the UN Security Council. UN was built on the same sovereignty principles established by Westphalia; all States would be equal and would be free to determine their own fate. Indeed, the

¹²⁹ For an outlook on the era please see: Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, pp. 369-411

¹³⁰ *Ibid.*, pp. 389-393

¹³¹ Mason, *Revolutionary Europe, 1789-1989: Liberty, Equality, Solidarity*, p. 131-148

¹³² Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, p. 403

¹³³ *Ibid.*, pp. 400-404

¹³⁴ Murray Newton Rothbard, *America's Great Depression*, 5th ed. (United States: Ludwig von Mises Institute, 2000), pp. 183-337

¹³⁵ Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, pp. 398-399

¹³⁶ For an historical overview: Anthony Beevor, *The Second World War*, (United Kingdom: Phoenix, 2014)

¹³⁷ Leland M. Goodrich, "From League of Nations to United Nations" *International Organization* Vol. 1 No. 1 (Feb, 1947), pp. 3-21

“sovereignty” principle was mentioned for the first time in the UN Charter Article 2 as: “The Organization is based on the principle of the sovereign equality of all its members”¹³⁸.

The establishment of the UN was an advancement in the governance of the international relations¹³⁹. The institution was far more successful in keeping the peace than their predecessors, since it did not only prohibit war, but any other kind or military intervention among States¹⁴⁰. Establishment of UN was also marked the establishment of the modern international human rights law, initiated by the adoption of the Genocide Convention and UDHR¹⁴¹, treaties adopted as a reaction to the horrors occurred during the war.

Following the establishment of UN, the Nuremberg Trials were held to bring the German war leaders before an international court. All these historical developments led to the establishment of a new international order, assured by institutions, with the states as the primary actors.

3. THE FIRST BUSINESS AND HUMAN RIGHTS DILEMMA: ATLANTIC SLAVE-TRADE AND THE ROLE OF MERCHANTS

15th-17th Century is the era where the discoveries were made, where we also encounter first business and human rights dilemma. During this era, the European powers started to colonize the newly discovered lands they have reached by sea¹⁴². First discoveries were done by Portuguese navigators under the sponsorship of the state in the beginning of the 15th Century. These discoveries created new trade routes¹⁴³, the first international corporations were established to assist the colonialization process and facilitate in carrying goods and raw materials from colonies to Europe. However, in addition to transfer of animals, plants, food and other raw materials, these corporations were also involved in slave-trade.

The ‘humble’ beginnings of explorations famously started with the Prince Henry the Navigator of the Portuguese Court, who had the ambition to discover new trade routes, expand Portugal to Africa and bypass the Ottoman Empire controlling most of the trade routes around

¹³⁸ Hassan, “Rise of Territorial State and the Treaty of Westphalia”, p. 68

¹³⁹ Juste Ruíz y Castillo Daudí, *Lecciones de Derecho Internacional Público*, pp. 57-59

¹⁴⁰ It should also be mentioned that this is open to criticism, despite this being the case, the United States dropped two atomic bombs in Japan just few weeks after the adoption of the UN Charter. The disagreement between the soviet bloc and the western capitalist powers also initiated the Cold War which lasted until the 1980s. Please see: Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, pp. 431-436

¹⁴¹ Juste Ruíz y Castillo Daudí, *Lecciones de Derecho Internacional Público*, p. 379

¹⁴² Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, p. 149-184

¹⁴³ Zs. P. Pach, “The Shifting of International Trade Routes in the 15th-17th Centuries”, *Acta Historica Academiae Scientiarum Hungaricae*, T. 14, No. 3/4 (1968), pp. 287-321

Mediterranean by the time¹⁴⁴. To reach this aim, Prince Henry sponsored certain expeditions, but interestingly he never went on a voyage himself¹⁴⁵.

Throughout the 15th Century, the Portuguese started the discoveries to Africa, starting to trade goods found in these lands. With the Pope's encouragement¹⁴⁶, more expeditions were made by the Portuguese which led to more discoveries, including the discovery of the Cape of Good Hope and the east coast of Africa and India. Goods and resources found in these new lands were not the only thing being traded, the trade also included the locals. Gradually slave-trade became a source for profit for both for the merchants, as well as the states¹⁴⁷.

Slave-trade occurred between 16th-19th Century by no means the first time the practice of human-trading occurred in history, for instance, before the Age of Discoveries Muslims were involved in slave-trade¹⁴⁸. Yet, Atlantic slave-trade was unique because number of people brought from Africa to Europe and the New World has been reached to millions. While the reasons behind having such high number of slaves is still debated, the highly profitable nature of slave-trade was surely one of the reasons¹⁴⁹.

At the end of the 16th Century, Dutch and English also started to travel through Atlantic, challenging with Spanish and Portuguese control over the Americas¹⁵⁰. The Dutch especially started to have interest in the Atlantic in the beginning of 17th Century, at the same time revolting against the Imperial rule of Habsburg, a part of Holy Roman Empire. They were seeing Spanish and Portuguese as cruel imperial rulers, which they were strongly fighting

¹⁴⁴ "The men who sailed forth from western Europe across the seas in the fifteenth and sixteenth centuries did not set out to create 'merchant empires' or 'western colonialism'. They sought wealth outside the confines of a continent where large-scale ambitions were constrained by tensions between lords and monarch, religious conflicts, and the Ottoman's lock on the eastern Mediterranean." Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, p. 149

¹⁴⁵ *Ibid.*, p. 154

¹⁴⁶ Pope Nicholas V issued a bull confirming that the Portuguese has the monopoly to trade in West Africa. Hugh Thomas, *The Slave Trade, The History of the Atlantic Slave Trade 1440-1870*, (United Kingdom: Picador, 1997), p. 65

¹⁴⁷ *Ibid.*, p. 103

¹⁴⁸ Murray Gordon, *Slavery in the Arab World*, (United States: New Amsterdam Books, 1989); Ottomans were taking slaves to train them as soldiers which was called the "Devshirme" system: Katalin Siska, "Slavery in the Ottoman Empire", *Journal of European History of Law*, Vol. 7, Issue 2 (2016), pp. 71-79

¹⁴⁹ Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, (United States: Routledge, 2017), p. 18

¹⁵⁰ Jonathan I. Israel, *The Dutch Republic and the Hispanic World 1606-1661*, (United Kingdom: Oxford University Press, 1986)

against by the time. They believed they were colonized by the Empire and the Indians were not savages but natural allies, in the campaign against this imperial rule¹⁵¹.

With this political situation in mind, Willem Usselinx and a group of like-minded people believed the Indians would welcome the Dutch and join them in their campaign against the imperial rule. This was how the Dutch West India Company (*Verenigde Westindische Compagnie-WIC*) was established¹⁵², in order to help colonization in the Indies to secure the domination from Spanish and Portuguese. Willem Usselinx was a strong Calvinist and he wanted to have the core values of this company in the same line. After having consultations with the theologians on the moral issues¹⁵³, he decided he did not want to engage in slave-trade. He believed slave-trade was uneconomical and inhuman¹⁵⁴, a decision not common during this historical period. Instead he wanted to liberate the Indians and so they could trade with them, which he presumed that they wanted to do the same¹⁵⁵. However, this policy was only kept for a decade, in 1630 with the conquest of Northern Brazil, the company started to engage in slave-trade, in order to keep being profitable and help the Netherlands to succeed as monarchy. This historical fact shows an early example of a business and human rights dilemma.

After two centuries of human-trading business, the international abolishment movement started in Britain in the late 18th Century. Though it is not really clear how this has started¹⁵⁶, this movement became a driving force in the British politics for the beginning of 19th Century. Supporters of abolishment were arguing that slave-trade was contrary to the religious laws, and the rights of men¹⁵⁷. Britain, abolished slave-trade in 1807, which led to the abolition of slave

¹⁵¹ Benjamin Schmidt, "The Dutch Atlantic" in the *Atlantic History: A Critical Appraisal* edited by Jack P. Greene and Philip D. Morgan (United States, Oxford University Press, 2009), p. 170

¹⁵² Not to be confused with the Dutch East India Company (Vereenigde Oost-Indische Compagnie, VOC) which was established in 1602 and was mostly operating in East Asia, such as Taiwan, Indonesia and Malaysia and also got into war with Portuguese traders. Please see: Burbank and Cooper, *Empires in World History: Power and Politics of Difference*, pp. 158-162

¹⁵³ "No contemporary record is found concerning consultation with the theologians; apparently economic incentives were sufficient to brush aside whatever moral scruples might initially have precluded the company from participating in the slave trade." Johannes Postma, *The Dutch in the Atlantic Slave Trade 1600-1815*, (United Kingdom: Cambridge University Press, 1990), p. 17

¹⁵⁴ Thomas, *The Slave Trade, The History of the Atlantic Slave Trade 1440-1870*, p. 162

¹⁵⁵ Schmidt, "The Dutch Atlantic", p. 171

¹⁵⁶ Martinez, *The Slave Trade and the Origins of International Human Rights Law*, (United States: Oxford University Press, 2012), p. 17

¹⁵⁷ *Ibid.*, p. 17

trade and slavery business in the British colonies. However, in order to abolish such an inhuman practice once and for all, they realized that they should go international¹⁵⁸.

Congress of Vienna was held in 1815 where European States signed a non-binding declaration on the Universal Abolition of Slave Trade. The illegalization came shortly afterwards, with British starting to sign bilateral treaties with Spain, Portugal and the Netherlands between the years 1817-1818. The first multilateral treaty was signed in 1841¹⁵⁹ and another one in 1890¹⁶⁰. In 1926, League of Nations Convention to Suppress the Slave Trade and Slavery was accepted, making the abolishment movement successful. In fact, it is claimed the abolishment of slave-trade constitutes the origins of the international human rights law¹⁶¹.

This period is a gold mine to shed a light to the complex relationship between the businesses and states. Indeed, trade was very much linked to defining the power politics in the international scene during this period (and arguably still is). The states needed this commerce in order to bring wealth to the Country which would make them more powerful and competitive among other States¹⁶². On the other hand, the merchants needed imperial state to make sure their wealth was protected¹⁶³. Keeping a balance between the private interests of the merchants engaging in trade and the States was very much of a concern¹⁶⁴. Clearly, this also created a

¹⁵⁸ “We cannot legislate for other countries; nor has this country a right to control any foreign legislature that may think proper to dissent from this doctrine and give permission to its subjects to prosecute this trade. We cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law.” *Ibid.*, p. 25, (quoting *The Amedie* (1810) 12 Eng. Rep. 92 (PC)); Abolition was, “not enough to put a permanent end to this lucrative business. Action had to be taken at the international level”. Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 37

¹⁵⁹ Treaty Between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade, London, (20 December 1841)

¹⁶⁰ General Act of the Brussels Conference Relating to the African Slave Trade.

¹⁶¹ “The history of the suppression of the transatlantic slave trade has implications for a number of contemporary debates about international law. Most legal scholars view international courts and international human rights law largely as post-World War II phenomena. But in fact, the nineteenth century slavery abolition movement was the first successful international human rights campaign, and international treaties and courts were its central features.” Martinez, *The Slave Trade and the Origins of International Human Rights Law*, p. 13

¹⁶² *Ibid.*, p. 149

¹⁶³ “Perceptions of backwardness and vulnerable sovereignty framed the policies with which imperial rules and magnates governed their domains. The concern to reverse the trend raised a set of thorny issues about the proper balance between public good and private interest. In general, Enlightenment thinkers promoted the idea that private interests were not just the cornerstones of public good, but enjoyed an autonomous status. If monarchies needed trade, they had to accept their dependence on members of *civitas* that did the trading. Thus, health of the regimes was tied explicitly to the privileges of private trading fortunes. Wise monarchs encouraged private interests as a way of promoting public welfare. This has become a common way to understand the origins of modern political economy and of the Enlightenment’s bequest to thinking about wealth and public affairs.” Jeremy Adelman, *Sovereignty and Revolution in the Iberian Atlantic*, (United States: Princeton University Press, 2006), p. 14

¹⁶⁴ It was possible for a merchant to go to another monarch to ask for investment in their expedition, in case he does not get the support from his own monarch. This famously happened with Ferdinand Magellan, the Portuguese naval officer who had a quarrel with the Portuguese monarch and went to the Spanish monarch to receive financial

power struggle between the monarchy and the merchants, which was then tried to be solved with accepting the fact both parties have some sort of autonomy:

“building a great state was the ultimate goal, but the state was also the only agent capable of curbing private habits that deprived it of its vitality. How could the state be the means to achieve greatness and the idyll at the same time?

The way out of the circular problem was an entente between political and economic power-holders-giving each other room to manoeuvre autonomously, but interdependently.¹⁶⁵”

Furthermore, the merchants engaged in slave-trade by no means bad people, slave-trade simply was a high-risk/high-return business¹⁶⁶. Some merchants engaged in slave-trade were also involved in charity causes, building schools and hospitals for the vulnerable in their home countries. Even though exploiting individuals in order to help other type of individuals are very contradictory, the merchants were simply not able to see their business in this light¹⁶⁷. Today the activities of the modern companies by no means reach to the horrific levels of slave-trade. However, the relationships between the state and the businesses, the exploitation of the third world countries, the ‘irony’ of the philanthropy of the merchants engaged in abusive business practices, the global outreach of the problem and international response produced to abolish such practice would resonate with today’s modern world and business and human rights studies.

4. THE ROLE OF BUSINESSES IN THE SECOND WORLD WAR AND THE NUREMBERG TRIALS

The Second World War and the Nuremberg Trials were very important milestones in the evolution of the modern international law. The Second World War and the Holocaust made the international community to reconsider the ideology of Westphalia and made them accept the idea international community should have a right to intervene when things go towards the wrong direction in another state. With the acceptance of the Genocide Convention and UDHR,

support for his expedition ideas. He was the first European to circumnavigate the Earth, discovering the Strait of Magellan and passing the Pacific Ocean, arriving back to Europe (he was killed in the Philippines by the locals, therefore he could not personally finish the journey, only a part of his fleet was able to reach Europe). This would resonate with today’s modern entrepreneurs as well, it is fairly normal for a businessman or woman to search for the most accommodating state to establish his business.

¹⁶⁵ Jeremy Adelman, *Sovereignty and Revolution in the Iberian Atlantic*, (United States: Princeton University Press, 2006), pp. 15-16

¹⁶⁶ Richard B. Sheridan, “The Commercial and Financial Organization of British Slave-Trade, 1750-1807”, *The Economic History Review* Vol. 11(2) (1957), pp. 249-263

¹⁶⁷ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, pp. 30-31

it has been agreed the international community should at least pay attention to the basic human rights are being protected by the states¹⁶⁸. This is also important for the business and human rights discussions.

There are many studies on why Second World War happened and how Hitler rose to power¹⁶⁹. One of the highlights of these discussions that matter the most for the business and human rights discourse is the role of businesses played in the Hitler's rise¹⁷⁰ and the prosecution of the business leaders during post-war trials.

Up until the 1930s, the government and German business did not have so much support for each other. With the effects of the Great Depression of 1929 hitting the business and Hitler becoming the Chancellor of Germany in 1933, things started to change. The big business started to align with Hitler and his economic policies, in order to adapt to the new economic system¹⁷¹ brought by the Nazi party. Although, the business support to Nazis were in the beginning did not have the aim to bring Nazis to power:

“As in the cases of *Flick* and *I. G. Farben*, most of the big business money that found its way to the Nazis was not given simply, or even primarily, with the aim of bringing them to power. Whereas Flick and Farben were seeking to buy political insurance against the eventuality of a Nazi capture of the government, others were attempting to alter the nature of the Nazi movement. This they hoped to accomplish by giving money to "sensible" or "moderate" Nazis, thereby strengthening that element and weakening the economically and socially radical tendencies that had always been the chief obstacles to cooperation between big business and National Socialism. There was, however, no agreement as to who the "sensible" Nazis were.¹⁷²”

¹⁶⁸ Kenneth Cmiel, “The Recent History of Human Rights”, in *The Human Rights Revolution: An International History* edited by Akira Iriye, Petra Goedde and William I. Hitchcock, (United States: Oxford University Press, 2012), p. 36

¹⁶⁹ John Keegan, *The Second World War*, (United Kingdom: Random House, 2011); Alan John Percivale Taylor, *Origin of the Second World War*, (United States: Simon and Schuster, 1996); B.H. Liddel Hart, *A History of the Second World War*, (United States: Pan Macmillan, 2015); Ian Kershaw, *Profiles in Power: Hitler*, (United States: Routledge, 2013)

¹⁷⁰ George W. F. Hallgarten, “Adolf Hitler and German Heavy Industry 1931-1933”, *The Journal of Economic History* 12(03) (1952), pp. 222-246; Henry Ashby Turner Jr., “Big Business and the Rise of Hitler”, *The American Historical Review*, Vol. 75, No. 1 (1969), pp. 56-70

¹⁷¹ “One factor in this turn of events was the ability of the new Chancellor, as the legally installed head of government, to appeal to their respect for constituted authority. But even more important, once he was in office Hitler demonstrated that he was, as he had always reassured them, not a socialist. He therefore had no difficulty in extracting large sums from big business, starting with the campaign for the Reichstag election of March 1933. These contributions unquestionably aided Hitler significantly. But they aided him in the consolidation of his power, not in its acquisition. He had achieved that without the support of most of big business, indeed in spite of its massive assistance to his opponents and rivals.” Turner, “Big Business and the Rise of Hitler”, p. 68

¹⁷² *Ibid.*, p. 64

More the Nazi regime and Hitler gained power, more things, so to say, ‘got out of control’:

“businessmen, especially in the financial sector continued to believe that they could carry on normal business free of politics. The problem was that the longer the Third Reich lasted, the more it became impossible to distinguish between normal business and criminal business in a wide variety of areas. That is, business opportunities were increasingly defined by the conditions created by the regime, namely, conditions of war, conquest, systematic theft and transfer of assets along racial lines, and mass murder.¹⁷³”

Following the events of the Second World War, the Nuremberg Trials began to prosecute the German war leaders with the acceptance of the Council Law No. 10¹⁷⁴. The recognized crimes were: (i) crimes against peace; (ii) war crimes; (iii) crimes against humanity; and (iv) membership in the categories of a criminal group or organization declared criminal by the International Military Tribunal (Article 2 of the Council Law No. 10). A team was gathered consist of British, French, Soviet and American judges and prosecutors to take on the cases, which also had to decide on who should be trialled.

Initially, the business leaders were included as defendants to be prosecuted at Nuremberg Trials¹⁷⁵, however this failed, and the prosecution team decided not to include industrialists in the list of defendants¹⁷⁶. There were non-international proceedings held by the US regarding those did not get convicted at the International Military Tribunal¹⁷⁷. There were 12 subsequent cases held by the US, included four cases concerning German industrialists: The *Flick Case* (Case #5)¹⁷⁸ - leading officials of a large coal and steel enterprise; The *I.G. Farben Case* (Case

¹⁷³ Gerald D. Feldman, “Financial Institutions in Nazi Germany: Reluctant or Willing Collaborators?” in *Business Industry in Nazi Germany* edited by Francis R. Nicosia and Jonathan Huerner, (United States: Berghen Books, 2004), p. 32

¹⁷⁴ Law adopted by the Allied Control Council in Germany providing for the punishment of persons guilty of war crimes, crimes against peace and against humanity, to give effect to the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the IMT Charter, and to establish a uniform legal basis to prosecute war criminals and other similar offenders other than those dealt with by the International Military Tribunal.

¹⁷⁵ “the economic case had four main aspects. First the prosecution believed that some industrialists had played a role in the conspiracy to launch an aggressive war: arguably the most important count at the IMT. Second, most industrialists had been involved in the aryanisation of the industry. Third, many of them had taken advantage of the German occupation of foreign territories to take control of industrial plants and seize equipment. Finally, the most obvious charge against industrialists was ‘the recruitment and deployment of around five million slave labourers, part of whom had been work-to-death labour supplied by the Nazi extermination camps.’” Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 66-67

¹⁷⁶ *Ibid.*, p. 67

¹⁷⁷ Steve R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, pp. 477-478

¹⁷⁸ Trials of War Criminals Before Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. VI “The Flick Case”, (United States: United States Government Printing Office, 1952)

#6)¹⁷⁹ – leading officials of the chemical and pharmaceutical giant that also produced Zyklon B, the gas used to kill the people in the concentration camps; The *Krupp* Case (Case #10)¹⁸⁰ – leading officials of the arms fabrication company; and The *Ministries* Case (Case #11)¹⁸¹ – the case prosecuted mainly the ministries of the Nazi regime but also the heads of Reichsbank and Dresdner Bank. These cases are highly relevant to the business and human rights discourse since some business leaders were convicted during these trials.

Accordingly, for a company or a business leader to be involved in an international crime and to be held liable, three factors are being searched for: (i) causation and contribution, meaning what has the company or business person done; (ii) proximity, meaning whether the businessperson was close to the abuses; and (iii) knowledge, meaning whether the business person was aware of the abuses, whether they shared the intent of the main perpetrator and they acted on purpose¹⁸².

During the subsequent Nuremberg Trials, the business leaders generally tried to escape from liability on the grounds of the third factor, knowledge. They claimed they did not have the knowledge of for what their products were being used for during the war¹⁸³. However, this deemed insufficient by the Court on the grounds the objective facts were indicating otherwise:

“Friedrich Flick, a German industrialist, was convicted after the Second World War for donating large sums of money to the head of the S.S., that helped the S.S. carry out criminal acts. The Court found that although the criminal character of the S.S. was not well known when Flick started attending fund-raising dinners in the 1930s, his contributions and attendance continued long after the criminal character of the S.S. was generally known. A further example is the case of Bruno Tesch, convicted of supplying poisonous gas to the Nazi Auschwitz concentration camp. This was not only because of inferences the court was invited to draw from the fact that he delivered ever-larger quantities of the gas to the camps, far beyond what could have been used for the legitimate extermination of pests. The lesson is that

¹⁷⁹ Trials of War Criminals Before Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. VII and VIII “The I.G. Farben Case”, (United States: United States Government Printing Office, 1952)

¹⁸⁰ Trials of War Criminals Before Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. IX “The Krupp Case”, (United States: United States Government Printing Office, 1952)

¹⁸¹ Trials of War Criminals Before Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. XII, XIII and XIV “The Ministries Case”, (United States: United States Government Printing Office, 1952)

¹⁸² Report of the International Commission of Jurists Expert Legal panel on Corporate Complicity in International Crimes, Vol. 1: Facing the Fact, Charting a Legal Path (Geneva, 2008), pp. 8-26

¹⁸³ Michael J. Kelly, “Prosecuting Corporations for Genocide under International Law”, *Harvard Law & Policy Review* Vol. 6 (2012), pp. 351-353

company officials will not be shielded from criminal responsibility even if they steadfastly deny they knew the consequences of their conduct, if the objective facts indicate otherwise.¹⁸⁴”

Under these cases there were many business leaders held liable on several grounds. For instance, Friedrich Flick was found guilty on the grounds of slave labour; spoliation and aiding and abetting criminal activities of the SS and convicted to seven-year sentence¹⁸⁵. The director of the Dresdner Bank, Karl Rasche, found guilty on the grounds of plunder and spoliation and membership in criminal organizations and sentenced to seven-years imprisonment¹⁸⁶, among others.

The Nuremberg Trials and the Second World War are important in international legal history, since they paved way to a whole new era for the international community¹⁸⁷. These trials shaped the future of international law and the construction of modern international criminal law and international human rights law¹⁸⁸. The Nuremberg Trials constitute the foundations of individual accountability before international law.

On the other hand, the businessmen were just ‘lucky’ enough to be not included in the list of defendants at the Nuremberg Trials when the list of defendants were being formed:

“In theory, the entire governmental and military apparatus could be arraigned: if some were guilty, then (...), all were guilty. The early American lists did include a hundred names or more. The British prosecution team, under Sir David Maxwell Fyfe, favoured a smaller and more manageable group (...). The chief difficulty in drawing up an agreed list of defendants derived from different interpretations of power-structure of the Third Reich. In 1945, the view was widely held that Hitlerism had been a malign extension of old Prussia of militarism and economic power. The real villains, on this account, were industrial bosses, who were Nazism’s alleged paymasters. (...)

These views did not go uncontested. (...) While Soviet lawyers, British socialists and Jackson’s team of New Dealer lawyers saw nothing unjust about including industrial managers at Nuremberg, they were

¹⁸⁴ Report of the International Commission of Jurists Expert Legal panel on Corporate Complicity in International Crimes, Vol. 1, p. 21

¹⁸⁵ Trials of War Criminals Before Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. VI “The Flick Case”, p. 1228

¹⁸⁶ Trials of War Criminals Before Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. XIV “The Ministries Case”, p. 863-868

¹⁸⁷ “The Nuremberg Military Tribunal was (...) an experiment, almost an improvisation. For the first time the leaders of a major state were to be arraigned by the international community for conspiring to perpetrate, or causing to be perpetrated, a whole series of crimes against peace and against humanity. For all its evident drawbacks, the trial proved to be the foundation of what has now become a permanent feature of modern international justice.” Richard Overy, “The Nuremberg Trials: International Law in the Making” in *From Nuremberg to the Hague: The Future of International Criminal Justice* edited by Philippe Sands, (United Kingdom: Cambridge University Press, 2003), p. 2

¹⁸⁸ Antonio Cassese, *International Criminal Law*, (United States: Oxford University Press, 2003), pp. 340-343

opposed by those who saw business activity as independent of politics and war-making. Even Albert Speer, Hitler's armaments minister and overlord of the war economy, was argued about. He was, one British official suggested, 'essentially an administrator', not a war criminal. This tendency to see economic leaders as functionaries rather than perpetrators probably saved Speer from hanging when trial ended in 1946.¹⁸⁹

This shows the decision to not to prosecute business leaders before an international tribunal was merely a product of political decisions of the time. If the businessmen were also trialled at the Nuremberg Trials, the foundations of the international criminal law would have been arguably different. We can argue this decision of not including business leaders to the list of defendants, creates a catastrophe for business and human rights lawyers today, especially for those who support the idea that the international criminal court should have jurisdiction over business enterprises and businessmen.

5. THE CLASH OF DIFFERENT ECONOMIC IDEOLOGIES AND THE ESTABLISHMENT OF ILO

The early history of business and human rights cannot be complete without looking into the clash between two economic models: capitalism and socialism and how the tension between them shaped the world today and contemporary discussions on business and human rights.

The Industrial Revolution happened in the second half of 18th Century England. This started a steady growth in the need for labour force while market was shifting from agriculture to textile manufacturing or manufacturing of small engines. The engines produced were being used in other industries, which paved way to more industrial advancement and need for more labour. The businesses started small, then gradually became bigger, and the pressure to invent was real¹⁹⁰.

This was the time when Scottish economist Adam Smith published his work *The Wealth of Nations* in 1776, becoming the 'father of classic economics and capitalistic regime'¹⁹¹. In his

¹⁸⁹ Overy, "The Nuremberg Trials: International Law in the Making", pp. 9-11

¹⁹⁰ *supra*. ft. 121

¹⁹¹ As accepted by many economics scholars: G.R. Bassiry and Marc Jones, "Adam Smith and the Ethics of Contemporary Capitalism", *Journal of Business Ethics* Vol. 12(8) (1993), pp. 621-627; Patricia H. Werhane, "Business Ethics and the Origins of Contemporary Capitalism: Economics and Ethics in the Work of Adam Smith and Herbert Spencer", *Journal of Business Ethics* Vol. 24(3) (2000), pp. 185-198; James E. Alvey, "Adam Smith's Higher Vision of Capitalism", *Journal of Economic Issues* Vol. 32(2), pp. 441-448

phenomenal book, Smith talks about the division of labour, productivity and free markets¹⁹². He was defending the idea that the individuals should be free to pursue their own personal interests, the States shall not interfere in the markets. The market shall find its equilibrium with supply and demand in labour, products and services¹⁹³. Adam Smith's ideas were welcomed enthusiastically in the entrepreneurial era of Britain and gradually spread to Europe and then to the world¹⁹⁴.

The industrialization process led to the creation of the factories, which led to urbanization and movement of population from country to the cities. Industrial Revolution provided job opportunities for a growing number of people and generated a working class. However, it also created labour shortage as well as, employment surplus. During the first years of industrial revolution, factories were working on the backs of cheap labour, including women and children.

“In the first decades of Industrial Revolution there was very little the workers could do by themselves to improve their condition. Drawn from agricultural communities they found themselves in unfamiliar surroundings, without friends, and with little leisure. The laissez-faire State, guaranteeing the free play of forces, penalized anyone who combined these forces to gain increase in wages or decrease in hours or who solicited anyone else to leave work, or objected to working with any other employee.¹⁹⁵”

The working conditions were the worst in the early decades of industrialization, the living standards of division between the labour force and the owners of these factories were huge, which created an unrest among workers¹⁹⁶.

In 1848, Karl Marx published *The Communist Manifesto*, where he talks about the class struggles and the downsides of capitalism¹⁹⁷. He claimed eventually the capitalist society, that

¹⁹² Please see the Analytical Introductions of the recent publication of the Wealth of Nations: Andrew Skinner, “Analytical Introduction” in *The Wealth of Nations (Books I-III)* by Adam Smith, (United Kingdom: Penguin Classics, 1999) pp. 8-85

¹⁹³ On Supply-Demand Balance please see: John B. Taylor, *Economics*, (United States: Houghton Mifflin Company, 1995), pp. 67-101; Joseph E. Stiglitz, *Economics*, 2nd ed., (United States: W.W. Norton & Company Inc., 1997), pp. 71-93

¹⁹⁴ Scott L. Newbert, “Realizing the Spirit and Impact of Adam Smith's Capitalism through Entrepreneurship” *Journal of Business Ethics* Vol. 46(3) (2003), pp. 251-258

¹⁹⁵ Antony Alcock, *History of International Labour Organization*, (United Kingdom: Macmillan Press Limited, 1971), p. 5

¹⁹⁶ Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century*, pp. 708-709

¹⁹⁷ “Marx believed that the force of history had led the economy inevitably to evolve from medieval feudalism to capitalism and that the economy, just as inevitably, would evolve from capitalism to socialism and eventually to communism. Not only would there be no private property, the state would make all allocation decisions. “From each according to his ability” wrote Marx, “and to each according to his needs”. Clearly Marx's vision of socialism provided different answers from the market economy to the basic economic questions of what to produce and in

creates a class division between the bourgeoisie who owned the capital and the working class, will be overthrown by a socialist revolution, where there will be no class differences among the society¹⁹⁸. *The Communist Manifesto* was quite influential in the workers movements of 19th Century, also paved way to the establishment of International Workingmen's Association, with Karl Marx being one of the founders¹⁹⁹. This association was later closed down, but Marx's work continued to be highly influential for years to come.

Marx also influenced the Russian revolutionary Vladimir Lenin, who turned Russia into a one-party communist state governed by the Russian Communist Party, creating the Soviet Union²⁰⁰. After its foundation, Soviet Union started to develop the communist economy, with the mentality to never bring capitalist ideology to Soviet Union again²⁰¹. This later spread to many other countries and China²⁰².

This tension between two different economic ideologies contributed to the polarization of the world for many decades, a period also known as the Cold War era, until the collapse of Soviet Union in 1991²⁰³. Nevertheless, the polarization also found its reflections in the business and human rights discussions.

At the end of the 19th Century, the unrests and the rise of communist movements made European politicians start to talk about an international labour regulation, to bring some balance to the highly polarized political climate²⁰⁴. After the First World War, the States decided that the response to labour movements had to be given in an international manner:

“The establishment of International Labour ‘Commission’ was considered urgent for three main reasons. First, it had already been specifically raised by several belligerent Governments, notably Germany. On 5 October, the German Chancellor, Prince Max of Baden, had stated in a Declaration of Policy that in the peace negotiations the German Government would use its influence to see that the protection of labour and workers' insurance were included in treaties that would bind the contracting Governments to bring about an agreed minimum of similar or equivalent measures of safeguard the life and health of workers and to look after their welfare in cases of sickness, accident and infirmity. He would be counting

what quantities, how to produce it, for whom it should be produced, and who makes the decisions. The state, not the market, would decide what, how, and for whom.” Stiglitz, *Economics*, p. 950

¹⁹⁸ Alcock, *History of International Labour Organization*, p. 7

¹⁹⁹ John Williams Follows, *Antecedents of the International Labour Organization*, (United Kingdom: Oxford University Press, 1951), p. 59

²⁰⁰ Stiglitz, *Economics*, p. 950

²⁰¹ Alcock, *History of International Labour Organization*, p. 17

²⁰² Stiglitz, *Economics*, p. 956

²⁰³ *Ibid.*, pp. 955-959

²⁰⁴ Alcock, *History of International Labour Organization*, p. 18

on the expert advice of employers' and workers' organizations in his preparations. Second, trade unionism had become far more consciously international, and if Governments failed to establish international labour standards, the trade unions would certainly try. The French socialists were known to be particularly keen on pursuing international action, and it was considered that it was chiefly to them that the bait contained in the German Chancellor's Declaration was directed. Third, all the Governments stood committed to creating an international organization after the war as a means of settling their political problems, and it was considered inevitable that one of its organs would be a Labour Commission.²⁰⁵”

In pursuit, in 1919, International Labour Organization (ILO) was established as a part of League of Nations²⁰⁶. ILO was one of the first international institutions to be established by the international community, with the purpose of establishing minimum labour standards.

However, having an international institution to decide upon matters traditionally under state rules, would be undermining the traditional state sovereignty. It was later decided any decision coming out of the international organization regarding labour Conventions will be adopted by two-thirds majority and the Governments had to bring these conventions before their national governments for implementation²⁰⁷. “Although parliaments were free and could refuse to adopt the decisions of the Conference, it was hoped that the pressure of international public opinion and the labour movement in various countries would make them fall in with the view of the Conference²⁰⁸”. This international law-making model would be familiar to anybody studying public international law and the implementation of treaties to the national systems today.

ILO immediately started to adopt many conventions to create certain standards for labour force and despite pausing for few years during the Second World War, continued to do so afterwards.

In 1977, ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises, on the issues of collective bargaining, child labour, health and safety. This declaration is different because unlike the rest of the conventions issued by ILO, as stated in Principle 4 it is not directed to states only but also to multinational enterprises and creates the responsibility for all parties concerned, to respect UDHR and corresponding International Covenants (Principle 8)²⁰⁹.

²⁰⁵ *Ibid.*, pp. 18-19

²⁰⁶ Manuel Diez de Velasco, *Las Organizaciones Internacionales*, 14^a ed. (España: Tecnos, 2006), pp. 353-359

²⁰⁷ Alcock, *History of International Labour Organization*, p. 22

²⁰⁸ *Ibid.*, p. 22

²⁰⁹ Please see Chapter II.

Without diving further into the discussion of whether international labour rights are human rights²¹⁰, it has to be mentioned the labour rights, right to association and treatment of workers are now mostly being recognized as a part of human rights and therefore consists a big part of the business and human rights discussions.

6. FIRST ATTEMPTS TO CREATE AN INTERNATIONAL REGULATORY REGIME FOR BUSINESS ENTERPRISES

After the Second World War, more international institutions such as International Monetary Fund (IMF), World Bank and Organization for European Economic Co-operation (OEEC-superseded by OECD) were established to promote world peace and liberate global trade and economy. The economic restoration of post-war Europe started with the mentality that economic stability would also bring political stability²¹¹, which was an idea championed by US who was aiding European states to recover from remainders of war²¹².

During this period, gradually, businesses became the pioneers of economic growth with the influence of the capitalistic ideology²¹³. The international trade was moving towards manufactured goods, foreign direct investment was accelerating in scale and this was led by mostly the Western business enterprises²¹⁴. UN had certain initiatives on development with a focus on foreign direct investment, but it also issued certain decisions such as the permanent sovereignty over natural resources of 1962²¹⁵.

²¹⁰ Please see: Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, pp. 52-59

²¹¹ This was mainly led by the Americans, especially with the Marshall Plan. “The Marshall Plan rested squarely on an American conviction that European economic recovery was essential to the long-term interests of the United States. (...) American leaders envisioned an open international economy founded on the principles of liberal capitalism, such as free trade and equal opportunity. But they also equated these principles with democratic forms of government, associated autarkic economic policies with totalitarian political regimes, and assumed that ‘enemies in the market place’ could not be ‘friend at the council table’. ‘The political line up followed the economic line up’ as Cordell Hull once put it.” Michael J. Hogan, *The Marshall Plan: America, Britain and the Reconstruction of Western Europe, 1947-1952*, (United States: Cambridge University Press, 1987), p. 26

²¹² This was also the dawn of the Cold War, since Soviet Union rejected the United States leadership in the creation of the new world order. For more on the subject: Benn Steil, *The Marshall Plan: Dawn of the Cold War*, (United Kingdom: Oxford University Press, 2018)

²¹³ “The American led in mass production stemmed from several sources.” Sylvia Ostry, *The Post-Cold War Trading: Who’s First?*, (United Kingdom: The University of Chicago Press, 1997), p. 3

²¹⁴ “There is ample evidence that FDI evolved as the result of technological change and managerial innovations in the structure and strategy of firms in Western Europe and United States.” Tagi Sagafi-nejad and John H. Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact*, (United States: Indiana University Press, 2008), p. 10-11

²¹⁵ UN General Assembly Resolution 1803 (XVII) Permanent Sovereignty Over Natural Resources

The positive but also negative impacts of Western Corporations in the developing world were growing with the faster communication and easier travel opportunities, the foreign direct investment pattern graphs started to show larger numbers starting from the 1970s²¹⁶.

The 1970s considered as a turning point in the contemporary history of business and human rights due to several series of scandals and conflicts happened one after another involving corporations²¹⁷, which led to an international response, in several different forms.

The “ITT Affair” is deemed important in the discussions since the late President Salvador Allende moved the discussions to the UN-level and caused a series of actions at the organization. The discussions were formed around how to put corporations under the international law umbrella, and it could be claimed that in the beginning, this seemed possible.

6.1. The ITT Affair and the UN Commission on Transnational Corporations

The Western European and American companies were leading in investing to third world countries during the 1960s and 1970s. The US was especially strong in Latin America²¹⁸, therefore had interests in those countries and their stability. Those were also the years the Cold War, major polarization in the world and turmoil in several countries’ political systems.

The ITT Affair was the turning point for discussions on business and human rights²¹⁹. In 1970, the socialist Salvador Allende was elected to be the President of Chile²²⁰. The US, particularly President Nixon, was not happy with Allende’s rise to power, because Allende was coming from a Marxist background²²¹. The American Central Intelligence Agency (CIA), immediately

²¹⁶ Dirk Willem te Velde, “Foreign Direct Investment and Development: An Historical Perspective”, *Background Paper for “World Economic and Social Survey 2006* (30 January 2006); “The stock of American FDI increased nearly fivefold between 1950 and 1966, an unprecedented development.” Ostry, *The Post-Cold War Trading: Who’s First?*, p. 7

²¹⁷ “the 1970s were a time of great change marked by a series of crises, scandals and conflicts which had a profound influence in the West: the oil crisis; the ensuing economic crisis; the wave of expropriation of Western foreign capital from developing countries; the end of the fixed exchange rates system; the Watergate scandal; the coup against the democratically elected President of Chile, Salvador Allende; the Arab-Israeli War; the eventual retreat of US troops from Vietnam, to name but a few.” Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 164; also please see Sagafi-nejad and Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact*, pp. 41-49

²¹⁸ United States Department of Commerce, Office of Business Economics, *US Investments in the Latin American Economy*, (1957).

²¹⁹ For more on ITT Affair and an outlook on the period’s approach to multinational corporations: Louis Turner, “Multinational Companies and the Third World”, *The World Today*, Vol. 30, No. 9 (September 1974), pp. 394-402

²²⁰ Sara K. Tedeschi, Theodore M. Brown, and Elizabeth Fee, “Salvador Allende: Physician, Socialist, Populist, and President” *American Journal of Public Health* Vol. 93, No. 12 (2003), pp. 2014-2015.

²²¹ Peter Kombluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability*, (United States: The New Press, 2003), p. 79

after Allende's election issued a paper stating that Allende government would create a considerable political and psychological costs in advancing of the Marxist idea. This led to the authorization of an anti-Allende campaign²²², in order to stop another socialist leader to become more powerful. Furthermore, American companies had investments in Chile²²³, and a socialist regime was a threat to those investments because of the nationalist economic policies the government was undertaking, such as expropriation of foreign company assets.

The International Telegraph and Telephone Corporation (ITT) was an American company had 70 percent of the shares of the Chilean Telephone Company. The Allende government also intervened to ITT's business, on the grounds of company was not fulfilling obligations and providing efficient services²²⁴. This was a threat to the ITT's investment, and they were afraid they might face expropriation. ITT later started lobbying in Washington to intensify their pressure on Chile²²⁵. CIA, through ITT, funded a right-wing newspaper called *El-Mercurio* to support Allende's opponents. The company was also involved in bribery²²⁶. In 1973, the violent Chilean coup' d'état took place which led to the overthrow of Allende.

Before his death, on 4th December 1972 Allende addressed the UN General Assembly stating the international community should pay more attention to the overgrowing power of the business enterprises and their political influence. He stated the companies are causing harm to the societies they are operating in and not being held accountable by any institution or parliament²²⁷. Allende committed suicide on 11th September 1973. General Augusto Pinochet took over the control of the country, bringing a regime remembered by massive human rights violations.

²²² Paul E. Sigmund, *The Overthrow of Allende and the Politics of Chile: 1964-1976*, (United States: University of Pittsburgh Press, 1980), p. 113

²²³ United States Department of Commerce, Office of Business Economics, *US Investments in the Latin American Economy*, (1957), pp. 65-68

²²⁴ Marcelo Bucheli and Erica Salvaj, "Reputation and political legitimacy: ITT in Chile, 1927-1972", *Business History Review* Vol. 87 No. 4 (2013), pp. 729-756.

²²⁵ Sigmund, *The Overthrow of Allende and the Politics of Chile: 1964-1976*, p. 155

²²⁶ Theodore H. Moran, "The United Nations and Transnational Corporations: A Review and a Perspective", *Transnational Corporations*, Vol. 18, No. 2 (August 2009), p. 92

²²⁷ "We are witnessing a pitched battle between the great transnational corporations and sovereign States, for the latter's fundamental political, economic and military decisions are being interfered with by world-wide organizations which are not dependent on any single State and which, as regards the sum total of their activities, are not accountable to or regulated by any parliament or institution representing the collective interest."

Address by Mr. Salvador Allende, President of the Republic of Chile at the UN General Assembly 27th Session (New York, 4 December 1972). For the full text of his speech: [http://www.un.org/ga/search/view_doc.asp?symbol=A/PV.2096] accessed December 2019

The ITT Affair was not the only ill-conduct of the American private actors. The Church Committee²²⁸ created after the coup occurred in Chile, documented dozens of accounts of corruption and ill-behaviour of the US multinationals around the world, which led to the discussions on corporate social responsibility on a wider scale²²⁹.

Despite ITT Affair is being used as a ‘poster-child’ in the business and human rights discussions, during the same time, anti-colonization process was also taking place, resulting in former colonies gaining independence and having a say at the UN General Assembly. In addition, the oil-rich countries realised their bargaining power and formed the organisation called Organization of the Petroleum Exporting Countries (OPEC)²³⁰. The economic differences created tensions between developed and developing countries were coming in front of the UN, which resulted in several resolutions and call for a New International Economic Order²³¹. In 1972, the UN Economic and Social Council (“ECOSOC”) adopted a resolution putting emphasis on multinational corporations as agents for the transfer of technology and capital to developing countries, and there was a need for formulating an international mechanism or policy to deal with the activities of these corporations²³².

These all resulted in ECOSOC requesting from the Secretary-General to appoint a group of experts to study the effects of multinational corporations on international development in the following years. These experts produced a report called “Multinational Corporations in the World Development”. Within this report a call was made for the establishment of corporate accountability before the international community²³³. The same report also called for an

²²⁸ The Committee was named after late Senator Frank Church. “During the mid 1970s, events in Chile generated a major debate on human rights, covert action, and proper place for both in America’s conduct abroad. (...) Chile became the catalyst for the first public hearing ever held on covert action. Senator Church’s Senate Select Committee to Study Government Operations with Respect to Intelligence Activities – known as the Church Committee-conducted the first major Congressional investigation into clandestine operations and published the first case studies, Covert Action in Chile, 1963-1973 and Alleged Assassination Plots Involving Foreign Leaders, detailing those operations abroad.” Peter Kombluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability*, p. xii

²²⁹ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 164

²³⁰ This intergovernmental association was formed in order to ensure income for the oil-rich states from their oil production that was being controlled by mostly the US-based multinational oil and gas companies. These corporations, also formerly known as “Seven-Sisters”, were controlling the oil industry and establishing the oil sale price which was not acceptable for the states that own and consequently, have the right to develop these natural resources. Organization of the Petroleum Exporting Countries, [http://www.opec.org/opec_web/en/] accessed December 2019

²³¹ UN General Assembly Resolutions 3201 (S-VI) and 3202 (S-VI), (1 May 1974)

²³² UN Department of Economic and Social Affairs, World Economic Survey 1971, Current Economic Developments, UN Doc. E/5144 (1972)

²³³ “Despite the considerable and transnational power which multinational corporations possess they, unlike governments, are not directly accountable for their policies and actions to a broadly-based electorate. Nor, unlike

international code of conduct for multinational corporations²³⁴, which resulted in studies and establishment of working groups. The same group also recommended for the launch of a special institution, which led to the creation of the United Nations Commission on Transnational Corporations (“UNCTC”) in 1974. The works of these working groups later led to the UN Draft Norms and the UNGPs.

In the beginning, between 1970s and 1980s, UNCTC was working to ease the tension between developed and developing states, assisting the UN and the national governments on matters regarding multinationals and issues arising from foreign direct investment. This commission was also studying the feasibility of a multilateral code of conduct for corporations with the purpose of taming their actions²³⁵. But from 1980s to 1990s this slowly started to change, due to developments occurred in political and economic diaspora²³⁶:

Indeed, in the beginning, the priorities of the States were not the same. The developing countries wanted to minimise the negative effects of the businesses, and they wanted to be in charge of regulating the investments. Since these countries were mostly affected by the incoming investments, the main focus was to protect the national interests rather than to protect States’ investors abroad. On the other hand, the developed countries were dealing with the outgoing investment, and thus, were concerned by the problems arising from this instead. This led the developed countries, to focus on the protection of their investors instead of their own national interests²³⁷. Furthermore, there was the socialist bloc of states, who had a different stance towards foreign direct investment²³⁸. After 1991, with the fall of communism and economic rise of the developing states, the balance of power had shifted.

purely national firms, are the multination corporations subject to control and regulation by a single authority which aim at ensuring a maximum degree of harmony between their operations and the public interest. The question at issue, therefore, is whether a set of institutions and devices can be worked out which will guide multinational corporations’ exercise of power and introduce some form of accountability to the international community into their activities.” UN Development of Economic and Social Affairs (ST/ECA/190), *Multinational Corporations in World Development* (1973)

²³⁴ ST/ECA/190, p. 102

²³⁵ UN Economic and Social Council (E/5665), Commission on Transnational Corporations, Report of the First Session (New York, 17-28 March 1975)

²³⁶ Karl P. Sauvant, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations”, *The Journal of World Investment and Trade* Vol. 16 (2015), pp. 56-58

²³⁷ Sauvant, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations”, pp. 20-25

²³⁸ “State socialism, as an ideal type, is characterized by structures of redistribution, central planning, an absence of private enterprise, autocratic power of the Communist party, and a prevalent ideology of Marxism-Leninism, which privileges collective interest.” Absence of private enterprise included domestic and foreign enterprises. Nina Bandelj, *From Communists to Foreign Capitalists: The Social Foundations of Foreign Direct Investment in Postsocialist Europe*, (United States: Princeton University Press, 2008), p. 10

In parallel of these developments, UNCTC was working actively on a draft code of conduct for transnational corporations. In 1976, the Commission issued a document “Issues involved in the Formulation of a Code of Conduct”. Accordingly;

“The formulation of international codes concerning TNCs is a complex process, requiring decisions on several different aspects simultaneously. In each case the decision will relate to and even depend on decisions on the other aspects. A primary decision concerns the coders precise purposes; a second concerns the actors to be covered, whether TNCs only or Governments and TNCs; a third concerns the coders comprehensiveness, the substantive issues that will be included within its provisions; and the fourth involves the approach or the stringency and methods of implementing its provisions, in other words, its legal nature and the means of surveillance and the possible penalties to be imposed.²³⁹”

Accordingly, in the beginning two options were identified with regard to formulation of the code of conduct: whether to cover only the corporations or both corporations and governments. Addressing merely the governments was not considered as an option, but still the report opts for the second option, stating that covering only corporations would undermine the Governments freedom to set their own constraints²⁴⁰. In fact, towards the end of the report, this is made clearer, stating the language of the code should be in such a way that the transnational corporations will be regulated but through the channels of the governments:

“A code aimed at regulating the behaviour of transnational corporations only may include provisions concerning their obligations toward the countries in which they operate (of the type "transnational corporations shall", or "shall not", do this or that). These provisions may be included in a legal instrument addressed to Governments and imposing on them the duty (or inviting them) to apply the provisions of the code in their domestic law.²⁴¹”

However, the Commission also did not opt out from the possibility of imposing duties directly on the transnational corporations. It has been stated the code of conduct may be directly covering corporations, though this would be the “less usual” way and would still involve government action particularly regarding enforcement:

“Another method, **less usual**, might be for the instrument embodying the code to be addressed to the transnational corporations themselves. Even in such a case, the code would have a definite impact on governmental positions and obligations: its enforcement would most probably be in the hands of Governments; and in specifying the duties of transnational corporations, the Governments adopting the

²³⁹ UN Economic and Social Council (E/C.10/17), Transnational Corporations: Issues involved in the Formulation of a Code of Conduct, Report of the Secretariat (20 July 1976), para. 22

²⁴⁰ E/C.10/17, para. 54

²⁴¹ E/C.10/17, para, 147

code would be authoritatively recognizing certain areas of governmental authority concerning transnational corporations.²⁴²”

Following this report, in 1977 an intergovernmental working group was formed to discuss a possibility of a multilateral treaty. This working group, namely “The Intergovernmental Working Group on a Code of Conduct” held several sessions, however these sessions could not reach a solution:

“All sessions were chaired by Sten Niklasson (Sweden), who managed to create, according to Sahlgren, ‘a very good ambiance, almost one of camaraderie, while maintaining a high intellectual standard, although not surprisingly, the atmosphere became more precarious and testy later during the negotiations.’²⁴³”

Indeed, in 1982 the Working Group sent the draft codes of conduct to the Commission, but the provisions of this final draft were not fully agreed before sent to the Commission²⁴⁴. The negotiations were elevated again at the Commission level. For instance, in 1983, the developing countries, led by Venezuela, proposed their version of the Code of Conduct, which included direct provisions on transnational corporations, such as “transnational corporations shall not interfere in the affairs which are concern of Governments” and an international mechanism to follow up the code²⁴⁵. Developed countries were not in favour of such code. The divide between developed and developing countries was steep, which led the discussion to go on for a decade and eventually came to an end in 1992²⁴⁶. Furthermore, it occurred the states were much more in control of the provisions that goes into the Bilateral Investment Treaties²⁴⁷, which made them favourable compared to a multilateral treaty. In July 1993, the negotiations were

²⁴² E/C.10/17, para, 147

²⁴³ Sauvart, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations”, pp. 38-39

²⁴⁴ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 173

²⁴⁵ UN Economic and Social Council (E/C.10/1983/S/4), Completion of the Formulation of the Code of Conduct on Transnational Corporations: Draft Code of Conduct on Transnational Corporations Proposed by Venezuela on behalf of the Group of 77 (21 January 1983)

²⁴⁶ “It was the view of delegations that no consensus was possible on the draft code at present. Delegations felt that the changed international economic environment and the importance attached to encouraging foreign investment required that a fresh approach should be examined, which could include the preparation of guidelines and/or any other international instrument on foreign investment at the next session of the Commission on Transnational Corporations.” UN General Assembly (A/47/446), Note by the Secretary General (15 September 1992), para. 2

²⁴⁷ The Bilateral Investment Treaties (BITs) started to become a tool used by the governments in order to regulate the foreign direct investment and the protection of the investors. Indeed, BITs were numbered 385 by 1989 and 2,265 by the year 2003. UNCTAD, “Quantitative data on bilateral investment treaties and double taxation treaties”, [[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx)] accessed December 2019

terminated after the work has been transferred to UNCTAD. In 1994, UNCTC was officially dissolved²⁴⁸.

