

# Contemporary responses to businesses' negative human rights impact\*

## Respuestas contemporáneas al impacto negativo sobre derechos humanos causado por empresas

## Respostas contemporâneas ao impacto negativo sobre os Direitos Humanos causado pelas empresas

Andres Felipe Lopez \*

### Abstract

The article provides a panoramic overview of the factual and legal problems created by transnational business activities that negatively impact human rights around the world, and critically analyzes the strengths and gaps of the various international initiatives created in order to address businesses impact on human rights. The main three international initiatives analyzed are the United Nations Guiding Principles on Business and Human Rights, National Action Plans on Business and Human Rights, and the Draft Treaty on Business and Human Rights. The article intends to organize the vast literature on BHR, serve as a departure point for those interested in researching on this sub-area of international human rights law, and to provide critical analysis of the international legal responses created to address these contemporary human rights

**Keywords:** Business and Human Rights. Corporate Accountability. UN Guiding Principles on Business and Human Rights. National Action Plans. Treaty on Business and Human Rights.

### Resumen

Este artículo ofrece una visión panorámica de los problemas facticos y jurídicos creados por las actividades de empresas transnacionales alrededor del mundo, y analiza críticamente las fortalezas y debilidades de las diversas iniciativas internacionales creadas con el propósito de regular el impacto de las empresas sobre los derechos humanos. Las tres iniciativas internacionales en las que se enfoca el artículo son: los Principios Rectores de Empresas y Derechos Humanos de Naciones Unidas, planes de Acción Nacional sobre empresas y derechos humanos, y el borrador de tratado sobre empresa y derechos humanos. El artículo pretende presentar el estado del arte sobre el desarrollo normativo en relación con el problema de derechos huma-

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\*\* Facultad de Derecho y Ciencias Políticas, Director del programa de Derecho. Professore de derecho internacional, Universidad de la Sabana. Es doctor en Derecho Internacional de los Derechos Humanos de la Universidad de Notre Dame (Estados Unidos), magister en Derecho Internacional y Comparado (LL. M.) de la Universidad de Georgetown (Estados Unidos), especialista en Derecho Administrativo y abogado de la Universidad del Rosario.  
Email: andres.lopez4@unisabana.edu.co

nos transnacional causado por empresas, establecer un putno de partido para aquillos interesado en enseñar o investigar en esta sub-área de los derechos humanos, y analizar críticamente las diversas respuestas jurídicas para enfrentar esta problemática contemporánea de la protección internacional de los derechos humanos.

**Palabras claves:** Empresa y Derechos Humanos. Responsabilidad Empresarial. Principios Rectores de Empresa y Derechos Humanos. Planes de Acción Nacional. Tratado sobre empresa y derechos humanos.

## Resumo

Este artigo oferece uma visão panorâmica dos problemas fatuais e legais criados pelas atividades de empresas transnacionais e analisa criticamente os pontos fortes e fracos das várias iniciativas internacionais criadas com o objetivo de regular o impacto das empresas nos direitos humanos. As três iniciativas internacionais em que o artigo se concentra são: os Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos, os Planos de Ação Nacionais sobre empresas e direitos humanos e o projeto de tratado sobre empresas e direitos humanos. O artigo tem como objetivo apresentar o estado da arte do desenvolvimento normativo em relação ao problema transnacional de direitos humanos causado pelas empresas, estabelecer um local de festa para os interessados em ensinar ou pesquisar nesta subárea de direitos humanos e analisar criticamente as várias respostas legais para enfrentar esse problema contemporâneo de proteção internacional dos direitos

**Palavras-chave:** Empresas e Direitos Humanos. Responsabilidade das empresas. Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos. Plano de Ação Nacional. Tratdo sobre empresas e Direitos Humanos

## 1 Introduction

The purpose of this article is to analyze the problems of negative human rights impacts caused by corporations and to provide an overview of the current state of the business and human rights field. There is a considerable amount of literature on this topic that has grown in an important way in recent years. This article

provides a general introduction to the business and human rights debate from the perspective of international law and human rights. This means it leaves aside the responsibility of businesses developed in the field of business ethics or other areas of law such as investment law, international trade, or corporate law.

The article firstly explores the factual relationship between businesses and human rights and the reality of the increasingly negative human rights impacts that private business entities are producing around the world, which justifies the endeavor of this research. Questions such as what rights have been violated and in what way and what kind of corporation is responsible for such violations are some of the issues explore in this section. Secondly, the article describes the regulatory problem that transnational corporations (TNCs) have caused and the limits of domestic law to regulate these entities, which explains the need for international law to get involved with what traditionally has been considered creatures of domestic law.

Thirdly, the article briefly describes the state of the business and human rights (BHR) field, summarized into three areas: 1) the United Nations Guiding Principles (UNGPs)<sup>2</sup> as the focal point of the BHR movement, 2) national action plans, and 3) the binding treaty debate. It goes beyond the length of this article to explore other areas of development of the debate about the responsibility of corporations for human rights violations such as 4) transnational human rights litigation, 5) international soft law initiatives such as the OECD Guidelines or the International Labor Organization's Tripartite Declaration, and the growing number of 6) Multi-Stakeholder Initiatives (MSI). The article provides a panoramic view of the relationship between business and human rights as a starting point for those engaged in the field advising governments or corporations or working in NGOs dedicate to this sub area of human rights. Furthermore, this article constitutes a useful tool for law professors and students interested in the intersection of businesses and human rights as a departing point of further debate.

## 2 Business negative impact on human rights and the legal challenge

A six-month research project developed by the Guardian revealed that slaves coming from Burma and other Asian countries have been forced for years to work in Thai fishing boats in the production of shrimps sold by some of the major retailer companies in the world for no pay and under threat of extreme violence.<sup>1</sup> Some of these retailers are Walmart, Costco, Tesco, Aldi, and Carrefour who sell shrimp in the U.S., UK, and other western countries. It is estimated that around 270,000 migrants work in the fishing industry and are kept as property in Thai fishing boats sometimes on the high seas or in Thailand's waters. In fact, the Thai government estimates that around 300,000 people work in the fishing industry but that the majority of them are unregistered migrants who are effectively ghosts to the authorities. The workers are commonly trafficked migrants passing through the Thai borders in very dangerous circumstances and are purchased by boat captains for around \$312 (250 sterling pounds) per person. Survivors who escaped from these vessels recount that they were constantly threatened, chained, malnourished, beaten, and in several occasions, they witnessed extrajudicial killings of their peers at the hands of boat captains.<sup>2</sup>

Like these examples, it is estimated that there are more than 21 million people in the world living under some form of modern slavery, of which 78% are slaves related to forced labor, 22% are sexual victims, and 26% are children.<sup>3</sup> Kevin Bales first used the term modern slavery started in his book *Disposable People: New Slavery in the Global Economy* published in 1999.<sup>4</sup> TNCs participate in modern slavery mainly through their supply

chain that is poorly monitored and that lack due diligence in regard to those from whom they are buying.<sup>5</sup> Moreover, businesses entities directly contribute to modern slavery since slavery itself is a relevant (if not essential) element to some industries such as brick production in Pakistan,<sup>6</sup> shrimp fishing in Thailand, coal mining in Brazil,<sup>7</sup> or cotton production in Egypt.<sup>8</sup> The slavers themselves are “businessmen” with a profit motivation who usually operate along the thin line between legality and illegality. Accordingly, modern slavery is a result of the culture in which profit triumphs human considerations.

Business impact on human rights is not limited to apparel manufacturing, extractive industries nor only to transnational corporations. Businesses of all types including small, large, domestic and international can and do have an impact on human rights.<sup>9</sup> In fact, a study made by the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises<sup>10</sup> revealed that the complaints of direct violation of human rights by business entities were presented against eight of the nine main business sectors, excluding only the financial service sector.<sup>11</sup> Nevertheless, since the report was presented there have been several reports of the negative human rights impact of the financial sector,

<sup>1</sup> Kate Hodal & Chris Kelly Felicity Lawrence, *Revealed: Asian slave labour producing prawns for supermarkets in US, UK*, The Guardian, June 10, 2014, <http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> (last visited July 29, 2019).

<sup>2</sup> Kate Hodal & Chris Kelly Felicity Lawrence, *Revealed: Asian slave labour producing prawns for supermarkets in US, UK*, The Guardian, June 10, 2014, <http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> (last visited July 29, 2019).

<sup>3</sup> Bales Kevin, *Disposable people new slavery in the global economy* (2d ed. 2012). See also, *Slavery Today « Free the Slaves*, <http://www.freetheslaves.net/about-slavery/slavery-today/> (last visited Jul 29, 2019).

<sup>4</sup> Bales, *supra* note 30

<sup>5</sup> See *Modern Slavery in Supply Chains*, CORE, <http://corporate-responsibility.org/issues/modern-slavery-bill/> (last visited Jul 29, 2019).

<sup>6</sup> Bales Kevin, *Disposable people new slavery in the global economy* (2d ed. 2012). at.149

<sup>7</sup> Bales Kevin, *Disposable people new slavery in the global economy* (2d ed. 2012). at.149

<sup>8</sup> Human Rights Watch (HRW), *Underaged and Unprotected* (2001), <https://www.hrw.org/report/2001/01/01/underaged-and-unprotected/child-labor-egypts-cotton-fields> (last visited Jul 29, 2019).

