doi: 10.5102/rdi.v15i2.5696

Some remarks on the third sessions of the Business and Human Rights Treaty Process and the 'Zero Draft'*

Algunas observaciones sobre el tercer período de sesiones del proceso del Tratado de Negocios y Derechos Humanos y el 'Zero Draft'

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Abstract

The process of creating an international legally binding instrument to regulate, under international law, the activities of transnational corporations and other business enterprises with respect to human rights, is slowly moving forward. Important and complex issues were addressed during the third session of the Intergovernmental Working Group, which was once more a forum of ideological and political confrontation. Nevertheless, the contours of a potential treaty are starting to become clearer, as a relative consensus on the measures that the instrument should include starts to crystallize. Substantial and procedural elements addressed during the third session have provided a large basis for discussion and analysis, while political and legal considerations are starting to appear more intensely as the process approaches the negotiation stage. In that regard, the 'zero draft' of the binding instrument provides States and other stakeholders with a starting point to negotiate one of the potential developments in the business and human rights field.

Key words: business and human rights; treaty process; Intergovernmental Working Group; transnational corporations; UNGPs.

Resumen

El proceso de crear un instrumento internacional jurídicamente vinculante para regular, bajo el derecho internacional, las actividades de las empresas transnacionales y otras empresas con respecto a los derechos humanos, comienza a avanzar lentamente. Diversas cuestiones, tanto importantes como complejas, fueron abordadas durante la tercera sesión del Grupo de Trabajo intergubernamental, que se convirtió nuevamente en un foro de confrontación ideológica y política. Sin embargo, los contornos de un eventual tratado empiezan a aclararse, conforme comienza a cristalizarse un consenso relativo respecto a las medidas que tal instrumento debería incluir. Los elementos sustantivos y procesales que fueron tratados durante la tercera sesión aportan una base amplia para la discusión y el análisis, mientras que distintas consideraciones políticas y jurídicas aparecen con mayor intensidad conforme

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la fase de negociación del proceso se aproxima. De tal forma, el 'borrador' del instrumento vinculante presenta a los Estados y otros actores interesados un punto de partida para negociar uno de los potenciales desarrollos del campo de las empresas y los derechos humanos.

Palabras clave: empresas y derechos humanos; tratado vinculante; Grupo de Trabajo intergubernamental; empresas transnacionales; Principios Rectores sobre las empresas y los derechos humanos.

1. Introduction

The third session of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (hereinafter 'IGWG') took place between 23 and 27 October 2017, after two previous sessions where the potential scope and content of a business and human rights treaty were discussed. The third session,[1] as it will be explored in this article, had as its main objective to begin discussions on a draft instrument on business and human rights, on the basis of a document prepared by the Chairperson-Rapporteur of the Intergovernmental Working Group. While the aforementioned document was not the draft text of the instrument, it did provide a wide and interesting basis for States and other stakeholders to discuss, for a week, the potential options available that could be included in the text for negotiation. However, as this article will briefly discuss, many of the options presented in the document could be controversial aspects of a potential legally binding instrument, a situation that could lead to reticence or even open rejection from many States, taking into consideration the contentious nature of the IGWG during its initial sessions. In addition, considering that the future instrument would be a part of general international law, it is important to situate it within the current practice of States –and in any case, to aim for elements that can evolve with their general acceptance–, in order to achieve a resulting document that presents feasible traits for the development of international (human rights) law.

In addition, the recent publication of the draft instrument for negotiation calls for a short analysis on some of its most important provisions –the *core*, so to speak, of the draft instrument–, in order to analyze the initial choices made by the Chairperson-Rapporteur for the beginning of negotiations, which shall take place in October 2018. As it can be observed from this short introduction, the aim of this article is not to provide a scientific or theoretical analysis; rather, its humble intention is to provide some comments on the different aspects included in the document for the third session, to take a quick glance at the actual negotiations that took place during that session, and to take a first look at the draft instrument, in an effort to compare these instruments to the current status of several of its elements under international law. In this regard, a first section will address the 'Elements' document prepared for the third session; a second section will reflect on some of the reactions and contributions of States during the session vis-à-vis some of the controversial or central aspects included in the Elements document; and finally, a last section will briefly address some of the aspects contained in the draft instrument released by the Chairperson-Rapporteur in mid-July 2018, prior to the fourth session of the Open-Ended Intergovernmental Working Group.

2. The basis for the third session: the 'Elements' document

Resolution 26/9 of the Human Rights Council mandated the Chairperson-Rapporteur of the IGWG to develop a document containing "elements for the draft legally binding instrument for substantive negotiations… taking into consideration the discussions held at its first two sessions".[2] Both sessions addressed numerous issues,[3] ranging from jurisdiction and State responsibility, to potential civil, criminal and administrative liability regimes in relation to corporate conduct. In addition, other important questions were also covered, such as the horizontal and vertical scope of the potential instrument (adressing which rights should be covered by

1 For a short recapitulation of some aspects of the session, see Cassel, Doug, "The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty", *Business and Human Rights Journal*, Vol. 3:2, 2018.

2 Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9 (26 June 2014), par. 3.

3 Cantú Rivera, Humberto, "Negotiating a Business and Human Rights Treaty: The Early Stages", *UNSW Law Journal*, Vol. 41(3), 2017.

the treaty in the first case, and which companies within a corporate group should be responsible for human rights violations committed within global supply chains, in the second case). In that sense, the 'Elements paper'[4] that was presented by the Chairperson-Rapporteur –barely a month in advance of the session, a situation that impacted on the possibility for delegations to adequately prepare for the session– with the intention of commencing negotiations included numerous substantive aspects (A), on the one part, as well as procedural possibilities (B), on the other part, with the aim of encouraging dialogue to bridge the important gap that so far has been the 'trademark' of the business and human rights treaty process. Nevertheless, one of the key aspects of the Elements paper was the fact that it included a large number of possibilities without any specific orientation, in an effort to favor dialogue among States and other stakeholders.

2.1. Substantive elements: rights and obligations for States and businesses

The Elements paper addressed an important number of substantive aspects, among them issues such as the scope of application (specifically which rights, acts and actors would be covered by it); general obligations for States, business enterprises and even international organizations; preventive measures that could be adopted in order to prevent human rights violations linked to business enterprises; and finally, aspects revolving around the issue of legal liability, focusing both on international responsibility and domestic liability for the different actors involved. While addressing each one of them in detail is beyond the scope of this article, some comments will be shared in relation to the potential options being presented to States by the Elements paper.