This was not the end of the discussion on creating a code of conduct. Some questions that were discussed within the work of UNCTC resurfaced after 1992²⁴⁹. However, the discussions slightly changed its focus and narrowed down to more social issues. In 1997, the UN Sub-Commission on the Promotion and Protection of Human Rights started to work on a new draft code²⁵⁰.

6.2. UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

In August 2003, “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” has been approved by the UN Sub-Commission on the Promotion and Protection of Human Rights²⁵¹ and sent to the Commission on Human Rights for approval²⁵².

The UN Draft Norms accepted businesses have obligations deriving from international human rights law and are subjected to monitoring of the international mechanisms²⁵³. This could be seen within several articles. For instance, Article 1 of the Draft Norms puts corporations almost at the same level as the States, giving them the obligation to promote, secure the fulfilment of, respect and ensure respect of and protect human rights²⁵⁴.

²⁴⁸ UN Economic and Social Council Res. 1994/1 (14 July 1994)

²⁴⁹ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 175

²⁵⁰ UN Sub-Commission (E/CN.4/Sub.2/1997/50)

²⁵¹ UN Sub-Commission Res. 2003/16

²⁵² The text of the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights can be found here: [<http://www1.umn.edu/humanrts/links/norms-Aug2003.html>] accessed December 2019

²⁵³ Detlev F. Vagts, “The UN Norms for Transnational Corporations”, *Leiden Journal of International Law* Vol. 16 (2003), pp. 795-796

²⁵⁴ Draft Norms Article 1: “States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.” Even though this article puts the States as the primary responsibility bearers, it gives the transnational corporations a certain level of obligation, that they bear within their “sphere of influence”. Sphere of influence has been defined as the “ability to influence markets, governments, stakeholders and communities”. David Weissbrodt and Maria Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, *American Journal of International Law* Vol. 97 (2003), p. 912

“Unlike the UN Guiding Principles adopted in 2011, which state that companies must ‘respect’ human rights, the Norms imposed the same obligations on companies as on states with regard to human rights. This means that the private sector was expected not only to respect but also to ‘promote, secure the fulfilment of, (...) ensure respect of and protect human rights’²⁵⁵.”

Article 12 stated the business enterprises do not only have to respect civil, cultural, economic, political and social rights and but also to contribute to their realization. In addition, Article 16 of the UN Draft Norms provides the companies shall be subjected to periodic monitoring and verification by the UN, other international and national mechanisms already in existence or yet to be created:

“Transnational corporations and other businesses enterprises shall be subject to **periodic monitoring and verification by United Nations**, other international, and national mechanisms, already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent, independent, and take into account input from stakeholders (including nongovernmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other businesses enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.”

How this was going to be made, the meaning of ‘verification’ and what would be the legal consequences of it, were unclear. The Commentary suggested that UN should be taking in the leading role in creating mechanisms; but could also delegate collection of information to the NGOs, unions, individuals and others²⁵⁶. This also brings in the question on whether NGOs are

²⁵⁵ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 186

²⁵⁶ “United Nations human rights treaty bodies should monitor implementation of these Norms through the creation of additional reporting requirements for States and the adoption of general comments and recommendations interpreting treaty obligations. The United Nations and its specialized agencies should also monitor implementation by using the Norms as the basis for procurement determinations concerning products and services to be purchased and with which transnational corporations and other business enterprises develop partnerships in the field. Country rapporteurs and thematic procedures of the United Nations, Commission on Human Rights should monitor implementation by using the Norms and other relevant international standards for raising concerns about actions by transnational corporations and other business enterprises within their respective mandates. The Commission on Human Rights should consider establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms. The Sub-Commission on the Promotion and Protection of Human Rights and its relevant working group should also monitor compliance with the Norms and developing best practices by receiving information from non-governmental organizations, unions, individuals and others, and then by allowing transnational corporations or other business enterprises an opportunity to respond. Further, the Sub-Commission, its working group and other United Nations bodies are invited to develop additional techniques for implementing and monitoring these Norms and other effective mechanisms and to ensure access is given to NGOs, unions, individuals and others.” Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, (U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2) (2003), Article 16, para. (b)

legitimate to get involved in such monitoring²⁵⁷. This article particularly was not favourable by the developed states, since it was undermining the state sovereignty and putting corporations almost at the same level as the states²⁵⁸.

The developed states and the private sector were heavily against the UN Draft Norms and developing states were not very supportive either. At last, in 2004, the UN Draft Norms were left aside without getting an approval, on the grounds of they have ‘no legal standing’:

“At its 56th meeting, on 20 April 2004, the Commission on Human Rights, (...) expressing its appreciation to the Sub-Commission for the work it has undertaken in preparing the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, which contain useful elements and ideas for consideration by the Commission, decided, without a vote, to recommend that the Economic and Social Council:

(c) Affirm that document (...) as a draft proposal, has **no legal standing**, and that the Sub-Commission should not perform any monitoring function in this regard.²⁵⁹”

However, this situation sparked the serious discussions on whether international law can be extended to business enterprises. In the same decision, the UN Commission on Human Rights, requested the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights and submit it to the Commission at its 61st Session. The report produced accordingly²⁶⁰, lists the arguments against or in favour of the UN Draft Norms²⁶¹ and states that the legal nature of the responsibility imposed on the business enterprises needs to be considered:

²⁵⁷ Larry Cata Backer, “Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law”, *Columbia Human Rights Law Review* Vol: 37 (2005), pp. 188-191

²⁵⁸ *Ibid.*, pp. 188-191

²⁵⁹ Office of the High Commissioner for Human Rights, (2004/116): Responsibilities of Transnational Corporations and Related Business Enterprises With Regard To Human Rights.

²⁶⁰ UN Commission on Human Rights (E/CN.4/2005/91), Report of the UN High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights (15 February 2005)

²⁶¹ “The main arguments both against and in favour of the draft Norms are summarized below. The stakeholders critical of the draft Norms argued that: (a) The draft Norms represents a major shift away from voluntary adherence by business to international human rights standards and the need for this shift has not been demonstrated; (b) The style of the draft Norms is unduly negative towards business. The tone of the draft is unbalanced and does not adequately take into account the significant positive contributions of business towards the enjoyment of human rights; (c) The recognition of legal obligations on business to “promote, secure the fulfilment of, respect, ensure respect of and protect human rights” is baseless and a misstatement of international law - only States have legal obligations under international human rights law; (d) The human rights content of the draft Norms is vague and inaccurate. For example, the reference to international treaties and other instruments in the preambular paragraphs and under the definitions includes documents that are only recommendations, have

“International human rights law generally imposes obligations on States, although some exceptions do exist, for example, in relation to armed groups. States parties to human rights treaties have the obligation to protect individuals and groups of individuals from the actions of third parties, including business entities. The process of elaborating a statement of universal standards on business and human rights would raise the question of the legal status of that text and whether it would impose direct legal obligations on business with regard to human rights. The Commission might wish to consider further the effect of imposing direct legal obligations on business entities under international human rights law and how such obligations might be monitored.²⁶²”

Upon receipt of this report, UN Commission on Human Rights requested Secretary-General to appoint a Special Representative on the issue of human rights and transnational

low levels of ratification, are not self-executing or are not human rights instruments. Those documents are therefore not indicative of the state of international human rights law; (e) The legal responsibilities on business identified in the draft Norms go beyond the standards applying to States. In particular, the wording of the draft Norms imposes duties on business to meet standards under treaties that a State in which a company was operating might not have ratified; (f) The draft Norms require business to undertake balancing decisions more appropriate to the role of Governments. Some human rights require Governments to decide on the most appropriate form of implementation, balancing often competing interests. The democratic State is in a more appropriate position to make such decisions than companies; (g) The imposition of legal responsibilities on business could shift the obligations to protect human rights from Governments to the private sector and provide a diversion for States to avoid their own responsibilities; (h) The implementation provisions of the draft Norms are burdensome and unworkable. The vagueness of some of the provisions in the draft Norms would make it difficult for a tribunal to adjudicate any communication that came before it and the reporting requirements in the draft Norms are burdensome. The binding approach adopted in the draft Norms could also be counter-productive, drawing away from voluntary efforts and focusing on the implementation of only bare minimum standards; (i) The draft Norms duplicate other initiatives and standards, particularly the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration.

Those stakeholders welcoming the draft Norms argued that they: (a) Are the most comprehensive, clear and complete initiative or standard on business and human rights that goes beyond labour standards; (b) Add to, rather than duplicate, existing initiatives and standards by attempting to identify the responsibilities of business in relation to specific human rights; (c) Provide a common set of standards for all business in relation to human rights and a level playing field for competing companies; (d) Provide a tool for evaluating current and future practices. The draft Norms offer a template of relevant rights and responsibilities against which companies can review and assess their activities in relation to human rights to assist them in understanding how operations can affect individuals and communities; (e) Establish the right balance between the obligations of States and companies with regard to human rights. The draft Norms do not challenge the role of the State as primary duty bearer for human rights, but the draft does indicate that companies have secondary responsibilities with regard to human rights within their respective spheres of activity and influence; (f) Provide a normative framework and template for action by States, assisting States in establishing national legislation by identifying specific areas where the State should regulate the activities of corporations in order to meet its obligations to protect human rights; (g) Attempt to deal with the situation where a company is operating in a State which is unwilling or unable to protect human rights. The identification of direct international legal obligations applicable to business envisaged by the draft attempts to address a situation where the State has either failed to legislate effectively, or is unable to protect human rights in the particular situation; (h) Address the current fatigue and mistrust amongst civil society in relation to voluntary initiatives which work for the well-intentioned and, although of significant value, do not cover all companies (many companies do not have a human rights policy). Voluntary initiatives are both inconsistent in their treatment of human rights and insufficient to mitigate comprehensively all threats to the enjoyment of human rights; (i) Offer the possibility of a remedy to victims of human rights violations. This builds on voluntary initiatives which are not supervised by an independent body and which do not necessarily guarantee a right to a remedy in the case of clear violations.” E/CN.4/2005/91, para. 20, 21

²⁶² E/CN.4/2005/91, para. 50

corporations²⁶³. In 2005, Professor John Ruggie from Harvard University was appointed as the Special Representative on Business and Human Rights by then the Secretary-General Kofi Annan. The initial expectation from him was to develop the UN Draft Norms, however, he decided to abandon them, as stated in the first report he submitted to the UN Commission on Human Rights²⁶⁴. He said the UN Draft Norms was not having an authoritative basis under international law, because it was merely asserting the responsibilities of States regard to human rights to corporations, instead of discovering or inventing new ones²⁶⁵. This decision embarked some negative responses from those created the UN Draft Norms²⁶⁶, however did not stop the Ruggie to proceed with his agenda.

The UN Draft Norms was an ambitious attempt²⁶⁷, it was suggesting a shift in the status of how things were being done when it comes to the regulating businesses and how states were getting involved. UN Draft Norms is an interesting milestone in the discussions related to business and human rights, suggesting the businesses have responsibilities deriving from international human rights law and creating certain mechanisms for monitoring, which made the corporate lobby not happy²⁶⁸. But the UN Draft Norms were certainly not as accommodating as the UNGPs, probably the reason why it failed. Then again, we agree with Bernaz stating that, “the

²⁶³ UN Commission on Human Rights (E/CN.4/2005/L.87) (15 April 2005)

²⁶⁴ “(..) But the conclusion is that the flaws of the Norms make that effort a distraction from rather than a basis for moving the Special Representative’s mandate forward. Indeed, in the Special Representative’s view the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights.” UN Commission on Human Rights (E/CN.4/2006/97), Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, (22 February 2006), para. 69

²⁶⁵ “The Norms are said merely to “reflect” and “restate” international legal principles applicable to business with regard to human rights. At the same time they are said to be the first such initiative at the international level that is “non-voluntary” in nature and thus in some sense directly binding on corporations. But taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones. What the Norms have done, in fact, is to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law - hard, soft, or otherwise.” E/CN.4/2006/97, para. 60

²⁶⁶ For a critic please see: David Weissbrodt, “UN Perspectives on Business and Humanitarian and Human Rights Obligations”, *American Society of International Law* Vol. 100 (2006), pp. 135-139

²⁶⁷ Jan Wouters and Anna-Louise Chané, “Multinational Corporations in International Law” Leuven Center for Global Governance Studies, Working Paper No. 129 (February 2015), p. 14

²⁶⁸ David Kinley and Rachel Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law”, *Human Rights Law Review* Vol. 2, (2006), p. 45

Norms did have a number of flaws and perhaps went too far, but probably did not deserve to be abandoned in the way that they eventually were²⁶⁹”.

7. THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Initially, Ruggie was appointed as a Special Representative to the Secretary-General for two years, then granted another year and after three more years of extension of his mandate, making his mandate in total of six years. During this period, his work received great deal of attention.

Ruggie had a different approach to the corporate responsibility. Unlike UN Draft Norms created a heavy corporate responsibility before international law, Ruggie relied on a broader and softer, governance-based approach²⁷⁰ in a manner of guidelines.

Following the failure of the UN Draft Norms, Ruggie started to create what he called “Protect, Respect and Remedy” framework which led to the acceptance the UNGPs (sometimes also referred as the “Ruggie Principles”). Differentiating from the UN Draft Norms, the UNGPs were drafted in a manner of soft-law guidelines, not creating any legal responsibilities for business enterprises.

7.1. The “Protect, Respect and Remedy” Framework

After his decision in 2006 that the UN Draft Norms should be abandoned, Ruggie continued to submit yearly reports to the first UN Commission on Human Rights (later became the UN Human Right Council). In 2007, his report was focusing on five topics: the state duty to protect; corporate responsibility and accountability for international crimes; corporate responsibility for other human rights violation under international law; soft-law mechanisms and self-regulation²⁷¹. In this report, Ruggie concluded, business enterprises do not have obligations deriving from international law, because international law merely binds states²⁷²; therefore, all the discussions made around the UN Draft Norms were not entirely helpful for the progress of the business and human rights field. In pursuit, Ruggie decided creation of a legal

²⁶⁹ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 188

²⁷⁰ Radu Mares, “Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress” in *The UN Guiding Principles on Business and Human Rights: Foundations and Implementations* edited by Radu Mares, (The Netherlands: Martinus Nijhoff Publishing, 2012), p. 2

²⁷¹ A/HRC/4/035, para. 6

²⁷² “The emerging corporate responsibility for international crimes is grounded in growing national acceptance of international standards for individual responsibility. Although it continues to evolve, there is observable evidence of its existence. In contrast, what if any legal responsibilities corporations may have for other human rights violations under international law is subject to far greater existential debate.”, A/HRC/4/035, para. 33 “In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations.” A/HRC/4/035, para. 44

accountability with the help of a binding treaty, but soft-law standards²⁷³ and initiatives were the key to development the business and human rights field:

“And while states have been unwilling to adopt binding international human rights standards for corporations, together with business and civil society they have drawn on some of these instruments in establishing soft law standards and initiatives. It seems likely, therefore, that these instruments will play a key role in any future development of defining corporate responsibility for human rights.²⁷⁴”

In the Report of 2008²⁷⁵, now famous the three pillars of Business and Human Rights framework have been introduced. These respective pillars were, the state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy. In the same report, these pillars were explained further.

Accordingly, the first pillar “The State Duty to Protect” relies on the legal obligation of States to protect their citizens from human rights abuses, those including occurred due to business operations. States should take all necessary steps to protect against abuse, including prevent, investigate, and punish the abuse, and to provide access to redress²⁷⁶. In the report, it has been stated there is an increasing encouragement at the international level, for home States to take regulatory action to prevent abuse by their companies overseas²⁷⁷.

The Second Pillar is about the Corporate Responsibility to Respect, where we observe the biggest diversion from the UN Draft Norms. Within the report it has been stated the corporations do have a responsibility to respect human rights. However, differentiating from the UN Draft Norms, this responsibility is not an obligation in a legal sense, but a responsibility that is softer and much narrower²⁷⁸. This responsibility has been defined in the Report of 2008, as “to respect rights essentially means not to infringe on the rights of others - put simply, to do no harm”²⁷⁹ and it does derive from “the basic expectation society has of business”²⁸⁰ and not international law.

²⁷³ “Soft law is “soft” in the sense that it does not by itself create legally binding obligations. It derives its normative force through recognition of social expectations by states and other key actors.”, A/HRC/4/035, para. 14

²⁷⁴ A/HRC/4/035, para. 44

²⁷⁵ UN Human Rights Council, (A/HRC/8/5), Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (7 April 2008)

²⁷⁶ A/HRC/8/5, para. 18

²⁷⁷ A/HRC/8/5, para. 19

²⁷⁸ Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, p. 191-192

²⁷⁹ A/HRC/8/5, para. 22

²⁸⁰ A/HRC/8/5, para. 9

The responsibility in a meaning of “do not harm” can be criticized. Clearly, this does not ask for the corporations to change their ways of operation. In case a corporation is meeting the minimal threshold of not causing any moral and ethical problems during their operations, they would meet this responsibility. They do not have to have any mechanisms to cope with human rights problems or develop values within the organization, they do not have to internalize the respect for human rights. Karp explains the situation as follows:

“In order to be an agent that is capable of bearing a responsibility to refrain from harming human rights – which, unlike the responsibility to respect human rights, is located mainly on the ‘external’ and ‘outer’ side of ethics – an agent needs to meet only the minimal threshold of moral agency. In order to be able to bear a responsibility to refrain from harming others’ rights, a corporate agent does not necessarily need to be able to develop value structures and ethical judgements that mirror those of natural persons. It simply needs to be able to understand the rules about external action and to act on them.²⁸¹”

Another big move of Ruggie was the statement of the corporate responsibility to protect would not be deriving from the international human rights law, but from “basic expectations of the society” which is a term that needs further discussion in its own right. This approach in legal terms is very debatable, which we will discuss further later²⁸². But to shortly introduce the topic here, in Backer’s words;

“This may appear to be too far a leap for traditionalists. Rules grounded in political legitimacy are understood as requiring obedience though the same has not been true of social license rules. Their force is felt but the rules of economics and self-interest have generally not been actionable before the courts of any state.²⁸³”

Even though the framework does not go as far as the corporations do not have to obey the domestic laws of the country they are operating in, it does create a poly-centric system where many actors are expecting to contribute into this responsibility²⁸⁴. This could be seen as an advancement, a diplomatic compromise, which probably helped to receive wide support from the Member States²⁸⁵. On the other hand, it can also be seen as a shortcoming of this

²⁸¹ David J. Karp, *Responsibility for Human Rights, Transnational Corporations in Imperfect States*, (United Kingdom: Cambridge University Press, 2014), p. 86

²⁸² Please see Chapter IV(5).

²⁸³ Larry Cata Backer, “On the Evolution of the United Nations’ ‘Protect-Respect-Remedy’ Project: The State, the Corporation and Human Rights in a Global Governance Context”, *Santa Clara Journal of International Law*, Vol. 38 (2011), p. 74

²⁸⁴ *Ibid.*, p. 43

²⁸⁵ *Ibid.*

framework, because there are just way too many public and private governance systems would like to have a say on the corporate responsibility.

The last pillar access to remedy, focuses on the importance of having judicial mechanisms working effectively, in case a corporate human rights abuse occurs. This pillar not only encourages judicial mechanisms, but also non-judicial ones. Non-judicial mechanisms may help receiving effective remedies for victims in case a state-centric judicial mechanism would not work, or even if they work, they might be much more accessible²⁸⁶. Non-judicial mechanisms would include, for instance publicly funded mediation services, such as those handling labour rights disputes in the United Kingdom and South Africa; national human rights institutions; or mechanisms such as the OECD's National Contact Points²⁸⁷. But it may also include company-based or industry-based mechanisms²⁸⁸.

This report was welcomed unanimously by the UN Human Rights Council and paved the way for the extension of Ruggie's mandate for three more years²⁸⁹. This new mandate was given with the intention of translating the framework into practical guiding principles.

7.2. Acceptance of the UN Guiding Principles on Business and Human Rights

Ruggie's mandate continued between the years 2009-2011. In 2011 the "Guiding Principles on Business and Human Rights, implementing the 'Protect, Respect and Remedy' Framework" (UNGPs) was presented to the UN Human Right Council and was endorsed unanimously on 16th June 2011²⁹⁰.

The UNGPs are being accepted as a milestone since it is the first legal tool succeeded to be accepted by the Member States on the issue of business and human rights²⁹¹. This was also a strong political statement coming from the States involved²⁹². The UNGPs sparked further

²⁸⁶ A/HRC/8/5, para. 84

²⁸⁷ A/HRC/8/5, para. 85; *infra*. pp. 77-78

²⁸⁸ A/HRC/8/5, para. 86

²⁸⁹ UN Human Rights Council (A/HRC/RES/8/7), Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (18 June 2008)

²⁹⁰ UN Human Rights Council (A/HRC/RES/17/4), Human Rights and transnational corporations and other business enterprises, (16 June 2011)

²⁹¹ UN Human Rights Council (A/HRC/17/31), Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework (21 March 2011)

²⁹² John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights*, (United States: W.W. Norton & Company Inc., 2013), pp. 120-121

discussions on implementation, encouraged states to act in order to have laws in the field of business and human rights²⁹³. Some states started to develop National Action Plans.

Other initiatives existed on the issues of business and human rights were aligned with the UNGPs, such as the OECD Guidelines on Multinational Enterprises. EU started to pay attention to Corporate Social Responsibility, so does the Council of Europe among other regional associations. These initiatives will be touched upon later in this thesis²⁹⁴.

Furthermore, the businesses were also welcoming of the UNGPs, the International Chamber of Commerce²⁹⁵, the International Organization of Employers also gave their endorsement²⁹⁶. The NGOs started to use the UNGPs as a part of their advocacy work.

Even though the UNGPs was highly successful and supported, it still falls short in solving the problem of creating legal accountability for corporations. Ruggie himself stated the UNGPs is “the end of the beginning”, meaning there is still a long way to go to ensure business enterprises are operating in human rights friendly manner. Quoting his words, the UNGPs are just “a foundation for expanding the international human rights regime to encompass not only countries and individuals, but also companies.”²⁹⁷

8. CONCLUSIONS

With this chapter we tried to look at the historical roots of the discussions on business and human rights. This analysis shows there are many dynamics involved in solving the problem of creating a framework that would be establishing a human rights friendly grounding for the corporate governance and operation and creating accountability for human rights abuses. It could be seen that there is a constant ‘ignorance’ or ‘resistance’ in involving businesses into

²⁹³ Please see Chapter II(4).

²⁹⁴ Please see Chapter II(3).

²⁹⁵ “We, the undersigned organizations, reaffirm our commitment to the UN Guiding Principles and to continuing to promote their implementation among our business networks (including at the national level) and the global business community. We urge companies everywhere to scale up their efforts to respect universally accepted human rights throughout their operations, value chains and business relationships. Meeting the corporate responsibility to respect human rights is a key contribution and vehicle through which business can help achieve the broader vision of peaceful and inclusive societies embraced by the SDGs.” International Chamber of Commerce, Statement in Support of the UN Guiding Principles and Sustainable Development Goals (November 2015)

²⁹⁶ “The IOE has closely followed this debate since the outset, and indeed mounted a successful campaign for the rejection of the draft norms described above. Nevertheless, the IOE strongly supported the pragmatic approach of the policy framework and, with the ICC and BIAC, led the business engagement with Prof. Ruggie, and often organised the business involvement in the many multi-stakeholder consultations that took place under his mandate, to ensure that the perspective of the corporate world was taken into account in creating the Guiding Principles.” International Organization for Employers, Fact Sheet for Business: Business and Human Rights

²⁹⁷ Ruggie, *Just Business: Multinational Corporations and Human Rights*, p. 124

international matters, which stops them from being obligated to respect international human rights principles before international law, despite the fact there have been many occasions that businesses got involved into international human rights abuses.

We can summarise few highlights from the historical review done in this chapter. Firstly, we do face the problem of very-well established “sovereignty” principle of international order in which is rooted in the Westphalian Principles. The international order had been formed around the ideal of “non-interference in the domestic matters” and international law had been constructed just to secure the international peace by creating a system where states are the primary law-makers and law-takers. This leaves the actors that are not states, but still effecting the global issues, in an unchartered territory.

Secondly, UN tried several times throughout the years, to create some sort of regulatory framework for these non-state actors, as we can see in the examples of Code of Conduct and the UN Draft Norms. However, both attempts failed due to the limitations faced with regard to the functioning of the international order. The UN Draft Norms particularly was a bold attempt to create international monitoring on the transnational corporations. This would also mean the states would be losing their grip over corporations. This was not acceptable, and the UN Draft Norms was labelled as having “no-legal-standing”. This bold notion is being revisited over and over again during the business and human rights discussions.

Thirdly, John Ruggie was appointed to research whether it is possible to create obligations for corporations under international law, in which he decided negatively and offered a soft-law approach to bring some harmony to the highly polarised discourse for a certain period. Though, the UNGPs was created on the foundations of “social expectations” rather than international human rights principles or international law in general, which makes the document highly problematic in legal sense.

Nevertheless, if we arrive to the present day, we can see that the business and human rights discourse is still relevant due to the immense pressure coming from societies, NGOs and the press. There is a bigger pressure on the business enterprises to become more “sustainable”, “ethical”, “responsible” and “transparent”, though none of these terms are defined by international legal sources.

CHAPTER II: REGULATION OF BUSINESS AND HUMAN RIGHTS

1. INTRODUCTION

Following the acceptance of the UNGPs, the regulatory activity on business and human rights gained momentum²⁹⁸. Here in this chapter we are aiming to identify the most important legal instruments shaping the regulatory landscape of business and human rights today.

We will first start with the international level. The current legal landscape at the international level has been constructed around a handful of soft-law initiatives not creating any legal obligations but trying to tackle certain problems and create some sort of foundational rules for business and human rights. These international legal measures, despite having a soft-law nature, are worth a mention due to them being used as foundational blocks for business and human rights. Especially three tools beside the UNGPs, namely, the OECD Guidelines for Multinational Enterprises (“**OECD Guidelines**”), the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (“**ILO Declaration**”) and the ISO 26000 (Guidance on Social Responsibility) have been referred by regional and national policies as references need to be taken into consideration by businesses when establishing human rights policies. We can see hard-law initiatives have failed to flourish at the international level due to political and legal reasons.

On the other hand, there is also legislative activity at the regional and national levels, where enforcing regulations are more streamlined compared to the international level. For instance, EU recently has enforced the Directive 2014/95/EU on Non-Financial Reporting, which creates a reporting duty for businesses on non-financial matters. Furthermore, there are soft-law decisions coming from the regional organizations. Here, we particularly focused on the Council of Europe recommendation, since we believe European region, being the most institutionalized, is the most advanced in creating effective corporate social responsibility policies. In addition, we touched upon the ASEAN Guidelines for Corporate Social Responsibility on Labour, where the South Asian countries agreed on a set of principles to regulate the labour issues.

²⁹⁸ “There exists a multitude of actions targeting the human rights conduct of business entities.” Wetzel, *Human Rights in Transnational Business*, p. 105

We could also see some steps have been taken by handful of nation states with regard to business and human rights matters. We have chosen four national legislations to give an understanding of what a national legislation could achieve with regards to business and human rights matters. The chosen national legislations are; the UK Modern Slavery Act, California Transparency in Supply Chains Act, Dutch Child Labour Due Diligence Law and being the most advanced, the French Law on Duty of Vigilance.

2. INTERNATIONAL SOFT-LAW MEASURES

When we refer to international legal tools, we refer to international instruments produced by international institutions do not only cover a small region that is geographically tied. Therefore, in this section we will look into the UNGPs, the OECD Guidelines, ILO Declaration, ISO 26000 (Guidance on Social Responsibility) and the UN Global Compact.

2.1. The UN Guiding Principles on Business and Human Rights

UNGPs could be acknowledged as the anchoring legal tool exists in the international level with regard to business and human rights. It was anonymously accepted by the UN Member States providing a strong political backing²⁹⁹. Following the acceptance of the UNGPs, other international legal instruments, more specifically the OECD Guidelines and ILO Declaration were amended in accordance with the UNGPs.

The UNGPs is a combination of guidelines constituted around three pillars: *The State Duty to Protect, The Corporate Responsibility to Respect and Access to Remedy*³⁰⁰. The UNGPs constituted as practical guidelines to implement “Protect, Respect and Remedy” Framework presented three years prior to the UN Human Rights Council. The historical context of the adoption of the UNGPs explained in the Chapter I, therefore this chapter will only identify the key principles of the UNGPs.

The one very important characteristic of the UNGPs is that it is applicable to any type of businesses, national or international, regardless of their size, location, sector or ownership³⁰¹,

²⁹⁹ Bernaz, *Business and Human Rights: History, law and policy - Bridging the accountability gap*, p. 193; also please check Chapter I(7.2).

³⁰⁰ Michael K. Addo, “The Reality of United Nations Guiding Principles on Business and Human Rights” *Human Rights Law Review* Vol. 14 (2014), pp. 133-147; Surya Deva, “Guiding Principles on Business and Human Rights: Implications for Companies” *European Company Law* Vol. 9 No. 2 (2012), pp. 101-109

³⁰¹ This was an achievement of the UNGPs, because the previous codes of conducts that were proposed by the UN, such as the UN Draft Norms focuses on certain type of enterprises, which are called transnational enterprises. UN Draft Norms, para. 20: “The term “transnational corporation” refers to an economic entity operating in more

which is an important point differentiates UNGPs from the rest of the international legal documents. The UNGPs consist of 31 principles: 10 principles for the State Duty to Protect (*Principle 1-10*), 14 principles for the Corporate Responsibility to Respect (*Principle 11-21*) and 7 principles for the Access to Remedy (*Principle 22-31*).

The State Duty to Protect

The first chapter of the UNGPs is addressed to the states and their duties to protect the human rights within their territories³⁰². This is yet another acceptance of a standard conduct to be followed by States, explained as there is a duty to prevent, investigate, punish and redress private actors' abuse of human rights. But besides this standard duty of States already exists, the UNGPs accepts States should also create policies, legislation, regulation and adjudication to prevent corporate human rights abuses³⁰³. This should be done with a "smart-mix" of policies and regulations, mandatory and voluntary actions to prevent human rights abuses by businesses³⁰⁴.

According to Ruggie, the "State Duty to Protect" is the most important pillar needs to be fulfilled to have a proper protection against corporate human rights abuse³⁰⁵. One of the biggest complexities we encounter at the state levels is the business and human rights related laws can be found in variety of different laws of the state, such as environmental, labour, property, privacy laws etc. Hence, the Principle 3 tries to ensure all types of regulations and policies should be respecting human rights. The States should incorporate necessary legislation or policies within these different laws and legal areas as the way they see the most effective³⁰⁶.

Another important principle in the UNGPs would be the Principle 2. The States should ensure all business enterprises domiciled in their territory and/or jurisdiction respect human rights

than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."

³⁰² Wetzel, *Human Rights in Transnational Business*, pp. 183-187

³⁰³ UNGPs, Principle 3: "In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts."

³⁰⁴ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (November 2016), p. ii

³⁰⁵ Ruggie, *Just Business*, p. 90

³⁰⁶ Commentary on Principle 3.

throughout their operations. This might be causing some questions surrounding extraterritorial jurisdiction. Indeed, no international human rights treaty currently requires states to have jurisdiction over extraterritorial cases; however, there is no limitation for having it either³⁰⁷. The UNGPs also encourages states to move into this direction³⁰⁸.

Furthermore, the UNGPs encourages states to have adequate human rights policies when they are engaging in relationships with the businesses through investment treaties or contracts³⁰⁹. In fact, this is one of the key issues that UN is focusing on, with the new Reform Package that was proposed by UNCTAD regarding the International Investment Regime³¹⁰. According to this regime, the states are encouraged to comply with the international standards and ensure “responsible investment”³¹¹, including in the area of business and human rights when getting into investment agreements.

The Corporate Responsibility to Respect

The second pillar, the corporate responsibility to respect, created around the idea of the respectful conduct is an expected conduct from corporations³¹². This responsibility exists independently of the State’s abilities and/or willingness to fulfil their human rights duties³¹³, meaning it would not matter if the State’s law system is ensuring the basic human rights are being protected. The corporations have this responsibility, nevertheless³¹⁴.

This responsibility is not limited to only few human rights, but to all internationally recognized human rights, at minimum, to International Bill on Human Rights³¹⁵ and the principles concerning fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work³¹⁶. It is possible for businesses to have more impact on certain rights than

³⁰⁷ Please see Chapter IV.

³⁰⁸ Commentary on Principle 2.

³⁰⁹ UNGPs, Principle 9.

³¹⁰ UNCTAD, *UNCTAD’s Reform Package for the International Investment Regime*, [http://investmentpolicyhub.unctad.org/Upload/UNCTADs%20Reform%20Package_web_09-03-2018.pdf], accessed December 2019

³¹¹ The term responsible investment includes the compliance with the domestic laws and encourage investors to comply with international standards, such as the UNGPs. Please see, *UNCTAD’s Reform Package for the International Investment Regime*, pp. 60-67

³¹² *Ibid.*, pp. 87-191

³¹³ UNGPs, Principle 11.

³¹⁴ Wetzel, *Human Rights in Transnational Business*, p. 187

³¹⁵ International Bill of Human Rights consists of UDHR and the main instruments that are codified around the UDHR: The International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights.

³¹⁶ UNGPs, Principle 12.

others, however limiting the rights to be respected would create limitations for any future developments.

The corporate responsibility to respect human rights requires business enterprises to avoid causing or contributing to adverse human rights impacts through their own activities and to seek to prevent or mitigate harm when such abuse occur³¹⁷. This can be achieved with having certain policies and processes in place, including a policy commitment and a human rights due diligence process to identify and prevent any human rights risks and certain processes to enable remediation in case any adverse human rights impact occurs³¹⁸. This would mean certain changes have to occur within the corporate management system, for the corporation to align with the business and human rights principles. Accordingly, there are three important key issues needs be incorporated into the corporate management system: a policy commitment; human rights due diligence practices; and an internal remedy system for the victims in case of an occurrence of a human rights abuse. The specifications of these three key issues have also been laid out by the UNGPs in the following principles: Accordingly, the policy commitment should be approved at the most senior level of the business enterprise; and stipulate the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations; publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; and reflected in operational policies and procedures necessary to be embed it throughout the business enterprise³¹⁹. The second key issue, human rights due diligence, should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities and should be ongoing, recognizing the human rights risks may change over time as the business enterprise's operations and operating context evolve³²⁰. Finally, in case the business causes a human rights violation or contributed to its adverse effects, they should provide a remedy process or contribute to the remediation process³²¹, and they should comply with all applicable laws and respect internationally recognized human rights, seek ways to honour internationally recognized human rights when faced with conflicting requirements and treat the risk of causing and contributing to gross human rights abuses as a legal issue, wherever they operate³²².

³¹⁷ UNGPs, Principle 13.

³¹⁸ UNGPs, Principle 15.

³¹⁹ UNGPs, Principle 16.

³²⁰ UNGPs, Principle 17.

³²¹ UNGPs, Principle 22.

³²² UNGPs, Principle 23.

Access to Remedy

As the last pillar, the access to remedy chapter encourages states to take appropriate steps to ensure access to remedy for the victims of corporate human rights abuses³²³. This could be done through judicial as well as, administrative and legislative processes³²⁴. The states should ensure the domestic judicial systems would be effective in addressing business and human rights issues. There must not be a denial of a case on unjustified grounds, and the barriers for accessing the judicial processes should be reconsidered and lowered when necessary³²⁵.

The states do not only have to make sure the judicial systems are working effectively, but also provide effective and appropriate non-judicial mechanisms³²⁶. It is also encouraged the states facilitate the access to non-state-based grievance mechanisms, such as dialogue-based mechanisms formed around industry or labour associations³²⁷. In order to ensure an early remedy, the businesses should be involved in operational-level grievance mechanisms for individuals or communities they are affecting³²⁸. An operational-level grievance mechanism can be an expert body formed by the enterprise, consists of the individuals living within the community and are responsible to facilitate the communication between the business and the community affected by the business³²⁹. The effectiveness criteria for the non-judicial mechanisms has been also set out within the UNGPs³³⁰.

³²³ Wetzel, *Human Rights in Transnational Business*, pp. 191-193

³²⁴ UNGPs, Principle 25.

³²⁵ UNGPs, Principle 26.

³²⁶ UNGPs, Principle 27.

³²⁷ UNGPs, Principle 28.

³²⁸ UNGPs, Principle 29.

³²⁹ On the different types of judicial mechanisms related to business and human rights: John Ruggie, "Protect, Respect, Remedy: A Framework for Business and Human Rights" MIT Press (2008), pp. 204-209

³³⁰ UNGPs, Principle 31: "The effectiveness can be ensured for non-judicial grievance mechanisms, both State-based and non-State-based: (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes; (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access; (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation; (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms; (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake; (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be: (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances."

One of the shortcomings of the UNGPs is that it does not set up a judicial mechanism for business and human rights cases and instead it leaves enforcement to the existing judicial systems and to companies' voluntary mechanisms. Considering neither was working efficiently before the acceptance of the UNGPs, we can criticize the principles do not actually provide an effective solution for the access to remedy problems and improve the situation for victims in this regard.

As a last point we have to mention that the UNGPs keeps the discussion on the business and human rights going³³¹, through the implementation process initiated by the UN Human Rights Council with the establishment of the Working Group on the issue of human rights and transnational corporations and other business enterprises. This Working Group actively works on business and human rights matters and provides a platform to discuss the issues surrounding the implementation process. Furthermore, some states also published National Action Plans for their own implementation projects and considered changes within their own legislations. The implementation process will be explained further in Chapter III.

2.2. The OECD Guidelines for Multinational Enterprises

Organisation for Economic Co-Operation and Development (“**OECD**”) was established in 1961 with a focus on assisting the problems of economic and social policies of its member states. Today OECD has 36 Member States mostly consisting of prominent economies of the world, such as the European countries, the US and Japan³³².

The OECD Guidelines for Multinational Enterprises (“**OECD Guidelines**”) was adopted in 1976³³³ and got an update five times ever since. The latest update was in 2011 which was done

³³¹ On the contrary, Wettstein criticizes the mainstreaming of UNGPs, as he believes this hinders the discussions on business and human rights as whole since the debates rather focuses on more technical issues than the larger picture. Please see: Florian Wettstein, “Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment” *Journal of Human Rights*, Vol. 14 (2015), p. 178

³³² There are currently 36 OECD member states: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Please see the updated list at: [<http://www.oecd.org/investment/investment-policy/oecddeclarationanddecisions.htm>], accessed December 2019

³³³ As of December 2018, the parties to these guidelines are all members states of the OECD, in addition Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Kazakhstan, Morocco, Peru and Romania, Tunisia and Ukraine. The European Community has been invited to associate itself with the section on National Treatment on matters falling within its competence. OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing (2011). [<http://dx.doi.org/10.1787/9789264115415-en>], accessed December 2019, p. 7, ft. 1

following the acceptance of the UNGPs. This update included a new human rights chapter and certain rules in parallel to the “Protect, Respect and Remedy” Framework³³⁴.

OECD Guidelines is a comprehensive code for responsible business conduct. It differentiates from the UNGPs because it does not only cover business and human rights issues. When the UN efforts failed to create a comprehensive code of conduct for the businesses during the 1970s, OECD succeeded in creating a document addressing the corporations.

OECD Guidelines are addressed to “multinational enterprises” specifically, which is what differentiates them from the UNGPs. The definition of the multinational enterprises³³⁵ has been made within the Guidelines as businesses operating in more than one country³³⁶. Accordingly, it could be claimed the domestic enterprises are not in the coverage of these guidelines. However, within the Guidelines it has been referred to these issues as there is no aim to introduce differences of treatment between domestic and multinational enterprises and the Guidelines are relevant to both³³⁷. This could create a bit of contradiction within the text, however considering that these Guidelines are mere soft-law principles, the legal impact of such contradiction is insignificant.

³³⁴ Wetzel, *Human Rights in Transnational Business*, pp. 106-110; Jernej Letnar Cernic, “Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises”, *Hanse Law Review* Vol. 4 (2008), pp. 71-101; Daniel J. Plaine, “The OECD Guidelines for Multinational Enterprises” *The International Lawyer* (1977); pp. 339-346; John Gerard Ruggie and Tamaryn Nelson, “Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges”, John F. Kennedy School of Government, Harvard University, Corporate Social Responsibility Initiative Working Paper No. 66 (2015)

³³⁵ This thesis does not aim to go into the discussions on the differences of the terms: multinational corporations, transnational corporations or multinational enterprises. These three terms mostly being used to refer to the same type of companies, which operates more than in one country, through subsidiaries or branches. In the business and human rights law sense, the differentiation does not make much difference, both transnational companies and multinational corporations (or enterprises) are subjected to the same type of rules. The problem arises when there has to be a liability that needs to be adhered to a specific company which brings in the corporate limited liability discussions. This would be a whole different discussion, that would be around corporate law, corporate groups and what does the national legislations permit on creating liability. For more information and a comparative study: José Engarcia Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law: International and Comparative Perspective* (United States: Kluwer Law and Taxation Publishers, 1994)

³³⁶ OECD Guidelines, Concepts and Principles, para. 4: “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.”

³³⁷ OECD Guidelines, Concepts and Principles, para. 5

The OECD Guidelines are addressed to multinational enterprises by the OECD governments directly and has the aim “to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their operations may give rise.³³⁸”. As mentioned in the preamble, these guidelines are voluntary recommendations for corporations, legally non-binding and non-enforceable, and it does not overrule the domestic laws of the Member States³³⁹. However, it is possible some governments change their domestic laws to comply. It is also possible, the OECD guidelines and domestic law do not comply, in this case, it has been advised to seek ways to honour these guidelines but still do not breach the domestic laws³⁴⁰.

The initial draft and the following amendments to the OECD Guidelines did not mention the human rights responsibilities of the multinational enterprises. Only after the 2011 update, the human rights responsibilities of corporations have been incorporated into the text³⁴¹. Accordingly, it has been mentioned in the General Policies Chapter the businesses should respect internationally recognized human rights of those affected by their activities³⁴².

Furthermore, Chapter IV of the OECD Guidelines has been dedicated to human rights³⁴³. This whole section is aligned with the UNGPs and what has been written within the UNGPs has almost been mirrored in the text of OECD Guidelines. It has been mentioned the corporations should respect human rights, seek ways to mitigate or prevent the adverse human rights impacts, have a policy commitment, carry out human rights due diligence and set up a remediation process for human rights abuses. Within the Commentary, it has been also stated irrespective of the country or specific context of enterprises’ operations, the corporations

³³⁸ OECD Guidelines, Preface, para. 9

³³⁹ OECD Guidelines, Preface para. 1

³⁴⁰ OECD Guidelines, Concepts and Principles, para. 2

³⁴¹ OECD, 2011 Update of the OECD Guidelines for Multinational Enterprises, Comparative table changes made to the 2000 text (2012)

³⁴² OECD Guidelines, General Policies, para. A(2)

³⁴³ OECD Guidelines, Chapter IV, Human Rights: “States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: (1) Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. (2) Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. (3) Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. (4) Have a policy commitment to respect human rights. (5) Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. (6) Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.”

should respect at minimum the internationally recognized human rights, those expressed in the International Bill of Human Rights³⁴⁴. In addition, the article recognizes the difference between direct and indirect human rights impacts of business, respectively in paragraph 2 and 3. Whereas, paragraph 2 states enterprises should avoid causing or contributing to adverse human rights impacts through their own activities³⁴⁵, paragraph 3 mentions more complex situations that could cause indirect human rights impacts. This paragraph mainly tries to address “business relationships”, including the relationships with business partners, its supply chain and any other non-State or State entity directly linked to its business operations³⁴⁶.

Beside the human rights issues, as mentioned, OECD Guidelines have more comprehensive set of rules on business code of conduct. Accordingly, OECD Guidelines has a special chapter on employment and industrial relations where the relationships with the labour associations, trade unions and representative associations are being mentioned. Forced labour, child labour and discrimination are the specific subjects covered³⁴⁷. This chapter echoes the ILO Tripartite Declaration of Principles concerning Multinational Enterprises, which will be discussed below, it also refers to 1998 Declaration on Fundamental Principles and Rights at Work³⁴⁸. Furthermore, multinational enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business³⁴⁹. This chapter follows the core OECD instruments target bribery such as the 1999 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions³⁵⁰. Last but not least, environmental impacts are also another subject covered by the Guidelines, stating the businesses should provide the public and workers with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise and engage in communication and consultation with the communities directly affected by their environmental and safety policies³⁵¹.

One of the most important things within the OECD Guidelines is the establishment of the National Contact Points (“NCPs”). NCPs have been established in order to facilitate the

³⁴⁴ OECD Guidelines, Commentary on Chapter IV, para. 39

³⁴⁵ OECD Guidelines, Commentary on Chapter IV, para. 42

³⁴⁶ OECD Guidelines, Commentary on Chapter IV, para. 43

³⁴⁷ OECD Guidelines, Chapter V, Employment and Industrial Relations

³⁴⁸ OECD Guidelines, Commentary on Chapter V, para. 48, 49

³⁴⁹ OECD Guidelines, Chapter VII, Combating Bribery, Bribe Solicitation and Extortion

³⁵⁰ OECD Guidelines, Commentary on Chapter VII, para. 76

³⁵¹ OECD Guidelines, Chapter VI, Environment

implementation process and provide a remedy system in case a non-compliance occur³⁵². NCPs function as a ‘non-judicial remedy system³⁵³’ and work domestically. The composition of an NCP may consist of senior representatives from ministries, government officials or independent experts. It may include NGOs, business community or worker organisations³⁵⁴. There are four criteria for the NCPs while undertaking functions: They should behave in a visible, accessible, transparent and accountable manner³⁵⁵.

The 2011 update also involves certain changes affecting the NCPs. Accordingly, the NCPs are obliged to have more transparency especially on certain cases. When an NCP decide to drop the case, or when there is no agreement reached between the parties, the reasons for non-agreement have to be provided and a statement have to be issued³⁵⁶. There will be no way to prevent this report to be published especially if there a human rights abuse.

Even though the OECD Guidelines are voluntary, under some circumstances the NCP Statements may create some effects on the parties. If the NCP deems appropriate, they may follow-up on its recommendations³⁵⁷. Furthermore, the results of the proceedings made publicly available could be sent to the government agencies when they are relevant to the specific agency’s policies and programmes³⁵⁸, which might cause some consequences upon the business enterprises.

Currently, the NCPs are the only international mechanism to hold corporations accountable to a certain extent with regard to human rights abuses. The state parties have the responsibility to set up the NCPs, making financial resources available for it to function. Though, this is not a legal obligation, a state may opt out of establishing an NCP, which diminishes its strength to be a reliable option to solve business and human rights cases.

2.3. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (“**ILO Declaration**”) is a document accepted in November 1977, and updated three

³⁵² Wetzel, *Human Rights in Transnational Business*, pp. 110-115

³⁵³ On non-judicial remedy systems: *supra*. ft. 329

³⁵⁴ OECD Guidelines, Procedural Guidance, National Contact Points, para. A(2)

³⁵⁵ OECD Guidelines, Commentary on the Procedural Guidance for NCPs, para. 9

³⁵⁶ OECD Guidelines, Commentary on the Procedural Guidance for NCPs, para. 32-35

³⁵⁷ OECD Guidelines, Commentary on the Procedural Guidance for NCPs, para. 36

³⁵⁸ OECD Guidelines, Commentary on the Procedural Guidance for NCPs, para. 37

times ever since, last one being in March 2017³⁵⁹. The last amendment included certain updates on decent work in supply chains and relevant issues derived from the UNGPs.

ILO Declaration, understandably, is more focused on worker rights. The aim of this Declaration is to encourage the positive contribution multinational enterprises can make to economic and social progress and the realization of decent work for all workers; and to minimize and resolve the difficulties to which their various operations may give rise³⁶⁰. It offers guidance to multinational enterprises specific to the areas of employment, training, conditions of work and life and industrial relations. Similar to OECD Guidelines, the ILO Declaration also addresses the multinational enterprises specifically, however, does not limit itself to a definition³⁶¹.

The first part of the ILO Declaration mentions that the multinational enterprises should, particularly when operating in developing countries, try to increase the employment opportunities and standards while taking the national governments policies in consideration³⁶². Declaration encourages the multinational enterprises to actively promote employment especially in these countries and try to use local resources as much as possible³⁶³.

When it comes to worker rights more in the realm of business and human rights, the governments should establish and maintain social protection through their national social security systems³⁶⁴, take effective measures to prevent and eliminate forced labour³⁶⁵ and child

³⁵⁹ Wetzel, *Human Rights in Transnational Business*, pp. 117-118; Jernej Letnar Cernic, "Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy." *Miskolc Journal of International Law* Vol. 6 No. 1 (2009), pp. 24-34

³⁶⁰ ILO Declaration, Aim and Scope, para. 2

³⁶¹ The wording in this paragraph is almost identical to the wording in the OECD Guidelines. ILO Declaration, Aim and Scope, para. 6: "To serve its purpose the MNE Declaration does not require a precise legal definition of multinational enterprises; this paragraph is designed to facilitate the understanding of the Declaration and not to provide such a definition. Multinational enterprises include enterprises – whether fully or partially state owned or privately owned – which own or control production, distribution, services or other facilities outside the country in which they are based. They may be large or small; and can have their headquarters in any part of the world. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term "multinational enterprise" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in this Declaration. In that regard, it also recognizes that multinational enterprises often operate through relationships with other enterprises as part of their overall production process and, as such, can contribute to further the aim of this Declaration"

³⁶² ILO Declaration, Employment, para. 16

³⁶³ ILO Declaration, Employment, para. 20

³⁶⁴ ILO Declaration, Employment, para. 22

³⁶⁵ ILO Declaration, Employment, para. 23

labour³⁶⁶ by providing victims protection and effective remedies. Governments should ensure non-discrimination at the workplace and promote equality³⁶⁷ and the wages of the workers hired by these businesses should not be less favourable to the workers than those offered by the comparable employers in the host country. Governments should adopt suitable measures to ensure this³⁶⁸. Governments should also ensure that multinational enterprises provide adequate safety and health standards and contribute to a preventative safety and health culture within the enterprises³⁶⁹ and multinational enterprises should be working with the national authorities to ensure such aim³⁷⁰.

The ILO Declaration also touches upon the industrial relations within the framework of freedom of association and the right to organize. Accordingly, the workers employed by the multinational enterprises, have the right to establish and to join labour organizations of their own choosing³⁷¹. The workers should have the right in accordance with the national laws, have representative organizations of their own choosing recognized for the purpose of collective bargaining³⁷². Last but not least, as a part of their duty to protect against business-related human rights abuses, governments should take appropriate steps to ensure, through judicial, administrative, legislative or any other appropriate means, in case an abuse occurs, for any affected worker to have access to effective remedy³⁷³. Voluntary initiatives or arbitration tools should be made available to prevent or settle the industrial disputes between employers and workers³⁷⁴. These measures are mirroring the principles within the UNGPs.