<sup>9</sup> Human Rights Watch (HRW), “On the Margins of Profit: Rights at Risk in the Global Economy”, 2008. <https://www.hrw.org/sites/default/files/reports/bhr0208webwcover.pdf>. p.2 (last visited July 29, 2019) [Here in after HRW, *On the Margins of Profit*].

<sup>10</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, Corporations and Human Rights: *A Survey of The Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* UN. Doc. A/HRC/8/5/Add.2, 2008 (By John Ruggie) [hereinafter Ruggie Report Add.2 2008] p. 23. (Las visited July 29, 2019).

<sup>11</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, Corporations and Human Rights: *A Survey of The Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* UN. Doc. A/HRC/8/5/Add.2, 2008 (By John Ruggie) [hereinafter Ruggie Report Add.2 2008] p. 23. (Las visited July 29, 2019).

too.<sup>12</sup> Indeed, BanckTrack reports that “Banks can cause human rights violations themselves, such as through discrimination in their hiring or service provision, and they can contribute or be linked to human rights violations through lending or other financial support for the companies responsible.”<sup>13</sup>

Business entities affect – directly and indirectly – almost all human rights recognized in international human rights law: e.g. rights to work, food, clothing, and the freedoms of speech, association, and conscience. However, there has been a special focus on gross human rights violations or crimes against humanity probably because of its severity and the visibility of such violations through transnational litigation.<sup>14</sup> The non-labor rights most cited or allegedly violated were the right to health violated in cases of exposure to pollutants and other toxins; the right to life and personal integrity; and the rights to an adequate standard for living.<sup>15</sup> The third most frequently violated rights were related to communities displaced by extractive projects which included failure to obtain informed consent and inadequate compensation. The victims were composed of workers and communities in equal parts and were primarily product end-users.<sup>16</sup>

Furthermore, corporate human rights violations occurred all over the world. It is not possible to restrict the problem to one country or even to a single continent because modern businesses’ transactions are transnational and involve several jurisdictions. However, there is some geographical concentration of human rights violations and common patterns. According to the Special Representative’s report, the human rights violations

took place in sixteen countries from the four regions with the biggest concentration of developing countries: Africa, Asia - Pacific, and Latin America.<sup>17</sup> Nevertheless, there were also reported violations in North America and Europe but in smaller proportions.<sup>18</sup> An additional geographical aspect of the problem is that the majority of TNCs have been incorporated in developed countries.

This led us to another issue which is the unmatched challenge of regulating businesses’ negative impact on human rights. Traditionally, business entities as creatures of national law were regulated by states that are internationally responsible for protecting every person within their territories or jurisdiction from third persons, including business entities, who would violate the rights of nationals or non-nationals within their territory or jurisdiction.<sup>19</sup> Nevertheless, the globalization phenomenon, the increase of power of business entities, in particular of transnational corporations, and the problem of states with low governance (especially when due to armed conflicts) have rendered traditional approaches to corporate responsibility ineffective and inadequate. Legal systems remain largely national while many large corporations are multinational. As a consequence, “multinational corporations have long outgrown legal structures than govern them, reaching a level of transnationality and economic power that exceeds domestic law’s ability to impose basic human rights norms”.<sup>20</sup> When the problem of businesses’ negative impact on human rights became a transnational problem, national norms were found insufficient.

The problem consists of a lack of regulation, a “governance gap”,<sup>21</sup> between the national norms regulating

<sup>12</sup> United Nations Environment Finance Initiative (UNEPFI), “Banks and Human Rights: A Legal Analysis” <http://www.unepfi.org/publications/social-issues-publications/banks-and-human-rights-a-legal-analysis-2/> (last visited July 29, 2019).

<sup>13</sup> Banktrack, Banks and human rights, [https://www.banktrack.org/campaign/banks\\_and\\_human\\_rights](https://www.banktrack.org/campaign/banks_and_human_rights) (last visited July 29, 2019).

<sup>14</sup> See, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

<sup>15</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, Corporations and Human Rights: *A Survey of The Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* UN. Doc. A/HRC/8/5/Add.2, 2008 (By John Ruggie) [hereinafter Ruggie Report Add.2 2008] p. 23.

<sup>16</sup> For a complete discussion of the main findings of the updated report: Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, Corporations and Human Rights: *A Survey of The Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* UN. Doc. A/HRC/8/5/Add.2, 2008 (By John Ruggie) [hereinafter Ruggie Report Add.2 2008] p. 22-25.

<sup>17</sup> Ruggie Report “A Survey of The Scope” Add.2 2008 par. 40.

<sup>18</sup> According to Ruggie, in this matter the report “cannot be taken as a conclusive evidence that there are fewer cases of cooperate-related human rights abuse in Europe and Norte America than elsewhere. What it does indicate is that there are far more cases in the Asia- Pacific region, Africa, and Latin America than are not being dealt with effectively through exiting forums, or that such forums don’t exist there in the first place”. Ruggie report Report “A Survey of The Scope” Add.2 2008.

<sup>19</sup> International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. EXEC. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] art. 2; UN Human Rights Committee (HRC), General comment no. 31, *The Nature of The General Legal Obligation Imposed on States Parties to The Covenant*, par. 10 UN. Doc. CCPR/C/21/Rev.1/Add.1, 2004.

<sup>20</sup> Stephens Beth, “The Amoral of Profit: Transnational Corporations and Human Rights”, *Berkeley J. Int’l L.* 2002, 20, pp.54-60.

<sup>21</sup> Ruggie Report “A Survey of The Scope” Add.2 2008.

corporate behavior of the home and host country and the inadequacy of international law – tailored traditionally to states – to regulate business entities. Home states norms are limited by rules of jurisdiction and other states' sovereignty, so they cannot be enforced by any entity outside the territorial jurisdiction of the country where the business has been incorporated.<sup>22</sup> Moreover, the host country sometimes lacks 1) adequate norms for regulating transnational business entities; 2) the political will to do so due to benefits governments receive from business entities' negative impacts on human rights; or 3) a sufficient degree of governance due to institutions that are incapable of enforcing existing human rights norms.<sup>23</sup>

National norms, like any other norms, are only as strong as their enforcement capacity. In many countries, even if these standards exist, the state's unwillingness or inability to enforce them leaves a serious legal gap for TNCs that perform activities in those countries. For instance, in Unilever experience, in some States, the legal minimum wage is even lower than the poverty minimum.<sup>24</sup> This situation places business entities in a difficult position even when goodwill is present.

In addition, corporations have learned to evade state power and the constraints of regulations by moving their operations around the world according to criteria of economic efficiency while state regulatory schemes are preeminently domestic and based on national laws and administrative bodies.<sup>25</sup> Similarly, corporate structure, the complex relationship between parents and subsidiaries, and the impossibility of piercing the corporate veil are used as a means of avoiding legal liability. Many cases against corporations in domestic tribunals have been dismissed on these grounds.<sup>26</sup>

Moreover, developing countries have been concerned to integrate their economies into the global economy in a manner that ensures the inflows of new investment capital under the idea that this means development. Consequently, in the race for economic growth, states usually agree to low standards of behavior for multinational corporations since they are the main channels of direct foreign investment.<sup>27</sup>

On the other hand, economic power carries political influence. Corporations play an important role in negotiations over issues related to international trade, patent protection, natural resources regulations, and international and national economic policy. The reality is that governments are coalitions that represent a variety of interests, and corporations are able to use their bargaining skills and economic power to influence national and international politics through lobbying or other means.<sup>28</sup> In the face of the unequal economic and political power between some states and corporations and the insufficiency of domestic legal systems, it seems that international law is the body of law suited for the task. However, even if that is true, we should not be too ready to leave the conversation about domestic law as a means of addressing the corporate human rights problem if we consider the possibility of the extraterritorial effects of domestic norms.

According to the Special Representative John Ruggie, states have adopted two legal ways to regulate issues beyond their territory: domestic measures with extraterritorial implications and the exercise of direct extraterritorial jurisdiction over private actors or activi-

<sup>22</sup> Farah Youseph, "Toward a Multi-Directional Approach to Corporate Accountability", in *Accountability in the Context of Transitional Justice Corporate*, Routledge, 2014. pp. 32-42.

<sup>23</sup> This last is usually the case in conflict zones or post-conflict zones where the risk for new conflicts is high and the institutions are very weak.

<sup>24</sup> Oxfam, "Labour Rights in Unilever's Supply Chain: From Compliance towards Good Practice", 2013 [https://www.unilever.com/Images/rr-unilever-supply-chain-labour-rights-vietnam-310113-en-tcm244-409769\\_en.pdf](https://www.unilever.com/Images/rr-unilever-supply-chain-labour-rights-vietnam-310113-en-tcm244-409769_en.pdf) (last visited July 29, 2019).

<sup>25</sup> Stephens "The Amoralism of Profit", p. 59.

<sup>26</sup> Recently, the UK High Court dismissed a case against Shell by two poor communities in the Niger Delta. The case was dismissed on the grounds of the separation between the parent corporation and the subsidiary. Joe Westby, "An elusive justice—holding parent companies accountable for human rights abuse", open Democracy, 2017, <https://www.opendemocracy.net/openglobalrights/>

[joe-westby/elusive-justice-holding-parent-companies-accountable-for-human-rights-ab](http://joe-westby/elusive-justice-holding-parent-companies-accountable-for-human-rights-ab) (last visited July 29, 2019; Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies", 2014, <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>; Gwynne Skinner, Robert McCorquodale and Oliver De Schutter, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", 2013, <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657dfa6a4963597fed598b/1483046398204/The-Third-Pillar-FINAL1.pdf>; Office of the High Commissioner for Human Rights, *Initiative on Enhancing Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*, 2015 <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>.