First of all, in relation to the scope of application, the Chairperson-Rapporteur divided it in two different aspects: an objective scope focusing on all human rights violations or abuses resulting from corporate activities that have a transnational character; and a subjective scope, where it is specifically mentioned that it "does not require a legal definition of TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character."[5]

In relation to the objective scope, the Elements paper tries to ensure that all human rights violations are covered, which should be the main purpose of this instrument, considering the explicit recognition made in the UNGPs –and its acceptance by Member States of the Human Rights Council– that business enterprises have the capacity to impact on all human rights. The suggestion included in this section also addresses other important issues, such as labor rights, environment, or corruption. This broad approach is especially adequate, since many corporate-related human rights abuses –which regularly take place in developing countries– normally start as a result of violations to economic, social, and cultural rights, including the right to a healthy environment or to labor standards, which then, due to the interrelated and interdependent character of human rights, can also impact on other civil and political rights.

But an important aspect to ponder in this area is the way in which this potential treaty would operate, if such an option was followed: since the treaty currently being discussed is being considered so far as a stand-alone treaty –and an instrument that does not create by itself new human rights–, it would potentially rely on the human rights obligations that States have so far committed to uphold, which could then lead to a rather inequitable outcome in terms of State obligations vis-à-vis the different internationally-recognized human rights. As it is widely known, different human rights treaties have varying degrees of ratification;[6] thus, a stand-alone treaty simply making reference to other human rights (and in this case, not even to other international instruments *per se*) could then allow States to pick and choose –to some extent, at least– the rights that could be applicable under this new conventional regime, or would depend on their ratification of other international and regional instruments.[7] Of course, this is not the only possible

4 *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights.*

5 *Ibid.*, p. 4.

6 For example, both of the Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights) have a large amount of ratifications, as does the Convention on the Rights of the Child. But that is not the case for other treaties, such as the Migrant Workers Convention, or even of several protocols to the core human rights treaties.

7 *Cf.* Forteau, Mathias, "Les renvois inter-conventionnels", *Annuaire français de droit international*, Vol. 49, 2003, pp. 100-101, 104, where Professor Forteau explains that while the voluntary approach

scenario, since several human rights are considered to be of a customary nature,[8] and as such do not require explicit conventional commitments from States; however, this is not the case for the wide majority of human rights, many of which are only considered by States as binding as a result of an explicit conventional commitment –namely those of an economic or social nature, and even some civil or political rights. In a sense, this could create an asymmetrical horizon for the application of new conventional obligations deriving from a business and human rights treaty.

In terms of the subjective scope, on the other hand, the Elements paper tries to move beyond the constant *impasse* that the definition of 'transnational corporations' has represented in past efforts at the UN. As such, it states that the aim of the instrument is to encompass "violations or abuses of human rights resulting from any business *activity that has a transnational character…*" (emphasis added). There is an important virtue in this approach, for as it has been explained previously,[9] from a legal point of view, transnational corporations do not exist.[10] They are an economic fiction that do not fit within current legal reality –or *realities*, taking into consideration both domestic and the international legal systems. In addition, it is not the transnational or domestic character of the perpetrator itself that should be the focus of this effort, but rather the human rights violation that is committed, regardless of the 'transnational' or 'domestic' character of the company –and it may be added, its public, private or joint character. Therefore, focusing a new instrument on *business activities of a transnational nature* could potentially contribute to establish clearer boundaries, and to move from a subjective scope to a 'conduct-based approach', in a similar vein to those treaties that prohibit certain egregious conducts, where the specific identity of the perpetrator is not necessarily defined. In this regard, the focus on business activities will need some delimitation, to ensure that all situations where business operations, activities or commercial relationships generate negative impacts on human rights are adequately covered, and to ensure that the specific aspects of transnationality that limit the capacity of domestic jurisdictions to pursue or hold businesses accountable are adequately taken into account.

The discussion on the subjective scope of the instrument is not confined to this particular aspect: the Elements document suggests that States, business enterprises, organizations of regional economic integration and even natural persons could be subject to the scope of the treaty. There are several important aspects to take into consideration regarding this suggestion: first of all, public international law continues to recognize full international legal personality exclusively to States;[11] all other actors of international relations may at best have limited legal personality –either *functional*, as in the case of international organizations, or relative (or limited) legal personality, as in the case of business enterprises. Secondly, considering it is States who are negotiating this international instrument, and taking into consideration that many of them have expressed explicit opposition to granting full international legal personality to business enterprises, it would probably be wise to recognize that the potential for the (indirect) evolution of international legal personality may not be the most desirable option to pursue through the development of a business and human rights treaty –especially if widespread ratification and acceptance by States is desired or expected.

While some authors have suggested that international law already applies directly to business enterprises or that there is a need to ensure that it addresses them directly,[12] it is unclear what benefits –beyond pure

remains a fundamental parameter of international law, the *renvoi* between different conventions seeks to ensure a solidary and unified application of different treaty regimes. Thus, he suggests that if a State accepts the norm that generates the *renvoi*, it implicitly agrees to the application of the second instrument (in this case, the human rights stipulated in the Elements document, which would then cover an important number of conventions and treaties on the subject).

8 Decaux, Emmanuel, "Le projet de l'ONU sur la responsabilité des entreprises transnationales" in Daugareilh, Isabelle (dir.), *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, Brussels, Bruylant, 2010, p. 473.

9 Cantú Rivera, Humberto, "¿Hacia un tratado internacional sobre la responsabilidad de las empresas en el ámbito de los derechos humanos? Reflexiones sobre la primera sesión del grupo de trabajo intergubernamental de composición abierta", *Anuario Mexicano de Derecho Internacional*, 2016, pp. 442-443.

10 See Kessedjian, Catherine, *Droit du commerce international*, Paris, PUF, 2013, p. 117; Menjucq, Michel, *Droit international et européen des sociétés*, 3e ed., Paris, Montchrestien, 2011, p. 401, on the characteristics of so-called 'transnational corporations', where he describes the phenomenon as one that is guided by the principles of unity of action, strategy or finance. See also Muchlinski, Peter T., *Multinational Enterprises and the Law*, 2nd ed., New York, Oxford University Press, 2007, p. 7.

11 Crawford, James, "Chance, Order, Change: The Course of International Law", *Recueil des cours*, Vol. 365, 2013, p. 159; Pellet, Alain, *Le droit international entre souveraineté et communauté*, Paris, Pedone, 2014, pp. 63-66.