When it comes to the implementation process, the Governing Body of the ILO is responsible to promote and implement the ILO Declaration. Accordingly, a regional follow-up mechanism comprises of regional reports has been established by the ILO in their decision of March 2014³⁷⁵. Furthermore, to ensure the application of the ILO Declaration at the national levels,

³⁶⁶ ILO Declaration, Employment, para. 26

³⁶⁷ ILO Declaration, Employment, para. 28

³⁶⁸ ILO Declaration, Conditions of Work and Life, para. 41, 42

³⁶⁹ ILO Declaration, Conditions of Work and Life, para. 43

³⁷⁰ ILO Declaration, Conditions of Work and Life, para. 46

³⁷¹ ILO Declaration, Industrial Relations, para. 48

³⁷² ILO Declaration, Industrial Relations, para. 55

³⁷³ ILO Declaration, Industrial Relations, para. 64

³⁷⁴ ILO Declaration, Industrial Relations, para. 67

³⁷⁵ ILO Governing Body (GB.320/POL/PV), 320th Session (March 2014); Tenth Item on the Agenda, Implementation Strategy for the follow-up mechanism of and promotional activities on the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 184-190; ILO Declaration, Operational Tools, Promotion: “Regional Follow-Up: A regional follow-up mechanism comprises a regional report on the promotion and application of the MNE Declaration in the ILO member States in the region. The regional reports are based primarily on inputs received from governments, employers’ and workers’ organizations in these member

national focal points established³⁷⁶. The national focal points are instructed to raise awareness of principles within the ILO Declaration among government ministries and agencies, multinational enterprises and employers' and workers' organizations; organizing capacity-building events; and developing online information and dialogue platforms in local languages where possible. These focal points should promote the principles within the ILO Declaration and facilitate dialogue in a manner that is transparent, accessible and accountable. These focal points are not monitoring bodies.

In case there is a dispute arising of the interpretation of the ILO Declaration, parties may inform the ILO Governing Body. If the Governing Body accepts the case, they may issue a reply that will be published in the Official Bulletin of the ILO³⁷⁷. This procedure is differentiating from the NCP procedure created by the OECD. The outcome of this procedure when its followed is merely a clarification on the issues related to the ILO Declaration³⁷⁸.

2.4. ISO 26000 (Guidance on Social Responsibility)

The International Organization for Standardization (“ISO”) is an organization prepares international standards for member bodies which are national standard institutions. ISO creates documents consist of international standards, which are requirements, specifications, guidelines or characteristics to ensure materials produced, services provided are ‘fit for their purpose’. Most popular ISO standards would be the ISO 9001 on quality management³⁷⁹, ensuring the customers get consisted, good quality products, ISO 22000 on Food safety

States on the basis of a questionnaire and a special session during ILO Regional Meetings provides a tripartite dialogue platform to discuss further promotional activities at the regional level. The regional reporting is based on a four-year cycle with a report to be presented to the Governing Body at the end of each cycle.”

³⁷⁶ ILO Declaration, Operational Tools, Promotion: “Promotion at the national level/promotion by tripartite appointed national focal points: The national focal points should seek to promote the principles of the MNE Declaration and facilitate dialogue in a manner that is transparent, accessible and accountable to tripartite constituents. They are invited to communicate and collaborate with their counterparts in other countries in order to exchange ideas and raise awareness of the MNE Declaration globally. And they are encouraged to regularly inform the International Labour Office of their activities. The Office offers support to member States to establish national focal points and to develop their promotional and dialogue facilitation activities on the MNE Declaration.”

³⁷⁷ ILO Declaration, Operational Tools, Procedure for the Examination of Disputes Concerning the application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions (Interpretation Procedure), para. 1-9

³⁷⁸ For more information please check the official website of ILO Governing Body: [<https://www.ilo.org/gb/lang-en/index.htm>] accessed December 2019.

³⁷⁹ ISO 9001: 2015 (Quality Management Systems – Requirements) [<https://www.iso.org/obp/ui/#iso:std:iso:9001:ed-5:v1:en>] accessed December 2019; also please see: Wetzel, *Human Rights in Transnational Business*, pp. 230-231

management³⁸⁰, establishing standards for companies to control of the food produced and ensure its safety or ISO 14001 on Environmental Management³⁸¹ ensuring the companies are properly managing their environmental responsibilities.

The characteristic of ISO standards is that they are voluntary. However, companies can get through a conformity assessment and get certified if they want to have proof of compliance with international standards. This certification gives them an advantage in the economic market³⁸². Hence, ISO standards should be understood as not legal requirements but just initiatives make the consumers feel more confident in buying a product³⁸³.

With regards to business and human rights field, ISO developed an international standards document called ISO 26000³⁸⁴ in 2010, to create standardization regarding social responsibility³⁸⁵. This document was drafted by using a multi-stakeholder approach, involving experts from 90 different countries in the drafting process. The non-legal status has been stated specifically in the text of ISO 26000³⁸⁶. These standards were developed in accordance with the ISO Sustainable Development Goals agenda³⁸⁷. As stated within the standards, “the overarching goal for an organization is to maximize its contribution to sustainable development³⁸⁸” when they would like to achieve and practice social responsibility standards³⁸⁹.

³⁸⁰ ISO 22000:2018 (Food Safety Management Systems – Requirements for any organization in the food chain) [<https://www.iso.org/obp/ui/#iso:std:iso:14001:ed-3:v1:en>], accessed December 2019

³⁸¹ ISO 14001: 2015 (Environmental management systems – Requirements with guidance for use) [<https://www.iso.org/obp/ui/#iso:std:iso:14001:ed-3:v1:en>], accessed December 2019

³⁸² For more information on the conformity assessment: ISO, “What is conformity assessment?”, [<https://www.iso.org/conformity-assessment.html>], accessed December 2019

³⁸³ ISO 9001 standardization sometimes being used on packages of the products to inform the consumer that the product they are buying have gone through quality checks properly.

³⁸⁴ For the text of ISO:26000 (Guidance on Social Responsibility) [<https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>], accessed December 2019

³⁸⁵ Wetzel, *Human Rights in Transnational Business*, pp. 231-233

³⁸⁶ “It is not intended to provide a basis for legal actions, complaints, defences or other claims in any international, domestic or other proceeding, nor is it intended to be cited as evidence of the evolution of customary international law.” ISO 26000, Scope

³⁸⁷ For more information: ISO, Contributing to the UN Sustainable Development Goals with ISO standards, [<https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100429.pdf>], accessed December 2019

³⁸⁸ ISO 26000, Introduction

³⁸⁹ ISO is being criticized on the grounds that it does not offer enough guidance for companies that are already in the later stage of integrating social responsibility practices. “the standard seems to be applicable for SMEs since it allows identification of those issues that are most important in a given situation and thus caters to the (more) restricted resources of smaller companies.” Rudiger Hahn, “ISO 26000 and the Standardization of Strategic Management Process for Sustainability and Corporate Social Responsibility”, *Business Strategy and Environment* Vol. 22, pp. 451-452

Therefore, ISO 26000 includes concepts cannot be only considered as “social” but also environmental. Furthermore, it does not refer to UNGPs, but it does refer to international documents such as the UDHR and Johannesburg Declaration on Sustainable Development³⁹⁰. This would be understandable since ISO 26000 was published in 2010, before the acceptance of UNGPs. It also follows a different and a more detailed approach than UNGPs and directed towards the businesses and not governments. It has been highlighted within these standards, the social responsibility should be an integral part of the core organization strategy and the standards have been drafted in such a way to ensure this³⁹¹. This documentation has been prepared for any type of organization (not only companies) and it contains clarifications on the concepts, terms and definitions related to social responsibility and guidance on integrating and implementing socially responsible behaviour throughout the organization. But importantly, ISO 26000 is not a management system standard, differentiating from for instance, ISO 14001 which focuses on environmental management systems³⁹².

The aim of the ISO 26000 is to provide guidance on ways to integrate socially responsible practices into the organization³⁹³. The core subjects focused are the organizations governance; human rights; labour practices; the environment; fair operating practices; consumer issues; and community involvement and development³⁹⁴. ISO 26000 focuses on 8 human rights issues in total and gives guidance on how to implement them: due diligence³⁹⁵; human rights risk

³⁹⁰ ISO 26000, Standard 3.3.2.

³⁹¹ ISO 26000, Introduction (Figure 1)

³⁹² Rudiger Hahn, “ISO 26000 and the Standardization of Strategic Management Process for Sustainability and Corporate Social Responsibility”, p. 443

³⁹³ Lars Moratis and Timo Cochiu, *ISO 26000: The Business Guide to the New Standard on Social Responsibility*, (United States: Routledge, 2017), p. 3

³⁹⁴ ISO 26000, Introduction (Table 1, 2)

³⁹⁵ “To respect human rights, organizations have a responsibility to exercise due diligence to identify, prevent and address actual or potential human rights impacts resulting from their activities or the activities of those with which they have relationships.” ISO 26000, Clause 6.3.3

situations³⁹⁶; avoidance of complicity³⁹⁷; resolving grievances³⁹⁸; discrimination and vulnerable groups³⁹⁹; civil and political rights⁴⁰⁰; and economic social and cultural rights⁴⁰¹.

This document has been prepared merely as a “guidance”. The companies cannot get certified for applying these social responsibility standards⁴⁰². Since ISO does not provide a certification scheme, there have been many other organizations allow certification for companies would like to have a competitive advantage when it comes to socially responsible practices⁴⁰³. Whereas it would be not easy to track which organizations are using the ISO 26000 due to lack of certification system, these standards received some sort of recognition among the stakeholders, and the document is being listed among other important international documents. Therefore, it holds a certain importance and being referred to as a useful guiding tool for businesses wishing to have more socially responsible practices⁴⁰⁴.

ISO 26000 is particular because it sets the baseline for the organizations to “respect human rights” however they might go beyond these fundamental and contribute to the fulfilment of

³⁹⁶ Specific guidance on risky situations such as conflict zones, culture of corruption, complex value chains, need for extensive measures to ensure security of premises or other assets etc. ISO 26000, Clause 6.3.4

³⁹⁷ According to the ISO 26000 complicity has both legal and non-legal meanings. In the legal context, it would be commissioning, having knowledge of, contributing to illegal acts. And in the non-legal context, it would be the commissioning of wrongful acts in the societal expectations of behaviour, which would be deemed inappropriate and disrespectful. “An organization may also be considered complicit where it stays silent about or benefits from such wrongful acts.” ISO 26000, Clause 6.3.5

³⁹⁸ ISO 26000, Clause 6.3.6: “to discharge its responsibility to respect human rights, an organization should establish a mechanism for those who believe their human rights have been abused to bring this to the attention of the organization and seek redress.”

³⁹⁹ ISO 26000, Clause 6.3.7: “The full and effective participation and inclusion in society of all groups, including those who are vulnerable, provides and increases opportunities for all organizations as well as the people concerned. An organization has much to gain from taking an active approach to ensuring equal opportunity and respect for all individuals.”

⁴⁰⁰ An organization should respect civil and political rights. ISO 26000, Clause 6.3.8: “Civil and political rights include absolute rights such as the right to life, the right to a life with dignity, the right to freedom from torture, the right to security of person, the right to own property, liberty and integrity of the person, and the right to due process of law and a fair hearing when facing criminal charges. They further include freedom of opinion and expression, freedom of peaceful assembly and association, freedom to adopt and practise a religion, freedom to hold beliefs, freedom from arbitrary interference with privacy, family, home or correspondence, freedom from attacks on honour or reputation, the right of access to public services and the right to take part in elections”

⁴⁰¹ ISO 26000, Clause 6.3.9: “To respect these rights, an organization has a responsibility to exercise due diligence to ensure that it does not engage in activities that infringe, obstruct or impede the enjoyment of such rights.”

⁴⁰² “This International Standard is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offer to certify, or claims to be certified, to ISO 26000 would be a misrepresentation of the intent and purpose and a misuse of this International Standard. As this International Standard does not contain requirements, any such certification would not be a demonstration of conformity with this International Standard.” ISO 26000, Scope

⁴⁰³ For instance, during the interviews conducted for the preparation of this thesis, the SA8000 certification scheme provided by Social Accountability International has been mentioned. For more information: SA8000 Standard [<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689>], accessed December 2019

⁴⁰⁴ Wetzel, *Human Rights in Transnational Business*, p. 233

human rights⁴⁰⁵. They might use their “sphere of influence”⁴⁰⁶ to support practicing of human rights. “In some cases, organizations may wish to increase their influence through collaboration with other organizations and individuals. Assessment of the opportunities for action and for greater influence will depend on the particular circumstances, some specific to the organization and some specific to the context in which it is operating.”⁴⁰⁷

2.5. The UN Global Compact

Ever since the establishment of the UN, the relationship between the organization and business enterprises consist of suspicions towards each other⁴⁰⁸. These suspicions especially escalated during the Cold War years. The initiation of the programme of the UN Global Compact was an attempt to bring change⁴⁰⁹, and a realization of businesses should be involved in and become a part of the implementation of the UN policies⁴¹⁰. The UN Global Compact was initiated by

⁴⁰⁵ ISO 26000, Clause 6.3.2.2: “The baseline responsibility of non-state organizations is to respect human rights. However, an organization may face stakeholder expectations that it goes beyond respect, or it may want to contribute to the fulfilment of human rights. The concept of sphere of influence helps an organization to comprehend the extent of its opportunities to support human rights among different rights holders. Thus, it may help an organization to analyse its ability to influence or encourage other parties, the human rights issues on which it can have the greatest impact and the rights holders that would be concerned.”

⁴⁰⁶ This is a term that is being used in corporate social responsibility discourse frequently. It has also been used in the UN Draft Norms as: “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.” Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, para. 1, Also please see the report of John Ruggie on the terms of “sphere of influence” and “complicity”. UN Human Rights Council (A/HRC/8/16), Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other business enterprises, Clarifying the concepts of “sphere of influence” and “complicity” (15 May 2008)

⁴⁰⁷ ISO 26000, Clause 6.3.2.2.

⁴⁰⁸ Georg Kell, “The Global Compact: Selected Experiences and Reflections”, *Journal of Business Ethics* Vol. 59 (2005), p. 70

⁴⁰⁹ “One cannot also deny the fact that it contributed in fostering multi-stakeholder partnerships for promoting social responsibilities of corporations. More importantly, the Compact - though still a work in progress - has paved the way for the U.N.'s engagement with key non-state actors to tackle pressing challenges of the 21st century.” Surya Deva, “Global Compact: A Critique of UN’s “Public-Private” Partnership for Promoting Corporate Citizenship”, *Syracuse Journal of International Law and Commerce*, Vol. 34, No. 1 (2006), p. 150

⁴¹⁰ “Protecting human rights everywhere is too big a job for governments alone. To be successful we need partners, and while we have been helped enormously by the NGO community in protecting the civil and political rights of people around the world, we need the corporate players in the global marketplace to ensure the access to economic, social, and cultural rights. If we are to address the impact of globalization, we have to find common approaches to resolving the labor, environmental, and human rights issues that companies inevitably face as they operate around the world. The underpinnings of both a profitable business environment and a salutary human rights environment rest on the same core foundations: rule of law and good governance. Partnerships like the Global Compact create a win-win situation for governments, civil society and the private sector” Betty King, “The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations”, *Cornell International Law Journal* Vol. 34 Issue 3 (2001), p. 483

the UN Secretary-General Kofi Annan in January 1999 at the World Economic Forum in Davos and was officially launched in July 2000.

The Global Compact is an initiative which forms itself around a very short set of principles to encourage corporations to align with the key policies of the UN⁴¹¹. Rather than serving as a legal tool, it relies on fostering dialogue between businesses and other stakeholders in order to attract their support⁴¹². The Global Compact initially had 9 principles, then another one on corruption was added in 2004. The principles follow key international texts in the areas of human rights, labour, environment and anti-corruption:

“Human Rights:

1. Businesses should support and respect the protection of internationally proclaimed human rights; and
2. make sure that they are not complicit in human rights abuse.

Labour:

3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
4. the elimination of all forms of forced and compulsory labour;
5. the effective abolition of child labour; and
6. the elimination of discrimination in respect of employment and occupation.

Environment:

7. Businesses should support a precautionary approach to environmental challenges;
8. undertake initiatives to promote greater environmental responsibility; and
9. encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption:

10. Businesses should work against corruption in all its forms, including extortion and bribery.”

Businesses voluntarily chose to participate to the Global Compact. The procedure to join the Global Compact is by writing a letter to the UN Secretary-General. Within this letter, the CEO of the company should express their commitment to the Global Compact and its principles, engage in partnerships to advance UN goals. The businesses are expected make the Global Compact an integral part of their businesses⁴¹³ and in order to ensure this, the Global Compact

⁴¹¹ Wetzel, *Human Rights in Transnational Business*, pp. 149-159

⁴¹² *Ibid.*, p. 149

⁴¹³ UN Global Compact [<https://www.unglobalcompact.org/>], accessed December 2019

system asks for the submission of a Communication of Progress annually. This report will consist of key points on how the company is implementing the Global Compact principles. This report should also be accessible to public⁴¹⁴.

Since the Global Compact is merely a voluntary platform, the non-compliance does not have legal consequences, the punishment is being done by ‘name and shame’ policies. For instance, companies part of the Global Compact and failing to prepare this report may get expelled from the programme. The expelled companies are also published on the Global Compact website. Furthermore, in case a company is abusing the Global Compact, the Global Compact office may monitor the dispute and offer a resolution. In case of non-satisfactory response coming from the Company in relation to the offered resolution, the company may be again expelled from the Global Compact.

One of the most important characteristics of the Global Compact is that it is a UN initiative and it is directly addressing the corporations. There is no state involvement in the Global Compact. Some writers would claim that the UNGPs and Global Compact form a complementary relationship since both are UN initiatives and they both strive for expanding corporate responsibility, and they are valuable for the future of the field of business and human rights⁴¹⁵.

That being the case, the Global Compact has its shortcomings, the principles are vague and general, and of course they are voluntary⁴¹⁶. There are many companies not communicating

⁴¹⁴ All the information regarding the processes to become a part of the Global Compact can be found on their website. *Ibid*.

⁴¹⁵ “The UN Global Compact overall is positioned as a complement to and not substitute for other approaches, including regulatory approaches, to advancing corporate responsibility. Indeed, since achieving a measure of consensus is an important prerequisite for the development of international law, whether by treaty or by custom, even though we are a voluntary initiative, our voluntary approach and global uptake is laying the groundwork for possible future international law designed to level the playing field in this area.” Ursula A. Wynhoven, “The Protect-Respect-Remedy Framework and the United Nations Global Compact”, *Santa Clara Journal of International Law* Vol. 9, Issue 01 (2011), pp. 88-89; “While it is true that the Global Compact is flawed due to its unbinding and unenforceable nature, it is also the biggest international initiative dealing with business and human rights. If it were nothing more than a logo on a website, it would not have been successful for almost 15 years. The Global Compact, much like the OECD Guidelines or ILO Tripartite Declaration, fails to create binding obligations for business entities regarding human rights yet, it manages to unite different sectors under the UN Banner for a common cause. The problem of corporations *bluewashing* their image is considerable and should not be ignored but at the same time should not be used to discredit the initiative as a whole.” Wetzels, *Human Rights in Transnational Business*, p. 159

⁴¹⁶ “there are at least three significant and interlocking limitations to these top-down efforts aimed at forging a partnership between business and a variety of different social forces. First, there is an absence of hard-and-fast standards. As long as there are no common codes of conduct governing their reports, and no rigorous, independent, public audits, the information provided by these corporations is at best incomplete, or at worst misleading. Second, the creation of common standards is insufficient without some sort of formalized enforcement and penalty mechanism. The latter can only be achieved through active state involvement—something contrary to the current

their progress regularly, and it has the potential to be used only for marketing purposes. Furthermore, the Global Compact fails to have a wide coverage. Most members are corporations from developed countries, whereas a smaller percentage are from developing countries.

3. REGIONAL REGULATIONS AND MEASURES

We see a serious regulatory activity on business and human rights issues at the European region. Both the Council of Europe issued recommendation directed at its Member States and European Commission have a policy strategy making sure that their member states are aligning with business and human rights matters. Furthermore, EU has accepted a relevant legislation on reporting duties of companies on non-financial matters. This section aims to explain these further.

3.1. EU Directive on Non-Financial Reporting (Directive 2014/95/EU)

EU has been focusing on corporate social responsibility (“CSR”) already for more than a decade. The European Commission started to work on CSR around 2000s, the first publication was in 2001 with the Green Paper⁴¹⁷ followed by the new initiative called the European Alliance for CSR⁴¹⁸ in 2006. These documents defined CSR as a ‘voluntary’ concept but with the new EU strategy on CSR, EU changed this definition in a manner that covers business and human rights, together with, environmental and labour concerns⁴¹⁹. The Directive 2014/95/EU

neoliberal times. Third, CSR initiatives need to be complemented by regulatory mechanisms in the ongoing strategies to liberalize trade and FDI flows under the aegis of multilateral trade and bilateral trade agreements.” Susanne Soederberg, “Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact”, *Globalizations* Vol. 4, No. 4 (December 2007), p. 510

⁴¹⁷ Commission of the European Communities (COM(2001)366 Final), Green Paper Promoting a European Framework for Corporate Social Responsibility, (Brussels, 18 July 2001)

⁴¹⁸ Commission of the European Communities (COM(2006)136 Final), Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility

⁴¹⁹ Previously, CSR was defined 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”. COM(2001)366 Final. Now the definition has been evolved into a more overarching theme. It has been stated as follows: “CSR at least covers human rights, labour and employment practices (such as training, diversity, gender equality and employee health and well-being), environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment and pollution prevention), and combating bribery and corruption. Community involvement and development, the integration of disabled persons, and consumer interests, including privacy, are also part of the CSR agenda.”, COM(2011)681 Final, p. 7. Normally, the corporate social responsibility is a term that covers business and human rights, however the focus of business and human rights slightly differs. Although corporate social responsibility is very much related to business and human rights, it could be said that they are two different fields of study. Whereas the “corporate social responsibility” can be defined as the responsibility of enterprises for their impacts on society and integration of social, environmental, ethical and human rights impacts into their business operations. (Please see: Brent D. Beal, *Corporate Social Responsibility: Definition, Core Issues and Recent Developments*, (United States: Sage Publishing, 2014), pp. 1-2.) Business and human rights mostly focus

which is also known as Non-Financial Reporting Directive⁴²⁰ was accepted in 2014, as a part of the EU Strategy on Corporate Social Responsibility⁴²¹. Besides the Non-Financial Reporting Directive, the EU also adopted legislation in 2017 regulating EU companies operating in the conflict minerals sector are importing from responsible resources⁴²².

According to the Directive 2014/95/EU, the companies that fulfil the criteria set out within the legislation should “disclose their business model, policies (including due diligence processes), outcomes, principal risks and risk management, and Key Performance Indicators (KPIs) relevant to the particular business, in four areas: environment, social and employee matters, respect for human rights, and anti-corruption and bribery⁴²³”. According to the Directive the following matters should be within the report:

“Where undertakings are required to prepare a non-financial statement, that statement should contain, as regards environmental matters, details of the current and foreseeable impacts of the undertaking's operations on the environment, and, as appropriate, on health and safety, the use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution. As regards social and employee-related matters, the information provided in the statement may concern the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities. With regard to human rights, anti-corruption and bribery, the non-financial statement could include information on the prevention of human rights abuses and/or on instruments in place to fight corruption and bribery.⁴²⁴”

on “accountability” that surfaces when a corporate human rights abuse occurs. (Please see: Bernaz, *Business and Human Rights: History, law and policy - Bridging the accountability gap*, p. 3); More on this issue: Anita Ramasastry, “Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability”, *Journal of Human Rights*, Vol. 14 No. 2, (2015), pp. 237-259

⁴²⁰ Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards Disclosure of Non-financial and Diversity Information by certain Large Undertakings and Groups (22 October 2014)

⁴²¹ COM(2011)681 Final

⁴²² Regulation 2017/821/EU of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas

⁴²³ European Commission (SWD(2019)143 Final), Commission Staff Working Paper, Corporate Social Responsibility, Responsible Business Conduct and Business & Human Rights: Overview of Progress (20 March 2019), p. 28

⁴²⁴ EU Non-Financial Reporting Directive, Recital 7

Companies covered within the Directive, around 6,000 companies⁴²⁵, had to report for the first time in 2018. This Directive aims to establish transparency among the companies to perform better and become more resilient, not only financially but also in matters that are relevant to the society. The non-financial report should be prepared in a manner disclosing the material information; fair, balanced and understandable, comprehensive but concise, strategic and forward-looking, stakeholder oriented, consistent and coherent⁴²⁶. The EU Member States is under the obligation to ensure auditors checking the companies complying with this non-financial reporting obligations.

Due to the unique structure of the EU, the EU Directives must to be transformed into the national laws of the Member states. Therefore, the EU directives have strong legal implications. However, there is no sanction provided within this directive on what would happen if a company does not comply with the non-financial reporting obligations.

3.2. Other Regional Measures

There are several regional organizations started to work on business and human rights issues. The Council of Europe and ASEAN established guidelines and principles for their member states to ensure there is implementation of the UNGPs or action taken on business and human rights matters, which will be explained shortly here in this section. African Union and Inter-American Commission on Human Rights initiated activities on business and human rights which are still under construction.

3.2.1. Council of Europe Recommendation CM/Rec(2016)3

The Council of Europe Recommendation on business and human rights was issued in 2016⁴²⁷, in order to create a unity in achieving better human rights protection among its Member States and ensure proper implementation of the UNGPs within the European region. The recommendation includes annexes and references to the Council of Europe treaties and urges

⁴²⁵ SWD(2019)143 Final, p. 20, According to the Directive 2014/95/EU, Large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall include in the management report a non-financial statement (Article 1, amending Article 19a of the Directive 2013/34/EU); Public-interest entities which are parent undertakings of a large group exceeding on its balance sheet dates, on a consolidated basis, the criterion of the average number of 500 employees during the financial year shall include in the consolidated management report a consolidated non-financial statement. (Article 3, amending Article 29a of the Directive 2013/34/EU)

⁴²⁶ Communication from the Commission (2017/C/215/01), Guidelines on Non-Financial Reporting

⁴²⁷ Human Rights and Business - Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States (2016), [<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>], accessed December 2019

the member states to take further steps in creating National Action Plans to track their progress of implementation of the UNGPs⁴²⁸. Furthermore, the Council of Europe states that the Member States should develop National Action Plans and they should ensure their publication and distribution. Acknowledging that the very few National Action Plans that have been submitted to the UN are mostly coming from the European States⁴²⁹, it could be stated that these European efforts are effective.

In line with the UNGPs, the states should take measures to ensure that the businesses are operating in a respectful manner, apply measures if necessary, and encourage and support businesses by other means for them to respect human rights⁴³⁰. Furthermore, member states have been recommended to encourage or, when necessary, to require that business enterprises domiciled within their territories to apply human rights due diligence throughout their operations⁴³¹.

In accordance with the Articles 6 and 13 of the European Convention on Human Rights, everyone should have access to courts in the determination of their civil rights, as well as, to everyone whose rights have been violated. These instruments also include providing an effective remedy mechanism before a national authority, including where such a violation arises from a business activity⁴³².

Differentiating from the general approach of the UNGPs, the recommendation has a more detailed approach on judicial remedies. The remedies have been divided into three, the civil liability for business-related human rights abuses, the criminal or equivalent liability for business-related human rights abuses, administrative remedies. Regarding civil liabilities, the member states should apply such legislative or other measures necessary to ensure that their domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction⁴³³. As mentioned specifically, the doctrine of *forum non conveniens* should not be applicable in these cases, meaning that the chosen jurisdiction for the disputes between parties as a part of their contract,

⁴²⁸ Appendix to Recommendation CM/Rec(2016)3, para. 10-12

⁴²⁹ Please see the full list: [<https://www.ohchr.org/en/Issues/Business/Pages/NationalActionPlans.aspx>], accessed December 2019

⁴³⁰ Appendix to Recommendation CM/Rec(2016)3, para. 13

⁴³¹ Appendix to Recommendation CM/Rec(2016)3, para. 20

⁴³² Appendix to Recommendation CM/Rec(2016)3, para. 31

⁴³³ Appendix to Recommendation CM/Rec(2016)3, para. 32

may not be applicable to such cases⁴³⁴. Member States should also consider applying criminal liability for business enterprises, particularly coming from the Criminal Law Convention on Corruption, Convention on Cybercrime or Convention on the Rights of the Child⁴³⁵. Administrative remedies include the decisions of the competent authorities such as granting support, delivering services or granting export licenses to business enterprises, to consider human rights risks, including those on the basis of the human rights impact assessment⁴³⁶.

Furthermore, it has been stated within the Recommendation that the Member States should assist raising awareness and facilitating access to non-judicial grievance mechanisms⁴³⁷, including NCPs⁴³⁸ and should become a part of OECD Guidelines and ILO Declaration, if they have not already done so⁴³⁹.

The interesting point of this recommendation, besides talking about the details of the implementation of the UNGPs within Europe⁴⁴⁰, leads the Member States to encourage the third states to implement the UNGPs, to develop partnerships and offer other forms of support to countries seeking to implement these standards⁴⁴¹. It also states that member states should offer advice and support to third countries wishing to strengthen, in line with the UNGPs, their own judicial and non-judicial grievance mechanisms and reduce barriers to remedies against business-related human rights abuses within their jurisdiction⁴⁴². In addition, the Recommendation encourage states to consider exercising extraterritorial jurisdiction over civil claims concerning business and human rights related abuses, over the subsidiaries of the business enterprises domiciled within their jurisdiction. Subsidiaries do not necessarily be domiciled within their jurisdiction⁴⁴³. It would be the same if there is no other effective forum guaranteeing a fair trial that is available and there is sufficiently close connection to the

⁴³⁴ Appendix to Recommendation CM/Rec(2016)3, para. 34

⁴³⁵ Appendix to Recommendation CM/Rec(2016)3, para. 44

⁴³⁶ Appendix to Recommendation CM/Rec(2016)3, para. 47

⁴³⁷ Appendix to Recommendation CM/Rec(2016)3, para. 49

⁴³⁸ Appendix to Recommendation CM/Rec(2016)3, para. 53

⁴³⁹ Appendix to Recommendation CM/Rec(2016)3, para. 52

⁴⁴⁰ Appendix to Recommendation CM/Rec(2016)3, para. 1-9

⁴⁴¹ Appendix to Recommendation CM/Rec(2016)3, para. 7: “Member States should encourage third countries to implement the UN Guiding Principles on Business and Human Rights and other relevant international standards. They should also consider developing partnerships with or offering other forms of support to countries seeking to implement those standards.”

⁴⁴² Appendix to Recommendation CM/Rec(2016)3, para. 8: “Member States should offer advice and support to third countries wishing to strengthen, in line with the UN Guiding Principles on Business and Human Rights, their own judicial and nonjudicial grievance mechanisms and to reduce barriers to remedies against business-related human rights abuses within their jurisdiction.”

⁴⁴³ Appendix to Recommendation CM/Rec(2016)3, para. 35

Member State concerned⁴⁴⁴. All these recommendations with regard to third world countries can create a bit controversy. This might have also been seen as another act of western hegemony⁴⁴⁵, but currently it is true that Europe likes to play the champion of human rights role in world politics. In fact, EU has many delegations representing European values overseas and being successful at it, such as in the African Union⁴⁴⁶ and ASEAN, which the latter already have established certain principles on business and human rights.

The Council of Europe, Committee of Ministers recommendations, are the conclusions of the meetings of the Ministers of Foreign Affairs of its member states⁴⁴⁷. These recommendations are directed to the governments of the Member States and the Committee may request the information whether action is being taken following these recommendations⁴⁴⁸. Even though, the Statute of Council of Europe does not mention anything with regard to what would happen if a state does not comply with a recommendation, the fact that the Ministers should inform the Committee of Ministers on their progress with regard to implementation is an important diplomatic tool. This particular recommendation requires a follow-up, therefore has stronger applicability.

3.2.2. ASEAN Guidelines for Corporate Social Responsibility on Labour

The Association of Southeast Asian Nations (“ASEAN”) is an association formed in 1967 among the southeast Asian states to foster economic growth within the area and promote peace within the region⁴⁴⁹.

⁴⁴⁴ Appendix to Recommendation CM/Rec(2016)3, para. 36: “Where business enterprises are not domiciled within their jurisdiction, member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against such a business enterprise, if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned.”

⁴⁴⁵ Western Hegemony is a concept that claims is that the human rights ideology started to spread from the Western World and tepid towards the values of the rest of the world. For a review of the Western institutions and Liberal theory of international relations: Andrew Moravcsik, “Explaining International Human Rights Regimes: Liberal Theory and Western Europe”, *European Journal of International Relations*, Vol. 1(2), (1995), pp. 157-189; For the difficulties in translating human rights regime to the third world: Andrew Hurrell, “Power, principles and prudence: Protecting human rights in a deeply divided world” in *Human Rights in Global Politics* edited by Tim Dunne and Nicholas J. Wheeler, (United Kingdom: Cambridge University Press, 1999), pp. 277-302

⁴⁴⁶ For instance, EU was trying to catalyse discussions on business and human rights within the African Union. Premium Times, “AU Set on Making African Business More Responsive to Human Rights”, [<https://www.premiumtimesng.com/business/business-news/227098-au-set-making-african-businesses-responsive-human-rights.html>], accessed December 2019

⁴⁴⁷ The Statute of Council of Europe, Article 15 (b)

⁴⁴⁸ For the previous initiatives of the Council of Europe in the area of business and human rights: Wetzel, *Human Rights in Transnational Business*, pp. 120-126

⁴⁴⁹ Association of Southeast Asian Nations, [<https://asean.org/>], accessed December 2019

The ASEAN Guidelines for CSR on Labour (“**ASEAN Guidelines**”) has been published in 2017⁴⁵⁰. This particular region provides a lot of investment opportunities, and the establishment of such principles were under construction for some time⁴⁵¹. These Guidelines establish a handful of principles with a focus on labour issues, directly applicable “to enterprises/establishments, private or public, whose decisions and activities may have economic, social and environmental impacts”. But it has been also stated the corporations also need to respect national circumstances⁴⁵².

These guidelines have prioritized forced labour and child labour; employment and employment relationship; human resources development and training; conditions of work and life; industrial relations; migrant workers; and sustainable development. The implementation of these principles should be done both at the national level and enterprise level. The enterprises should prepare reports on CSR initiatives and report on a regular basis⁴⁵³.

The ASEAN Guidelines are quite simple and short set of principles encourage enterprises to create CSR initiatives. They are not as detailed as the European set of principles, but certainly an advancement for the region.

4. NATIONAL REGULATIONS

The pressure on the having better business and human rights policies paved way for several states to pass national legislations⁴⁵⁴.

These national legislations mostly focus on creating reporting duties for businesses on corporate social responsibility matters. However, the main focus of these reporting duties differs from legislation to legislation. For instance, the California Transparency in Supply Chain Act has more focus more on the market. It tries to inform consumers by way of forcing companies to report on certain matters. The European legislations have more focus on the

⁴⁵⁰ ASEAN Guidelines for Corporate Social Responsibility on Labour, full text can be found here: [<https://asean.org/wp-content/uploads/2017/12/21.-September-2017-ASEAN-Guidelines-for-CSR-on-Labour.pdf>], accessed December 2019

⁴⁵¹ Please see: Human Rights Resource Center, *Business and Human Rights in ASEAN: A Baseline Study* (2013)

⁴⁵² ASEAN Guidelines for CSR on Labour, para. 10

⁴⁵³ ASEAN Guidelines for CSR on Labour, para. 18-22

⁴⁵⁴ For a study on national legislations, please see: Chiara Macchi and Claire Bright, “Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation in, *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* edited by M. Buscemi, N. Lazzarini and L. Magi, (Forthcoming), (w/o page numbers)

reporting and how it should be monitored by the governmental authorities, such as in the UK Modern Slavery Act.

The French Law being the most interesting one of the bunch, goes a bit further and ensures that the business and human rights policies are implemented within the corporations, and if a corporation does not fulfil its commitments within the report they published, they would be sanctioned. Other national legislations mentioned in this chapter do not offer such a sanctioning mechanism, with the exception of the recent Dutch Child Labour Due Diligence Law. However, the recent Dutch Child Labour Due Diligence Law is a specific legislation that has a focus on child labour.

Other European countries, such as Switzerland and Finland are expected to enforce similar regulations on business and human rights in the future.

This chapter will specifically focus on these mentioned national legislations, California Transparency in Supply Chains Act (2012), The UK Modern Slavery Act (2015), the Dutch Child Labour Due Diligence Law (2019) and the French Law on the Duty of Vigilance (2017).

4.1. The State of California Transparency in Supply Chains Act (2012)

The State of California, the western state of the US enacted the Supply Chains Act in 2012⁴⁵⁵, with the focus on protecting and informing the consumers. The aim of this act was to eradicate the disadvantage of the consumer knowledge regarding the operations in the supply chains of companies, where the human trafficking and forced labour may occur.

The Act primarily rearticulates human trafficking is a crime under the state, federal and international law and slavery and human trafficking exists in every country, including the US and the State of California. However, the Act does not necessarily create an accountability for these crimes, but rather a transparency obligation with regard to supply chains and allow the consumer to decide whether to support the company or not⁴⁵⁶, which is a different approach from what we can see from the other national legislations.

The disclosure has to contain if the retailer or the manufacturer does each of the following:

⁴⁵⁵ US Senate Bill No. 657 (State of California)

⁴⁵⁶ “Consumers and businesses are inadvertently promoting and sanctioning these crimes through the purchase of goods and products that have been tainted in the supply chain.” SB657, Section 1(h); “Absent publicly available disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking. Consumers are at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions.” SB657, Section 1(g)

“(1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.

(2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.

(3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.

(4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

(5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.⁴⁵⁷”

In case of failure of disclosure, the Attorney General has the right to bring an action for injunctive relief, meaning he could apply to the court in order to command the company to comply with the law.

The Act covers retailers and manufacturers doing business in California, which has the annual worldwide gross receipts in excess of 100 million US Dollars⁴⁵⁸. That being said, California is the State that hosts Silicon Valley, where the biggest technology companies located at together with other big business hubs which makes this Act to cover some of the biggest US businesses, including the ones with large supply chain networks around the world.

4.2. The UK Modern Slavery Act (2015)

In 2015, the UK enforced the Modern Slavery Act⁴⁵⁹. The Act mainly focuses on the activity of modern slavery and defines it as an offence. As per the Act, the term “modern slavery” is an

⁴⁵⁷ SB657, Section 3(c)

⁴⁵⁸ SB657, Section 3(a)

⁴⁵⁹ UK Modern Slavery Act 2015, c. 30

umbrella term⁴⁶⁰ being used to cover several concepts, including slavery, servitude, forced or compulsory labour⁴⁶¹, and human trafficking⁴⁶².

The aim behind this Act was to eradicate the modern slavery in the supply chains of the businesses. Indeed, the lower levels of the supply chains are mostly invisible to the headquarters and mostly are being left out from the corporate social responsibility practices⁴⁶³. When a modern slavery issue rises, the company tries to solve the problem, either by cutting the ties with the supplier or work to bring them up to the standards⁴⁶⁴. Even then, the abuse may occur. The UK Modern Slavery Act tries to prevent this issue by commissioning an Independent Anti-slavery Commissioner appointed by the Secretary of State⁴⁶⁵. The Commissioner must encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences and the identification of victims of those offences⁴⁶⁶. The Commissioner must submit a strategic plan in a reasonable time after the appointment to the Secretary of the State⁴⁶⁷.

Another obligation within the UK Modern Slavery Act is that the commercial organisation that supplies goods and services and has the total turnover of not less than an amount prescribed by regulations made by the Secretary of State to produce a statement for each financial year of the organization⁴⁶⁸. The threshold for the turnover has been determined as £36m by the Secretary

⁴⁶⁰ UK Modern Slavery Act, Introduction: “An Act to make provision about slavery, servitude and forced or compulsory labour and about human trafficking, including provision for the protection of victims.”

⁴⁶¹ The first three articles of the Act cover the definition of these offences. In order to define slavery, servitude and forced labour, the Act refers to the Article 4 of the European Human Rights Convention (ECHR) (UK Modern Slavery Act, Article 1(2)). However, in the ECHR the terms have not been defined (ECHR, Article 4 on covers what the term does not include), but we can refer to the case law of the European Court of Human Rights (ECtHR) for a definition. The ECtHR refers to the ILO Convention No. 29 (*Van der Muselle v. Belgium* (23 November 1983), para. 32) and accordingly, forced labour has been defined as “all work or service exacted under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily”. International Labour Office, *A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (ILO: Geneva, 2005), para. 14. In 2005, the ILO has identified that there are two basic elements to the forced labour: the work or service is exacted under the menace of a penalty and it is undertaken involuntarily and identified several situations in practice that could be regarded as forced labour. ILO, *A Global Alliance Against Forced Labour*, p. 6

⁴⁶² The human trafficking has been defined as a person arranging or facilitating the travel of another person with the aim to exploit that person (UK Modern Slavery Act, Article 2). The ways of exploitation have been defined in the following article and includes sexual exploitation, removal of organs, securing services by force, threats or deception, securing services from children or vulnerable persons, in addition to slavery, servitude and forced labour (UK Modern Slavery Act, Article 3).

⁴⁶³ Steve New, “Modern Slavery and Supply Chain: The Limits of Corporate Social Responsibility?”, *Supply Chain Management: An International Journal*, Vol. 22 Issue 6, p. 702

⁴⁶⁴ Steve New, “Modern Slavery and Supply Chain: The Limits of Corporate Social Responsibility?”, p. 701

⁴⁶⁵ UK Modern Slavery Act, Article 40

⁴⁶⁶ UK Modern Slavery Act, Article 41

⁴⁶⁷ UK Modern Slavery Act, Article 42

⁴⁶⁸ UK Modern Slavery Act, Article 54

of State⁴⁶⁹. The companies do not have to be incorporated in the UK in order to be bound by this statement obligation. The only requirement is to carry a business or part of business in the UK⁴⁷⁰.

Article 54(5) states that this statement may include information about;

- a) the organisation's structure, its business and its supply chains;
- b) its policies in relation to slavery and human trafficking;
- c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- f) the training about slavery and human trafficking available to its staff."

This statement has to be public, for instance if the company has a website, the statement has to be put on the website. In case of failure of disclosure, the Secretary of State may apply to High Court for a sentence⁴⁷¹, which strengthens this obligation.

Following the UK Modern Slavery Act, a fairly similar Australian Modern Slavery Bill has been enforced in 2018 as well⁴⁷². However, the specific focus of the Act and no sanctioning mechanism diminishes the legal strength of this Act.

⁴⁶⁹ Guidance issued under Section 54(9) of the Modern Slavery Act 2015 by the Home Secretary, *Transparency in Supply Chains etc.: A Practical Guide* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf], accessed December 2019, p. 6

⁴⁷⁰ *Transparency in Supply Chains etc.: A Practical Guide*, p. 7

⁴⁷¹ UK Modern Slavery Act, Article 54(11)

⁴⁷² Australian Modern Slavery Bill (2018), Act No, 153. Similar to the British Modern Slavery Act, the Australian Modern Slavery Bill (2018) requires a statement from entities based, or operating, in Australia. The difference would be that the companies should have an annual consolidated revenue of more than 100 million Australian Dollars. Furthermore, the entity has to be an Australian entity at any time in the reporting period or should carry on business in Australia at any time in that reporting period (The Bill, Article 5). According to the Bill, these statements have to be registered in a Register that is being operated by the Minister (Article 19), in addition to being on the website of the company. Besides, the mandatory statements, any company falling outside of the scope of the Bill may also provide voluntary statement on the modern slavery. In case of failure to comply, the Minister may extend, or further extend the period. Unlike the British Act however, the Australian Bill states that in case of failure to comply, the Minister can only publish the information regarding the failure. There is no article with regards to going to the court for a fine on the establishment, when failed to comply this requirement. On the other hand, the companies may apply to Administrative Court to appeal the decision of the Minister.

4.3. Dutch Child Labour Due Diligence Law (2019)

Recently in May 2019, the Dutch Senate has adopted the Dutch Child Labour Due Diligence Law⁴⁷³. The law is expected to enter into force on 1st January 2020⁴⁷⁴.

As could be understood from its title, the new Dutch Law specifically focuses on Child Labour and it will apply to all companies operate within the Dutch market by bringing goods and services. The law would have an extraterritorial effect, meaning for a company does not have to be incorporated within the Netherlands to be within the scope of this legislation, it is sufficient to have operation within the Dutch market.

The legislation requires the companies to do mandatory due diligence to identify and address the risks of child labour in their supply chains. The due diligence has been identified as investigating whether there is a ‘reasonable presumption’⁴⁷⁵ that the goods and services may be supplied with child labour⁴⁷⁶. In case of an existence of such presumption, the company has to submit a statement and a plan of action to a yet to be identified regulatory authority⁴⁷⁷. This statement, differentiating from the UK Modern Slavery Act and the French Law on Duty of Vigilance, has to be submitted only once instead of annually, which is being considered a shortcoming of the law⁴⁷⁸. In case of failure of submission of the mentioned statement, a fine up to 4,100 Euros may be imposed.

In case of non-compliance with the submitted statement and plan of action, upon complaint, the regulatory authority can impose administrative or criminal sanction on the company. A fine could be up to the 10% of the worldwide annual turnover of the company. In worst case

⁴⁷³ For the Text of the Dutch Child Labour Due Diligence Law (in Dutch): Wet zorgplicht kinderarbeid, [<https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vkblk11jgyy/f=y.pdf>], accessed December 2019

⁴⁷⁴ Anya Marcelis, “Dutch Take the Lead on the Child Labour with New Due Diligence Law” [<https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/>], accessed December 2019

⁴⁷⁵ The law refers to ILO-IOE’s ‘Child Labour Guidance Tool for Business’ in order to identify whether there is a ‘reasonable presumption’. The Dutch Child Labour Due Diligence Law, Article 5(3). For the Guidance please see: ILO-IOE, *How to do business with respect for children’s right to be free from child labour: ILO-IOE child labour guidance tool for business*, (ILO: Geneva, 2015).

⁴⁷⁶ The Dutch Child Labour Due Diligence Law, Article 5.

⁴⁷⁷ The Dutch Child Labour Due Diligence Law, Article 3. Also please see. MVO Platform, “The Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law” (3 July 2019), [<https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>], accessed December 2019

⁴⁷⁸ Macchi and Bright, “Hardening Soft Law” (w/o page numbers)

scenario, the law permits the imprisonment of the director of the company up to two years⁴⁷⁹, if the act has been committed twice within five years under the leadership of the same manager⁴⁸⁰.

The Dutch law is a step towards ensuring the implementation of the UNGPs, however it has certain shortcomings. It does not have a wide coverage since it is only focusing on child labour problems. Furthermore, there still needs to be further administrative organization by the Dutch authorities to ensure the effective functioning of the legislation.

4.4. French Law on Duty of Vigilance (2017)

In February 2017, the French National Assembly adopted a law on Duty of Vigilance (*Devoir de Vigilance*, sometimes also translated as Duty of Care), for the businesses⁴⁸¹. This law is different from the previous acts mentioned due to the fact that it focuses more on the prevention of human rights abuses, by creating a duty of vigilance. This means that in case there is a foreseeable harm to human rights or the environment that might occur after an act that the company is seeking to pursue, there is a legal obligation to adhere a standard of reasonable care⁴⁸², which differs from the disclosure requirements that has been enacted by other examples of legislations.

This law applies to any company that are at the end of two consecutive financial years, employs at least 5,000 employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least 10,000 employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad⁴⁸³.

Accordingly, there are three steps for the duty of care: risk analysis or elaboration, reporting or disclosure and effective implementation. The companies that are within the scope of this law must establish an effective duty of vigilance plan. This plan should include reasonable

⁴⁷⁹ Ropes&Gray, “Dutch Child Labour Due Diligence Act approved by Senate – Implications for Global Companies”, (5 June 2019), [<https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>], accessed December 2019

⁴⁸⁰ The Dutch Child Labour Due Diligence Law, Article 9.

⁴⁸¹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, (28 Mars 2017) [<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>], accessed December 2019

⁴⁸² Sandra Cossart, Jerome Chaplier and Tiphaine Beau de Lomenie, “The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All”, *Business and Human Rights Journal*, Vol. 2, Issue 2 (United States: Cambridge University Press, 2017), p. 318

⁴⁸³ Loi No. 2017-399, Article 1

vigilance measure for risk identification and prevention within the frame of human rights and environmental protection⁴⁸⁴. This vigilance plan and effective implementation reports that would implement this plan shall be publicly disclosed.

In case of non-compliance with duty of care, civil liability may occur, and the company may be sanctioned up to EUR 10 million. Furthermore, in case there are victims because of lack of care, these victims may ask claim that the company was not complying with the vigilance plan and can seek for damages⁴⁸⁵.

The French Law is differentiating from the other existing national legislation on the fact that it does not refer to only one or two abuses, such as the modern slavery and human trafficking. Instead, it covers all human rights and does not specify one particular right⁴⁸⁶. Furthermore, it goes beyond the reporting duty, it also requires effective implementation and risk identification, and it provides a sanctioning mechanism⁴⁸⁷.

5. CONCLUSIONS

From this analysis, we can safely say that the international legal accountability does not currently exist within the international existing regulations. We mostly encounter with non-legally binding principles that tries to establish guidance for business enterprises and encourages states to pass national legislations and corporations to engage in self-regulation. There are only a handful of states, mostly the developed countries, established reporting duties. With the exception of the French and Dutch Law, these national legislations do not mention in

⁴⁸⁴ According to the Loi No. 2017-399 Article 1(4): “The plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. It shall include the following measures: (1) A mapping that identifies, analyses and ranks risks; (2) Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship; (3) Appropriate action to mitigate risks or prevent serious violations; (4) An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned; (5) A monitoring scheme to follow up on the measures implemented and assess their efficiency.”

⁴⁸⁵ Cossart, Chaplier and Lomenie, “The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All”, p. 322

⁴⁸⁶ The first suit under the French Duty of Vigilance Law has been filed in October 2019. The East African, ‘NGOs file suit against Total over Uganda oil project’ (24 October 2019), [<https://www.theeastafrican.co.ke/business/NGOs-sue-Total-over-Uganda-oil-project/2560-5323092-r3aeku/index.html>], accessed December 2019

⁴⁸⁷ For more on the French Law of Duty of Vigilance, please check: Stephane Brabant and Elsa Savourey, “Law on the Corporate Duty of Vigilance: A Contextualised Approach”, *Revue Internationale de la Compliance et de l'éthique des affaires – Supplement a la Semaine Juridique Entreprise et Affaires* N° 50 (14 Decembre 2017)

sanctioning mechanisms. Nevertheless, there is a trend, especially among European States to pass certain legislations within the business and human rights field⁴⁸⁸.

Ensuring companies are disclosing their actions or commitments on business and human rights, as being done by the national legislations, may provide a certain level of prevention from corporate human rights abuses. This disclosure may create some public and governmental scrutiny, which might result in a better action coming from the companies. However, national legislations have their weaknesses. First of all, they do not cover all types of businesses, only the companies meet certain requirements or operate within certain territories. Second, the application of national laws is territorial. Their reach is limited to the companies that operate within their own territories or have some sort of link to their jurisdiction. This would mean that only a handful of companies would need to disclose their information, leaving the majority of the companies outside of the scope of their legislation, without any monitoring. Third, there is no harmonization among the state legislations, therefore the companies operate in more than one state may need to produce more than one report on same matter. And fourth, reporting does not necessarily create accountability for corporations to comply the report. The reports could be used only for marketing purposes without actually a proper implementation plan. In this sense, the Dutch Law and French Law are more advanced, since these laws also require an effective implementation plan for the reports.

Despite the criticism, the serious regulatory action with regard to business and human rights matters in different parts of the world which demonstrates the importance and urgency of the subject. But considering the universality of human rights and ensuring protection of the all citizens of the world, we still believe that the discussions should continue beyond the national territories and the solutions should be searched for in the international level.