<sup>27</sup> Olivier De Schutter, *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements*. London: Routledge, 2013.

<sup>28</sup> Stephens "The Amoralism of Profit", p. 58.

ties abroad.<sup>29</sup> Although, the use of direct extraterritorial jurisdiction is often problematic because of the political and legal relevance of territorial sovereignty, state practice has shown that it is becoming more common and accepted to use direct extraterritorial jurisdiction to regulate “criminal activity such as terrorism, money laundering, corruption, grave human rights breaches, and “sex tourism”<sup>30</sup>.

### 3 International legal initiatives on businesses’ responsibility for human rights

Different actors and groups have attempted in diverse ways to reduce the “governance gap”<sup>31</sup> and to meet the challenge that business entities present for human rights. Some business sectors have attempted to self-regulate; human rights activists and civil society have brought transnational business entities to civil and criminal courts; international organizations have produced

several guidelines regarding business and human rights, and some states have even tried implementing new norms to regulate their business entities abroad. The result of all these efforts is a multidirectional approach to corporate human rights responsibility through at least five principal avenues: corporate codes of conducts based on self-regulation (or Multi - Stakeholders Initiatives),<sup>32</sup> soft-law initiatives issued by international organizations,<sup>33</sup> extraterritorial regulations,<sup>34</sup> transnational litigation, and contractualization of human rights.<sup>35</sup> Furthermore, there are ongoing debates about the creation of a treaty to regulate business entities’ impacts on human rights, but this is still in its earliest phases.<sup>36</sup> None of these initiatives are perfect or complete individually, but together they create a complex matrix that attempts to regulate business entities.

Yet the more initiatives for regulating corporate impact on human rights proliferate and create different standards, the more disarticulated those initiatives become. Most are based on voluntary implementation and weak enforcement mechanisms. And even when legal avenues of enforcement such as contract law, investment law, and civil and criminal litigation are used, these avenues often obtain inadequate reparations for human rights victims, since they were originally designed to protect legal goods different from those protected by human rights law.

<sup>29</sup> UN Guiding Principles p. 7. According to Jennifer Zerk: “Extraterritoriality is not a binary matter: it comprises a range of measures. Indeed, one can imagine a matrix, with two rows and three columns. Its rows would be domestic measures with extraterritorial implications; and direct extraterritorial jurisdiction over actors or activities abroad. Its columns would be public policies for companies (such as CSR and public procurement policies, export credit agency criteria, or consular support); regulation (through corporate law, for instance); and enforcement actions (adjudicating alleged breaches and enforcing judicial and executive decisions). Their combination yields six types of ‘extraterritorial’ form, each in turn offering a range of options.” Jennifer A Zerk, “Extraterritorial Jurisdiction: Lessons for The Business and Human Rights Sphere from Six Regulatory Areas”, 2010, pp. 16-18, [https://www.hks.harvard.edu/content/download/67817/1244078/version/1/file/workingpaper\\_59\\_zerk.pdf](https://www.hks.harvard.edu/content/download/67817/1244078/version/1/file/workingpaper_59_zerk.pdf); Surya Deva. “Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations International Law and Human Rights.” *Newcastle Law Review* 2004, 8 pp. 87-116.

<sup>30</sup> Zerk, “Extraterritorial Jurisdiction”, p. 5.

<sup>31</sup> “The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.” Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, Corporations and Human Rights: *Protect, Respect and Remedy: A Framework for Business and Human Rights* par. 3 UN. Doc. A/HRC/8/5, 2008 (By John Ruggie) [Hereinafter Ruggie Report 2008].

<sup>32</sup> Murphy Sean D, “Taking Multinational Corporate Codes of Conduct to the Next Level Essays in Honor of Oscar Schachter”, *Colum. J. Transnat’l L.*, 2004, 43, p. 391.

<sup>33</sup> Uche Ewelukwa Ofofodile, Sarah Altschuller, Anna Dolize, Michael Fessler, “Corporate Social Responsibility”, *Int’l Law.*, 2012, 46, p. 181; Josep Lozano, and Maria Prandi. “Corporate Social Responsibility and Human Rights” In *Corporate Social Responsibility: The Corporate Governance Of The 21st Century*, Kluwer Law International, 2011. The most relevant initiatives developed by international organizations are the United Nations Global Compact (UN Global Compact), the European Union Green Paper on Corporate Social Responsibility (Green Paper), the OECD “Guidelines for Multinational Enterprises” (OECD Guidelines), and the International Finance Corporation Sustainability Framework (IFC).

<sup>34</sup> Zerk, “Extraterritorial Jurisdiction”, p. 16.

<sup>35</sup> Farah, “Toward a Multi-Directional Approach”, p. 40.

<sup>36</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, 2 2nd mtg, Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 [hereinafter UN Sub-Commission Norms] Office of the U.N. High Commissioner for Human Rights, *Reports and other documents of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (last visited Aug 22, 2017).; Olivier De Schutter, “Towards a New Treaty on Business and Human Rights”, *Business and Human Rights Journal*, 2016, 1, pp. 41–67.

The international community has made several attempts to regulate the conduct of transnational corporations, not only regarding human rights but corporations' ethical behavior and their impact on society more generally. In 1976, the OECD published the Guidelines for Multinational Enterprises,<sup>37</sup> and later in 1977 the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>38</sup> In 2003, the UN Sub commission on Human Rights proposed the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>39</sup> This initiative imposed legal obligations on transnational corporations<sup>40</sup> and states, which included periodical reports, implementation of domestic and internal measures, and accountability for human rights violations. However, this proposal was archived due to a lack of international consent. The failure of these initiatives has been attributed to the international community's reluctance to create binding norms directed exclusively for the regulation of corporations, states' concern about the excessive intervention of international law in their domestic affairs, and the concerns raised by the possible negative effects of this regulation on the competitiveness of their corporations.<sup>41</sup>

### 3.1 United Nation Guiding Principles (UNGPs)

In an attempt to coordinate the business and human rights movement, in 2005, the UN Human Rights

<sup>37</sup> The OECD guidelines are "Recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards" Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises, <http://mneguidelines.oecd.org/guidelines/> (last visited July 29, 2019).

<sup>38</sup> Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) - 4th Edition, 2017, [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang-en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm) (last visited July 29, 2019).

<sup>39</sup> UN Sub-Commission Norms.

<sup>40</sup> UN Sub-Commission Norms p. 10 "Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate".

<sup>41</sup> Pini Pavel Miretski & Sascha-Dominik Bachmann, "The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: A Requiem", *Deakin L. Rev.*, 2012, 17, p. 5-42.

Commission established a mandate for a Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Special Representative) with the purpose of "identify[ing] and clarify[ing] existing standards and practices" regarding business and human rights.<sup>42</sup> Professor John Ruggie was appointed the Special Representative by the former Secretary General of the United Nation, and in 2007 the Human Rights Council (before the Human Rights Commission) renewed his mandate for an additional year. After this time, one of the main observations of the Special Representative was that there were a number of public and private initiatives regarding business and human rights, but none of the initiatives "had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system."<sup>43</sup>

Therefore, in 2008 the Special Representative asked the Council to adopt the "Protect, Respect, and Remedy" framework<sup>44</sup> that he developed as a common ground for all BHR initiatives. The framework establishes a duty of states to protect human rights, a corporate responsibility to respect human rights, and a need to provide effective remedies for victims of human rights abuses by corporations. The Council adopted the framework in Resolution 8/7, extended the Special Representative's mandate until June 2011, and asked him to advance a set of guiding principles that could become the common ground for the business and human rights initiatives.<sup>45</sup>

Consequently, the Special Representative led a multi stakeholder process with the participation of business, academics, governments, human rights organizations, and other international organizations that culminated with the proposal of thirty-one principles that should guide states and corporations with respect to their responsibilities and duties regarding human rights. The United Nation Guiding Principles on Business and Hu-

<sup>42</sup> UN Guiding Principles. [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>43</sup> UN Guiding Principles. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>44</sup> UN Guiding Principles. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>45</sup> UN Guiding Principles. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

man Rights (UNGPs) were endorsed by the UN Human Rights Council on June 2011,<sup>46</sup> and since then, became the main focal point of the business and human rights movement and the different BHR initiatives.<sup>47</sup>

The UNGPs are the result of a “practical consensus” among many but not all the different stakeholders of the business and human rights world about the duty of corporations to respect human rights. The UNGPs form the focal point of the business and human rights initiatives and the guidance for further action, which may be compared to what the Universal Declaration on Human Rights represents for the entire human rights project.<sup>48</sup> A relevant section of human rights advocates and some developing countries have been dissatisfied with the “softness” of the UNGPs, but a second attempt of creating a binding treaty on business and human rights has taken its place.<sup>49</sup>

The thirty-one Guiding Principles are divided into three parts according to the pillars of the “protect, respect, and remedy” framework proposed by the Special Representative: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) access to effective remedy for victims.<sup>50</sup> Each pillar is composed of two kinds of principles: foundational and operational principles. The former explains the rationale of the responsibility, while the latter specifies the means of implementation.