12 Carrillo Santarelli, Nicolas, *Direct International Human Rights*

symbolism– this approach would bring: at the end of the day, creating international legal obligations directly applicable to business enterprises –which is, of course, not *legally* impossible– would be confronted to the need to ensure monitoring or oversight of some kind; that monitoring would need to be performed by the State, which then begs the question of the need to move beyond a State-centric approach, or to make an attempt to a sort of 'refoundation' of international law. Instead, a different route may be followed: as Vincent Chétail explains, primary rules of international law establish the expected or prohibited conduct that is to be observed both by States and non-State actors[13] (which would then support the argument of the direct application of international law to business enterprises), but the secondary rules have only developed to allow the attribution of State responsibility. In that regard, the State obligation to transpose the rules established in international instruments to their domestic order in order to ensure that business enterprises adopt preventive measures –and are subject to civil, criminal or administrative liability in case of their contribution to human rights violations– could probably contribute to avoid a diplomatic *impasse* in the first place, as well as to ensure a relatively uniform evolution of attribution regimes relating to corporate accountability for human rights violations under domestic law. This approach, while apparently conservative –or at least less revolutionary than the idea of direct international human rights obligations for businesses–, could probably receive enough support from States to become an international norm, a *sine qua non* condition to ensure the evolution of international business and human rights standards, and avoid a political *impasse* that could delay unnecessarily or even derail the process.

The options set forth in the Elements document suggested a wide range of measures that States could adopt to advance the internationalization of the business and human rights regime. They went from direct international human rights obligations for corporations –which curiously reflected many of the aspects outlined by the second pillar of the UNGPs, including compliance mechanisms to ensure adequate human rights due diligence–, to more general State obligations under international human rights law. However, an important aspect that was also included in the text of the Elements was the need for States to adopt preventive measures in their domestic legislation to require corporate human rights due diligence, on the one hand, as well as a set of other procedural requirements under international human rights law, such as adequate consultation processes with potentially affected stakeholders, on the other hand. As it can be observed, the Chairperson-Rapporteur presented the participating States to the IGWG with one potentially unfeasible option –in terms of the legal acceptance by States–, as well as with a viable option that had just recently been adopted by France, through its *loi de devoir de vigilance*.[14] This could be an acceptable option for States, one that would clearly impose upon them an obligation to regulate the extra-territorial activities of business enterprises domiciled within their domestic jurisdiction, a scenario that could probably create a level-playing field, and one which reflects what may potentially become a general legal requirement in numerous States even before a new treaty regime on business and human rights comes to light.

A final important point that was presented in the Elements document with respect to substantive aspects was the issue of legal liability, which is presented as a State obligation to adopt measures in the civil, criminal and administrative fields to ensure the legal liability of business enterprises involved with human rights violations, in addition to the potential international responsibility of the State for actions, omissions or complicity

Obligations of Non-State Actors: A Legal and Ethical Necessity, Oisterwijk, Wolf Legal Publishers, 2017; Francioni, Francesco, "Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations" in Benedek, Wolfgang, De Feyter, Koen and Marrella, Fabrizio (eds.), *Economic Globalisation and Human Rights*, Cambridge, Cambridge University Press, 2007, pp. 254-260.

13 See algo Chétail, Vincent, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Alland, Denis et al. (eds.), *Unité et diversité du droit international:* écrits *en l'honneur du professeur Pierre-Marie Dupuy*, Leiden, Brill, 2014, p. 127: "As soon as there is state responsibility in accordance with the notion of due diligence, one may assume that the violation in question has been –or at least will be– committed by private actors which are thus the holder of the relevant international obligation. Otherwise no breach can be attributed to them and there is no ground for justifying the duty of the state to act in due diligence to prevent, investigate or redress violations. In other words, as violations are not directly imputable to the state itself, private actor must be considered the direct bearer of the violated rule."

14 On this legal development, see Cossart, Sandra, Chaplier, Jérôme and Beau de Lomenie, Tiphaine, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", *Business and Human Rights Journal*, Vol. 2(2), 2017; several other States, including Switzerland and Germany, have been working in the development of similar laws to require corporate human rights due diligence throughout global supply chains.

with corporate activities that have a negative effect on human rights.[15] Beyond establishing a general legal liability provision similar to that present in the ILC draft articles on crimes against humanity,[16] this particular section of the Elements document sets forth several measures with respect to criminal liability of business enterprises, particularly in relation to actions that may constitute international crimes. For example, it highlights the importance of ensuring the potential criminal liability of "transnational corporations" and other business enterprises in their domestic legislation as a result of its violation or abuse or that of applicable international human rights instruments, as well as for any attempt to engage in such conduct, complicity or participation in the commission of such violations. This provision, which clearly departs from international positive law, would however find support in several domestic legal systems around the world that do provide for the criminal liability of business enterprises, an aspect that has recently been in OHCHR's agenda.[17] While a general idea, it states the importance of ensuring repression of any corporate engagement with gross human rights violations, as it has been repeatedly argued before federal US courts in Alien Tort Statute cases,[18] as well as in other jurisdictions.[19]

A second aspect that is explored to a certain extent is that of civil liability, where the Elements document sets forth that States shall adopt measures to ensure the civil liability of business enterprises for abuses throughout its activities, as well as for its planning, preparation, direction of or benefit from human rights abuses. This aspect is especially relevant for victims, due to the important focus on redress and reparation of damages. Nevertheless, it is important to highlight the inherent difficulties that have appeared in the different domestic legal systems dealing with civil lawsuits for business-related human rights violations, notably the United States, the United Kingdom, France or the Netherlands, and especially the fact that while the political branches of some of these governments seem to embrace the ideal of potential corporate civil liability for involvement in human rights abuses (as is the case of France, for example), the judiciaries in these countries have been hesitant –and in some cases even reluctant– to grant any type of reparation to victims of business-related human rights abuses, therefore creating an important gap between political choices, on the one hand, and judicial practice, on the other. Finally, administrative sanctions are suggested as a way to complete the domestic legal framework of States, in a manner that seems to suggest the importance of responsible business conduct to ensure continued access to public procurement and commercial contracts with States. This provision would reflect some of the aspects that are present in the UNGPs, where States are invited to fully use their domestic legal powers to incite appropriate corporate behavior with respect to human rights.

As it can be observed, the substantive aspects of the Elements document had the main objective of starting to delineate the potential options that States could choose to adopt in the framework of a business and human rights treaty. In that regard, due consideration should be given not just to the legislative and poltical practices and preferences of States, but also to the judicial experiences that have taken place in numerous cases across different jurisdictions. While the topics of general obligations and preventive measures will more than likely be within the general purview of political branches, the issue of legal liability needs to be addressed with an appropriate dose of judicial realism, in order to ensure that the suggestions made in the near future vis-à-vis this topic can be plausible and in accordance with the legal principles of States, in order to avoid a chasm between law and practice.

15 How this provision may interact with the Draft Articles on State Responsibility for Internationally Wrongful Acts, or how much influence it may have upon it, is a relevant question that is relatively unclear at the time of discussion of the Elements paper.