⁴⁸⁸ For more on this please see: Macchi and Bright, “Hardening Soft Law” (w/o page numbers)

CHAPTER III:

THE DISCOURSE ON THE FUTURE EVOLUTION BUSINESS AND HUMAN RIGHTS LAW

1. INTRODUCTION

After the acceptance of the UNGPs, its implementation process had begun. Certain states, mostly the European states took the implementation process seriously and started to adopt National Action Plans. As we have seen from the previous chapter, some states have also adopted legislations. In the meantime, the UN started to organize annual Forums at UN Geneva Headquarters to gather all stakeholders and discuss most relevant issues.

However, shortly after the acceptance of the UNGPs, it had deemed insufficient to prevent corporate human rights abuses, due to its non-binding nature. Civil society and several states started to create pressure on the international community to have more legally applicable rules on business and human rights matters. This led to the proposal of UN Human Rights Council Resolution, A/HRC/RES/26/9 in 2013. This resolution diverged the discussions on the future of business and human rights at the UN-level, a reminiscence of the divisions of the past.

Acceptance of A/HRC/RES/26/9 led the formation of a UN Working Group in 2014, which officialised the initiation of the Legally Binding Treaty Process. Several sessions of discussions on a binding treaty and its context have already been held in Geneva and at the last session the latest draft, namely “the Revised Draft” has been presented. After couple sessions of negotiations, the binding treaty negotiations and the implementation process of the UNGPs have also accepted to be complementary.

This chapter aims to look into the current discourses at the UN more in detail, by focusing on both the implementation process and the binding treaty negotiations and its current standing. However, we do believe it would be beneficial to explain the discussions surrounding the acceptance of A/HRC/RES/26/9 in order to provide an understanding for the later developments occurred at the UN.

2. THE DISCUSSIONS AROUND THE UN HUMAN RIGHTS COUNCIL RESOLUTION ON CREATION OF A WORKING GROUP TO ELABORATE A LEGALLY BINDING TREATY (A/HRC/RES/26/9)

2.1. Negotiations and Acceptance of A/HRC/RES/26/9

Two years after the acceptance of the UNGPs, in September 2013, the Representative of Ecuador presented a proposal for the creation of a working group to elaborate a legally binding instrument on business and human rights. Together with other group of states⁴⁸⁹, the Representative of Ecuador stated that a soft-law instrument is insufficient to address the corporate accountability problems and provide proper legal remedies for victims and there is a need to elaborate a legally binding instrument⁴⁹⁰. Accordingly, such international legally binding instrument would be clarifying the obligations of transnational corporations in the field of human rights and provide the establishment of effective remedy mechanisms⁴⁹¹.

The States believed the UNGPs were lacking effectiveness on addressing the problems joined to this new initiative. Civil society organizations also supported this initiative. For instance, several organizations gathered around an initiative called the “Treaty Alliance” which actively works on campaigns to urge states to participate in the negotiations of the international treaty to ensure protection of human rights from the corporate human rights abuses⁴⁹². In June 2014, the Resolution drafted by Ecuador and South Africa and signed by Bolivia, Cuba and Venezuela, called for the establishment of the open-ended intergovernmental working group to elaborate an international legally binding treaty (“OEIGWG”), which shall have the mandate of elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises⁴⁹³.

⁴⁸⁹ The statement was delivered on behalf of the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador.

⁴⁹⁰ It was pointed out as follows: “The endorsement by the UN Human Rights Council in June 2011 of the “Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework” was a first step, but without a legally binding instrument, it will remain only as such: a “first step” without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations” Republic of Ecuador, Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council, September 2013

⁴⁹¹ “An international legally binding instrument, concluded within the UN system, would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies.” Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council

⁴⁹² Treaty Alliance, [<https://www.treatymovement.com/>], accessed December 2019

⁴⁹³ UN Human Rights Council (A/HRC/RES/26/9), Elaboration of an internationally binding instrument on transnational corporations and other business enterprises with respect to human rights (14 July 2014), para. 1

It has been also decided the first two sessions of OEIGWG shall be dedicated to the conducting constructive deliberations on the content, scope, nature and form of the future international instrument⁴⁹⁴.

In the same Human Rights Council session (26th Session), another resolution drafted by Norway was proposed. This new resolution (A/HRC/RES/26/22) was about the extension of the mandate for the existing Working Group on Business and Human Rights to ensure the effective implementation of the UNGPs. This resolution also stated the obligation and primary responsibility to protect and promote human rights and fundamental freedoms lie within the States⁴⁹⁵.

A/HRC/RES/26/22 was adopted with consensus. A/HRC/RES/26/9, on the other hand, received opposition. The States had strong business lobby were not in favour⁴⁹⁶. A/HRC/RES/26/9 received twenty-four votes in-favour, fourteen against and thirteen abstentions. The States in favour included the proposing countries but also, China, India and Russia. India stated they do not agree with having these two resolutions exclusive, but

⁴⁹⁴ A/HRC/RES/26/9, para. 2

⁴⁹⁵ It has been specifically stated as “Stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State” UN Human Rights Council (A/HRC/RES/26/22), Human rights and transnational corporations and other business enterprises, 15 July 2014; Following this, the emphasis on national legislations has been even strengthened by stating that “Recognizing that policies and proper regulation, including through national legislation, of transnational corporations and other business enterprises and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms”, however following this statement it has been also agreed that governance gaps at the international level are also concerning: “Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies or derive maximally the benefits of activities of transnational corporations and other business enterprises, and that further efforts to bridge governance gaps at the national, regional and international levels are necessary”. Whether these “further efforts” included a binding treaty is not clear, however considering the political setting, this resolution clearly was an effort to suppress this newly found voice within the Council.

⁴⁹⁶ Jens Martens and Karolin Seitz, “The Struggle for a UN Treaty: Towards global regulation on human rights and business”, Global Policy Forum (August 2016), pp. 22-23; However, after the adoption of the Resolution, they soften their approach, but still being heavily against any type of treaty or extraterritorial jurisdiction, international court that would have direct jurisdiction or legally binding obligations on businesses. “After the IOE’s lobbying efforts proved unable to prevent the establishment of an intergovernmental working group, the organisation performed a tactical U-turn and announced that it would attentively follow the treaty process and constructively participate in OEIGWG discussions. During the first session of the OEIGWG, the IOE provided oral and written statements, and at the UN Forum on Business and Human Rights in November 2015 it organized a side event focussed on the treaty process. As an IOE strategy paper shows, the organisation feared corporations and industrialised nations retracting from the process could potentially lead the working group to quickly decide on a legally binding instrument. The IOE strategy paper advocates developing a vague instrument, which does not contain any direct and legally binding obligations for corporations, written in the form of a declaration of general principles. Any form of extraterritorial jurisdiction or even an international court for TNCs would have to be prevented by all means.”, p. 23

complementary⁴⁹⁷. China and Russia stated that the national legislation still should be the primary focus and they have reservations with regard to extraterritorial jurisdiction⁴⁹⁸.

In addition, the African Group and the Latin American countries were heavily supporting the idea of gradually developing a legally binding instrument. The African Group stated even though businesses were important in the development of their countries, the human rights abuses of these companies led to marginalization and impoverishment of certain groups within the societies, and furthermore there is a power imbalance between the transnational corporations and some states which had to be addressed⁴⁹⁹.

On the other hand, the two important players in the business and human rights discussions, EU and US were heavily against this proposal⁵⁰⁰.

2.2. The Position of the EU and US with regard to A/HRC/RES/26/9

Two important actors in the business and human rights discussions are undeniably the US and the EU. They are both developed economies and headquartering many companies that invest abroad. These companies had also involved in human rights abuses. Therefore, their stance on business and human rights matters is important and it was an achievement that they got behind the UNGPs.

Both the EU and the US are making progress with the implementation of the UNGPs. Most EU member states and the US submitted their National Action Plans and developed certain policies to make sure the implementation process is ongoing⁵⁰¹. Particularly EU has a very strong policy focus on business and human rights. The organization had published policy papers on the

⁴⁹⁷ “We do not regard the two resolutions on business and human rights as mutually exclusive. In fact in our view, they are complementary. We believe that the Resolution before us [A/HRC/RES/26/9] seeks to open an opportunity for States to discuss in a focused manner the issue of transnational corporations. As we promote the integration of the world economy and capital flows across borders, it is important that we plug possible protection gaps that may arise due to business operations of transnational corporations. (...) When states are unable to enforce national laws with respect to the gross violations committed by business and hold them accountable due to the sheer size and clout of the transnational corporations, the international community must come together to seek justice for the victims of the violations committed by the transnational corporations. We believe that we need to further the dialogue on these aspects and the resolution gives us an acceptable roadmap for the Council to move forward in this direction.”, Martens and Seitz, “The Struggle for a UN Treaty: Towards global regulation on human rights and business”, p. 19

⁴⁹⁸ *Ibid.*, p. 20

⁴⁹⁹ *Ibid.*, pp. 20-21

⁵⁰⁰ Surya Deva, “Alternative Paths to a Business and Human Rights Treaty” in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* edited by Jernej Letnar Cernic and Nicolas Carillo-Santarelli, (United Kingdom, Intersentia, 2018), pp. 14-15

⁵⁰¹ Please see: Chapter III(3.1.2)

corporate social responsibility strategy⁵⁰² and has lobbying activities in the third-party organizations with regard to implementation of the UNGPs⁵⁰³.

However, when the legally binding treaty negotiations sparked one more time at the UN, the reactions of the US and the EU were negative. Particularly US had a very strong reaction to the A/HRC/RES/26/9 in a manner of heavy opposition and rejection to be a part of the treaty negotiations. They stated in an official statement of their non-participation in the negotiation process and called out other countries to do the same, on the grounds that this process was a threat to the UNGPs and its implementation process⁵⁰⁴. They were also strongly opposing the idea of a legally binding treaty since the proposed treaty was not including all the domestic companies. Needless to say, any direct international liability that this OEIGWG will be proposing would not be feasible under international law⁵⁰⁵.

The EU shared the same position. As an initial reaction EU announced that they will be opposing the resolution and will not be participating to the negotiations⁵⁰⁶. However, unlike

⁵⁰² Please see Chapter II(3)

⁵⁰³ *supra*. ft. 446

⁵⁰⁴ “while we share and appreciate the concerns expressed by some delegations and civil society colleagues that we need to do more to improve access to remedy for victims of business-related human rights abuses, our concern is that this initiative will have exactly the opposite effect. First, this resolution is a threat to the Guiding Principles themselves. To be clear, it is not complementary to the resolution to be offered by the Business and Human Rights core group. The proposed Intergovernmental Working Group will create a competing initiative, which will undermine efforts to implement the Guiding Principles. The focus will turn to the new instrument, and companies, states, and others are unlikely to invest significant time and money in implementing the Guiding Principles if they see divisive discussions here in Geneva. Second, on the substance, this initiative is unlikely to address the concerns that animate calls for a legally binding instrument, as a one-size-fits-all instrument is not the right approach to handling the complex fabric that is regulation of business. It also would only be binding on the states that became party to it. The IGWG will not benefit from the necessary and important voices of key stakeholders, including the private sector. The United States will not participate in this IGWG, and we encourage others to do the same” Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument, Statement by the Delegation of the United States of America, Geneva (26 June 2014);

⁵⁰⁵ “During the 4th UN Forum on Business and Human Rights in November 2015, the US delegation repeated its arguments for not participating in the treaty process. The US stated that it was concerned about the focus on transnational corporations. To establish a truly “level-playing field” a new legal instrument would have to apply also to domestic companies (in particular also to state-owned ones). The US opposed direct, legally binding human rights commitments for corporations; the responsibility would have to remain with governments. Moreover, a new global legal instrument, the US argued, would not solve the basic problem that the success or failure of such an instrument depended ultimately on implementation at the national level. It was wrong to describe the UN Guiding Principles as soft law and a treaty as hard law, because, in the context of National Action Plans, the Guiding Principles too could include elements of hard law. The US feared that the treaty process could slow the implementation of the UN Guiding Principles by governments and corporations.” Martens and Seitz, “The Struggle for a UN Treaty: Towards global regulation on human rights and business”, p. 21

⁵⁰⁶ “We (...) deeply regret that the resolution presented by Ecuador and South Africa unnecessarily polarized the debate as if there could be two camps, in favour or against progress on prevention of and remedy to business-related human rights abuses. (...) the EU has decided to oppose the establishment of the Open-Ended Intergovernmental Working Group as proposed in this resolution. The EU Member States Members of the Council will vote ‘no’ and invites all to oppose it. We are at a critical juncture. If this resolution is adopted, it will divide the Council not only to vet, but in years to come. If the Open-ended Intergovernmental Working Group is

the US, EU soften their approach later due to the changes happened during the negotiations at the OEIGWG. EU currently follows the treaty process and started to attend the negotiations; however, they are relatively inactive during the discussions⁵⁰⁷.

After the acceptance of the A/HRC/RES/26/9, EU announced a set of requirements to attend the negotiations. First requirement was the treaty to cover “all business enterprises” and not only the transnational corporation. And second, the treaty should be founded upon the UNGPs and the negotiation process should ensure that the implementation of the UNGPs is not undermined⁵⁰⁸.

Whereas the latter point has been welcomed by the OEIGWG, the first point was a major point of discussion. Indeed, one of the main criticisms against the A/HRC/RES/26/9 regarding its footnote, where it was proposed that the binding treaty would cover only certain types of companies, referred as “transnational corporations”⁵⁰⁹. In fact, the footnote specifically excluded domestic companies, by stating that the term “other business enterprises” denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of relevant domestic law. This has been accepted as a step back from what has been achieved with the UNGPs and attracted opposition from both the US and the EU⁵¹⁰. On the other hand, other states such as South Africa and Pakistan were in favour of such distinction, which was probably the reason why this was included in the proposal⁵¹¹.

2.3. Other Arguments Against the Proposal of a Business and Human Rights Treaty

With the acceptance of the A/HRC/RES/26/9, the consensus reached around the UNGPs gradually started to divide into two groups supporting different types of future possibilities.

established, the EU and its Member States will not participate for the abovementioned reasons” EU Explanation of Vote, “Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights”

⁵⁰⁷ Please see: The Reports of the Sessions.

⁵⁰⁸ EU European Parliament Research Service, Briefing, Towards a binding international treaty on business and human rights, (April 2018), pp. 10-11

⁵⁰⁹ Douglas Cassel and Anita Ramasastry, “White Paper: Options for a Treaty on Business and Human Rights”, *Notre Dame Journal of International & Comparative Law*, Vol. 6, Issue 01 (September 2016), pp. 40-41

⁵¹⁰ Martens and Seitz, “The Struggle for a UN Treaty: Towards global regulation on human rights and business”, p. 25

⁵¹¹ Phil Bloomer, “Negotiation and fighting for a binding treaty on business and human rights”, *The Guardian* (27 July 2015), [<https://www.theguardian.com/global-development-professionals-network/2015/jul/27/negotiating-and-fighting-for-a-binding-treaty-on-business-and-human-rights>], accessed December 2019

The first one supported the further implementation of the UNGPs and second one, was in favour of the creation of a binding treaty to fill in the legal governance gaps.

When the UNGPs were created, Ruggie realized any hard-law instrument would be likely to fail just like the previous attempts, therefore he opted for the option to create a soft-law instrument⁵¹². He accepted the ‘Protect, Respect, Remedy’ framework tries to create a coherence and generate cumulative progress in the business and human rights domain, and specifically stated there is something that it does not do, to “recommend that states negotiate an overarching treaty imposing binding standards on companies under international law⁵¹³”.

Therefore, unsurprisingly, Ruggie criticized the A/HRC/RES/26/9 and the newly established treaty process on couple of grounds⁵¹⁴. Firstly, he criticised the resolution only focusing on transnational corporations. This would mean the local factory owners supplying materials to the transnational corporations might be out of the scope of a possible treaty since there is no clear indication on how we can identify a transnational corporation. The proposal also does not focus on specific human rights issues and it seeks to create an overarching international framework in international human rights law⁵¹⁵. Secondly, establishing a treaty might sound simple, however, the current international policies and legal order was not capable of achieving such treaty⁵¹⁶. And thirdly, international law should be used as a problem-solving platform and

⁵¹² Please see Chapter I.

⁵¹³ He also continues stating that “I have three main reservations about recommending to states that they launch a treaty process at this time. First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.” John Ruggie, “Business and Human Rights – Treaty Road Not Travelled”, (6 May 2008), [<https://www.globalpolicy.org/social-and-economic-policy/social-and-economic-policy-at-the-un/un-and-business/32270-business-and-human-rights-treaty-road-not-travelled.html>], accessed December 2019

⁵¹⁴ John Ruggie, “A UN Business and Human Rights Treaty?” An Issues Brief by John G. Ruggie (28 January 2014)

⁵¹⁵ “The resolution calls for the establishment of an open-ended (no time limit) intergovernmental working group within the Human Rights Council, “the mandate of which 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.”. Thus, the resolution is not addressed to any specific human rights abuses. Rather, it seeks to establish an overarching international legal framework—a global constitution of sorts— governing business conduct in relation to human rights. It then goes on to define “other business enterprises” in a way that is intended to exclude national companies, so that the new legal framework would apply only to transnational corporations.16 Thus, to illustrate, the language of the proposed treaty would have covered international brands sourcing garments from the factories housed in the collapsed Rana Plaza building, but not the local factory owners.” John Gerard Ruggie, “Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization” Regulatory Policy Program Working Paper RPP-2015-04, (Cambridge, 2015), (w/o page numbers)

⁵¹⁶ “the very scale of the proposed treaty. The idea of establishing an overarching international legal framework through a single treaty instrument governing all aspects of transnational corporations in relation to human rights may seem like a reasonable aspiration and simple task. But neither the international political or legal order is capable of achieving it in practice. The crux of the challenge is that business and human rights is not so discrete

not an end itself, meaning it has to ensure there are reasonable expectations from the treaty process and what is trying to be achieved with it⁵¹⁷. In addition, Ruggie stated it was too early to start such treaty negotiations when the implementation process had just begun. The implementation process will take time and the data to be collected on the implementation projects will be only available after a couple of years⁵¹⁸, to be used for future developments.

On the other hand, he advised “if treaty negotiations are to have any chance of success, they should focus on “carefully constructed precision tools” aimed at specific governance gaps⁵¹⁹”. He also accepts the treaties are important in the international human rights system, and ideally what should be aimed for to have a proper business and human rights framework⁵²⁰.

As seen from the discussions on A/HRC/RES/26/9, the supporters of UNGPs would state instead of the creation of a binding treaty, existing instruments should be strengthened, including the UNGPs and consequently, the national laws⁵²¹. As the history shows, the attempts

an issue-area as to lend itself to a single set of detailed treaty obligations. Politically, the problem iversity, institutional variation, and conflicting interests across states only increases as the number of TNC home countries grows. On the legal side, the International Law Commission documented nearly a decade ago that the predominant trend in international legalization is the fragmentation of international law into separate and increasingly autonomous spheres. Its report to the UN General Assembly concludes that “no homogenous hierarchical meta-system is realistically available” within the international legal order to resolve detailed differences among the separate spheres, that this would have to be left to the realm of practice. The category of business and human rights is a case in point: it encompasses 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 a high level of abstraction that it would be devoid of substance, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalization in this domain— as we already began to witness in the recent Council debate.” John Gerard Ruggie, “Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization”, (w/o page numbers). The official US position would be in the lines with what Ruggie is suggesting with regard to the international legal system.

⁵¹⁷ “Early on in my mandate I identified an approach to international legalization in business and human rights consistent with the principled pragmatism that brought us the Guiding Principles. Principled pragmatism views international law as a tool for collective problem solving, not an end in itself. It recognizes that the development of any international legal instrument requires a certain degree of consensus among states. And it holds that before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests narrowly crafted international legal instruments for business and human rights—“precision tools” I called them—focused on specific governance gaps that other means are not reaching.” John Gerard Ruggie, “Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization”

⁵¹⁸ John Ruggie, “A UN Business and Human Rights Treaty?” (w/o page numbers)

⁵¹⁹ John Gerard Ruggie, “Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and Proposed Treaty on Business and Human Rights”; Wetzels, *Human Rights in Transnational Business*, p. 199

⁵²⁰ “Treaties form the bedrock of the international human rights system. Specific elements of the business and human rights agenda may become candidates for successful international legal instruments. But it is my carefully considered view that negotiations on an overarching treaty now would be unlikely to get off the ground, and even if they did the outcome could well leave us worse off than we are today.” John Ruggie, “Business and Human Rights – Treaty Road Not Travelled”

⁵²¹ *supra*. ft. 495

to create a binding treaty on business and human rights have been failed many times, due to the developed and developing countries were unable to come to a common ground and they had different priorities⁵²². Developed countries were not in favour of having excessive legislation deriving from an international organization, whereas the developed countries were more concerned about creating a power balance between the foreign investors and the States. This situation has not changed⁵²³. Since the A/HRC/RES/26/9 is highly supported by the developed countries and received huge opposition from the business lobby and several developed countries, it is likely to fail again⁵²⁴.

Thus, overall the wish of the opposition was the efforts should be channelled to the proper implementation of the UNGPs and solving the issues with regard to access to remedies. Furthermore, an international treaty is not a solution for the problems we face with regard to the lack of effective remedies. Instead, the national judiciary systems need to be strengthened and the international community should help governments to build functioning institutions⁵²⁵.

Therefore, the acceptance of the A/HRC/RES/26/9 started the divergence of the group of states heavily invested in having a binding mechanism on business and human rights issues. These states have already started the drafting process, as we will explain below. But before looking into the treaty process, we will first focus on the UNGPs and its implementation process and how far its reach.

3. THE IMPLEMENTATION PROCESS FOR THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The implementation process for the UNGPs is being held by the relevant bodies formed by the UN. There is already almost a decade of work done on the implementation of the UNGPs, however, we could argue that this process goes rather slowly and only a handful of states have followed the advices provided by the responsible Working Group.

⁵²² Please see: Chapter I(6, 7)

⁵²³ Chris Esdaile, “Does the world need a treaty on business and human rights?”, Presentation given at the University of Notre Dame Law School and Business & Human Rights Resource Centre first annual London human rights speaker series event (14 May 2014)

⁵²⁴ The International Organisation of Employers also opposed the resolution by issuing a Commentary on the Business and Human Rights Treaty proposal. International Organisation of Employers, IOE Comments on the Proposal for a Binding UN Treaty on Business and Human Rights, (9 May 2014), [<https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=110553&token=a366dde84d4545823995cff94e1eedd04be850fe>], accessed December 2019

⁵²⁵ Please see: *Ibid.*

3.1. The Implementation Process

Following the acceptance of the UNGPs, the implementation process started immediately, with the formation of the Working Group on the issue of human rights and transnational corporations and other business enterprises (the “**Working Group**”)⁵²⁶ whose mandate was prolonged latest in 2017 for three more years⁵²⁷. This Working Group was entrusted with the promotion and support of the implementation of the UNGPs⁵²⁸ and also to align their work with the 2030 Agenda for Sustainable Development⁵²⁹.

Considering UNGPs is a document that is highly depended on voluntary initiatives, the implementation process also consists of voluntary actions. The Working Group now has mainly two important channels to ensure the implementation⁵³⁰: The Annual UN Forums on Business and Human Rights, where stakeholders gather at the UN and discuss most pressing issues, and the National Actions Plans that the States had to create and submit it to the Working Group.

⁵²⁶ “Decides to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years, to be appointed by the Human Rights Council at its eighteenth session, and requests the Working Group: (a) To promote the effective and comprehensive dissemination and implementation of the Guiding Principles; (b) To identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders; (c) To provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights; (d) To conduct country visits and to respond promptly to invitations from States; (e) To continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas; (f) To integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children; (g) To work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations; (h) To develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes, in particular the Office of the United Nations High Commissioner for Human Rights, the Global Compact, the International Labour Organization, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organization for Migration, as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations; (i) To guide the work of the Forum on Business and Human Rights (...); (j) To report annually to the Human Rights Council and the General Assembly.” A/HRC/RES/17/4, para. 5.

⁵²⁷ UN Human Rights Council (A/HRC/RES/35/7), Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, (14 July 2017)

⁵²⁸ A/HRC/RES/17/4, para. 6

⁵²⁹ A/HRC/RES/35/7, para. 12

⁵³⁰ Besides guiding and recommending states on their journey to implement UNGPs.

3.1.1. UN Forums on Business and Human Rights

The Working Group works actively on the facilitation of the implementation process of the UNGPs. They are also responsible for the organization of the UN Forum on Business and Human Rights (the “**Forum**”) that meets annually at the UN headquarters in Geneva, Switzerland. The Forums have started to gather in 2012, the year after the acceptance of the UNGPs and they have the following mandate:

“(…) a Forum on Business and Human Rights under the guidance of the Working Group to 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 practices⁵³¹”

The Forums exist to facilitate the implementation of the UNGPs and keep the conversation on business and human rights matters ongoing and actual. They are being held with the participation of the business and human rights community, including academics, business leaders, governments and NGOs⁵³². The purpose of the Forum is to discuss the relevant and most pressing issues on business and human rights, under the supervision of the Working Group. The Chairperson for the first session was John Ruggie, but the Forums continued by different chairpersons in the later sessions. The Forums got doubled in size through time and involved around more than 2500 stakeholders in 2018. There are different themes held each year⁵³³.

It has to be stated that the Forums do not have any decision-making power, therefore the conclusions reached throughout the Forums are not relevant to the legal scholarship. These annual Forums merely serve as an international platform for the stakeholders to come together every year and network, exchange ideas and get informed on the recent developments⁵³⁴. No specific applicable decisions came out of the Forums, just some conclusions on certain matters

⁵³¹ A/HRC/RES/17/4, para. 12

⁵³² “Decides to establish a Forum on Business and Human Rights under the guidance of the Working Group to 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” A/HRC/RES/17/4, para. 12.

⁵³³ About the UN Forum on Business and Human Rights please check [<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>], accessed December 2019

⁵³⁴ All information and documentation about the UN Forums can be found on its official website.

compiled in Reports which are presented to the UN General Assembly⁵³⁵. The main issues being discussed continuously includes the best practices of corporations and governments, the access to remedy problems and judicial and non-judicial mechanisms, the importance of human rights due diligence and how it could be implemented as a practice.

It could be observed that the discussions are getting more and more specific within these Forums, more focused on certain matters and sectors that are relevant. For instance, the first session held in 2012, was formed of panels themed around the pillars with several side events being held for more specific issues and held by external organizers. This changed throughout the years, more parallel side events were incorporated to the event which resulted in the less control of the Working Group on the course of discussions. This resulted in Forum to follow the trends, by having more sessions on the “trendy” topics such as the mega sporting events in 2015 and 2016. In 2018, it could be seen the discussions were mostly about the tech companies and disruptive technologies, such as blockchain technology.

On the other hand, these Forums do sometimes function as a political platform. It could be observed, the governments and businesses show their commitments to the business and human rights issues during recorded sessions. We can see activism speeches, and scrutiny of government or business actions by the civil society groups. For instance, it is possible for governments to hold sessions at the Forum on specific issues they might found pressing. In the 2017 Forum the Swiss Ministry of Foreign Affairs held a session on the UNGPs and commodities trading sector⁵³⁶. It is also possible for the sessions to be organized by the business sector, like Microsoft on the topics such as big data and its implications on human rights⁵³⁷. The mega sporting events, for instance, the Tokyo 2020 Olympics were also presented at the Forums together with the sustainability commitments of the Japanese organizers⁵³⁸, which also

⁵³⁵ For Reports and other documents related to the Forums: [<https://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>], accessed December 2019

⁵³⁶ Session on Implementing UNGPs in the Commodities Trading Sector (27 November 2017) organized by the Swiss Ministry of Foreign Affairs [https://www.ohchr.org/Documents/Issues/Business/ForumSession6/2_ImplementingUNGPs.pdf], accessed December 2019

⁵³⁷ Session on Technology and Human Rights (27 November 2017) [https://www.ohchr.org/Documents/Issues/Business/ForumSession6/20_AddressingAccessRemedy.pdf], accessed December 2019

⁵³⁸ Session on Taking Stock and Reiterating Commitment to Remedy: Embedding Respect for Human Rights in the Tokyo Olympics (29 November 2017) organized by the Global Compact Network Japan, the Institute of Developing Economies, IDE-JETRO-EY Japan and Climate Change and Sustainability Services [https://www.ohchr.org/Documents/Issues/Business/ForumSession6/51_EmbeddingRespectHumanRights.pdf], accessed December 2019

included the Human Rights Watch in the session to comment. To conclude, the Forums are an opportunity for the governments and the businesses to present their commitments and their work on the business and human rights issues within a positive environment and share their experiences with the rest of the participants. It is also a place to “announce” commitments, such as the BNP Paribas in 2017 Forum, announcing withdrawal from financing of oil and gas extracted from tar sands and of tobacco production because of human rights considerations based on its commitment to the UNGPs and other international standards⁵³⁹.

After the establishment of the OEIGWG, there has been sessions included a presentation on the outcomes of the discussions held during the binding treaty negotiations, presented by the Permanent Mission of Ecuador⁵⁴⁰.

Forums demonstrate the vast universe and outreach of business and human rights issues many people from all over the world involve in discussing, rather than actually having a specific legal meaning. These Forums are a good example on how the international community gets together when there is a tool in place joins them on a common ground. Though, it is hard to say these Forums support the evolution of the national legislation and create pressure on implementation of the UNGPs in a serious manner.

3.1.2. National Action Plans

The National Action Plans (“NAPs”) are submitted by the governments, in order to state what will be their state of action in the following years with regard to business and human rights issues. Only a small amount of States has submitted their NAPs, the biggest majority of these states are the European States⁵⁴¹. US also submitted their action plan, which was done in

⁵³⁹ A/HRC/38/49, Para. 82

⁵⁴⁰ Working together towards the elaboration of the international legally binding instrument on transnational corporations and other business enterprises, with respect to human rights, Moving forward the celebration of the Second Session of the OEIGWG, Res. A/HRC/RES/26/9, Side event organized by Ecuador on Fifth Forum on Business and Human Rights, [\[https://www.ohchr.org/Documents/Issues/Business/ForumSession5/Nov16/UpdateonTreatyProcess.pdf\]](https://www.ohchr.org/Documents/Issues/Business/ForumSession5/Nov16/UpdateonTreatyProcess.pdf), Working together towards the elaboration of the international legally binding instrument on transnational corporations and other business enterprises, with respect to human rights, Moving forward the celebration of the Third Session of the OEIGWG, Res. A/HRC/RES/26/9, organized by the Permanent Missions of Ecuador (28 November 2017) [\[https://www.ohchr.org/Documents/Issues/Business/ForumSession6/34_UpdatesProcessElaborating.pdf\]](https://www.ohchr.org/Documents/Issues/Business/ForumSession6/34_UpdatesProcessElaborating.pdf), both accessed December 2019

⁵⁴¹ “By 20 November 2018, 21 states had published NAPs. 9 At least 11 states are developing a NAP and there are 15 countries in which non-state initiatives are working towards a NAP. 18 of the 21 states that have published NAPs are members of the Council of Europe. There are 3 NAPs from states in the Americas. 2 African states and 4 Asian states are currently developing NAPs. States with NAPs contribute to 45.6% of global GDP and account for 43.6% of global imports (based on 2017 figures).” Danish Institute of Human Rights, *National Action Plans*

December 2016. From the non-European states, we could only see Colombia, Chile, Georgia, Indonesia, India and Thailand submitted their NAPs⁵⁴².

The NAPs outline the steps states will be taking for further compliance with the UNGPs. The Working Group also published a set of Guidelines for States to develop NAPs⁵⁴³. These guidelines provide detailed step-by-step guidance on how the process of creating a NAP should be initiated by the States, by providing organizational guidelines. The guidance states, for a NAP to be impactful there has to be “smart mix” of regulations and voluntary initiatives need to be followed by the governments, to create a more human rights friendly environment within corporate space⁵⁴⁴. Accordingly;

“The UNWG considers that NAPs, and the process to develop them, can provide for:

- Greater coordination and coherence within government on the range of public policy areas that relate to business and human rights;
- An inclusive process to identify national priorities and concrete policy measures and action;
- Transparency and predictability for interested domestic and international stakeholders;
- A process of continuous monitoring and evaluation of implementation;
- A platform for ongoing multi-stakeholder dialogue; and
- A flexible yet common format that facilitates international cooperation, coordination, and exchanges of good practices and lessons learned.⁵⁴⁵”

In fact, the existing NAPs mostly identify the nuances relevant to business and human rights within the existing legislation, the training strategies of the governments, information portals or NGOs to be supported and other voluntary initiatives taken in accordance with the UNGPs.

on Business and Human Rights: An Analysis, [https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrb_2018/nap-analysis_2018.pdf], accessed December 2019, pp. 9, 11

⁵⁴² For the final list on the countries submitted their NAPs: [<https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>], accessed December 2019

⁵⁴³ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, Version 1.0, [https://www.ohchr.org/documents/issues/business/unwg_%20napguidance.pdf], accessed December 2019

⁵⁴⁴ “Identify a ‘smart mix’ of mandatory and voluntary, international and national measures: The UNWG recommends that a NAP should, in line with the UNGPs, represent a ‘smart mix’ of mandatory and voluntary, as well as international and national measures. The term ‘smart mix’ means that all possible measures to influence corporate impacts on human rights should be taken into consideration and that the combination of the identified measures should be ‘smart’ in the sense that it is most effective in addressing the adverse impacts.” UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, p. 12

⁵⁴⁵ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, p. 11

According to the data published by the Danish Institute of Human Rights, the topics which appear in at least 20 NAPs include, children's rights, conflict-affected areas, corporate law and governance, equality and non-discrimination, guidance to business, human rights due diligence, judicial remedy, non-financial reporting, non-judicial grievance mechanisms, OECD National Contact Points, policy coherence, public procurement, state-owned enterprises/public-private partnerships and trade and workers' rights⁵⁴⁶.

The aim of NAPs is to facilitate the implementation of the UNGPs by encouraging states to do analysis of their own laws. However, the submission numbers show the lack of participation to the discourse from the governments and will to implement the UNGPs fully. Since principles are a soft-law instrument, none of the states can actually be forced legally to submit such reports or implement them in a serious manner.

In fact, submitted NAPs, leaving any reforms aside, do not offer huge changes within the national judicial systems⁵⁴⁷. For instance, the Swiss NAP states that:

“in the view of the economic freedom that is guaranteed by the Swiss Federal Constitution the federal government fulfills its duty to protect with a smart mix of non-legally-binding and -where necessary-supplementary statutory requirements, with national and international measures. (...) The approach is based on the internationally recognized understanding of the concept of a smart mix.⁵⁴⁸”

However, they only offer very small amount of changes within the current judiciary system or general laws of the States. The British NAP for instance, does not even offer such a commitment. The British NAP has been criticized on the grounds that it does not even propose any changes within the current judicial system, it merely relies on encouragement and providing incentives to the businesses to act more responsibly. When it comes to remedies, it does not propose any changes, but only commits to “support” effective remedy for the victims⁵⁴⁹. There are no clear timelines on when to fulfil these commitments or who will be

⁵⁴⁶ Danish Institute on Human Rights, *An Analysis*, p. 6

⁵⁴⁷ Tara L Van Ho, “‘Band Aids Don’t Fix Bullet Holes’: In Defence of A Traditional State-Centric Approach” in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty*, edited by Jernej Letnar Cernic and Nicolas Carillo-Santarelli, (United Kingdom: Intersentia, 2018), p. 116

⁵⁴⁸ Report on the Swiss Strategy for the Implementation of the UN Guiding Principles on Business and Human Rights (9 December 2016), [<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/switzerland.pdf>], accessed December 2019, p. 11

⁵⁴⁹ Damiano de Felice and Andreas Graf, “The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights”, *Journal of Human Rights Practice* 7(1) (2015), p. 60

tasked to fulfil them⁵⁵⁰. Same goes with the Dutch NAP⁵⁵¹ where there is no clear indication of who is responsible to make sure that the NAP is being realized⁵⁵².

In general within these NAPs, the States tend to focus on what works within their system, instead of what should be changed and need a reform⁵⁵³. For instance, the US NAP indicates states are responsible to provide effective remedy to the victims, however it does not focus on the barriers existing in the US system. We see an externalization⁵⁵⁴ of the problem because it

⁵⁵⁰ “Commitments made in the 2016 NAP vary in specificity and measurability. None of the “government commitments” made in the NAP explicitly specify which government agency or department will be tasked with fulfilling the commitment or provide a timeline within which they must be carried out. The specificity of expected actions and outcomes varies greatly throughout the NAP. Commitments that are less specific are inherently harder to measure, as there is little guidance on what specific tasks should be carried out, to what extent, and by what time.” International Corporate Accountability Roundtable and European Coalition for Corporate Justice, Assessment of the National Action Plan (NAP) on Business and Human Rights of the United Kingdom (August 2017),

[<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/icar-analysis-uk-2016.pdf>], accessed December 2019

⁵⁵¹ Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights, [<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-Netherlands.pdf>], accessed December 2019

⁵⁵² “many of the action points are overly vague and do not identify a clear timeline for implementation or a responsible government entity. For example, although the NAP states that “credibility is an important element of the Dutch human rights policy”, there is no concrete commitment to change policies or legislation if implementation and enforcement with the government’s human rights policy is not actually achieved. Furthermore, although the NAP states that CSR is an integral part of the trade missions and “expects companies represented in trade mission to look into the possible adverse effects of their operations on communities”, the government only expresses an expectation towards companies or trade missions and embassies, not a clear path toward doing so.” International Corporate Accountability Roundtable and European Coalition for Corporate Justice, Assessment of the National Action Plan (NAP) on Business and Human Rights of the Netherlands (November 2014),

[<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/icar-analysis-uk-2016.pdf>], accessed December 2019

⁵⁵³ Van Ho, “‘Band Aids Don’t Fix Bullet Holes’: In Defence of a Traditional State-Centric Approach”, p. 117

⁵⁵⁴ “One negative aspect of the U.S. NAP is that many of the government action points are overly vague, making it difficult to discern the concrete steps the NAP is committing specific government agencies or ministries to take. This difficulty hampers the ability for stakeholders, including internal government actors, to hold responsible government entities accountable for their commitments.” International Corporate Accountability Roundtable, Assessment of the National Action Plan (NAP) on Business and Human Rights of the United States (February 2017),

[<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/icar-analysis-usa.pdf>], accessed December 2019

has been stated not all countries have such mechanisms in place⁵⁵⁵. This the same with other NAPs, including Denmark⁵⁵⁶, Sweden⁵⁵⁷, Finland⁵⁵⁸ and Norway⁵⁵⁹.

It is not surprising that the supporters of the UNGPs consist of States submitted the NAPs to the Working Group, like the US and the European states. However, when we look at the contents of the NAPs, we could encounter a very self-unaware approach coming from these states, which is highly problematic. There is no serious effort in reforming the judicial systems of these nation States or reducing barriers to provide effective remedies for the victims, considering these states are mostly the ones headquartering the companies. There is a limited number of future actions being promised but with no deadlines or any indication of responsible government offices to undertake these promises.

4. BINDING TREATY NEGOTIATION PROCESS

Only a little progress has been made with regard to implementation of the UNGPs and making sure the corporations are aligning with human rights principles. The implementation process has been criticised since only a handful of member states submitted their NAPs⁵⁶⁰. Therefore, there has been a call from some states, scholars and civil society⁵⁶¹ regarding a binding treaty.

⁵⁵⁵ The Secretary of State, Responsible Business Conduct: First National Action Plan for the United States of America (Washington, 16 December 2016)

⁵⁵⁶ Danish National Action Plan - implementation of the UN Guiding Principles on Business and Human Rights (March 2014), [<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/12/denmark.pdf>], accessed December 2019

⁵⁵⁷ Government Offices of Sweden - Action Plan for Business and Human Rights, [<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-Sweeden.pdf>], accessed December 2019

⁵⁵⁸ Finnish Ministry of Employment and the Economy, National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights, [<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/nap-finland.pdf>], accessed December 2019

⁵⁵⁹ Norwegian Ministry of Foreign Affairs, Business and Human Rights: National Action Plan for the implementation of the UN Guiding Principles, [<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/nap-finland.pdf>] accessed December 2019

⁵⁶⁰ “While ongoing commitment to implementing the UNGPs by a wide range of actors is generally encouraging, progress remains far too slow and uneven, and capacity constraints make it difficult for some actors to take necessary measures to ensure implementation. (...)

It is noteworthy that of the 47 members of the Human Rights Council, only a handful have taken steps to develop national action plans for implementing the UNGPs, and only a few additional countries not on the Council have done so.” Institute for Human Rights and Business, Submission to the UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Concerning possible principles, scope and elements of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (June 2015)

⁵⁶¹ The civil society was calling out the following unresolved issues: “a) At the national level, many states do not have a criminal, civil and administrative mechanisms in place to hold national companies and TNCs accountable as legal persons. b) The multinational nature and strategies TNCs use in order to escape liability across borders require States to cooperate jointly at the international level to regulate, monitor, adjudicate and enforce judicial decisions to ensure liability of the companies involved in abuses and remedy for affected individuals and communities. Such international cooperation is currently lacking and depends on the goodwill of States. c) States

Despite major opposition⁵⁶², A/HRC/RES/26/9 has been accepted and the discussions a possible international treaty has been initiated.

OEIGWG started their sessions a year after the adoption of A/HRC/RES/26/9. The first two sessions were dedicated to conduct deliberations on the content, scope and nature of the future international instrument. Following the third session, the Elements of a Binding Treaty was presented by the Chair in September 2017 to the states and the Fourth Session was already devoted to the “Zero Draft” which was presented in July 2018. The Fifth Session which took place in October 2019, was dedicated to the “Revised Draft” presented in July 2019.

4.1. Legally Binding Treaty Negotiation Sessions

4.1.1. First Session (2015)

The first session of the OEIGWG held between 6th-10th July 2015 in Geneva. The participants included Governments, civil society and business organizations.

The first session was rather built on disagreements and was controversial⁵⁶³. Some states, for instance Brazil⁵⁶⁴ and China⁵⁶⁵ did not maintain a clear position. Russia publicly changed their

systematically fail to comply with their extraterritorial obligations to respect, protect and fulfil human rights, and binding regulations clarifying what such obligations imply for States regarding TNC regulation is currently lacking. d) Remedy mechanisms available to affected individuals and communities in order to hold the home States of TNCs accountable for their failure to comply with their extraterritorial obligations to protect human rights beyond their borders are non-existent in many countries or have been weakened. e) There is clear asymmetry between binding trade and investment law protecting corporate interests on the one side, and weak enforcement of human rights law on the other side. f) Arbitration tribunals or Investor-State Dispute Settlement System mechanisms included in investment and trade law create a ‘chilling effect’ on States which legislate to protect human rights. Indeed, the increasing number of claims by companies against States threatens their financial capacity to implement human rights. At the same time, arbitration tribunals operate as a private judicial system, outside the States’ domestic court system, with arbitrators whose independence is questionable: they often have close ties with the corporate sector (some having even been members of corporate boards) and evidently have a vested interest in investors bringing arbitration cases. g) There is an increasing undue influence of the most powerful TNCs in public policy standard-setting process and governance, which has been alleged to undermine human rights protection. The situation is so strong that civil society actors are speaking about ‘corporate capture’ of policy spaces. This happens both at national and international level. h) There has been an increase in criminalization and psychological and physical harassment of human rights defenders and trade unionists by TNCs and other business enterprises. i) There still exists a big gap between the affected individuals and communities perception of the reality and that of the delegations present in the UN human rights system” Ana Maria Suarez Franco and Daniel Fyfe, “Voluntary vs. Binding: Civil Society’s Claim for a Binding Instrument” in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty*, edited by Jernej Letnar Cernic and Nicolas Carillo-Santarelli, pp. 144-146

⁵⁶² *supra*. pp. 106-111

⁵⁶³ Official Report of the First Session, UN General Assembly (A/HRC/31/50), 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 (5 February 2016)

⁵⁶⁴ The summary of Brazil’s statement: South Center, “Business and Human Rights: Commencing discussions on a legally binding instrument”. *South Bulletin, Issues 87-88*, (23 November 2015), p. 8

⁵⁶⁵ The summary of China’s statement: South Center: *Ibid.*, p. 7

position on a binding treaty, although they supported the A/HRC/RES/26/9⁵⁶⁶. Canada, Australia and US were not present during the discussions⁵⁶⁷. That being said, despite its commitment not to attend the discussions, EU attended the First Session⁵⁶⁸. However, this caused some intense discussions erupting at the adoption of the agenda point, where EU proposed two amendments to the agenda in order to include a point on the “Implementation of the UNGPs – a renewed commitment by all States” and to add “all” before “business enterprises” wherever it appeared in the working programme. The first point was accepted by the Chair-person; however, the second one got rejected due to opposition from the participating countries. EU left the session on the second day after issuing a statement that the discussions do not correlate with the current implementation process of the UNGPs⁵⁶⁹, since UNGPs cover all business enterprises both domestic and transnational and the treaty process clearly does not follow the same path.

The session included panels on the implementation of the UNGPs (which was added after EU’s proposal); principles for the binding treaty; coverage of the instrument including the concept of transnational enterprises; the scope of human rights that would be covered by the future instrument; obligations of States to guarantee the respect for human rights; enhancing the responsibility of the transnational corporations and their legal responsibility and national and international remedy mechanisms, including international cooperation⁵⁷⁰.

The first session concluded that the binding treaty process does not oppose the implementation process of the UNGPs and it should be understood as a complementary process. Furthermore, a consensus has been reached on the future binding treaty should not only include gross human

⁵⁶⁶ The summary of Russia’s statement: South Center: *Ibid.*, p. 6

⁵⁶⁷ The list of states that participated to the session: A/HRC/31/50, para. 6

⁵⁶⁸ The summary of EU’s statement: *South Bulletin* p. 7

⁵⁶⁹ “The EU is supportive of a consensual track at the UN level. The EU supported Human Rights Council A/HRC/RES/26/22 presented by the core group (Argentina, Ghana, Norway, Russian Federation). Accordingly, the EU is firmly committed to the implementation of the “UN Guiding Principles on Business and Human Rights (UNGPs)” endorsed by consensus by the UN Human Rights Council in 2011. The EU supports the UN Working Group in all its activities, including the annual Forum on Business and Human Rights. (...) The focus on solely transnational corporations, as foreseen in the process set out by A/HRC/RES/26/9 which divided the Human Rights Council, neglects the fact that many abuses are committed by enterprises at the domestic level, thus undermining a fundamental element of the UNGPs that cover all businesses, regardless of whether firms are transnational. (...) For the reasons outlined above, the process as currently set out towards an international legally binding instrument raises several concerns. It is unclear how a possible treaty would relate to the policy framework already created by the UNGPs and what a legally binding instrument would involve, or how it would function in operational terms. In addition, pushing for a legally binding document at this stage unnecessarily polarizes the debate.” Submission of the European Union, “Inter-Governmental Working Group (IGWG) on the elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights”

⁵⁷⁰ For more information on the Sessions: A/HRC/31/50

rights violations but all human rights, building on the fact that human rights are universal, indivisible, interdependent and interrelated⁵⁷¹.

The major discussion was on the scope of the treaty and whether it should include all business enterprises or only transnational enterprises divided the opinions. Regarding this, for instance one panellist stated it was impossible to cover all business enterprises with an international treaty and the “transnational enterprise” does not have to be defined but it could be left to the jurisprudence or it could be delegated to the national legislations⁵⁷². Some states were also in favour of only addressing transnational corporations, whereas several of them were holding a middle ground such as South Africa, Uruguay and Ecuador. In contrast, some NGOs opposed this stating all enterprises were susceptible of committing human rights violations and all victims needed protection and access to remedies, regardless of the nature of the enterprise committing the abuse, so the treaty must include all enterprises⁵⁷³. The consensus was not reached during the First Session.

Furthermore, there were no general agreement with regard to creating direct international legal obligations for businesses and access to remedies for victims of corporate human rights abuses.

4.1.2. Second Session (2016)

In the Second Session⁵⁷⁴ which was held between 24-28 October 2016, EU started to attend to the discussions again. They stated they decided to continue attending the negotiations, due to the conclusions they came regarding the programme of work not undermining the implementation of the UNGPs⁵⁷⁵ and the scope of work was widened in a manner that was covering all business enterprises⁵⁷⁶.

The Second session included panel sessions on the overview of the social, economic and environmental impacts of transnational corporations and legal challenges, primary obligations of states in protecting human rights, obligations and responsibilities of corporations, a debate

⁵⁷¹ This was taken from the Vienna Declaration and Programme of Action issued in World Conference on Human Rights (UN/Doc/A/Conf.157/23) (1993)

⁵⁷² A/HRC/31/50, para. 57

⁵⁷³ A/HRC/31/50, para. 61

⁵⁷⁴ UN Human Rights Council (A/HRC/34/47), Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (4 January 2017)

⁵⁷⁵ A/HRC/34/47, para. 14

⁵⁷⁶ Please see: Written Submission by FIAN International, FI, CCFD, CCJ and SID for the second session of the Open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights, Part 3 (24-28 October 2016)

on the scope of the international legally binding instrument, access to justice at the national and international levels.

In fact, during the sessions there seemed to be a consensus around interpretation of the footnote in the A/HRC/RES/26/9 in a manner that is more flexible, and to include all companies linked to global supply chains⁵⁷⁷. It has been aimed to include the domestic companies to the scope, to a certain extent⁵⁷⁸. This way the arguments against the transnational corporations have been dismissed, however this point still remained a matter of debate⁵⁷⁹.

Furthermore, an extensive discussion was conducted on the access to remedy problems and the necessity to remove barriers at the national and international levels and also making sure there are measures, standards and mechanisms in the binding instrument⁵⁸⁰.

This session was different than the First Session which was heavily polarized, and the negotiations moved further towards the negotiation phase⁵⁸¹. Indeed, the Elements of a Binding Treaty was shared by the Chairperson in September 2017 creating a base for the treaty negotiations⁵⁸² for the Third Session.

⁵⁷⁷ “The fifth panellist stated that 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.” A/HRC/34/47, para. 69

⁵⁷⁸ A/HRC/34/47, para. 71-78

⁵⁷⁹ However, the business lobby such as the International Organization of Employers and International Chamber of Commerce was still heavily against a hard-law instrument. “a legally binding instrument is not necessary as they consider that there are already sufficient existing standards available with regard to the regulation of TNCs and that what is lacking is their enforcement. Limiting the instrument’s scope to TNCs, imposing direct human rights obligations on businesses and expanding extraterritoriality were some of the red lines that the business community expressed.” Suarez and Fyfe, “Voluntary vs. Binding: Civil Society’s Claim for a Binding Instrument”, p. 156

⁵⁸⁰ “Several delegations stressed the importance of a victim-centred approach and a focus on access to remedies and reparations. Even if there were positive measures at the national level to protect victims from human rights violations by transnational corporations, there must also be measures, standards and mechanisms in a binding instrument at the international level. Additionally, transnational corporations must fulfil existing binding obligations relating to human rights in accordance with international law.” A/HRC/34/47, para. 17

⁵⁸¹ “Unlike in the first session, discussions during the second session were mostly centred on what a future treaty would look like instead of whether such a treaty was legitimate or not. With this session, the treaty process has gained a new momentum and entered a new phase: the negotiation phase.” Suarez and Fyfe, “Voluntary vs. Binding: Civil Society’s Claim for a Binding Instrument”, p. 157

⁵⁸² Chairmanship of the OEIGWG established by HRC res. A/HRC/RES/26/9, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (29 September 2017) [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf], accessed December 2019

4.1.3. Third Session (2017)

The Third Session took place between 23-27 October 2017, which was organized around the Elements of a Binding Treaty (the “EBT”) document. This document was welcomed by many delegations⁵⁸³, but there were points of non-consensus. For instance, the EBT did not explicitly cover all business enterprises⁵⁸⁴, which continued the polarization on the subject⁵⁸⁵ encountered in the previous sessions. In addition, the EBT tried not to define what is meant by transnational corporations. Instead, the focus was on the business activity having “transnational character”⁵⁸⁶. Needless to say, this created certain confusion among the negotiators and this shift in focus was not satisfactory for neither side⁵⁸⁷.