### 3.1.1 State Duty to Protect

The first pillar is the state duty to *protect* human ri-

ghts of those that are in its territory and/or jurisdiction from third parties, including corporations. The first pillar does not create new international obligations since several international human rights instruments recognize the state’s duty to protect.<sup>51</sup> Accordingly, the language of the UNGPs has barred from deliberation any interpretation of the principles that attempts to expand existing international state obligations.<sup>52</sup> Nevertheless, it is incorrect to think that the principles of the first pillar only restate existing international law. Although the UNGPs help to clarify the state duty to protect with respect to third parties, they differ from existing international law because they establish an additional or higher duty to protect from corporations that have ties to the state.

The UNGPs clarify the scope of the duty to protect by identifying the ways to discharge those obligations through preventive measures (pillar III deals with remedies) such as enforcing existing laws; channeling new laws into particular corporate law norms, so they do not diminish the capacity of corporation to respect human rights;<sup>53</sup> formulating policies that incentivize or encourage businesses to respect human rights;<sup>54</sup> and ensuring coherence among different parts of the state (e.g. human rights office and foreign trade).<sup>55</sup> The UNGPs also

<sup>46</sup> The Guiding Principles have been endorsed by different international initiatives by NGOs and international organizations. The Working Group, created to develop the implementation of the Guiding Principles, have issued several reports on how the Guiding Principle have been embraced in Human Rights Council, Res. 17/4 Adopted by the Human Rights Council: *Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess., Agenda Item 3, U.N. Doc. A/HRC/RES/17/4, 2011.

<sup>47</sup> UN Guiding Principles. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>48</sup> Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2003.

<sup>49</sup> Business & Human Rights Resource Centre, Binding Treaty, <https://business-humanrights.org/en/binding-treaty> (last visited July 29, 2019).

<sup>50</sup> UN Guiding Principles. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>51</sup> “These Guiding Principles are grounded in recognition of: (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms” UN Guiding, principle 1; Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 2, S. EXEC. DOC. C, 95-2, at 2 (1978), 660 U.N.T.S. 195 [hereinafter CERD], Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, art. 5, 1249 U.N.T.S. 13, 17 [hereinafter CEDAW]; and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art. 1, S. TREATY DOC. No. 100- 20, at 1 (1988), 1465 U.N.T.S. 85, 113-14 [hereinafter Torture Convention].

<sup>52</sup> Hence, the UNGPs is not saying that *all* states are responsible for protecting *all* the internationally recognized human rights of the persons present in their territory or under their jurisdiction from third parties. According to international law, only the states that have ratified human rights treaties or that are not permanent objectors of customary law that impose such obligation are internationally responsible for protecting the human rights recognized in those treaties from third parties abuses.

<sup>53</sup> UN Guiding Principles, principle 1. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>54</sup> UN Guiding Principles, principles. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).

<sup>55</sup> UN Guiding Principles, principle 8. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019).



specify the situation in which states usually lose their capacity to meet their international obligations when they incorrectly regulate businesses that provide public services,<sup>56</sup> make contracts with them, or celebrate Bilateral Investment Treaties (BITs) which unable states to pursue further action to meet their international obligations.<sup>57</sup>

None of this is new, but it is a clarification of the state duty to protect. However, the operational principles of the second pillar establish that states have special duties of regulation in regard to businesses in accordance with their *closeness* to the state and the nature of their activity.<sup>58</sup> Closeness to the state here is not a justification for corporate responsibility, but a secondary rule that determines a situation in which states' responsibilities increase. In other words, although the states are already responsible for protecting human rights from third parties under existing IHRL, the operational principles allocate a higher responsibility to the state in relation to corporations that have a nexus with the state such as those owned by, controlled by, or that receive support from the state, as well as those that have celebrated contracts with the state or that provide public services by state concession.<sup>59</sup> Thus, there is a gap between existing international law and the UNGPs. Such a gap can be seen as a form of advancing the creation of new international norms, whether by a later treaty or by creating customary international law. This is precisely one of the roles of international soft law: to reach consensus in areas where there was no previous agreement and to start the ongoing process of voluntary commitments that could later be transformed into legal ones.

### 3.1.2 Corporate Responsibility to Respect

The second pillar specifies the corporate responsibility to respect human rights. In contrast with the first pillar, it is debatable if the second pillar gathers existing

international norms because there are no international norms (hard law) *directed* towards corporations, whether in treaties or customary international law. Therefore, it could be argued that the corporate responsibility to respect does not have the same legal status as the norms recognized in the first and third pillars. In fact, Ruggie did not claim legal authority for pillar two; rather he said it was based on social expectations of business and the social license to operate.<sup>60</sup> (See Figure 1)

However, different scholars have argued that although existing international law is not directed towards corporations because traditionally only states are subjects of international law, existing international law places obligations on corporations but does not contemplate a form of implementation or international accountability for those obligations.<sup>61</sup> Moreover, the general duty to respect expressed as a form of limitation to individual rights in the major international human rights instruments applies to every agent in society.<sup>62</sup> There is no reason to sustain that such an obligation does not apply to businesses, in at least a high level of generality that would need further development to be enforced – especially because it is expressed through international law that rises problems of legal personality, among others.

The UNGPs are the first international document in which the corporate responsibility to respect human rights (as an independent duty) has been expressly set forth. According to the Report of the Special Representative, “the corporate responsibility to respect human rights means avoiding the infringement of the rights of others and addressing adverse impacts that may occur”.<sup>63</sup> It has three main features. First, it is independent from the state capacity to regulate or enforce that responsibility; second, it involves all the potential human rights impacts produced by the business activi-

<sup>56</sup> UN Guiding Principles, principle 5. See: <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshreN.pdf> (Las visited 01 August. 2019)

<sup>57</sup> UN Guiding Principles, principle 9. See: <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshreN.pdf> (Las visited 01 August. 2019)

<sup>58</sup> UN Guiding Principles, principle 4. See: <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshreN.pdf> (Las visited 01 August. 2019)

<sup>59</sup> UN Guiding Principles, principle 4.5. See: <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshreN.pdf> (Las visited 01 August. 2019)

<sup>60</sup> Ruggie Report, “A Survey of The Scope”, Add. 2 2008 par. 55.

<sup>61</sup> Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility.” *Yale Law Journal*, 2001, 111, pp. 443–546; Bernaz, Nadia. *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*. New York, N.Y: Routledge, 2016.

<sup>62</sup> Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets—Keynote Address*, 25 *Brook. J. Int'l L.* pp. 17–26, 1999.

<sup>63</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study conducted by the Special Representative UN. Doc. A/HRC/14/27/Add.2*, 2010 (by John Ruggie) [hereinafter Ruggie Report Add. 2 2010].

ties or through its relations with other actors (supply chains), which means that it covers direct and indirect participation in human rights abuses; and third, its minimum standards are the already existing human rights recognized in the International Bill of Rights (UDHR, ICCPR, ICESCR) and ILO conventions.<sup>64</sup>

The formula of responsibility of corporations adopted in the UNGPs is that corporations have to respect (do not harm) all internationally recognized human rights (as a minimum those recognized in the international bill of human rights and ILO conventions),<sup>65</sup> but the corporate responsibility to respect is specified through the exercise of the due diligence developed by the same corporation.<sup>66</sup> In other words, there is a general principle of responsibility that applies to all corporations regardless of size, activity, or location<sup>67</sup> and with respect to all human rights, but the specification of the responsibility depends on the process of due diligence. Therefore, the due diligence process becomes the central element of corporate responsibility.

The *scope* of the corporate responsibility has been defined as a duty to *respect* in contrast with terms of the much wider, previous language used in the UN Sub-Commission Norms on the Responsibilities of Transnational Corporations according to which corporations “have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law”.<sup>68</sup> The language of respect is a way to define the minimum standard of corporate responsibility and comes from the language used in international human rights law treaties to specify states’ duties. For instance, Article 2.1 of the ICCPR says that state parties should respect human rights, as does Article 1 of the American Convention.

<sup>64</sup> Ruggie Report Add.2 2010, pp. 57-65. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]. ICCPR. International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, art. 11, 993 U.N.T.S. 3, 7 [hereinafter ICESCR]

<sup>65</sup> UN Guiding Principles, commentary to principle 12. [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019)

<sup>66</sup> UN Guiding Principles, commentary to principle 17, 18. [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019)

<sup>67</sup> UN Guiding Principles, commentary to principle 14. [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019)

<sup>68</sup> UN Sub-Commission Norms, A.1

Some scholars have argued that corporations are also bound by the tripartite obligations of respect, protect, and fulfill, which mirrors the international responsibility of the state.<sup>69</sup> However, the UNGPs took a different path and narrowed the scope of corporate responsibility to respect, while keeping the tripartite typology of obligation for states.<sup>70</sup>

The obligation to respect, under the tripartite typology, has been identified as a negative obligation that requires abstention, non-interference, non-violation or non-infringement of another’s human rights. In the words of Asbjorn Edie, “the obligation to respect requires the state, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available... to satisfy its basic need.”<sup>71</sup> Similarly, the Inter-American Court on Human Rights in *Velasquez Rodriguez* defined the obligation to respect found in Article 1 of the American Convention as a negative obligation that is translated into a limitation or restriction to state power,<sup>72</sup> which is complemented by the positive obligations that arise from the obligation to “ensure” included in Article 1.1.