16 International Law Commission, *Crimes against humanity. Addendum: Text of draft article 5, paragraph 7, provisionally adopted by the Drafting Committee on 7 July 2016*, A/CN.4/L.873/Add.1 (8 July 2016).

17 On this aspect, see the reports produced by OHCHR for its Access to Remedy Project: Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights*, A/HRC/32/19 (10 May 2016); Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*, A/HRC/32/19/Add.1 (12 May 2016).

18 See generally Koebele, Michael, *Corporate Responsibility under the Alien Tort Statute*, Leiden, Martinus Nijhoff, 2009; Muir Watt, Horatia, "L'*Alien Tort Statute* devant la Cour Suprême des Etats-Unis", *Revue critique de droit international privé*, 2013.

19 The notable case of France in the Lafarge case is an example, where the company has been indicted for charges of financing a terrorist organization (the Islamic State), engaged in potential crimes against humanity. The case is still pending at the time of writing.

2.2. Procedural elements: access to justice, effective remedy and jurisdiction

Beyond the substantive aspects considered in the previous subsection, several other "procedural" questions (which at the same time also address substantive rights) were introduced in the Elements paper presented by the Chairperson-Rapporteur, most notably the issues of access to justice, effective remedy and the (controversial) question of jurisdiction. The first two of them are particularly interrelated, given the eminently procedural nature of access to justice and the substantive aspects that conform the right to an effective remedy;[20] both are complemented by the dual nature (public and private) of jurisdiction.

In relation to the questions of access to justice and effective remedy, the Elements paper suggested several interesting elements. One of them is the focus on vulnerable groups, stating that their particular characteristics should be taken into account when adopting measures to guarantee access to justice and to an effective remedy. Several other points are made in relation to due process guarantees that have long been reclaimed in cases brought by individuals or groups against transnationally-operating business enterprises, such as equality of arms, reversal of the burden of proof, public interest litigation or the right to a fair trial with an impartial judge. The suggestions included in this regard also go as far as to include the principle of discovery, which nevertheless is unnatural to civil law systems, where such procedural tools are not necessarily available for contending parties. An important question to consider in relation to this is the nature of human rights litigation, where the victim usually has an extended legal protection as a result of its legal fight against the State, a legally and politically superior entity; but in cases of business-related abuses, where two relatively equal parties –in terms of both being non-State actors– are in dispute, such considerations need to be pondered cautiously,[21] in order not to affect the principe of equality, on the one hand, and to avoid frivolous claims –which unfortunately do happen–, on the other hand. Of course, such scenarios may be clearer where there are widespread negative effects on the livelihood, health or environment surrounding a person or group; but this won't necessarily be the case with all kinds of human rights violations. In any case, it is important to ensure that an effective access to justice that adequately protects the right to due process and reinforces the possibility of access to remedy for victims is available at the domestic level, in order to ensure that no human rights abuse goes unpunished.

In relation to the right to an effective remedy, the Elements paper proceeds in a relatively different direction. To begin with, it suggests that remedies should exist in cases where "a TNC or OBE is acting under their instructions, direction or control; or when a TNC or OBE is empowered to exercise elements of governmental authority and has acted in such capacity while committing the violation or abuse of human rights."[22] In this specific scenario, it is particularly important to take into consideration the position adopted by the International Law Commission on the Draft Articles on Responsibility of States for Internationally Wrongful Acts,[23] whereby article 5 clearly refers to "parastatal" entities exercising public functions or services, that is, elements of governmental authority,[24] which may include private corporations in certain circumstances. Article 8 of the Draft Articles also makes reference to the possibility of involvement of private business enterprises in internationally wrongful acts, especially if they act on the instructions of, or under the direction or control of the State in exercising a specific conduct.[25] As it can be observed, both are replicated in the text of the Elements paper. However, the question left unresolved in this specific case is who will bear responsibilty for the breach of an international obligation, and more impor-

20 See generally Shelton, Dinah, *Remedies in International Human Rights Law*, 3rd ed., Oxford, Oxford University Press, 2015.

21 Rodley, Sir Nigel, "Engagement des États parties" in Decaux, Emmanuel (dir.), *Le Pacte international relatif aux droits civils et politiques*, Paris, Economica, 2010, p. 122, cautioning against unnecessarily expanding the human rights field into the private sphere.

22 *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, p. 9.

23 General Assembly, *Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83 (12 December 2001).

24 General Assembly, *Report of the International Law Commission on the work of its fifty-third session (23 April-1June and 2 July-10 August 2001)*, A/56/10 (2001), p. 43, par. 2: "The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of governmental authority concerned." See also Crawford, James, *State Responsibility: The General Part*, Cambridge, Cambridge University Press, 2013, pp. 126-132, 141-147.

25 Crawford, James, *State Responsibility: The General Part*, Cambridge, Cambridge University Press, 2013, pp. 161-165.

tantly, who will have the obligation to repair. The ILC Articles point to the responsibility *of the State* for the breach of an international obligation, which as a consequence entails its own obligation to provide reparation to the injured or aggrieved party. However, it is unclear what the specific intent of invoking the Articles on State Responsibility is beyond providing a legally sound basis, given that as it has been argued generally throughout the sessions of the Intergovernmental Working Group, the apparent objective of the project is that businesses will bear responsibility (including the obligation to repair damages) for their participation or involvement in human rights abuses, not States themselves. In the way that it is phrased, that aspect on the obligation to provide victims with an effective remedy gets somewhat lost within the lines making reference to the Articles on State Responsibility, and especially in relation to its articles 5 and 8.

Beyond this specific aspect, the position on remedies follows to a certain extent the choices made in the UN Guiding Principles, therefore recognizing the possibility of coexistence between judicial and non-judicial mechanisms, provided that the latter does not supersede the former. This, of course, is a positive step that serves to highlight the specific nature of the business and human rights dilemma, in which a non-State actor is subjected to historically State-centred legal standards, including those on the obligation to repair the damage as a result of a breach of international law; yet, the novelty is the openness to consider the possibility of non-judicial mechanisms, which have not been expressly taken into account in other international human rights treaties. To that regard, the Elements paper makes a nod to the van Boven and Bassiouni Principles on reparation[26] –as well as to the ILC Articles–, stating that measures should be taken to ensure that an integral reparation is considered and applied where possible. Thus, this should entail measures of restitution, compensation, rehabilitation, satisfaction and non-recurrence, in order to allow *restitutio in integrum* to the largest extent possible.