The EBT did not also touch upon the issue of proposing direct obligations on corporations, despite the affirmative discussions at the Second Session. It could be seen throughout the EBT, the States are still the primary duty bearers ensuring the businesses are respecting human rights. On the other hand, there was a reference to the “existing” UN Draft Norms in the Preamble, document contained direct legal obligations imposed on the businesses. But as known, this

⁵⁸³ UN Human Rights Council (A/HRC/37/67), Report on the third session of the open-ended intergovernmental working on transnational corporations and other business enterprises with respect to human rights, (24 January 2018), para. 22

⁵⁸⁴ The Elements of a Binding Treaty stated the Scope of Application as follows: “In this regard, based on the deliberations of the first two sessions, this proposal considers that the objective scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure. With regard to the subjective scope, the present instrument does not require a legal definition of the TNCs and OBEs that are subject to its implementation, since the determinant factor is the activity undertaken by TNCs and OBEs, particularly if such activity has a transnational character.”

⁵⁸⁵ “Many delegations agreed that States had the primary duty in protecting against human rights abuses by third parties, including business enterprises, and commended the elements document for reflecting that consensus. However, there was disagreement as to which business enterprises should be covered by a legally binding instrument. Several delegations expressed the view that national enterprises should be covered by the instrument, a view shared by many NGOs. Given the complex nature of corporate structures and the prevalence of nationally incorporated subsidiaries, those delegations feared that transnational corporations could find ways to fall outside the scope of an instrument regulating only transnational activities. While some delegations expressed the view that A/HRC/RES/26/9 and the proposed elements permitted all business enterprises to be covered, other delegations rejected that as expanding the mandate in A/HRC/RES/26/9 and noted that national laws already regulated national companies.” A/HRC/37/67, para. 27

⁵⁸⁶ Deutsches Institute für Menschenrechte, Building on UN Guiding Principles towards a Binding Instrument on Business and Human Rights: Comments on the ‘Elements for the Draft Legally Binding Instrument’ of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises, Position Paper (March 2018), pp. 4-5

⁵⁸⁷ Doug Cassel, “The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty”, *Business and Human Rights Journal Vol. 3 Issue 2* (July 2018), p. 280

document does not have any legal standing as there was a consensus on moving on from it⁵⁸⁸. This issue was left unresolved in this session⁵⁸⁹.

Building on the EBT document, the “Zero Draft”⁵⁹⁰ was prepared by the Chairmanship, which was the main discussion of the Fourth Session held between 15-19th October 2018. On 16th July 2019, OEIGWG published the “Revised Draft”⁵⁹¹ building on the negotiations and comments on the Zero Draft to be negotiated in the Fifth Session held in October 2019.

4.2. The “Zero Draft” (2018)

The particularity of the “Zero Draft” is, it tries to take a step ahead from UNGPs. But from certain perspectives, it has been criticised as a step back from what has been achieved with the UNGPs, due to its narrowed scope⁵⁹².

The Zero Draft introduces 15 main articles constituted around four pillars: Prevention⁵⁹³; victim’s rights and access to justice⁵⁹⁴; international cooperation⁵⁹⁵; and monitoring

⁵⁸⁸ *Ibid.*, p. 281, also please see Chapter I(6.2)

⁵⁸⁹ “Concerning the inclusion of a section on “obligations of transnational corporations and other business enterprises”, some delegations asked for information on the legal basis for imposing international human rights obligations on companies. Additionally, questions were raised as to how that would work in practice and whether that would be appropriate in the absence of a structure capable of law enforcement. Other delegations found it appropriate to impose international obligations on companies and referenced several treaties establishing obligations on legal entities. In their view, such obligations were necessary to ensure the effectiveness of the instrument.” A/HRC/37/67, para. 71

⁵⁹⁰ Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, “Zero Draft” (16 July 2018), [<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>], accessed December 2019

⁵⁹¹ Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, “Revised Draft” (16 July 2019), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf], accessed December 2019

⁵⁹² For the report on the Fourth Session: UN Human Rights Council (A/HRC/40/48), Report on the fourth session of the open-ended intergovernmental working on transnational corporations and other business enterprises with respect to human rights, (2 January 2019)

⁵⁹³ “The first, and primary, pillar was prevention. It incorporated elements of the Guiding Principles, drew on experiences from national, regional and international systems and took into account discussions held in earlier sessions of the working group.” UN Human Rights Council (A/HRC/40/48), Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (2 January 2019), para. 27

⁵⁹⁴ “Victims’ rights, access to justice in particular, were the second pillar. The emphasis was on the removal of practical obstacles faced by victims in their pursuit of redress. Inspiration had been taken from working group discussions and regional regulations concerning jurisdiction.” A/HRC/40/48, para. 28

⁵⁹⁵ “International cooperation was the third pillar. The transnational nature of contemporary practices and the need for States to work together to ensure that justice was done were recognized in that pillar.”, A/HRC/40/48, para. 29

mechanisms⁵⁹⁶. However, despite the pillars have been cleared out as such by the OEIGWG, the Zero Draft does not necessarily follow an organization of the text around pillars as we see in the UNGPs. Therefore, here we will only focus on the much-debated points of the Zero Draft.

4.2.1. Scope of the Treaty

As per the Article 2, one of the purposes of this Convention is “to strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities of transnational character”. Therefore, the Zero Draft does not necessarily go further than the EBT when it comes to the scope of the treaty. It has been stated as “The Convention shall apply to human rights violations in the context of any business activities or transnational character⁵⁹⁷”, however, differentiating from the EBT, the Zero Draft defines the term “business activities of a transnational character”. Accordingly, it “shall mean any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions⁵⁹⁸”.

Here, the most important part of this definition would be the “impact in two or more national jurisdictions”. This is open to interpretation, but it could be interpreted as in line with what has been achieved in the Second Session, meaning the term “other business enterprises” will be interpreted in a way that would not involve all domestic companies, but those that are in a relationship with larger companies that are transnational, such as companies that are a part of supply chains. That being said, still it would not be covering the domestic enterprises that solely operates domestically in state territories. Considering the complexity of trade relationships, it is hard to define which company would be solely domestic and which company is a part of a supply chain. Domestic companies may include the ones only operates locally, for instance having local production and sales within a state such as Portugal, including small enterprises and micro family companies. However, considering the complexity of trade relations, it is still not clear how can we differentiate a domestic business activity and transnational business activity and the difference between their responsibilities to respect human rights. For instance,

⁵⁹⁶ “Monitoring mechanisms, which were discussed in the draft instrument and, more prominently, in the draft protocol, were the focus of the fourth pillar. Inspiration had been drawn from other human rights treaties.”, A/HRC/40/48, para. 30

⁵⁹⁷ Zero Draft, Article 3 (1)

⁵⁹⁸ Zero Draft, Article 4 (2)

a local retail market owner that buys and sells a product from the neighbouring country would be in the scope of this treaty? Will it be responsible for making sure the international human rights law is protected and the local market owner that is across the street that only buys and sells local products will not be responsible? Or a national mining company caused the death of 301 miners due to carbon monoxide poisoning in 2014, in Soma, Turkey⁵⁹⁹ is not responsible for protection of international human rights due to not operating transnationally? We believe, this would be against the universality principle of international human rights law.

Nevertheless, this expansion of the scope under the “Zero Draft”, was not able to stop the controversy on the issue. Some states were still demanding the treaty should cover “all business enterprises” similar to the UNGPs⁶⁰⁰. In the same line, Phil Bloomer and Maysa Zorob noted this a step back from what has been reach by the UNGPs:

“Nevertheless, the proposed scope of the Zero Draft falls short in several key areas. A contentious area of the Treaty’s scope is its exclusive focus on “business activities of a transnational character.” While

⁵⁹⁹ In this case the general manager of the company and certain other people were criminally held liable and sentenced to prison time by the Turkish courts. For more information: Mining Dot Com, “Five Top Exec’s Convicted Over Turkey’s worst mine disaster”, (11 July 2018). [<https://www.mining.com/five-top-mining-execs-convicted-turkeys-worst-mine-disaster/>], accessed December 2019. In the meanwhile, following this disaster, a specific labour court was established in the region for the civil cases. In 2017, in an important decision, the Turkish Supreme Court sentenced the Turkish Coal Enterprises Institution who was the mother company of the enterprise that was developing the respective mine in Soma (Soma Komur Isletmeleri AS) to pay non-pecuniary compensation for the families of the victims. The court was heavily relying on human rights principles while deciding on the matters. The decision included the wording stating that the “it should be emphasized that the fundamental rights come before any other laws” and “what really matters is the human life and no valuation can compensate the deep agony of the families arising from the loss of this life. The aim here is to provide certain comfort for the families and on the other hand, aversively sanction the abusive party in a manner that will ensure they will act diligence and attention.” (translated by the Author). Yargıtay 21. Hukuk Dairesi, E. 2017/1857; K. 2017/3192.

⁶⁰⁰ “Although delegations indicated that articles 3 and 4 were necessary, there were divergent views as to what they should consist of. With respect to article 3 (1), many States and organizations insisted that the instrument cover all business enterprises, regardless of whether they engaged in transnational activities, noting that such an approach would be consistent with the Guiding Principles. In their view, what was important was the seriousness of the human rights impact, not the type of activity or nature of the company. Some delegations called for the instrument to cover only transnational corporations. Several other delegations were of the view that the approach taken in the draft, in which the focus was on the transnational character of business activities, was a fair compromise that was consistent with the footnote to resolution 26/9 and should satisfy those who wanted the instrument to cover more than just transnational companies. Yet other delegations disagreed, arguing that such an approach was vague and potentially too broad. In addition to the issue of scope, some delegations and organizations reasserted their position that it was inappropriate to refer to “violations” when referencing business activity. It was suggested that the draft should refer instead to “abuses” or ‘adverse human rights impacts’ (...) Although the comments on article 3 (1) were applicable to article 4 (2), arguments specifically regarding the latter article were also made. Some delegations and NGOs questioned the provision of article 4 (2) under which business activities of a transnational character were understood to mean for-profit activities alone. That qualification, in their view, unnecessarily narrowed the scope of the instrument and exempted certain companies that were responsible for human rights abuses. There were also calls for explicit references to parent companies and/or global supply chains, as well as transnational corporations and other business enterprises.”, A/HRC/40/48, para. 73, 76

this conception is a welcome widening of scope from the previous exclusive focus on transnational corporations, it falls short of the coverage suggested by the UNGP, which apply to “all businesses”. (...) such a restrictive definition risks denying access to remedy for victims of human rights abuses committed by national companies. From the experience of Business & Human Rights Resource Centre, allegations of corporate abuse are made against both national and international companies and national laws currently too often provide no adequate protection or remedy from either source of abuse. Including national companies in the Treaty’s scope is key in driving concrete improvements for the vulnerable and victims of abuse.⁶⁰¹”

In addition, Ruggie also criticized this point stating the “business activities of a transnational character” is a term not defined in law or social sciences, therefore it has to be constructed from scratch, which would be a challenge in itself. He continues by pointing out that even in case of having a definition, what is meant with “for-profit economic activity” is not clear. The complexity of the global supply chains will be still hard to be tackled, for the purposes of monitoring and attributing legal liability⁶⁰².

4.2.2. Legal Liability

Considering the scope of the treaty was not clear, it also creates a confusion to whom this legal liability will be attributed. In parallel, Ruggie criticised, the Article 10(6)⁶⁰³ including mother companies within the scope of legal liability. Accordingly, the way this article is written, does not include “so called “lead” companies like Apple, which do not hold equity in their business partners, as well as Unilever’s many contractors.”⁶⁰⁴, due to the fact that it would be hard to define what is a “commercial and productive activity” or an “for-profit economic activity”. Indeed, the meaning of these terms might differentiate in national legislations.

⁶⁰¹ Phil Bloomer and Maysa Zorob, “Another Step on the Road? What does the “Zero Draft” Treaty mean for the Business and Human Rights movement?”, *Business and Human Rights Resource Centre, Reflections of the Zero Draft Blog Series*, [<https://www.business-humanrights.org/en/another-step-on-the-road-what-does-the-zero-draft-treaty-mean-for-the-business-and-human-rights-movement>], accessed December 2019

⁶⁰² John G. Ruggie, “Comments on the Zero Draft Treaty on Business and Human Rights” *Business and Human Rights Resource Centre, Reflections of the Zero Draft Blog Series*. [<https://www.business-humanrights.org/en/comments-on-the-zero-draft-treaty-on-business-human-rights>], accessed December 2019

⁶⁰³ The Zero Draft, Article 10(6): “All persons with business activities of a transnational character shall be liable for harm caused by violations of human rights arising in the context of their business activities, including throughout their operations: (a) to the extent it exercises control over the operations, or (b) to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim, or (c) to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.”

⁶⁰⁴ John G. Ruggie, “Comments on the “Zero Draft” Treaty on Business & Human Rights”

Nevertheless, the Zero Draft included an article on the legal liability. Accordingly, the Zero Draft does not specifically create any direct legal obligations on corporations, but rather a system for cooperation among states when a human rights abuse occurs. According to Article 10(1),

“State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil and administratively liable for violations of human rights undertaken in the context of business activities of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions”.

The Zero Draft still puts the states as primary actors and empowers them to create legislation to ensure that there are clear sanctions on corporate human rights abuses. In Article 10(5), it has been stated that the “State Parties shall provide for a comprehensive regime of civil liability for violations of human rights undertaken in the context of business activities and for fair, adequate and prompt compensation.”. For criminal liability for instance, in Article 10(8) it has been stated, “State parties shall provide measures under domestic law to establish criminal liability for all persons with business activities of a transnational character that intentionally, whether directly or through intermediaries, commit human rights violations that amount to a criminal offence, including crimes under international law, international human rights instruments, or domestic legislation”.

The latter paragraph on criminal liability could be criticized since it could be interpreted as the Zero Draft gives the authority to any domestic court to decide upon matters might be the concern of the International Criminal Court. This article has been altered in the Revised Draft.

Furthermore, it has been thought the accountability regimes constructed by states would need support of other states upon occurrence of a case. Article 11 tries to ensure there is cooperation among states with regard to legal assistance might be needed while deciding upon the case, such as access to information or supply of evidence⁶⁰⁵.

⁶⁰⁵ Zero Draft, Article 11(2): “States Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial proceedings in relation to the cases covered by this Convention, including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations covered under this Convention. The requested Party shall inform the requesting Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.”

4.2.3. Prevention and Adjudication of Corporate Human Rights Abuses

The Zero Draft relies on mandatory human rights due diligence when it comes to regulating prevention of corporate human rights abuses. The Zero Draft largely leaves this the matter in the hands of the States and the legislatures:

“State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties’ territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities.⁶⁰⁶”

The same article continues with establishing the minimum requirements for the human rights due diligence. Accordingly;

“Due diligence (...) shall include, but shall not be necessarily limited to:

- a. Monitoring the human rights impact of its business activities including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services.
- b. Identify and assess any actual or potential human rights violations that may arise through their own activities including that of their subsidiaries and of entities under their direct or indirect control or directly linked to its operations, products or services.
- c. Prevent human rights violations within the context of its business activities, including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services, including through financial contribution where needed.
- d. Reporting publicly and periodically on non-financial matters, including at a minimum environmental and human rights matters, including policies, risks, outcomes and indicators. The requirement to disclose this information should be subject to an assessment of severity of the potential impacts on the individuals and communities concerned, not to a consideration of their materiality to the financial interests of the business or its shareholders.
- e. Undertaking pre and post environmental and human rights impact assessments covering its activities and that of its subsidiaries entities under its control, and integrating the findings across relevant internal functions and processes and taking appropriate action.
- f. Reflecting the requirements in paragraphs a. to e. above in all contractual relationships which involve business activities of transnational character.

⁶⁰⁶ The Zero Draft, Article 9 (1)

g. Carrying out meaningful consultations with groups whose human rights are potentially affected by the business activities and other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.

h. Due diligence may require establishing and maintaining financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.⁶⁰⁷”

In pursuit, states are obliged to make sure that the due diligence is being performed and there are necessary national mechanisms to ensure this⁶⁰⁸. Failure to conduct a due diligence should result in liability and compensation⁶⁰⁹. It has been also stated States may chose to leave certain companies outside the scope of this requirement: “States Parties may elect to exempt certain small and medium-sized undertakings from the purview of selected obligations under this article with the aim of not causing undue additional administrative burdens.⁶¹⁰”.

According to the Zero Draft, the victims⁶¹¹ of violations of human rights shall have access to courts where:

“a. such acts or omissions occurred or;

b. the Court of the State where the natural or legal person or association or natural or legal persons alleged to have committed the acts or omissions are domiciled.⁶¹²”

The Zero Draft could be stated as a “good idea to try and secure support, in the name of realism” as Bernaz noted⁶¹³, and it is true that the Zero Draft somehow goes beyond the UNGPs in securing human rights, but it still fails to create a reliable remedy mechanism for the victims, let alone creating liability for certain types of companies. Furthermore, we are of the opinion

⁶⁰⁷ The Zero Draft, Article 9 (2)

⁶⁰⁸ The Zero Draft, Article 9 (3)

⁶⁰⁹ The Zero Draft, Article 9 (4); Article 10 (1): “The nature of liability and compensation that is again going to be decided by the States. “State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions. Liability of legal persons shall be without prejudice to the liability of natural persons.”

⁶¹⁰ The Zero Draft, Article 9 (5)

⁶¹¹ The term “victims” has been defined as “persons who individually or collectively alleged to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights, through acts or omissions in the context of business activities of a transnational character.” The Zero Draft, Article 4(1)

⁶¹² The Zero Draft, Article 5(1)

⁶¹³ She continues stating that “but the idealist in me can’t help feeling a bit disappointed.”. Nadia Bernaz, “The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism”, *Business and Human Rights Resource Centre, Reflections of the Zero Draft Blog Series*, [<https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism>], accessed December 2019

the Zero Draft relies heavily on the goodwill of the States and State legislators and encourages them to take action, which might be as problematic as relying heavily on the goodwill of the corporations and corporate actors in protecting human rights, as what has been tried to achieve partly by the UNGPs.

4.3. The “Revised Draft” (2019)

In July 2019, the Revised Draft has been presented to the States by the OEIGWG built upon the consultations on the Zero Draft. The Revised Draft has been discussed at the Fifth Session of negotiations in 14-18 October 2019⁶¹⁴.

The Revised Draft relatively improves the language of the Zero Draft. Furthermore, the organization of the code has been modified⁶¹⁵ and more technical articles has been introduced⁶¹⁶. However, most importantly, it involves some major changes with regard to the scope of the treaty and legal liability. Most states part of the negotiations had welcomed the Revised Draft⁶¹⁷.

The tone of the purpose of the Revised Draft has been changed from ensuring the State’s obligations to be fulfilled under international human rights law⁶¹⁸ to a more business and human rights focused tone, stating the purpose of this treaty is ‘to strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities’, ‘to prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses’, and ‘to promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities’⁶¹⁹.

⁶¹⁴ For the Draft Report on the Fifth Session: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/IGWG_5th_DraftReport.docx], accessed December 2019

⁶¹⁵ For instance, the ‘Definitions’ has been moved to Article 1 from Article 4 and the ‘Jurisdiction’ article has been moved from Article 5 to Article 7.

⁶¹⁶ The Article 15 on the Implementation and Article 16 on the Settlement of Disputes.

⁶¹⁷ Please see the coverage of the Fifth Session: [<https://www.business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/fifth-un-intergovt-working-group-session-on-proposed-business-human-rights-treaty-14-18-oct-2019>], accessed December 2019

⁶¹⁸ The Zero Draft, Article 2. Clearly this article involves more paragraphs than what has been stated but it could be clearly seen that the main concern was to make sure that States’ obligations were fulfilled within the business and human rights realm.

⁶¹⁹ The Revised Draft, Article 2.

4.3.1. Scope of the Treaty

The biggest change within the Revised Draft is the enlargement of the scope of the treaty, in a manner to involve all companies, but maintaining the focus on businesses engaging in transnational activities⁶²⁰. In Article 3 of the Revised Treaty, it has been stated that “This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character”. It has to be mentioned that this Article, also expresses the wording “except as stated otherwise” which opens up the possibility for the treaty to limit the application under regulated circumstances⁶²¹. That being said, this is a step towards the universal application of the treaty.

The definition of a business activity with a transnational character has been also moved to the Article 3 and has been clearly outlined. Accordingly, the business activity with a transnational character has been described within the Revised Draft as:

“A business activity is of a transnational character if:

- a. it is undertaken in more than one national jurisdiction or State; or
- b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or
- c. It is undertaken in one State but has substantial effect in another State.⁶²²”

In addition, the definition of the “business activities of a transnational character” has been entirely removed from the definitions under Article 1 and replaced with a definition of a “business activity”. Accordingly, “business activities” mean “any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means⁶²³”. This is in line with the inclusion of all business enterprises

⁶²⁰ Carlos Lopez, “Legal Liability for business and human rights abuses under the revised draft of a treaty on business and human rights” (11 September 2019), *Cambridge Core Blog* [<https://www.cambridge.org/core/blog/2019/09/11/legal-liability-for-business-human-rights-abuses-under-the-revised-draft-of-a-treaty-on-business-and-human-rights/>], accessed December 2019

⁶²¹ Matthew Mullen, “Keeping the Perspective – Article 30 Commentary on the Revised Draft of the Proposed BHR Treaty”, *Business and Human Rights Resource Centre, Reflections of the Revised Draft Blog Series*, [<https://www.business-humanrights.org/en/keeping-perspective-article-30-commentary-on-the-revised-draft-of-the-proposed-bhr-treaty/>], accessed December 2019

⁶²² The Revised Draft, Article 3(2). To mention again, in the Zero Draft the definition was under Article 4.

⁶²³ The Revised Draft, Article 1(3).

to the scope of the treaty. Furthermore, the reference to “for profit” has been removed, which would allow the state-owned enterprises to be included within the scope of the treaty⁶²⁴.

After all the discussions and polarization on the issue, this change regarding the scope of the treaty should be welcomed. It has to be mentioned that this wording has a diplomatic approach to it, in a way to satisfy both parties. It might encourage more states to participate to the negotiations which would help to strengthen the political standing of the treaty⁶²⁵.

4.3.2. Legal Liability

There have been some changes in the approach to the legal liability within the Revised Draft. As per Article 6(1), “State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character”. Accordingly, the legal liability clause has been more generalized by, again, empowering states to create a “comprehensive and adequate system” instead of mentioning civil, criminal and administrative liabilities as we can see in the Zero Draft. However, it could be stated a “comprehensive and adequate system” would involve such liabilities⁶²⁶.

The Article 6(6) makes clear the States should pass domestic legislation by focusing on the transnational business activities. Accordingly,

“States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently control or supervises the relevant activity that caused harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.”

The “contractual relationships” has been identified as “any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual

⁶²⁴ Gabriela Quijano, “A new draft Business and Human Rights treaty and a promising direction of travel”, *Business and Human Rights Resource Centre, Reflections of the Revised Draft Blog Series*, [<https://www.business-humanrights.org/en/a-new-draft-business-and-human-rights-treaty-and-a-promising-direction-of-travel>], accessed December 2019

⁶²⁵ Quijano, “A new draft Business and Human Rights treaty and a promising direction of travel”

⁶²⁶ Lopez, “Legal Liability for business and human rights abuses under the revised draft of a treaty on business and human rights”

relationship as provided under the domestic law of the state”⁶²⁷. This definition widens the scope of the “contractual relationship” abundantly, in a manner involving more companies or commercial relationships⁶²⁸.

The biggest change in the legal liability regulations is the way the treaty approaches to the criminal liability. The wording is made clearer on international criminal offences and the States duties. Accordingly, the article now focuses what the domestic laws should legislate and not decide on matters outside of the scope of the applicable domestic laws. Article 6(7) lists the specific offences that the domestic laws should legislate⁶²⁹, and Article 6(8) specifically states “such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed offences”. This would mean the Article 6(7) requires states to enact legislation on the liability of legal entities, including civil, administrative and criminal. Considering that the offences listed in the paragraph are normally accepted as criminal offences, the States may enact legislation accepting the criminal liability of legal entities, which is a relatively advanced addition under an international treaty⁶³⁰.

⁶²⁷ The Revised Draft, Article 1(4).

⁶²⁸ Lopez, “Legal Liability for business and human rights abuses under the revised draft of a treaty on business and human rights”

⁶²⁹ The Revised Draft, Article 6(7): “Subject to the domestic law, the State Parties shall ensure that their domestic legislation provides for criminal, civil or administrative liability of legal persons for the following of criminal offences: (a) War crimes, crimes against humanity and genocide as defined in articles 6,7 and 8 of the Rome Statute for the International Criminal Court; (b) Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment; (c) enforced disappearance, as defined in article 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance; (d) extraterritorial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; (e) Forced Labour as defined in article 2.1. of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957; (f) The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (g) Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement; (h) slavery and slavery-like offences; (i) Forced displacement of people; (j) Human trafficking, including sexual exploitation; (k) Sexual and gender-based violence.”

⁶³⁰ As mentioned above, the criminal liability of legal entities does not necessarily exist in every state legislation. In the same line, “A number of States, such as France, already have legislation recognizing criminal responsibility of corporations for the commission of such crimes, but other States do not recognize in their legal systems such form of responsibility at all and apply international criminal law only to individuals or natural persons” Lopez, “Legal Liability for business and human rights abuses under the revised draft of a treaty on business and human rights”

4.3.3. Prevention and Adjudication of Corporate Human Rights Abuses

The Revised Draft follows the same path as the Zero Draft with regard to mandatory due diligence⁶³¹. However, the requirements of due diligence have been divided into two by differentiating on how the due diligence should be realized⁶³² and what it should include⁶³³.

It has also been stated the state parties may provide incentives to facilitate compliance for small and medium sized enterprises in order to avoid causing undue additional burdens⁶³⁴. Furthermore, the state parties are also obliged to protect the human rights due diligence policy from commercial and other vested interests of persons conducting business activities⁶³⁵.

Differentiating from the Zero Draft, the Revised Draft gives adjudicative powers to the state where the victims are domiciled. Accordingly, the victims⁶³⁶ of corporate human rights abuses⁶³⁷ shall have access to courts where:

⁶³¹ The Revised Draft, Article 5(1)

⁶³² The Revised Draft, Article 5(2): “(..) the State parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows: (a) Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships; (b) Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships; (c) Monitor the human rights impact of their business activities, including those under their contractual relationships; (d) Communicate to stakeholders and account for policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships.”

⁶³³ The Revised Draft, Article 5(3): “Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to: (a) Undertaking environmental and human rights impact assessments in relation to its activities and those under their contractual relationships, integrating the results of such assessments into relevant internal functions and processes, and taking appropriate actions. (b) Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable. (c) Reporting publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards concerning the conduct of their business activities, including those of their contractual relationships. (d) Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed. (e) Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services.”

⁶³⁴ The Revised Draft, Article 5(6)

⁶³⁵ The Revised Draft, Article 5(5)

⁶³⁶ The term “victims” has been defined as “any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse”. The Revised Draft, Article 1(1)

⁶³⁷ The “human rights violation or abuse” has been defined as “any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons,

- “a. such acts or omissions occurred; or
- b. the victims are domiciled; or
- c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.”⁶³⁸

Despite having major upgrades, the Revised Treaty still heavily relies on the State’s ability to legislate and provide access to courts on business and human rights matters. There is still no clear indication of how the victims will access to remedy if there is a problem with the national courts. There is no remedy system provided at the international level⁶³⁹.

6. CONCLUSIONS

To summarize, the current discourses continuing in two different directions give us several possibilities for the future evolution of business and human rights law: the continuation of the implementation process of the UNGPs and creating more awareness about the social impact of the companies and encouraging a plural legislative action; or the acceptance of a binding treaty which heavily relies on states legislatures and encouraging states to take further legal action on business and human rights matters and cooperation among themselves once an abuse occur.

From the current picture at the UN and the negotiation process, we can see that the Revised Draft is taking shape in a way that is complementing the UNGPs and its implementation. But it should be mentioned that both the UNGPs and the treaty process are realistic solutions constructed around the realities of the current international legal system. However, we believe they are far both from ideal if the aim is to align the corporations with international human rights principles, protect the victims from abuse and facilitate their access to courts. There are still some unanswered questions and problems that might appear in the future, especially regarding the Revised Draft.

individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights”. The Revised Draft, Article 1(2)

⁶³⁸ The Revised Draft, Article 7(1)

⁶³⁹ Isedua Oribhabor, “Revised Draft UN Treaty on business and human rights: A few steps forward, a few unanswered questions” *Business and Human Rights Resource Centre, Reflections of the Revised Draft Blog Series*, [<https://www.business-humanrights.org/en/revised-draft-un-treaty-on-business-and-human-rights-a-few-steps-forward-a-few-unanswered-questions>], accessed December 2019

CHAPTER IV:

INFERENCES FOR THE FUTURE OF BUSINESS AND HUMAN RIGHTS

1. INTRODUCTION

With this study we tried to look into a problem of the 21st Century world. The world of the new century is highly globalized and impacted immensely by the big corporations. These impacts could be both in positive and negative aspects. We tried to understand whether it is possible to eliminate adverse human rights impacts of corporations through international law.

For such purpose, we tried to look into the question through three lenses. We first tried to understand how this problem came into being by looking into the history of the evolution of an international community and business and human rights field. Then we continued by looking at the current regulatory framework and the outreach of these documents and whether they create serious obligations for corporations. And lastly, we tried to understand the latest steps being taken at the UN that affects the evolution of the field of business and human rights.

Accordingly, we came to the following inferences following our analysis:

As seen throughout Chapter I, several attempts have been made to bring businesses to the level of the international law and align their activities with the universal values. The most serious attempt in this sense was the UN Draft Norms which was proposed in the beginning of the new century⁶⁴⁰. UN Draft Norms would bring the transnational corporations to the monitoring of the UN, but it was left unnegotiated stating that it has ‘no-legal-standing’⁶⁴¹. Later, the newly appointed Special Representative to Secretary-General John Ruggie created the UNGPs, which was highly successful but not capable of becoming an effective solution for preventing human rights abuses. The UNGPs was a soft-law instrument that was founding itself on the “social expectations”, and not on the principles of international law⁶⁴².

The current regulatory framework that affects the business and human rights cases are not necessarily advanced, as we have discussed in Chapter II. There are handful of guidelines especially coming from international organizations, try to establish some sort of guidelines for

⁶⁴⁰ Please see: Chapter I(6.2)

⁶⁴¹ *supra*. p. 59

⁶⁴² Please see: Chapter I(7); Chapter II(2.1)

corporations including the UNGPs. These soft-law measures mostly rely on the goodwill of corporations and their ability to self-regulate themselves voluntarily, meaning the companies would regulate their own behaviour in a manner that would be applicable within their business operations and their internal mechanisms⁶⁴³. Whereas this might be helpful in creating better company cultures aligned with international human rights principles, we still face the problem of what would happen if there is a serious human rights abuse. There are no remedy mechanisms being imposed by any of these international soft-law measures, with an exception of the OECD Guidelines, that establishes NCPs. NCPs however, are not accepted as judicial mechanisms, they are, again, a voluntary mechanism has no power to make legal decisions⁶⁴⁴. In addition, few states also started to develop their own national legislation on business and human rights matters⁶⁴⁵. However, most of these legislations focus on small amount of companies, only the ones with big budgets. Or they focus on a specific legal subject like we see in the UK Modern Slavery Act, which covers only the offences of slavery, servitude, forced or compulsory labour and human trafficking. These national legislations mostly try to create a reporting duty and not a mechanism that would create accountability for the business enterprise, with the exceptions of the French legislation on Duty of Vigilance which also regulates the responsibility of creating a monitoring system for implementation and a monetary sanction in case of non-compliance with the duty of vigilance⁶⁴⁶, and the Dutch legislation creating a monitoring system only for child labour⁶⁴⁷. But we do believe, few national laws cannot save the victims all over the world. There needs to be a harmony in all national systems and a goodwill among the states to compensate the victims and cooperation⁶⁴⁸. Even in the establishment of such harmonized national systems, we believe the continuation of such regulatory harmonization and its success would heavily depend on the dynamics international relations and would face descent and ascent in accordance with the status of interstate relations, unless there is an international body to monitor the process.

⁶⁴³ Please see: Chapter II(2)

⁶⁴⁴ *supra*. pp. 77-78

⁶⁴⁵ Please see: Chapter III(3.1.2)

⁶⁴⁶ Please see: Chapter II(4.4)

⁶⁴⁷ Please see: Chapter II(4.3)

⁶⁴⁸ For a study on EU countries and cases with regard to Business and Human Rights: European Parliament, Access to Legal Remedies for victims of Corporate Human Rights Abuses in Third Countries, February 2019. [https://corporate-responsibility.org/wp-content/uploads/2019/03/EXPO_STU2019603475_EN.pdf], accessed December 2019

Beside the regulatory movements in the national legal systems, the evolution of the business and human rights field at the international level also continues. Seeing the ineffectiveness of the UNGPs in solving issues arising from corporate human rights abuses, the binding treaty negotiations were initiated mostly by the developing states, as we have seen in Chapter III⁶⁴⁹. Accordingly, today we face two separate discussions continuing at the UN level, first one regarding the further implementation of the UNGPs and second, the binding treaty that would create a set of legal obligations. In the last years, these two discourses started to be more complementary.

From the analysis we can observe that the implementation process of the UNGPs are going rather slow. There are only a handful of States submitted their NAPs regarding the upgrades they are planning to do within their own legal systems. Even the ones who submitted these NAPs, do not necessarily propose meaningful changes in their current judicial systems that would allow victims to access the courts freely⁶⁵⁰.

The second discourse that is going in parallel, the binding treaty negotiations, is already producing some tangible results⁶⁵¹. The Revised Draft already has some welcoming from the States⁶⁵². That being said, it needs further negotiations since it heavily relies on the state mechanisms, judiciaries and legislative powers to create legislation on business and human rights matters which are unproven tracks to be followed for business and human rights. We are uncertain whether this is the most efficient way to solve the problems.

Here we would like to present our conclusions in detail with regard to the main limitations need further addressing for a healthier development of the business and human rights field in the future.

2. INTERNATIONAL LEGAL PERSONALITY AND BUSINESS ENTERPRISES

As we have discussed in Chapter I by looking at the history of the business and human rights discussions, one of the biggest controversial points in the business and human rights field would be whether business enterprises possess any international legal personality so international law can create direct liabilities on them. Traditionally, only the States have international legal personality. This argument finds its roots in the foundations of international

⁶⁴⁹ Please see: Chapter III(2)

⁶⁵⁰ *supra*. pp. 118-119

⁶⁵¹ Please see: Chapter III(4)

⁶⁵² *supra*. p. 132

law, which is constructed as a law regulating state relations⁶⁵³. Therefore, private entities, who are considered as non-state actors, do not possess international legal personality and therefore should not be governed by international law. This argument was used against the UN Draft Norms⁶⁵⁴ and which also re-appeared in the current binding treaty negotiations⁶⁵⁵, which was explained in Chapter III.

2.1. The Concept of International Legal Personality

Defining the concept of international legal personality would not be easy⁶⁵⁶, since it would be differentiating from how a legal personality is defined under domestic laws. Accordingly, the laws of the state would grant the legal personality and being a legal person in one domestic law does not necessarily mean to be granted with legal personality under another domestic law⁶⁵⁷. The legal personality granted by a domestic law would also not mean there will be a legal personality granted by international law⁶⁵⁸. The international legal personality in fact, is being granted by the capacities that an entity possesses, instead of being very clear-cut and regulated. Under domestic laws the legal personality is being granted by a higher authority when met certain criteria for instance, reaching a certain age for an individual⁶⁵⁹, whereas the international law would be very different⁶⁶⁰.

⁶⁵³ More on this please see the historical analysis conducted under Chapter I.

⁶⁵⁴ *supra*. pp. 59-61

⁶⁵⁵ *supra*. pp. 122, 124

⁶⁵⁶ For a comprehensive analysis of international legal personality, please see Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, (The Netherlands: Asser Press, 2004)

⁶⁵⁷ For a comparative analysis of the corporate legal personality under different State jurisdictions, please see: Sneha Mohanty and Vrinda Bhandari, "The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis", *Comparative Law* 32(7) (2011), pp. 194-205

⁶⁵⁸ Roland Portmann, *Legal Personality in International Law*, (United States: Cambridge University Press, 2010), pp. 7-8

⁶⁵⁹ Under national law the criteria might differ for different situations. For instance, for Portuguese law: "A personalidade jurídica das pessoas singulares adquire-se, nos termos do n.º 1 do art.º 66.º do Código Civil (CC), no momento do nascimento completo e com vida, cessando a mesma personalidade com a morte (n.º 1 do art.º 68.º do CC), sem prejuízo da tutela de direitos de personalidade de pessoa falecida, ofendida no seu bom nome (art.º 71.º do CC). A personalidade jurídica de uma pessoa singular envolve a sujeição a deveres e a titularidade de direitos, destacando-se de entre estes, os direitos de personalidade (art.º 70.º e seguintes do CC), alguns dos quais foram elevados à categoria de direitos fundamentais pelo facto de constarem da Constituição da República: é, a título de exemplo, o caso dos direitos à identidade pessoal, à capacidade civil, à cidadania, ao bom nome e reputação, à imagem, à palavra, à reserva de intimidade da vida privada e familiar, dignidade pessoal e identidade genética (art.º 26.º da CRP). As pessoas individuais podem ser sujeitos de quaisquer relações jurídicas, salvo disposição legal em contrário e por isso mesmo dispõem de capacidade jurídica (art.º 67.º do CC)." Lexionário do Diário da República Electrónica 'Personalidade Jurídica' (parágrafo II) [<https://dre.pt/lexionario/-/dj/115073275/view>], accessed December 2019

⁶⁶⁰ Portmann, *Legal Personality in International Law*, pp. 8-9

The capacities a legal personality should possess under international law is not very well defined therefore it creates certain discussion among scholars. Most scholars would agree the primary subjects of international law are still the states⁶⁶¹. Despite, the majority of scholars would be approaching to the international legal personality in the same manner, some would agree that non-state actors⁶⁶² also enjoy a certain limited legal personality under international law⁶⁶³. This new approach to international legal personality is a consequence of the Second World War and its aftermath, when the international order changed rapidly and started to include many new actors besides states to the international scene⁶⁶⁴. Even ICJ has affirmed that “throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.”⁶⁶⁵

The argument against having direct legal obligations for corporations would derive from the traditional approach to the international legal personality⁶⁶⁶, deeply rooted in the Westphalian Principles⁶⁶⁷. For instance Cassese, would state while the individuals are the primary subjects of the national laws, the States are the fundamental subjects of the international law and only states possess full capacity under international law⁶⁶⁸. As per his stance, the new personalities emerged as a feature of modern international law, only have a limited capacity to act⁶⁶⁹ and this does not grant them an international legal personality. In the same line, Brownlie, defines the subject of international law is an entity capable of possessing international rights and duties

⁶⁶¹ Cassese, *International Law*, p. 59; Cristina Queiroz, *Direito Internacional e Relações Internacionais*, (Portugal: Coimbra Editora, 2009), p. 149; G.E. Do Nascimento e Silva e Hildebrando Accioly, *Manual de Direito Internacional Público*, (Brazil: Editora Saraiva, 2002), p. 81; José Juste Ruiz y Mireya Castillo Daudí, *Lecciones de Derecho Internacional Público*, (España: Tirant Lo Blanch, 2005), p. 187; Islam Safa Kayat and Mustafa Aykanat, “International Legal Personality of International Organizations: OPEC Case” *AİBÜ Sosyal Bilimler Enstitüsü Dergisi*, Cilt:16, Yıl:16, Sayı: 4, (2016), p. 66; Pierre-Marie Dupuy, *Droit International Public*, 8^e ed. (France: Dalloz, 2006), p. 27

⁶⁶² “Non-state actors” is a term that is being used for any other type of participants in the international affairs, that are not sovereign states. Philip Alston, “The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, p. 7

⁶⁶³ Gatto, *Multinational Enterprises and Human Rights*, pp. 49-50

⁶⁶⁴ Salem Hikmat Nasser, *Fontes e Normas do Direito Internacional: Um Estudo sobre a Soft Law*, (Brazil: Editora Atlas S.A., 2005), pp. 89-91

⁶⁶⁵ International Court of Justice held that the UN is also a subject of international law. *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion (11 April 1949), p. 178

⁶⁶⁶ Kobrin, “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights”, pp. 351-355

⁶⁶⁷ Please see: Chapter I(2); Do Nascimento e Silva e Accioly, *Manual de Direito Internacional Público*, pp. 8-10; Juste Ruiz y Castillo Daudí, *Lecciones de Derecho Internacional Público*, p. 23

⁶⁶⁸ Cassese, *International Law*, p. 71

⁶⁶⁹ *Ibid.*, p. 72

and the capacity to maintain its rights by bringing international claims⁶⁷⁰. Accordingly, it is the states and organisations which represent normal types of legal person on the international plane. But slightly differing from Cassese, he accepts the international plane has a complicated nature and there are more actors than only the States and they might enjoy personality on a treaty basis⁶⁷¹. On the other hand, he states, even though corporations are powerful actors and could enter into agreements with states, they should not be treated as a legal personality under international legal framework⁶⁷².

2.2. In Defence of Business Enterprises Possessing International Legal Personality

We do believe this strict traditional outlook on business enterprises not possessing international legal personality is hindering the progress of business and human rights law. The recent developments in the field demonstrate international legal personality does not only have to be granted by the foundational principles of international law. Indeed, the international legal personality has been defined by ICJ in 1949. In the decision of *Reparation for Injuries in the Service of the United Nations*, ICJ decided on whether the international institutions enjoy international legal personality. The Court decided affirmatively the international institutions, in this case the UN, possess legal personality⁶⁷³.

Pursuant to this decision, Court followed two criteria that an international law subject should meet in order to possess legal personality under international law: the subject should be “capable of possessing international rights and duties” and have “capacity to maintain its rights by bringing international claims”⁶⁷⁴. When applied to business enterprises, they, to an extent, fulfil these criteria. Firstly, it could be claimed that corporations, just like individuals, have rights deriving from international human rights law. This would be rather limited, but it is possible for a corporation to claim certain rights deriving from international human rights law against the States, for instance freedom of movement or freedom of establishment⁶⁷⁵.

In the same line, as we have noted in the previous chapters, business managers may be subjected to international criminal proceedings in case they breach international criminal law

⁶⁷⁰ Ian Brownlie, *Principles of Public International Law*, 4th ed., (United Kingdom: Oxford University Press, 1990), p. 58.

⁶⁷¹ *Ibid.*, p. 68

⁶⁷² *Ibid.*, p. 67

⁶⁷³ *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion (11 April 1949)

⁶⁷⁴ Brownlie, *Principles of Public International Law*, p. 179

⁶⁷⁵ Martin Gelter, “Centros, the Freedom of Establishment for Companies, and the Court’s Accidental Vision for Corporate Law”, *ECGI Working Paper No. 287/2015* (February 2015), p. 2

duties⁶⁷⁶. In this case, the Rome Statute specifically refers to natural persons, however, it is accepted the corporations have, despite being more limited, duties under international law. For instance, corporations should not be involved in genocide or using forced labour, as imposed by their domestic laws which transferred international rules to their domestic systems⁶⁷⁷.

The corporations having only a limited amount of rights does not diminish their status under international law. In the *Reparation for Injuries in the Service of the United Nations* case it has been stated as:

“the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.⁶⁷⁸”

This would mean, a legal personality under international law does not necessarily have to possess all the international rights to be entitled to international legal personality. This would be the case with UN, which sometimes act like a state but does not necessarily have all the international rights and obligations that a state possesses.

As for the second criteria, the fact the corporations cannot bring claims before the ICJ does not limit them from access to other types of international courts. Foremost, it is possible for corporations to go to international arbitration tribunals to claim their rights deriving from

⁶⁷⁶ They would also have certain duties under UN Convention on the Law of the Sea as allowed by Articles 187 and 291 (2).

⁶⁷⁷ Even Friedman would suggest that the corporations should stay within the limits of the rules of the game when engaging in business. “The view has been gaining widespread acceptance that corporate officials and labor leaders have a “social responsibility” that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.” Milton Friedman, *Capitalism and Freedom*, 2nd ed. (United States: University of Chicago Press, 2002), p. 133

⁶⁷⁸ *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion (11 April 1949), p. 178

bilateral investment treaties⁶⁷⁹. It is also possible that the corporations can bring claims against states before the European Court of Justice, even if not ICJ⁶⁸⁰.

In accordance with this reasoning, the corporations not possessing international legal personality claims could be dismissed⁶⁸¹. The answer to this would be the business enterprises do possess international legal personality, however compared to states, their status would be indeed, rather limited⁶⁸².

In any case, this argument could not be used as an insurmountable obstacle in the evolution of business and human rights law. In parallel, Ratner would defend that business enterprises are possessing international legal personality. He would state that even though states are not willing to create legally binding instruments on the corporations in the form of a code of conduct at the international level, they have already accepted certain legal instruments in the form of the international criminal law, international environmental law, create indirect legal obligations over corporations⁶⁸³. “The question is not whether nonstate actors have rights and duties, but what those rights and duties are⁶⁸⁴”. It could be claimed here, the international law is lagging behind in recognising duties for businesses enterprises in the same manner as they

⁶⁷⁹ Where we see more development with regard to acceptance of non-state actors as subjects of international law would be in the field of international economic law, which has the main subjects of trade, commercial transactions and investment law. One of the sources of international economic law are the Bilateral Investment Agreements that mostly are conducted between states parties. These agreements are executed in order to facilitate the investments that would be coming from the other party states. Trade, investment, goods exchange cannot be complete without the existence of businesses enterprises. The business community may even take a part in the negotiations of regional trade agreements, such as what is happening at the World Trade Organization. For further information please see: Sylvia Ostry, “The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations” in the *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* edited by Kennedy, Daniel L. M. and James D. Southwick, (United Kingdom: Cambridge University Press, 2002), p. 290

⁶⁸⁰ Michael Addo ed., *Human Rights Standards and Responsibility of Transnational Corporations*, (The Netherlands: Kluwer Law International, 1999), pp. 187-196

⁶⁸¹ Cragg, “Business and Human Rights: A Principle and Value-Based Analysis”, pp. 278-284

⁶⁸² Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, pp. 86-89; Nicola Jägers, “The Legal Status of the Multinational Corporation under International Law” in *Human Rights Standards and Responsibility of Transnational Corporations* edited by Michael Addo, pp. 263-267; Jorge Bacelar Gouveia, *Manual de Direito Internacional Público: Uma Perspetiva de Língua Portuguesa*, 5^a ed. (atualizada), (Portugal: Almedina, 2019), p. 540

⁶⁸³ Steve R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, p. 488. “As an initial matter, it bears brief mention that international law doctrine poses no significant impediment to recognition of duties beyond those of states... the orthodoxy now accepts that nonstate entities may enjoy forms of international personality. For a half-century it has been clear that the United Nations may make claims against states for violations of their obligations to it. International lawyers have argued about the extent of personality enjoyed by individuals and corporations in light of treaties allowing victims of human rights to sue states in regional courts or permitting foreign investors to sue states in the International Centre for the Settlement of Investment Disputes. And the corpus of international criminal law makes clear that actors other than states have duties under international law.”, pp. 475-476

⁶⁸⁴ Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, p. 476

recognise their rights in certain contexts⁶⁸⁵. This is mostly due to the fact the state-centric understanding of international law is very hard to be subverted. In parallel, Higgins would state that “We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint⁶⁸⁶”. Andrew Clapham, would argue “international lawyers realize that the role of non-state actors is too important to be ignored yet feel constrained by the “rules” on subjectivity to develop a framework to explain the rights and duties of non-state actors under international law.⁶⁸⁷”

3. THE UNSYSTEMATIC NATURE OF INTERNATIONAL POLITICAL SYSTEM AND LAW-MAKING

As we have analysed in Chapter I, the business and human rights discourse was highly polarized, since there are many stakeholders and different interests, until the acceptance of the UNGPs⁶⁸⁸. The polarization can get intense and can slow down the progress immensely, since unlike the national legal systems, international law does not have a constitutional structure⁶⁸⁹. The international law-making system is “eclectic, unsystematic, overlapping, and often poorly coordinated⁶⁹⁰”. In fact, in international law there are different possibilities, situations and methods that States can come together and create common decisions on matters need universal attention, there are no rigid rules or formal procedures being imposed⁶⁹¹. There are different international organizations, conferences, meetings, *ad hoc* meetings issue multilateral treaties, without any central authority above them to guide these treaties or law-making process⁶⁹². There is no centralized system as we see in the national systems. Despite this being the case, when there need to be a global consensus on certain matters, we mostly turn to UN as a

⁶⁸⁵ M. Sornarajah, *The International Law on Foreign Investment*, 3rd. ed., (United Kingdom: Cambridge University Press, 2014), p. 63; Menno T. Kamminga, “Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC” in *The EU and Human Rights* edited by Philip Alston et. al. (United Kingdom: Oxford University Press, 1999), pp. 553-570

⁶⁸⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, (United Kingdom: Oxford University Press, 1994), p. 49

⁶⁸⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (United Kingdom: Oxford University Press, 1994), p. 60

⁶⁸⁸ Please see: Chapter I(6)

⁶⁸⁹ For a comprehensive study on constitutionalizing international law: Jan Klabbbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*, (United States: Oxford University Press, 2009); Mahmut Gocer, “Uluslararası Hukuk ve Uluslararası Anayasa Kavramı” *Ankara Üniversitesi SBF Dergisi* Vol. 57 No. 2, pp. 1-16;

⁶⁹⁰ Alan Boyle and Christine Chinkin, *The Making of International Law*, (United Kingdom: Oxford University Press, 2007), p. 100

⁶⁹¹ Wladimir Brito, *Direito Internacional Público*, 2ª ed. (Portugal: Coimbra Editora, 2014), p. 153

⁶⁹² *Ibid.* pp. 155-156; José Juste Ruiz y Mireya Castillo Daudí, *Lecciones de Derecho Internacional Público*, p. 147

principal law-making organ, since the it provides institutional mechanisms for negotiations to happen⁶⁹³.

The business and human rights treaty negotiations are mostly concentrated at the UN⁶⁹⁴, therefore, we will be focusing on the UN here while explaining the international political landscape and law-making.

3.1. An Overview of the International Political and Legal Order

When the UN Charter⁶⁹⁵ was drafted, identifying each UN body and their functions, none of its specialized agencies were created as legislative bodies. But through time they slowly turned into law-making agencies⁶⁹⁶, producing large amounts of legal texts and making the UN the principal law-making organization at the international order⁶⁹⁷.

There are five principle organs of the UN, as established pursuant to the Article 7(1) of the UN Charter, the General Assembly, the Security Council, the Economic and Social Council, the ICJ, and the Secretariat. The General Assembly consist of all the members of the UN⁶⁹⁸, whereas the Security Council has a limited membership, with 5 permanent and 10 temporary

⁶⁹³ José Juste Ruiz y Mireya Castillo Daudí, *Lecciones de Derecho Internacional Público*, pp. 147-150

⁶⁹⁴ Please see: Chapter III

⁶⁹⁵ UN was established with the UN Charter that was drafted in a conference held in San Francisco, with the attendance of the representatives of 50 states. On 26th of June 1945, the Charter was signed by these 50 States, later 51 states with the participation of Poland. The UN came into existence on 24th of October of the same year when the Charter was ratified by China, the Soviet Union, the United Kingdom, the United States among other States.