Respect in the UNGPs means, at a minimum “do not harm”. Thus, it would imply that it is mainly a responsibility of abstention or non-interference. However, the UNGPs also imposes a positive duty of due diligence on companies to undertake reasonable efforts to foresee and avoid or mitigate and to remedy human rights violations. Accordingly, the language in the UNGPs is open to a broader interpretation that might imply to international human rights law under the classical tripartite typology because it places positive requirements of actions on corporations. For instance, the corporate responsibility to respect includes the obligation of corporations to develop and implement corporate policies and nationwide human rights risk assessment and to

<sup>69</sup> Jernej Letnar Čeranič, “Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights”; Nicola M. Jägers, in *Corporate Human Rights Obligations: In Search of Accountability*, p. 76, 2002.

<sup>70</sup> UN Guiding Principles, principle 1. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf) (Las visited 01 August. 2019)

<sup>71</sup> Asbjorn Eide, *Realization of Social and Economic Rights* 4/24/17 3:22:00 PM: *The Minimum Threshold Approach*, 43 I.C.J. Rev. pp. 40–52, 1989.

<sup>72</sup> *Velasquez Rodriguez v. Honduras*, Judgment of the Inter-Am. CT. H.R. (ser. C) No. 4, 1988

monitor production through the entire supply chain.<sup>73</sup> In addition, as part of the responsibility to respect the UNGPs derive from an obligation to address adverse human rights impacts and offer remedy for violations, which evidently are obligations that require more than abstention.<sup>74</sup> In this sense, as Ruggie himself said in 2008, doing no harm is not merely a passive responsibility.<sup>75</sup> In fact, the primary means of discharging the responsibility to respect is by conducting a due diligence process, which is explained below to imply several proactive measures by the corporation.<sup>76</sup>

Ultimately, the duty to respect is the minimum standard of corporate responsibility, which means that in some circumstances, corporations might have additional obligations to protect human rights such as keeping workers safe in areas affected by conflict or safe from violence in the workplace.<sup>77</sup> Although these circumstances are exceptional, in such cases the corporate responsibility scope extends to an obligation to protect, which, however, makes the distinction between respect and protect unclear.

The UNGPs specify the corporate responsibility to respect according to the relationship of the business institution with the activity in two categories: 1) businesses' *own* activities, and 2) activities *directly linked* with their operations, products, or services, which include all supply chain relationships. According to the UNGPs, the duty to respect requires of corporations five types of actions (positive or negative) divided according to the kind of business relationship with the activity explained above. These actions are to “avoid causing”, “avoid contributing”, “address adverse impacts”, “seek to prevent”, and “seek to mitigate”.<sup>78</sup>

<sup>73</sup> Justine Nolan & L Taylor, “Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?”, in *Journal of Business Ethics* pp. 433–451, 2009.

<sup>74</sup> UN Guiding Principles, principle 13. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) (Las visited 01 August. 2019)

<sup>75</sup> Ruggie Report; Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises, *Business and human rights: Towards operationalizing the “protect, respect and remedy”* UN. Doc A/HRC/11/13, 2009 [hereinafter Ruggie Report 2009] The 2009 report specified other positive aspects of corporate responsibility to respect rights.

<sup>76</sup> Ruggie Report 2008 par. 56.

<sup>77</sup> Ruggie Report 2009 par. 63–64.

<sup>78</sup> UN Guiding Principles, principle 13. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) (Las visited 01 August. 2019).

Regarding the corporate responsibility when businesses act through their *own activities*, the duty to respect requires that the corporation 1) “avoid causing or contributing to adverse human rights impacts”.<sup>79</sup> Thus, according to the Guiding Principle 13.a, there are two forms of corporate responsibility when businesses act through their own activities. The first is through direct action, which is, being the cause of an adverse human rights impact. The second is indirect, through any form of contribution to an adverse human rights impact committed by a third party. Both of the obligations are obligations to “avoid” which at first glance would indicate a negative obligation or a requirement not to do something. However, as will be explained below, the means of discharging the obligation to avoid requires positive actions mainly through the due diligence process.

The second requirement of the duty to respect is to 2) “seek to prevent or mitigate adverse human rights impacts that are directly linked to their [the corporation’s] operations, products and services by their business relationships”.<sup>80</sup> This second specification of the duty to respect is a much wider rule of responsibility attribution than the first because it includes all business relationships through the supply chain, and the concrete requirement of action is even vaguer than the requirement to avoid. The requirement to “seek” might indicate that it is a matter of means and not of results. In addition, it is a requirement to “prevent” future adverse human rights impacts and to “mitigate” past adverse human rights. The action of prevention and mitigation is much more than mere avoidance; it is a requirement to do something that could include corporate policies, social programs, and internal mechanisms to provide remedies for victims. In sum, the scope of the responsibility to respect is actually to avoid, address, prevent and mitigate adverse human rights impacts depending on the relationship of the business institutions with the activity (See Figure 2).

The rule of attribution under this first requirement of the duty to respect implies an action on the part of the corporation: causation or contribution. This is diffe-

<sup>79</sup> UN Guiding Principles, principle 13. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) (Las visited 01 August. 2019).

<sup>80</sup> UN Guiding Principles, principle 13. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) (Las visited 01 August. 2019).

rent from the second requirement according to which there might be a violation of the duty to respect without cause or contribution to the harm because omission of prevention or lack of due diligence sufficiently triggers the responsibility. In other words, the direct link to the third party which is a product of a lack of due diligence might be enough to violate the duty to respect. Ruggie has clarified that the word “direct” is intended to narrow the possible business relationships that can trigger corporations’ responsibilities.<sup>81</sup> Also, he clarified that there must not be “mutual commercial benefit” in order for a business relationship be considered a direct linkage.<sup>82</sup>

The remaining problem and most interesting question is: what can be considered the “own activities” of a corporation. Does it mean that it has to be part of its corporate objectives, or does it refer to any kind of activity related to its normal operations? Is securing its assets or part of its own activity? Thus, must adverse human rights impacts, for which corporations are responsible, be part of the process of production, distribution, and selling of its products or services? What would happen to, for instance, banks or financial institutions whose operations or services are limited but whose indirect impact is wide? If a corporation dedicated to food production were to contract guerilla members to protect its assets and in doing so were to cause negative impacts on the community where it does businesses, would it have a direct responsibility even if that contract was not related to its business activity? Might it mean activities carried out or authorized by agents of the corporation? Or is “activity” another way of refer-

ring to actions or decisions while doing businesses, such that there is no limitation of responsibility in accordance with the kind of activities the corporation “owns”?<sup>83</sup> (Figure 1)

### 3.1.3 Effective Remedies

The third pillar of the UNGPs is access to an effective remedy for victims of corporate abuses. This pillar allocates obligations to both states and corporations. The pillar distinguishes between state-based and non-state-based remedial mechanisms, and within state mechanisms, it distinguishes between judicial and non-judicial mechanisms. The relevance of this pillar is that it matches state and corporate responsibility with the right of victims to an effective remedy, and it provides effectiveness criteria to evaluate the plurality of non-judicial remedial mechanisms.<sup>84</sup>

Through the inclusion of this pillar, the UNGPs overcame the debate of voluntarism that has characterized the BHR movement since the 1990s adding legal consequences for corporate noncompliance to the language of responsibility (which is already a way to clarify that respect to human rights law is not a matter of illuminated self-interest or goodwill). The pillar is understood as an extension of the state’s duty to protect from third parties, which is based on existing international law and thus has important legal weight.

There are four mechanisms to implement the UNGPs. Firstly, these principles, especially the responsibility to respect, could be implemented as a matter of corporate governance on the basis of self-regulation and voluntary corporate compliance. Alternatively, they could be implemented through the incorporation of the UNGPs’ substantive standards into other international initiatives as has occurred with the OECD Guidelines or the ISO norms. Secondly, as with all international law systems that have been created, the state is expected to implement these norms through domestic law, in particular through “national action plans”. Third, another path of implementation of the corporate responsibility to respect human rights is through the incorporation of this duty into the jurisprudence of

<sup>81</sup> “In drafting the GPs, I sought to protect against overly broad interpretations: at the extreme, “the CEO is friendly with the Minister thus the Company is connected to everything abusive the government does. Putting the word “directly” before “linked” was intended to stress than any abuse must be linked to the company’s operation, products, or services, not merely to the fact of a relationship itself.” John Ruggie, OECD Workshop Ruggie Letter, 2015, [https://business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017\\_0.pdf](https://business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017_0.pdf). (last visited April 12, 2019).

<sup>82</sup> “In drafting the GPs, I sought to protect against overly broad interpretations: at the extreme, “the CEO is friendly with the Minister thus the Company is connected to everything abusive the government does. Putting the word “directly” before “linked” was intended to stress than any abuse must be linked to the company’s operation, products, or services, not merely to the fact of a relationship itself.” John Ruggie, OECD Workshop Ruggie Letter, 2015, [https://business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017\\_0.pdf](https://business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017_0.pdf). (last visited April 12, 2019).

<sup>83</sup> This seems to be a question about the even deeper or more detailed specification of the responsibility depending on the activity of the business. The principle of responsibility is “property”, owned directly, different from the principle “the activity for it was created” or social reason.

<sup>84</sup> UN Guiding Principles. Principle 13. See: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) (Las visited 01 August. 2019).

other regional human rights tribunals, such as the Inter-American Court on Human Rights. Fourth, the last path of implementation is the development of new international law based on the UNGPs standards through the creation of a treaty or customary international law.