In addition to access to justice and the right to remedy, one of the most important and complex procedural aspects addressed by the Elements paper is that of jurisdiction. The suggestions included in this section must be confronted to the expansion of judicial practice across national jurisdictions around the world in business and human rights cases. To begin with, the first point made in the Elements paper in relation to jurisdiction is that States parties "shall adopt legislative and other adequate measures to facilitate that their judiciaries are allowed to consider claims concerning human rights violations or abuses alleged to have been committed by TNCs and OBEs throughout their activities…" A second point refers to allowing judiciaries to consider claims of abuses committed "under their jurisdiction or concerning victims within their jurisdiction", while a third one expands this notion to include "violations or abuses committed by TNCs and OBEs and their subsidiaries throughout the supply chain domiciled outside their jurisdiction." As it can be observed, the three proposals put forward by the Chairperson-Rapporteur make reference to adjudicative jurisdiction,[27] in which a court in one State may consider situations that took place in a different State –thus, beyond its own jurisdiction.

The first and third suggestions make implicit reference to situations potentially taking place beyond the territory of the State ("throughout their activities" and "throughout the supply chain domiciled outside their jurisdiction"), situations in which, under public international law, there must exist either a connection between a person, property or situation and the State assuming jurisdiction (territory, nationality, passive personality, effects doctrine or otherwise);[28] or, on the other hand, when there are not sufficient links with one State, but a denial of justice is plausible, a third, unrelated State may assume jurisdiction to avoid such a scenario.[29] In relation to the first point, a classic situation of extra-territorial jurisdiction, recent domestic case law from different jurisdictions has been relatively divided, as it

26 General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147 (16 December 2005).

27 General Assembly, *Report of the International Law Commission on the work of its fifty-eight session (1 May-9 June and 3 July-11 August 2006)*, A/61/10 (2006), Annex E, par. 5: "Adjudicative jurisdiction refers to the authority of a State to determine the rights of parties under its law in a particular case." See also Ryngaert, Cedric, *Jurisdiction in International Law*, 2nd ed., Oxford, Oxford University Press, 2015, pp. 9-10.

28 General Assembly, *Report of the International Law Commission on the work of its fifty-eight session (1 May-9 June and 3 July-11 August 2006)*, A/61/10 (2006), Annex E, pars. 10-15.

29 Bucher, Andreas, "La compétence universelle civile", *Recueil des cours*, Vol. 372, 2014, p. 103; Ryngaert, Cedric, *op. cit.*, pp. 135-142. This point will not be discussed in detail in this article.

has been shown in *Kiobel*[30] or *Daimler*[31] before the United States Supreme Court; the same position has been taken by at least the Versailles Court of Appeals in the *Jerusalem Tramway* case.[32] In all of them, the existing link between a foreign parent corporation, the facts and the corresponding jurisdiction were considered to be insufficient to be able to adjudicate the case. But other cases have relied in different rationales for allowing the domestic court of one country to assume jurisdiction over situations taking place elsewhere. For example, in *Akpan*,[33] the Dutch Code of Civil Procedure allowed its courts to exercise jurisdiction where there was a link to situations taking place in a different country, although applying the substantive rules of the foreign jurisdiction (in that particular case, Nigeria) and taking into consideration an existing duty of care from parent companies vis-à-vis its foreign subsidiaries. In *Vedanta*,[34] the London Court of Appeals allowed a tort claim to move forward as a result of the still-developing doctrine of the parent company's duty of care in relation to foreign subsidiaries, allowing Zambian villagers to file a claim against the parent company for its lack of due diligence vis-à-vis its foreign subsidiary and themselves. Finally, in *Al-Shimari*,[35] United States federal courts are considering a case of torture and other grave violations of international human rights law committed by a military contractor –a private military and security company– that took place in Iraq, where they have recently found that immunity does not apply vis-à-vis such violations, and that there is a clear and substantial link between the forum, the facts and the parties to allow the exercise of extraterritorial adjudicative jurisdiction. While a general, unified trend does not so far exist, comparative judicial practice in the exercise of extraterritorial adjudicative jurisdiction may perhaps show that two interesting points are becoming more relevant for the assertion of extraterritorial jurisdiction: on the one hand, the exercise of a duty of care (or lack of) by a parent company vis-à-vis its foreign subsidiaries (as it has been pointed out in the UNGPs through the figure of human rights due diligence); and on the second hand, the consideration of a sufficient degree of influence between a parent company and its foreign subsidiaries, in addition to a sufficient nexus between the adjudicating forum and the case –the famous "touch and concern" test put forward in *Kiobel*.

The other important point that is presented in the Elements paper relates to claims concerning violations or abuses commited under the State's jurisdiction or concerning victims within their jurisdiction. At first sight, this proposal appears to refer exclusively to jurisdiction over domestic cases, which would in theory be outside of the scope sought in resolution 26/9; at the end of the day, States are supposed to be able to effectively control corporate behaviour that is purely domestic in nature –or at least that is the assumption made in the resolution creating the Intergovernmental Working Group. However, a second look sheds light on the possibility of transboundary harm that may have a detrimental effect to persons within that State's jurisdiction, thus also hinting at extraterritorial jurisdiction based on several of the principles of jurisdiction as detailed by the ILC Secretariat (with perhaps the sole exception of the nationality principle). Both types of proposals attempt thus to cover the domestic and extraterritorial exercise of jurisdiction, and focus on the adoption of legislative measures that allow judiciaries to consider such claims. Nevertheless, given the wide discretion awarded to States to apply international obligations within their domestic sphere (which of course includes respect to their legal principles and traditions), and the possibility that a large number of States already include such legal standards within their own civil procedure codes[36] –which appears to be the focus of this section, rather than criminal jurisdiction–, it is necessary that going forward a much clearer delimitation of the exercise of extraterritorial jurisdiction is developed,

30 *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 133 S. Ct. 1659 (2013).

31 *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

32 *Association France-Palestine Solidarité et al c. Société Alstom Transport SA et al*, nº 11/05331, Cour d'appel de Versailles (2013).

33 *Friday Alfred Akpan et al c. Royal Dutch Shell PLC et al*, Nº C/09/337050/HA ZA 09-1580, District Court of The Hague (2013).

34 *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

35 *Suhail Najim Abdullaj Al Shimari et al. v. Caci Premier Tech., Inc.*, No. 1:08-cv-827 (LMB/JFA), District Court for the Eastern District of Virginia.

36 At the end of the day, the assertion of jurisdiction for civil (tort) law cases will not only depend upon jurisdiction under public international law, but on the exercise of jurisdiction in accordance with domestic conflict of law (private international law) rules. See also Ryngaert, Cedric, *op. cit.*, p. 19: "Unlike public international rules, which merely require a *strong* nexus of the regulating State with a situation, conflict of laws rules are ordinarily geared to identifying the State with the *strongest* nexus to the situation… traditional rules of public international law, which allow several States to exercise their jurisdiction over one and the same situation, will cast aside only the most outrageous assertions."

one that takes into account the indirect rationales that appear in judgments in business and human rights cases across different jurisdictions.