⁶⁹⁶ Oscar Schachter, "United Nations Law", *American Society of International Law*, Vol. 88, No. 1 (January 1994), p. 1; "Although it has been emphasized that they are not legislatures, most UN organs have acted much like parliamentary bodies in their proceedings. Moreover, member governments and international officials have often called for solutions to the world's problems through new law and legal regimes. Thus, demand stipulated supply and in various ways texts of legal import were produced.", p. 2; "There can be surely no doubt, twenty-five years after the founding of United Nations, that its political organs are engaged in law making business." Rosalyn Higgins, "The United Nations and Law Making: The Political Organs" *The American Journal of International Law*, No. 64, No. 4 (September 1970), p. 48

⁶⁹⁷ "The UN is a central element, but by no means the only one, nor even the principal one in certain contexts, such as the international economic law. Moreover, the UN is not a coherent whole but comprises multiple organs, specialized agencies, working groups and programs which operate through various procedures and mechanisms" Boyle and Chinkin, *The Making of International Law*, p. 100-101; According to Boyle and Chinkin, there are several reasons for the UN to have such a purpose. First, the member states trust the organization, and this gives a certain legitimacy to the laws that are being produced through the organization. Furthermore, it is the organization with the biggest coverage if member states, being universal and every state has an equal voice and vote in the General Assembly, despite the fact that this is not the case for other organs such as the Security Council. Second, the UN is a political institution where negotiation, deliberation and compromise can take place freely. The inclusivity is within the core of the organization and this makes the global law-making more legitimate and powerful. Third, it has universal competence that has been given by the UN Charter. It covers many areas including economic, social and cultural issues even though they did not explicitly mention by the Charter. The modern needs could be covered by the UN Charter easily due to its flexible nature. p. 108-109

⁶⁹⁸ José A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 9ª ed. (España: Editorial Tecnos, 2003), pp. 697-700

members⁶⁹⁹. There are other subsidiary organs established later on, such as the UN Human Rights Council and UN Conference on Trade and Development⁷⁰⁰. The main role of these agencies was to coordinate and harmonize the actions of their member states, however through time, they also started to act like legislatures by adopting law-making treaties and declarations of law⁷⁰¹. In fact, there are hundreds of treaties being produced by the UN, that were initiated, negotiated and adopted by these UN bodies or by international conferences gathered under the aegis of a UN body⁷⁰².

Most international law-making appears as a response to the new challenges and needs in the world order⁷⁰³, but not all states are parties to all international treaties. States may choose to not to become a party to a treaty⁷⁰⁴. The success of an international treaty is highly depended on the political landscape at a given moment in time, since the States mostly send their representatives to these and they might leave the negotiations if their interests are not reserved⁷⁰⁵. There is no central parliament or authority issuing laws and binding all the member states as we see in the national systems, which, in comparison, makes the international law-making quite chaotic and unsystematic⁷⁰⁶.

The political process is often complex, and mostly shaped by the blocs and alliances of States. There are many groups coexist within the UN, that have regional or historical ties⁷⁰⁷, such as the Group of 77 (the group of developing states) or the EU. “In the world of UN law, states are compelled to define their national interest in relation to the collective interests of various groups of states and, ideally, in relation to the common interest of the whole community of states.⁷⁰⁸” and the “state autonomy and equality are profoundly affected -that is reduced- by the requirements of group cohesion⁷⁰⁹”. The tension between these group of States, or the

⁶⁹⁹ *Ibid.*, pp. 700-704

⁷⁰⁰ For the structural scheme of the UN: [https://www.un.org/en/pdfs/18-00159e_un_system_chart_17x11_4c_en_web.pdf], accessed December 2019

⁷⁰¹ Schachter, “United Nations Law”, pp. 1-2

⁷⁰² *Ibid.*, p. 2

⁷⁰³ *Ibid.*, p. 16

⁷⁰⁴ Or they may choose to put reservations to a treaty. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, pp. 105-110; Bacelar Gouveia, *Manual de Direito Internacional Público*, pp. 246-252

⁷⁰⁵ Bacelar Gouveia, *Manual de Direito Internacional Público*, p. 242

⁷⁰⁶ *Ibid.*, p. 242; For various way to codify international law, please see: Gerson de Britto Mello Boson, *Direito Internacional Público: O Estado em Direito das Gentes*, 3^a ed., (Brazil: Del Rey, 2000), pp. 43-48

⁷⁰⁷ Schachter, “United Nations Law”, p. 21

⁷⁰⁸ *Ibid.*, p. 21

⁷⁰⁹ *Ibid.*, p. 21

individual ambitions of the States within these groups, can determine the future of an international treaty.

3.2. The Business and Human Rights Negotiations under the Current International Political and Legal Order

The lobbying power of the corporations within their home states should not be underestimated, especially in certain states. It is a known fact that the corporate lobby has the power to set regulatory agendas within their home states, due to their economic power⁷¹⁰. They could create pressure on their home states to protect their business and also to operate in the same line internationally⁷¹¹. For instance, home states can create pressure on host states to protect their outgoing investments. This would mean that the corporations may also influence the way how the international law is being codified⁷¹². Considering the fact most powerful business enterprises are headquartered in the Western world, their pressure on their own home states could be observed in the way the Western countries approach to the business and human rights discussions with regard to regulating corporate behaviour⁷¹³. Indeed, in the business and human rights debates, we mostly see the developing states are struggling for more firm actions when the developed states are rather sceptical of having further regulation.

These different priorities among different groups of states resulted in non-progress when it comes to business and human rights negotiations in the past. Since there is international order has no authority like the states systems and it cannot function without some sort of consensus among states, the current negotiations as well might continue to be failure.

We are off the opinion, the business and human rights discussions are just another demonstration of the reality that the needs of the 21st Century are different that those in 1945. We might be facing a need to move beyond Westphalian world order⁷¹⁴. The current developments in the social diaspora which highly effects business and human rights problems,

⁷¹⁰ For a study on the corporate influence on politics: Adam Bonica, "Avenues of influence: on the political expenditures of corporations and their directors and executives", *Business Politics* 18(4) (2016), pp. 367-394

⁷¹¹ As happened in the ITT Affair. Please see: Chapter I(6.1)

⁷¹² Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in the *Non-State Actor Dynamics in International Law* edited by Math Noortmann and Cedric Ryngaert, (United Kingdom: Ashgate Publishing Limited, 2010), pp. 13-16

⁷¹³ For the latest Foreign Investment Trends: UNCTAD, *World Investment Report 2019: Special Economic Zones*, (Geneva, 2019), [https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf], accessed December 2019

⁷¹⁴ Jena Martin Amerson, "'The End of the Beginning?': A Comprehensive Look at the UN's Business and Human Rights Agenda from a Bystander Perspective", *Fordham Journal of Corporate and Financial Law*, Vol. 17 (2012), p. 933

might force the international law focus to shift from state sovereignty towards the individual⁷¹⁵. However, this shift from an unsystematic international law-making and politics to a more accommodating system requires far-reaching reforms within the global order and consequently within the institution of UN, but there are some solutions that has been proposed.

3.3. Proposed Solutions on Altering the International Legal Order

3.3.1. UN Reform

One of the criticisms relevant to international law and business and human rights discussions would be the fact that UN was formed following the western values⁷¹⁶ and Western States has a weight of decision-making power within the organization⁷¹⁷. Indeed, the Westphalian Principles find itself on the values of liberalism and state sovereignty, which are highly driven from the European understanding of the world⁷¹⁸. This creates a certain backlash from the non-Western states⁷¹⁹, and most of the time these two worlds divide when there is a need for a decision. The way to solve this problem to alter the way we conduct the world politics and the way to do this would be to reform the institution that hosts it: The UN.

⁷¹⁵ Richard Falk, "Revisiting Westphalia, Discovering Post-Westphalia" *The Journal of Ethics* Vol. 6, pp. 311-352; Richard Falk, "The Post-Westphalia Enigma" in *Global Governance in the 21st Century: Alternative Perspectives on World Order* edited by Björn Hettne and Bertil Odén (Sweden: Almqvist & Witsell, 2002); pp. 147-183

⁷¹⁶ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (United Kingdom: Macmillan Press, 1995); Amitav Acharya and Barry Buzan, "Why there is no Non-Western International Relations Theory? An Introduction", *International Relations of the Asia-Pacific* (2007), pp. 1-26; For the analysis of Martin Wight's theories, which were heavily criticising the Western understanding of the world politics: Ian Hall, "Martin Wight, Western Values, and the Whig Tradition of International Thought", *The International History Review* 36(5) (2014), pp. 961-981

⁷¹⁷ Donald J. Puchala, "World Hegemony and the United Nations", *International Studies Review*, Vol. 7 (2005), pp. 581-583. Puchala approaches this western hegemony and leaderless governance with certain humour: "When the well meaning "man from Mars" arrived at the headquarters of the United Nations in New York City and asked to be taken to that organization's leader, personnel at the security desk assumed that the Secretary-General was being sought. They, thus, proceeded to direct the visitor to 38th floor. But diplomats encountered in the corridors promptly suggested to the misdirected Martian that he was in the wrong building. "Cross First Avenue", they instructed. "The leader of the United Nations is in the US Mission." The United States, however, denied this statement and assured the by now very confused Martian that, far from leading the United Nations, they were not very interested in the organization. "Go and talk to the Cubans, the Algerians, the Indians, or the others from the Group of 77. They are leading the United Nations, and that is precisely why we Americans are not very interested." But the leaders of the Group 77 explained to the alien visitor that their hold even on their own Third World group was at best tenuous. "The United Nations" they rather ruefully acknowledged, "is economically dominated by the North and politically controlled by the West," who, the bewildered Martian discovered, are essentially the same people, although they have no address." p. 571

⁷¹⁸ Please see: Chapter I(2)

⁷¹⁹ On criticisms regarding Western Hegemony: Dieter Rucht, "Social movements challenging neo-liberal globalization" *Civil society: Berlin perspectives* 2 (2006), p. 189; specifically, for the period of 1970s: Hal Brands, "Third World Politics in an Age of Global Turmoil: The Latin American Challenge to US and Western Hegemony, 1965-1975" *Diplomatic History* Vol. 32(1) (2008), pp. 105-138.

In fact, throughout the history of the UN the organization was reformed two times, in 1997 and 2002, concerning the issues of management and coordination of the organization. Recently, in 2004, the Secretary-General Kofi Annan issued a report called *A More Secure World*⁷²⁰ to introduce a pathway to reform the organization, however this report was only partially realized. For instance, UN Human Rights Council was created, but reforming of the UN Security Council was failed⁷²¹. The current Secretary-General Antonio Guterres is also undertaking certain reforms however on a smaller scale⁷²². There are scholars calling for more serious institutional reforms such as the reform of the UN Security Council, or how can we create a balance of power within the institution⁷²³.

Looking from the legal perspective, we first have to acknowledge the legal rules established the UN was drafted right after the Second World War. Their focus was on the different needs of the post-war world of 1945⁷²⁴. On the contrary, the needs of the world in 21st Century is much different⁷²⁵, the world is getting more connected and technologically advanced, which allow new types of global issues to raise. This results in a stronger need for a better world organization⁷²⁶ so the legal rules formed the UN should be more accommodating to the needs of the global citizens and national governments⁷²⁷. Accordingly, there is a growing scholarship

⁷²⁰ UN General Assembly (A/59/565), *A More Secure World: Our Shared Responsibility*, Report of the High Panel on Threats, Challenges and Change (2 December 2004)

⁷²¹ David Hannay, “‘A More Secured World: Our Shared Responsibility’ – The Report of the UN Secretary General’s High Level Panel on Threats, Challenges and Change” in *Human and Environmental Security: An Agenda for Change* edited by Felix Dodds and Tim Pippard, (United States & United Kingdom: Earthscan, 2005), p. 15

⁷²² The Secretary-General’s reforms are based on three pillars: Development, Management and Peace and Security, however these reforms do not go as far as changing the construction of the Security Council. Please check: Letter from the Secretary-General to Member States on Management Reform (29 January 2019). [https://reform.un.org/sites/reform.un.org/files/sg_reform_letter_en_29jan19.pdf], accessed December 2019

⁷²³ Yehuda Z. Blum, “Proposals for UN Security Council Reform”, *The American Journal of International Law*, Vol. 99, No. 3 (July 2005), pp. 632-649; Richard Butler AC, “Reform of the United Nations Security Council” *Penn State Journal of Law & International Affairs*, Vol. 1 Issue 1 (April 2012), pp. 23-39; Lauri Mälksoo, “Great Powers then and now: Security Council reform and responses to threats to peace and security” in the *United Nations Reform and the New Collective Security* edited by Peter G. Danchin and Horst Fischer, (United States: Cambridge University Press, 2010), pp. 94-113

⁷²⁴ Bruce Russett, “Ten balances for Weighing UN Reform Proposals”, *Political Science Quarterly* Vol. 111, No. 2 (Summer 1996), p. 259

⁷²⁵ Giuliana Ziccardi Capaldo, *The Pillars of Global Law*, (United States: Routledge, 2008), p. 1

⁷²⁶ Paul Kennedy and Bruce Russett, “Reforming United Nations”, *Foreign Affairs*, Vol. 74, No. 5 (Sept-Oct 1995), p. 58; Anne-Marie Slaughter, “Security, Solidarity and Sovereignty: The Grand Themes of UN Reform” *The American Journal of International Law*, Vol. 99 No. 3 (July 2005), pp. 619-631

⁷²⁷ “The chief reason effective international instruments are required is an eminently practical one, as the founders realized. Simply put, states, people, and businesses need an international system to provide physical, economic, and legal security. They need some for if international police force to deter terrorists and other breakers of the peace; bodies like the World Trade Organization to head off trade wars; institutions like those developed at Bretton Woods to assist emerging economies; international human rights organizations to guarantee individuals’ basic freedoms across the globe; and a myriad of agencies and offices to ensure such basics as telecommunications and

on how the UN reform should be in a theoretical sense⁷²⁸, which we will not dive into deep detail here in this thesis. But it could be mentioned, the international lawyers are mostly focusing on how we can reform the UN and how this would shift the state sovereignty principle which is the foundation of international law and international relations today⁷²⁹. Some scholars would support the idea that we should change the idea of state sovereignty as a foundation all together⁷³⁰, and to focus on the individuals, and this would be in line with the global law discussions that will be touched upon below⁷³¹.

safe air traffic. If the United Nations system did not exist, much of it would have to be invented.” Kennedy and Russett, “Reforming United Nations”, pp. 57-58

⁷²⁸ “Analyses of the recent UN reform endeavour have broadly followed two different trajectories. On the one hand, international lawyers and political theorists have focused on the implications of reform initiatives for sovereignty as a fundamental principle of international law and international relations. Neoliberal interventionists suggest (and welcome) that UN reform entails a shift in emphasis from state security to human security, with this, a transition from Westphalian to conditional sovereignty. By contrast, Charter liberals maintain that, human security discourse notwithstanding, current UN reform efforts reaffirm (or ought to reaffirm) the principle of equal sovereignty. Of course, this is not a merely academic debate, but a division of running through the UN policy community since the humanitarian interventions of the 1990s. International Relations (IR) scholars and policy analysts, on the other hand, have largely focused on issues of state power and the UN’s institutional authority, especially, in connection with reform of the UN Security Council. Realist-oriented scholars see UN reforms as a function of the balance of power in international politics. Liberal observers typically see UN reform as a matter of striking a different kind of balance, namely one between efficiency and the legitimacy of the organization. Once again, this debate is not purely academic. Media commentary on UN reform has often followed similar lines.” Hans Martin Jaeger, “UN Reform, Biopolitics, and Global Governmentality” *International Theory* Vol. 2(1) (2010), pp. 50-86; “For all the setbacks it has faced in recent years, the UN remains indispensable to the international community it serves. And yet, support for the UN, however broad, is shallow; expectations of it are often excessive, as is the subsequent criticism when it fails to meet these expectations. If support is to become both deeper and better informed about the realities of international life, it is essential that national politicians and the institutions of civil society are drawn into the discussion. There seems to be a new willingness to address all these issues. But will there be the perseverance and the determination in the future to see them through to a conclusion?” David Hannay, “‘A More Secured World: Our Shared Responsibility’ – The Report of the UN Secretary General’s High Level Panel on Threats, Challenges and Change”, p. 16

⁷²⁹ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, pp. 286-305

⁷³⁰ Such as: “The UN now has really to become an instrument for redressing the injustice that is lived every day by the vast majority of the world’s people. In a very real sense, the UN must become, in immediate future an organization for ‘the peoples’. This is not some pious exhortation or an appeal to notions of charity. Not at all. The United Nations must become the instrument of first resort to address the peoples’ issues. Since the beginning, the UN has been an organization by and for states whose territorial sovereignty and political integrity has been inviolate, in theory and for the most part, in practice. Article 2, Paragraph 7 of the Charter enshrines that principle. I am not suggesting that this principle is now to be set aside. But the UN must now turn its attention to addressing the issues of most immediate concern to the citizens of the Member States. We will all agree, I am sure, that the highest purpose of the nation state is to serve the needs of its peoples. The role of social organization throughout history has, in theory, been to ensure the protection and prosperity of its citizens. By the same token, the role of the UN, and its highest purpose, must be to reach beyond the strictures of inter state rivalry, and address the needs of the peoples of the world. It must now begin to bring real meaning to the concept, in the opening words of the Charter – ‘We the Peoples’”. Grenville-Woord, Geoffrey Presentation to the Federal Liberal Conference on the Future of the United Nations, (Vancouver, 1991)

⁷³¹ In line with the discussions on Global Centralism, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, pp. 290-294

3.3.2. Global Law Discussions

Besides the UN reforms, we need to mention the discussions favour a complete paradigm shift in the understanding of public international law in order to deal with challenges of the 21st Century much more efficiently⁷³². This line of academic debate has been named as “global law” by Domingo and Teubner.

Accordingly, what we currently observe at the current international order is that certain global problems are trying to be solved through treaties constructed among states. But these treaties are not practical, and they are unable to serve every legal requirement⁷³³ and they do not reach to people, meaning the individual or the citizens. This decreases the reliability of international law in solving problems.

The idea of “global law” claims the focus of international law should be altered from being a regime puts states in its core to having the individual at the centre and in accordance with this, the international law should be reconceptualized. The “global law” scholar Domingo explains this as follows:

“The central focus of the law is the person. Without the person, no law could emerge (*ius ex persona oritur*). For this reason, the global law paradigm fully takes on board the first element of the classical law paradigm, the person. It considers the person, not only in and of itself, or as a member of a specific political community, but instead as the integral constituent part of humanity as a whole. In the statist international paradigm, the state takes the place of the person, whereas in this new global paradigm, the global community (that is to say, humanity) neither replaces nor displaces the person, but naturally integrates it therein. Thus, in this new global paradigm the person is the primary subject and focus, and is not relegated to a secondary role, as happened with the application of the international law paradigm.⁷³⁴”

⁷³² Jonathan I. Charney, “Universal International Law”, *The American Journal of International Law*, Vol. 87, No. 4 (October 1993); Rafael Domingo, “Gaius, Vattel and the New Global Law Paradigm”, *The European Journal of International Law*, Vol. 22, No. 3 (2011); Gunther Teubner ed., *Global Law Without a State* (United Kingdom: Ashgate, 2003); Neil Walker, *Intimations of Global Law*, (United Kingdom: Cambridge University Press, 2015); Ziccardi Capaldo, *The Pillars of Global Law*

⁷³³ “Much of the demand for international law has been filled by treaties accepted as binding by state parties. Treaties, however, are unable to serve all the international legal requirements of the contemporary world. Treaties, often require considerable time to be negotiated, adopted and brought into force. It is also impracticable to have treaties rarely approaches universal participation. Domestic law usually requires complex formal acts before treaties are accepted as binding. In contrast, general international law may be established on the basis of less formal indications of consent and acquiesce. This makes worldwide law possible; it cannot be done through treaties alone.” Jonathan I. Charney, “Universal International Law”, p. 551

⁷³⁴ Domingo, “Gaius, Vattel and the New Global Law Paradigm”

Global law supporters would claim there is an urge to centralize the global politics and global law: “The difference between a highly globalized economy and a weakly globalized politics is pressing for the emergence of a global law that has no legislation, no political constitution and no politically ordered hierarchy of norms which could keep the paradox of self-validation latent⁷³⁵”, meaning the current legal plurality linked to the current way of conducting world affairs is not sufficient. International law should not be dependent on states formed around territories, but it should be an independent law field having its own institutions, and law-making mechanisms⁷³⁶ and it should put individual into its core.

That being said, realization of the idea of global law would not mean to erase the state organization indefinitely; but to accept the states are more and more dependent on the international guidance and form institutions to meet these needs, and provide them with this:

“The national level remains important; in fact the most important source of law within the global mosaic. It can be no part of any serious analysis of law’s global condition to suggest otherwise. Crucially, however, national law and the actors of national legal system are less and less self-contained and self-reliant. They are increasingly unlikely to operate in isolation, without the catalyst, guidance, support, moderation or challenge of regulatory forms situated beyond the national jurisdiction, or without effects on destinations situated beyond or otherwise not conterminous with the national jurisdiction, whether these be legal rule-making sites or decision-taking forums.⁷³⁷”

Evidently, the shift to global law paradigm would also mean that the UN should be reconstructed with the aim to democratize international relations and give enough power to the global citizen in decision-making, besides the states⁷³⁸. This would mean creation of more democratic procedures within the UN, there are even discussions going as far as creation of a

⁷³⁵ Gunther Teubner, “Foreword: Legal Regimes of Global Non-State Actors” in the *Global Law Without a State* edited by Gunther Teubner, p. xiv

⁷³⁶ Gunther Teubner, ““Global Bukowina’: Legal Pluralism in the World Society” in the *Global Law Without a State* edited by Gunther Teubner, p. 7-8

⁷³⁷ Walker, *Intimations of Global Law*, p. 16

⁷³⁸ “In order to change the situation, we must re-establish the United Nations. Its original limitations have become unmanageable. Our current international situation makes this suggested transformation possible. (...) Restoring the person as the fundamental actor in international actions is an indispensable condition for any renewal efforts. Democratizing international relations means granting enough power to the global citizen to change structures and cease limitations imposed by existing structures. The need for this shift, overlooked and even objected to by some today, is fundamental to the reform and reconstruction of a global order that sadly has brought war, hunger, crisis, and destruction—the horsemen of an apocalypse whose end is as yet uncertain.” Rafael Domingo, “The Crisis of International Law”, *Vanderbilt Journal of Transnational Law*, Vol. 42 (2009), pp. 1592-1593

global parliament⁷³⁹. The idea of global law, would be in line with the idea there should be a state-like governance at the international level.

Here, we should be acknowledging the fact this idea is hard to be realized in the recent future, and states are probably not ready for such a shift in the world governance⁷⁴⁰. Despite this being the actual case, we do believe moving towards a global law paradigm could bring in some advantages in solving some global problems in a more efficient manner. When we focus on business and human rights cases, global law would also provide legitimacy to create direct obligations for business entities under the international law. This might even be the “silver-bullet solution” that the Ruggie was searching for.

4. THE DIFFERENTIATION BETWEEN SOFT-LAW AND HARD-LAW

The discussions on the acceptance of A/HRC/RES/26/9⁷⁴¹, showed certain states are of the opinion there is still a necessity of having legally binding regulations, since the UNGPs do not pose any legal obligations on any of the stakeholders. We do believe this is a discussion rooted in the differentiation of soft-law and hard-law, two important ‘variations’ of law we can find in the international law⁷⁴².

There is a certain level of complexity surrounding this differentiation. Indeed, the international law-making has evolved around the unsystematic nature of the international order⁷⁴³, which resulted in the utilization of certain legal tools differentiate from what we observe at the national levels. Accordingly, at the international level, we can talk about several law-making instruments: hard-law instruments, including UN Security Council Resolutions, International Court Decisions, binding treaties; and principles, guidelines and UN Resolutions sometimes referred as, soft-law instruments⁷⁴⁴. However, we believe the differentiation between soft-law

⁷³⁹ Richard Falk and Andrew Strauss, “Toward a Global Parliament”, *Foreign Affairs* Vol. 80 No. 1 (Jan-Feb 2001), pp. 212-220; Heikki Patomäki, “Rethinking Global Parliament: Beyond the Indeterminacy of International Law” *Widener Law Review* Vol. 13 (2007), pp. 375-393

⁷⁴⁰ Nicholas Connolly and Manette Kaisershot, “Corporate Power and Human Rights” *The International Journal of Human Rights*, Vol. 19 No. 6 (2015), p. 666

⁷⁴¹ Please see: Chapter III(2)

⁷⁴² Salem Hikmat Nasser, *Fontes e Normas do Direito Internacional: Um Estudo Sobre a Soft Law*, pp. 97-140; Queiroz, *Direito Internacional e Relações Internacionais*, pp. 112-114; Cassese, *International Law*, pp. 196-197; Emmanuel Decaux, *Droit International Public*, 4^e ed. (France: Éditions Dalloz, 2004), p. 52; William S. Slomanson, *Fundamental Perspectives on International Law*, 4th ed., (United States: Wadsworth, 2003), pp. 25-27; Maria Luísa Duarte, *Direito Internacional Público e Ordem Jurídica Global do Século XXI*, (Portugal: Coimbra Editora, 2014), pp. 156-159

⁷⁴³ *supra*. pp. 146-149

⁷⁴⁴ Slomanson, *Fundamental Perspectives on International Law*, pp. 25-26

and hard-law; and specifically, treaties as legal instruments, have to be made clear due to their relevance to the business and human rights discussions.

Indeed, despite having these different categories of law instruments, in international law the boundaries can get very translucent⁷⁴⁵. A treaty, for instance, which has to go through a certain adoption process in order to be legally enforceable⁷⁴⁶, can be hard-law or soft-law, or it could also be both⁷⁴⁷. It is also possible a non-binding, soft-law document could turn into a customary international law and consequently, become hard-law and binding⁷⁴⁸. Therefore, the difference between hard-law and soft-law cannot be understood by looking into the name of the document but the context of the document⁷⁴⁹.

Accordingly, what matters here would be not the label of document, such as a treaty, guiding principles or a General Assembly Resolution, but what kind of rules they contain. What matters would be whether the document contains soft-law or hard-law rules. In this sense, the political backing, meaning the political will of the states to be bound by the rules written within these instruments, would be very important⁷⁵⁰.

That being said, this perspective allows us to elaborate the discussions surrounding the UNGPs not being efficient enough as legally binding treaties further.

4.1. The Definitions of Soft-Law and Hard-Law

4.1.1. Soft-Law

In the most traditional sense, one way to classify a legal text as a soft law document, is to look at what kind of procedural rules it has followed to be approved by the States. Without prejudice to other types of hard-law instruments⁷⁵¹, if a legal text does not follow the procedures to create a treaty established by the Vienna Convention on the Law of Treaties⁷⁵² or UN Security Council Resolutions adoption procedure⁷⁵³, it could be categorized as a soft-law instrument.

⁷⁴⁵ Alan Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, *International and Comparative Law Quarterly* Vol. 48 (1999), p. 902

⁷⁴⁶ Bacelar Gouveia, *Manual de Direito Internacional Público*, pp. 219-239

⁷⁴⁷ Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, p. 902

⁷⁴⁸ Slomanson, *Fundamental Perspectives on International Law*, p. 26; Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, p. 901

⁷⁴⁹ Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, p. 902

⁷⁵⁰ Slomanson, *Fundamental Perspectives on International Law*, p. 26

⁷⁵¹ Customary International Law, General Principles, Judicial Decisions.

⁷⁵² Vienna Convention on the Law of Treaties, Articles 6-18

⁷⁵³ UN Charter, Article 27

Soft-law instruments can be chosen merely for its unbureaucratic acceptance procedure which makes the document ready to be referred faster, compared to a binding treaty has to follow certain procedures in order to be legally enforced⁷⁵⁴. They are easily amendable and adjustable for occasions and it could also help developing hard-law treaties in the future or adjust existing treaties without going through the hassle of amendment procedure⁷⁵⁵. Furthermore, states do not have to go through the national procedure to make the soft-law instruments applicable in their own national legislations, which might be, in some cases, problematic for States to carry out⁷⁵⁶. Therefore, in international relations when there is a need for coherence and harmonization in certain matters, soft-law documents are heavily used⁷⁵⁷.

The characteristic of a soft-law instrument is that it is legally not-binding and decisive, meaning it is not mandatory for the parties to the soft-law agreement to carry out the principles that have been agreed upon⁷⁵⁸. The soft-law instruments are identified as non-legally binding instruments produced as a response to the needs of contemporary international relations⁷⁵⁹. Soft-law is not enforceable through binding dispute resolution, meaning States cannot go to courts relying on soft-law principles.

However, sometimes these soft-law instruments might carry some legal weight. They can be used to fill in the legal gaps left by hard-law treaties, to create diplomatic coherence or just merely to start treaty negotiations on certain subjects⁷⁶⁰. Soft-law principles, guidelines, UN

⁷⁵⁴ “Soft law is usually generated as a compromise between those who wish a certain matter to be regulated definitely and those who, while not denying the merits of the substantive issue, do not wish (at least for a time) to be bound by rigid and obligatory rules-perhaps because they fear they cannot obtain whatever domestic legislative approval is necessary (say to achieve ratification of a treaty through the ensuing internal processes required for State acceptance of an obligatory treaty.)” Sломanson, *Fundamental Perspectives on International Law*, p. 26

⁷⁵⁵ For this reason, it is also being referred as “Flexible law”. Queiroz, *Direito Internacional e Relações Internacionais*, p. 112; Nasser, *Fontes e Normas do Direito Internacional: Um Estudo sobre a Soft Law*, p. 97

⁷⁵⁶ “international actors often deliberately choose softer forms of legalization as superior institutional arrangements. To be sure, soft law is sometimes designed as a way station to harder legalization, but often it is preferable on its own terms. Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own. Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization. This is especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty. Soft legalization also provides certain benefits not available under hard legalization. It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time. In addition, soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power.” Kenneth W. Abbott and Duncan Snidal, “Hard Law and Soft Law in International Governance”, *International Organization* Vol. 54 No. 3 (Summer 2000), p. 423

⁷⁵⁷ Abbott and Snidal, “Hard Law and Soft Law in International Governance”, p. 422

⁷⁵⁸ Eduardo Correia Baptista, *Direito Internacional Publico, Vol. I*, (Portugal: AAFDL Editora, 2015), p. 90

⁷⁵⁹ Nasser, *Fontes e Norma do Direito Internacional: Um Estudo Sobre Soft Law*, pp. 113-117

⁷⁶⁰ “Soft law is manifestly a multi-faceted concept, whose relationship to treaties, custom and general principles is both subtle and diverse. At its simplest soft law facilitates progressive evolution of international law. It presents

General Assembly Resolutions are not binding on the member states, but, when they are accepted by the majority of the votes, they might form a basis for progressive development of the law or the speedy consolidation of customary rules⁷⁶¹. Higgins stated that “(...) passing of binding decisions is not the only way in which law development occurs. Legal consequences can also flow from acts which are not, in the formal sense “binding”. And, further, law is developed by a variety of non-legislative acts which do not seek to secure, in any direct sense, “compliance” from Assembly members (...)”⁷⁶². The legal ‘strength’ of resolutions might differ from resolution to resolution⁷⁶³. It is possible for ICJ accept soft law, mostly UN General Assembly Resolutions, which are technically are more universally accepted documents, as binding⁷⁶⁴.

Furthermore, some documents enforced as soft-law instruments, in practice, may be gradually accepted and endorsed as hard-law⁷⁶⁵. Particularly, if they start to interact with other hard-law

alternatives to law-making by treaty in certain circumstances, at other times complements treaties, while also providing different ways of understanding the legal effect of different kinds of treaty. Those who maintain that soft law have perhaps not looked hard enough at the ‘infinite variety’ of treaties, to quote Baxter once more. Soft law in its various forms can of course be abused, but so can most legal forms, and it has generally been more helpful to the process of international law making that it has been objectionable.” Boyle and Chinkin, *The Making of International Law*, p. 229

⁷⁶¹ Brownlie, *The Principles of Public International Law*, p. 14

⁷⁶² Rosalyn Higgins, *Problems and Process: International Law and How we Use it*, (United Kingdom: Oxford University Press, 1995), p. 24

⁷⁶³ The UN Charter enabled the UN Security Council to issue binding decisions, which has not been granted to the UN General Assembly. UN Member States that are not part of the Permanent five would claim that the UN General Assembly has more authority than the UN Security Council and it is a forum where ‘the masses’ can rally to counterbalance the aristocracy’ of the permanent five (P-5)”. M. J. Peterson, “General Assembly” in *The Handbook on United Nations*, Thomas G. Weiss and Sam Daws ed., (United States: Oxford University Press, 2007), p. 98. “(UN) Charter Article 10 defines the resolutions addressed to states as recommendations, and few governments have taken up international lawyers’ suggestions that the Assembly has actually acquired some degree of legislative authority over states. Yet even without direct legislative authority, the General Assembly’s egalitarian treatment of members and open agenda should have assured its place as the preeminent global deliberative body.”, p. 103

⁷⁶⁴ As in the Military and Paramilitary Activities in and against Nicaragua (*Nicaragua vs. Unites States*) [1986] case. Christine Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, *International and Comparative Law Quarterly* Vol. 38 Issue 04 (October 1989), p. 858; Also “Some ICJ opinions lend credence to the claim that at least some General Assembly resolutions may be binding. In the Certain Expenses Case, which involved the obligation of member nations to contribute to UN expenses, the Court commented that “Article 18 deals with the ‘decisions’ of the General Assembly ‘on important questions.’ These ‘decisions’... have dispositive force and effect... including suspension of rights and privileges of membership, expulsion of Members and ‘budgetary questions.’” In the Namibia case, dealing with South Africa’s failure to comply with its trust obligations regarding the former South-West Africa, the ICJ stated that it would not be correct to assume that, because the General Assembly is in principle vested with only the power to recommend, “it is debarred from adopting... resolutions which make determinations or have operative design.” In the separate opinion of the prominent British ICJ judge, Sir Hersch Lauterpacht, in South-West Africa Voting Procedure case: “a Resolution recommending... a specific course of action creates some legal obligation which ... is nevertheless a legal obligation and constitutes a measure of supervision”” Slomanson, *Fundamental Perspectives on International Law*, pp. 26

⁷⁶⁵ *supra*. ft. 756

instruments, their soft-law nature can be changed or altered⁷⁶⁶. In contrast, it is also possible for a document labelled as international treaty may consist soft wording⁷⁶⁷. The context and the wording of the document would be important in classifying them as soft-law or hard-law⁷⁶⁸. Accordingly, in soft-law documents there will be no specific commitments and the content will be consisted of more open-textured and general principles⁷⁶⁹.

4.1.2. Hard-Law

Hard-law is used for legally binding international rules⁷⁷⁰. When states accept to be bound by a regulation, they delegate some of their powers to international institutions, in order to interpret and implement the written rules⁷⁷¹. One of the biggest characteristics of hard-law is, states would align their own behaviour by agreeing to the written rules and consequently limit their sovereignty for the sake of the international common good⁷⁷². The rationale for States to enter into hard-law arrangements has been explained as Abbott and Snidal as, “by using hard law to order their relations, international actors reduce transactions costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting⁷⁷³”.

Accordingly, international treaties, as a part of hard-law instruments, are governed by the “Vienna Convention on the Law of Treaties”. Pursuant to Article 1(1(a)) of the Vienna Convention, a “‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” States could enter into an agreement by ratification, acceptance, approval and accession, these are only different ways of entering into an agreement and stating consent to be bound by a treaty⁷⁷⁴.

⁷⁶⁶ Boyle and Chinkin, *The Making of International Law*, p. 213

⁷⁶⁷ Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, p. 902

⁷⁶⁸ “The point was made years ago by the late Judge Baxter that some treaties are soft in the sense that they impose no real obligations on the parties. Though formally binding, the vagueness, the indeterminacy, or generality of their provisions may deprive them of the character of “hard law” in any meaningful sense. This remains true.” *Ibid.*, pp. 906-907

⁷⁶⁹ *Ibid.*, pp. 901-902

⁷⁷⁰ Slomanson, *Fundamental Perspectives on International Law*, p. 25

⁷⁷¹ Abbott and Snidal, “Hard Law and Soft Law in International Governance”, p. 421

⁷⁷² Oona A. Hathaway, “Why do Countries Commit to Human Rights Treaties?”, *Journal of Conflict Resolution* Vol. 51 No. 4 (August 2007), p. 588

⁷⁷³ *Ibid.*, p. 422; also, for further explanation on each reason please see: pp. 424-434

⁷⁷⁴ Vienna Convention on the Law of Treaties, Article 2(b)

A treaty has to go through certain procedures for it to become legally effective⁷⁷⁵. The treaty would enter into force internationally, upon a date the State parties agree upon or in case of absence of such date, the treaty would enter into force when the negotiating parties state their consent to be bound by the treaty⁷⁷⁶. Moreover, a treaty has to go through the national parliaments and its specific adoption procedures in order for it to be applicable within the States' judicial system⁷⁷⁷. These procedures differentiate in every State, in compliance with their constitutional requirements⁷⁷⁸. For instance, in case for a treaty to be in force within the Turkish law⁷⁷⁹, the Turkish Parliament has to vote affirmatively for a legislation regarding the “approval of the international treaty”, which would have to go through the ordinary law-making process established by the Turkish Constitution in a separate chapter⁷⁸⁰. It is possible that a State ratifies a treaty at an international conference and then fails to pass it through the national jurisdiction. This would legally mean the treaty would not become a part of the national judicial system. This happened with the, now famous, 1997 Kyoto Protocol. According to the US Constitution, the President of the US ‘shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur’⁷⁸¹. And therefore, the Kyoto Protocol has been negotiated and signed by the President Bill Clinton and Vice President Al Gore. The protocol was creating obligations for the developed economies to reduce the Greenhouse Gas Emissions, which then the senate argued such commitment would seriously harm the US economy. Hence, this protocol could not pass the senate’s approval, creating a dilemma formed around the rules of state implementation of international treaties⁷⁸².

⁷⁷⁵ Bacelar Gouveia, *Manual de Direito Internacional Público*, pp. 219-239; Juste Ruiz y Castillo Daudí, *Lecciones de Derecho Internacional Público*, pp. 158-160;

⁷⁷⁶ Vienna Convention on the Law of Treaties, Article 24

⁷⁷⁷ Bacelar Gouveia, *Manual de Direito Internacional Público*, pp. 387-400 (with a focus on Portuguese Law); Juste Ruiz y Castillo Daudí, *Lecciones de Derecho Internacional Público*, pp. 158-160 (with a focus on Spanish Law); Rona Aybay, “Uluslararası Anlaşmaların Türk Hukukundaki Yeri” *TBB Dergisi* Vol. 70 (2007), pp. 187-213 (with a focus on Turkish Law)

⁷⁷⁸ For instance, please see this Briefing for the different requirements of the EU countries: European Parliament, *Ratification of International Agreements by EU Member States* (November 2016), [[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593513/EPRS_BRI\(2016\)593513_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593513/EPRS_BRI(2016)593513_EN.pdf)] accessed December 2019

⁷⁷⁹ Türkiye Cumhuriyeti Anayasası, Article 90

⁷⁸⁰ Türkiye Cumhuriyeti Anayasası, Articles 89 and 96

⁷⁸¹ US Constitution, Article II, Section 2, Clause 2

⁷⁸² Jon Hovi, Detlef F. Sprinz and Guri Bang, “Why the United States did not become a party to the Kyoto Protocol: German, Norwegian and US perspectives”, *European Journal of International Relations* Vol. 18(1), pp. 129-150

Treaties are legally binding, when it meant to be so. They create obligations for the parties involved, signed and ratified the treaty⁷⁸³. In contrast, parties did not ratify the treaty do not have obligations created by this exact same treaty⁷⁸⁴. This flexibility of course effects the applicability and the universality of a legal document and consequently its hard-law or soft-law nature.

It has to be remembered there is an “infinite variety” of treaties, and as mentioned before, not every treaty will have hard binding rules⁷⁸⁵. On one side, there are treaties could receive such acclamation they would turn into customary international law, as we see in the example of UNCLOS and even States did not ratify the treaty will became bound by its rules⁷⁸⁶. But on the other hand, it is also possible for the treaty to lose its effectiveness and its hard-law nature and have a softer nature. We could observe this in the example of the 1992 UN Framework Convention on Climate Change, adopted with consensus at the Rio Conference, but its articles were drafted unclear and it was not certain if the treaty was actually creating any sort of obligations on the parties⁷⁸⁷.

Compared to soft-law instruments, hard-law arrangements are not common in the international order. Thus, it could be claimed, most international treaties or other types of legal instruments mostly contain soft principles⁷⁸⁸. For a treaty to be considered as hard-law, it needs to have the political will of states to give up on their sovereignty in that particular subject, which rarely happens in today’s international order⁷⁸⁹. We can also see most treaties do not impose an enforcement mechanism in times of non-compliance which makes them also soft in nature⁷⁹⁰.

⁷⁸³ Valerio de Oliveira Mazzuoli, *Direito dos Tratados*, 2^a ed. (Brazil: Editora Forense, 2014), pp. 209-233

⁷⁸⁴ Boyle and Chinkin, *The Making of International Law*, p. 233

⁷⁸⁵ Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, p. 911

⁷⁸⁶ United States, who is not a party to the treaty even after joining the negotiations, has accepted that UNCLOS has the power of the customary international law. United States Oceans Policy, Statement of the President, March, 10, 1963 [<https://www.state.gov/documents/organization/143224.pdf>], and United States Oceans Policy, Law of the Sea and Exclusive Economic Zone, National Security Decision [<https://fas.org/irp/offdocs/nsdd/nsdd-83.pdf>], both accessed December 2019

⁷⁸⁷ Boyle and Chinkin, *The Making of International Law*, p. 220

⁷⁸⁸ Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, p. 913

⁷⁸⁹ *Ibid.*, p. 906-909

⁷⁹⁰ *Ibid.*, p. 909-912

4.2. Identification of Relevant Business and Human Rights Documents as Soft-Law and Hard-Law

4.2.1. The Revised Draft

As we have explained in Chapter III, the OEIGWG is currently working on the draft of a legally binding instrument on business and human rights⁷⁹¹. We have mentioned the Zero Draft and latter, the Revised Draft as the evolvement of a possible binding treaty⁷⁹². Whereas we are aware the Revised Draft is not the final legal document and has no legal force at this stage, we can already look into the context of the document and attempt to identify it as soft-law or hard-law, by assuming it is a legal document as of its current contextual standing.

The Revised Draft contains several articles creating certain obligations on States. For instance, the Article 5(1) states state parties *shall* regulate effectively the activities of business enterprises within their territory or jurisdiction and *shall* ensure their domestic legislation requires all business enterprises respect human rights and prevent human rights violations or abuses⁷⁹³. The treaty uses word “shall” frequently within the text which is being used in the legal discourse as imposing a legal duty or obligation, that has a dominant force⁷⁹⁴. Accordingly, not complying with this obligation might bring liability to the States.

On the other hand, it is hard to state the Revised Draft establish a new set of internationally acclaimed rules in a way that UNCLOS or GATT does. Firstly, successful hard-law instrument at the international level generally would have a strong political backing from the States. Currently the Revised Draft is still in the process of getting the support of all the UN, and some states already isolated themselves from the negotiations⁷⁹⁵. If not all the states become a party to the agreement, the international document will not have wide coverage, which would create adverse effects on business and human rights discourse in general. Secondly, the Revised Draft does not impose a non-compliance mechanism ensuring its enforcement⁷⁹⁶. This abundantly

⁷⁹¹ Please see: Chapter III(4)

⁷⁹² Please see: Chapter III(4.2, 4.3)

⁷⁹³ The full article is as follows: “State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.” The Revised Draft, Article 5(1)

⁷⁹⁴ Olga A. Krapivkina, “Semantics of the verb shall in legal discourse”, *Jezikoslovlje* (2017), pp. 305-317

⁷⁹⁵ Please see: Chapter III(2.2)

⁷⁹⁶ *supra*. p. 137

diminishes the strength of the document and makes it harder to categorize it as a hard-law instrument.

4.2.2. UN Guiding Principles on Business and Human Rights

Unlike the current standing of the Revised Draft, the UNGPs has a serious political backing from the UN Member States, which makes it a powerful document in the international law sense⁷⁹⁷. However, if we ask whether UNGPs are containing soft-law principles or hard-law obligations and analyse deeper, it would be harder to say the latter. Though politically backed by most States, the UNGPs does not limit the sovereignty of States on the area of business and human rights, still cannot be referred in international courts, but most importantly, yet to change the way to conduct business. Furthermore, it explicitly founds itself on not international law principles, but on a concept of “social expectations” which fairly extenuates its legal authority⁷⁹⁸.

On the other hand, the UNGPs could be considered as a start on the development of the legal field on business and human rights and could help to speed up the harmonization of national systems, which was probably its intention to do so⁷⁹⁹. It may help the development of the business and human rights field in the future, which could be observed from the current implementation discussions at the UN. However, we believe, under current circumstances, the UNGPs has serious shortcomings to turn into customary international law and would need better implementation and treaties founded upon it to do so.

5. THE VOLUNTARY NATURE OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

As we have mentioned in Chapter III, the process of implementation of the UNGPs is going rather slow, only a handful of states published their NAPs and even the ones published their NAPs, we see very small amount of self-criticism⁸⁰⁰. We do believe this derives from the highly voluntary nature of the UNGPs, which provides a large room for governments, corporations and other stakeholders to fill in legal gaps with their own version of code of conducts⁸⁰¹. This

⁷⁹⁷ Please see: Chapter I(7.2)

⁷⁹⁸ Please see: Chapter IV(5)

⁷⁹⁹ Maddalena Neglia, “The UNGPs – Five Years On: From Consensus to Divergence in Public Regulation on Business and Human Rights”, *Netherlands Quarterly of Human Rights* Vol. 34(4) (2016), pp. 289-317

⁸⁰⁰ *supra*. pp. 117-119

⁸⁰¹ “Given the political climate in which the SRSG was appointed, the pragmatic approach and reliance on soft law with regard to a corporation’s responsibilities toward human rights is understandable, but inadequate.” Justine Nolan, “The Corporate Responsibility to Respect Rights: Soft Law or Not Law?” *Human Rights Obligations of*

was the necessary step to be taken to have the UNGPs approved⁸⁰², however this was insufficient⁸⁰³, as we have seen with the initiation of the binding treaty negotiations⁸⁰⁴.

The voluntary nature of the UNGPs has been emphasized as founding corporate responsibility to respect principle on the “basic expectations of the society”, instead of international law principles⁸⁰⁵. We have to state with the current understanding of legal scholarship, the term “social expectations” has no legal meaning⁸⁰⁶.

5.1. The Definition of “Social Expectations”

It would be hard to define the what does the term “social expectations”. It is possible to define it vaguely as expectations of a society which heavily depend on the social norms the society possess. These social norms can be found in the press, social practices, activist operations⁸⁰⁷, sometimes in legal decisions⁸⁰⁸. In ISO 26000⁸⁰⁹, the term “social expectations” has been mentioned as follows:

“Social responsibility involves an understanding of the broader expectations of society. A fundamental principle of social responsibility is respect for the rule of law and compliance with legally binding obligations. Social responsibility, however, also entails actions beyond legal compliance and the recognition of obligations to others that are not legally binding. These obligations arise out of widely shared ethical and other values.

Although expectations of socially responsible behaviour will vary between countries and cultures, organizations should nevertheless respect international norms of behaviour such as those reflected in the Universal Declaration of Human Rights, the Johannesburg Declaration on Sustainable Development and other instruments.⁸¹⁰”

Business: Beyond the Corporate Responsibility to Respect? edited by Surya Deva and David Bilchitz, (W/o page number)

⁸⁰² Nicola Jägers, “Will transnational private regulation close the governance gap?” in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* edited by Surya Deva and David Bilchitz, p. 328

⁸⁰³ Peter Muchlinski, “Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation” *Business Ethics Quarterly* Vol. 22(1) (2012), p. 146

⁸⁰⁴ Please see: Chapter III(2)

⁸⁰⁵ Please see: Chapter II(2.1)

⁸⁰⁶ Nolan, “The Corporate Responsibility to Respect Rights: Soft Law or Not Law?” (W/o page number)

⁸⁰⁷ Patricia Illingworth, “Global Need: Rethinking Business Norms” in *The Business and Human Rights Landscape: Moving Forward, Looking Back* edited by Jena Martin and Karen E. Bravo (United States: Cambridge University Press, 2015), p. 179

⁸⁰⁸ For more information on this please see. Eric A. Posner, *Law and Social Norms*, (United States: Harvard University Press, 2002)

⁸⁰⁹ It has to be mentioned again that ISO is not an institution that produces legal documentation, but this specific document is being referred within the business and human rights discussions as guidelines for corporations, therefore it has been included here, since it also gives a definition for social expectations. Please see Chapter II(2.4) for more information.

⁸¹⁰ ISO 26000, Clause 3.3.4

It might be necessary to define “social norms” in order to have a better understanding of “social expectations”. But defining “social norms” would also be a challenge⁸¹¹. Babcock defines it as “norms are informal obligations or social rules that are not dependent on government either for their creation or their enforcement. They can be both descriptive and aspirational, as they portray how people behave and also prescribe how they should behave to conform to community expectations.⁸¹²”; or in a more general way as Sunstein defined, “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.⁸¹³”. Hence, social norms can be moral or merely cultural, it could be rules of etiquette (as also mentioned in ISO 26000), a simple gesture such as shaking hands when you meet a person for the first time.

What is important of the social norms that they are subject to change⁸¹⁴. It could change from culture to culture, but also a culture might change through time. It is possible for the interests of the society to change and therefore affect the social norms by replacing the old with the new. Sometimes it is easier to change the norms, sometimes it would take years of convincing a society⁸¹⁵. There are ways to create a social norm change. It could be through activism, philosophy, through the works of NGOs, lawyers and governments⁸¹⁶. The laws can also change the social norms or vice-versa, and this change can come from international community as well⁸¹⁷.

It could be argued this is what tried to be achieved through UNGPs, by creating a baseline and empowering the stakeholders, including businesses and NGOs, to create their own voluntary

⁸¹¹ Cass R. Sunstein, “Social Norms and Social Roles”, *Columbia Law Review* Vol. 96 (1996), p. 914

⁸¹² H. Babcock, “Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm,” *Harvard Environmental Law Review* Vol. 33 Issue 01 (2009), p. 134

⁸¹³ Sunstein, “Social Norms and Social Roles”, p. 914

⁸¹⁴ Illingworth, “Global Need: Rethinking Business Norms”, p. 177

⁸¹⁵ “People’s private judgments and desires diverge greatly from public appearances. For this reason, current social states can be far more fragile than is generally thought – as small shocks to publicly endorsed norms and roles decrease the cost of displaying deviant norms, and rapidly bring about large-scale changes in publicly displayed judgments and desires. Hence societies experience norm bandwagons and norm cascades. Norm bandwagons occur where the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms, to a “tipping point” where it is adherence to the old norms that produces social disapproval. Norm cascades occur when societies are presented with rapid shifts toward new norms.” Sunstein, “Social Norms and Social Roles”, p. 912

⁸¹⁶ Illingworth, “Global Need: Rethinking Business Norms”, p. 178

⁸¹⁷ *Ibid.*, p. 178

initiatives and to create voluntary codes to create new social norms⁸¹⁸, which would become the new reality of operating a businesses.

In one of the reports that was submitted to the UN Human Rights Council, Ruggie has stated the following:

“In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts.

Whereas governments define the scope of legal compliancy, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company’s social license to operate.⁸¹⁹”

Accordingly, the social expectations are any businesses “social license to operate”, which could be defined as ‘an implicit agreement between the society and corporations’⁸²⁰.

5.2. The “Social Expectations” of the 21st Century Global Citizen

The question we need to ask here would be whether the 21st Century society really expects businesses to respect human rights? After all, the Nobel Prize winner economist Milton Friedman famously said “the social responsibility of a business is to increase its profits⁸²¹”, even adding the social responsibility “is one way for a corporation to generate goodwill as a by-product of expenditures that are entirely justified in its own self-interest⁸²²”.