### 3.2 National Action Plans (NAPs)

In 2014, the UN Human Rights Council issued two resolutions to propose different possible ways to implement the UNGPs: National Action Plans (NAPs) and a legal binding treaty.<sup>85</sup> The NAPs “are government-drafted policy documents that articulate state priorities and indicate future actions to support the implementation of legal obligations or policy commitments on a given topic”,<sup>86</sup> which were previously employed in other policy areas including general human rights implementation. After five years of the UNGP endorsement, the NAPs are its most relevant impact as a soft law instrument. Several countries have launched NAPs and several others have initiated the process of consultation and development of their plans. In 2018, a total of thirteen countries have developed NAPs. The first NAP was developed by the UK, the next by the Netherlands in 2013, followed by Denmark, Finland, Lithuania, Sweden, and Norway over the next two years. In 2016, Switzerland, Italy, the USA, and Germany launched their respective NAPs.<sup>87</sup> Colombia was the first Latin-American country that has launched a NAP in 2016.<sup>88</sup> In addition, civil so-

ciety groups,<sup>89</sup> the Working Group,<sup>90</sup> and the UN Global Compact<sup>91</sup> have published draft guidelines for developing NAPs.

The problem of current NAPs is that most of them are largely “declaratory of existing measures and commitments, with few hard promises to take new action.”<sup>92</sup> This is due in part to the nature of NAPs which are only governance tools that help promote convergence between standards where there is no clarity of the legal obligation; they also bring domestic laws, policies, and practices into alignment with international norms (even if they are soft law).<sup>93</sup> In other words, NAP formation is a way of setting goals, promoting dynamic cooperation between different local stakeholders, and working toward stronger commitments, but it does not impose legal obligations on corporations. Because of this, some have argued that NAPs are a waste of resources that could be better invested in advocacy for other forms of implementation such as naming and shaming, reporting, or mandatory due diligence.<sup>94</sup>

On the other hand, some NAPs are a reaffirmation of the corporate duty to respect, which is not only a step forward in the implementation of that duty through domestic law but also a way to demonstrate state practice that could later develop customary international law.<sup>95</sup> In addition, NAPs have been strategically

<sup>85</sup> Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/RES/26/22, 2014 <http://www.ohchr.org/EN/Issues/Business/Pages/Resolutions-Decisions.aspx>.

<sup>86</sup> Claire Methven O'Brien., *National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool*, 1 Bus. and hum. rights j. Business and Human Rights Journal pp. 117-118, 2016.

<sup>87</sup> Office of the High Commissioner for Human Rights, *State national action plans*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited July 29, 2019) There are current NAPs processes taking place/being formed in France, Ireland, Belgium, Portugal, Poland, Scotland and Slovenia. Non-European countries that are working on NAPs include Argentina, Australia Azerbaijan, Chile, Guatemala, Greece, Japan, Jordan, Kenya, Malaysia, Mauritius, Mexico, Mozambique, Myanmar, and Thailand.

<sup>88</sup> Consejería de Derechos Humanos, *Plan de Acción de Derechos Humanos y Empresas*, [http://www.ohchr.org/Documents/Issues/Business/NationalPlans/PNA\\_Colombia\\_9dic.pdf](http://www.ohchr.org/Documents/Issues/Business/NationalPlans/PNA_Colombia_9dic.pdf) (last visited July 29, 2019).

<sup>89</sup> International Corporate Accountability Roundtable & Danish Institute for Human Rights, “National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks”, 2014, <https://www.icar.ngo/publications/2017/1/4/national-action-plans-on-business-and-human-rights-a-toolkit-for-the-development-implementation-and-review-of-state-commitments-to-business-and-human-rights-frameworks> (last visited April 12, 2019) [Hereinafter ICAR & DIHR, National Action Plans on Business and Human Rights].

<sup>90</sup> Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guidance on National Action Plans on Business and Human Rights*, version 1.0, [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAP-Guidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAP-Guidance.pdf) 2014.

<sup>91</sup> UN Global Compact, *Guidance for Global Compact Local Networks on National Action Plans on Business and Human Rights*, <https://www.unglobalcompact.org/library/5151> (last visited July 29, 2019).

<sup>92</sup> O'Brien, “National Action Plans”, p. 118.

<sup>93</sup> O'Brien, “National Action Plans”, p. 117-118.

<sup>94</sup> ICAR & DIHR, National Action Plans on Business and Human Rights; Robert McCorquodale, “Expecting business to respect human rights without incentives or Sanctions UK Human Rights Blog”, <https://ukhumanrightsblog.com/2013/09/04/expecting-business-to-respect-human-rights-without-incentives-or-sanctions-robert-mccorquodale/> 2014. (last visited July 29, 2019).

<sup>95</sup> Government of Sweden, “Action Plan for Business and Hu-

effective in encouraging the business sector's voluntary commitment to the UNGPs.<sup>96</sup>

Beyond NAPs, some examples of other domestic measures created to address negative human rights impacts are the UK Modern Slavery Act which requires every corporation with a total global annual turnover of £36million that performs business (or part of a business) in the UK to produce a slavery and human trafficking statement for each financial year.<sup>97</sup> Others include the Dodd-Frank Act that requires corporations to report on the sources of minerals used in their products that originated from the Democratic Republic of Congo or adjoining countries,<sup>98</sup> or the recent French law that establishes a duty of care obligation for parent and subcontracting companies.<sup>99</sup> These domestic measures are part of the interesting matrix of national and international development in the BHR field based on the UNGPs which also include guidelines, benchmarking, and joint action platforms.<sup>100</sup>

### 3.3 Treaty on BHR

In 2013 in response to the nonconformity of some governments and human rights communities to the “softness” of the UNGPs, Ecuador (with the support of 85 other countries) urged the UN Human Rights Council to consider developing a binding legal instrument on business and human rights.<sup>101</sup> The claimed

to desire a binding law more effective than voluntary mechanisms to overcome businesses' resistance to accountability, an issue commonly presented in the implementation of soft law mechanism such as the UNGPs. At the end of 2013, more than 600 civil society groups joined the call for a legally binding treaty.<sup>102</sup>

John Ruggie has been skeptical of an all-encompassing “silver bullet” treaty that could address all the problems related to negative corporate human rights impacts.<sup>103</sup> Some of his reasons for questioning the treaty path come from the observation that “human rights treaties are least effective in the case of those countries where they are needed most”<sup>104</sup> because those countries are unwilling or unable to enforce their international obligations, which is precisely the regulatory challenge as explained above. Thus, adding another international obligation on host states is either “redundant or irrelevant”.<sup>105</sup> In addition, he argues that any treaty capable of addressing all the national and international issues related with the business and human rights field would have to be at a very high level of abstraction with very little practical use to real people in real places.<sup>106</sup> Moreover, since the treaty would be so abstract, every state would approach enforcement in different ways producing “confusion and conflicting outcomes, not uniform practices.”<sup>107</sup> Ultimately, Ruggie is expressing

man Rights”, <http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>. 2015.

<sup>96</sup> United States Council for International Business, Global Business Initiative on Human Rights & UN Global Compact et.al, “Statement on National Action Plans on Business and Human Rights”, Session at the UN Annual Forum on Business and Human Rights, <http://www.global-business-initiative.org/wp-content/uploads/2016/11/NAPs-Statement-Nov-2016.pdf>. 2016.

<sup>97</sup> “UK Modern Slavery Act”, <https://www.gov.uk/government/collections/modern-slavery-bill>, 2015.

<sup>98</sup> Business & Human Rights Resource Centre, “Implementation of US Dodd-Frank Act rule on conflict minerals: Commentaries, guidance, company actions”, <https://business-humanrights.org/en/conflict-peace/conflict-minerals/implementation-of-us-dodd-frank-act-rule-on-conflict-minerals-commentaries-guidance-company-actions> (last visited July 29, 2019).

<sup>99</sup> Lucia Ortiz, “France Adopts Corporate Duty of Care Law, Friends of the Earth International”, <http://www.foei.org/press/france-adopts-corporate-duty-care-law> (last visited July 29, 2019).

<sup>100</sup> World Business Council on Sustainable Development, “Business & Human Rights: From Principles to Action”, <http://www.wbcsd.org/Clusters/Social-Impact/Resources/Business-Human-Rights-From-Principles-to-Action>. 2016.

<sup>101</sup> Business & Human Rights Resource Centre, “Calls for a bind-

ing treaty on business & human rights – perspectives”, 2013 <https://business-humanrights.org/en/calls-for-a-binding-treaty-on-business-human-rights-perspectives> (last visited July 29, 2019).

<sup>102</sup> Cassel Douglass & Ramasastry Anita, *White Paper: Options for a Treaty on Business and Human Rights*, 6 Notre Dame J. Int'l Comp. L. 1, p. 10, 2016.

<sup>103</sup> John Ruggie, “Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors”, Inst. for Hum. Rts. & Bus, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors> (last visited July 29, 2019); John Ruggie, “A Business and Human Rights Treaty? International legalisation As Precision Tools”, Inst. for Hum. Rts. & Bus, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision> (last visited July 29, 2019).

<sup>104</sup> John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013) p. 61.

<sup>105</sup> John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013) p. 61.

<sup>106</sup> John Ruggie, “Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors”, Inst. for Hum. Rts. & Bus, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors> (last visited July 29, 2019).

<sup>107</sup> John Ruggie, “A Business and Human Rights Treaty? International legalisation As Precision Tools”, Inst. for Hum. Rts. & Bus, 2014, <https://www.ihrb.org/other/treaty-on-business-human>

concern about the possibility of states using the treaty negotiation as an excuse not to advance in the implementation of the UNGPs since all their efforts are invested in the treaty negotiation process. His concern arises from the fact that “most states that voted in favor of initiating treaty negotiations have done little if anything to implement and promote the UNGPs within their own countries, regions, or globally”,<sup>108</sup> while the countries opposing the treaty (see below) have done more in this matter, in particular, European countries.