As a starting point, the Elements paper presented by the Chairperson-Rapporteur of the Open-Ended Intergovernmental Working Group includes a broad amount of potential measures in relation to several topics, in order to allow States to discuss and consider the several existing possibilities, under international (human rights) law, to move forward in relation to the negotiation and adoption of a convention on human rights and transnational corporations and other business enterprises. Whether the political will to address such a complex issue in a treaty exists is yet to be seen; however, the third session –as it will be briefly summarized in the following section– clearly showed the inherent difficulty to advance the current *status quo* under international law.

3. Law and politics in the third session of IGWG

The third session of the Open-Ended Intergovernmental Working Group on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights took place between 23 and 27 October 2017 in the Palais des Nations, in Geneva. While a full account of the session can be found in the official report presented by the Chairperson-Rapporteur to the Human Rights Council,[37] the following paragraphs will concentrate on some of the aspects and issues that were especially relevant for setting the tone of the IGWG in its third meeting. In particular, three aspects will be briefly addressed: the issue of 'primacy' of human rights over investment and trade interests and instruments; the question of the subjective scope of the treaty; and finally, the different types of obligations that the Elements paper presented. Of course, these comments will be paired with a personal appreciation of the reaction of States, which might be an indicator of the type of proposals they may be more inclined to accept or endorse as the fourth session looms closer, and which may provide room for convergence over an eventual conventional instrument on business and human rights.

One of the key issues that have been discussed in the past few years has been the suggestion that human rights should take precedence before trade or investment interests. An argument that has been advanced to support this position is that trade and investment are at the service of human beings, and that they are instruments to pursue human development and rights, not an end in themselves. As a moral or philosophical discussion, this can clearly be considered a valid and sound argument: the economy, as well as the State, are instruments to ensure the protection and well-being of the population. However, when taken to the plane of international law, to a landscape where only a few select norms –*jus cogens*– have a superior normative value than the rest[38] –and where all other norms largely depend on the voluntarist approach of international law–, this idea becomes, at least from a legal standpoint, less definitive and perhaps even fragile.[39] One of the initial controversies that arose during the third session was precisely the issue of 'primacy', as a result of a specific aspect in the proposed principles and objectives of the Elements paper that highlighted the need to recognize "the primacy of human rights obligations over trade and investment agreements." Civil society, academia and even some States have, to some extent, pushed precisely for that explicit recognition to be made in a future binding instrument;[40] however, some of the main questions to ponder in this regard are whether a general recognition of such a 'hierarchy' of norms is necessary; to what extent it can actually produce the desired results –notably a systemic or harmonic interpretation of the body of rules of public international law–; and finally, how it would operate in practice.

First, the question of a general recognition of a hierarchy within norms of public international law faces an important dilemma: how can a "primacy" rule in a busi-

37 Human Rights Council, *Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, A/HRC/37/67 (24 January 2018). Another short note on the third session can be found in Cassel, Doug, *op. cit.*

38 Pellet, Alain, "Notes sur la 'fragmentation' du droit international: droit des investissements internationaux et droits de l'homme" in Alland, Denis et al. (eds.), *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy*, Leiden, Martinus Nijhoff, 2014, p. 780.

39 For a balanced analysis of the issue of primacy, see De Schutter, Olivier, *International Human Rights Law*, 2nd ed., Cambridge, Cambridge University Press, 2014, pp. 71-111.

40 *Cf.* Shelton, Dinah, "Normative Hierarchy in International Law", *American Journal of International Law*, Vol. 100, 2006, p. 294: "The asserted primacy of all human rights law has not been reflected in state practice."

ness and human rights treaty generate effects beyond its State Parties? A quick survey of the positions expressed by States during the third session of IGWG reflects that there is no clear consensus on this issue –with several States expressing hesitation or reticence to the idea of establishing a hierarchy of norms–, and while some arguments were made that the IGWG could contribute to the codification of the primacy of international human rights law over other areas of international law, it appears to be that there is not sufficient State practice to support that assertion. Otherwise, how would numerous countries be involved in investor-State dispute settlement, if they had already asserted in their bilateral investment treaties that human rights obligations prevail over obligations towards investors? In any case, this specific point demonstrates that State practice over the years has at least implicitly recognized the equal value of international norms (or at least between investment and human rights treaties), not a hierarchy among them, and thus, it may be an issue subject to progressive development –including through the development of *ex ante* obligations for States before the conclusion of new investment or trade agreements[41]–, but not to codification at this point. In addition, it is not necessarily an issue of generating an abstract rule of primacy, but to ensure that whenever a "normative interaction"[42] takes place, all aspects of public international law that may be relevant to the conflict of norms are adequately taken into account.[43]

A plausible option –although one that may perhaps be limited to Latin American countries– would be the possibility of considering the primacy of human rights over investment and trade regimes as a general principle of law, taking into consideration that most constitutions of Latin American States consider human rights to be of supraconstitucional or constitutional value, and thus to have a higher "hierarchy" than investment or trade agreements within the domestic order. However, this would not necessarily offer a solution to the question of primacy –at least under international law–, particularly considering that investment tribunals will most likely not take into consideration domestic norms as part of the legal basis of a dispute, and that the issue at hand is not one of the interpretation of international norms at the domestic level, but rather of a conflict of norms within the international sphere.

A second interesting point that came forward during the third session was the subjective scope of the instrument. While some arguments have already been expressed *supra*, there was an important level of disagreement among delegations, experts and NGOs as to who should be subject to the binding instrument: should it be exclusively transnational corporations? Or transnational corporations and all other business enterprises, as suggested by the European Union and affirmed by several developing countries, as well as by some NGOs and even some experts? Or, as posited above, should the focus be *conduct-based*, instead of subject-based? An important recognition of the "transnational mirage"[44] was pushed forward by Olivier De Schutter in his written remarks in response to the Elements paper, where he explained that

> "from the legal point of view, the distiction between transnational corporations and other business enterprises does not pass scrutiny: TNCs are simple networks of distinct companies (each of which is domiciled in a national jurisdiction) more or less tightly connected to one another by investment or contractual links, and that follow a global strategy under a more or less integrated leadership structure. Thus, the scope of the future [Treaty on Business and Human Rights] is rightly more based on the transnational nature of the activity than on the nature of the corporation itself: in other terms, it is to the extent that the corporation develops its economic activities across different national jurisdictions… that the future TBHR shall be of relevance to those activities."[45]

Nevertheless, the ideological focus on transnational corporations, and the verbal lack of recognition –at least during the third session– by some States that all business enterprises, regardless of their specific characteristics, can have a direct or indirect negative impact on human rights,[46] is at least concerning, particularly taking

41 Simma, Bruno, "Foreign Investment Arbitration: A Place for Human Rights?", *International & Comparative Law Quarterly*, Vol. 60(3), 2011, pp. 594-596.