It could be claimed the Friedman’s way of approaching businesses has been evolved and the implementation discourse is about changing the norm of business-as-usual⁸²³. But currently there are 180 active policy commitments of corporations listed by the Business and Human Rights Resource Centre⁸²⁴. Taking the vast number of businesses exist in the world today into

⁸¹⁸ This would be creating a polycentric system for protecting human rights that might be hindering the universality principle of human rights. More on this: Larry Cata Backer, “Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All”, *Fordham International Law Journal* Vol. 38, Issue 2 (2015), pp. 517-529

⁸¹⁹ A/HRC/8/5, para. 54-55

⁸²⁰ Illingworth, “Global Need: Rethinking Business Norms”, p. 179

⁸²¹ Milton Friedman, “The Social Responsibility of Business is to Increase its Profits”, *The New York Times Magazine* (13 September 1970)

⁸²² *Ibid.*; but please also see: *supra*. ft. 677

⁸²³ Richard A. Epstein, “Why There is No Milton Friedman Today?” *Econ Journal Watch* Vol. 10(2) (May 2013), pp.175-179

⁸²⁴ Please check: Business and Human Rights Resource Center, “Human Rights Policy Statements”, [\[https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-\]](https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-)

account, this is such a small number. In a survey conducted by the Economist Intelligence Unit in 2015 among corporate executives around the world, in fact “83% of respondents agree human rights are a matter for business as well as governments⁸²⁵”. This actually dismisses the claims of Friedman on businesses only having a certain type of responsibility, which would be making profits. But, according to this survey “44% of respondents say that human rights are an issue on which chief executive officers (CEOs) take the lead, and 22% say that they have a publicly available human rights policy in some form”. This shows that there is a willingness from the businesses to adopt human rights regimes, however they are rather slow adopting to the ‘expectations of the society’.

Since social expectations cannot be explained through legal analysis, in order to understand whether UNGPs have a solid foundation, we believe there is a need to turn into another source of data. Therefore, in order to bring in a better understanding to the “social expectations” of the actual society, we will be referencing empirical data sources⁸²⁶.

The studies we have encountered with, were done among consumers to shed a light on how the current perception among society is. For instance, in a scientific research conducted in 2005 in has been found:

“across our two studies we found that greater than 80% of respondents believed firms should engage in social initiatives and 76% felt those initiatives would benefit firms. In our second study we also asked respondents if they would boycott firms that acted irresponsibly, and we found that 52% stated that they would boycott if reasonable alternatives were available. Thus, our results suggest that consumers expect firms to be involved in social initiatives and may reward them for their efforts through purchase behaviour. Additional investigations that focus on the interaction between the inherent virtue of the CSR

[examples/implementation-by-companies/type-of-step-taken/human-rights-policy-statements](#)], accessed December 2019

⁸²⁵ The survey was conducted with the participation of 853 senior corporate executives in November and December 2014. “Respondents’ companies are active in a wide variety of sectors, the most common of which are financial services, manufacturing, professional services (all 10%), technology, and healthcare (each 9%). About half (51%) of respondents have some human rights oversight role at their organisation. Thirty percent are based in Europe, 29% in the Asia-Pacific region, and 28% in North America, with the remainder from Latin America, Africa, and the Middle East. Their companies span a range of sizes, with 51% having an annual revenue of under US\$500 m, and 23% over US\$5 bn. Those surveyed mostly occupy senior positions, with 48% at C-suite or board level.”, The Economist Intelligence Unit, “The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights”, (2015), [\[https://www.mazars.com/content/download/773111/39635892/version//file/Mazars%20and%20EIU%20global%20report%20on%20Human%20Rights%20and%20Business_March%202015.pdf\]](https://www.mazars.com/content/download/773111/39635892/version//file/Mazars%20and%20EIU%20global%20report%20on%20Human%20Rights%20and%20Business_March%202015.pdf), accessed December 2019

⁸²⁶ Please also check the Annex of this thesis for an empirical research that was conducted by the Author.

action and the perceived tangible benefit to the firm on consumers' buying behaviour are warranted in order to determine the external validity of our findings.⁸²⁷

According to another report gathered by a private organization located in the US called CONE, the 93% of the consumers, if given the opportunity, would buy a product or service associated with a cause, when price and quality are about the same. And 93% are prepared to boycott a company for irresponsible business practices⁸²⁸. 31% of the participants also stated the businesses should change the way they operate and align their businesses with more social and environmental causes⁸²⁹.

Despite this being the case for corporate social responsibility, when it comes to the real-life purchasing decisions, we could see the numbers are fairly different. For example, in garment industry where branding is important and has deeper meanings for consumers, the purchasing decisions may depend on other factors than the social impact⁸³⁰. A young NGO, namely Fashion Revolution⁸³¹ focusing on the apparel sector, made a survey among consumers regarding their purchase decisions from the apparel brands. Accordingly, “when buying clothes, more than one in three consumers surveyed across the five largest EU markets said that they consider social (38%) and environmental impacts (37%)⁸³²”. This data shows the majority of the consumers do not take into consideration the social impact of a company while actually making a purchase, but still it is undeniable that there is an increase in awareness.

On the other hand, the same survey shows the consumer percentages that agrees the fashion brands should be required by law to respect the human rights of everybody involved in making their products is 77%; provide information about the social impacts of their business is 68%;

⁸²⁷ Karen L. Becker-Olsen, B. Andrew Cudmore and Ronald Paul Hill, “The impact of perceived corporate social responsibility on consumer behaviour”, *Journal of Business Research* Vol. 59 (2006), p. 52

⁸²⁸ The survey was conducted with 10,000 consumers in 10 countries, including the United States, Canada, the United Kingdom, Germany, France, Russia, China, India and Japan. Cone Communications, 2011 CONE/ECHO Global CR Opportunity Study, [<http://www.conecomm.com/2011-cone-communicationsecho-global-cr-opportunity-study-pdf>], accessed December 2019

⁸²⁹ Cone Communications, 2011 CONE/ECHO Global CR Opportunity Study

⁸³⁰ For a report on the labour abuses of the Apparel Industry please see: Human Rights Watch, “Paying for a Bus Ticket and Expecting to Fly” How Apparel Brand Purchasing Practices Drive Labor Abuses” (April 2019)

⁸³¹ Fashion Revolution, [<https://www.fashionrevolution.org/>], accessed December 2019

⁸³² The survey was conducted with the participation of 5,000 people aged 16-75 in the five largest European markets, including Germany, United Kingdom, France, Italy and Spain, to find out how supply chain transparency and sustainability impacts EU consumers' purchasing decisions when shopping for clothing, accessories and shoes. Fashion Revolution, Consumer Survey Report (November 2018), can be accessed at: [https://www.fashionrevolution.org/wp-content/uploads/2018/11/201118_FashRev_ConsumerSurvey_2018.pdf], accessed December 2019

say if they are paying the workers who make their products a fair, living wage is 72%⁸³³. This shows the consumer places reliance in the legal systems to assure the social impacts of companies are regulated.

5.3. The Acceptability of “Social Expectations” as a Foundation for Future Evolution of Business and Human Rights Law

The social expectations are slowly moving towards more socially conscious products and the consumers expect the companies to have certain policies in place. There is indeed a certain awareness among consumers with regard to the social impact of the companies, but the “social expectations” or “social licence to operate” are not as easily defined⁸³⁴. We do believe the social expectations can change very frequently and most importantly, we cannot demand rights built on social expectations nor we can go to court solely relying on what is society expecting from a business enterprise. What would happen if a business decides to ignore the social expectations and not join this movement? What would happen if the businesses cannot engage well enough with the communities they are affecting? The UNGPs does not consider this side of the coin and we believe this is the weak point of the UNGPs.

One solution for this would be to have a better legal understanding and a legal concept built around “social expectations”. This possibility seems like a long shot. If there is to be a regime around business and human rights creating an accountability for corporate human rights abuses, we need to create certain legal foundations for such accountability to occur and legally demanded⁸³⁵. The voluntary initiatives can only create a positive improvement in the social impact of businesses to a certain extent⁸³⁶ but further legal action is required to actually make sure there is a corporate alignment to human rights values and eradicate abusive behaviour⁸³⁷. As also Nolan suggested:

“Given the political climate in which the SRSG was appointed, the pragmatic approach and reliance on soft law with regard to a corporation’s responsibilities toward human rights is understandable, but

⁸³³ Fashion Revolution, Consumer Survey Report (November 2018)

⁸³⁴ Ruggie explains what “social licence to operate” is in his remarks that he presented in 2008. Remarks by SRSG John Ruggie, International Institute for Conflict Prevention&Resolution, Corporate Leadership Award Dinner (New York, 2 October 2008)

⁸³⁵ Nolan, “The Corporate Responsibility to Respect Rights: Soft Law or Not Law?” (w/o page number)

⁸³⁶ For instance, Ramasastry argues that Business and Human Rights should not focus on the voluntary initiatives that the corporations get engaged with, but more on accountability when a human rights abuse occurs. Anita Ramasastry, “Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability”, pp. 237-259.

⁸³⁷ Barnali Choudhury, "Balancing Soft and Hard Law for Business and Human Rights.", *International & Comparative Law Quarterly* Vol. 67 No. 4 (2018), pp. 961-986.

inadequate. While the SMSG has successfully sought to craft a framework of guidelines palatable to States and business, the path of principled pragmatism has led to the development of soft law guidelines that prize dialogue and consensus over ambition. However, a harder edge could be given to this soft law approach to develop a more robust framework that not only encourages, but requires corporations to respect human rights. (...) The source of the corporate responsibility to respect human rights should also be linked to international human rights law and not left to the whim of society⁸³⁸”.

In fact, even some data shows there is a will from the people to have the governments and legal systems to get involved in order to create certain baselines for code of conducts of the companies, as we see from the data provided by Fashion Revolution⁸³⁹.

6. EXERCISING EXTRATERRITORIAL JURISDICTION ON BUSINESS AND HUMAN RIGHTS CASES

Access to remedy is one of the major problems we are facing in the realm of business and human rights, due to in most of the given cases there are many stakeholders and many national jurisdictions involved. The Revised Draft leaves the matter to the hands of the state courts and tries to obligate states to adjudicate on matters that are relevant to business and human rights by giving them jurisdiction⁸⁴⁰. We do believe, this is a non-explicit allowance of extraterritorial jurisdiction⁸⁴¹, which needs further analysis.

Extraterritorial jurisdiction is a debated issue at the UN and at the State levels for few years⁸⁴². Certain decisions of the UN state States should consider extraterritorial jurisdiction when it comes to protecting certain rights against corporate abuse⁸⁴³. When it comes to the Revised Draft however, under the current available text we see no clear call on exercising of

⁸³⁸ Nolan, “The Corporate Responsibility to Respect Rights: Soft Law or Not Law?” (w/o page number)

⁸³⁹ According to Fashion Revolution, Consumer Survey Report (November 2018), 68% of the participants strongly/somewhat agree that “the Government has a role to play in ensuring clothing (including shoes and accessories) is sustainably produced.”; 77% of the participants strongly/somewhat agree that “fashion brands should be required by law to respect the human rights of everybody involved in making their products”

⁸⁴⁰ *supra*. p. 137

⁸⁴¹ On the other hand, extraterritorial jurisdiction has been explicitly encouraged under UNGPs Principle 2.

⁸⁴² Olivier de Schutter, “The “Zero Draft” for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: A Comment”, (12 October 2018), pp. 4-5; Olivier de Schutter, “Towards a New Treaty on Business and Human Rights”, *Business and Human Rights Journal* Vol. 1 Issue 1 (January 2016), pp. 45-47; Daniel Augenstein and David Kinley, “When human rights ‘responsibilities’ become ‘duties’: the extra-territorial obligations of states that binds corporations” in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* edited by Surya Deva and David Bilchitz (Cambridge University Press, 2013), pp. 271-294

⁸⁴³ “the Committee underscores that “States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries”. UN Committee on Economic and Social Rights (E/C.12/2011/3), Report on the Forty Sixth and Forty-Seventh Sessions (2–20 May 2011, 14 November–2 December 2011), Annex VI, para. 5

extraterritorial jurisdiction. We might make the connection by looking at the Article on Adjudicative Jurisdiction (Article 7). According to this paragraph, the State courts of where such acts or omissions occurred; or the victims are domiciled; or the natural or legal persons alleged to have committed such acts or omissions in the context of business activities are domiciled, would have jurisdiction over the cases of corporate human rights abuses. This article may cause a State court to decide upon a case that has occurred outside of its territory. This would be the allowance of extraterritorial jurisdiction which is a debated issue at the UN and at the State levels for few years⁸⁴⁴.

There are couple of criticisms that could be posed for the allowance or dependence of extraterritorial jurisdiction need to be taken into consideration.

6.1. The Definition of “Extraterritorial Jurisdiction”

We can talk about two different types of jurisdiction, territorial and extraterritorial⁸⁴⁵. The territorial jurisdiction would be the power to regulate, adjudicate and enforce the persons, things and transactions within a nation’s territory⁸⁴⁶. It is generally considered the state has a “monopoly of force within their borders”⁸⁴⁷. This monopoly deriving from the principle of non-interference in the domestic matters, has also been confirmed by the Vienna Convention on the Law of Treaties, Article 29 with regard to international laws as “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party *in respect of its entire territory*”.

Extraterritorial jurisdiction could be described generally as a situation where the States enact laws or take measures beyond their national boundaries⁸⁴⁸. The jurisdiction could be prescriptive, adjudicative or enforcement jurisdiction⁸⁴⁹. In a given situation, the exercising of extraterritoriality highly depends on the type of the jurisdiction and how the legislation is⁸⁵⁰.

⁸⁴⁴ de Schutter, “The “Zero Draft”: A Comment”, pp. 4-5

⁸⁴⁵ Wade Estey, “The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality”, *Hastings International and Comparative Law Review* Vol. 21 No. 1 (Fall 1997), p. 177

⁸⁴⁶ *Ibid.*, p. 177

⁸⁴⁷ Anthony J. Colangelo, “What is Extraterritorial Jurisdiction?”, *Cornell Law Review* Vol. 99, Issue 06 (September 2014), p. 1311

⁸⁴⁸ Isabel Jalles, *Extraterritorialidade e Comércio Internacional: Um Exercício de Direito Americano*, (Lisboa: 1986), pp. 43-47

⁸⁴⁹ Prescriptive jurisdiction would be the power make and apply laws to persons; adjudicative jurisdiction would be used for power to subject persons to judicial process, like courts. Enforcement jurisdiction would be the power to compel compliance and punish non-compliance. Colangelo, “What is Extraterritorial Jurisdiction?”, pp. 1310-1311. Here we mostly refer to adjudicative jurisdiction.

⁸⁵⁰ For instance, the extraterritoriality has been mostly being used for the US Law, however there are certain developments in the EU with regard to allowing extraterritorial jurisdiction. Please see: Joanne Scott,

The legislation may allow exercising extraterritorial jurisdiction depending on the location of the conduct or the location of the party⁸⁵¹. Nevertheless, the exercise of extraterritorial jurisdiction would be an infringement of another states “monopoly of force”, or so called “sovereignty” within their own national borders⁸⁵², which is sometimes, but rarely, allowed by international⁸⁵³ or domestic laws.

For instance, the Supreme Court of Canada in the case *R. v. Hape*⁸⁵⁴, decided the Canadian Charter of Rights and Freedoms may apply to extraterritorial cases when the foreign state gives its consent to the application of the Canadian law. It has also been stated the respect for the other State’s territory and approval may not be applicable when there is a clear violation of international law and fundamental human rights⁸⁵⁵, hence opening a way for exercising extraterritorial jurisdiction. This case law was applied in the case of *Canada (Prime Minister) v. Khadr Oona (2010)*⁸⁵⁶. Accordingly, the Amnesty International sued Canadian state on the grounds that Canadian forces were detaining non-Canadians in Afghanistan against the

“Extraterritoriality and Territorial Extension in EU Law”, *The American Journal of Comparative Law*, Vol. 62 (2014), pp. 87-125

⁸⁵¹ Anthony J. Colangelo, “What is Extraterritorial Jurisdiction?”, p. 1305; “For a classic prescriptive jurisdiction example, if Jane fires a gun in State A across the border into State B, and the shot hits and kills Dick in State B, where did the act occur? The answer depends on which part of the transaction we focus. If it is Jane’s conduct—firing the gun—the act occurred in State A. If it is the effect of Jane’s conduct—Dick being shot and killed—the act occurred in State B. The fields of conflict of laws (or private international law) and public international law have long dealt with these types of questions in multistate systems. (...). To return to our shooting hypothetical, traditional choice-of-law or private international law rules would resolve the conundrum by selecting one element of the multijurisdictional transaction and then localizing the entire transaction based on that element.45 Accordingly, if the relevant choice-of-law rule says the key element is where the harm ultimately is felt, the act took place (or, using traditional choice-of-law terminology, the cause of action arose) in State B. State B therefore may apply its laws to the act as a matter of State B’s territorial jurisdiction. In other words, State B would not be exercising extraterritorial jurisdiction if it applied its laws to Jane in the hypothetical. On the other hand, if the choice-of-law rule says that the key element is where Jane’s conduct setting the harm in motion occurs, State A has territorial jurisdiction. Further complicating matters is the possibility that State A and State B might have different choice-of-law rules, leading to either both states or neither state having territorial jurisdiction over the act.”, p. 1313

⁸⁵² *Ibid.*, p. 1311-1312

⁸⁵³ Such as the humanitarian intervention, but this is open to criticism. Please see: Daphné Richemond, “Normativity in International Law: The Case of Unilateral Humanitarian Intervention”, *Yale Human Rights and Development Journal* Vol. 6, Issue 01 (2003), pp. 45-80; also please see *infra*. pp. 174-175

⁸⁵⁴ *R. v. Hape (2007)* 2 S.C.R. 292

⁸⁵⁵ “In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to co-operate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international co-operation and the comity of nations.” *R v. Hape*, para. 52

⁸⁵⁶ *Canada (Prime Minister) v. Khadr Oona (2010)* 1 S.S.C. 3 1, S.C.R. 44

Canadian Charter of Rights and Freedoms⁸⁵⁷ which has clear articles on legal rights regarding life, liberty and security of person. The question of extraterritorial jurisdiction has been raised with regard to the application of the respective Charter to the crimes committed in another country in alliance with the *Hape* case-law. Particularly for this case, the Supreme Court of Canada, affirming the *Hape*, sentenced, the application of international human rights laws can trigger the application of Canadian Charter and the victims can claim remedies provided under the Charter⁸⁵⁸. However, the Court did not specifically decide when does the international law obligations are becoming an exception allowing extraterritorial cases⁸⁵⁹.

In this sense, the UK follows a principle called “effective control” when a decision has to be taken on whether a State can establish extraterritorial jurisdiction, which is a concept also being used by several other jurisdictions. For instance, in 2010, the Supreme Court ruled in *Smith, R. v. Secretary of State for Defence*⁸⁶⁰ case, the Human Rights Act does not apply to British soldiers at all times when they are serving abroad. The British laws would only apply if there is an “effective control” of the State in that territory, which according to the case would mean there should be a physical British military base. In this case specifically, the soldier died outside of the military base has not considered dead within the jurisdiction of the United Kingdom⁸⁶¹. In alignment, the ECtHR stated the ECHR would apply to extraterritorial cases if there is “effective control” of the member state in that territory⁸⁶².

However, these national laws are specific for situations that we see a State violating human rights and there are specific human rights instruments, national or international, in place for claimants to find grounds to claim for remedies. When a corporation abuses a human right

⁸⁵⁷ Canadian Charter of Rights and Freedoms (1982)

⁸⁵⁸ “As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the Charter. International customary law and the principle of comity of nations generally prevent the Charter from applying to the actions of Canadian officials operating outside of Canada. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations or fundamental human rights norms.” *Canada (Prime Minister) v. Khadr Oona* (2010), para. 14

⁸⁵⁹ Oona A. Hathaway et. al. “Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?” *Arizona State Law Journal* Vol. 43 (2011), p. 400

⁸⁶⁰ *R (on the application of Smith) v. Secretary of State for Defence*, [2010] UKSC 29, [2011] A.C. 1

⁸⁶¹ “The Court was also influenced by what it perceived as the illogicality of holding that Private Smith was within the jurisdiction when on military premises, but not when outside them: ‘...it is accepted that a British soldier is protected by the 1998 Act and the Convention when he is at a military base. In our judgment, it makes no sense to hold that he is not so protected when in an ambulance or in a truck or in the street or in the desert. There is no sensible reason for not holding that there is a sufficient link between the soldier as victim and the United Kingdom whether he is at a base or not. So too, if he is court-martialled for an act committed in Iraq, he should be entitled to the protection of article 6 of the Convention wherever the court martial takes place.’” *R. v. Secretary of State for Defence*, para. 36

⁸⁶² *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 346 (2001).

outside the territory of the home state, can we still talk about “effective control” or demand extraterritorial justice?⁸⁶³

Under current circumstances, the answer to this question would be negative. In fact, Ruggie has mentioned this in the 2007 Report, as “international law firmly establishes that states have a duty to protect against nonstate human rights abuses *within their jurisdiction*, and that this duty extends to protection against abuses by business entities.⁸⁶⁴” and in the footnote it has been mentioned “beyond the national territory, the duty’s scope will vary depending on the State’s degree of control”. Indeed, that extraterritorial jurisdiction will be depended on what the state laws say with regard to exercising it, as we have seen in the case of the UK and Canada above. But there is no international obligation to exercise extraterritorial jurisdiction, with the exception of some specific laws not related to business and human rights. Ruggie indeed continues as “Current guidance from the Committees suggests that the treaties do not require States to exercise extraterritorial jurisdiction over business abuse. However, they are not prohibited from doing so⁸⁶⁵”. Following this encouragement, extraterritorial jurisdiction came to the table as a solution to the business and human rights matters. It has been mentioned in the UNGPs as well⁸⁶⁶.

Of course, here we have the issue of how we can harmonize international laws and state discretion on extraterritorial jurisdiction⁸⁶⁷. For instance, international law can allow extraterritorial jurisdiction as we see in the case of humanitarian intervention but still there would be no clear-cut definition⁸⁶⁸. The laws allow a state to intervene to another states territory to put an end to human rights abuses occurring in that territory with military forces⁸⁶⁹.

⁸⁶³ Alexander Layton and Angharad M. Parry, “Extraterritorial Jurisdiction – European Responses”, *Houston Journal of International Law* Vol. 26(2) (2004), pp. 309-322

⁸⁶⁴ A/HRC/4/035, para. 10

⁸⁶⁵ A/HRC/4/035, para. 15

⁸⁶⁶ Commentary, Principle 2: “At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.”

⁸⁶⁷ For a study on unifying extraterritorial jurisdiction: Anthony J. Colangelo, “A Unified Approach to Extraterritoriality”, *Virginia Law Review* Vol. 97 No. 5 (September 2011), pp. 1019-1109

⁸⁶⁸ On humanitarian intervention please see: Allen Buchanan, “Reforming International Law of Humanitarian Intervention” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* edited by J.L. Holzgrefe and Robert O. Keohane (United Kingdom: Cambridge University Press, 2003), pp. 130-173

⁸⁶⁹ Christine Chinkin and Mary Kaldor, “The Doctrine of ‘Humanitarian Intervention’: and how it exposes the absence of any serious intention to help Syrians” (22 April 2018), can be found at: <https://www.opendemocracy.net/en/doctrine-of-humanitarian-intervention-and-how-it-exposes-absence-of-an/>, accessed December 2019

According to the UN Charter, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state⁸⁷⁰", but the UN Charter would allow intervention of the international community if a state fails to protect their citizens from "genocide, war crimes, ethnic cleansing and crimes against humanity". In a Report published in 2001 this "responsibility to protect"⁸⁷¹ has been enlarged in a manner that would involve "responsibility to prevent"⁸⁷². However, whenever an intervention occurs or does not occur, controversy arises. Especially the military acts of States without a UN Security Council resolution are highly contested under international law⁸⁷³. And this could give rise to the same situation on how extraterritorial jurisdiction would be received when it comes to business and human rights cases.

Despite exercising extraterritorial jurisdiction for business and human rights cases are not as 'serious' as humanitarian intervention cases, still the uncertainty around the discussions of humanitarian intervention can give us guidance on what could happen when a court needs to decide on a business and human rights case heavily exercising extraterritorial jurisdiction. Besides that, exercising extraterritorial jurisdiction for business and human rights cases has been supported by some scholars⁸⁷⁴ and in a relatively minor scale, by some

⁸⁷⁰ The UN Charter, Article 2(7)

⁸⁷¹ Jutta Brunée and Stephen J Toope, "Norms, Institutions and UN Reform: The Responsibility to Protect", *Journal of International Law and International Relations*, Vol. 2 (2006), pp. 121-137

⁸⁷² Report of the International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" (Canada: International Development Research Center, December 2001)

⁸⁷³ Jayshree Bajoria and Robert MacMahon, "The Dilemma of Humanitarian Intervention" (12 June 2013), [<https://www.cfr.org/backgrounder/dilemma-humanitarian-intervention>], accessed December 2019

⁸⁷⁴ According to Surya Deva "in the area of corporate human rights violations, the current regulatory framework is predominantly territorial" and he defends that the current model falls short when dealing with business and human rights issues. There is no international regulatory regime to put companies under liability and hold them accountable for human rights violations. The attempts to create one has failed, and extraterritorial jurisdiction might be a solution for the ever-pressing problem. Surya Deva, "Corporate Human Rights Violations: A Case for Extraterritorial Jurisdiction", *Handbook of the Philosophical Foundations of Business Ethics*, edited by Christoph Luetge, (New York: Springer, 2012), pp. 1079-1080; In the same line, McCorquodale and Simons stated that the extraterritorial jurisdiction is already applicable when the State is involved with the company when the corporation is acting under the instruction, direction or control of the State or when they are exercising elements of governmental authority. And for the rest of the corporation's extraterritorial jurisdiction is considerable since there already certain laws in growing number areas of law. Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", *The Modern Law Review* Vol. 70, Issue 04 (2007), pp.598-625; Also in defense of the extraterritorial jurisdiction from the environmental law point of view, please see: Tetsuya Morimoto, "Growing Industrialization and Our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Law to Transnational Corporations Abroad", *Utrecht Law Review* Vol. 1, Issue 02 (December 2005), pp. 134-159

States⁸⁷⁵. However, the serious application of extraterritorial jurisdiction for business and human rights cases in the courts are still an area needs further discussion and debate.

6.2. Alien Tort Statute of the US

The most pointed domestic law as an example of extraterritorial jurisdiction would be the Alien Tort Statute of the US. This regulation was issued as federal law more than two hundred years ago, in 1789. It was written in a way would allow non-US nationals to bring claims to US courts when there is a tort activity. Accordingly, “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States⁸⁷⁶” can be brought before the US Courts.

This article of the Alien Tort Statute is significant because the wording makes it possible for foreigners (or as indicated in the text, “aliens”) to open a case that is a victim of tort activity according to not only the US laws but also the “law of nations”.

The term “law of nations” is open to interpretation, since this Statute has been issued years before the establishment of the UN or acceptance of modern international law documents. According to the first sources published before the acceptance of the Alien Tort Statute, “law of nations” was identified as the natural law⁸⁷⁷, which is a concept that is universal for all civilized inhabitants of the world. When the Alien Tort Statute was first published, the violation of law of nations were “widely recognized as common-law crimes”⁸⁷⁸.

In 1980, the US Court of Appeals in the case *Filartiga v. Pena-Irala*⁸⁷⁹ decided that the “law of nations” would be interpreted as “modern international law”, and if the defendant is within the jurisdiction of the US courts, the court might decide on the case⁸⁸⁰. After *Filartiga* there

⁸⁷⁵ For instance, Statements for further investigation can be seen in the NAPs of France, Denmark, Finland, and Slovenia. Germany states that the victims can already bring cases to the German courts for civil remedies, so does Sweden for most serious crimes. On the other hand, it could be seen that the Netherlands would be rather sceptical for the extraterritorial jurisdiction. Some NAPs do not even mention efforts regarding extraterritorial jurisdiction.

⁸⁷⁶ US Judiciary Act, ch. 20 Art. 9(1) (1789)

⁸⁷⁷ “Guided by Blackstone the Founding Generation viewed the law of nations as resting on natural law. He explained that “the law of nations is a system or rules deducible by natural reason and established by universal consent among civilized inhabitants of the world.” William S. Dodge, “The Historical Origins of the Alien Tort Statute: A Response to the ‘Originalists’”, *Hastings International and Comparative Law Review* Vol. 19 (1996), p. 226

⁸⁷⁸ Dodge, “The Historical Origins of the Alien Tort Statute: A Response to the ‘Originalists’”, p. 232

⁸⁷⁹ *Filartiga v. Pena-Irala*, 630 F. 2^d 876, (1980). In this case all parties were Paraguayan citizens, and the suit was claiming that the defendant Pena-Irala had tortured plaintiff Filartiga’s decedent to death. “Torture” was accepted a violation of law of nations.

⁸⁸⁰ Anne-Marie Burley, “The Alien Tort Statute and The Judiciary Act of 1789: A Badge of Honor”, *American Journal of International Law* Vol. 83 (1989), p. 462

were several more cases came in front of the US Courts and the Alien Tort Statute has been celebrated as a “badge of honour”, since it has been considered the US was doing their duty to the international community⁸⁸¹.

On the other hand, the extraterritorial reach and the scope of this article had not been considered carefully only until recently. The respective article in the Alien Tort Statute can be interpreted as involving any type of alien, including the non-state actors and the business enterprises that have operations outside of US. In fact, this article has been used by some lawyers to bring cases against business enterprises in breach of international human rights law outside of the territory of the US, as we will see in the cases of *Kiobel v. Dutch Petroleum* and *Jesner v. Arab Bank*. However, the US Supreme Court decided for this type of abuses negatively, resolving the important presumption of the extraterritorial reach of the Alien Tort Statute⁸⁸², and narrowing its application significantly⁸⁸³.

In 2013, Nigerian nationals initiated a case on the grounds that Royal Dutch Petroleum was abusing the rights of the local residents at the oil field they were developing in Nigeria. The claims included serious human rights abuses conducted by the Nigerian Security forces, hired by the Royal Dutch Petroleum⁸⁸⁴. In *Kiobel v. Royal Dutch Petroleum Co.*⁸⁸⁵, the US Supreme Court decided that the claims brought by the plaintiffs have occurred outside of US, they do not “touch and concern” the US territory, the defendant did not have sufficient relation with the US⁸⁸⁶ and therefore the court does not have the authority to hear the case even if the

⁸⁸¹ “Filartiga did not answer all the questions. It did, however vindicate a vision of the United States at the forefront of efforts to strengthen the rule of law in international as well as domestic affairs. This posture remains a matter of national honor, a source of justifiable national pride. It also accords with a broader concept of accountability to the international community as an obligation to a functioning society constituted under a common legal system, rather than as one owed simply to its individual members states. Here again, duty ultimately reinforces interest. A fundamental premise of modern human rights law, based on the experience of the 1930s, is that internal repression breeds external insecurity. Thus, failure to secure minimum human rights standards will eventually jeopardize the international system and all its participants.”, Burley, “The Alien Tort Statute and The Judiciary Act of 1789: A Badge of Honor”, p. 493

⁸⁸² David P. Stewart and Ingrid Wuerth, “*Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute”, *American Journal of International Law*, Vol. 107, No. 3 (July 2013), p. 603

⁸⁸³ Norton Rose Fullbright, “Alien Tort Statute cannot be used to sue corporations” (26 April 2018) [<https://www.nortonrosefulbright.com/en/knowledge/publications/c158e451/alien-tort-statute-cannot-be-used-to-sue-foreign-corporations>], accessed December 2019

⁸⁸⁴ According to petitioners, respondents violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.

⁸⁸⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)

⁸⁸⁶ The Royal Dutch Petroleum Company is incorporated in the Netherlands and they only had “corporate presence” in the US.

defendant had violated the fundamental human rights deriving from international law. Consequently, court ruled out the extraterritorial application of the Alien Tort Statute⁸⁸⁷ and only narrowed it down to the cases that touches and concerns the US. Unsurprisingly, this created certain debates⁸⁸⁸.

Leaving aside the test of “touch and concern”, what has been not decided with *Kiobel v. Royal Dutch Petroleum* is whether Alien Tort Statute covers business enterprises⁸⁸⁹. In 2018, US Supreme Court also narrowed the application of Alien Tort Statute for such claims by excluding foreign corporations from the scope of Alien Tort Statute in *Jesner v. Arab Bank*⁸⁹⁰.

In *Jesner v. Arab Bank*, the plaintiffs claimed the Arab Bank, located in Jordan with a branch office in New York, was financing terrorism and engaging in genocide and crimes against humanity through their New York Office. They claimed it was unquestionable that the Alien Tort Statute also covered corporations and therefore the US Courts should be eligible to look into the case. The majority reasoning for the dismissal of the case was there was no sufficient ground that international law covers the corporations⁸⁹¹ and therefore the Alien Tort Statute would not be applicable.

In *Kiobel v. Royal Dutch Petroleum*, the claims brought under Alien Tort Statute with regard to business and human rights were already narrowed down⁸⁹². With *Jesner v. Arab Bank*, the

⁸⁸⁷ It has been held by the Court that nothing in the ATS’s text evinces a clear indication of extraterritorial reach. Violations of the law of nations affecting aliens can occur either within or outside the United States. And generic terms, like “any” in the phrase “any civil action,” do not rebut the presumption against extraterritoriality.

⁸⁸⁸ “In truth, however, the statute is difficult, and not just because it is a 200-year-old textual cipher. The real difficulty is the policy conflict behind the ATS. Both sides of the debate capture important and deeply held views: on one side, the need to redress horrific violations of the most fundamental human rights, and on the other, the view that many of these cases have little to do with the United States, may impose foreign policy costs, and may not enhance net social welfare for those most harmed. At a high level of abstraction, there is a parallel to the now pressing question of what the United States and other countries should or should not do in Syria to enforce international human rights and humanitarian law. From the perspective of international law, this division tracks in some respects the differences between “modern” customary international law with its normative impetus and “traditional” custom with its basis on the sovereign equality of states, predictability, and stability. Many individuals identify strongly with one side of this debate or the other, which is part of what makes the debate difficult to resolve collectively” Stewart and Wuerth, “*Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*”, p. 620

⁸⁸⁹ The Supreme Court in *Kiobel* resolved the case on the alternatively, because “all the relevant conduct took place outside the United States”, the claims did not ‘touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application.”

⁸⁹⁰ *Jesner et al. v. Arab Bank*, PLC (2017)

⁸⁹¹ As stated within the decision: “The singular achievement of international law since the Second World War has come in the area of human rights,” where international law now imposes duties on individuals as well as nation-states. It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities.”

⁸⁹² Dodge explains that After *Kiobel*, if a business and human rights case wishes to be successful they have to go through a number of steps: “establishing personal jurisdiction, convincing the court that corporations are liable to

US Supreme Court goes even further and significantly narrows the way for suing corporations under the Alien Tort Statute, with any possible human rights claims⁸⁹³, failing hopes for the Alien Tort Statute to become a leading example for extraterritorial reach of a State jurisdiction⁸⁹⁴.

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

In 2011, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (“**Maastricht Principles**”)⁸⁹⁵ was drafted by a group of experts in Maastricht⁸⁹⁶. The main idea behind drafting these principles was to fill in a gap missing in the international human rights system⁸⁹⁷, which would be to assure the universality of human rights through the extraterritorial protection⁸⁹⁸. It has to be pointed out, this is not a

suit under ATS, proving the facts necessary to meet the applicable standard for aiding and abetting liability and showing that conduct in the US is sufficient to displace the presumption against extraterritoriality.” William S. Dodge, “Business and Human Rights Litigation in US courts before and after Kiobel” in *Business and Human Rights: From Principles to Practice*, edited by Dorothée Baumann-Pauly and Justine Nolan (Abingdon: Routledge, 2016), p. 251

⁸⁹³ “After *Jesner*, the foreign subsidiaries of US parent companies are not liable to suit under the ATS. This means that the plaintiffs must either convince the court to attribute the tortious conduct of the subsidiary to the parent company or find tortious conduct on the part of the parent itself.” William S. Dodge, “Developments in the Field: Corporate Liability Under US Alien Tort Statute: A Comment on *Jesner v Arab Bank*”, *Business and Human Rights Journal*, Vol. 4 (2019), p. 136; “In *Jesner*, the US Supreme Court avoided the erroneous conclusion that customary international law norms of human rights law do not apply to corporations. Instead, the Court placed yet another limitation on the ATS cause of action, holding that foreign corporations are not subject to liability. Technically, *Jesner* preserves the possibility of ATS suits against US corporations. However, as a practical matter, such suits will have to show: (i) that the US corporation, not just its foreign subsidiary, violated customary international law; (ii) if the claim is for aiding and abetting, that the US corporation had the requisite *mens rea*; and (iii) that there was sufficient conduct in the US to satisfy *Kiobel*’s ‘touch and concern’ test. So, while corporations continue to be subject to customary international law norms of human rights law, the prospects of holding them liable for violating those norms in US courts have faded nearly to vanishing point.”, p. 136-137

⁸⁹⁴ William S. Dodge, “Understanding Presumption Against Extraterritoriality”, *Berkeley Journal of International Law* Vol. 16(85) (1998), pp. 85-125

⁸⁹⁵ See the Text of Maastricht Principles: [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23], accessed December 2019

⁸⁹⁶ “The experts came from universities and organizations located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council.” See the signatories that adopted the Maastricht Principles in their individual capacity in the Annex of the document. “The Principles were adopted by the experts in their individual capacity. Organizations are listed with the names of experts for the purpose of identification rather than endorsement of the Principles by their institution.”

⁸⁹⁷ “Extraterritorial obligations (ETOs) are a missing link in the universal human rights protection system. Without ETOs, human rights cannot assume proper role as the legal bases for regulating globalization and ensuring universal protection of all people and groups. A consistent realization of ETOs can generate an enabling environment for Economic, Social and Cultural Rights and guarantee the primacy of human rights among competing sources of international law. ETOs provide regulation of transnational corporations, hold Inter-Governmental Organizations accountable for their impacts, and ultimately stop the destruction of eco-systems and climate.” Maastricht Principles, Introduction

⁸⁹⁸ Vandenhole (a signatory for the Principles as well) explains the need for Maastricht Principles as follows: “Why this new set of principles? Human rights law is increasingly challenged by developments in real life: while

legal document but rather “clarifications” about the extraterritorial obligations of states based on the current standing international law⁸⁹⁹. Accordingly, this type of ‘extension of state responsibility’ is not new, it has been used by international law before, such as under CEDAW recommendations⁹⁰⁰. Similarly, UN Committee on Economic, Social and Cultural Rights encourages the States to pay more attention to corporate actions abroad⁹⁰¹. The drafters of this document were already supporting the idea international law poses obligations on states to establish extraterritorial jurisdiction on certain matters.

Accordingly, Maastricht Principles states “all States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritoriality⁹⁰²”. This does not mean every State is responsible for ensuring the human rights of every human being in the world. “Rather, Principle 3 indicates states may have extraterritorial obligations in relation to all human rights, in the circumstances and under the conditions that these Principles identify”⁹⁰³, and “these principles” that has been

sovereign States legally bear the primary responsibility for human rights violations, they are not always able to live up to their human rights obligations. When it comes to issues of poverty and the lack of realisation of economic, social and cultural rights, the territorial State sits not always (alone) in the driving seat: decisions from other, more powerful actors, such as international (financial) organisations, transnational corporations and/or other States may have a much larger and profound impact on the realisation of socio-economic human rights than the territorial State has. Likewise, States may be subject to acts of other States that act outside their own territory, in military or civil operations, through development cooperation or otherwise. These new realities pose fundamental challenges to human rights law. In practice, human rights law may not be able to properly address these new situations, and therefore runs a risk of marginalisation in endeavours to bring about (social) justice. Conceptually, the decentralisation of the territorial State in a good number of instances necessitates a fundamental re-thinking of a basic tenet of human rights law, i.e. that human rights obligations are primarily if not exclusively incumbent on the territorial State. New duty-bearers such as foreign States, corporations and international organisations need to be integrated into the human rights legal regime.” Wouter Vandenhoe, “Beyond Territoriality: The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights”, *Netherlands Quarterly of Human Rights*, Vol. 29/4 (2011)

⁸⁹⁹ “The Maastricht Principles do not purport to establish new elements of human rights law.” Maastricht Principles, Introduction

⁹⁰⁰ Under the General Recommendation of CEDAW for violence against women, the measures to eliminate discrimination against women by any person, organization or enterprise should be taken by States and in addition, the States may also be responsible for the private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. Convention on the Elimination of All Forms of Discrimination against Women [http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm], accessed December 2019

⁹⁰¹ For instance, under General Comment 15, paragraph 33 issued by the Committee states that: “Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.” General Comment no. 15: The Right to Water (Arts. 11 and 12 of the Covenant), Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11), [http://www.refworld.org/publisher,CESCR,GENERAL,,4538838d11,0.html], accessed December 2019

⁹⁰² Maastricht Principles, Principle 3.

⁹⁰³ Maastricht Principles, Commentary of Principle 3.

referred to would be the Principle 9, where it has been stated that extraterritorial obligations arise when:

- “a) Situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- b) Situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c) Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.⁹⁰⁴”

The remarkable point about the Maastricht Principles is it does not only focus on the extraterritorial obligation of the State, but also on the non-state actors and their human rights obligations⁹⁰⁵. Indeed, it extends the responsibilities of States to non-state actors acting under the authority of the State⁹⁰⁶ and it does so by building this under the “current standing of international law”.

Principle 24 mentions that States must take necessary measures to ensure non-State actors, including the transnational businesses and other business enterprises, to not impair the enjoyment of economic, social and cultural rights⁹⁰⁷. Within the commentary, it has been stated “outside the exceptional circumstances, only the conduct of the state’s organs may be attributed to the state and thus engage its responsibility; however, such conduct includes the failure of the state to adopt regulations or to implement them effectively where such a failure is in

⁹⁰⁴ Maastricht Principles, Principle 9.

⁹⁰⁵ “Some of the salient discussion points, either in the lead-up to the Maastricht expert meeting, or during the meeting, include the following. First of all, the scope of the obligations – and the most appropriate terminology – had to be decided on. Should there be an exclusive focus on extraterritorial obligations of States, or should the Principles also include human rights obligations of non-State actors? And if the focus is on extraterritorial obligations of States, should the Principles be confined to extraterritorial obligations *sensu stricto*, or also include global obligations? The Maastricht Principles concern only extraterritorial obligations of States, although the drafters felt some temptation to go beyond that scope in some of the Principles, e.g. with regard to corporations and other business enterprises, and with regard to international organisations” Vandenhoe, “Beyond Territoriality: The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights”, p. 432

⁹⁰⁶ Maastricht Principles, Principle 12: “State responsibility extends to:

a) Acts and omissions of non-State actors acting on the instructions or under the direction or control of the State; and b) Acts and omissions of persons or entities which are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority, provided those persons or entities are acting in that capacity in the particular instance.”

⁹⁰⁷ Maastricht Principles, Principle 24: “All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.”

contravention of the human rights undertakings of the state⁹⁰⁸” and therefore, “the duty of the state to protect human rights by regulating the conduct of private actors extends to situations where such conduct may lead to violations of human rights in the territory of another state⁹⁰⁹”.

The specific circumstances have been established in the following principle. Principle 25 states the following:

“States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

- a. The harm and threat of harm originates or occurs on its territory;
- b. Where the non-state actor has the nationality of the State concerned;
- c. As regards business enterprises, where the corporation, or its parent or controlling company, has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
- d. Where there is a reasonable link between State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor’s activities are carried out in that State’s territory;
- e. Where any conduct impairing economic, social and cultural rights constitutes a violation of peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.⁹¹⁰”

States are free to adopt legislation allowing exercise of extraterritorial jurisdiction and the regulations must include the aforementioned circumstances, since international law does not prohibit them from doing so⁹¹¹.

It is possible to find certain domestic regulations allowing extraterritorial jurisdiction for the paragraphs (a), (b), and (c) today⁹¹², the paragraphs (d) and (e) stretches the extraterritorial jurisdiction further than what has been typically allowed by the domestic legislation. Paragraph (d) is about the cooperation among States, which may not be covered by the first three

⁹⁰⁸ Olivier de Schutter et. al, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Cultural and Social Rights”, *Human Rights Quarterly*, Vol. 34 (2012), p. 1134

⁹⁰⁹ *Ibid.*, p. 1135

⁹¹⁰ Maastricht Principles, Principle 25

⁹¹¹ “Indeed, in the 1927 *Lotus* Case, the Permanent Court of International Justice had expressed the view in dicta that states were, in principle, free to regulate matters situated outside their national territory unless specific rules of international law prohibited such exercise of extraterritorial jurisdiction.” de Schutter et. al, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Cultural and Social Rights”, p. 1138

⁹¹² Because this is a way of regulating the conducts of nationals abroad. Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Cultural and Social Rights”, p. 1139

paragraphs⁹¹³. For instance, when the State's need to enforce certain decision in another State like extracting evidence or listening to witnesses, seize assets etc.⁹¹⁴ in a manner not be considered as an interference to the domestic affairs. In fact, this type of cooperation has also been mirrored in the Revised Draft within the Article 10⁹¹⁵.

Paragraph (e) on the other hand, states the extraterritorial jurisdiction must be exercised when a crime against the international law exists, such as war crimes, crimes against humanity, genocide, torture and forced disappearances, where states must contribute to combating these violations anyhow, under the principle of universality⁹¹⁶.

To continue, we have to mention that Maastricht Principles is a proposed set of principles by experts guiding stakeholders with regard to exercising extraterritorial jurisdiction particularly to protect economic, social and cultural rights. However, these principles clearly do not have any legal significance and despite being endorsed by important individuals, they do not possess any political or legal strength. Although they definitely contribute to the discussions in this area.

6.4. The Feasibility of Mandatory Extraterritorial Jurisdiction as a Solution for Business and Human Rights Cases

It might be the case there are no international law restrictions on encouraging states to exercise extraterritorial jurisdiction within the area of business and human rights⁹¹⁷. But to solve the problems around business and human rights cases, we disagree this is the most effective solution. Here we would like to mention certain points as a matter of criticism with regard to exercising extraterritorial jurisdiction and allowing such practice through international laws when it comes to business and human rights cases.

Firstly, there is a possibility that states may exploit the allowance extraterritorial jurisdiction, which we also see with the cases regarding humanitarian intervention⁹¹⁸. There needs to be

⁹¹³ *Ibid.*, p. 1141

⁹¹⁴ *Ibid.*, p. 1141

⁹¹⁵ The Revised Draft, Article 10(1): "State Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial and other proceedings in relation to claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations."

⁹¹⁶ de Schutter et. al, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Cultural and Social Rights", p. 1142-1143

⁹¹⁷ Jennifer A. Zerk "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas." *Corporate Social Responsibility Initiative Working Paper* No. 59 (2010)

⁹¹⁸ *supra*. pp. 174-175

certain and clear principles on how to exercise extraterritorial jurisdiction, otherwise there will always be controversy on having decisions by foreign courts on matters involve foreign companies. But furthermore, as Mattei and Lena stated, extraterritorial jurisdiction may turn into the spread of ideas of the western states through their jurisdiction⁹¹⁹. Considering the global politics is constructed upon western ideals primarily⁹²⁰, there is no protection against such situation from happening with regard to business and human rights cases⁹²¹. It has to be also kept in mind the eastern states are also turning into major powerhouses and they also have their companies going abroad and making investments⁹²². Would it be acceptable for the US for instance to accept a Chinese court to decide on a matter that happened within their national territories? Will the American victims go to Chinese courts to sue the parent company and will they get properly compensated by these Courts? We highly doubt this would be as easy as imagining a Chinese victim to go to an American court when a US corporation gets involved in human rights abuses, with the current outlook on international relations. Any type of solution on the table with regard to business and human rights and access to remedy, should also take future scenarios into consideration and accommodate different ideals.

Second, the exercise of extraterritorial jurisdiction needs the consent of the other states, which might again be problematic. As mentioned by the International Law Commission,

“The assertion of extraterritorial jurisdiction by a State is entitled to recognition by other States only to the extent that it is consistent with international law. In the event that one State exercises extraterritorial jurisdiction that another State judges excessive, the other State may oppose such an exercise of jurisdiction in a number of different ways. Examples of such opposition have included diplomatic protests; non-recognition of laws, orders and judgments; legislative measures such as “blocking statutes” and “claw-back statutes”; judicial measures such as injunctions; and the institution of international proceedings.⁹²³”

⁹¹⁹ Ugo Mattei and Jeffrey Lena, “U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications”, *Hastings International and Comparative Law Review*, Vol. 24 (2001), pp. 381-400; Austen L. Parrish, “Reclaiming International Law from Extraterritoriality”, *Minnesota Law Review* Vol. 93 (2009), p. 866

⁹²⁰ Please see: Chapter I(2)

⁹²¹ Rachel Chambers argues that in case of an acceptance of the extraterritorial jurisdiction for human rights cases, there needs to be principles established around how this power will be used. Rachel Chambers, “An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional dilemma raised/created by the use of the extraterritorial techniques” *Utrecht Law Review* Vol. 14 Issue 02 (2018), pp. 22-39

⁹²² Parrish, “Reclaiming International Law from Extraterritoriality”, p. 860

⁹²³ UN, Report of the International Law Commission, Fifty-eighth session, (1 May-9 June and 3 July-11 August 2006), pp. 529-530

There is always the sensitivity of getting caught in the web of foreign affairs and politics when deciding upon a case of business and human rights which might affect the fairness or the applicability of a legal decision⁹²⁴. Furthermore, as International Law Commission suggested in the quote above, the outcome of a case decided by a foreign state court may invoke some negative political responses, that might not be favourable for neither party.

Third, even though setting up extraterritorial jurisdiction might be an easy solution to address business and human rights claims, from the victims' point of view, going to a foreign court might be extremely costly, considering the victims are mostly from developing or least developed countries do not have enough financial resources to cover judicial proceedings in developed countries. It would be very naïve to accept a victim living in the surrounding villages of a less developed country where the corporation is operating, has the means to go to a court that is located on the other side of the world and speaks a foreign language and operates on foreign laws to ask for protection⁹²⁵.

Lastly, allowing extraterritorial jurisdiction may not influence the behaviours of the companies after all. As Bernaz explains:

“the exercise by certain states of extraterritorial adjudicative jurisdiction, though positive from a human rights point of view is by no means the magic potion that will firmly entrench human rights into corporate culture. By definition, lawsuits are meant to be the exception and while arguably they may have an influence on behaviours, they do not adequately address systemic problems which have to do with how corporations work when operating abroad and not with relatively isolated incidents, however serious they may be.⁹²⁶”

We would still be needing the voluntary initiatives assuring the corporations are aligning themselves with human rights standards⁹²⁷. The exercise of extraterritorial jurisdiction may assist cases with gross human rights violations and possibly the ones pressured by the civil society or attracts a lot of media attention⁹²⁸. The smaller cases may not even be addressed.

⁹²⁴ Parrish, “Reclaiming International Law from Extraterritoriality”, pp. 864-865

⁹²⁵ Even though not covered under this thesis, the Revised Draft actually tries to create a fund for the victims. The Revised Draft, Article 13: “States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims. This Fund shall be established at most after (X) years of the entry into force of this (Legally Binding Instrument). The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund.”

⁹²⁶ Nadia Bernaz, “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?”, *Journal of Business Ethics* Vol 117 (2013), p. 509

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid.*

It could be stated extraterritorial jurisdiction might solve some of the problems of business and human rights adjudication only in the case of application by all states in a respectful manner. Still considering the complexity of the business operations and supply chains, first of all, identifying the jurisdictions that would analyse the cases might be problematic. Furthermore, whether this would be a long-term resolution to remedy problems is highly debatable⁹²⁹. The world evolves in such a fast phase, the developing countries are becoming dominant in world politics and allowing the states decide on global matters on with the national mindset might not be the most effective solution. Still, considering that international law is slow in progress, this might be an easier option to create at least some sort of protection for the victims of abuse in the short term⁹³⁰.