Nevertheless, Ruggie is not at all against a treaty but only against the idea that the treaty is the one and ultimate solution to the corporate problem. He predicts that Ecuador’s proposal might end in one of two ways: either the negotiation takes too long (a decade or more), and ends like previous norms with no real effect, or “they manage to persuade enough developing countries to adopt such a treaty text, but which home countries of most TNCs do not ratify and, therefore, are not bound by”.<sup>109</sup> In order to avoid ending in one of these situations, he suggested that the treaty should not be limited to TNCs, should create an intergovernmental working group that could advance a treaty draft, include all sectors including business in the process, and not stop implementing the UNGP during the treaty negotiation process.<sup>110</sup>

In 2014, the UN Human Rights Council established an Intergovernmental Working Group to elaborate a treaty to regulate the activities of TNCs and other business enterprises. Twenty members of the Council supported the initiative, fourteen states opposed it, and thirteen abstained. The opposing states were mainly European states, the U.S., Japan, and the Republic of Korea.<sup>111</sup> The reasons that motivated the opposition were the unnecessary polarization that this could bring

to the field, the unsuitability of an overacting instrument to face the complexities of business activities, the limitation that the treaty would only bind state parties, the problem of corporate legal personality on international law, and that local businesses would be left outside the treaty according to the resolution.<sup>112</sup>

The spectrum of possibilities in the content of the treaty oscillates between minimal obligations such as public reporting and disclosure and provisions for legal liability that could find effective remedy through civil and/or criminal procedures in national courts or in an international tribunal.<sup>113</sup> Professors Doug Cassel and Anita Ramasastry classified the various treaty options into four categories: treaties mandating national action, treaties establishing international enforcement machinery, treaties that would mandate states to amend their laws to ensure consistency with their duty to protect human rights, and treaties tailored to particular business sectors or specific human rights violations.<sup>114</sup>

Although there are many different treaty options, there are some ideas that might help limit the number of options available. For instance, the range of rights covered by the treaty will increase or decrease based on the kind of duties imposed by the treaty and enforcement mechanisms. The harder or stronger the mechanisms, the fewer rights there are that can be reasonably covered by the treaty. Thus, if any treaty obligations are reporting, planning, or implementing could reasonably cover all the human rights recognized in the International Bill, but a treaty that imposes criminal sanctions to corporations would only be able to cover those rights protected through recognized international crimes.<sup>115</sup>

Furthermore, a treaty that would not contemplate “legally enforceable corporate accountability and access of victims to remedies”<sup>116</sup> will not achieve what the proponents of the treaty (Ecuador and South Africa) seek through this instrument. Therefore, a treaty that im-

rights/a-business-and-human-rights-treaty-international-legalisation-as-precision (last visited July 29, 2019).

<sup>108</sup> John Ruggie, “Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors”, *Inst. for Hum. Rts. & Bus.*, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors> (last visited July 29, 2019).

<sup>109</sup> John Ruggie, “Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors”, *Inst. for Hum. Rts. & Bus.*, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors> (last visited July 29, 2019).

<sup>110</sup> Cassel & Ramasastry, “White Paper”, p. 10.

<sup>111</sup> Human Rights Council *Res. 26/9*, U.N. Doc. A/HRC/RES/26/9, ¶ 1 (July 29, 2019).

<sup>112</sup> Statement by the Delegation of the U.S., Explanation of vote on the resolution of the Human Rights Council, *Res. A/HRC/26/L.22/Rev.1* available at: Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights, US Mission Geneva, <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/> (last visited Aug 24, 2017).

<sup>113</sup> Cassel & Ramasastry, “White Paper”, p. 18-19.

<sup>114</sup> Cassel & Ramasastry, “White Paper”, p. 119.

<sup>115</sup> Cassel & Ramasastry, “White Paper”, p. 42-43.

<sup>116</sup> Cassel & Ramasastry, “White Paper”, p. 25.

ses only non-binding individual petition systems, monitoring bodies, or mere reporting and disclosure obligations would not suffice for this purpose. However, the stronger the sanctions and enforcement mechanism, the harder will it be to find consensus among countries.

In addition, a solution to the problem of abstraction in a framework treaty pointed out by Ruggie might be a combination between a framework treaty and optional protocols tailored to a specific sector or human right or establishing particular enforcement mechanisms. This was the treaty model of the international legal regime on the ozone layer.<sup>117</sup>

Among the different treaty options, Ruggie argues that the most reasonable one would be a treaty that addresses *jus cogens* norms violations or those most serious human rights violations such as crimes against humanity, genocide, forced labor, torture, and extrajudicial killings.<sup>118</sup> This kind of treaty would have a wider level of agreement among international actors since there are good reasons for arguing that existing international law already allocates obligations on non-state actors to respect these “core” norms.<sup>119</sup> Nevertheless, he accepts that such a treaty would not include the broad spectrum of human rights violations in which business entities are involved. The same kind of objection can be applied to those treaties that would create direct liability for recognized international crimes either through national or international prosecution.<sup>120</sup> An alternative solution would be the model embraced by the New Protocol to the African Court of Justice and Human Rights<sup>121</sup> which

expands the list of crimes that corporations can commit and clarifies that legal persons can be directly prosecuted for those crimes.<sup>122</sup> The problem with this model is that it will not obtain the same kind of consensus that the first one could, nor will it even obtain the same legal support since there is still much disagreement about the type of crimes corporations can directly commit under international law.<sup>123</sup>

The most controversial treaty model would be one that directly allocates responsibility to corporations, by which states would accept that all TNCs under their jurisdiction are subjected to some defined obligations with respect to human rights and might be directly liable under such a treaty whether in domestic courts or a new international tribunal. It is controversial because it implies a silent revolution since corporations would be directly bound by international law and not only domestic law. Olivier De Schutter, argues that such a treaty could be conceived by analogy to the ICC statute, except this one would be tailored to serious human rights violations committed by corporations or in which corporations are complicit.<sup>124</sup> Thus, in its scope, that kind of treaty would be very much like the one proposed by Ruggie. This is different from the proposal of the International Commission of Jurists of a treaty that could obligate to pass a national law to require corporations to respect human rights because under this option corporations would not have a direct international obligation, they only have to obey domestic law of the country where they are incorporated.<sup>125</sup>

<sup>117</sup> For a discussion of Framework Treaties. Cassel & Ramasastry, “White Paper”, p. 24-25.

<sup>118</sup> John Ruggie, “A Business and Human Rights Treaty? International legalisation As Precision Tools”, Inst. for Hum. Rts. & Bus, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision> (last visited July 29, 2019).

<sup>119</sup> Nicola M. Jägers, “Corporate Human Rights Obligations” p. 46, 2002. For instance, in *Doe v. Unocal*, 1997 the United States Court of Appeals of the ninth circuit found responsible Unocal for violating international human rights norms that amount to breaches of *jus cogens* in Myanmar subjecting peasants to a forced labor program as part of a project to build a pipeline to transport natural gas from Myanmar’s coast through the country until Thailand. The Court stated that forced labor is one of the “handful of crimes ... to which the law of nations attributes *individual liability*,” such that state action is not required.

<sup>120</sup> Cassel & Ramasastry, “White Paper”, pp. 26-27; 36-37.

<sup>121</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, accessible at <http://www.au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20>

[ON%20THE%20AFRICAN%20COURT%20-%20EN\\_0.pdf](#). (Not in force yet).

<sup>122</sup> Cassel & Ramasastry, “White Paper”, p. 36.

<sup>123</sup> Andrew Clapham argues that the lack of jurisdiction to try a corporation does not mean that the corporation does not have a direct legal obligation or that we cannot say that the corporation has breached international law. It means that the obligation must be enforced through different forums, e.g. national domestic courts, international human rights treaty monitoring bodies, or even through mechanism made under non-binding schemes for investigation such as that of the OECD. Andrew Clapham, *Human Rights in The Private Sphere* p. 178, 1993. In United States of America, Court of Appeals for the Second Circuit, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, S.D.N.Y. 2003 the argued that international norms that bind private individuals do not directly apply to corporations but only to their owners or managers.

<sup>124</sup> De Schutter, “Towards a New Treaty”, p. 59.

<sup>125</sup> International Commission of Jurists, “Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises”, <https://www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf> .2016.