42 Pellet, Alain, "Préface" in Burgorgue-Larsen, Laurence et al (dirs.), *Les interactions normatives: droit de l'Union européenne et droit international*, Paris, Pedone, 2012.

43 Pellet, Alain, "Notes sur la 'fragmentation' du droit international…, *op. cit.*, pp. 769-770.

44 This point was first suggested in Cantú Rivera, Humberto, "¿Hacia un tratado internacional…, *op. cit.*

45 De Schutter, Olivier, *The "Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respecto to human rights": A Comment*, 23 October 2017, par. 19.

46 Human Rights Council, *Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, A/HRC/37/67 (24 January 2018), par. 60.

into consideration that several of those States also support a focus that could yield, in practical terms, little to no results at all. A certain reminiscence of the North-South clash that impregnated the UN Code of Conduct era appears to be taking place in the IGWG process, one which does not necessarily take into account the current global reality where numerous transnational business operations have their origin in developing countries, and where a practical approach is needed if any expectations of developing an international set of norms to regulate corporate conduct vis-à-vis human rights are to become a reality.[47]

A final relevant point that resulted from the third session relates to the types of obligations presented by the Elements paper. As it has also been mentioned before, the two main models presented by the Chairperson-Rapporteur are direct international obligations for corporations, and indirect obligations for corporations via the State. States participating in the third session did not have homogeneous approaches to this question: whereas the European Union, Brazil, Singapore and several others openly questioned the feasibility and convenience of imposing direct international obligations on corporations, some others, such as South Africa, insisted on the necessity to ensure that the treaty addresses them directly. On the other hand, in relation to indirect obligations through the lens of preventive measures –and notably of the establishment or 'hardening' of corporate human rights due diligence through national legislation–, a larger consensus seemed to appear: both developed and developing countries participating in the session, such as Mexico, Brazil, France, South Africa and the European Union, underscored the importance of adopting national legislation requiring corporations to undertake human rights due diligence throughout their activities and operations, in order to identify, prevent, mitigate or redress human rights abuses caused by them or with which they are involved. This is a significant statement with a profound echo, a development that has been led by the French law on *devoir de vigilance*, and that could be an applicable model that could potentially create an international legal standard of prevention –very similar to the prevention principle in international environmental law–, which is, at the end of the day, one of the main needs in business and human rights cases. In that regard, this aspect seems to be one of the most promising avenues that have resulted so far from the negotiations of the business and human rights treaty, but also one that needs to be paired with appropriate domestic mechanisms for implementation, the main Achilles' heel of international human rights law.

Beyond these considerations, the "temperature" of Room XX in the Palais des Nations during the third session was at least as confrontational as that of the first session. While the European Union and its member States attended the session and participated actively during the different panels held during the week –although mostly to raise doubts or ask questions about the objectives or proposals put forward in the Elements paper–, a particular tension was felt between them and the Chairmanship of the Intergovernmental Working Group, the Permanent Representative of Ecuador. This is not only reflected in the report of the third session, but also appeared in an informal meeting taking place before the final formal session on Friday 27 October 2017, which had as its main objective to consult with States and other stakeholders on the route to be followed after the third session, considering that the resolution mandating the creation of the IGWG only made reference to three sessions, but not beyond that. This meeting marked the first appearance of the United States delegation in the treaty process, claiming that the mandate of the Intergovernmental Working Group would expire after the third session, as per the terms of resolution 26/9. An important exchange took place among several delegations, with many of them expressing full support to the continuation of the IGWG, and some others suggesting that despite their relative support to the process, the Human Rights Council should provide a roadmap on the way to follow, which is the Council's practice (as it can be observed in the IGWG on private military and security companies).[48] As the uncertainty and tensions grew, the Office of the High Commissioner for Human Rights clarified the issue, stating that the duration of the Working Group is determined by the original mandate, which clearly states that the goal is the development of a legally binding instrument. This episode, however, transferred into the final meeting of the Intergovern-

47 Sauvant, Karl P., "The Negotiations of the United Nations Code of Conduct on Transnational Corporations", *The Journal of World Investment & Trade*, Vol. 16, 2015, p. 74.

48 Human Rights Council, *Renewal of the mandate of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies*, A/HRC/RES/28/7 (26 March 2015), par. 1.

mental Working Group, which was once more marked by the animosity between the representatives of the European Union and Ecuador.

One of the main characteristics of the third session was the lack on in-depth participation of many delegations, as a result of the limited time between the release of the Elements paper and the start of the session. Nevertheless, it is clear that beyond the issue of preventive measures, much remains to be done in terms of consensus-building in relation to most of the other aspects being addressed in the business and human rights context, especially if the adoption of a treaty on this subject matter is expected to happen sometime soon. Complex questions such as jurisdiction, legal liability, international cooperation, as well as the scope of application of the instrument, need to be seriously considered and debated by all parties and stakeholders, in order to create a new legal regime that effectively addresses the imbalances of power among States, business enterprises, and the population in general, as well as the governance gaps[49] that allow businesses to escape accountability whenever they are directly or indirectly involved in human rights abuses.

4. Final thoughts: preliminary considerations of the zero draft of the legally binding instrument

While making detailed comments on the first draft of the legally binding instrument is not the objective of this article, its recent publication calls for a brief reflection on some of the choices made by the Chairmanship of the Intergovernmental Working Group. To begin with, the "zero draft" is divided in three broad sections, the first one focusing on the preliminary parts of the text, the second one on the substantive and procedural issues, and the third one on the potential follow-up mechanisms and the general provisions in relation to a conventional instrument. At a first glance, the text reflects important choices made on several aspects where consensus was more largely present during the first three sessions.

As it can be observed in the statement of purpose in article 2, there are three main goals that are envisaged for a future instrument: the design of new rules of international (human rights) law; the reinforcement of domestic provisions, namely in terms of legal procedures and prevention; and finally, the enhancement of international cooperation to limit impunity in business-related human rights cases. This is a positive sign, since the second goal is one of the areas where more consensus appeared to exist during the third session of the IGWG, especially in relation to preventive measures. But beyond that point, several other aspects are included in the substantive section of the draft instrument. In relation to the scope, especially compared to the Elements paper, the draft instrument points out that the instrument "shall apply to human rights violations in the context of any business activities of a transnational character." As it can be observed, a preference for the conduct-based approach was the choice made by the Government of Ecuador, in a pragmatic effort to focus on the actual actions (or omissions) that may result in negative impacts on human rights. This decision is relevant, since it allows the government to bypass the controversial issue of defining what a "transnational corporation" is –a decision further reflected in draft article 9.5–, although more refinement will be required in the definition of what a business activity of a transnational character actually means, particularly in terms of causation or involvement.