7. THE INEFFECTIVENESS OF THE INTERNATIONAL COURT MECHANISMS

As explained in Chapter III, the Revised Draft heavily relies on States and their ability to address the corporate human rights abuses, and we do believe there are issues with giving too much power on States and their ability to exercise extraterritorial jurisdiction⁹³¹. One of the criticisms made to the Revised Draft was, it does not mention a court mechanism to solve the cases of business and human rights, in case the state courts are not doing their job properly⁹³². That being said, it is debatable whether a referral to or an establishment of an international court mechanism would solve the access to remedy problems faced by the victims considering the effectiveness of international jurisdiction and international court mechanisms are debated issues under the international law⁹³³.

7.1. An Overview of the International Court Mechanisms

International law has been built upon the goodwill of the States that they would comply with the laws created to maintain the international order and peace. Nevertheless, there are few court

⁹²⁹ Parrish, "Reclaiming International Law from Extraterritoriality", p. 864

⁹³⁰ For a consenting opinion for exercising extraterritorial jurisdiction: McCorquodale and Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", pp. 598-625

⁹³¹ On extraterritorial jurisdiction, please see: Chapter IV(6); also please see (on an analysis of the *Lotus* case): Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, pp. 11-17

⁹³² Oribhador, "Revised draft UN Treaty on business and human rights: A few steps forwards, a few unanswered questions"

⁹³³ Yuval Shany, *The Completing Jurisdictions of International Courts and Tribunals*, (United States: Oxford University Press, 2003); Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society*, (United Kingdom: Cambridge University Press, 2004); Chris de Cooker ed., *Accountability, Investigation and Due Process in International Organizations*, (The Netherlands: Martinus Nijhoff Publishers, 2003); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (United States: Oxford University Press, 2003)

mechanisms at the international level⁹³⁴ to make sure States are complying with the treaties they abide themselves to⁹³⁵, but most of the time the enforcement is being done by several complaint, reporting or sanctioning bodies⁹³⁶. In case there needs to be a more serious effort to make sure the states are acting in compliance with the treaty, treaties decide upon the establishment of a specialised international court to address the disputes that might arise from these respective treaties, as we see in the case of UNCLOS or GATT⁹³⁷. These specialized courts may have different hearing procedures. They might be organized as a traditional court, similar to the ones at the national levels, or as an arbitration court, mostly looking after the cases related to investment and trade⁹³⁸.

But these court mechanisms mostly being used as a last resort. Before taking the matter to international courts, we mostly see States acting on their own, not leaving the disputed issue to the hands of an international organization or a court⁹³⁹. Normally, a State would take actions involving economic or diplomatic measures, such as trade restrictions or cutting diplomatic ties when they decide another State does not comply with their international obligations⁹⁴⁰. Even though this could be a really effective way of enforcement of the international rules, the success of these measures would highly depend on the States involved in the dispute and how far they are willing to protect and comply with the international laws⁹⁴¹.

⁹³⁴ Mato de Campos et. al., *Organizações Internacionais*, pp. 131-133

⁹³⁵ Bacelar Gouveia, *Manual de Direito Internacional Público*, pp. 737-772

⁹³⁶ Jutta Brunée, “Enforcement Mechanisms in International Law and International Environmental Law” in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* edited by Ulrich Beyerlin et. al., (The Netherlands: Martinus Nijhoff Publishers, 2006), p. 6

⁹³⁷ The International Tribunal on the Law of the Sea and the WTO Dispute Settlement System has been established respectively to make sure the enforcement of these treaties. *Ibid.*, p. 5

⁹³⁸ Also being referred as ‘quasi-judicial’ processes. Quasi-judicial processes can be defined as “the process which nonjudicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures. C. Neal Tate and Torbjorn Vallinder ed., *The Global Expansion of Judicial Power*, (United States: New York University Press, 1995), p. 28

⁹³⁹ “While contemporary international law is still state centered in fundamental respects, the traditional conception of enforcement has come to be both tempered and widened in important ways. Arguably, states self-help options – countermeasures to a violation of their rights – no longer include forcible measures, except in the narrow circumstances of self-defense. But as the range of permissible countermeasures has narrowed, the range of potential enforcers of international law has grown. Self-help is no longer purely bilateral. Today, international law encompasses some obligations that are owed *erga omnes*, which entitle all states to take measures in response to a violation.” Brunée, “Enforcement Mechanisms in International Law and International Environmental Law”, p. 4

⁹⁴⁰ On economic warfare from a US Perspective: R.T. Taylor, *Economic Warfare: Sanctions, Embargo Busting, and Their Human Cost*, (United States: Northeastern University Press, 2001)

⁹⁴¹ In the *Barcelona Traction (Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32) case the ICJ stated that “An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of domestic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have legal interest in their protection; they are obligations *erga omnes*.”, however did not

To give a slightly detailed overview on the international courts, we will focus on International Court of Justice (“ICJ”), the principal judicial organ of the UN⁹⁴². ICJ was formed in 1945 and its headquarters are located in the Hague, the Netherlands. All the members of the UN are also members of the ICJ⁹⁴³. The Court consists of 15 independent judges⁹⁴⁴, coming from variety of nationalities and two of them cannot come from the same nationality⁹⁴⁵. The members are elected by the UN General Assembly and the Security Council according to a certain procedure established by the Statute⁹⁴⁶.

The State parties to the ICJ can bring cases to the ICJ with regard to all matters specially provided for in the UN Charter or in treaties and conventions in force⁹⁴⁷. The court has jurisdiction over all legal disputes concerning the interpretation of a treaty; any question of international law; the existence of any fact which would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation⁹⁴⁸.

The differentiation of the international court system from the national systems would be the decisions of the ICJ would not have a binding force except between the parties and in respect of that particular case⁹⁴⁹, meaning there is no *stare decisis* doctrine that would be applicable to ICJ decisions⁹⁵⁰. In fact, ICJ also delivered an opinion on the matter in the *Legality of the Threat or Use of Nuclear Weapons* stating that ICJ indeed cannot make laws and they cannot create precedents:

“Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather

state what would be the consequences of this right to protect would mean. More on this: M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, *Law and Contemporary Problems* Vol. 59 No. 4 (Autumn 1996), pp. 63-74

⁹⁴² UN Charter, Article 92

⁹⁴³ UN Charter, Article 93

⁹⁴⁴ The updated list can be found in the following link: [<https://www.icj-cij.org/en/current-members>], accessed December 2019

⁹⁴⁵ The Statute of International Court of Justice, Article 3

⁹⁴⁶ The Statute of International Court of Justice, Article 4-8; Bacelar Gouveia, *Manual de Direito Internacional Público*, pp. 740-741

⁹⁴⁷ The Statute of International Court of Justice, Article 36(1); Bacelar Gouveia, *Manual de Direito Internacional Público*, p. 741

⁹⁴⁸ The Statute of International Court of Justice, Article 36(2) Bacelar Gouveia, *Manual de Direito Internacional Público*, p. 742

⁹⁴⁹ The Statute of International Court of Justice, Article 59

⁹⁵⁰ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Revised ed., (United States: Routledge, 1997), p. 51

its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.⁹⁵¹

Whereas in theory, ICJ does not have to comply with its own past decisions, in practice the judges mostly decide differently⁹⁵². Article 38, 1(d) of the ICJ Statute allows the court to apply its previous judicial decisions while deciding on new disputes. Indeed, international courts ‘tend to prefer an integrated conception of international law to a fragmented one⁹⁵³’. This type of interaction we also can observe in the case-laws of the ECtHR and ECJ. ICJ as well, hesitates to overrule the its previous judgements. The court in fact, refers to its own previous judgements quite frequently⁹⁵⁴. In this sense, it could be claimed when a court decides upon a case, it is highly possible for the Court to rely on its previous judgements, *practically* creating precedents⁹⁵⁵.

On the other hand, when a decision has been taken by the ICJ, the enforcement of this decision would highly depend on the States and their willingness to comply with the respective judgement. We believe this affects the legal reliability of the Court extensively and clearly creates a legitimacy problem⁹⁵⁶. As Dixon points out:

“While a state cannot be compelled to use the ICJ for the resolution of a legal dispute, if a matter is referred to it, its award is binding on the parties and must be carried out. In this sense, the ICJ is primarily

⁹⁵¹ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion of 8 July 1996, [<https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>], accessed December 2019, para. 18

⁹⁵² Mohammed Shahabuddeen, *Precedent in the World Court*, (United Kingdom: Cambridge University Press, 2007), p. 2

⁹⁵³ Boyle and Chinkin, *The Making of International Law*, p. 311

⁹⁵⁴ In the *Kosovo* case, the ICJ Judges also stated that the Court should be acting in a coherent manner for creating predictability and consistency: “The choice of the Court has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options. First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.” *Legality of Use of Force*, Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby [<https://www.icj-cij.org/files/case-related/107/107-20041215-JUD-01-01-EN.pdf>], accessed December 2019, para. 3

⁹⁵⁵ Mohammed Shahabuddeen, *Precedent in the World Court*, pp. 234-241

⁹⁵⁶ On the legitimacy of International Courts: James Meernik, *International Tribunals and Human Security*, (United Kingdom: Rowman & Littlefield, 2016), pp. 129-158

concerned with the enforcement of international rights and duties, although the procedure by which states can be compelled to carry out awards of the Court is very limited. Such enforcement is by reference to the Security Council and it suffers from all of the defects associated with that body.⁹⁵⁷

However, ICJ does not particularly look after cases of human rights, because human rights matters are not occurring between States but rather between States and individuals. At the international level, the human rights enforcement is mostly done by “soft-law” initiatives⁹⁵⁸.

Under specific circumstances, we can observe specific types of courts could be formed for “self-containing” systems⁹⁵⁹. For instance, WTO has been formed for the proper implementation of the GATT and now serves as the main international arbitration court for the issues related to trade disputes⁹⁶⁰. When it comes to international investment law, no centralized investment court has been established but we see a reference to the investment arbitration courts within Bilateral Investment Agreements⁹⁶¹. It could be argued the international courts are being formed when there is a need, and they are being designed in accordance with the needs of the parties involved.

7.2. Proposed Solutions for International Court Mechanisms for Business and Human Rights

Besides the discussions on the extraterritorial jurisdiction for the business and human rights cases, we also see a few of proposals investigating the possibility of establishing different types

⁹⁵⁷ Martin Dixon, *Textbook on International Law*, 3rd ed. (United Kingdom: Blackstone Press Limited, 1998), p. 8

⁹⁵⁸ In the case of human rights, international law mostly relies on “soft-law” mechanisms. Yvonne M. Dutton, “Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms”, *University of Pennsylvania Journal of International Law*, Vol. 34(1) (2012), pp. 28-34

⁹⁵⁹ Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, pp. 99-103

⁹⁶⁰ There have been several occasions where human rights claims came in front of the arbitration courts, which highlighted the difficulties of reconciling economic needs and human rights commitments of States. Traditionally, WTO Dispute Settlement Body or Appellate Body does not decide on human rights matters. However, it is possible for the WTO to make decisions on human rights matters if they have been raised as a defence. “There appears to be broad agreement about the limits of WTO competence in that the jurisdiction of WTO panels is limited to claims made under the WTO agreements. So no claims can be brought to WTO dispute settlement procedures alleging breaches of international law, including breaches of human rights, which are not based on provisions of WTO agreements. WTO dispute settlement proceedings are therefore restricted to ruling on claims that are based on WTO agreements. But WTO dispute settlement panels can make decisions on trade matters specified in the WTO agreements that also involved non trade issues such as human rights issues, since this is part of their ‘implied’ or ‘incidental’ mandate required in order to settle disputes.” James Harrison, *The Human Rights Impact of the World Trade Organization*, (United Kingdom: Hart Publishing, 2007), p. 188

⁹⁶¹ Investment arbitration is a way of adjudication when there is the consent of the parties and hence, this makes the jurisdiction of the panels very limited. Therefore, even if an arbitration court decides on a human rights matter, this decision will be only binding on states. It is possible to bring human rights claims before the investment arbitration courts; however, this would be rather limited. Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, pp. 136-142

of international court mechanisms. It has to be mentioned these proposals would need the universal acceptance of the legal accountability of corporations under international human rights law, therefore they are long-shot solutions, but we do believe they are much more efficient solutions than relying solely on state mechanisms.

Here we will present the proposals of extending the jurisdiction of ICC to corporations, the establishment of a World Court of Human Rights, and the recent proposal on the establishment of an International Arbitration Court for the issues regarding business and human rights.

7.2.1. The Extension of the Jurisdiction of the International Criminal Court to Legal Entities

The Statute of Rome of ICC allows the court to exercise jurisdiction over only on individuals⁹⁶², in case of crimes of aggression, genocide, crimes against humanity and war crimes⁹⁶³.

The Statute of Rome does not allow the ICC to exercise jurisdiction over legal entities directly. The Article 25(1) clearly stated the Court has jurisdiction over only on “natural persons”, excluding the legal entities⁹⁶⁴. It has to be mentioned here that the corporate officials who have committed one of these crimes, not in relation with their legal entities, would be inside the jurisdiction of the ICC, they are clearly individuals and their criminal liability would still exist⁹⁶⁵.

That being said, during the negotiations of the creation of the ICC, the legal entities were to be included into the jurisdiction of the Court as could be seen in the early drafts of the Rome Statute:

“5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

⁹⁶² William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed. (United Kingdom: Cambridge University Press, 2004), p. 101

⁹⁶³ The Statute of Rome of ICC, Article 1; Bacelar Gouveia, *Manual de Direito Internacional Público*, p. 750; On each crime: Schabas, *An Introduction to the International Criminal Court*, pp. 26-66

⁹⁶⁴ For the Status of Individual under the Statute of Rome of ICC: Lamia Mekhemar, “The Status of the Individual in the Statute of the International Criminal Court” in *The Rome Statute of the International Criminal Court: A Challenge to Impunity* edited by Mauro Politi and Giuseppe Nesi, (United Kingdom: Ashgate, 2002), pp. 123-130

⁹⁶⁵ Sanjana Roy, *Jurisdiction of International Criminal Court* (January 15, 2013), pp. 5-6

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.⁹⁶⁶

During these discussions there was a deep divergence on the issue. In the end, the reference to legal entities were removed from the text of the Rome Statute⁹⁶⁷. With the current text of the Statute, it is not possible to add the legal entities within the jurisdiction of the ICC, since there is a clear emphasis on natural persons. This, however, is heavily criticised. There are situations where some corporations selling arms to violent groups, which causes the prolongation and violence of the conflicts in some zones of the world⁹⁶⁸ and reports show more violations caused by the corporations⁹⁶⁹. The legal entities who are selling these guns are not being brought before the ICC. They are also being caught into the enforcement gaps of the domestic legislations⁹⁷⁰. Since ICC was created to deal with the main individuals that bear the responsibility of the serious crimes⁹⁷¹, which excludes many people might have been involved in criminal activities or taking financial advantage of a violent activity that is taking place at a certain time.

Under the current legal regime, one of the feasible solutions bringing in some relief for the victims⁹⁷² of business and human rights crimes would be the extension of the jurisdiction of ICC to legal entities⁹⁷³. This would involve a change in the Statute of Rome and creates the

⁹⁶⁶ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (UN Doc. A/CONF.183/2/Add.1), Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, (Rome, 15 June-17 July 1998), p. 49

⁹⁶⁷ “There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.” UN Doc. A/CONF.183/2/Add.1, p. 49, note. 3

⁹⁶⁸ Larissa van den Henrik and Jernej Letnar Cernic, “Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again”, *Journal of International Criminal Justice* Vol. 8(3) (2010), p. 739

⁹⁶⁹ Human Rights Watch, “Ripe for Reform: Stemming Slovakia’s Arms Trade with Human Rights Abusers” (February 2004); “Afghanistan: Crisis of Impunity—The Role of Pakistan, Russia, and Iran in Fueling the Civil War” (July 2001); “Worldwide Production and Export of Cluster Munitions” (April 2005)

⁹⁷⁰ Henrik and Cernic, “Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again”, pp. 727-730

⁹⁷¹ Article 1 of the Statute of Rome: “It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”

⁹⁷² For an opinion on the “victim oriented” criminal proceedings procedure: André Ventura, “A Vitima e o Processo Penal: subsídios para uma compreensão jurídico-dogmática”, *Revista de Direito Público* No. 5 (Janeiro-Junho 2011), pp. 9-26

⁹⁷³ Martin-Joe Ezeudu, “Revisiting corporate violations of human rights in Nigeria’s Niger Delta region: Canvassing the potential role of the International Criminal Court”, *African Human Rights Law Journal* Vol. 11 (2011), pp. 23-56

necessity to amend Article 25(1) in a way to include the legal entities, as was proposed during the discussions. In fact, this solution might be one of the forerunners when it comes to creating some sort of corporate accountability for serious crimes, since it does not require a paradigm shift in understanding of the international law all together⁹⁷⁴, but a mere amendment to an already existing international treaty.

This solution, however, would clearly have a limited reach. The extension of the jurisdiction of ICC would only be applicable for the crimes indicated within the Statute of Rome⁹⁷⁵ and would be insufficient for the rest of the human rights abuses relatively less “serious” compared to war crimes, such as the ones occurring due to the mismanagement of supply chains. And considering the possibility of supply chain issues being occurred more frequently compared to crimes against humanity, we would still need to be out of a solution for the victims of this type of crimes. Therefore, this solution, being the most feasible, is also not the ideal.

7.2.2. Establishment of a World Court of Human Rights

In 2007, World Court of Human Rights was proposed by the legal scholar Manfred Nowak due to UN not having a court system for human rights⁹⁷⁶. According to him, considering that we already have a system at the European level, ECtHR, works efficiently and fulfilling the needs, a similar court at the international level would also have certain success⁹⁷⁷. It has been proposed this court would have with a similar structure to the ICC⁹⁷⁸.

According to this project, a World Court would be created by a treaty that would be ratified by States voluntarily⁹⁷⁹. But in addition, Nowak differentiated the World Court of Human Rights from other international courts by stating that this treaty would be open to ratification of the

⁹⁷⁴ Henrik and Cernic, “Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again”, p. 17; also please see: Chapter IV(3)

⁹⁷⁵ For more information please see: Nadia Bernaz, “Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient”, *Business and Human Rights Resource Centre*, [<https://www.business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient>] accessed December 2019

⁹⁷⁶ Manfred Nowak, “The Need for a World Court of Human Rights”, *Human Rights Law Review* 7 (2007), pp. 251-259

⁹⁷⁷ *Ibid.*, p. 251

⁹⁷⁸ *Ibid.*, p. 255

⁹⁷⁹ *Ibid.*

non-state actors as well⁹⁸⁰, to overcome the difficulty to holding Non-State actors accountable in relation to the international law⁹⁸¹.

“transnational corporations (...) might be invited and encouraged to accept the binding jurisdiction of the World Court in relation to selected human rights in the sphere of their respective influence, such as the prohibition of forced or child labour; the right to form and join trade unions; the right to collective bargaining; and the prohibition of discrimination. The World Court would not only be in a position to decide in a binding judgment whether or not a business corporation subject to its jurisdiction has violated any human right of an employee, a client or any other person affected, but it might also provide proper reparation to the victim concerned.”⁹⁸²

This would mean this proposed project might provide some mechanism to create legal accountability for corporate human rights cases⁹⁸³. Clearly, this is still a project and its success would highly depend on the support of the States. Furthermore, the voluntary nature of accepting the jurisdiction of this court, especially with regard to business enterprises would need a lot of diplomacy and lobbying work among the corporations to get them on board.

7.2.3. Establishment of an International Arbitration Court for Business and Human Rights

Another project for solving the enforcement issues around business and human rights is the proposal to establish an International Arbitration Court specifically for business and human rights cases⁹⁸⁴. This is a recent project that has been initiated by a group of scholars⁹⁸⁵. The project is still in its initial phase. The group has been published a paper regarding the outcome of the meeting they had in the Hague, in order identify some key issues. Accordingly, there were some initial key points made, including the connection between state-investor arbitration and business and human rights arbitration and substantive laws that would be applicable to the

⁹⁸⁰ *Ibid.*, p. 256-257

⁹⁸¹ Martin Scheinin, “International Organizations and Transnational Corporations at a World Court of Human Rights”, *Global Policy* Vol. 3 Issue 4 (November 2012), pp. 488-491

⁹⁸² Nowak, “The Need for a World Court of Human Rights”, pp. 256-257

⁹⁸³ For more on the World Court of Human Rights: Manfred Nowak, “On the Creation of World Court of Human Rights” *National Taiwan University Law Review* Vol. 7 (2012), pp. 259-291

⁹⁸⁴ For a similar arbitration court: Xabier Ezeizabarrena, “The Role if the International Court of Environmental Arbitration and Conciliation” in *Sustainable Justice: Reconciling Economic, Social and Environmental Law* edited by Marie-Claire Cordonier Segger and Judge C.G. Weeramantry, (The Netherlands: Martinus Nijhoff Publishers, 2005), pp. 505-512

⁹⁸⁵ Center for International Legal Cooperation, ‘The Hague Rules on Business and Human Rights Arbitration’, [<https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/>], accessed December 2019

business and human rights arbitration⁹⁸⁶. Following this, the Working Group has published the summary of the Consultations on the Hague Rules on Business and Human Rights Arbitration⁹⁸⁷, another round of consultations was held in September 2019.

This project has some positive aspects to it. First of all, arbitration courts are preferred by corporations for several reasons, since they are directly accessible. Unlike the international courts, national remedies do not have to be exhausted to access to an international arbitration court⁹⁸⁸. Secondly, arbitration panels are more independent and less biased compared to traditional courts. Furthermore, there is a higher chance of them being not affected by corruption. Thirdly, despite having deficiencies, the enforcement system of arbitration is more effective than current international human rights courts⁹⁸⁹.

In an arbitration court, the States do not have to be taken into consideration. Therefore, with regard to the parties to an arbitration, might be the victims against the business enterprises or business enterprises against other business enterprises⁹⁹⁰, and therefore make the dispute settlement system much more accessible.

In any case, there needs to be a consent from the business enterprises to have such an external judicial body to solve cases for this system to function. But considering arbitration has been a choice of dispute settlement for cases that needs faster solutions, especially when there are financial interests at stake, this solution might be much more favourable for the business and human rights cases, in case of a creation of accountability regime.

⁹⁸⁶ Business and Human Rights Arbitration Project Report, Drafting Team Meeting (25-26 January 2018), [<https://www.business-humanrights.org/sites/default/files/documents/BHR%20Arbitration.%20Report%20Drafting%20Team%20Meeting%2025-26%20January%202018.pdf>] accessed December 2019

⁹⁸⁷ The Hague Rules on Business and Human Rights Arbitration, Summary of Sounding Board Consultation Round 1 – Results Elements Paper on the Hague Rules on Business and Human Rights Arbitration (June 2019), [<https://www.cilc.nl/cms/wp-content/uploads/2019/06/Summary-Paper-Sounding-Board-Consultation-Round-1-%E2%80%93-Results.pdf>], accessed December 2019

⁹⁸⁸ Pierre-Marie Dupuy, “Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law” in *Human Rights in International Investment Law and Arbitration* edited by Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann, (United Kingdom: Oxford University Press, 2009), p. 48

⁹⁸⁹ Todd Weiler, “Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order”, *Boston College International and Comparative Law Review* Vol. 27 (2004), pp. 429-450

⁹⁹⁰ Business and Human Rights Arbitration Project Report, Drafting Team Meeting, pp. 2-3

CONCLUSIONS

The 21st Century showed us today's society is borderless. Globalization shifted the understanding of who the "public" is, leaving the States and the foundations they have built themselves upon, like the nation-state, the common language and history, weaker. States are bound with the historical borders they limit themselves into, with the rules enforced centuries ago. But people with internet access at any given time can be reached from anywhere in the world, business enterprises can move from their operations from a state to another state in a matter of days. Whereas this a leap for the humankind, this also leaves the disadvantaged more vulnerable in the face of this fast-paced world. And law is having troubles to adjust itself to these realities, balancing the distribution of power and make sure that the justice is established.

For instance, the recent case of the company Cambridge Analytica, demonstrates the urgency of the problem. Cambridge Analytica was a British data company using social media channels to convince people to vote for the controversial political candidates⁹⁹¹. In certain democratic systems it is possible for candidates to receive support from corporations for their election campaigns and the immense financial support collected through these donators are being used in advertisement campaigns. Cambridge Analytica found an effective way to do advertisements for certain political candidates. They used the findings of behavioural psychology science to create a map of voters with the data they collected through the social media platform Facebook, without the knowledge of its users. Together with this data they have pinpointed the "persuadable" voters and used Facebook Ads to persuade them to vote for the candidate they were working with⁹⁹².

Despite the legislators of EU, US and UK initiated investigations on the matter, no serious legal liabilities could be created for the manipulation of voters who let go of their personal data without knowing⁹⁹³. Furthermore, the issue of the disruption of a whole democratic process through fake advertisements was left unsolved, and this is creating concerns among the

⁹⁹¹ This is a recent case that involved a British data company 'Cambridge Analytica' which used the data they received from Facebook to manipulate the voters and force them to behave in a certain manner during the elections. It is confirmed that they had a serious impact in the recent US elections, where the controversial candidate Donald Trump won the elections with a small margin. The company is now being liquidated.

⁹⁹² For more information about the case: The Guardian, Cambridge Analytica case files: [<https://www.theguardian.com/news/series/cambridge-analytica-files>] accessed December 2019

⁹⁹³ This invokes the discussions around right to privacy. Galit A. Sarfaty, "Can Big Data Revolutionize International Human Rights Law?" *University of Pennsylvania Journal of International Law*, Vol. 39, Issue 01 (2017), pp. 88-89

society⁹⁹⁴. There are no legal rules to stop companies like Cambridge Analytica to use their economic power in an unethical manner and affect the lives of many.

Whereas the companies like Cambridge Analytica is one end of the spectrum, there are also companies reaching millions of people worldwide and creating their own cultures which are followed by their consumers from different nations and backgrounds in almost a fanatical manner. These loyal followers sometimes give a company the power to an extent that they could question State authority, because they can easily publicise their point of views and receive following on certain matters⁹⁹⁵. For instance, in February 2016, the American tech giant Apple released a letter to their consumers regarding a demand from the Federal Bureau of Investigation (FBI) of the US⁹⁹⁶. In the letter, it has been stated the FBI requested Apple to create a new operating system to hack the phone of a terrorist recovered from the San Bernardino case, in order to find evidence with regard to his recent activities. Apple refused to do what has been requested by the FBI, to not to create a precedence within the company of breaching the privacy of its consumers whenever FBI pleases. No need to say, this letter was covered in the media abundantly and created a concern and immense commentary from the public⁹⁹⁷. This example clearly shows the states have started to experience decline in their ability to control the business enterprises and the public reactions they might cause. This also shows how complex the state-business relationship can get in the 21st Century.

We can find many other examples related to business and human rights issues⁹⁹⁸, some of them were already mentioned in this thesis. It is clear what could the business enterprises can do and

⁹⁹⁴ For criticism please see, The Guardian. "Politicians can't control the digital giants with rules drawn up for an analogue era" by Andrew Rawnsley (25 March 2018) [<https://www.theguardian.com/commentisfree/2018/mar/25/we-cant-control-digital-giants-with-analogue-rules>] accessed December 2019

⁹⁹⁵ Please see: Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (United Kingdom: Cambridge University Press, 1996); Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization*, (United States: Columbia University Press, 1996); Paul Hirst, *War and Power in the 21st Century* (United Kingdom: Polity Press, 2001), pp. 110-144

⁹⁹⁶ The New York Times, "Breaking Down Apple's iPhone Fight with the U.S. Government" (21 March 2016), [https://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html?_r=0], accessed December 2019. Apple, "A Message to Our Customers" (16 February 2016), [<http://www.apple.com/customer-letter/>], accessed December 2019.

⁹⁹⁷ Apple decided to bring this issue to the public and released the mentioned letter stating that the request may have strong consequences in the future with regard to the right to privacy of their users. The public reaction was outrageous and not to mention, global, and was in a manner as non-favouring the state institutions. In the end FBI decided to withdraw the case and released a statement that they hacked the phone without the help of the Apple engineers, therefore there was not a need for a case.

⁹⁹⁸ Not to mention that the socially responsible companies have better financial performances. Brenda E. Joyner and Dinah Payne, "Evolution and Implementation: A Study of Values, Business Ethics and Corporate Social Responsibility" *Journal of Business Ethics* Vol. 41 (2002), pp. 297-311

impact, if they do not consider respecting the universal fundamental rights of the society is an integral part of doing a business. This, in our view, is unacceptable, and we do believe establishment of rules for businesses not to engage in operations having negative human rights implications is necessary. This would mean there is a need of a universal acceptance of the fact that not only the States but also all business enterprises do have international legal accountability with regard the protection of international human rights principles. This requires a universal legal compromise that international human rights principles indeed create obligations on business enterprises. How this legal compromise is going to be reached is the main problem we are facing.

Currently, we are only seeing serious legislative action at the State levels. As this thesis pointed out, there are several States, mostly from the European region, passing legislations creating reporting duties for human rights implications of businesses. However, these national legislations are only territorially applicable since only the companies operating in certain jurisdictions are covered, they are unharmonized since they deal with different types of human rights abuses, and furthermore, they are mostly addressed to certain corporations with specific financial power, leaving small and medium sized companies outside the scope of the application. This creates, some sort of regulatory pollution which companies need to comply with. Companies need to operate in many different jurisdictions one way or another and they have to create different reports complying each legislative obligation which is undesirable in a fast-paced business environment. Therefore, we do believe, a harmonized global solution creating a more overarching solution is more ideal.

The business and human rights problem is global, not territorial. Such a global problem needs a global solution, where we have a feasible framework stopping the excessive exploitation of the human capital and not done so, pay the price. In fact, in one of the briefs that Ruggie gave after the acceptance of the UNGPs, he stated the following:

“A perfectly understandable reaction to the global problem of business-related human rights harm is to say there ought to be a law, one single international law, which binds all business enterprises everywhere under a common set of standards protecting human rights. Accordingly, some treaty advocates all along have urged the adoption of a “business and human rights treaty”—that is, a general or overarching legal instrument covering all relevant dimensions.”⁹⁹⁹

⁹⁹⁹ John G. Ruggie, “A UN Business and Human Rights Treaty?” (28 January 2014)

On the other hand, creation of such international treaty solving business and human rights problems and creating obligations and accountability for all types of businesses, would pose immense changes at the international order. This solution is, indeed, harder to be reached. Ruggie also mentioned the same in his speech by stating “while the aspiration is understandable, realizing it in practical terms poses monumental challenges¹⁰⁰⁰”.

However, the word “change” in the legal scholarship has some sort of difficulties behind it. It is relatively hard to change laws, it is harder to change constitutions, it is the most difficult to amend international treaties. When we think about the difficulties posed by the creation of international legal accountability for corporate human rights abuses, changes needed, are enormous in scale. We need changes in the way we understand international law, the way we discuss international treaties, the way we adjudicate cases. Even though the national solutions on business and human rights are welcomed, States should also acknowledge the fact that besides trying to lead the discussions on business and human rights, they should delegate the power to make decisions on global matters to international organizations who are, or should be, far more equipped to solve problems on global matters, which includes the business and human rights matters.

These changes are not likely to happen in the next year, or maybe in the next century, but it has to be acknowledged that there is a pressing need. That being said, when there was a need to establish equality among states, the Principles of Westphalia was adopted. When the states needed a better order at the international level to make sure that the peace is secured, the UN was established. When there was a need to create a universal understanding with regard to the fundamental rights that an individual possesses, the UDHR was set forth. We need to accept that the change is inevitable and momentary shifts in understanding of the social world would need to be solved. Now is the time to acknowledge there is a need to create a better international system that would be fulfilling the needs of the global society, which is highly demanding, globalized, connected, on the move, and completely dependent on the services that the private persons are providing them.

¹⁰⁰⁰ *Ibid.*

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ANNEX

BUSINESS AND HUMAN RIGHTS: AN EMPIRICAL STUDY WITH PORTUGUESE AND TURKISH CONSUMERS

This research project initiated on September 2017 and went on throughout the year of 2018¹⁰⁰¹. The project was carried out with a team of researchers from Turkey and Portugal¹⁰⁰². The main aim of this project was to understand the views of the general public on Business and Human Rights issues. The means to achieve this aim was to create an online survey that would be filled in by the participants. No personal data was collected during the collection of answers phase of this project.

Several brainstorming and drafting sessions occurred within the working group at the beginning. After having the first draft of the questionnaire ready, several consultations were made with the experts. These experts consisted of academics, business owners and human rights specialists from both Portugal and Turkey. After these consultations, a pilot round of the survey was conducted among a small group of people in order to make sure that the language of the survey was appropriate for the non-legal audience.

The survey was opened to the public on May 2018 and closed on July 2018. **There were number of 501 complete responses to the survey.**

The main goals of this research were as follows:

- To collect data from the general population to measure how seriously the social impact of companies is taken, and who this may change when it comes to consumers' different political views, age and gender,
- To collect data on how consumer behaviour may change upon being informed by human rights violations conducted by the companies, specifically human rights violations conducted overseas,
- To collect data on how consumers, perceive international organisations in dealing with business and human rights issues.

¹⁰⁰¹ For a more comprehensive analysis, please see the related Working Paper published through the research centre CEDIS: [<https://cedis.fd.unl.pt/blog/project/business-and-human-rights-an-empirical-study-with-portuguese-and-turkish-consumers/>], accessed December 2019

¹⁰⁰² Burcu Filiz (TR); Deniz Yazgan (TR); Irem Sanli (TR); Cemre Dilara Altun (TR); Gabriela Ferreira Dutra (PT); Filipe Jones Mourao (PT)

Accordingly, the survey was divided into four parts: the first part collecting general demographic information regarding the participant, the second part trying to understand whether consumers really lean towards more “conscious” brands, the third part tries to collect data on awareness of responsibilities of companies and the universal scope of the problem and the fourth part focusing on the regulative expectations of consumers and awareness of the universal legal tools that are currently enforced.

SUMMARY OF THE RESULTS AND CONCLUSIONS

Following the survey results and the analysis of data, several conclusions were reached.

First of all, the hypothesis that consumers lean towards more human-rights friendly companies would be a true statement. Societies do expect companies respect human rights and treat their workers in a respectable manner. This would not be only limited to workers, but also the people living in surroundings.

However, when it comes to business relationships, meaning supply chain management and protecting rights within these relationships, consumers living in Portugal, a developed EU country, seem to be more conscious of the relevance of the issue. It is rather clear that consumers in Turkey, a developing country, need an increase in awareness of the business and human rights matters, this consciousness appears to have only started.

When it comes to regulatory expectations, consumers in Turkey have a lack of confidence in their own national judicial system, although in this case, Turkish consumers' confidence may be especially low, since the country is going through social and political turmoil in the last few years. Still in both countries, regarding cases for business and human rights, a court (or an organization) above the national systems is much more preferred by respondents. This could be a confirmation that more action is expected from the higher institutions.

Furthermore, the tendency among consumers is that any type of broadly defined human rights abuse by a company should be considered a human rights abuse. The most-disturbing abuses appear to be child labour and human trafficking; however, the general conception is any kind of human rights need to be protected.

A final consideration would be regarding awareness raising. We came to the conclusion that legal tools on business and human rights at the international level must be communicated much better, not only to business leaders and governments but also to consumers. Furthermore, there is a need for better policies, probably in hard-law format to ensure the consumers are being listened.

RESULTS (PORTUGAL)

| | |
|--------------------|-----|
| Responses | 304 |
| Complete Answers | 268 |
| Incomplete Answers | 36 |
| Completion Rate | 88% |

General

1. Gender

| | Percentage | Number of Respondents |
|------------------------|------------|-----------------------|
| Female | 61% | 163 |
| Male | 37% | 99 |
| Do not want to specify | 2% | 6 |
| Total | | 268 |

2. Year of Birth

| | Percentage | Number of Respondents |
|--------------|------------|-----------------------|
| -18 | 0.7% | 2 |
| 18-25 | 8.2% | 22 |
| 25-40 | 69.4% | 186 |
| 40-55 | 14.9% | 40 |
| 55-70 | 6.7% | 18 |
| 70+ | 0% | 0 |
| Total | | 268 |

3. Education Level

| | Percentage | Number of Respondents |
|---------------------|------------|-----------------------|
| Primary Education | 1% | 2 |
| Secondary Education | 14% | 38 |
| Bachelor's Degree | 41% | 110 |
| Masters or above | 44% | 118 |
| Total | | 268 |

4. Yearly Income Level

| | Percentage | Number of Respondents |
|-------------------------------|------------|-----------------------|
| Under 10.000 euros | 31% | 83 |
| Between 10.000 - 25.000 euros | 41% | 110 |
| 25.000+ euros | 13% | 35 |
| Do not want to specify | 15% | 40 |
| Total | | 268 |

5. From 1 to 5, with 1 being strongly disagree and 5 being strongly agree, please rate how much you agree with the following statements:

| | (1) | (2) | (3) | (4) | (5) | Total |
|--|---------|--------|-------|-------|---------|-------|
| Human rights are universal, applicable to every human being on earth | 14-5% | 11-4% | 13-5% | 21-8% | 209-78% | 268 |
| Economics and human rights are irrelevant | 165-62% | 38-14% | 23-9% | 14-5% | 28-10% | 268 |
| Total | | | | | | 268 |

6. The government intervention to economy should occur (Please choose one of the statements that is closer to your personal beliefs):

| | Percentage | Number of Respondents |
|--|------------|-----------------------|
| When the national interests have to be protected | 7% | 18 |
| When the social inequality has to be tackled | 46% | 123 |
| Governments should regulate the economy in all aspects | 44% | 119 |
| Governments should never intervene to the economy | 3% | 8 |
| Total | | 268 |

Part I: Consumer Behaviour

Brand A is a global coffee chain. The Company A behind the Brand A claims to be transparent about the supply chain and exports fair trade coffee beans from the African country Angola, where farmers are being paid the living wage of that respective country. Brand A also has a scholarship fund for its workers, who would like to continue their studies in the higher education while working for the company as a barista. The price of a cup of coffee costs 1 Euro.

Brand B is a global coffee chain which is more well-known and always more crowded than Brand A. There is no information being shared by Company B regarding who provides the coffee beans to do coffee, but the company sometimes collects donations for social causes. The price of a cup of coffee costs 0,7 euros.

7. Please make choices according to the following statements within the frame of the case study above:

| | Brand "A" | Brand "B" | Total |
|--|-----------|-----------|-------|
|--|-----------|-----------|-------|

| | | | |
|--|---------|--------|-----|
| If I have 1 euro to spend on a coffee, I would choose to buy from | 218-81% | 50-19% | 268 |
| There is news on media that Brand B did not pay their coffee farmers on time and used forced labour to increase coffee production in Angola. There is no answer from the company on the allegations. My budget for a cup of coffee is still 1 euro, I would choose to buy from | 245-91% | 23-9% | 268 |
| If I will continue to buy coffee everyday, I would choose from | 230-86% | 38-14% | 268 |
| Total | | | 268 |

Part II: Responsibilities of Companies

8. From 1 to 5, with 1 being strongly disagree and 5 being strongly agree, please rate how much you agree with the following statements:

| | (1) | (2) | (3) | (4) | (5) | Total |
|---|-------|-------|--------|--------|---------|-------|
| If a national company has workers in Bangladesh that produce clothing, the Turkish/Portuguese company should protect the human rights of the Bangladeshi workers | 6-2% | 2-1% | 10-4% | 15-6% | 235-88% | 268 |
| If a national company has a factory in Bangladesh, they should protect the human rights of the community of people living around that company (does not necessarily have to work for the company) | 8-3% | 4-1% | 27-10% | 42-16% | 187-70% | 268 |
| If a national company promotes racial causes, | 14-5% | 13-5% | 42-16% | 57-21% | 142-53% | 268 |

| | | | | | | |
|--|-------|-------|--------|--------|---------|-----|
| they should also have policies to combat racial discrimination in their day-to-day work | | | | | | |
| If a national company buys products from a different company, they should be responsible of what happens in this separate company with regard to human rights protection | 3-1% | 2-1% | 4-1% | 23-9% | 236-88% | 268 |
| If an American company buys products from a national company, they should be responsible of assuring that the human rights of the national workers and the communities are being protected | 12-4% | 10-4% | 35-13% | 54-20% | 157-59% | 268 |
| Total | | | | | | 268 |

Part III: Regulatory Expectations and Solutions

9. From 1 to 5, with 1 being strongly disagree and 5 being strongly agree, please rate how much you agree with the following statements:

| | (1) | (2) | (3) | (4) | (5) | Total |
|--|-------|--------|---------|--------|---------|-------|
| I have general knowledge about Universal Declaration of Human Rights | 4-1% | 13-5% | 72-27% | 98-37% | 81-30% | 268 |
| Turkish/Portuguese government is responsible for protecting and having regulations in place regarding universal human rights | 13-5% | 7-3% | 53-20% | 59-22% | 136-51% | 268 |
| I think national courts dealing with human rights are working well | 24-9% | 65-24% | 135-50% | 44-16% | 0-0% | 268 |
| I think the international courts on human rights (European Court of Human Rights etc.) are working well | 22-8% | 56-21% | 116-43% | 66-25% | 8-3% | 268 |
| International Organisations (such as the United Nations, | 10-4% | 8-3% | 32-12% | 76-28% | 142-53% | 268 |

| | | | | | | |
|---|--------|--------|--------|--------|---------|-----|
| European Union) are responsible to protect my human rights | | | | | | |
| I heard about Guiding Principles on Business and Human Rights | 84-31% | 59-22% | 51-19% | 38-14% | 36-13% | 268 |
| It is required by the most legal systems that a company should be audited with regard to financial matters, in order to make sure that they are complying with the necessary legislation. Companies should be audited by audit companies with regard to human rights matters, besides financial matters | 5-2% | 4-1% | 18-7% | 52-19% | 189-71% | 268 |
| Total | | | | | | 268 |

10. Please choose one of the statements that is closer to you.

Which one of the following human rights abuses that would be conducted by a company would make me consider to change my shopping habits in your opinion (and would make you have a stand against that company and its products):

| | Percentage | Number of Respondents |
|-------------------------------------|------------|-----------------------|
| Gender Discrimination among workers | 5% | 14 |
| Forced Labour | 9% | 24 |
| Mobbing | 1% | 2 |
| Salaries under living wage | 2% | 6 |
| Child Labour | 13% | 34 |
| Disrespectful working conditions | 3% | 9 |
| Contributing to corruption | 2% | 5 |
| Human Trafficking | 19% | 50 |
| Environmental Damage | 6% | 17 |
| All of the above | 72% | 192 |
| None of the above | 1% | 3 |
| Other | 4% | 10 |
| Total | | 268 |

11. Please choose one of the statements that is closer to you.

11.1. Do you think that companies are complying with certain ethical rules?

| | Percentage | Number of Respondents |
|---|------------|-----------------------|
| Yes, I believe they have their own ethical rules | 47% | 127 |
| No, companies have nothing to do with ethics | 13% | 35 |
| Yes, I believe the ethical rules are being provided by the national government | 11% | 29 |
| Yes, I believe the ethical rules are being provided by the international organisations (such as the United Nations) | 29% | 77 |
| Total | | 268 |

11.2. In the case of a national company violates human rights during their operations abroad (for instance in Bangladesh), which courts do you think should look at the case?

| | Percentage | Number of Respondents |
|---|------------|-----------------------|
| International organisations (such as the United Nations) | 27% | 72 |
| National Courts | 8% | 22 |
| Host country Courts (Bangladeshi Courts) | 16% | 43 |
| There should be a separate court at the international level | 43% | 116 |
| There is no need to look into this case | 1% | 2 |
| Other | 5% | 13 |
| Total | | 268 |

RESULTS (TURKEY)

| | |
|--------------------|-----|
| Responses | 280 |
| Complete Answers | 233 |
| Incomplete Answers | 47 |
| Completion Rate | 83% |

General

1. Gender

| | Percentage | Number of Respondents |
|------------------------|------------|-----------------------|
| Female | 51% | 119 |
| Male | 48% | 111 |
| Do not want to specify | 1% | 3 |
| Total | | 233 |

2. Year of Birth

| | Percentage | Number of Respondents |
|--------------|------------|-----------------------|
| -18 | 0% | 0 |
| 18-25 | 38.2% | 89 |
| 25-40 | 45.5% | 106 |
| 40-55 | 7.7% | 18 |
| 55-70 | 8.2% | 19 |
| 70+ | 0.4% | 1 |
| Total | | 233 |

3. Education Level

| | Percentage | Number of Respondents |
|---------------------|------------|-----------------------|
| Primary Education | 0% | 1 |
| Secondary Education | 6% | 14 |
| Bachelor's Degree | 63% | 146 |
| Masters or above | 31% | 72 |
| Total | | 233 |

4. Yearly Income Level

| | Percentage | Number of Respondents |
|---------------------------------------|------------|-----------------------|
| Under 10.000 Turkish Liras | 26% | 61 |
| Between 10.000 - 50.000 Turkish Liras | 35% | 82 |
| 50.000+ Turkish Liras | 20% | 46 |
| Do not want to specify | 19% | 44 |
| Total | | 233 |

5. From 1 to 5, with 1 being strongly disagree and 5 being strongly agree, please rate

how much you agree with the following statements:

| | (1) | (2) | (3) | (4) | (5) | Total |
|--|--------|--------|--------|--------|---------|-------|
| Human rights are universal, applicable to every human being on earth | 10-4% | 8-3% | 24-10% | 29-12% | 162-70% | 233 |
| Economics and human rights are irrelevant | 74-32% | 39-17% | 43-18% | 27-12% | 50-21% | 233 |
| Total | | | | | | 233 |

6. The government intervention to economy should occur (Please choose one of the statements that is closer to your personal beliefs):

| | Percentage | Number of Respondents |
|--|------------|-----------------------|
| When the national interests have to be protected | 19% | 45 |
| When the social inequality has to be tackled | 53% | 123 |
| Governments should regulate the economy in all aspects | 25% | 58 |
| Governments should never intervene to the economy | 3% | 7 |
| Total | | 233 |

Part I: Consumer Behaviour

Brand A is a global coffee chain. The Company A behind the Brand A claims to be transparent about the supply chain and exports fair trade coffee beans from the African country Angola, where farmers are being paid the living wage of that respective country. Brand A also has a scholarship fund for its workers, who would like to continue their studies in the higher education while working for the company as a barista. The price of a cup of coffee costs 8 Turkish Liras.

Brand B is a global coffee chain which is more well-known and always more crowded than Brand A. There is no information being shared by Company B regarding who provides the coffee beans to do coffee, but the company sometimes collects donations for social causes. The price of a cup of coffee costs 7 Turkish Liras.

7. Please make choices according to the following statements within the frame of the case study above:

| | Brand "A" | Brand "B" | Total |
|---|-----------|--------------|-------|
| If I have 8 Turkish Liras to spend on a coffee, I would choose to buy from | 206-88% | 27-12% | 233 |
| There is news on media that Brand B did not pay their coffee farmers on time and used forced labour to increase coffee production in Angola. There is no answer from the company on the allegations. My budget for a cup of coffee is still 8 Turkish Liras, I would choose to buy from | 211-91% | 22-9% | 233 |
| If I will continue to buy coffee everyday, I would choose from | 196-84% | 37-16% | 233 |
| | | Total | 233 |

Part II: Responsibilities of Companies

8. From 1 to 5, with 1 being strongly disagree and 5 being strongly agree, please rate how much you agree with the following statements:

| | (1) | (2) | (3) | (4) | (5) | Total |
|---|-------|-------|--------|--------|---------|-------|
| If a national company has workers in Bangladesh that produce clothing, the Turkish/Portuguese company should protect the human rights of the Bangladeshi workers | 3-1% | 3-1% | 7-3% | 25-11% | 195-84% | 233 |
| If a national company has a factory in Bangladesh, they should protect the human rights of the community of people living around that company (does not necessarily have to work for the company) | 13-6% | 12-5% | 27-12% | 44-19% | 137-59% | 233 |

| | | | | | | |
|--|-------|--------|--------|--------|---------|-----|
| If a national company promotes racial causes, they should also have policies to combat racial discrimination in their day-to-day work | 13-6% | 34-15% | 50-21% | 50-21% | 86-37% | 233 |
| If a national company buys products from a different company, they should be responsible of what happens in this separate company with regard to human rights protection | 2-1% | 1-0% | 3-1% | 7-3% | 220-94% | 233 |
| If an American company buys products from a national company, they should be responsible of assuring that the human rights of the national workers and the communities are being protected | 12-5% | 22-9% | 41-18% | 45-19% | 113-48% | 233 |
| Total | | | | | | 233 |

Part III: Regulatory Expectations and Solutions

9. From 1 to 5, with 1 being strongly disagree and 5 being strongly agree, please rate how much you agree with the following statements:

| | (1) | (2) | (3) | (4) | (5) | Total |
|--|---------|--------|--------|--------|---------|-------|
| I have general knowledge about Universal Declaration of Human Rights | 4-2% | 2-1% | 13-6% | 25-11% | 189-81% | 233 |
| National government is responsible for protecting and having regulations in place regarding universal human rights | 1-0% | 0-0% | 2-1% | 17-7% | 213-91% | 233 |
| I think national courts dealing with human rights are working well | 114-49% | 80-34% | 24-10% | 9-4% | 6-3% | 233 |
| I think the international courts on human rights (European Court of Human Rights etc.) are working well | 26-11% | 45-19% | 94-40% | 54-23% | 14-6% | 233 |
| International Organisations (such as | 4-2% | 5-2% | 16-7% | 55-24% | 153-66% | 233 |

| | | | | | | |
|---|--------|--------|--------|--------|---------|-----|
| the United Nations, European Union) are responsible to protect my human rights | | | | | | |
| I heard about Guiding Principles on Business and Human Rights | 42-18% | 35-15% | 47-20% | 40-17% | 69-30% | 233 |
| It is required by the most legal systems that a company should be audited with regard to financial matters, in order to make sure that they are complying with the necessary legislation. Companies should be audited by audit companies with regard to human rights matters, besides financial matters | 2-1% | 1-0% | 12-5% | 39-17% | 179-77% | 233 |
| Total | | | | | | 233 |

10. Please choose one of the statements that is closer to you.

Which one of the following human rights abuses that would be conducted by a company would make me consider changing my shopping habits in your opinion (and would make you have a stand against that company and its products):

| | Percentage | Number of Respondents |
|-------------------------------------|------------|-----------------------|
| Gender Discrimination among workers | 14% | 33 |
| Forced Labour | 3% | 7 |
| Mobbing | 18% | 41 |
| Salaries under living wage | 10% | 24 |
| Child Labour | 21% | 48 |
| Disrespectful working conditions | 9% | 21 |
| Contributing to corruption | 11% | 25 |
| Human Trafficking | 16% | 38 |
| Environmental Damage | 14% | 32 |
| All of the above | 64% | 150 |
| None of the above | 0% | 1 |
| Other | 3% | 6 |
| Total | | 233 |

11. Please choose one of the statements that is closer to you.

11.1. Do you think that companies are complying with certain ethical rules?

| | Percentage | Number of Respondents |
|---|-------------------|------------------------------|
| Yes, I believe they have their own ethical rules | 20% | 47 |
| No, companies have nothing to do with ethics | 70% | 164 |
| Yes, I believe the ethical rules are being provided by the national government | 2% | 5 |
| Yes, I believe the ethical rules are being provided by the international organisations (such as the United Nations) | 7% | 17 |
| Total | | 233 |

11.2. In the case of a national company violates human rights during their operations abroad (for instance in Bangladesh), which courts do you think should look at the case?

| | Percentage | Number of Respondents |
|---|-------------------|------------------------------|
| International organisations (such as the United Nations) | 29% | 68 |
| National Courts | 8% | 18 |
| Host country Courts (Bangladeshi Courts) | 20% | 47 |
| There should be a separate court at the international level | 39% | 92 |
| There is no need to look into this case | 0% | 0 |
| Other | 3% | 8 |
| Total | | 233 |