Other different issues that might have to be dealt with in a treaty would be: the scope of corporate reasonableness between parent companies and their subsidiaries; the rights and type of business entities covered by the instrument; the clarification of the extraterritorial jurisdiction of state and of the legal standards to determine complicity (e.g. knowledge, purpose test); direct responsibility (e.g. negligence); and the obligation to overcome the corporate veil.<sup>126</sup>

The Intergovernmental Working Group has held four sessions. The last session took place on October 2018. In September 2017, the Chair of the working group issued a document titled “Elements for the draft legally binding instrument” which constitutes the basis for further negotiations to elaborate a treaty on BHR, and a Zero Draft (followed by its draft Optional Protocol) was presented in July 2018.<sup>127</sup>

Some of the elements to highlight of draft legally binding instrument are: 1) it suggests a treaty not only for TNCs but also to regulate other business enterprises (OBE) that can harm human rights; 2) it reaffirms the primary responsibility of the state to protect human rights; 3) the obligations proposed are directed toward states and TNCs independently; 4) one of the main obligations of the state will be to ensure domestic civil, administrative and criminal liability of TNCs regarding human rights abuses, and to adopt legislation to ensure the TNCs adopt and implement due diligence processes; 5) the main obligation directed to TNCs are mainly those set forth in the UNGPs; 6) the term “under the jurisdiction” of the state means not only that a TNC is incorporated in that state but also that is registered, has its headquarters, or has substantive activities in the state concerned;<sup>128</sup> and 7) proposes that states should consider different mechanism of implementation and monitoring of the future treaty obligations including an International Court on Transnational Corporations and Human Rights or create special chambers on existing

international and regional Human Rights Courts dedicated to adjudicating on this issues.<sup>129</sup>

The elements for the draft of a treaty on TNCs and other business enterprises with respect to human rights has various relevant characteristic that are worthy to highlight about the scope of application *rationae personae*, the explicit hierarchy of international law specified in the treaty, the rights covered, the substantial obligation included in the treaty – in particular in regard with o the problematic exercise of national jurisdiction extraterritorially-, and the implementation mechanism of the treaty that includes the possible creation of an international tribunal.

First, the draft treaty is designed in order to include Transnational Corporations and other Business Enterprises regardless of its size, structure, mode of creation or control. What defines the scope of application *rationae personae* is the transnational character of the activity performed by these entities. Although this is a positive sign since it overcomes the complex discussion about the type of business association that should be regulated (e.g. multinationals or transnational) this delimitation of the scope of application of the treaty leaves out national corporations with a very relevant social impact and capacity to elude state control. A reasonable explanation of such limitation is the reaffirmation of the primary duty of the state to regulate, investigate and sanction violations of human rights committed within its territory or jurisdiction, while international law main concern is human rights violations that are transnational in character.

Second, the draft treaty has adopted the formula of the UNGP that includes all recognized human rights rather than specifying the most commonly violated rights or choosing for the option of a treaty that sanctions the most serious or grave human rights violations following the model of the Rome Statute. This is of relevance because, from a realistic point of view, the wider the material scope of the treaty will be, the weaker will have to be the sanctioning mechanisms.

Third, regarding the obligations enshrined in the draft treaty, the drafters have reaffirmed the relevan-

<sup>126</sup> Cassel & Ramasastry, “White Paper”, p. 39-49.

<sup>127</sup> Human Rights Council, *Report on the thirds session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* UN. Doc. A/HRC/26/9 <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

<sup>128</sup> Human Rights Council, *Report on the thirds session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* UN. Doc. A/HRC/26/9 <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

<sup>129</sup> Human Rights Council, *Report on the thirds session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* UN. Doc. A/HRC/26/9 <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

ce of the primary responsibility of States to protect against human rights abuses by third parties including corporations (article 3), while TNCs and OBEs have an independent obligation from the state's obligations to "comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains" (article 3.2). The language clearly entails mandatory obligations instead of a guiding principle for private entities. Accordingly, TNCs and OBEs are being treated as subjects (or at least participants) of international law since they can bear international obligations. However, this is not a complete revolution to classic general international law because the implementation mechanism of the obligation remains at the head of the state (article 3.1).

In addition, it must be highlighted that article 3 expands businesses' obligation to respect established in the UNGP to an obligation of using their influence to promote and ensure respect of human rights, which is beyond from the notion of respect previously explained. This could be translated into, for instance, international responsibility of TNCs for their failure to promote a culture of human rights within their organization. From the outset, this seems controversial because of the expansion of the limited and discrete responsibility to respect of the UNGPs.

The model adopted in the draft treaty is to create obligations of internal legislation for states parties in order to enforce TNCs and OBEs' human rights obligations. Some of these legislative or administrative measures include: periodically report, an obligation to perform human rights and environmental impact assessments, include human rights clauses in their procurement contracts, and require corporations to oversee their supply chains to prevent human rights abuses. The process of internalization of international legal standards is a common form of enforcement of international law, and in various ways, an effective form because states and non-state actors are much more willing to obey domestic law than international law itself.<sup>130</sup> For the time being, it would be unreal to expect that international law could allocate international obligations and sanctions to non-state actors without the necessary in-

<sup>130</sup> Harold Hongju Koh, Regarding the idea of internalization as a necessary process of enforcement of international law, *see*, "Why Do Nations Obey International Law Review Essay," *Yale Law Journal*, no. 8 (1997 1996): 2599–2660.

tervention of states.<sup>131</sup>

Fourth, the draft treaty is based on the premise that a hierarchy among international law regimes exists giving prevalence to human rights over international trade or investment law. Moreover, the draft treaty explicitly affirms that states shall take the necessary measures to take "into account the primacy of human rights over pecuniary or other interests of corporations." (article 3.1). This means that not only international law has a hierarchy over other regimes, but that corporations' interest themselves should be subjected to the primacy of human rights.

Fifth, the draft treaty includes a section on the legal liability of TNCs and OBEs which is one of the main differences with the UNGPs because the treaty would not only be a binding instrument, but also one that ascertains corporate legal responsibility for human rights abuses. Legal liability could be criminal, civil or administrative. Regarding criminal responsibility, the draft asserts that states shall create criminal liability or its equivalent for TNCs and OBEs subject to their jurisdiction. However, such criminal liability could not preclude the individual responsibility of those involved in the decision-making process within the corporation. The civil legal liability should be independent of criminal liability and vice versa, and states shall create legislation which precludes TNCs and OBEs to benefit from privileges and immunities granted by international law.<sup>132</sup>

Although the treaty does not contemplate the exercise of extraterritorial jurisdiction to establish legal liability for TNCs and OBEs, it incorporates a wide notion of jurisdiction. Article 7 defines that under the jurisdiction of the state it is included a TNC "which has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned" (article 7). Accordingly,

<sup>131</sup> The discussion about the possibility of allocate direct international obligations on corporations, and other non-state actors has been a delicate matter subjected to intense academic debate. *See generally*, Carlos Manuel Vásquez, "Direct vs. Indirect Obligations of Corporations under International Law," *Columbia Journal of Transnational Law*. 433 (2005): 927–59.

<sup>132</sup> The discussion about the possibility of allocate direct international obligations on corporations, and other non-state actors has been a delicate matter subjected to intense academic debate. *See generally*, Carlos Manuel Vásquez, "Direct vs. Indirect Obligations of Corporations under International Law," *Columbia Journal of Transnational Law*. 433 (2005): 5–6.

the draft treaty extends, and even contradicts, national norms in different states because it extends state jurisdiction over the actions of the subsidiaries of the parent or controlling company which has substantive connections to the state. In addition, the draft treaty established that the rule that grants jurisdiction over the abuses could be either the forum where the harm occurred or where the corporations are incorporated or have a substantial presence.

Ultimately, the draft treaty contemplates the possibility that State parties create an international tribunal or special chambers in existing international or regional Courts devoted to Transnational Corporations and Human Rights. In addition, it encourages international cooperation through the creation of new multilateral or bilateral treaties in order to strengthen mutual cooperation to advance national judicial procedures against corporations.

## 4 Conclusion

This article has shown the complexity of the corporate problem due to the different forms in which corporations can harm human rights, the variety of rights that can be violated, and the insufficiency of domestic law to regulate what traditionally has been a creature of the state. It has also critically described the different attempts of the international community in order to address the governance gap created by globalization and the modern corporate practices that harm human rights.

The UNGPs have become the focus of the BHR movement. Evidence of this is that all other international initiatives such as International Soft law, and Multi Stakeholders Initiatives (MSI)<sup>133</sup>, the NAPs or even the treaty assume as a departure point Ruggie's work whether to differentiate from it or to embrace it.

<sup>133</sup> Multi Stakeholders Initiatives (MSIs) started as codes of conduct specific to corporations or were drafted exclusively by industry. Later these codes of conduct evolved into MSIs that include a wider spectrum of participants and topics. They involve various actors such as workers' representatives, consumer groups, customers, investors, NGOs, businesses, and governments. In recent years they have multiplied, but there is no clear form of categorization or registry. Some MSIs are industry oriented, and others are multi-industry or universal, but all are intended to address the challenges of governance gaps and to enhance dialogue among different stakeholders.

Although the BHR movement is young, it has impressively grown in the past decade. It transverses different legal regimes and exemplifies the complex and sometimes unclear separation between public and private spheres. This article has explored several of the legal and non-legal initiatives that address businesses' responsibility for human rights. However, several other initiatives have been omitted such as non-financial disclosures,<sup>134</sup> contractualization of human rights,<sup>135</sup> international trade and investment law mechanism,<sup>136</sup> possible investigations of corporate managers by the International Criminal Court,<sup>137</sup> and transnational criminal litigation.<sup>138</sup> To describe and explain all these other possible forms of redressing human rights wrongs committed by corporations exceeds the limits of this article.

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## Tables and figures

Figure 1. Foundational Principles Pillar 2

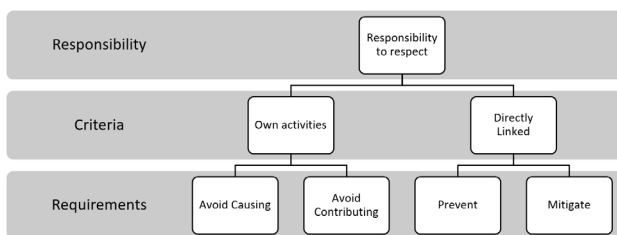


Figure 2. Operational Principles Pillar 2