A second point raised within the scope of the instrument is the already mentioned *renvoi*: as it currently stands, article 3.2 mentions that the instrument "shall cover all international human rights and those rights recognized under domestic law." This aspect will probably raise some concerns among delegations, particularly taking into consideration the uneven level of ratification of the different international human rights instruments; for example, what happens to those States that recognize in their domestic laws rights that have not yet crystallized under international law? Or, on the other hand, what about those States that have not ratified some of the basic human rights treaties? How will this provision affect their position vis-à-vis those other treaty regimes? These questions will need to be addressed, perhaps through an exception stating that the *renvoi* will only operate in relation to those rights that have already been recognized by the State (although this will unfortunately limit the objective scope of the future instrument, in a similar way as reservations could potentially do as well).

In terms of jurisdiction, the draft instrument curren-

49 See generally Simons, Penelope and Macklin, Audrey, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, London, Routledge, 2014.

tly proposes that the *forum loci delictii* or the *forum societatis* criteria should be applicable, therefore allowing a dual jurisdiction whereby both the host State or the home State may be suitable forums to bring claims against corporations for their involvement or participation in human rights abuses. This is a pertinent decision, given that it may create a subsidiary jurisdiction in the home State, which may be accessible either after the exhaustion of remedies in the host State, or as a result of the legal or practical impossibility of the host State to provide adequate remedies to the victims. This could serve a double purpose: incentivize capacity-building in developing countries (which at the end of the day, should be a goal in itself within this negotiation), and secondly, to ensure that victims will have an available forum to bring their claims should the original forum not be adequate or available. Yet, an important issue may arise in relation to article 5.2, where the draft instrument tries to define where a legal person is "at home". While the first two options point to the statutory seat or the central administration of a legal person (which would be in line with Brussels I bis regulation) as the places where it would be at home, the third and fourth points are potentially less convincing, given that they relate to the place where a company may have a "substantial business interest" or a "subsidiary, agency, instrumentality, branch, representative office or the like". The main problem with this provision is that at least in *Kiobel* and *Daimler*, the United States Supreme Court recognized that the most adequate fora to bring such claims against foreign corporations would be where they are at home –and that, it was concluded, certainly is not the case for a representation office (as in *Kiobel*) or where a company may have "substantial" business interests (as in *Daimler*). Thus, a different formulation will probably need to be determined in order for this provision to be in line with current practice under international and European law.

In addition to the issue of jurisdiction, article 9 addresses the issue of prevention, which is a step forward in 'hardening' the corporate human rights due diligence requirement established under the UN Guiding Principles on Business and Human Rights. Through this provision –where the different steps of human rights due diligence are spelled out in detail, and complemented with some other requirements that have consolidated under domestic or regional law, such as non-financial reporting requirements, or the use of leverage in supply chains and contractual relations–, the Chairmanship of the IGWG takes a step forward in highlighting the need for a debate on the domestic law mreasures that need to be adopted, in order for States and businesses to comply with Pillars 1 and 2 of the UNGPs. Considering the measures already in place in France, as well as in other countries in relation to non-financial reporting, this provision may cause States to act at the domestic level to consider these elements as necessary reforms in their legislation, which could thus contribute to raise the profile of this provision as one of the central additions that could be made by the draft instrument.

A potentially contentious article of the draft instrument will be article 10 on legal liability. While its inclusion in the Elements paper was welcomed, the idea of providing specific instructions to States on how and what steps will need to be taken may prove counterproductive, particularly considering the opposition manifested by some States during the third session vis-à-vis their own legal traditions and principles. Particularly on the issue of criminal liability –where the text provides that "State Parties *shall provide measures under domestic law to establish criminal liability* for all persons with business activities of a transnational character…" (emphasis added)–, the current wording may not necessarily attract much support, especially from States that do not yet foresee corporate criminal liability in their criminal codes.[50] Another aspect that is particularly peculiar is the appearance of the concept of universal jurisdiction "over human rights violations that amount to crimes" under draft article 10.11, an aspect that is not present in relation to civil liability. This is a curious choice, given that potentially most cases involving human rights abuses by business will not necessarily qualify as a crime, but most –if not all– of them will require at least some form of reparation as a result of direct or indirect damages to victims, a situation that would call for the development of a transnational civil liability regime.

Finally, another interesting point that is raised in article 13 (titled "Consistency with International Law") is the issue of trade and investment agreements. Contrary to the abstract "primacy" idea that was present in the Elements paper, the draft instrument presents two provisions on that question: first, it states that future trade

50 Nevertheless, draft article 10.12 foresees that in the event that the legal system of a State does not foresee corporate criminal liability, other dissuasive non-criminal sanctions –including administrative sanctions– may be applicable.

and investment agreements shall not contain provisions that conflict with the implementation of the draft instrument; second, it mentions that "all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under the Convention…" As it can be observed, the first suggestion could be more easily fulfilled, given that this treaty could impose a future obligation upon State parties to ensure that they insert clauses in trade and investment agreements preventing the well-known consequence of "regulatory chill". However, the second provision, requiring a certain type of interpretation for existing agreements, appears to be more problematic to put into practice, especially if those agreements are not in the process of being renegotiated. In essence, the problem is not only the restriction on their abilities to respect and ensure existing international human rights obligations; rather, it is actually the interpretation made by arbitral tribunals of the behavior adopted by States which would be contrary to bilateral investment treaties or trade agreements, an aspect that should be addressed in order for those tribunals to take into account other rules of public international law. However, as already discussed, it remains unclear how this treaty could generate effects over other legal instruments from a different area of international law.

As it can be observed from these brief reflections, the current process of drafting a business and human rights treaty is starting to crystallize, and with it, numerous possibilities and difficulties will become more and more apparent. In that sense, it will be especially important to take into consideration that international human rights law –as mentioned by Alain Pellet– is a part of general international law, and as such, it should take into account the different options –and perhaps solutions?– that this area of law offers.[51] As Dan Sarooshi mentioned in his course at The Hague Academy of International Law (in what may be a potentially appropriate metaphor), making tea involves a slow process where different elements have to coincide under the right conditions, but eventually there is a moment when the time –and tea, of course!– is right. This begs the question if, like tea, this is the right time to consolidate norms of international law on a complex subject matter such as business and human rights, and whether all the different elements are in place to move forward in such a quest.

51 Pellet, Alain, ""Droits-de-l'hommisme" et droit international", *Droits fondamentaux*, N°1, 2001, p. 168.

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ISSN 2237-1036

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

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VOLUME 15 • N. 2 • 2018
DOSSIÊ ESPECIAL BUSINESS AND HUMAN RIGHTS